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ROMANTIC COMMON LAW, ENLIGHTENED CIVIL LAW: LEGAL UNIFORMITY AND THE HOMOGENIZATION OF THE EUROPEAN UNION

Vivian Grosswald Curran*

[L]a grandeur du génie ne consistrait-elle pas ... à savoir dans quel cas il faut l'unité et dans quel cas il faut des différences?

- Montesquieu

INTRODUCTION

The main thrust of this article is to suggest why the European Union may succeed in its objective of legal uniformity despite encompassing the two highly distinct legal traditions of the common law and the civil law. My theory is that the defining characteristics of the civil-law legal culture, although in stark and profound contrast with those of the common-law legal system, nevertheless appear prominently and pervasively in the non-legal spheres of common-law nations; and vice versa, such that common-law legal characteristics correspond closely to elements often excluded from civil-law legal cultures, but which are included in the non-legal domains of the civil-law European Union Member States.

Conversely, the defining characteristics of civil-law legal culture not only are largely absent from common-law legal systems, but, as Peter Goodrich has demonstrated, they consciously and repeatedly were rejected by England. Nevertheless,

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1 Montesquieu (Charles de Secondat, baron de), De l'Esprit des Lois, livre xxix, chapitre xviii (1990) ("[D]oes not the greatness of genius consist in knowing in which case uniformity is needed, and in what case differences?")

2 See Peter Goodrich, Edipus Lex (1995). See also Mackay Cooper, The Common and the Civil Law - A Scot's View, 63 Harv. L. Rev. 468, 471-72 (1949) ("The Anglo-Saxon is instinctively hostile to
they are prominently and pervasively present in the non-legal spheres of common-law European Union Member States. Consequently, lawyers from all of the Member States have an intimate understanding of the fundamentals of both the common-law and civil-law mentalities, although they have learned to apply only one of those mentalities to legal discourse and analysis.

The progression towards legal uniformity is spawning a hybrid, homogenized legal culture from the systems of the civil and the common law that encounter each other in the new Europe. The resulting homogenization in turn fortifies uniformity, as the two distinct legal cultures are altered by their mutual encounters, adapting to the imperatives of coexistence and coalescence, and in turn reinforcing homogenization, as their acquired adaptive characteristics contribute to a further breakdown of distinctive legal attributes by processes of reciprocal influence and blending. I propose to support this thesis by signaling the striking resemblances between the common-law mentality and Romanticism; and between the civil-law mentality and the Enlightenment. The renditions of Romanticism and the Enlightenment that I apply to the common and civil law in these pages are based principally on Isaiah Berlin’s analysis and discussion of Romanticism and the Enlightenment throughout the course of his life’s work. This article both analyzes Berlin’s discussion of Romanticism and the Enlightenment in terms of the common and civil-law legal methodologies and mentalities, and explores the implications of this analysis within the context of the European Union.

Because all of the European Union’s Member States were influenced by both Romanticism and the Enlightenment, lawyers from both the common-law and civil-law legal systems are adept at both conceptions of the world and of life that underlie the legal systems. Thus, the process of Europeanization is reduced to re-learning to apply the “other,” “un-learned” system’s tenets and methodology to the legal sphere of reasoning, thinking, arguing and conceptualizing. This process of skill re-acquisition for European lawyers and judges is greatly facilitated by their preexisting intimacy of acquaintance with the “other” perspective in the non-legal domains of their lives.

Before I proceed with this analysis, I want to be very clear that I am not suggesting that Romanticism was itself a cause of the common-law legal system, or the Enlightenment a cause of the civil-law legal system. Both legal systems predate Romanticism and the Enlightenment by many centuries. Rather, Romanticism and the Enlightenment are useful to my argument to the extent that they are emblematic of different modes of intellectual discourse, outlook, thought and focus that have long coexisted in western society. For complex reasons, one or the other of those discourses dominates the legal institutions of Europe’s Member States.

The last two sections of this essay discuss the challenges to Europe’s future posed by the fusing of legal cultures and by the coalescence of a wider range of cultural
characteristics in Europe, not all of which are attributable solely to the effects or acts of the European Union. The European Union’s increasing unicity and univocality may threaten some of its most cherished goals. The very means by which the European Union increasingly becomes capable of effectuating its goals paradoxically also may undermine the ideals it seeks to promote. My conclusion is that economic and legal uniformity simultaneously may be both necessary to the European Union and destructive of it inasmuch as economic and legal uniformity may be incompatible and irreconcilable with cultural pluralism. Unmasking and lucidly examining this fundamental incompatibility lodged in the innermost structures and objectives of the European Union is called for, even if it may entail the burden of recasting institutional aspirations. Conscious recognition of the paradox embedded within the depths of the European Union should be undertaken as part of a reassessment as to which steps will be likeliest to realize the most desirable progression possible of the European Union into the future.

CHALLENGES TO UNIFORMITY OF LEGAL INTERPRETATION

From the perspective of legal uniformity, the European Union’s judicial system would seem to invite comparison with federalist systems such as the one that exists in the United States. Like the European Union’s Member States, each of the United States’ fifty states has its own legal system. For each state in the United States, however, a state supreme court has the final word on issues of state law, and even within the federal court system, lack of legal uniformity persists among the federal circuit courts where the United States Supreme Court has declined to hear issues appealed from the circuits.5

A still greater incommensurability between the European Union and the United States persists in that the European Union’s judicial system encompasses the very different traditions of the common and civil law.6 With this problematic in mind, a more

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6 I do not consider the presence of Louisiana in the United States to present a comparable presence of a different legal mode of operation, although the extent to which Louisiana law’s civilian origins have eroded into common-law characteristics and modus operandi may well be an illustrative portent for the European Union. See Gordon Ireland, Louisiana’s Legal System Reappraised, 11 Tul. L. Rev. 585, 591 (1937) (how Louisiana “was affected by ... osmosis from the common law jurisdictions that surrounded her on three sides ... “). On the common-law methodology of Louisiana’s judiciary, see also James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 La. L. Rev. 1 (1993). For an overview of the controversy about whether Louisiana should be classified as a common-law, civil-law or mixed jurisdiction, see Kenneth M. Murchison, The Judicial Revival of Louisiana’s Civilian Tradition: A Surprising Triumph for the American Influence, 49 La. L. Rev. 1 (1998). For the arguments, contrary to my conclusions, that (1) generally, legal uniformity issues in the European Union are comparable to those in the
fruitful comparison in terms of the European Union’s judicial challenges might be with
an international convention, such as the U.N. Convention on Contracts for the
International Sale of Goods (hereinafter, the “CISG”), whose Article 7 (1) mandates
that, “[i]n the interpretation of this Convention, regard is to be had to ... the need to
promote uniformity in its application ... .” Similarly to the situation in the European
Union, the national courts of the CISG signatory States must apply the convention in a
uniform manner, and even, if necessary, “against their own statal public authorities.”

Legal uniformity of application seems destined to remain unrealized for the CISG. Briefly,
the numerous courts in the CISG’s over fifty signatory States encounter manifold impediments to uniformity of application. First, there are inevitable problems
of judicial interpretation itself. Even within a given legal system, legal uniformity may
be said to remain an unrealized ideal rather than an achievable practice. Second,
tensions often exist between what judges may perceive to be an objective interpretation
of the CISG text, and what they consider fairness and justice to require in a pending
case. Third, problems surround the mythology that the CISG itself is a single text, when
in fact in all of its versions it is a translated text, published in more than one official and
unofficial language translations, with both intentional and unintentional substantive
disparities appearing in its different language versions. Fourth, differences in legal
traditions, cultures and practices are such that concepts of legal phenomena as basic as
“trials” and “contracts” fail to denote the same concepts in different languages, despite
the ease with which a translator may pick an allegedly equivalent word in a different
language. Finally, differences abound in what the national courts consider to be...
primary and secondary sources of legal authority. These differences are particularly vivid between civil-law and common-law legal systems.

For example, where a U.S. judge striving to apply the CISG uniformly would be prepared to consult prior CISG case law, a French judge would expect to consult scholarly commentary rather than the judicial decisions themselves. Moreover, a U.S. judge would be perplexed by a French judicial application of the CISG, because the French court opinion might well consist of one sentence without any clear description of the case's underlying factual scenario, and essentially be inaccessible without the explanatory scholarly commentary that French lawyers seek when trying to understand French judicial decisions.

Conversely, a French judge assessing United States CISG case law instinctively would look for la doctrine, the scholarly commentary that occupies a privileged position of influence on French court adjudications, but which, to a common-law trained legal mind, may be perceived as tainted by the scholar's interpretive subjectivity, not to speak of by the lowly status of American scholars in terms of their influence on court decisions. Given these significant differences across legal cultures in the

12 On the status of law professors in civil-law states, John Henry Merryman has said that “[the teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors,” and André Tunc similarly has described the civil law as “a law of law teachers.” John Henry Merryman, The Civil law Tradition 59-60 (1969); André Tunc, Methodology of the Civil Law in France, 50 Tul. L. Rev. 459, 469 (1976). Accord, James Q. Whitman, The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change, xiii - xiv (1990). For an excellent historical account of the civil-law heritage, and in particular how “learned men,” rather than judicial decisions, came to embody legal authority in fourteenth-century Italy, see John P. Dawson, The Oracles of the Law 138-147 (1968). Dawson notes that the Roman legal system seemed poised for case-law methodology, but that this possibility was deflected by increasingly dictatorial emperors whose power might have been usurped by judges operating in a system of stare decisis. Dawson also explains that, in the medieval period, the Roman tradition of legal experts was transmuted to judicial reliance on experts, which in turn became the influence of the sapiente, or “learned men”: “The Roman tradition of a legal elite, detached from any public office, was transferred to a group of academicians, whose authority mounted with the mass of their writings, leaving the judges wholly submerged.” Id. at 146-147. See also Whitman, supra, at 58 (detailed discussion of problem of identifying Roman ius publice respondendi); and at 86-90 (role of legal scholars in Roman republican versus imperial period). One sees in the Roman legal experts the origins of the civilian reliance on scholarly work. See Whitman, supra, at 28-40; 101-199. More generally, see Tony Judt, Past Imperfect: French Intellectuals (1944-1956) 202 (1992) (discussing “the insignificance of the intelligentsia in the public life of the [United States]. In marked contrast to their French homologues, American intellectuals are marginal to their own culture ... the intellectual in America has no purchase upon the public mind, not to mention public policy. There was (and remains) something profoundly inimical and alien to the European and French conception of the intellectual and his or her role.” Judt does not view the elevated role of the intellectual in France as an unalloyed benefit to society, however, concluding that France gave “to the thoughts and deeds of its postwar intellectual elite a
understandings even of what a judicial decision is, uniform application of the CISG based on prior judicial decisions of necessity is compromised by the inevitable variety among judicial interpretations and manners of interpretation of prior case law, much of which is a consequence of the legal methodology used in each signatory State.  

Even at first glance, it is apparent that some of the challenges to a uniform application of the CISG have been resolved in the European Union context. Perhaps the most dramatic and visible differences between the CISG and the European Union are, on the one hand, the significant disparity, arguably amounting to a difference in order of magnitude, between the number of CISG signatory States (listed at 54 as of April, 1999), in contrast to the European Union's smaller number of Member States; coupled with, on the other hand, the use of a single court to interpret European Community law, as opposed to the use of the panoply of the national courts of signatory States for the CISG.  

The remarkable success in the European Union of the referral process from national courts to the European Court of Justice has been analyzed at length in recent years. By
all indications, the readiness of domestic courts to participate actively in referring cases to the European Court of Justice appears to have become a tradition in the national life of the Member States, with national judges abstaining from referral generally where the European Court of Justice has made its position on the relevant legal issue clear.  

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The referral structure operates successfully by funneling a multitude of legal issues towards a single European court, so long as they ostensibly fall within its sphere of competence. 18 However cacophonous the languages of origin may be, however stubborn the problems of translation may be that persist on numerous levels between referring Member State court and the European Court of Justice, the adjudication of issues deemed European is univocal, issued and uttered by the European court, and, moreover, based on that court’s body of precedents.

The European Union’s structural remedy to the CISG problem of adjudication by diverse courts in numerous nations need not, however, mean that legal convergence, either substantive or methodological, would be realized at a substructural level. Scratching the surface of the European Union’s legal system might bring into view a juridical Tower of Babel, due to the clash of discordant legal cultures between the two principal, divergent legal systems coexisting in the European Union: namely, the common-law and civil-law systems.

Certainly, the European Union Member States do suffer from some of the same barriers to legal uniformity as the CISG, such as the use of numerous different languages, with inevitable attendant imperfections of translations that go beyond the realm of language, extending to profound conceptual differences, to conflicts between disparate understandings in common-law and civil-law systems as to the defining characteristics of law. 19 These obstacles to legal uniformity are very real and will persist in diminishing the extent to which legal uniformity can be achieved or perfected. The European Union may, however, be overcoming critical obstacles to legal uniformity. It may be developing a kind of homogenization of the two judicial traditions it encompasses - in other words, a new and different product may be emerging, a byproduct of the unique composition of the European Union’s legal institutions.

A EUROPEAN INTERSECTION OF SETS

To those of us who believe that law is part and parcel of the larger society in which it emerges, develops and thrives, and which, in turn, it affects in a dynamic process of mutual influence, the most likely situation one might imagine would be that, to the extent law reflects the larger society, common-law characteristics should permeate the

17 See Lord Slynn of Hadley, Critics of the Court: a Reconsideration in European Community Law in the English Courts, in Adenas & Jacobs, supra note 11, at 3; Beloff, supra note 11, at 13.
18 See Treaty Establishing the European Community [EC Treaty], art. 234. (as amended through December 2000).
larger society of nations with a common-law legal system, as civil-law characteristics should permeate the larger society of nations with a civil-law legal system. While that statement in and of itself is not inaccurate, the point I hope to develop is that its converse is inaccurate: namely, the larger cultures of common-law nations are not devoid of civil-law attributes, and vice versa. Both common-law and civil-law attributes abound in the larger social, political and intellectual cultures of all of the European Union’s Member States. Each Member State has myriad non-legal characteristics that correspond to the defining characteristics of both the common-law and civil-law mentalities.

Precisely because law is embedded in the larger society, and because the fundamentals of both common-law and civil-law mentalities are pervasive in all of the European Union’s Member States, lawyers come to the law with an understanding, an instinctive grasp, of both mentalities, and proceed to learn to “un-learn” one of those mentalities when dealing with legal analysis. Indeed, the process of becoming a lawyer involves repressing the “other” mode of thinking, “un-learning,” when engaging in legal thought, its manner of reasoning, of perceiving and analyzing the world. The conception of the world, the method of reasoning, that lawyers are “un-learning” for the purposes of their legal training, nevertheless remains valid for the non-legal domains of intellect and discourse. This formative process applies to lawyers trained in both the common and civil-law legal systems.

Thus, for example, because of the profound influence of Romanticism in Germany, and Romanticism’s embodiment of common-law characteristics, a German lawyer should have the capacity to understand the common-law mentality. Its foreignness will reside in its application to the legal domain. The extent to which Romanticism has been an influence in a civil-law nation’s general culture should correlate with the degree of ease its lawyers and judges face in adapting common-law concepts and conceptions in the sphere of law. Consequently, the penetration of common-law attributes should be easier, quicker and deeper in Germany than in France, a country in which the Enlightenment played a more dominant role in intellectual discourse and development than did Romanticism.20

The influences of the Enlightenment and Romanticism in Europe are the subject of countless commentaries, and have been amply documented. To the extent that my thesis is valid, because Romanticism is kindred to the common-law mentality in many ways, and because the Enlightenment is kindred to the civil-law mentality in many ways, examining Romanticism and the Enlightenment will make visible the presence of the common-law perspective in the general cultures of Europe’s civil-law States, as it will the presence of the civil-law perspective in the general cultures of Europe’s common-law States. My use of Romanticism and the Enlightenment is thus as a tool to demonstrate my thesis, but there also should be areas beyond the residues of the Enlightenment and Romanticism that evidence the admixture of common-law and civil-law attributes in the non-legal spheres of the European Union States’ cultures.

My categories and correspondences are not impregnable. Romanticism and the Enlightenment have considerable overlap. Although often contrasted with each other,

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each also is greatly indebted to the other. Moreover, as Isaiah Berlin has put it, today “[w]e are children of both worlds.”21 Similarly, the legal sphere of societies is not distinct and separable from the rest of society: on the contrary, each exists in a dynamic interrelation of mutual influence with the other. Nevertheless, it still is possible to discern attributes characteristic of legal culture that are not equally characteristic of the larger culture.

My theory is sustainable to the extent that one can distinguish some attributes as characteristic of Romanticism, but uncharacteristic of the Enlightenment, and vice versa; that one can distinguish some attributes as characteristic of legal institutions, but uncharacteristic of non-legal institutions, and vice versa; and that one can distinguish some attributes as characteristic of common-law legal systems, but uncharacteristic of civil-law legal systems, and vice versa. Each of these binary oppositions is far from absolute in validity, however. A helpful way to envision them is as elements in mathematical sets, where the sets overlap, such that their intersection covers some area, but where there is not a union of sets, and the areas of complement, the non-intersecting areas of the sets, also are appreciable.

The homogenization of law and legal methodology in Europe increasingly will effect an expansion of the area covered by the intersection of the two sets representing the common law and the civil law. If one were to imagine the set representing the common law as a circle of red paint, and the set representing the civil law as a circle of white paint, European legal homogenization would be the pink area of overlap, with its dimensions increasing in jagged lines and a range of shades from white to red, as paint seeps unevenly beyond the circles’ circumferences.

I do not want to overstate the case, or, worse, to appear to minimize the critical differences between the common and civil-law legal systems. Many flaws, especially in comparative legal analysis, have resulted from an unfortunate tendency to overlook the profound and fundamental nature of those differences.22 Indeed, in Bulmer v. Bollinger,23 Lord Denning of Britain’s House of Lords seemed almost to despair of reconciling those differences. In an opinion that has been reproduced in part by Claire Kirkpatrick in her recent article in the European Law Journal24; and, still more recently, by Anthony Arnall in European Community Law in the English Courts,25 Lord Denning expressed the collision of the two legal traditions in terms of a common-law court’s dilemma as it attempted to deal with European legislation drafted in the civil-law style. His opinion brings to light the alien aspect to the common-law legal perspective of what, ultimately, is the civil-law idea of law itself, of the law as text, and of the function and nature of legislation. Lord Denning signals how ill-equipped the common law is to assimilate and process texts drafted and conceived in the civil-law mentality, legal texts

22 See Curran, supra note 11 (tracing the development of comparative law in the United States in terms of its émigré leaders’ reluctance to acknowledge the fundamental nature of differences among legal cultures).
25 Anthony Arnall, Interpretation and Precedent in European Community Law, in Adenas & Jacobs, supra note 11, at 117.
that do not fit into the pre-existing common-law grids and categories; in other words, legal texts that can not be decoded and deciphered by using the common law's habitual tools of interpretation:

The Treaty is quite unlike any of the enactments to which we [are] accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise to provide for them. They have sacrificed style and simplicity. They have forgone brevity. They have become long and involved ... How different is this Treaty! It lays down general principle. It expresses its aims and purposes ... but it lacks precision. It uses words without defining what they mean. An English lawyer would look for an interpretation clause but would look in vain. There is none! ...It is the European way. Seeing these differences, what are the English courts to do?26

Finally, Lord Denning answered his own question: "We must follow the European pattern."27

It is not just the English who are obliged to embark on a foreign way. Although the homogenized European legal product has a stronger strain of civil- than of common-law mentality, and may be criticized as allowing the former to dominate the latter, civil-law methodology is not remaining unchanged in the European context. The very prevalence of the European Court of Justice as a source, if not, as many would say today, as the most important source, of legal authority in the European Union, has created a system with an increasingly common-law-like component of stare decisis.28 European judges, like their common-law brethren, and, unlike their civil-law brethren (at least in the latter's official role), create law, fashioning it with each judicial decision, such that legal

26 Bulmer, supra note 23, at 1236. It should be noted in this context that, according to Professors Atiyah and Summers, Lord Denning has an "inclination for radical innovation," and is the only judge in several centuries of English judicial history to have repudiated the peculiarly English strictures on stare decisis. See P.S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions 349 (1987). For further reference to Lord Denning's idiosyncratic judicial outlook, see id., at 122, 133, 287, and 290-91.

27 Bulmer, supra note 23 (emphasis added). See also Neil MacCormick, Questioning Sovereignty: Law, State and Nation in the European Commonwealth 98 (1999) ("the price of [British] judicial loyalty to integrationist doctrine in Community law [is] a high one, but the House of Lords [is] ready to bite the bullet"). On the difficulty in statutory interpretation for a civil-law judge interpreting common-law statute (the converse of Lord Denning's dilemma), see Wolfgang Oehler, Working With a Code: Is There a Difference Between Civil-Law and Common-Law People?, 1997 U. Ill. L. Rev. 711, 714 (1997) ("when approaching statutory law of a common-law jurisdiction, a lawyer educated and trained in a civil-law country will find herself forced to muddle through what appears to her a troublesome, if not superfluous, verbosity of explanatory sentences and definitions in her attempt to gain knowledge of it in the way she has been used to back at home."). On the basic approaches to distinguishing common-law from civilian interpretive methodology, see generally, Law-Finding and Procedure in Common Law and Civil Law, in Konrad Zweigert & Hein Kötz, Introduction to Comparative law 256-275 (Tony Weir trans., 1998). For Professors Zweigert and Kötz's account of Lord Denning, see id. at 267.

28 But see Katja Langenbucher, Argument by Analogy in European Law, 57 Cambridge L.J. 481, 506 (1998) (arguing against viewing the European Court of Justice as implementing a common-law methodology, "since the European Court of Justice does not recognise binding precedents as a source of law."). To the extent that the precedents are "binding" in practice, however, one might wonder whether their being unrecognized as a source of law will suffice to prevent a doctrine of stare decisis from developing de jure, if not de facto. Indeed, Langenbucher's attempt to distinguish between the European Union's attitude to precedents and the common law's overlooks the fact that stare decisis is not strictly applied in common-law jurisdictions, at least by the highest courts. See id. at 507-08. Langenbucher's analysis nevertheless reflects many pertinent differences between the European and the common-law effect of judicial precedents. See id.
norms are judicially created for future application to similar future cases. This phenomenon is not totally like the common-law’s *stare decisis*, however, inasmuch as the European Court of Justice’s decisions have a civil-law flavor in the style of their composition, such that the European judicial decision itself resonates with familiarity and significance to civil-law citizens in ways alien to their common-law counterparts. Moreover, Paolo Mengozzi points out that decisions of the German and Italian national Constitutional Courts accord a status to European Court of Justice decisions that not only meets the common-law standard of legally binding precedents, but in fact exceeds it, inasmuch as European Court of Justice decisions, in his words, “transcend ... the limits of the common law concept,” because they simultaneously constitute binding precedents, along the lines of common-law methodology, but yet are deemed applicable even to factually *dissimilar* future cases.

What Mengozzi describes as “transcending” common-law concepts is not so much going beyond the common law, as though the German and Italian national Constitutional Courts were becoming more common-law in methodology than the national common-law legal systems’ courts themselves. It is, rather, a civil-law twist on common-law methodology that we are seeing today in the European Union. The common-law recognition of precedents as a binding source of law is blending with the civil-law custom of norm-formation for general prospective deductive application. The manner of applying the norms derived from European Court of Justice precedents is emerging in the civil-law style of privileging the deductive process from norm to application, and departing from the common-law insistence on limiting the applicability of norms derived from precedents to factually analogous future cases. Thus, although precedents are being accorded legally binding stature, absent are the common law’s privileging of the process of analogizing in its methodological hierarchy, and the common law’s pervasive attribution of legal significance to the discrete facts of each case.

The common law also is affecting the civil-law Member States’ Europeanization in the form of national legislative enactments that are progressing in a manner reminiscent

29 The European Court of Justice’s preeminent role as the source of European Community legal authority predictably has discomfited civilian Member States, causing them to seek alternatives which would relegate the Court to an inferior status. See Paolo Mengozzi, European Community Law 84–85 (Patrick Del Duca trans., 1992). For the civil law’s opposition to “[p]recedent-justice [as] not only illogical but pernicious,” and attributing to “Rome’s high legal culture ... its [i.e., precendential justice’s] systematic prohibition,” see Dawson, supra note 12, at 100, quoting Woldemar Engelmann, Die Wiedergeburt der Rechtskultur in Italien 29 (1938); François Gény, *Méthode d’interprétation et sources en droit privé positif* (1919) (in two volumes), for the French revolutionary jurist Chapelier’s statement that case law was the most hateful of all institutions and Robespierre’s that case law (“[c]e mot de jurisprudence des tribunaux”) had to be erased from the French language (“*doit être effacé de notre langue*”). See also Whitman, supra note 12, at 56, for the specific terms of Justinian’s prohibition against reliance on precedents. As Maurice Adams points out, however, the use of precedents in the absence of the common-law’s full-fledged methodology diminishes the extent to which a civil-law court’s acknowledging precedents approximates the common-law judicial approach. See Maurice Adams, *The Rhetoric of Precedent and Comparative Legal Research*, 62 Mod. L. Rev. 464 (1999). See also Dawson, supra note 12, at 323 (“The citations by [French] lawyers to past decisions gave the judges some clues but not much help, for the lawyers’ ignorance of the reasons for past decisions often made their citations irrelevant.”). For a comparative analysis of the methodology of the European Court of Justice and the United States Supreme Court, see Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law*: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B., 33 Tulsa L. J. 135 (1997).

30 The Court’s reasoning is deductive, from principles of enacted law.

31 Mengozzi, supra note 29, at 190.
of common-law processes. In order to remain compliant with European standards, Member States pass legislation as new European Union directives necessitate. This method of national legal reform goes against the grain, however, of the civil-law concept of law as the codified embodiment of the national legal spirit, written down from a point of departure that foresees an organic legal system, a coherent whole. Accordingly, the process has been the subject of criticism by jurists from civil-law Member States. Reinhard Zimmermann has decried the ongoing process of national legal evolution in Europe as follows:

This way of ‘Europeanizing’ our private law has been highly unsatisfactory so far. We are dealing with no more than fragments of uniform law, inserted rather inorganically, and in a ‘higgledy-piggledy’ fashion, into the various national legal systems. Rather than gain in coherence, rationality, and predictability, the law has tended to become disjointed.

Similarly, Friedrich Kübler refers to the “pointilliste character” of this new way of creating legal norms, a way that he criticizes for being in a relation of confrontation with the “ideal of codification of the established understanding of law.” Gustav Radbruch described such “neglect” towards the elegant, symmetrical and fitting ordering of law as typifying English, as opposed to German, law. Indeed, what appears to Professors Zimmermann and Kübler to be a distressingly haphazard legal evolution because of its piecemeal progression, is the very image of the common law’s pattern of progression. The Member States’ “higgledy-piggledy” enactments in response to European Union directives are alterations based on particulars rather than on the coherent whole.

Professor Kübler’s reference to pointillisme is even more illustrative of the common-law production of law, whose meaning, like that of a pointilliste painting, derives from the combined effect of its multifarious elements. In the European Union’s Member States, this arouses the skepticism and mistrust of the civil-law jurist because it

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32 See, e.g., Treaty of Rome, part I, art. 10.
33 Zimmermann, supra note 2, at 218. Accord, Kirchner, supra note 13, at 674 (describing the goal of European legal unification as the creation of a “new legal order”). Where Zimmermann regrets the “higgledypiggledy fashion” of European law-making, Gustav Radbruch similarly described the English legal system as proceeding on a “zigzag course” (“ein[ ] unschöne[r] Zickzackkurs”). Radbruch, supra note 11, at 9. See also Guido Alpa, Les nouvelles frontières du droit des contrats, 4 Revue internationale de droit comparé 1022-23 (1998) (noting the difficulty of comparing European Union law to UNIDROIT or other contract principles because, with the exception of the Lando Commission’s work, European Union law comes piecemeal, in the form of individual directives, frustrating attempts to come to coherent conclusions as to its principles). But see Reiner Schulze, A Century of the Bürgerliches Gesetzbuch: German Legal Uniformity and European Private Law, 5 Colum. J. Eur. L. 461, 467-72 (generally endorsing the current process, although hoping for more systematization). Schulze suggests that the Europeanization of law is a process of “de-codification.” Id. at 472.
35 See Radbruch, supra note 11, at 9 (“Vernachlässigung der symmetrischen und geschickten Anordnung ...”), quoting and presumably translating Macaulay. Radbruch’s description of the English legal system is highly complimentary. It should be noted that his book was published in 1946; one senses in Radbruch’s glowing portrayal of the English legal spirit and people, their law-abiding nature, propensity for self-criticism, and indomitable commitment to freedom, an often unspoken contrast with the authoritarian Nazi period Radbruch had just gone through in Germany. See, e.g., id. at 13-15.
is an evolution proceeding inversely from the civil-law norm, for the European legal progression taking place today is occurring law by law, rule by rule, in reaction to new circumstances imposed by the European Union. The Member States' law is thus evolving in response to the particular new needs of the ever-evolving society. This is how the common law develops, including the particular statutes that legislatures enact in order to change the course of judicial trends.36

This manner of legal evolution now occurring within the European Union Member States marks a profound alteration in the conception of law and the propriety of legal change for the European Union's civil-law Member States. It also marks a profound contrast with Enlightenment ideology, inasmuch as the latter sought to apply scientific methods to all areas of study, including the social and political sciences, with an approach that was, like the civil-law state's approach to law, "organic" and "anti-atomic"37: i.e., which privileged the whole, the coherent, and the interrelatedness, as opposed to the component part, the particular, and the isolated.38

ROMANTIC COMMON LAW; ENLIGHTENED CIVIL LAW

The common law is a law defined in terms of past judicial decisions. The resulting methodology is such that the common law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation. The common law evolves with the ongoing derivation of legal standards from prior judicial decisions, but it is defined by continuous motion. This means that the common law is that which cannot be crystallized, frozen or ever entirely captured. It is fluid, with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the lived experiences39 which formed the basis of the litigation that led to the prior relevant court adjudications.40

The common law is the analysis of the particular because common-law legal rules derive from a series of unique life experiences, by definition not amenable to exact repetition. The common law signifies by way of the courts' assessments of the legal significance attributable to unique events, to facts in the unicity of their particular life contexts.41 By virtue of their inextricable connection to the factual life scenarios that

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36 See Justice Frankfurter's characterization of United States law as an "instrument of adjustment ...", Frankfurter & Landis, supra note 5, at 59-60.
37 See Berlin, Age of Enlightenment, supra note 4, at 20.
38 See id. For the argument that Continental Europe's reception of Roman law was predominantly the adoption of rationalism in legal methodology, rather than the incorporation of foreign substantive legal principles, i.e., that it signified the "Verwissenschaftlichung" or scientization of law, see Michael Stolleis, The Law Under the Swastika: Studies on Legal History in Nazi Germany 58-61 (Thomas Dunlap trans., 1998).
39 Throughout this article, I use the expression "lived experience" to denote the experience-in-life of a party before that experience becomes encoded in a court narrative that inevitably involves transformation and reduction, including experiences omitted entirely from the judicially forged rendition of events.
41 See Karl N. Llewellyn, The Bramble Bush 2 (1985) (1930) ("the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it a rule of law or any other, mean anything at all") (emphasis in original); Melvin Aron Eisenberg, The Nature of the Common Law 160 (1999) (1988) ("the test for determining the law must turn on factual criteria"); Pierre Legrand, European Legal Systems Are Not Converging 45 Int'l & Comp. L.Q. 52 (1996) (discussing the common law's focus on the factual and contextual, concluding, however, that convergence of the common and civil law traditions within the European Union is a virtual
lead to litigation, common-law legal issues also must be unique. It is thus clear that reasoning by analogy from a prior adjudicated case to a pending case never can attain scientific precision. The comparison must at best remain simile; it never can reach the exact equivalence of metaphor.42

The common law’s analogical reasoning is defined in terms of the pending case’s outcome - in other words, common-law legal reasoning consists of arguments, some of which succeed in practice, and others of which fail. Those arguments destined for success join the ranks of a hierarchy of legal axioms, the springboard for future analogies to meet the needs of future arguably similar cases. Thus, each legal standard is linked irreducibly to the factual context from which it emerged, rendering both legal standard and legal argument inextricably bound to factual context.43

The common-law twin concepts of holding and dictum illustrate the inseparability of fact from law. A common-law court’s holding is defined as that part of the judicial opinion consisting of the court’s resolution of the precise legal issues in their factual contexts that the parties asked the court to resolve. Under the doctrine of stare decisis, only the holding has binding precedential authority on future similar cases. By contrast, dictum is any other pronouncement contained in the court’s opinion. Prototypical dictum is a court’s expression of how it would have resolved the case had one or more of the facts been different from what they were. Dictum is particularly instructive in revealing which facts were influential in and dispositive of the court’s final resolution of the legal issues. Dictum legitimately may be persuasive authority to a future court dealing with the hypothetical situation the earlier court discussed, but even then, technically, it does not have binding precedential effect.44

Common-law lawyers therefore fashion their arguments from a close study of prior cases. Their success as lawyers depends on persuading the judge in each case of the accuracy of the analogies they suggest between their client’s situation and that of the precedents they cite. Similarly, common-law lawyers must persuade the judge that their client’s situation is different from situations that arose in the precedents they hope to distinguish. The common-law lawyer’s task also is to persuade the judge that the lawyer’s interpretation of existing case law accurately reflects prevailing contemporaneous legal standards, and that the accumulated body of relevant precedents

impossibility). For an analysis of the common law’s defining legal issues in terms of associated facts, and the inextricability of the common-law legal issue from its defining facts, see Vivian Curran, Common-Law Methodology: The Four-to-Five Step Procedure for Legal Reasoning and Some Important Aspects of the Bluebook (unpublished manuscript, 1992) (this manuscript represents my attempt to implement the “un-learning” of civil-law thought processes and perceptions that common-law law students must undergo in order to grasp common-law legal methodology. I have used it both for United States J.D. students and for foreign LL.M. degree candidates.)

42 See Edward Levi’s excellent analysis of common-law legal reasoning, in which he concludes that common-law judges are obliged to classify things as equal which at least are somewhat different, by virtue of the common law’s composition of rules that change even as they are applied. Levi calls this phenomenon a “moving classification” system. Edward H. Levi, An Introduction to Legal Reasoning 3 (1949).


44 Cf. Sunstein, supra note 5, at 5 (“courts should follow prior holdings but not necessarily prior dicta”); Benjamin N. Cardozo, The Nature of the Judicial Process 29 (1921) (“obscuring dicta... must be stripped off and cast aside”).
obliges the judge to rule in favor of the lawyer’s client. The lawyer’s reasoning does not consist merely in bringing to the judge’s attention precedents favorable to the lawyer’s client. It is equally important for the common-law lawyer to show the judge why unfavorable cases are irrelevant to the pending case. Thus, common-law lawyers engage in complex factual triages, distinguishing as factually different and distant those cases whose outcomes would militate against their client’s interests; and, conversely, presenting as analogous the facts of cases whose outcomes militate in favor of their clients.

Facts thus are central to the very meaning and concept of law in the common-law legal system. This centrality of the particular facts to the common-law legal system is conveyed to United States law students through the casebook method of education. From their first day of studies, law students read series of cases that provide the data from which they are to deduce governing legal norms. The task of formulating legal principles by extracting them from individual cases is a task never wholly achievable to the extent that the factual baggage is a constant and necessary companion to common-law legal principles.

The difficulty beginning law students frequently experience and express is the difficulty inherent in adjusting to common-law lawyers’ freedom and room for leverage, to their room for interpretive creativity. It also reflects the uncertainty embedded in the common law. Along with the freedom and adventure of crafting innovative new legal arguments derived from prior court decisions, common-law lawyers may hope not just to win their case, but also to forge new legal standards by persuading the judge to adopt their arguments, however novel and original. The lawyer more ingenious at seeing how prior case law can be analogized and distinguished according to the needs of the client’s case may make law by dint of presenting the more persuasive of the two conflicting interpretations of precedents that the adversaries argue to the court.

This very freedom implies an absence a priori of any single correct result in an absolute sense. It implies substantive law’s flexibility and dependence on argumentation. Thus, at the heart of the common law lies an exaltation of methodology, of argumentation that not only rivals, but also determines, substantive law. Justice Scalia has written that “[t]he rule of law is about form.” Indeed, according to H.L.A. Hart, in the United States, there is “a concentration, almost to the point of obsession, on the judicial process ....”

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46 See Levi, supra note 42, at 1-19 (for how law is created by arguments initially asserted without success, often repeatedly so, until eventually a court accepts them.)
47 In a statement that provides a stark contrast to the civil law, Judge Posner has written of the common-law legal system that “[l]egal training and experience equip lawyers with a set of essentially casuistic tools ... but not with the tools they need in order to understand the social consequences of law.” Richard A. Posner, Overcoming Law 90 (1995).
The common law's methodology or process may be said to be its "grammar," in the sense that semioticians speak of grammar as the underlying network of signs creating significance.50 Consequently, common-law legal education emphasizes to students how to formulate argument. It seeks to transmit its methodology as much or more than positive law, conveying the doubtful status of positive law in a system whose self-understanding is one of flux.

The case law method also highlights the procedural, allowing students to observe the manifold ways in which substance is linked to procedure, in which facts are subject to the court's optic or prism of perception, and in which the procedural context is a primordial, defining aspect of judicial perception.51 According to John Dawson, the doctrine of stare decisis, the common law's cornerstone, originally applied principally to matters of procedure: "The binding force of precedent was chiefly felt on points of procedure and practice."52

As Professor Merryman has put it, "to read a case is a very inefficient way to learn a rule of law ... 53 One studies cases in order to become familiar with the process, to learn how the legal system operates ... the emphasis is not on substance but on method ... ."54 Judge Posner remembers his first day in law school as follows: "[W]e were asked to read for each course not an overview or theoretical treatment of the field but a case -- a case, moreover, lying in the middle rather than at the historical or logical beginning of

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51 The case law method also serves to develop the independence of thinking necessary for common-law lawyers to play a primordial role in law creation. According to Learned Hand, a preeminent American judge, "the strongest element of the case method of legal education ... was a method which offers to the student a chance to do his own thinking, in preference to [teachers] working out his own conclusions for him." Gerald Gunther, Learned Hand: The Man and the Judge 46 (1994), quoting Learned Hand, 8 Harv. L. Rev. 65, 66 (1894). For a discussion of the initial reception in the United States to the case law method of instruction, introduced by Harvard Law School's Dean Langdell, see id. at 46-47. See also Paul D. Carrington, Moths to the Light: The Dubious Attractions of American Law, in Hübner & Ebke, supra note 43, at 135 ("The case law method of instruction ... provided a form of intellectual rigor uniquely relevant to the form taken by American law.")

52 Dawson, supra note 12, at 73. Another tradition that served to hone the common law's focus on both the concretely factual and the procedural was the original need for common-law complaints to meet the strictures of writs, a process that increasingly gave rise to legal fictions, but that always necessitated intensive scrutiny, and potentially also a recasting, of the facts alleged by the plaintiff. Vestiges of this system have survived in both England and the United States. More importantly, the writ system's measurement of a case's scrutiny, and potentially also a recasting, of the facts alleged

53 Merryman, supra note 45, at 872.

54 Id. at 873. Accord, Arthur Taylor von Mehren, The Judicial Process in the United States and Germany: A Comparative Analysis, in 1 Festschrift für Ernst Rabel 77 (1954) ("Legal education in the United States, conducted by the case method ... directs attention at a very formative stage in the lawyer's career towards the functional nature of the judicial process."); Scalia, supra note 48, at 5.
the field." By contrast, "[i]n the civil law world, the educational focus is primarily on
substance; method is deemphasized." Accordingly, in The Bramble Bush, Karl
Llewellyn advised his students at Columbia University as follows: "You must read each
substantive course, so to speak, through the spectacles of procedure. For what
substantive law says should be means nothing except in terms of what procedure says
that you can make real." 

Justice Frankfurter also recognized the role of procedure as primordial to the
common law: "The history of the Supreme Court, as of the Common Law, derives
meaning to no small degree from the cumulative details which define the scope of its
business, and the forms and methods of performing it - the Court's procedure, in the
comprehensive meaning of the term." This does not mean that the accumulation of
details does not produce a body of principles, as Richard Posner suggests, but it means
that the formation of law, whether of case rules or established principles, is derived
from the common law's focus on the particular, and this tradition underlies the
common-law psyche, its conception of law.

The common law's focus on the procedural has deep historical roots. Describing
the development of the common law from twelfth-century England, James Herget notes
that, "For the early English barristers the law consisted of discrete sets of rules and
arguments related to specific procedural devices."

Jürgen Habermas, steeped in the common-law theoretical legal analysis of Dworkin,
Rawls, Ely, Sunstein, Ackerman, Michelman and Hart, among others, proposes what
he presents as a new legal paradigm based on procedure:

I intend to sharpen the contours of a third legal paradigm, which provides a specific
interpretation of the other two and goes beyond them. I start with the assumption that
the legal systems emerging at the end of the twentieth century in mass welfare-state
democracies are appropriately understood in proceduralist terms.

Habermas turns to procedure as to a universal alternative to, or substitute for, substance,
seeing in procedure a solution to the problem that differing legal cultures and societies,
and differing sub-populations within modern democracies, are likely never to be able to
harmonize on a substantive level.

In this I believe Habermas to be mistaken. Not only is the procedure of each society
interpreted differently, as Habermas recognizes, but the procedure of each society also

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56 Merryman, supra note 45, at 871.
57 Llewellyn, supra note 41, at 9. For the influence of German Romanticism on Llewellyn and on the
UCC, see James Whitman, Commercial Law and the American Volk: A Note on Llewellyn's German Sources
for the Uniform Commercial Code, 97 Yale L. J. 156 (1987). Cf. by contrast the published version of Italian
Supreme Court decisions: "Procedural features of the specific case are not included." Michele Taruffo &
Massimo La Torre, Italian Precedent, in Interpreting Precedents: A Comparative Study 141, 150 (D. Neil
58 Frankfurter & Landis, supra note 5, at vi (emphasis added).
60 Herget, supra note 11, at 112. Accord, Dawson, supra note 12, at 56.
61 See Habermas, Between Facts and Norms, supra note 11.
62 See id. and notes therein.
63 Habermas, Between Facts and Norms, supra note 11, at 195. See also id. at 296 ("Our reflections
from the standpoint of legal theory revealed that the central element of the democratic process resides in
the procedure of deliberative politics.")
64 See id. at 311.
is different in its most fundamental sense, and precisely because it is not capable of
demarcation or isolation from substance. A blending of procedure and substance, a
blending certainly incomplete, ineffable and ultimately elusive to exact definition,
characterizes each legal culture as well as the larger society, such that procedure is not
an alternative to substance.62 Rather, one imbuies the other with its presence, each
marking the other with its traces. Procedure and substance, although not equivalent,
nevertheless ultimately are inseparable, and will be misunderstood if analyzed as
distinct.63 The struggle to separate procedure from substance is itself a complex
phenomenon, and is not unique to the field of legal analysis.64

My view is closer to that of Stuart Hampshire, inasmuch as he has signaled the
local and traditional bases of procedure.65 Although more pessimistic than Habermas,
Hampshire nevertheless believes that there is one universal, human-wide rule of
procedure on which an edifice of justice may be constructed or at least attempted:
namely, "that contrary claims [must be] heard."66 I differ from Hampshire, however, in
that I suspect he too is overly optimistic. The divergences among procedures which he
himself signals seem to me likely to preclude any effectively reliable uniformity or
universality in the concept of hearings. Moreover, as Isaiah Berlin has demonstrated,
the idea that conflicting sides deserve an impartial hearing, far from being universal, is a
culturally and historically contingent value.67

It is perhaps of interest in this context to reflect on the evolution of judicial
interpretation of the Fourteenth Amendment's due process clause in the United States Constitution. What began as judicial
examination of procedure transmogrified into substantive judicial scrutiny. See Gunther, supra note 51, at
119-23 for a discussion of this issue, including the following relevant cases: Allgeyerv.
State of La., 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Adair v. U.S., 208 U.S. 161 (1908); Mullerin. State of
Oregon, 208 U.S. 412 (1908); and Hart, supra note 49, at 124-25, including an additional case reference, with
respect to the Fifth Amendment's expanded interpretation from the procedural to the substantive, to Adkins v.
Children's Hospital of the District of Columbia, 261 U.S. 525 (1923). More generally, for the view that
 substance and procedure exist in a mutually influential and dependent dynamic, see Mirjan Damaška,

62 See Harry M. Flechtner, The U.N. Sales Convention (CISG) and MCC. Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule, 18 Journal of Law and Commerce 259, 284-86 (1999) (suggesting through the example of market price damages that legal rules often can be characterized as either substantive or procedural). The interdependence of form and substance emerges clearly in
literature, where the more the two are melded, the greater the work of art. Habermas' treatment of
procedure as distinct from substance may also be related to his overall, Socratic-style focus on debate as the
crucial sine qua non of democratic society. Cf. Maher, supra note 16, at 243 (noting "glaring injustices caused
by differing national procedural rules" in the European Union Member States). But see Pierre Roseren,
Review by French Courts of the Conformity of National Provisions with Community law, in Constitutional
Adjudication in European Community Law: Essays for the Hon. Mr. Justice T.F. O'Higgins 268 (Deirdre
Curtin & David O'Keeffe eds., 1992) (National rules of procedure are not implemented so as to thwart
Community law).

63 The mathematician Abraham Robinson's invention of infinitesimals within the field of calculus
engendered a dispute as to whether the nature of his invention was of new substantive objects or, rather, of
new procedures to facilitate deductive reasoning. See Robert Kaplan, The Nothing That Is: A Natural History

65 Id. at 17.
66 See Berlin, Roots of Romanticism, supra note 21, at 9-13. Hampshire's corollary point is that all
humans are familiar with the practice of according a hearing to conflicting sides because all humans
experience inner conflicts. See Hampshire, supra note 68. The idea is arresting, but its validity would depend
on human-wide experience in the conscious weighing of conflicting sides to issues, such that the practice
would be able to form a basis for extrapolation and application to courts of law and other adjudicative bodies.
If in fact the rational weighing of pros and cons is undertaken either unconsciously, or simply is not a human-
The common law’s focus on the procedural, the pervasive importance of the procedural in the common law, merely render more visible the dynamic of fusion that characterizes substance and procedure in the civil-law legal systems as well, but often imperceptibly. In the intertwining of the threads of substance and procedure, the strands of procedure are more prominent and obtrusive in common-law legal systems than they are in civil-law legal systems. Common-law legal cultures have a stronger flavor of the procedural in their aftertaste, a starker, more vivid tint of it in their coloring.

Perhaps it is because the overlap and connections between procedure and substance in the Continental European systems are not always visible that Habermas approaches procedure as a separable element that can be valorized independently of, and in contradistinction to, substance, so that, following his plan, it can be reinfused into the realm of the substantive, elevated by conscious will to the level of a substantive value, and even to primacy among substantive values. In my view, the differing roles of procedure in the civil and common-law systems are sufficiently embedded in their respective legal cultures as to make a change of stature for procedure in civil-law legal culture likely either to be profoundly upsetting to substantive civil-law legal tenets, or else likely to overlook much of what might be categorized as procedural. As a result, what will be wrested for refashioning into the newly elevated category will be incapable of achieving Habermas’ goal of creating a uniform turf of procedure on which disparate cultures and subpopulations can meet and which can produce enduring harmonious coexistence.

By way of contrast to the prominence of the procedural in common-law legal culture, Continental European legal culture traditionally has focused on a less flexible hierarchy of legal authority, on what Professor Thomas Fleiner refers to as a “hierarchical order of legal norms.” According to Professor Fleiner, civil-law legal culture de-emphasizes procedure: “It is not the procedure which guaranties legitimacy, good law and justice, but...the higher instance which is close to the roots of justice.”

The civil-law focus on that “higher instance” of authority, once a king who ruled by wide habit, Hampshire’s theory would be invalid. See also Hart’s criticism of Dworkin (“the procedural fairness of a voting system or utilitarian argument which weighs votes and preferences equally is no guarantee that all the requirements of fairness will be met in the actual working of the system in given social conditions”). Hart, supra note 49, at 218. Hart’s criticism of Dworkin applies in part to Habermas and in part to Hampshire as well, particularly (with respect to Habermas) Hart’s concern with the possibility that large segments of populations may be “impervious to [rational] argument,” id., and (applicable to both Habermas and Hampshire) noting more specifically that “the moral unacceptability of the results in such cases is not traceable to the inherent vice of the decision procedure...”).

Habermas’ underlying premise, which I also find difficult to accept, is that there are human-wide common conventions of communication. See Habermas, Between Facts and Norms, supra note 11, at 19; Jürgen Habermas, Postmetaphysical Thinking 138 (William Mark Hohengarten trans., 1992), quoted in George H. Taylor, Metaphor as the Origin of Meaning: The Challenge of Ricoeur’s Hermeneutics (1998) (manuscript on file with author).


Id. at 2. Accord Peter G. Stein, Judge and Jurist in the Civil Law: A Historical Interpretation, 46 La. L. Rev. 241, 249 (1985). Accordingly, the powerful French Parlements in pre-Revolutionary times “claimed from the outset to have inherited the rights of the medieval ruler to decide according to equity.” Vernon Valentine Palmer, From Embrace to Banishment: A Study of Judicial Equity in France, 47 Am. J. Comp. L. 277, 282 (1999). This de-emphasis of procedure in civil-law legal cultures may explain Habermas’s idea that it is separable from substance and consists of a terrain in which everyone can agree.
divine right, and more recently a legislature empowered by the State's most organic law, its Constitution, to pass laws, has had as a consequence, according to Professor Fleiner, that civil-law states have "a different understanding of democracy as legitimacy of the legislature and not as legitimacy of the courts."\(^{75}\)

Perhaps the most frequently expressed complaint on the part of beginning law students in the United States is that their professors don't tell them what the law is. This discomfort stems from their not yet having "un-learned" their still civil-law mentality, imported from the domain of their prior life experience and prior intellectual training, from their still equating law with immutable governing principles that, once learned, should, they believe, serve to solve and resolve all questions of law. They enter law school committed to the concept that law school will teach them the discrete guiding principles that resolve all legal disputes. This conception of law does not tally with the common law, however. Common-law legal education in the United States thus begins a process of teaching law students to "un-learn" this approach when thinking of legal issues, to re-conceptualize law as a process of argumentation, as a body of cases which form a point of departure for reasoning by analogy and distinction.

Even where a statute governs an issue, such that one might think that deductive reasoning is required, common-law reasoning retains the need for analogizing. As Justice Frankfurter put it, "the final rendering of the meaning of a statute is an act of judgment,"\(^{76}\) and "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote and spoke them."\(^{77}\) In keeping with Justice Frankfurter's insight that statutes have meaning through court interpretations, we can see how, in common-law systems, statutes too are subject to reasoning by analogy: the courts will resolve a statutory issue by analogizing to the precedents that involved the same statutory provision and a similar legal issue.

Indeed, practicing lawyers know that even when a statute is new, such that there are no precedents to analogize to the pending case's facts and issues, judges in the United

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75 Fleiner, supra note 73, at 2. Cf. The comment of Portalis, drafter of the Code Napoléon: "Nous raisonnons comme si les législateurs étaient des Dieux, et comme si les juges n'étaient même pas des hommes." ("We reason as though the legislators were Gods and as though the judges were not even men."). quoted in Palmer, supra note 74, at 277. For English translations of Portalis, see M. Shael Herman, Excerpts from a Discourse on the Code Napoleon by Portalis and Case Law and Doctrine by A. Esmein, 18 Loy. L. Rev. 23, 24-28 (1972); and Alain Levasseur, Code Napoleon or Code Portalis, 43 Tul. L. Rev. 762, 767-74 (1969) [hereinafter Portalis Excerpts].

76 Felix Frankfurter, Some Reflections on the Readings of Statutes, 47 Colum. L. Rev. 527, 532 (1947) (referring with approval to Holmes). I owe the discovery of this article to the reference in Scalia, supra note 48, at 23. Accord, John Chipman Gray, The Nature and Sources of the Law 164 (1909), quoting O. Bulow, Gesetz und Richteramt 6-7 (Dunker & Hamblot eds., 1885), quoted in James E. Herget & Stephen Wallace, The German Free Law Movement As the Source of American Realism, 73 Va. L. Rev. 399, 426-27 (1987) ("the power of [Case] Law is stronger than the power of legislation, a legal judgment maintains itself even if it contradicts a statute. Not by its legislative, but by its judicial determinations, the law-regulating power of the State speaks its last word.")

77 Frankfurter, supra note 76, at 533, quoting Gray, supra note 76, at 102, 125, 172 (2d ed., 1921). For a similar view as to the analogical reasoning used when courts apply the rules, or norms, of precedents, see Eisenberg, supra note 41, at 96. The right of the common-law judge to reject statutes as invalid because contrary to natural law may be the origin of common-law constitutional review. See Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 389-91 (1908). See Lon Fuller, The Law in Quest of Itself 40-41 (1940) ("The judge makes law even when he states that he is refusing to make it ... "). For a discussion of Gray's views on the subject, see William Twining, Karl Llewellyn and the Realist Movement 21-22 (Weidenfeld & Nicholson eds., 1973).
States will entertain arguments based on what is called “foreign law:” i.e., the law of another state. Foreign law in principle has an extremely low precedential value, but United States judges are so loath to apply any legal norm, even one statutorily codified, unless it is embedded in a factual context, and can be understood by analogizing the facts of the case at bar to facts of prior cases, that, for practical purposes, the “foreign law” of other states takes a giant leap in precedential stature where “foreign” case law alone can offer a history of judicial decisions of cases governed by similarly worded statutes. 78

Common-law judges’ skill and habit are in reasoning by analogy and distinction between a particular confluence of factual circumstances and legal issues, to an accumulated body of arguably similar and dissimilar prior cases. Consequently, statutory norms are lain on a Procrustean bed of precedents, even when they have never yet been subject to adjudication in the relevant jurisdiction. Accordingly, common-law lawyers arguing cases governed by statutory authority will argue based on analogies to, and distinctions from, precedents. The significance of the common law thus resides in the case law, even where the common-law court is applying a statute, and even where the statute is new.

In his criticism of American legal realism, Hermann Kantorowicz made some excellent arguments. He may not have apprized the common-law situation correctly, however, when he protested, “[b]ut every statute was once a new statute,”79 contesting the American legal realist view that judicial opinions always dominate legislation. Kantorowicz argued that statutes trump case law in common-law legal systems at the very least when a governing statute is newly enacted, because even common-law judges must apply new statutes without assistance from precedents, inscribing their statutory interpretation and application on a tabula rasa. 80 Despite appearances to the contrary, however, even when U.S. judges are applying new statutes, they generally still are operating de facto, if not de jure, under stare decisis.

The reason for this is not that common-law judges intend to flout legislative supremacy, but, rather, that they naturally gravitate to case law, in a phenomenon reminiscent of the regressions to the mean typically observed in many other fields. Nor do common-law judges’ reversion to the case law of other jurisdictions, when no precedents exist within their own jurisdictions, proceed from abstract common-law interpretive theory. They proceed, rather, from the common-law judge’s conception of legal analysis as inseparable from the detailed analogizing that precedents enable, and

78 See, e.g., Matter of Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (1993) (New York state court adjudicated a statutory construction issue of first impression under New York state statute by analogizing to Minnesota state case law construing identical term in a Minnesota state statute); State v. McDonald, 352 P.2d 343, 351 (Ariz. 1960) (“Although we are not bound to follow the [case law] interpretation placed on a statute by a state from which our statute was adopted, it is persuasive”).

79 Hermann U. Kantorowicz, Some Rationalism About Realism, 43 Yale L. J. 1240, 1251 (1934). Professor Merryman notes that the American legal realists were not comparatists. See John Henry Merryman, Comparative Law Scholarship, 21 Hastings Int’l & Comp. L. Rev. 771, 781 (1998). This may go a long way towards explaining the extent to which American legal realism altered, perhaps unintentionally, the German sources of its inspiration, resulting in the features of American legal realism with which Kantorowicz disagreed, many of which seem attributable to me to underlying differences between common and civil-law perceptions. For a British echo of Kantorowicz’s criticism of American legal realism, see Hart, supra note 49, at 128. At least one line in Hart’s essay, American Jurisprudence through English Eyes: The Nightmare and the Noble Dream, id. at 123,131, even is reminiscent of Kantorowicz’s title; namely, Hart’s query, “But in what did the realism of the Realists consist?”

80 See Kantorowicz, Some Rationalism About Realism, supra note 79.
that statutory interpretation precludes if conducted in a factual vacuum, as when it is decontextualized by the absence of prior case law.

This need for precedential analogy is so strong that judges will entertain foreign cases as persuasive authority for purposes of determining the application of a new statute even when the foreign precedents were adjudicated pursuant to merely similarly worded statutes, rather than to identically worded statutes. Indeed, as Justice Cardozo observed, the fact that an applicable norm is of statutory provenance does not alter the process of judicial reasoning: "[T]he work of deciding cases in accordance with precedents that fit them is a process similar in its nature to that of deciding in accordance with a statute. It is a process of search, comparison, and little more." Judge Posner concurs: "[R]easoning by analogy is the standard judicial technique for dealing with novelty - [i.e., reasoning] from existing cases." H.L. A. Hart similarly noted that, "when deciding cases left unregulated by the existing law ... [courts] proceed ... by analogy ... ." Judge Posner further writes that there is judicial "antipathy to legal novelty because a genuinely new case is not continuous with precedent ... ."

Thus, where Habermas comments that "[j]udges decide actual cases within the horizon of a present future," one might note that the common-law judge decides the normative import even of a brand new statute by drawing from its past incarnations in cases, however tenuously analogous, because the common-law judge etches into a present future by means of preexisting, judicially created cues. Indeed, in a passage that criticizes judicial power over statutory legislation in the United States, Roscoe Pound complained that, when judges decide statutes, they do so in accordance with case law, and they ultimately contort and constrict legislative enactments to comply with existing common law, despite the putative domination of statutes over case law:

The proposition that statutes in derogation of the common law are to be construed

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81 See e.g., Murray v. McCann, 658 A.2d 404, 442 Pa. Super. 30 (1995) (lower state court did not err in following case law of Michigan where the Pennsylvania statute it was interpreting had been inspired by a similar Michigan statute); State of New Jersey v. Ramseur, 524 A.2d 188, 225 (N.J. 1987) ("Despite the differences in language, cases under New Jersey's [relevant statutory provision] and under the Model Penal Code's form share common problems of definition and application as well as common goals. As is apparent from the discussion that follows, attempts by the judiciary to clarify and make those provisions constitutionally definite significantly displace the actual language of the statutes. The similarity of those clarifications makes cases decided under one form of the statute [i.e., in one state] persuasive in cases decided under another form [i.e., in another state]").

82 Cardozo, supra note 44, at 20. Accord, John W. Salmon, Introduction, in The Science of Legal Method lxxxii (Ernest Bruncken & Layton B. Register trans., 1969) (1917). See also Sunstein, supra note 5, at 43 ("Even rule interpretation has a large element of case analysis.") Cf. Gustav Radbruch's somewhat idealized description of statutes' being incorporated into a unified, seamless web of case law in the English legal system. Radbruch, supra note 11, at 28. ("Die Statuten werden ... bald umspannen von einem dichten Gewebe maßgeblicher Prädjudizien und mit ihm un trennbar hineinverwoben in das einheitliche Gewebe des Common Law.") In terms of democratic theory, Guy Scoffoni argues that the ultimate "last word" in the United States resides with the people, not the judiciary, because of the people's power to amend the Constitution and thereby modify the judges' referential bases. See Guy Scoffoni, La légitimité du juge constitutionnel en droit comparé: Les enseignements de l'expérience américaine, 2 Revue internationale de droit comparé 243, 265 (1999) ("Le pouvoir de dernier mot peut ainsi revenir au peuple chaque fois que nécessaire, au moyen d'une modification par le constituant, des bases de référence du juge.")


84 Hart, supra note 49, at 7.

85 Posner, supra note 47, at 76. Posner describes the legal practitioner as having a similar "aversion to any but incremental changes." Id. at 83.

86 Habermas, Postmetaphysical Thinking, supra note 72, at 198.
strictly...assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law,...[one] must always face the situation that the legislative act...will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the status quo as little as possible.87

Pound's point continues to remain relevant in a context of judicial recognition of statutory supremacy, because the common-law courts, even when doing their utmost to effectuate statutory norms, can do so only by way of analyzing precedents, thus perpetuating the triumph of precedents, and certainly of precedential reasoning. One thinks in this context also of the "Aristotelian insight that no rule is able to regulate its own application."88

The common-law legal systems, unlike their civil-law counterparts, have developed a highly sophisticated methodology for interpreting case law, but they have no methodology of comparable sophistication, depth or refinement to civil-law methodology in statutory interpretation. The common law's comparatively primitive approach to statutory interpretation is reflected in and by an ongoing debate surrounding even the most fundamental and primary aspects of statutory interpretation.89 Conversely, the civil-law systems, which have honed their methodology of statutory interpretation to a high level of refinement, are at a comparatively primitive stage in terms of case law methodology. The active and ongoing nature of the debate about case law interpretation in civil-law legal cultures reflects the more tentative methodological status of case law interpretive theory in the civil-law world, especially in comparison to civil-law theory concerning statutory interpretation.90

The common law is a law of almost boundless potential for both judge and lawyer, but the measure of its potential, the measure of the opportunities for ingenious creativity, is also the measure of its inherent uncertainty, fluidity and capacity for transformation. In these attributes, the common law corresponds to the ethos of Romanticism. Romanticism as a movement has been defined in endless, often mutually contradictory ways. Yet, as Henry Hardy, editor of The Roots of Romanticism, Isaiah Berlin's posthumous book, and of other Berlin works, suggested, "[t]o say of someone that he is a romantic thinker is not to say nothing."91 Berlin himself was the first to observe that "[t]he word 'romanticism' is vague, and like most terms of its kind, tends to be too general to be of use."92 Yet use it he did, because

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87 Pound, supra note 77, at 387 (1908). Accord, Learned Hand, Due Process of Law and the Eight-Hour Day, 21 Harv. L. Rev. 495 (1908). See Pound, supra note 77, at 388, for a contrast with Roman law tradition. It should be noted that the propriety of having judges make law remains a matter of heated debate in the United States. See Scalia, supra note 48; and Zeppos, supra note 12. Cf. Scoffini, supra note 82, at 264 ("La Constitution appartient au peuple, non au juge" ... .").

88 Habermas, Postmetaphysical Thinking, supra note 72, at 199.

89 See, e.g., Scalia, supra note 77; Kent Greenawalt, Legislation: Statutory Interpretation: 20 Questions (1999); Eisenberg, supra note 41. For references to recent scholarly work on statutory interpretation in the United States, see William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 1-4, and citations therein (2000).

90 See Baudenbacher, supra note 6, at 349 ("In recent years there have been considerable efforts in the literature to develop a doctrine of precedent in civil law.").

91 Berlin, supra note 4, at 4. For an excellent discussion of the problem of terminology in historical analysis, see Jerome Frank, Fate and Freedom (1953) (Simon & Schuster eds., 1945), especially Twistory, at 18-27. Like Henry Hardy, Frank concludes that even "leaky words" are not "entirely valueless." Id. at 26.

92 The Essence of European Romanticism, in Berlin, Power of Ideas, supra note 4, at 200.
during the period that begins in the late Renaissance and ends with the full development of industrial capitalism, a vast transformation of ideas, language, attitudes, ways of thinking and acting took place. Any student of the eighteenth century is bound to notice that towards its end the beliefs of two millennia were, if not destroyed, at any rate challenged on an ever-widening scale .... 93

Over the course of his life’s work, Isaiah Berlin himself gave what is probably the most nuanced, subtle and penetrating rendition of both Romanticism and the Enlightenment in existence in the English language. One sees through Berlin’s portrayal and commentary the fissures Romanticism wrought in the masonry of the Enlightenment, as well as the rich diversity in thoughts that has influenced and enriched Romanticism and the Enlightenment, and the peripatetic paths those influences followed through the history of ideas.

Describing the young Goethe in his early Romantic period, Berlin cites Hamann as a major influence on Goethe’s Romantic

reaction [against] ... the tendency on the part of the French [Enlightenment] to generalise, to classify, to pin down, to arrange in albums, try to produce some kind of rational ordering of human experience, leaving out the élan vital, the flow, the individuality, the desire to create, the desire, even, to struggle, that element in human beings which produced a creative clash of opinion between people of different views, instead of that dead harmony and peace which, according to Hamann and his followers, the French were after. 94

Lest one think that the capacity to generalize and classify are banal because they are human universals, it is of interest to note that, about five millennia ago, the Sumerians developed a complex society, including a bicameral Assembly which had decision-making, but not necessarily legislative power, and numerous written laws, yet were incapable of what Samuel Kramer, the eminent Sumeriologist who devoted much of his life to decoding and translating Sumerian texts, called “the methodological tool of comprehensive generalization.” 95 According to Professor Kramer, “[t]he Sumerians compiled numerous law codes ... but nowhere is there a statement of legal theory.” 96

Berlin proceeds from Hamann, whom he characterizes as “the first person to declare war on the Enlightenment”, to discuss Herder, one of the fathers of Romanticism. 97 Berlin focuses on Herder’s view that the particular is significant as the expression of the general. 98 In this we see an important attribute that Romanticism

93 Id. at 201.
94 Id. at 46. For a discussion of Hamann’s contributions to Romanticism, see Johann Georg Hamann, in Berlin, supra note 37, at 271-75. On the lack of systematization typical of the common law, see infra note 139.
95 Samuel Noah Kramer, From the Tablets of Sumer Twenty-Five Firsts of Man’s Recorded History 33 (1956).
96 Id.
97 Berlin, supra note 37.
shares with the common law. As we noted above, it is from the particular case, from each decision of each court, that the common law is derived. The common law’s focus on the particular tallies with Romanticism’s focus on “the irreducible variety of human self-expression ...”99, and its rejection of purely scientific aspirations and methodology: “We have recourse to purely scientific methods of displacement only when communication breaks down ...”100

The common law espouses Vico’s method of “imaginative insight,” 101 and Herder’s idea of empathy through immersion in the “other’s” world and standards, what he called “sich einfühlen,”102 for common-law courts assess legal issues in the context of the parties, the parties’ lives, and of the parties’ experiences as situated in the particular society in which they live. Accordingly, Von Mehren describes United States case law as “a vast collection of human experience.”103 By contrast, he views German case law, and describes its self-understanding, “less as a collection of human experience and judicial experimentation than ... judicial applications of the written law.”104

In her recent book, Jutta Limbach, a former law professor who currently serves as a judge on Germany’s Federal Constitutional Court, describes the German judicial decision’s failure to attend to the concrete facts of cases, noting specifically that the first pages of German judicial decisions refer neither to the defendants nor to their particular offenses, and that the remainder of court opinions, although generally lengthy, pays scant attention to the particulars that transpired.105 According to Limbach, German judicial decisions’ references to the concrete particulars of cases consist of no more than “isolated/scattered indications” (“eingestreuten Hinweise”).106

The civil-law judicial tradition of neglecting facts in court decisions traditionally has been still more pronounced in French court decisions than in German ones, although

100 Id. In this passage, Berlin is explaining the thought of Vico as a generative force in Romanticism.
101 Id. at 62. For a superb account of Vico’s thought and ties with Romanticism, see Berlin, Vico and Herder, supra note 97.
103 Von Mehren, supra note 54, at 79. For Learned Hand’s scrupulous attention to facts in his judicial decision-making, not just while a trial court district judge, but also as an appellate judge, see Gunther, supra note 51, at 291 (“whatever the subject - patents and copyrights, maritime law, bankruptcy, corporate and commercial law, citizenship and aliens’ deportation, criminal law, problems of evidence and jurisdiction - Hand unflaggingly sought to get to the bottom of the facts ... He would skillfully dissect and explain the technical data about a complex mechanical or chemical patent, for example, or, as if he were an experienced seafarer, the hows and whys of a ship collision.”) See also id. at 311 (discussing Hand’s “intense absorption in the factual ...”).
104 Von Mehren, supra note 54, at 79 (emphasis added).
106 Id. at 31. Accord, Radbruch, supra note 11, at 35. (“Der englische Richter ist an dem Sachverhalt, welcher der Einteilung zugrunde liegt, viel weitergehend interessiert als der deutsche Richter.”) Cf. James Herget’s reference to “German tradition as emphasizing an ... abstract legal order ...,” Herget, supra note 11, at 29.
the French judiciary also is sparing in its discussion of law, leaving much of the significance of its decisions to be explained by \textit{la doctrine}, scholarly commentary. Dawson aptly described the French judicial opinion as noteworthy for "extreme parsimony" in its references to facts.\footnote{Dawson, supra note 12, at 411. It should be noted that France has been edging away from its aversion to reporting facts and analysis in court decisions. See Lyndell V. Prott, \textit{A Change of Style in French Appellate Judgments}, 7 Études de logique juridique 51 (1978), reprinted in part in \textit{Mary Ann Glendon et al., Comparative Legal Traditions} 214-17 (1994). See also Baudenbacher, supra note 6, at 352-53 (review of judicial treatment of facts in France, Germany and Italy).} The great paradox embedded in French judicial discourse is that, on the one hand, it must include the court's reasoning or \textit{motivations}, in order to enable the public to prevent the judiciary from sliding into any semblance of the pre-Revolutionary corruption, arrogance and arbitrariness that had aroused the public's antipathy against France's judges. On the other hand, however, the very humility that France's judiciary adopted after 1789, in its zeal to demonstrate its republican loyalty, also acts as a restraint against judicial engagement in lengthy discussion of any kind, for fear that such a practice might look discomfitingly similar to a judicial usurpation of a formative role in law, rather than a passive application of legislative intent.\footnote{On the post-Revolutionary French judiciary as a reaction against common excesses by judges before 1789, see Dawson, supra note 12, at 374-431; John Henry Merryman, \textit{How Others Do It: the French and German Judiciaries}, 61 S.Cal. L.Rev. 1865, 1873 (1988). For the negative consequences to France's judiciary of French post-Revolutionary anti-judicial zeal, see John Henry Merryman, \textit{The French Deviation}, 44 Am. J. Comp.L. 109, 116 (1996). All groups in French legal life traditionally have agreed on the primacy of the legislature, including the influential legal scholars: "The academic profession in France ... admitted only one proper subject for its attention - the text of the law. It was there that one could discover the only authentic source of law, the will of 'the legislator.'" Dawson, supra note 12, at 393. Professor Schwarz-Liebermann von Wahlendorf quotes the great French theorist, François Gény, as saying that the French judges' obedience to the sovereign takes the form of their extracting from the law that which everyone well knows is not within it ("tirant ... \textit{de la loi ce dont tout le monde sait que ce n'est pas dedans}"). Hamburg-Albrecht Schwarz-Liebermann von Wahlendorf, \textit{Le juge législateur: l'approche anglaise}, 4 Revue internationale de droit comparé 1109, 1110 (1999).}

The Italian tradition of \textit{massime} perhaps represents the epitome of the civil-law tradition of inattention to facts. According to Professors Taruffo and La Torre, decisions of Italy's Court of Cassation generally are not published in full.\footnote{Michele Taruffo & Massimo La Torre, \textit{Precedent in Italy}, in \textit{Interpreting Precedents: A Comparative Study} 141, 148 (D. Neil MacCormick & Robert S. Summers eds., 1997).} Rather, the published versions of Italian supreme court cases recast the cases as abstract propositions of law. Thus, the potential influence of a precedent on future cases is adapted to a framework of deductive reasoning from normative propositions:

In Italy there is a rather peculiar institution that was created in 1941 and is annexed to the Corte di Cassazione. It is called the Ufficio del Massimario and is composed of judges. Its main function is to analyze all the judgments delivered by the court in order to extract from them the so-called \textit{massima}. This is a short statement (usually five to ten lines) concerning the legal rule that has been used in the decision considered: it is stated in very general terms, \textit{usually without any express reference to the facts of the specific case}, and it takes into account only the legal side of the decision.\footnote{Id. (emphasis added).}
accorded its decisions.\textsuperscript{111}

Although the common law, by contrast, highlights the concrete facts, the privileged position the common law grants to the concrete facts and events that transpire in each case does not mean that common-law courts are adept at capturing and representing the lived experience. Indeed, the rules of evidence and the variety of factors that determine the court record may result in a narrative of the case events that ultimately bears no more than a remote resemblance to the lived experiences of the parties that the court’s rendition purports to recount.\textsuperscript{112} Yet even a wildly inaccurate common-law court account of facts reflects the court’s attention to the parties in their own environment, since the court is situating legal significance in the context of what the court has defined as constituting the lived experience.\textsuperscript{113} As Judge Posner put it, referring to the judicial focus on the particular facts as they unfold at trial, “[f]or the judge, as for Hamlet, the play’s the thing.”\textsuperscript{114} Thus, where Habermas signals “the tension between facticity and validity,”\textsuperscript{115} one may describe the common law as a fusion of validity with facticity.\textsuperscript{116}

Whether the facts as transmogrified by common-law judicial institutions are close to, or distant from, the facts as the parties experienced them, the common law remains focused on concrete, temporal facts, and this is in contrast to the isolated, timeless, acontextual abstraction of rules that civil-law societies apply to govern the lived experiences of parties. The common law is a formalized undertaking to institute Herder’s idea of understanding the general by listening to the particular, by listening to the individual, and by trying to feel as the “other” does in the environment in which the “other” dwells.\textsuperscript{117} A civil code, on the other hand, in the words of Portalis, the chief drafter of France’s Civil Code, “governs everyone; it considers men en masse, never as individuals ... Were the situation otherwise, ... [i]ndividual interests would besiege legislative power; at each instant, they would divert its attention from society’s general interests.”\textsuperscript{118}

\textsuperscript{111} See id. at 151.
\textsuperscript{112} Cf. Habermas’ discussion of the non-existence of facts outside of their representation, in Habermas, Between Facts and Norms, supra note 11, at 10-11. To conceive of this problematic at a more abstract level, see id., at 12 (“Once meanings and thoughts have been hypostasized into ideally existing objects, the relations among the worlds pose stubborn questions. It is hard to explain how sentence meanings and thoughts reflect events in the world and how they enter persons’ minds. Formal semantics has slaved away in vain on these questions for decades.”)
\textsuperscript{113} Some civilians see the common law’s attention to the concrete as coexisting with an inferior ability to engage in abstract thinking. See Schwarz-Liebermann von Wahlendorf, supra note 108, at 1116 (“une mentalité maniant difficilement l’abstraction, pour ne pas dire plus”). See also Wittgenstein, supra note 1, at 19 (explaining that “[t]he contempt for what seems the less general case in logic springs from the idea that it is incomplete”).
\textsuperscript{114} Posner, supra note 47, at 130.
\textsuperscript{115} Habermas, Between Facts and Norms, supra note 11, at xi (inner quotation marks omitted).
\textsuperscript{116} The tension between facticity and validity is a central theme of his book, Between Facts and Norms, and the phrase recurs throughout it. See Habermas, Between Facts and Norms, supra note 11. Habermas’ corollary focus on “the transition from the internal justification of a verdict that relies on given premises to the external justification of the premises themselves,” id. at 199, is a fascinating issue that, like the tension he signals between facticity and validity, in my opinion also would have benefited from a comparative analysis of results in civil-law versus common-law legal systems.
\textsuperscript{117} See Herder, supra note 102.
\textsuperscript{118} Levasseur, supra note 75, at 772. See Kantorowicz, Some Rationalism About Realism, supra note 79, at 1246 (“the language of the legislator ... is chiefly related to classes of things, not to individual objects”). But see Habermas, Between Facts and Norms, note 11, at 405, categorizing the “individual,” “concrete,” and “personal, as characterizing a liberal paradigm, which he contrasts to opposing characteristics of a welfare-state legal paradigm. Interestingly, Habermas does not appear to consider the differences separating commo-
In this context, Marianne Constable’s work on the history of English jury trials is instructive.\(^\text{119}\) Constable notes that the original jury of peers was designed to bring to the court people who spoke the defendant’s language, at a time when the dwellers of different English counties generally spoke mutually incomprehensible languages. Language in the Romanticist doctrine is the expression of myriad intangibles that characterize its speakers’ world view and mode of thought, sensation and reaction.\(^\text{120}\) At a time when England encompassed a multitude of languages, the common-law juror was the person entitled to assess the significance of the defendant’s act, because that act, in tandem with the defendant’s words, came from a world whose distinctive attributes were comprehensible to the juror who “spoke the same language,” a phrase whose meaning extends beyond the realm of the linguistic.\(^\text{121}\) Thus, historically, the common law has been receptive institutionally to the particular as the key to unlocking the meaning of the general.

Perhaps most importantly of all, Romanticism represents a reaction against the absolute, against the belief that truth is perpetual and of the same form throughout time. As Berlin puts it, the Romanticist, unlike the Enlightenment thinker, was the opponent of unhistorical doctrines of natural law, of timeless authority, of the assumption made by, for example, Spinoza, that any truth could have been discovered by anyone, at any time, and that it is just bad luck that men have stumbled for so long in darkness because they did not or could not employ their reason correctly.\(^\text{122}\)

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\(^{120}\) Herder and Humboldt were among the most influential Romantic thinkers to capture and convey the significance of language as the expression of a distinctive world view. Isaiah Berlin believes Johann Georg Hamann to have been one of the greatest influences on Herder, and describes Hamann’s “greatest discovery [as being] that language and thought are not two processes but one ....” Berlin, Age of Enlightenment, supra note 4, at 273. According to Berlin, “Hamann showed ‘how language enters into the non-linguistic elements of our total experience, and how it modifies our language.’” Id. at 274. In our time, the contemporary philosopher of language, George Steiner, has best captured the multivalent richness and significances of language. For the particular understanding of law as language, see Großfeld, The Strength and Weakness of Comparative Law, supra note 11; Großfeld, Kernfragen der Rechtsvergleichung, supra note 11. For the semiotic applications of law as a language or as a system or network of signs, see, e.g., Jackson, supra note 50. For an excellent analysis of common-law analytical development in terms of language in common-law legal reasoning, see Levi, supra note 42. But see Habermas, Between Facts and Norms, supra note 11, at 11 (“if we want to explain the peculiar status that distinguishes thoughts from mental representations, we must turn to the medium of language.”) Habermas posits that thoughts can “transcend the individual consciousness,” id. at 12, and have “identical meanings,” id. at 11 (emphasis added), at least within a given “language community.” Id. at 11.

\(^{121}\) See Constable, supra note 119.

\(^{122}\) In this passage, Berlin is explaining the thought of Vico. For more on Vico as a precursor of Romanticism, see Berlin, Vico and Herder, supra note 97; and Berlin, Power of Ideas, supra note 4, at 53-67. Lon Fuller makes the opposite comment about naturalism, but his definition of natural law differs from Berlin’s. The contrast Fuller emphasizes is between natural law, which he associates with judicially created law, and positivistic law, which he associates with legislation. If one keeps Fuller’s definitions in mind, his perspective is compatible with the one expressed in these pages: “[T]he work of the positivists is essentially timeless; by abstracting law entirely from its environment and defining it not in terms of its content, but of its
In contrast to this ahistoricity embedded in the civil-law mentality, Romanticism and the common law share a profoundly historical nature. The common law is historical inasmuch as it privileges the present—the particular set of facts surrounding the case at bar, in the context of the present, the actual (in both French and German, "actuel" and "aktuell," respectively, connoting both of these concepts), what Llewellyn so aptly calls "living facts," connected to the current situation of the people who are the parties, with differences in facts sufficient to allow the court to determine that a prior case is not a valid "precedent" if it is distinguishable on its facts. But what are the "facts" if not historically bound, if not part of the life context of the parties who arrive in court from an evolving, ever-changing society? By contrast, as Zippelius put it, in his Introduction to [German] Legal Methodology, "[t]he [civil-law] legal order is ... a structure/compilation ["ein Gefüge"] of ought-norms. The purpose of their articulation is not to describe facts, but, rather, to prescribe behavior." The common law's heightened use of juries also illuminates its historical focus, as does the common-law concept of the "reasonable person." Jurors are meant to evaluate parties according to the particular moment and place in which the events at issue occurred. Similarly, the "reasonable person" is defined in terms of the momentary. It is a concept that bespeaks of transience, and of grasping significance through the contemporaneous particulars of time and place. Moreover, the common-law judicial resolution in England traditionally was rendered orally, rather than in writing, in contrast to its civil-law counterpart. As Justice Cardozo put it, "the judge in shaping the rules of law must heed the mores of his day;" and "the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not form and sanction, they run no risk of either being outdated or of ever contributing anything to the development of the law except restraints and inhibitions." Fuller states that "[t]o my mind nothing is more preposterous than [the] argument that natural law is inherently static," id. at 114. To the extent that he is referring to judicial law, as opposed to legislation, my perspective is similar to Fuller's. For a critical view of Fuller's use of the term "natural law," see Contemporary Uses of the Phrase "Natural Law," in Frank, supra note 91, at 296. On the German legal tradition's espousal of natural law, see Whitman, supra note 12, at 47-48 ("As early as 1669 Leibniz had declared that fully half of Roman law was 'natural law.' A generation later, natural law had thoroughly established itself in the language of German legal arguments; indeed, leading lawyers ... could chastise lawyers of earlier generations for devoting too much attention to Roman law and too little to natural law.") See also id. ("The only true universal law was natural law.")

122 Llewellyn, supra note 41, at 17 (emphasis added).
123 See Eisenberg, supra note 41, at 3 (emphasis added) (the common law "consists of the rules that would be generated at the present moment by application of the institutional principles that govern common law adjudication."); cf. id. at 17 ("the judge may properly employ a norm that is still emerging in the society, if he believes that the norm will soon attract substantial social support, and he is ready to pull back if that belief proves incorrect.")
125 See Dawson, supra note 12, at 86. See also Jauffret-Spinosi, supra note 13, at 758 (contrasting the importance of oral testimony in English legal procedure with the written nature of legal process in the civil-law legal systems).
126 See Cardozo, supra note 44, at 104. Similarly, James Whitman links the English legal system's historicity to its emphasis of custom. See Whitman, supra note 12, at 71-72.
Accordingly, the common law refers to court opinions, a word that connotes the possibility of valid disagreement, while the civil law typically refers to decisions: "décision" in French and "Entscheidung" in German. Herder wrote that "[t]here is not a man, a country, a national history, a state which resemble each other, hence truth, goodness and beauty differ from one another ..." This Romanticist view is at the core of common-law legal methodology which seeks truth and justice for particular individuals in the context of their own events, fashioning from those events, as the court filters and defines them, a new legal rule. The common-law legal rule or standard, then, derives from the scrutiny of particulars. Its rule cannot be absolute, however, because its formation is inductive in nature, rather than deductive. The crafting of the common-law legal standard inductively; i.e., reasoning from the accumulated body of precedents to a legal norm, is a method that dictates a contestable nature to the outcome.

In other words, induction by definition cannot produce certainty of result, since any rule reached by means of assembled examples or particulars, no matter how numerous they may be, is vulnerable to defeat by counterexample. Induction is like the pointilliste technique evoked by Kübler. One additional dot of color can alter the entirety of the painting, just as one additional case can alter the accumulated body of case law, because the new dot of paint, like the new case, jogs a totality that has no cohesion independent of the particulars. The cohesion of the pointilliste painting is a function of a vision derived from connecting the dots, and is inseparable from the act of connecting, from the process of linkage, undertaken by the spectator as interpretant, independently of the creator. Similarly, the cohesion of the common law is a function of how the individual cases are united analytically by the interpretants, lawyers and judges, arguing and deciding future pending cases.

The pointilliste analogy also illustrates the relativism embedded in the common law, its logically inconclusive nature, for each spectator creates the painting anew, by bridging the dots of paint left unconnected by the painter, according to the spectator's individual vision and genius. Similarly, each lawyer and judge envisions a body of case law anew, from the selective perspective of the case at bar, and by means of the individual, unique conceptual abilities that both limit the resulting interpretation and open hitherto unknown potentialities for novel analytical reconfigurations. As Kant put...
it in his *First Introduction to the Critique of Judgment*, if

the variety and diversity of the empirical laws [are] ... great, ... while it would be in part possible to unify perceptions into an experience by particular laws ..., it would never be possible to unify these empirical laws themselves under a common principle, were it the case ... that the variety and dissimilarity of these laws ... were infinite and that we were confronted by a crude, chaotic aggregate totally devoid of system ... 133

Conversely, the civil-law court begins with the general, universal legal norm that applies to the particulars, such that a case is defined as “a particular state of affairs falling under a rule ... ”134 By positing legal norms that govern particular cases, the civil law offers the possibility of absolute truth to the extent that its axioms are valid. While both systems observe particular humans in the context of their problems, the common law exalts the particulars, which, as the court encodes them in its narrative, become a set of givens, enabling the formation of the legal standard or proposition for which the pending case will stand in the future, for others to claim as legal precedent.

The civil law, on the other hand, scrutinizes that which is above the factual context. It embodies the Enlightenment perspective of truth as univocal and absolute. This view does not suppose that every judge will identify the correct resolution to every case, or will at the right solution to the legal issues and dilemmas presented. In other words, Enlightenment ideology would not suggest that judicial decisions necessarily are correct. Enlightenment ideology suggests, rather, a concept also embedded in civil-law mentality: namely, that a correct answer exists if only the judge is clever enough to find it, and that it is in principle deducible from the applicable legal authority, whether that authority is the Code or another governing textual source of law: “The Germans will, of course, admit the occurrence of the ‘hard’ case; in such instances opinions may differ over which is the right solution, but in theory one exists.”135

By the nineteenth century, Jhering in Germany, and Gény and Saleilles in France signaled the necessary inability of legal systems to account for the situations judges must decide, allegedly in keeping with pre-existing law.136 Professor Joerges notes that nineteenth-century German legal theorists recognized that “statutes program the law only in a highly incomplete manner, that elements of a pre-positive practical reason enter into interpretation.”137 Civil-law legal systems nevertheless emanate from, and are

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133 Kant, supra note 13, at 14. Cf. Hart, supra note 49, at 67 (“Logic is silent on how to classify particulars ... ”).

134 Habermas, Between Facts and Norms, supra note 11, at 199.

135 Herget, supra note 11, at 118 (emphasis added). As Herget also suggests with respect to Germany, the traditional civilian ban against dissenting opinions derives from the problem that “a dissenting opinion would imply that the judge [had] not reach[ed] the solution.” Id. See also Taruffo & La Torre, supra note 109, at 146-47 (“The normal structure of the [Italian] higher court judgment is deductive, since the opinion aims at showing that the final decision is a conclusion stemming from a chain of consistent logical steps, moving from given premises and arriving at a ‘necessary’ end.”) Cf. Murchison, supra note 6, at 28 (characterizing as a turn away from the civilian to the common-law perspective the willingness of Louisiana’s courts “to subordinate the desire for legal certainty to the achievement of just results”).

136 See, eg., Rudolf von Jhering, Der Zweck im Recht (1887) (1883) (the motto of this work was “Der Zweck ist der Schöpfer des ganzen Rechts” (“The purpose/goal/intent is the creator of all law”)); Rudolf von Jhering, Scherz und Ernst in der Jurisprudenz (1964) (1884); Gény, supra note 29; and Raymond Saleilles, Préface, in id.

structured in accordance with, an underlying principle of the possibility of correct judicial decisions.\footnote{138 See Jhering, Geist des römischen Rechts, supra note 11; Jhering, Scherz und Ernst, supra note 136; Gény, supra note 29 (including Saleilles, supra note 136). For an account of the contemporary status of case law in Germany, see Rheinhard Zimmermann, An Introduction to German Legal Culture, in Introduction to German Law I (Werner F. Ebke & Matthew W. Finkin eds., 1996). For the influential role in Germany of the view that logic is systematically applicable to law, see Mathias W. Reimann, Holmes' Common Law and German Legal Science, in The Legacy of Oliver Wendell Holmes, Jr.72, 84 (Robert W. Gordon ed., 1992).} The civil-law legal structure corresponds to the Enlightenment tenet that, in Berlin's words, "a true answer must be discoverable in principle, though I may not happen to know it ..."\footnote{139 Berlin, Roots of Romanticism, supra note 21, at 181 (emphasis added). In a similar vein, Herget notes that "[c]ommon lawyers, typified by Edward Coke, have been traditionally distrustful of generalization and abstract theory." Herget, supra note 11, at 70. See also id. at 71 ("It is significant that in the whole period from Thomas Aquinas through the Spanish natural law, there was no common lawyer who attempted to systematize or theorize about English law.") For Dworkin's variant on the idea that a single correct judicial resolution exists for every case, see Ronald Dworkin, Taking Rights Seriously 81 (1977); and for persuasive criticism of Dworkin on this point, see Hart, supra note 49, at 138-40.} The Enlightenment sought to universalize the scientific methods that had furthered knowledge greatly in the seventeenth century. Thus, according to Enlightenment philosophy, just as to the underlying civilian conception of law, 

[It]o every genuine question there were many false answers, and only one true one, once discovered it was final - it remained forever true; all that was needed was a reliable method of discovery. A method which answered to this description had been employed by 'the incomparable Mr. Newton'; his emulators in the realm of the human mind would reap a harvest no less rich if they followed similar precepts. If the laws were correct, the observations upon which they were based authentic, and the inferences sound, true and impregnable conclusions would provide knowledge of hitherto unexplored realms, and transform the present welter of ignorance and idle conjecture into a clear and coherent system of logically interrelated elements - the theoretical copy or analogue of the divine harmony of nature ...\footnote{140 Berlin, Age of Enlightenment, supra note 4, at 16. Cf. Kant's description of the scientific method: "[T]he principles according to which we perform experiments must themselves always be derived from the knowledge of nature, and hence from theory." Kant, supra note 13, at 6. Newton has been described as "the first thinker of the Age of Reason." Kaplan, supra note 67, at 155. According to John Maynard Keynes, Newton aspired to "decode the secrets of the universe from the starry cryptogram in which God had hidden them." Id. Hart described the later work of Wittgenstein and Waismann in showing that the unforeseeable poses a challenge to the very idea of definitions in science as much as in law. Hart, supra note 49, at 275 ("there can be no final and exhaustive definitions of concepts, even in science"). Berlin also clarified that "[w]hat was common to all the [substantive doctrines] -incompatible enough for wars of extermination to have been fought in their name- was the assumption that there existed a reality, a structure of things, a rerum natura, which the qualified enquirer could see, study and, in principle, get right. Men were violently divided about the nature of the wise - those who understood the nature of things - but not about the proposition that such wise men existed or could be conceived .... This was the great foundation of belief which romanticism attacked and weakened." Berlin, Power of Ideas, supra note 4, at 202.}  

Alexander Pope, inveterate eighteenth-century optimist of the Enlightenment, put it more poetically:

All nature is but art, unknown to thee;  
All chance, direction which thou canst not see;  
All discord, harmony not understood;  
All partial evil, universal good:  
And, spite of pride, in erring reason's spite,
One truth is clear: Whatever is, is right.\textsuperscript{141} Horkheimer and Adorno extend this concept of the Enlightenment: “To the Enlightenment, that which does not reduce to numbers, and ultimately to the one, becomes illusion .... \textsuperscript{142}” Their concept may be compared to what Kant describes as a “principle of finality.”\textsuperscript{143} This “principle of finality” also may be seen in the civil law’s adoption of legislative enactments as axiomatic points of departure for deductive reasoning, for without axioms, in the words of the mathematician Robert Kaplan, “the kind of certainty demanded by deductive thought is unattainable because of the nature of deductive thought. To stop the infinite regress, we have to say at some point: ‘we hold these truths to be self-evident.’”\textsuperscript{144} Those “self-evident truths” or axioms correspond in the civil law to legislation taken to be true for purposes of reasoning from their application to the facts of a pending case.\textsuperscript{145} Significantly, the word “axiom” derives from the Greek for “what is thought worthy.”\textsuperscript{146}

The other great bedrock of Enlightenment thinking that Berlin attributes to western thought from the time of classical antiquity until the advent of Romanticism is the belief that all truths are mutually reconcilable, that no two truths can be contradictory.\textsuperscript{147} So entrenched is this assumption that Berlin calls it a “\textit{philosophia perennis}.”\textsuperscript{148} The civil-law mentality also mirrors this view inasmuch as it presents its Code as a coherent and complete representation of law, all of its parts mutually reconcilable. As Kant has argued, to the extent that we view “\[t\]he unity of nature under a principle of the thoroughgoing connection of everything contained in th[e] sum of all appearances ... [t]o this extent we are to regard experience in general as a system under transcendental laws ... and not as a mere aggregate.”\textsuperscript{149} Along these lines, what codes lack in...

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\item\textsuperscript{142} Max Horkheimer & Theodor W. Adorno, Dialectic of Enlightenment 7 (John Cumming trans., 1997) (originally, Dialektik der Aufklärung (1944)). This assessment of the Enlightenment is excessively negative in my view, but illustrates the Enlightenment’s tendencies towards scientizing and univocality. In the context of the Enlightenment faith in science, see Dawson’s characterization of German reception of Roman law: “[T]he lasting effect of the reception was that German law was ‘scientificized’ \textit{[verwissenschaftlicht]}”). Dawson, supra note 12, at 238.

\item\textsuperscript{143} Kant, supra note 13, at 23.

\item\textsuperscript{144} Kaplan, supra note 67, at 140. For a succinct presentation of Wittgenstein and Quine’s analysis of the problem of infinite regress in the domain of language and concept, see Sabina Lovibond, Realism and Imagination in Ethics 102-03 (1983).

\item\textsuperscript{145} See H.R. Hahlo, \textit{Here Lies the Common Law}, 30 Modern L. Rev. 241, 246 (1967) (“The belief in codification as a cure for the uncertainties, illogicalities and inconsistencies of the law harks back to the eighteenth-century rationalism when philosophers and lawyers believed that it was possible to construct out of the strands of pure reason a system of legal principles from which the solution for every legal problem could be derived with near-mathematical certainty by a process of logical deduction.”); H. Patrick Glenn, The Grounding of Codification, 31 U.C. Davis L. Rev. 765, 765 (1998) (“Codification, as we have known it, is a product of the enlightenment”); Whitman, supra note 12, at 104 (describing codification as “the great Enlightenment ideal ...”).

\item\textsuperscript{146} See Kaplan, supra note 67, at 140.

\item\textsuperscript{147} See Berlin, Roots of Romanticism, supra note 21, at 184-185. For a similarly critical analysis of this view, see Hart, supra note 49, at 77.

\item\textsuperscript{148} Monism, \textit{in} Berlin, The First and the Last, supra note 98, at 38.

\item\textsuperscript{149} Kant, supra note 13, at 14. Kant of course disagrees with the Enlightenment optimism that humans
specificity they provide in spirit. The codified embodiment of the national law is of a piece, whole and harmonious. As a mathematician put it in analyzing the nature and multifaceted functions of the concept of zero, "[n]ature abhors a vacuum and so do we."  

The traditional conception of the completeness of the civil-law codes has given way in recent times to a recognition that they contain or may contain gaps. These gaps are to be filled in by judges in accordance with the spirit of the codes, a directive often found explicitly within the code itself, or, as Saleilles put it, "[b]eyond the Civil Code but by means of the Civil Code" ("Au-delà du Code civil, mais par le Code civil"). In our effort to assess current French legal theory, it is noteworthy that the author of a textbook for French law students published in its sixth edition as recently as 1999, quotes Saleilles’ statement above, citing it for the continuing principle of French legal methodology that the Code remains even today the necessary, required means for

will be able to apprehend the system: "[I]t does not follow from this that nature is a system comprehensible by human cognition through empirical laws also, and that the complete systematic union of its appearances in one experience (hence experience as a system) is possible for mankind." Id. (emphasis in original). See also id. at 15 (emphases in original), where Kant ascribes to fortuity the conclusion that "manifold empirical laws happened to be fitted for the systematic unity of natural knowledge in a totally interconnected possible experience, without, by means of an a priori principle, presupposing nature to have such a form."  

See René David, The French Concept of Law, in French Law: Its Structure, Sources and Methodology 71 (Michael Kindred trans., 1972); Reimann, Toward a European Civil Code, supra note 6, at 1340 ("The uniform laws [of the United States], including the U.C.C., are not true codes in the European sense because they do not aspire to create a comprehensive logical order. Neither [United States] uniform laws nor restatements are designed as closed systems, the gaps of which can be filled by extrapolation from the overall framework"); and Maxeiner, supra note 49, at 117, n.19 ("[t]he [civil-law] legal order forms a unity") (citing K. Engisch, Die Einheit der Rechtsordnung (1987) (1935)). Contrary to my rendition of the civil law, however, von Mehren has stated that, in Germany, "[i]t is ... clearly perceived that the codified law is neither complete nor unambiguous." Von Mehren, supra note 54, at 74. Significantly, however, von Mehren qualifies this assertion by describing the German judicial enterprise nevertheless as a search for "the true sense and purpose of the text [i.e., the Code]." Id. at 74. Moreover, as von Mehren further points out, "German decisions usually prefer to present the court's result as a logical deduction from authoritative starting points for reasoning contained in the codified law." Id. at 75.

Kaplan, supra note 67, at 175. Cf. Charles Seife, Zero: The Biography of a Dangerous Idea 5 (2000) (ancient abhorrence of zero due to its "power to shatter the framework of logic"); id. at 19 ("zero was inexorably linked with the void - [t]here was a primal fear of void and chaos"). Seife argues that abhorrence of the void, as well as of the infinite, is a peculiarly western tradition, stemming from Aristotle, rather than a human-wide one, and recounts the church’s persecution of believers in zero, and of zero itself: "Zero was a heretic." Id. at 91.

This is one of the main thrusts of Carl Baudenbacher’s recent article. See Baudenbacher, supra note 6. As I try to demonstrate here, however, the existence of lacunae is the imperfection or exception to be filled in according to the general spirit manifested and implied by the Code. In this sense, codes do remain organic and coherent, at least at the level of legal theory. Baudenbacher also believes that modern hermeneutical theory plays a significant role at least in German conceptions of the role of the judge. He refers specifically to Gadamer’s Truth and Method. This would militate against the traditional idea of the at least theoretical capacity of judges to identify answers deducible on the sole basis of logic. See Baudenbacher, supra note 6. See also Comparative Law 643-51 (Rudolf B. Schlesinger et al. eds., 1988) (1950) (difficulties civil-law courts experience in reconciling a growing observance of precedents to still prevailing contrary legal theory).

Saleilles, supra note 136, at xxv. Compare Jhering’s "Through Roman law, beyond Roman law!," described as Jhering’s “statement of purpose,” in Whitman, supra note 12, at 225, and acknowledged by Saleilles to be the origin of his own statement. See Saleilles, supra note 136, at xxvi ("Je ne saurai mieux faire que par cette forte devise, inspirée d’un mot analogues Jhering ... "). Accord, Eugen Ehrlich, Judicial Freedom of Decision: Its Principles and Objects, in The Science of Legal Method, supra note 82, at 73 ("Every species of legal science, consciously or unconsciously, tends to progress through the formulated law beyond the formulated law").
arriving at judicial results. This is particularly significant and somewhat ironic because Saleilles specified immediately after the words quoted above that the part of his phrase on which he himself insisted was not "by the Civil Code," but, rather, "beyond the Civil Code," thus privileging judicial freedom from the Code, not subservience to it: "Ce à quoi nous tenons le plus c'est à 'l'Au-delà.'"

Saleilles' and Gény's optic were not the prevalent French view. In the words of their contemporary, the French scholar Esmein, "[c]ase law is the ... expression of the civil law ... ;" and, in the words of Hermann Kantorowicz, "[t]he law is not what the courts administer but the courts are the institutions which administer the law." Kantorowicz, a founding figure of both the sociological and free law movement schools of German legal theory, which inspired the American legal realist school, nevertheless in some ways held a profoundly civilian conception of law. For Kantorowicz, the science of law not only was a science, albeit a cultural rather than a natural one, but also one whose purpose, as "a rational and normative science, [was to] tr[y] to transform the given law into a more or less consistent system of rules." Referring to contemporary Germany, Professor Lundmark of the University of Münster states that "the insistence ... that judge-made law is not real law does not mean that judge-made norms do not exist. Rather, it means that judge-made norms should not exist."

Code lacunae in civil-law legal cultures represent imperfections in the legislative attempt to create a complete and coherent body of law. Still more importantly, the judges who purport to fill in the gaps are to do so under the guidance of the Code itself—i.e., in keeping with the nation's legal spirit as expressed both explicitly and implicitly in the text. While code lacunae necessitate active judges, the decisions reached by those judges do not attain either a binding precedential value, or a legal authority comparable to that of the Code's provisions, nor are they the norm:

- [Judicial decision-making] in the continental tradition ... goes one step further than purposive interpretation in that it overtly extends an enacted rule to cases the legislature had not foreseen. However, it is still part of its interpretation because it applies the legal principles inherent in the code instead of drawing them from other sources. ... [F]irstly, the judge must demonstrate that there is a lacuna in the code. Secondly, there must be no constitutional restrictions which bar the analogy. Finally, he must establish a relevant similarity between his case and the scope of the original rule.

Thus, Hermann Kantorowicz, although a primary figure in the German free law movement, held a profoundly civilian conception of law.
movement often associated as the model for American legal realism, criticized the American legal realists for believing that "the law is not a body of rules, not an Ought, but a factual reality, [and for believing that] it is the real behavior of certain people, especially of the officials of the Law, more especially of the judges who make the Law through their decisions, which, therefore, constitutes the Law."\textsuperscript{162} Even Kantorowicz, known for his departures from traditional German conceptions of law and legal theory, considered the judge’s task, whether in a common-law or a civil-law jurisdiction, to be to form rules only "whenever the formal law has a gap."\textsuperscript{163} The view of judges acting to fill "gaps" implies that the norm is statutory law.\textsuperscript{164} For Kantorowicz, judges fill in the law’s gaps, but they are not truly gaps because "free law" dictates to the judge how they must be filled.\textsuperscript{165} Thus, free law in effect eliminates the gap, that unsettling vacuum in the law, that absence signaling the deficiencies of legislative foresight.

Judicial creation of law in civil-law legal cultures remains the exceptional recourse that endows the codes with the cohesive completeness that eluded their drafters. The requirement that judges first establish the existence of a gap in the code is because civil-law "judges have to be prevented from legislating under the pretext of having discovered a lacuna they intend to fill."\textsuperscript{166} In heading the commission that drafted the French Civil Code, Portalis envisioned the judicial gap-filling function as follows: "It is to judicial decision that we surrender the rare and exceptional cases incapable of fitting into a world of rational legislation."\textsuperscript{167}

Portalis understood that legislation invariably fails to anticipate all future

\textsuperscript{162} Kantorowicz, Some Rationalism About Realism, supra note 79, at 1243. By this time, the already aging Kantorowicz, whose famous German writings dated from the early years of the twentieth century, was a refugee in the United States. The article cited here was written while he held a position at the New School for Social Research in New York. In 1935, he left the United States for England. He died in 1940. See Kartheinz Muscheler, Hermann Ulrich Kantorowicz: Eine Biographie 107-24 (1984); Thomas Raiser, Hermann Ulrich Kantorowicz, \textit{in} Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland, 365-81 (Marcus Lutter et al. eds., 1993); entry Hermann Kantorowicz, 10 Encyclopedia Judaica 746 (1971); and Monika Frommel, Hermann Ulrich Kantorowicz (1877-1940): Ein streitbarer Relativist, \textit{in} Streitbare Juristen: Eine andere Tradition 243-52 (Thomas Blanke et al. eds., 1988). For more information about the University of Exile created by the New School for Social Research, see Gunther, supra note 51, at 443-44.

\textsuperscript{163} Kantorowicz, Some Rationalism About Realism, supra note 79, at 1244 (emphasis added).

\textsuperscript{164} Cf. A. L. Goodhart’s characterization of Kantorowicz in his introduction to Kantorowicz’s last book, published posthumously: “The free law doctrine [of Kantorowicz] recognizes the importance of the so-called gap, usually ignored by the other schools, which seem to assume that the law is complete and that every legal question can therefore be answered automatically.” A. L. Goodhart, Introduction, \textit{in} Hermann Kantorowicz, The Definition of Law xv-xvi (1980) (1958).

\textsuperscript{165} For a summary of what Kantorowicz means by “free law,” see Hermann U. Kantorowicz, Legal Science - A Summary of Its Methodology, 28 Colum. L. Rev. 679, 693-98 (1928).

\textsuperscript{166} Langenbucher, supra note 28, at 485.

\textsuperscript{167} Portalis Excerpts, supra note 75, at 772-73 (emphasis added). On the other hand, Kantorowicz suggested that the gap-filling cases also may be viewed as the most significant determinations of law from a practical standpoint inasmuch as, even though, in his description, they have a “validity ... far less[er] than that of the formal law and sometimes nil, ... their practical importance is even greater because, where the formal [i.e., statutory] law is clear and complete, litigation is not likely to occur.” Kantorowicz, Some Rationalism About Realism, supra note 79, at 1241. Radbruch made the related point that English case law is a law of strife rather than peace because, unlike Continental European law, it evolves from the matters in dispute that reach the courts. See Radbruch, supra note 11, at 36 (“das englische Case-Law handelt nur vom Recht, daß sich im Streit befindet, nicht vom Recht im Stände der Ruhe.”) I have tried to emphasize the contrasts between civilian and common-law legal mentalities in order to bring to light their underlying mechanisms. I do not mean to suggest, however, a lack of overlap, including, for example, the reliance on prevalent authority in France of the Conseil d’État.
eventualities. He wrote that he and his drafting committee "kept clear of the dangerous ambition of wanting to forecast and regulate everything." Indeed, the failure to desist from trying to micro-manage the future through detailed, comprehensive regulation had caused the Allgemeines Landrecht, the Prussian Code of 1794, to prove unwieldy and unworkable. Portalis conceived of the judge's role as both crucial and active: "A code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge ... A host of things is thus necessarily left to the province of custom, the discussion of learned men, and the decision of judges."

Despite endorsing an active role for France's judges, necessitated by the Civil Code's anticipated lacunae, Portalis nevertheless conceived that role as one of applying the law, not creating it, even where a judge sought to fill gaps of silence in the Code, for the drafters of the Napoleonic Code envisioned their own role as follows: "The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances."

By contrast, the common-law legislator drafts statutes with particularity, precisely in order to "get down to the details of questions which may arise in particular instances," so as to wrest from judicial control a particular situation for which the legislator wants to alter the course of judicially created common law. Whereas common-law judges have dominion over all areas not removed from their purview by the legislature, according to Portalis, "it is for the [French] judge and ... jurist, imbued with the general spirit of the laws, [only] to direct [the law's] application." He further stated that "the judge's science is to put these [legislative] principles into effect, to diversify them, and to extend them, by means of wise and reasoned application, to private causes; [and] to examine closely the spirit of the law when the letter kills ... ."

Thus, the traditional French theory of judicial conduct incorporates the idea that judges will fill the code's gaps by case decisions, yet conceives of that conduct more as law application than as law creation. Portalis suggested room for judicial creativity, intelligence and analytical acuity, but only within the realm of remaining within the spirit of enacted legislation, in order to apply what the legislators may not have had the

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168 Portalis Excerpts, supra note 75, at 769.
169 See Glendon, supra note 107, at 52 ("The Prussian General Territorial Law of 1794 is chiefly remembered today as a monument of legal hubris. In its ambition to foresee all possible contingencies and to regulate the range of human conduct down to the most intimate details of family life, it was hampered in operation both by its excessive detail and its failure to acknowledge the limits of law"); Whitman, supra note 12, at 55 ("Princely [German] jurists of the absolutist era had begun to see the value in a new ideal: the making of complete codes that would provide positive commands for every possible legal eventuality from the mouth of the prince himself, codes with no 'holes,' no 'interstices'...""); and Zimmermann, supra note 138, at 14 ("the fathers of the Prussian General Land Law ... were ... obsessed with the idea that they had to provide an exhaustive regulation, from first principles down to the finest details, for every imaginable set of facts."). Accord Gény, supra note 29, at 82-84 (Gény goes so far as to criticize the French Civil Code for similar "naive blindness"), id. at 84, 118. See also Eugen Ehrlich, The Sociology of Law, 36 Harv. L. Rev. 130, 133 (1922) ("To embrace the whole variegated body of human activities in Legal Provisions is about as sensible as trying to catch a stream and hold it in a pond; the part that may be caught is no longer a living stream but a stagnant pool - and a great deal cannot be caught at all.").
170 Portalis Excerpts, supra note 75, at 769.
171 Id. See also Olivier Moreteau, Codes as Straight-Jackets, Safeguards and Alibis: The Experience of the French Civil Code, 20 N.C. J. Int'l Law & Com. Reg. 273, 274 (1995) (the French Civil Code is not a straight-jacket because of the "general couching of terms within the Code").
172 Portalis Excerpts, supra note 75, at 274.
173 Id. at 722.
foresight to ordain, but which the texts they have enacted suggest through the filter of the judiciary’s understanding of their implicit import. As Olivier Moreteau, a French law professor, has put it, “[t]he judge contributes to the law, but does not create it.” This outlook has remained current in France, at least inasmuch as Professor Moreteau states “it has remained heretical to admit openly that judges can be lawmakers or that they may have some normative powers.” Moreover, Portalis’ idea that judges should have more than a merely mechanical role in applying the law predated the view that later came to dominate in France; namely, that the judiciary should be restricted to rote application of legislative enactments.

By contrast, in common-law legal cultures, judicial creation of law traditionally has been the norm, not the exception, and statutes “are conceded [by common-law judges] to be applicable to certain cases ... but are not conceived of as entering into the legal system as an organic whole.” Still more importantly, the idea of an “organic whole” does not underlie the common-law conception of law. However much progress statutes may have made in winning judicial deference, statutes themselves purport to remedy particular problems at particular times, rather than to proceed from an overarching, cohesive legal schema.

Unlike the common-law judge, the task of the civil-law judge who searches for the correct resolution to pending legal issues seeks an expression of that consistent body of law that is the Code, a manifestation of the “organic whole,” one that confirms, strengthens and represents its harmony, eschewing any interpretation that might undermine its cohesive, all-inclusive spirit. Romanticism represents the converse. It suggests pluralism, the concept that there are many truths. Romanticist value pluralism also is an attribute of common-law legal culture inasmuch as the common-law court’s vision is primed on the mosaic of facts and circumstances presented in their unicity with each case.

By contrast, the civil law focuses on codes, written texts designed to govern throughout time, designed to embody the immutably true, to embody principles so

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174 See id.
175 Moreteau, supra note 171, at 276 (emphasis added).
176 Id. at 275. It should be noted that this tendency is far stronger in France than in Germany, where the legal culture traditionally has been more comfortable with limited law-making potential for judges. The specter of a government by judges threatening democracy is being raised again today in France by the President of France’s RPR party, Michèle Alliot-Marie. See Fabrice Lhomme, Je m’attends à des mauvais coups contre les juges, L’Express, Jan. 20, 2000, at 53.
177 See Dennis, supra note 6, at 5 (“the French Civil Code was adopted before the mechanical conception of judicial process gained its greatest popularity”). For a detailed account of the history of this evolution, see Gény, supra note 29, especially at 23-26.
178 Pound, supra note 77, at 386.
179 Judge Posner insists that the common law also develops from pre-existing theories, but the theories he describes are those adopted by individual judges for unexplained reasons of personal preference, such that they are subject to flux as the judges attempt to continue to keep the accumulating cases cohesive under the theory, and as the cases themselves may modify the judges’ theoretical outlook. See Posner, supra note 47, at 174-75.
180 By contrast, see Justice Scalia’s analysis of the Holy Trinity Church v. United States, 143 U.S. 457 (1892), in which he decries any resort to the spirit of the law. See Scalia, supra note 77, at 18-23.
181 One of Isaiah Berlin’s contributions to the analysis of Romanticism is the distinction he draws between pluralism and relativism. Although modern relativism may be seen as a later outgrowth of Romanticism, it is value pluralism rather than relativism that characterized the Romantic movement. See Berlin, Roots of Romanticism, supra note 21; see also John Gray’s intellectual biography of Isaiah Berlin. John Gray, Isaiah Berlin (1996). For a succinct account of Berlin’s distinction between relativism and pluralism, see Pluralism, in Berlin, The First and the Last, supra note 98, at 52.
reliable that they supersede and can withstand the vicissitudes of the particular, of the
temporal, of the myriad contextual elements that connect human beings to the legal
issues they ask courts to adjudicate. The civil law poses as a "superstructure of theory
valid for any time or place."\(^{182}\)

Accordingly, Wolfgang Oehler, educated in law in both Germany and the United
States, and a professor of law in Germany, notes that, "[j]ust as reports and textbooks
full of cases are the staple diet of the common-law student, learned commentary on legal
norms and codes, condensing the systematic law, constitutes the primary tool of choice
for the legal apprentice in civil law."\(^{183}\) In privileging the system, the whole, the civil
law mirrors the Enlightenment which, according to Horkheimer and Adorno,"recognizes as being and occurrence only what can be apprehended in unity: its ideal is
the system from which all and everything follows."\(^{184}\)

This does not, however, preclude doubt:

It was essential to guarantee the efficacy of the instruments of investigation before its
results could be trusted. This epistemological bias characterized European philosophy
from Descartes’s formulation of his method of doubt until well into the nineteenth
century, and is still a strong tendency in it. The direct application of the results of this
investigation of the varieties and scope of human knowledge to such traditional
disciplines as politics, ethics, metaphysics, theology and so on, with a view to ending
their perplexities once and for all, is the program which philosophers of the eighteenth
century attempted to carry through \(\ldots\) This use of observation and experiment entailed
the application of exact methods of measurement, and resulted in the linking together of
many diverse phenomena under laws of great precision, generally formulated in
mathematical terms. Consequently only the measurable aspects of reality were to be
treated as real \(\ldots\).\(^{185}\)

The Nobel laureate physicist Richard Feynman traces the roots of this Enlightenment
methodology to Galileo.\(^{186}\) Feynman couples the concept of scientific universality,
derived from the fact that all substances are composed of atoms ("our knowledge is in
fact universal"),\(^{187}\) a concept he endorses, with the indispensable nature of doubt and
uncertainty to the scientific method: "[A]ll our statements are approximate statements of
different degrees of certainty \(\ldots\) when a statement is made, the question is not whether it
is true or false but rather how likely it is to be true or false."\(^{188}\)

In his book on the French intellectual tradition, Tony Judt notes the influence in

\(^{182}\) Dawson, supra note 12, at 234.

\(^{183}\) Oehler, supra note 27, at 717.

\(^{184}\) Horkheimer & Adorno, supra note 142, at 7. My own view of the Enlightenment is far less critical
than that of Horkheimer and Adorno, who see in it the roots of the twentieth century’s totalitarian and fascist
régimes.

\(^{185}\) Berlin, Age of Enlightenment, supra note 4, at 16-17. Thus, according to Berlin, skepticism is the
hallmark of the modern era, of the Enlightenment as well as of Romanticism. Accord Kramer, supra note 95,
ther at 76 ("modern thinking man is usually \ldots skeptical of all absolute answers. Not so the Sumerian thinker [of
ca. 3000 B.C.]; he was convinced that his thoughts \ldots were absolutely correct and that he knew exactly how
the universe was created and operated.")

\(^{186}\) See Richard P. Feynman, The Role of Scientific Culture in Modern Society, in The Pleasure of

\(^{187}\) Id. at 101. Plato thought this to be particularly true of mathematics: "[G]eometry is knowledge of the
eternally existent." Plato, The Republic 244 (Francis Macdonald Cornford trans., 1967) (1941). See also id. at
241 ("the properties of number appear to have the power of leading us toward reality \ldots").

\(^{188}\) Feynman, supra note 186, at 111.
French intellectual circles of tendencies I have attributed to the Enlightenment and to the civil-law mentality, but also comments on contrary tendencies. He refers to a French “habit of abstraction,” that he associates at least in part with aspects of the French Jesuit tradition. Describing the scholarship of the French sociologist Émile Durkheim, Judt notes that Durkheim, who did so much to help define the shape of intellectual practice in republican France, was also one of the most astute commentators upon it, noting in *L’Évolution pédagogique de la France*, the tendency to the impersonal and the abstract in French thought and seeing in it a distinctively Gallic trait, dating at least to the seventeenth century and attributable in part to Jesuit pedagogical habits. He might well have invoked his own Dreyfusard colleagues as further evidence, since (in contrast with the conservative, literary and anti-Dreyfusard “intellectuals” around Barrès, Brunetière and the Académie française) they showed a common temperamental aversion to the concrete, the individual, the given, preferring to identify their commitment with ideas and social values rather than the disruptive, divisive, and empirical claims of isolated persons ... Durkheim and his friends had something of a horror of the “individual.”

Judit sums up Durkheim’s circle as having a “genius for abstracting, reifying and generalizing.” Judt comments also, however, on “an accompanying tendency to reason by analogy ... ” a tendency I dissociate from the civilian-like mentality he otherwise attributes to Durkheim.
By contrast, John Stuart Mill has been described as representative of a British focus on the particular that Isaiah Berlin attributes to the empiricist tradition, and contrasts with the Continental European perspective. According to Berlin, Mill believed that particular predicaments required each its own specific treatment; that the application of correct judgment, in curing a social malady, mattered at least as much as knowledge of the laws of anatomy or pharmacology. He was a British empiricist and not a French rationalist, or a German metaphysician, sensitive to day-to-day play of circumstances, differences of ‘climate’, as well as to the individual nature of each case, as Helvétius or Saint-Simon or Fichte, concerned as they were with the grandes lignes of development, were not.

The Romantic de-emphasis of rational justification and universal objectivity is not compatible with the stated objective of most civil-law scholars. Justice Holmes’ famous statement that the life of the law has been experience rather than logic is illustrative of the common law’s perspective, just as the reaction of the eminent French legal scholar André Tunc is illustrative of the civil law’s perspective. Commenting that the Holmesian point is anathema to the civil-law lawyer, Tunc makes clear that this is not because of Holmes’ emphasis on the importance of experience. As Tunc points out, Portalis also stressed the importance of life experience, fully realizing that the success of the French Civil Code depended on its consisting of guidelines sufficiently general as to provide the necessary flexibility to accommodate the inevitable significant changes French society would undergo with the passage of time. According to Tunc, the civilian’s problem resides not in Holmes’ emphasis of experience, but rather in his disdain for logic. Tunc takes the position that logic, albeit wedded to experience, is the

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Jurisprudence and Philosophy. Hart’s Essays contain a superb presentation of the analytical fallacies involved in correlating positivism with unjust or immoral judicial decisions. See Hart, supra note 49, at 74. My only difference with Hart lies in the harshness of his criticism of Radbruch. See id. at 75. Hart’s opinion of Radbruch is not unsubstantiated or entirely unpersuasive, but Radbruch in my opinion was a rare heroic figure, deserving of the utmost admiration. A lifelong friend of Hermann Kantorowicz, mentioned elsewhere in these pages, Radbruch had been a minister of justice before the Nazi takeover, and was of major assistance to Kantorowicz (already the object of discrimination in Weimar Germany) in obtaining his professorship at Kiel. For a portrayal of Radbruch through his friendship with Kantorowicz, see generally Muscheler, supra note 162.

— See Berlin, Four Essays on Liberty, supra note 4, at 193
— Id. (emphasis added). Similarly, one might attribute Braudel’s famous innovation of the longue durée as the appropriate focus of historical analysis as a contribution typical of the Continental European outlook.
— Holmes, supra note 43, at 1 (“The life of the law has not been logic: it has been experience”); accord, Judge Andrews’ summary of causation theory in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (dissenting opinion) (“This isn’t logic. It is practical politics.”) Holmes may well have been aware of the definition of “the life of the law” given by the German legal theorist Hermann Kantorowicz, and translated into English by Roscoe Pound: “[T]he life of the law is in its enforcement.” Hermann Kantorowicz, Rechtswissenschaft und Soziologie 8 (1911) (emphasis added), quoted in Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 25 Harv. L.Rev. 513, 513-15 (1912). Kantorowicz’s definition came to my attention in the overview of the German free law movement of Professors Herget and Wallace, supra note 76, at 424. For an insightful analysis of Holmes’ statement as not historicist in nature, but merely positivistic, see Harold J. Berman, Toward an Integrative Jurisprudence, 76 Calif. L.Rev. 779, 788 (1988) (“Since judges in [the common-law] tradition explain their decisions in terms of precedent, it was necessary for Holmes, as a positivist, to analyze the meanings attributed to the rules at various times.”)
— See Tunc, supra note 12, at 468.
— See id. (“If there is a sentence which the French lawyer has great difficulty in understanding, it is Holmes’ famous saying: ‘The life of the law has not been logic: it has been experience.’")
— See id.
very heart of the civilian's understanding of law.\(^{202}\)

To the extent that we can connect Romanticism to the Holmesian rendition of the common law, to the examination of the lived before the examination of the law, it is interesting to note that the German legal theorist Jhering, from a civil-law legal system, said precisely what Holmes did:

That particular cult of the logical, which tries to twist jurisprudence into a mathematics of law, is an aberration and rests on ignorance about the nature of law. Life is not here to be a servant of concepts, but concepts are here to serve life. What will come to pass in the future is not postulated by logic but by life, by trade and commerce, and by the human instinct for justice, be it deducible through logic or unlikely to happen at all .... \(^{203}\)

While this would suggest, as I in fact would predict, that German jurists will be more adept than their French counterparts at making the mental leap towards grasping common-law methodology, this conclusion may be undermined by statements of such French legal luminaries as Saleilles and Gény, who also viewed law as rooted in experience rather than logic, mirroring Holmes' statement as closely as Jhering.\(^{204}\) In her article on what she calls the French juristes inquiets (anxious jurists), Marie-Claire Belleau describes her research into the writings of Saleilles, Gény and other contemporaries, revealing the considerable pluralism that existed in French legal theory at the turn of the century.\(^{205}\) Her work has been further confirmed and strengthened by the research of Mitchel de S.-O.-I'E. Lasser, who has documented the unofficial and invisible, but significant, role of case law and particularized, fact-oriented legal reasoning that occurs behind the scenes in French judicial methodology.\(^{206}\)

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\(^{202}\) See id. at 468-69. For the argument that logic and experience inevitably are intertwined and inextricable from each other, such that Holmes' statement, when probed, essentially is meaningless, see Twining, supra note 77, at 16.


\(^{204}\) See, e.g., Marie-Claire Belleau, The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France, 1997 Utah L. Rev. 379 (1997); Dennis, supra note 6, at 6; and infra; Herget & Wallace, supra note 76, at 409-11. Herget and Wallace also set forth numerous quotes from the writings of German free law movement scholars, such as Ehrlich, Kantorowicz and Fuchs, their French colleague Gény, and American legal realists such as Llewellyn, Frank and Cohen. See Comparative Index, in id., at 440. See Belleau, supra note 204.

\(^{206}\) See Mitchel de S.-O.-I'E. Lasser, Comparative Law and Comparative Literature: A Lesson in Progress, 1997 Utah L. Rev. 471 (1997); and Mitchel de S.-O.-I'E. Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325 (1995). Accord, Palmer, supra note 74, at 301. Cf. Cardozo, supra note 144, at 16 (referring to the French Gény and the German Ehrlich for the propositions that the "judge [is] the interpreter for the community of its sense of law and order and must supply omissions, correct uncertainty and harmonize results with justice through a method of free decision ... "; and that the individual judge is the only "guaranty of justice," id. at 17, as well as for the view that it is an "abuse" to "envisage[1] ideal conceptions provisional and purely subjective in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the
In terms of French judicial reliance on precedents, Lasser is in the tradition of John Dawson in believing that the French courts' decisions mask an unarticulated and unavowed attention to prior court adjudications. While the unexpressed actions of courts are of primordial importance in analyzing the French judicial system, it should be remembered, however, that French and German attention to precedents remains highly distinguishable from the sophisticated common-law analysis of precedents. The detailed analysis and explication of precedents within common-law judicial opinions is without equivalent in the civil-law legal culture. While the civil-law judicial systems have developed and refined their methodology of statutory interpretation to a degree unknown in the common-law legal world, the civil-law legal world has no equivalent to the complex case-law analytical methodology that common-law courts have evolved over centuries.

The similarity of the statements made by Holmes, Jhering, Saleilles and Gény are, however, instructive in suggesting the admixture of common-law and civil-law attributes even in both legal systems. Within the common-law legal system, for example, by virtue of the courts' crafting of legal principles, each precedent stands for a legal norm from which applications to future pending cases can be deduced. Common-law reasoning thus clearly contains a deductive component that is as intrinsic to its nature as the analogical reasoning by similarity and dissimilarity which dominates the comparative process of evaluating the legal significance of a pending case by weighing it against prior case law. Moreover, Patrick Atiyah makes the case quite compellingly that English judges are far less likely than their United States counterparts to decide a pending case for the sake of justice of outcome if it means ignoring established precedent. According to Atiyah, British more than United States judicial middle ages, ends in confining the entire system of positive law, a priori, within a limited number of logical categories, which are predetermined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting themselves to the ever varied and changing exigencies of life. Id. at 47. Cardozo also quotes Saleilles as follows: "One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction." Id. at 170 (quoting Raymond Saleilles, De la personnalité juridique 45, 46). See also Palmer, supra note 74, at 299-300, and Baudenbacher, supra note 6, at 339 (discussing Gény's realist position in Méthode d'interprétation et sources en droit privé positif).

200 See Dawson, supra note 12, at 405; accord Merryman, The French Deviation, and How Others Do It, supra note 108.

200 See supra note 89, and surrounding text. Accord, Adams, supra note 29. Dawson also distinguished French adherence to jurisprudence, or established case law, from the common-law use of case law. See Dawson, supra note 12, at 337-38. For a most insightful historical analysis of the civilian need to equate law with writing, and the common-law need to wrest law away from any immutable textual form, see Stein, supra note 74, at 246-47.

200 It should be remembered, however, that while Holmes was a judge with the ability to give judicial voice to his views, Jhering, Saleilles and Gény were not. Despite the influential role of legal scholars in civil-law legal culture, scholarly views are not always implemented by judges. Professor Tomlinson notes that Gény's urging judges to go beyond mere statutory interpretation generally was not accepted or implemented by French judges. See Edward A. Tomlinson, Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking, 48 La. L. Rev. 1299, 1358 (1988). For the focus on case law and legal methodology of the influential Roman jurists up to ca. 235 A.D., see Dawson, supra note 12, at 117-118. On the other hand, the mere reference to precedents need not signify the adoption of common-law methodology. See Adams, supra note 29. For the pre-Revolutionary French legal tradition of privileging specific facts in judicial decisions, see generally Palmer, supra note 74, at 283.

210 Patrick Atiyah, Lawyers and Rules: Some Anglo-American Comparisons, 37 Sw. L.J. 545 (1983). For a revealing and somewhat paradoxical comment about United States practice, see the recent case of Kimel v. Florida Board of Regents, 528 U.S. 62, 98-99 (2000) (Stevens, J. dissenting) ("Despite my respect for stare decisis, I am unwilling to accept Seminole Tribe as controlling precedent ... The kind of judicial activism manifested in [that and other similar cases] represents such a radical departure from the proper role of this
methodology treats precedents as establishing binding norms. This would suggest a considerable measure of deductive reasoning in English legal methodology, the common-law methodology operating within the European Union. Moreover, as Kant put it, “the faculty of judgment ... is not simply a capacity of subsuming the particular under the universal whose concept is given [as in typical civil-law methodology], but also the converse, of finding the universal for the particular.”

The question persists, however, as to how abstract such common-law norms are or can be. Any norm derived from case law inevitably will be a function of the facts that gave rise to the norm. Indeed, Justice Cardozo suggested in Palsgraf, as he attempted a definition of negligence, that “[p]roof of negligence in the air, so to speak, will not do,” i.e., “[i]t may well be that there is no such thing as negligence in the abstract.” Holmes concurred: “General propositions do not decide concrete cases.” As Holmes discussed in The Common Law, fact and law are not easily distinguishable from each other in a system in which the two are inextricably intertwined and interdependent in a dynamism of mutual interaction. Melvin Eisenberg has concluded that common-law

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211 Atiyah, supra note 210. Atiyah and Summers also develop this theme in Atiyah & Summers, supra note 26, at 267-297. Accord, In re Groffman, [1969] 1 W.L.R. 733, [1969] 2 All. E.R. 108 (wherein Judge Simon of England’s High Court of Justice notes that “I am bound by what was decided by the Court of Appeal, even if I were to disagree with it ....”) (reprinted in Jesse Dukemenier & Stanley M. Johnson, Wills, trusts, and Estates, 227, 231 (2000)); Arthur L. Goodhart, Case Law in England and America, 15 Cornell L. Q. 173, 190-91 (1930) (Goodhart suggests that United States lawyers are less likely than their English counterparts to “believe in the authority of precedents” because Americans are accustomed to a lack of legal uniformity among state jurisdictions. He implies that the leap from interstate diversity to nonuniformity within a given jurisdiction is easily made.); Cf. Sunstein, supra note 5, at 42 (“Most of the important constraints on judicial discretion come ... from the process of grappling with previous decisions”); accord Dawson, supra note 12, at 81 (“The conception of the force of precedent that now prevails in England is the most extreme of any to be found in the modern world.”); but see Herget, supra note 60, at 65 n.12 (“[S]tudents of the common law [of both England and the United States] know that precedents often fail to constrain future court decisions”); Estate of Parsons, 163 Cal. Rptr. 70, 75 (1980) (Grodin, J., of the California Court of Appeal, stating that “[w]e [i.e., judges] cannot ignore what the statute commands ... merely because we do not agree that the statute as written is wise or beneficial legislation”)(quoting Estate of Carter, 9 Cal. App. 2d 714, 718 (1939)). For an account that emphasizes the similarities between U.S. and English judicial practices, see The Right Hon. Lord Irvine of Lairg, Common origins, Common Future, 86 A.B.A. J. 55-56 (2000).

212 While the deductive component in a system of strict adherence to stare decisis may seem to signal a similarity between the common-law and civil-law legal systems, it should be remembered that it is precisely the non-adherence to precedents that is the hallmark of the civil-law legal mentality; thus, despite the increase in deductive reasoning necessitated by England’s stricter version of stare decisis, its increased attachment to precedent also constitutes a discordance with the civil-law perspective that is more pronounced than in the United States’ less precedent-bound version of stare decisis.

213 Kant, supra note 13, at 15.

214 Accord, Llewellyn, supra note 41, at 2; Reimann, supra note 6, at 1342 (“Common lawyers construe [legal rules] narrowly and always with a view to the concrete facts that generated them in the first place - an approach almost antithetical to the succinct and general rules of which the traditional civil codes have consisted.”); Contra Lon Fuller, The Law in Quest of Itself, 52-54 (1940) (commenting on Holmes’ statement that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461). Fuller points out that it is impossible to state a rule of law that is merely a prediction of judicial action, excluding all reference to reasons underlying and motivating the action: i.e., to norms. Fuller, supra, at 52-55.


216 Id. at 102 (Andrews, J. dissenting).


218 See Holmes, supra note 43, at 122-23. See also Habermas, supra note 11, at 199 (“If we consider a
courts intentionally formulate legal norms that go beyond what the pending case strictly necessitates. He calls this the “enrichment model,” and contrasts it to the “by-product model,” in which courts would establish normative propositions “only as an incidental by-product of resolving disputes.” Under both models, however, the rules courts are capable of formulating are rooted in the facts from which they emanate. Moreover, under the doctrine of stare decisis, normative propositions not necessitated by the adjudicated case may carry persuasive weight, even significant persuasive weight, but not binding legal authority. As Learned Hand put it,

precedents will not have the force of instances of a general principle, but of precedents upon precisely the questions which were decided. While there is perhaps nothing inherently or inevitably necessary in such a result, since a court might extend the logical consequences of a decision beyond the precise question which it decided, yet, in fact, the result has been otherwise, as may be shown by the decisions themselves.

Not only is the rule created by each common-law judicial decision a function of the case’s facts, an effort of “divining the underlying principles [from] the morass of particulars,” but also, as Edward Levi demonstrated, the rules of prior cases change with each new application. Rules change as they are applied for various reasons, including the evolution of social values that is the focus of Levi’s attention, but they also change with application of necessity because they are applied to new facts, by virtue of the inevitable factual disparity between the pending case and each precedent. Each case is thus like a new square in a mosaic, or a sculptor’s stroke, changing the face of the whole, altering its meaning through the addition of facts in its trajectory through time.

The civil-law norm, by contrast, is loosened from factual specificity by virtue of its generality of expression and anonymity of origin. Although arguably no norm can be so general as to be completely free of factual baggage, at least implicitly, nevertheless one sees the disconnectedness between civil-law norm and fact in, for example, the five articles of the French Civil Code whose link to the entire field of French tort law they

case to be a state of affairs falling under a rule, then such a case is constituted only by being described in terms of the norm applied to it. At the same time, the norm acquires a more accurate meaning precisely in virtue of its application to a corresponding state of affairs, which is thereby transformed into a case. A norm always ‘takes in’ a complex lifeworld situation only in a selective manner, in view of relevance prescribed by the norm itself.”.

Eisenberg, supra note 41, at 6.

Id.; contra Posner, supra note 47, at 122 (“the ordinary judge ... is not interested in shaping the future ....”).

Eisenberg, supra note 41, at 6.

Id.; Cf. Schwarz-Liebermann von Wahlendorf, supra note 108, at 1115, describing the common-law procedure of reaching rules as “ideas that come knocking on the door” (“idées qui frappent à la porte”).

See, e.g., Llewellyn, supra note 41, at 40-41 (“when [a court] speaks to the question before it, it announces law, and if what it announces is new, it legislates, it makes the law. But when it speaks to any other question at all, it says mere words, which no man needs to follow”) (emphases in original).

Hand, supra note 87, at 501.

Gunther, supra note 51, at 411.

See Levi, supra note 42, at 3; see also Eisenberg, supra note 41, at 36 (“almost any rule employed in a common law decision is new ....”).

See id; see also Cardozo, supra note 44, at 23 (“every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered ....”) (quoting Munroe Smith, Jurisprudence, 21 (1909)).
spawned is at best highly elusive if not utterly mysterious and elliptical.\textsuperscript{228} By contrast, the common-law rule that emerges from each case may be conceivable only in terms of numerous facts from the parties’ lived experience, and the narrower the rule, the more numerous those facts will be.

As Lon Fuller suggested in his powerful book, \textit{The Law In Quest Of Itself}, written in 1940 as an effort to identify and salvage the legal roots of democracy that were withering in much of the western world, the common-law judge is unable to draw the dividing line between fact and norm.\textsuperscript{229} Fuller approved of the common law’s coalescence of fact with law, endorsing case law as more adept than legislation in fostering public ethics.\textsuperscript{230}

Hermann Kantorowicz, the maverick German thinker who had inspired American legal realism, hotly disagreed: “In the interpretation of American law, and for that matter European law also, we must distinguish between law and facts.”\textsuperscript{231} By the time Kantorowicz wrote those words, he had been thrust into the common-law legal world by the forces of history, having been stripped in Nazi Germany in 1933 of his professorship at the University of Kiel.\textsuperscript{232} The Nazi judicial system was to abuse ideas some found reminiscent of those Kantorowicz had developed in his scholarship, in order to justify judicial outcomes at odds with established German legal norms.\textsuperscript{233}

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\textsuperscript{228} See Konrad Zweigert & Hein Kötz, Introduction to Comparative Law, 615-622 (3d ed. 1998); see generally Tomlinson, supra note 209; see also id. at 1361-1362 apps. 1 and 2 (for English translations of the French code tort articles). For a fascinating depiction of another example of disconnectedness of legal norm from factual circumstance in French law, see John P. Dawson, Specific Performance in France and Germany, 57 U. Mich. L. Rev. 495 (1959).
\textsuperscript{229} Fuller, supra note 77.
\textsuperscript{230} Fuller believed that the common-law judge “ought to be proud that his contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old story.” Id. at 140; accord, Greenavalt, supra note 89, at 18 (“it is extremely difficult to say in practice and in conceptualization just where discovery gives way to creation”) (emphasis added); Holmes, supra note 43, at 122-25; Schwarz-Liebermann von Wahrendorf, supra note 108, at 1114 (“les frontières entre precedent et principe peuvent être fluides”). See Fuller, supra, at 132 et seq. for the view that judicially created law promotes morality better than legislative law, for “the greater moral persuasiveness of judge-made law ….” Id. at 134. Cass Sunstein agrees with Fuller inasmuch as he associates common-law methodology with democracy. See Sunstein, supra note 5, at 24-45. In terms of U.S. constitutional law, Guy Scoffoni argues that it is the possibility of amending the Constitution that reconciles constitutional justice with democratic theory and legitimizes the powerful role of the judge in the United States’ political system. See Scoffoni, supra note 82, at 265.
\textsuperscript{231} Kantorowicz, Some Rationalism About Realism, supra note 79, at 1244. See also Kantorowicz, Dualism of Facts and Rules, in Kantorowicz, Definition of Law, supra note 164, at 25-28; Jauffret-Spinosi, supra note 13, at 756-757 (describing the failure of non-French court opinions to distinguish between facts and law as highly confusing to French jurists reading such opinions).
\textsuperscript{232} See Muscheler, supra note 162.
\textsuperscript{233} See Herget & Wallace, supra note 76, at 418-19. As Professor Whitman has signaled, to say that Nazi legal theory abused Kantorowicz’s work is an oversimplification of complex facets of Nazi legal theory. Letter from Professor James Q. Whitman (May 2, 2000) (on file with author). My own sense is that the uses, misuses, abuses or, more simply, the potential applications and interpretations of legal theory are so vast and varied that legal theory often can be used in good faith for purposes antithetical to its original underlying tenets and conceptualization. For an account of post-war criticism of Kantorowicz for having views in common with Nazi jurisprudence, see the excellent article of Joerges, supra note 203, at 171. For a further presentation of my own views, see Vivian Grosswald Curran, Rethinking Hermann Ulrich Kantorowicz: Free Law, American Legal Realism, and the Legacy of Anti-Formalism in Rethinking the Masters of Comparative Law (Annelise Riles ed., forthcoming). For an account of Nazi legal practice, see Legal and Political Science: Hans Frank, Carl Schmitt and Others, in Max Weinreich, Hitler’s Professors: The Part of Scholarship in Germany’s Crimes Against the Jewish People 36-40 (1999). For Gustav Radbruch’s criticism of the Free Law Movement as structurally indistinguishable from Carl Schmitt’s nationalistic decisionism, see Frommel, supra note 162, at 61-62.
\end{flushright}
Kantorowicz's sense of the separability of facts from substantive issues of law may have stemmed from the traditional civil-law conception of the role of facts in civil-law legal culture. The civil law delegates the search for facts to judges, such that facts do not become subject to what Professor Langbein calls "[a]dversary domination," as they do in common-law systems in which private parties dominate the investigation of facts.\(^{234}\) Since the facts in civil-law systems typically are ascertained preliminarily and primarily by the court until such time as the judge believes the dossier to be factually accurate, facts themselves are not conceived of as the focal trial issues to be argued and disputed by the adversaries.\(^{235}\)

Although Kantorowicz disagreed with Fuller about the desirable relation between fact and norm, Kantorowicz in 1934, like Fuller in 1940, reflected on law's tragic potentials for rabid injustice.\(^{236}\) My sense is that Kantorowicz would have been a great supporter of the European Union and an advocate for a single, all-encompassing judicial methodology. In part, I believe this would have been an outgrowth of his ultimately, at least partially, civilian legal perspective, of his sense that right answers exist, and that there is a best way discoverable for, and applicable to, both common-law and civil-law legal methodology, an outlook admittedly greatly mitigated and colored by his profound insights into the complexities of law as a vibrant social instrument in evolving societies.\(^{237}\)

To the extent that Kantorowicz would have favored a common methodology for the common- and civil-law judicial systems, it would have been by virtue of believing them to have enough shared attributes to warrant a single methodology, for he was a lifelong critic of the view that objectively correct principles of law can be identified as common

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\(^{234}\) See John H. Langbein, The German Advantage, 52 U. Chi. L. Rev. 823, 845 (1985). Accord, Damaška, supra note 65, at 2 & n.3 (including references to others who have espoused this view). Damaška also emphasizes the importance of "the peculiar organization of the trial court; [and] the temporal concentrations of proceedings," as well as the control of the adversaries, in understanding Anglo-American fact-finding. Id. at 4.

\(^{235}\) See Langbein, supra note 234, at 845. See also Whitman, Legacy of Roman Law, supra note 12, at 38 (noting the widespread view in sixteenth-century Germany that "adversary justice [was] immoral"). For modern criticism of the effects of the common-law's adversarial control and definition of facts, see Damaška, supra note 65, at 100.

\(^{236}\) See Kantorowicz, Some Rationalism About Realism, supra note 79.

\(^{237}\) Indeed, in his conclusion to Der Kampf um die Rechtswissenschaft, Kantorowicz portrayed his free law movement as demanded by the times, and outlined the historical evolution that rendered free law appropriate for the twentieth century. See Gnaeus Flavius (pseudonym for Hermann Ulrich Kantorowicz), Der Kampf um die Rechtswissenschaft 49 (1906). Kantorowicz had a very nuanced view. He rejected both the traditional civilian perspective that legal principles can be adopted effectively in every legal system, but also rejected the view that decisionism can lead codified laws to be instrumentalized to serve any goal; i.e., that law is arbitrary because subject to unpredictable interpretation. See generally Kantorowicz, Some Rationalism about Realism, supra note 79; Frommel, supra note 162, at 50-51 (for Kantorowicz's disagreement with Gustav Radbruch and Ernst Fraenkel's belief that codified laws can be used to reach any purpose a judge or legislative system may have). See also Monika Frommel, Hermann Ulrich Kantorowicz (1877-1940): Ein streitbarer Relativist, in Streitbare Juristen: Eine andere Tradition, 243, 247 (Thomas Blanke et al., eds., 1988) ("man könne nur beide Geschichtspunkte kombinieren - wissend, daß es kein 'richtiges Recht', sondern nur mehr oder weniger plausible Rechtssätze geben könne."); also id. ("Die Meinung, Zwecke und Werte wissenschaftlich begründen zu können, hieß er [Kantorowicz] für einen neuen Aberglauben."). In part, I suspect that Kantorowicz would have been a proponent of the European Union because of his antipathy to nationalism. See Muscheler, supra note 162, at 119 (for the attraction that the idea of an international order held for Kantorowicz, despite his ultimately abandoning the idea). For a thorough analysis of Kantorowicz's legal theory, see Karlheinz Muscheler, Relativismus und Freirecht: Ein Versuch über Hermann Kantorowicz (1984).
to all legal systems. Kantorowicz was ahead of his time in signaling the contextuality of meaning and in taking an anti-essentialist, semiotic approach to legal analysis, which he called "conceptual pragmatism." Nevertheless, like Isaiah Berlin, whose belief in value pluralism did not prevent him from also believing that there was a "kernel of truth in the old a priori natural law tradition," Kantorowicz also suggested that natural law concepts are not totally invalid, despite his emphasis of cultural and anthropological approaches to understanding the nature of law: "If only positive law were 'law,' as is taught by many authorities, Grotius' *lus belli ac pacis* (1625) should not be mentioned in a history of legal science because its epoch-making ideas concerning natural law, like those of its innumerable predecessors and successors, would not be ideas concerning 'law' ... " This is how Kantorowicz concluded his article, published in 1934, five years before Germany invaded Poland, and one year before the enactment of Hitler's Nuremberg laws:

[S]ound methods without a sound methodology are dangerous, not so much in the hands of the master as in the hands of his pupils. Here lies, it seems to me, a field for fruitful cooperation. Perhaps the present events in Germany, like the even more memorable accomplishments of the Turks in 1435, may facilitate this cooperation. Let

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238 The latter view had been endorsed by the German legal theoretician Stammler. For Kantorowicz's criticism of Stammler, see Monika Frommel, *Die Kritik am "Richtigen Recht" durch Gustav Radbruch und Hermann Ulrich Kantorowicz*, *in Jenseits des Funktionalismus: Arthur Kauffmann zum 65. Geburtstag* 53 (Lothar Philippis & Heinrich Scholler eds., 1989); Muscheler, *Relativismus und Freirecht*, supra note 237, at 29. Indeed, Frommel suggests that Kantorowicz's views corresponded to Lon Fuller's idea of the inner morality of law. See Frommel, supra, at 60 (citing Lon Fuller, *Positivism and Fidelity in Law: A Reply to Professor Hart*, 71 Harv. L. Rev. 630-705 (1958) and Lon Fuller, *The Morality of Law* (1964)); see also Kantorowicz, *Legal Science*, supra note 165, at 684-685 ("This universality [of legal values] is, indeed, certain in the case of the theoretical value, since more than one truth is logically inconceivable; but it is only probable in the case of the esthetic value, and it is highly improbable in the case of the practical values. The validity of practical values, therefore, is only a relative one, i.e., different practical values are appropriate for different types of conscience, the types being distinguished by the recognition of different final aims."). In analyzing methodologies for conducting comparative law, George Bermann concludes that "[t]he appreciation of diversity that underlies the comparative law enterprise itself to erect a single ... methodology as, alone, worthy of the enterprise." George A. Bermann, *The Discipline of Comparative Law in the United States*, 4 Revue internationale de droit comparé 1041, 1052 (1999).

239 See *Kantorowicz, The Definition of Law*, supra note 164, at 1-10; Kantorowicz, *Legal Science*, supra note 165, at 684 ("The objective validity of the values does not necessarily imply their universality ... "). Compare with integrative jurisprudence's definition of law, with less emphasis on the justiciable, but otherwise with much in common with Kantorowicz's definition: "Law may be defined as the balancing of justice and order in the light of experience." Bermann, supra note 198, at 788.


241 Kantorowicz, *Definition of Law*, supra note 164, at 14. He also portrayed natural law affirmatively in contrast to nineteenth-century positivism, describing naturalism as a form of free law. See Gnaes Flavius, supra note 237, at 10-11. Indeed, Kantorowicz describes free law as the natural law of the twentieth century: "*Unser freies Recht also ist Naturrecht - des 20. Jahrhunderts.*" Id. at 12; see also id. at 41-50 (for the relation of morality and quasi-morality to law); Kantorowicz, Some Rationalism About Realism, supra note 79 (for his general criticism of American legal realism as one-sided, distorted and, perhaps most of all, simplistically extremist). I am in complete agreement with Professor Joerges' view that the different contexts in which the free law, sociological and legal realist theories emerged in, respectively, Germany and the United States, resulted in different underlying conceptions in each nation of the apparently similar legal theories. See Christian Joerges, On the Context of German-American Debates on Sociological Jurisprudence and Legal Criticism: A History of Transatlantic Misunderstandings and Missed Opportunities, 1993 European Yearbook in the Sociology of Law 403, 414 (1993).
us hope that American and German jurists may combine their specific gifts, which so happily supplement each other, in order to create the jurisprudence of the future.\footnote{Kantorowicz, Some Rationalism About Realism, supra note 79, at 1253. The ironic reference to “the memorable accomplishments of the Turks” is to the astonishing conquests of Mohammed II, most notably, and starting with, his siege of Constantinople in 1453, which was followed by his conquests of Serbia, Walachia, Bosnia, Albania and the Crimea, culminating only with his death in 1481, as he stood on the brink of conquering Venice. Kantorowicz must principally have been comparing Hitler’s rapid acquisition of a stranglehold on power in Germany to Mohammed’s siege of Constantinople, since Kantorowicz was writing several years before Hitler’s \textit{Blitzkrieg} successes, but the latter also bear comparison to Mohammed’s military victories both in their breadth and speed. For an overview of Turkish history under Mohammed II, see 22 Encyclopaedia Britannica 588, 592 (1954) (entry for Turkey). Professor Whitman has pointed out to me that many Greek scholars went into exile after the fall of Constantinople, and that “Kantorowicz was identifying himself with them, and hoping for an American Renaissance” along the lines of the Italian Renaissance arguably triggered by the exiled Greek intellectuals. Whitman, Letter, supra note 233. Kantorowicz’s hopes were realized in the field of comparative law, as it was the generation of refugees from fascist Europe that triggered the greatest era of comparative law in the United States’ history.}

CONJUGATING A FUTURE IMPERFECT\footnote{This title was inspired in part by Judt, supra note 12.}

The homogenization of Europe’s legal cultures may be analyzed as part of a wider issue of progressive cultural uniformity within the European Union. This section explores processes of leveling absorption occurring on multiple fronts within the European Union, as well as some underlying assumptions that both may be unwarranted and detrimental to the future development of the European Union.

The European Union aspires to reconcile respect for national identity and national sovereignty with legal and economic uniformity. In an article that should be required reading for anyone involved in formative aspects of the European Union, Nathaniel Berman describes the efforts of international legal experts after World War I to implement a “new world order.”\footnote{Nathaniel Berman, But the Alternative Is Despair: European Nationalism and the Modernist Renewal of International Law, 106 Harv. L. Rev. 1792, 1794 (1993).} Although Berman does not address the European Union directly, the resemblances between the interwar era and the current era in Europe are more than striking. They take on an eerily Cassandra-like resonance with respect to the European Union’s ability to reconcile national rights, aspirations, cultures and sovereignty with a legal order that can unify disparate nations under an order governed by a humane rule of law.

The Paris Peace Conference that followed the First World War and the turmoil of the decline and fall of the Ottoman and Austro-Hungarian empires resulted, with respect to Germany, in the Treaty of Versailles, which in turn culminated in the world cataclysm known to us today as the Second World War and the holocaust. It emphatically is \textit{not} my purpose to suggest that analogies between the post-World War I international law measures and the ongoing formation of the European Union would justify a conclusion that the European Union is likely to culminate in similar human catastrophe. Indeed, it is not my belief that the post-World War I attempts to establish a new international legal order based on civilized, humanitarian liberal legal principles caused the rise of Hitler or Nazism. An accumulation of the unlikeliest of coincidences and tragic fortuities in my view was more responsible for Hitler’s accession to power than were the interwar events Berman describes in his compelling article.\footnote{See Curran, The Legalization of Racism, supra note 195, at 13-14; Henry Ashby Turner, Jr., Hitler’s Thirty Days to Power: January 1933 (1996).}
I do believe, however, that the interwar period has important instructive potential for the European Union inasmuch as a shared fallacy suggests that extreme caution and even skepticism are called for in the face of the widespread belief that the European Union's current institutional and legal structures are capable of preventing renewed political and social turmoil in Europe. An underlying assumption common in the European Union today, also operative among international lawyers after the First World War, is that a transition from barbarity to civilization has occurred, and that the new legal order being created will assure the preservation in the European Union of a harmonious reconciliation and coexistence of national rights and human rights. As in the aftermath of the First World War, today, a half century after the Second World War, the citizens of the former belligerent states share a sense that Europe will not regress into the atrocities and upheavals of the past.  

Just as in the period following the first World War, in Europe today, the European Union assumes that "[t]he recognition of nationalism [is] ... the prerequisite to an order marked by peace and liberty," an order simultaneously capable of satisfying nationalist longings and limiting nationalist excesses. Berman notes the paradox of the interwar era, equally true of the European Union today, that the "law would be founded on nationalist 'puissance' and yet stand in opposition to it." Just as in the European Union today, many in the interwar period wanted to replace the state by the individual as the foundational principle of international law.

The focus on supranational law as the autonomous link among the various nations, and as a power acquiring independent force, so potent in the European Union today, also characterized the interwar era: "The recognition of nationalism revitalized international law, while the indirect and asymmetrical quality of the 'alliance' freed international law to respond to the nationalist challenge with a wide range of innovative, specifically 'legal' solutions." From this new legal order it was thought that a new Europe would arise, a Europe that would honor its civilized, enlightened heritage.

The alleged triumph of the Versailles Treaty, so evocative of the European Union's current self-image and self-representation, was its creation of a "subtle system aimed at the simultaneous preservation of sovereign prerogatives, national identities, and individual and minority rights ..." As we know today, however, that system was not able to prevent the destruction of millions - state 'citizens,' ethnic 'nationals,' linguistic 'minorities,' and internationalized 'inhabitants' - in the name of putatively national and even European goals. Auschwitz is located in Upper Silesia, the very region in which the interwar 'experiment' in attempting to resolve the 'chaos and violence' of nationalist conflict through law had achieved its fullest expression.

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246 This point was made with force by Professor Thierry Leterre, according to whom French youth dismisses out of hand the idea of another war with Germany, so preposterous it seems to them. Thierry Leterre, Lecture at the University of Pittsburgh, Center for West European Studies and European Union Center (March 17, 1999).

247 Berman, supra note 244, at 1802.

248 Id. at 1803.

249 See id. at 1807.

250 Id. at 1820.

251 Id. at 1899.

252 Id. at 1899-1990.
Another, earlier, analogy to the European Union is to be found in nineteenth-century efforts within Germany to use Roman law as a unifying, universalizing force for justice. Describing the ultimate failure of Savigny and Jhering’s strivings to achieve this, Professor Whitman poignantly summarizes as follows, in a comment equally applicable to the more internationalist aspirations of the interwar era that is Berman’s focus: “Between the intention and the act ... fell the shadow. For better or for worse, the history of Roman law in Germany proved to be a history of unrealized hopes and miscalculated programs - as, sadly, has so much of modern legal history.”

If the tradeoff between European Union measures constructing a new, uniform legal order today, with a corollary, however much unavowed, diminution in cultural diversity and autonomy, were a tradeoff between sacrificing diversity for the sake of future peace; if the increasing bureaucratization of Europe, the funneling of the many into the one, were the price to pay to preserve European life itself, to prevent definitively a recurrence of the events that from 1933 to 1945 deprived millions of European victims of human dignity and of life, and caused thousands of European victimizers to descend into depraved savagery - if one could count on those being the terms of the tradeoff, the price to pay would seem to many to be well worth it.

The horror of Europe’s recent past defined the possibilities of what the European Union undertook to seek to prevent in its future. The striking similarities between the European Union’s formative efforts to create a new legal order and those evoked above that occurred during the interwar era, may give us cause for uneasiness today, however, to the extent that the interwar measures in international law illuminate the inability of law and democratic institutions to internalize mechanisms for self-perpetuation.

One of the lessons to be gleaned from the Second World War is the fragility of constructs designed to achieve, not only democracy and the rule of law, but also, and especially, the endurance of those constructs. It is perhaps of particular note in this context to remember that, in 1940, France democratically ended its own democracy, by a process that punctiliously followed the Third Republic’s prescribed legal procedure. In June of 1940, an elected French parliament voluntarily and suicidally destroyed by democratic vote an old and venerable democracy. With an overwhelming majority, the legislature created in its place a dictatorship that was to demolish France’s democratic structures, and to stain the word “collaboration” with the sinister connotations it acquired when France’s new leader, Philippe Pétain, soon thereafter dedicated his nation to collaborating with the goals and methods of Nazi Germany.

My study of the phenomenon of France’s destruction of democracy by the very institutional means its democratic structures had developed in order to perpetuate democracy, has led me to doubt whether human institutions can be so structured as to transcend contemporaneous values held by individuals and groups, values that fluctuate over time with the hopes and fears of those who harbor them. Human values exist in transient relations of mutual influence with the paths and choices that emerge as

See Whitman, Legacy of Roman Law, supra note 12; Rudolf von Jhering, Der Geist des römisohen Rechts, supra note 11.

Whitman, Legacy of Roman Law, supra note 12, at 234. Hein Kötz notes that Anselm von Feuerbach predated Jhering by several decades in calling for legal unification and universalization. See Hein Kötz, Comparative Law in Germany Today, 4 Revue internationale de droit comparé 753, 753-54 (1999).

For a detailed discussion of that process, see Curran, The Legalization of Racism, supra note 195, at 15-24.

See id.
desirable and undesirable to populations and individuals reacting to evolving personal, social, political, cultural and economic circumstances at given moments.

The concept I am trying to communicate, particularly the irreducible dependence of political and institutional significance on the conduct and beliefs of those who people a given society at a given point, was captured by Ernst Cassirer, writing in 1945:

The self-preservation of the state cannot be secured by its material prosperity nor can it be guaranteed by the maintenance of certain constitutional laws. Written constitutions or legal charters have no real binding force, if they are not the expression of a constitution that is written in the citizens’ minds. Without this moral support the very strength of a state becomes its inherent danger.257

This is a reason to weigh the processes at work in the European Union in a new light. It is not a reason to renounce the attempt to develop institutions that will foster long-term respect for human rights and the rule of law. To the extent that the ineffable interplay of individual and collective life with social, political, cultural, economic and historical influences can reinforce human commitment to democratic, humane values, the European Union’s effort to construct institutions that promote and strengthen those values is critically important. It is in its aspiration to construct such institutions that the European Union is the greatest adventure of our time, properly invested with our hopes for a civilized future. Less justified, however, is to invest in the European Union assumptions that its aspirations for a civilized future are an already accomplished part of the acquis communautaire.258

If we are to weigh the relative value of national cultural autonomy with legal and economic uniformity, how do we arrive at the precise, or even imprecise, weights we should assign each of those values? To believe that they are incommensurable does not preclude the logic of trying to grasp and formulate the interests involved, at least inasmuch as incommensurability does not eviscerate the logic of certain ultimate judgments, such as the one suggested earlier, that loss of cultural specificity would be worth the sacrifice if the preservation of the lives of millions were the result of such an exchange. The dubious nature of any attempt to predict the future course of events as the European Union’s institutions take shape and evolve may make the weighing appear less likely to assist ultimate judgment, yet, to the extent that we see legal and economic uniformity as inversely correlated with cultural diversity, we should try to assess the merits and importance of each, despite the inevitably profound limitations to our historical foresight, limitations which Wittgenstein summarized as follows and which may be helpful to remember: “When we think of the world’s future, we always mean the destination it will reach if it keeps going in the direction we can see it going in now;

257 Ernst Cassirer, The Myth of the State, 76 (1946); accord, Theory of Legal Change, in Wolfgang Friedmann, Law in a Changing Society 3-62 (1988); Richard S. Kay, Constitutional Chrononomy, 13 Ratio Juris 31, 41 (2000) (success of constitutions “hinge[s] on the degree to which the political and social values that animate the making of the constitution continue to be widely shared in the relevant society”); see also Lovibond, supra note 144, at 54-58 (noting that obedience to rules emanates from preexisting communal consensus as to rules, coupled with sanctions derived from those rules, rather than from an autonomous power within rules to command obedience).

it does not occur to us that its path is not a straight line but a curve, constantly changing direction.”

Scholarly literature increasingly has been signaling the encroachment on cultural diversity by European Court of Justice decisions promoting economic uniformity. The European Union also exerts pressures that militate against cultural diversity in other ways. A recent New York Times article reports turmoil in Spain as the Spanish cling to their traditional midday siesta, resisting European Union pressures to relinquish a habit thought to undermine efficiency and progress. As the article states, “[t]he siesta question is a big issue here because abandoning the midday snooze amounts to a radical change in the traditional way of life.” The assault on the siesta follows a prior, unsuccessful attempt by the European Union to eliminate the Spanish accent known as the “tilde” from computer keyboards “in order to conform with the single [European] market enshrined in the Treaty of Rome ....”

What is the value of a tilde or of the siesta, or of the faces of a nation’s historically important literary, political and scientific figures on national currencies soon to disappear into a single European currency? What is the value of culture to any society? Can culture be generalized or must it retain national specificity to fulfill its purposes? The inevitable imprecision of the answers to such questions will be exacerbated by the existence of a wide range of answers within any nation-state, as well as by the fact that different aspects of culture will be prized to varying degrees within different cultures.

At one extreme of the spectrum is the view of the British diplomat and writer, Harold Nicolson, which Professor Merryman quoted in his article, Two Ways of Thinking About Cultural Property. Nicolson thought it reasonable to sacrifice human life for Europe’s artistic patrimony, for, in his words, “the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can be created again.” Nicolson more specifically declared himself ready to sacrifice both his own life and his sons’ lives: “I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes nor should I hesitate for an instant ... to save St. Mark’s even if I were aware that by so doing I should bring death to my sons ....”

But who is the aggressor threatening national cultures? Europe’s national cultures are in battles of self-defense that are not solely reactions against the European Union. In

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262 Id.
263 Id.
264 Perhaps still more significantly, as Clifford Geertz puts it, “[t]he trouble is that no one is quite sure what culture is. Not only is it an essentially contested concept, like democracy, religion, simplicity or social justice; it is a multiply defined one, multiply employed, ineradically imprecise. It is fugitive, unsteady, encyclopedic, and normatively charged, and there are those, especially those for whom only the really real is really real, who think it vacuous altogether, or even dangerous, and would ban it from the serious discourse of serious persons.” Clifford Geertz, Available Light: Anthropological Reflections on Philosophical Topics, 11 (2000) (emphasis added). See also Janet Blake, On Defining the Cultural Heritage, 49 Int. & Comp. L.Q. 61, 62-63 (2000) (difficulties involved in attempting to define the meaning of the concept of culture).
266 Sir Harold Nicolson, Marginal Comments, Spectator, Feb. 25, 1944 (quoted in Merryman, supra note 265, at 840).
267 Id.
ascribing respective weights to assess the balance of European economic uniformity, on the positive side, against the leveling of European cultures, on the negative side, one would want to avoid attributing blame to the European Union for progressive cultural uniformity caused by forces other than the European Union, and for which the European Union may not be responsible.

Some thirty years ago, I sat next to my mother at a play in a theater in France. Since she was speaking to me in French during the intermission, my mother was surprised when a young American woman needing assistance confidently addressed her in English. My mother's English was fluent from decades of residence in the United States and prior study of English, but audibly non-native. When asked, the young woman explained that she unhesitatingly had identified my mother as an American because of her unmistakably American shoes.

In the 1960's, I too had the impression that I could distinguish Americans from Europeans based on their clothing. I further believed that, among Europeans, I could distinguish people's countries of origin within Europe on the basis of clothing, at least for some European countries. My evidence conceded is of minimal empirical value, especially since I rarely verified my conclusions, let alone conducted anything remotely resembling a controlled experiment. Nevertheless, it has been many years since any of the distinctions which once struck me so forcibly have seemed to exist at all. Today, especially among the young, not only do Europeans seem to me indistinguishable from each other in their dress in terms of particular countries of origin, but, in addition, European youth generally also seems to me to be indistinguishable from American youth on the basis of dress.

The increasing similarity with American culture would suggest that the forces engendering and promoting uniformity are not restricted to the European Union. After all, the outspoken battle of France against *franglais* is being waged against American, not British, English. While there may be no official or discernible comparable linguistic battle in Germany, a regular perusal of German news magazines or newspapers reveals an influx of English words at a pace as rapid and of a magnitude as momentous as those which France is experiencing. On the other hand, whatever the precise relative measure of the leveling of cultural diversity by influences often grouped under the general rubric of globalization, the European Union at the least also represents a force in increasing cultural homogeneity, and is hastening, although not solely responsible for, the demise of cultural specificity among its Member States.

In February of 1999, the French television program, *Bouillon de culture*, aired a show about the European Union in the form of interviews with several authors who had just published books dealing with the European Union. One of the authors had written a book in "Europanto," humorously touted as the European language of the future. The word "Europanto" evokes that other artificially constructed language, Esperanto, replacing the etymological root for "hope" ("espérer" in French; "esperar" in Spanish; "sperare" in Italian) in "Esperanto," with that for "Europe" in "Europanto."

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268 This, again, is a report of my personal, nonscientific, observations, but I feel justified in describing them because of the massive extent of the influx of English words into the standard spoken and written vocabulary in both France and Germany. Acquaintances from Italy and Spain confirm a similar influx of English words into their languages. Moreover, in France, at least some scholars argue that the American influences threaten not only French vocabulary, but also traditional, and presumably far more deeply entrenched, French syntactical structures.

269 *Bouillon de culture* (TV 5 television broadcast, Feb. 5, 1999).
Esperanto was developed by Ludovic Zamenhof in the late nineteenth century as a way of overcoming humanity's Tower of Babel, by demolishing the "language barriers [that] can exacerbate national and racial antagonisms."\textsuperscript{270} I was first introduced to Esperanto at the age of eight or nine by a relative who has been a devoted advocate and fluent speaker for most of his adult life. Conversant in French, German and English, I had no trouble understanding Esperanto immediately, without having had any prior exposure to it.

Piggybacking on the foundational ideas of Esperanto, Europanto poses as having just one basic rule (as opposed to Esperanto's sixteen rules)\textsuperscript{271}, namely, to be comprehensible to any national of any European Union Member State.\textsuperscript{272} By February, 1999, the date of my first exposure to Europanto (on Bouillon de culture), in addition to the three European Union Member State languages that I spoke, I had studied two other Member State languages, although without having acquired fluency in either of the latter. Paradoxically, in contrast to the instant comprehensibility of Esperanto, I could not make heads or tails of Europanto when the author read excerpts of the book he had written in it. I would estimate that I understood the gist of between five and seven percent of the Europanto text he read.

The author also had translated la Marseillaise, the French national anthem, into Europanto, and agreed to sing it on the show. Despite knowing the French lyrics, I once again found myself at a loss to understand most of the strange sounds I was hearing. It later became clear that this in part was because the putative translation involved a Europeanizing alteration of a semantic nature. For example, the Europanto translation of one of the more bellicose lines in the anthem, in which France's citizens are urged to take up weapons, "Aux armes, citoyens!", was one of the few phrases I could understand in Europanto, and this led to my discovery that the song had not been translated with a goal to preserving semantic significance. The phrase had been transformed into a new concept: "Las linguas, citoyens!"

The alleged translation had transmuted the national call to weapons into the European promise of peace.\textsuperscript{273} The Europanto version of la Marseillaise implicitly extols language and communication as the European substitute for violence. Ironically, in Europanto, the anthem stresses languages in the plural ("las linguas"), while Europanto itself symbolizes an end to linguistic plurality, a replacement of one for the multitude of European languages, as it purports to endorse communication through the impenetrable veil of its own incomprehensibility.

In this, Europanto may be seen as a metaphor for the dilemma of the European Union: on the one hand, its self-representation of encouraging plurality and diversity, on the other, the fact that its own language is incomprehensible to its own self-represented language community.

\textsuperscript{270} Entry "Esperanto," in Encyclopaedia Britannica, 1968 Printing. I am grateful to my relative, Ulrich Paul Ronald, who has been an active member of the movement to promote Esperanto, for sending me all of the materials on Esperanto I have used in preparing this article, and for having introduced me to it in my childhood.

\textsuperscript{271} See The ABCs of Esperanto (Channing L. Bete Co. ed., 1971). Europanto's single grammatical rule was in statement made by Europanto writer on Bouillon de culture, see supra note 269.

\textsuperscript{272} Statement made by Europanto writer on Bouillon de culture, supra note 269.

\textsuperscript{273} In the shadow of the Second World War and the German Occupation, the Marseillaise acquired a symbolism of universality in the French popular consciousness, but one that preserved and incorporated, rather than diluted, the significance of its French nature. See, for example, the poem by Louis Aragon, French Resistance fighter and surrealist poet, Et si c'était à refaire je referai ce chemin, in which he evokes a French Resistance member who, having refused to capitulate to the Gestapo, dies singing the Marseillaise not just for the sake of France, but for the sake of all of humanity ("finissant la Marseillaise pour toute l'humanité").
coupled on the other hand with its imposition of oneness over the many, the erasure of difference through the artificial construction of a new, unique and single format aspiring to meet the needs of Europe’s future.

The univocality of Europanto implicitly offers the image of an end to the Tower of Babel, but, in its failure to be comprehensible, Europanto might appropriately be described as contributing yet one more tongue to the confusion wrought by the already existing mutually incomprehensible languages of Europe. Finally, in addition to being universally incomprehensible, Europanto seems to have managed to eradicate the lyricism that so profoundly marks the Romance languages of Europe, as well as to have preserved no trace of the singular beauty and musicality of Europe’s Germanic languages.

The dilemma of Europe’s striving to harmonize law and economics, to create the foundations for a harmonious union of states without abolishing the cultural aspects most emblematic of those states, is a serious dilemma. On the one hand, fulfilling the dream of unifying Europe and of taking constructive steps towards achieving and preserving the political and human ideals that more than once have been trampled in Europe’s past, is perhaps the most exciting, worthwhile and promising experiment being conducted in the world today. On the other hand, the implications of the gradual, even peaceful, decline of cultural specificity is an issue of grave proportions, for the endangerment of cultural specificity is a threat that extends beyond the aesthetic dimensions of European life.

To the extent that convergence of national traditions or substitutions of new European institutions occur, singularity replaces plurality. This tendency, if allowed to proceed unreflectively and unchecked, ultimately may challenge the European Union’s ability to realize its most cherished ideals and goals. Democratic and liberal values may be less likely to thrive in an increasingly homogeneous atmosphere. The efficiency of a single computer keyboard, or of uniform waking and working hours throughout the European Union, may contribute to making unanimity the rule, and individuality the rare exception.

Innovation and tolerance may decline along with diversity in a culture that prizes and promotes the efficiency uniformity can foster over the chaotic uncertainties of difference, uncertainties that, however, may be correlated with disruptive intrusions later understood to have been genius, just as the welter of chaos later may be understood to have been synonymous with freedom. No matter, or despite, its inherent value, any single perspective is in danger of self-impoverishment when not subject to contributions from the outside, to visions and imaginations not contained within its own parameters. As the European Union increasingly becomes institutionalized, an entity spreading ever-wider and deeper pools of uniformity into its Member States, it may find itself undermining its own values by the very power it has acquired to promote them.

As I write these words, the New York Times reports the European Union’s warning to Austria against allowing Haider’s nationalistic party into the Austrian government: “The European Union warned today that its 14 other members would diplomatically isolate the small country of Austria if its anti-immigrant Freedom Party led by Jörg Haider enters a coalition government.” Haider has become known for rejecting liberal

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274 For a discussion of related issues in the context of conducting international law, see Riles, supra note 11.

275 Donald G. McNeil Jr., Europeans Move Against Austrians on Nativist Party, N.Y. Times, Feb. 1, 2000, at A-1. A subsequent New York Times article specified that there had been no vote by the European
values of inclusiveness through anti-immigration positions, and by comments perceived as reflecting support for Nazism.

The past looms as a warning that the institutions of democracy and the rule of law are vulnerable to defeat from within, to implosion and transmutation. Günter Verheugen, the unelected European Union Commissioner in charge of enlargement, has been quoted as saying, "I don't believe in this wrong-headed notion that we can wait and see what Haider really does. We must make it quite clear that in Europe, we will not tolerate that you can win elections with anti-Europe, anti-foreigner, racist slogans." Verheugen's views are echoed by many Austrian intellectuals and artists who foresee repression of artistic and intellectual freedom of expression under Haider, and who are articulating a sense of déjà vu, of what will come "again." Verheugen and most of the European Union's Member States' populations were educated after the war under the specter of the missed chances of their elders, the failure to stop Hitler when it might still have been possible, whether in 1936, upon the remilitarization of the Rhineland, or later, still before it was "too late." They were educated to avoid what the historian Fritz Stern calls the evils of passivity. In November 1999, the World Jewish Congress reported that threats to Austria's Jewish population had "increased tenfold during and following the successful campaign" of Haider and his Freiheitliche Partei.

In Paris, hundreds of people demonstrated in front of the Austrian Embassy on February 5, 2000, under a banner that read "Aujourd'hui l'Autriche. Demain la France." ("Austria today. France tomorrow."). Like Austria, France has a successful extreme-right political party under the leadership of Jean-Marie LePen and, like Austria, France's liberals have a memory, whether personal or historical, of the black years, les années noires, as the German Occupation often is described. Because of the past, many in Austria feel that they know what is coming, just as many in European leadership positions must feel that the burden they carry today is heavier because of the apparent resemblance of current events to those of the 1930's, and perhaps because they may be experiencing the present challenge as an opportunity to undo the past, to make "un-happen" what happened, to reverse the irreversible. In the aftermath of the tragedy of the Second World War, one reaction was to try to wrest meaning from the irremediable nature of the massive suffering and death. Perhaps Europe today hopes that by applying the lessons of its elders, it will invest the tragedy of the past with constructive significance. In acting against Austria, the Member States technically are operating qua nations, but not only do they do so in concerted fashion, and in their particular configuration as the European Union's Member States, but also...
by evoking the European Union expressly, despite the absence of a European legal source of authority to so proceed.

If successful in excluding Haider’s Freedom Party from the Austrian government, would the European Union promote the liberal, humanistic values it cherishes and believes Haider to revile, or would it pave the way for future exclusionism by its own act of exclusion? Would it promote democracy by eliminating a perceived threat to democracy, or would it promote repression by interfering with the internal freedoms of a Member State’s political processes? Would the European Union promote justice for the perennial “other,” symbolized by the immigrants some Austrians do not welcome, by promoting the European Union’s vision of justice, and its vision of the way to justice, or would the European Union subvert its own values by failing to consider that a different “other,” even one as much at odds with its goals as Haider’s political party, also may have worth, or at least may have a right to be tolerated within the scope of existing law, even if not endorsed? Aggressive action by the European Union against a country as small and powerless as Austria, even for the best of motives, may also signal the abandonment of the traditional European ideal of honor, which shuns the easy victory of the strong over the weak and the small:

\[
Trop\ peu\ d'honneur\ pour\ moi\ suivrait\ cette\ victoire:
\]
\[
A\ vaincre\ sans\ péril,\ on\ triomphe\ sans\ gloire^282
\]

(I should derive too little honor from this victory:
To vanquish without peril is to triumph without glory)

The temptation to impose solutions grows to the extent that difference is not itself prized as a value. As discussed in the next and last section, in a return to the context of the European Union’s converging methodologies and cultures of law, diversity’s decline may be the paradox lodged in the entrails of the European Union, ultimately undermining from within the tolerance, individual rights and progress the European Union seeks to realize and institutionalize.

CAUTIONARY CONCLUSIONS

The leap from civil-law conceptions of law to common-law conceptions, and vice versa, is not small. A melding of the two signifies a profound alteration of each. The question remains as to what consequences will result from the homogenization of European legal culture already underway, and whether, ultimately, a single legal culture is desirable. This question does not address the fairness of the relative strengths of common-law versus civil-law components. The Europeanization of legal cultures appears to be resulting in the relative domination of civil-law culture to the detriment of common-law culture, but I intentionally do not address that concern because my focus is on whether homogenization is possible and whether it is desirable, not whether the result will reflect equal component parts of civil and common law.\(^283\)

\(^{282}\) Pierre Corneille, Le Cid, act I, scene ii (1637). For approving reactions to the European Union’s response to Austria, see l’Express, No. 2536, Feb. 10, 2000, 43-47 (especially Jacques Attali, Les post-empires, at 44). For the view that the European Union’s united stand against Austria signifies an important political step towards the formation of a future European Constitution, see id. at 44; and towards overcoming “the logic of sovereign nations” (“la logique de nations ... souveraines”), see id. at 43.

\(^{283}\) Cf. Patrick Atiyah, Law and Modern Society, 63-64 (1983) (“it is historically true that minority legal
On the one hand, as Eric Stein has pointed out in his article on the assimilation of national laws as a function of European integration, the feasibility of a coherent European economic system inevitably depends on a coherent European legal order. To this end, the European Court of Justice has articulated explicitly its goal of legal uniformity. It has been doing so for over thirty years.

It is difficult to quantify the amount of legal homogenization attributable specifically to the European Union. Contacts between the common-law and civil-law legal cultures have been increasing at a rapid pace due to the phenomenon generally referred to as globalization. Civilian-trained lawyers are studying in advanced law degree programs in common-law countries in ever-greater numbers. The case-law method is being adopted in bits and pieces by civil-law law professors who have studied in the United States, thus exposing some subset of civil-law law students to it, and diminishing what Judge Posner has described as “[t]he homogeneity of professional training” in law. Although assuredly not solely responsible for the increasing methodological homogenization between the common and civil-law legal cultures, the European Union nevertheless at the least is an important contributory factor in accelerating the process, if not the primary catalyst in causing it.

Legal unification has had a long history in Europe, well beyond the unification of law by Rome. In pre-Revolutionary France, for instance, the legal uniformity eventually achieved by Napoleon had been a goal of the Bourbon kings, deemed ever more pressing as travel and communication increased among various parts of France. The achievement of uniformity necessarily involves loss of diversity, of pluralism. A loss in difference between the legal systems, cultures and traditions of the common and systems in federal countries (e.g., Louisiana in the United States and Quebec in Canada) have tended over the years to become greatly influenced by the majority systems and in the very long run this might also happen in Europe); and Glendon, supra note 107, at 487 n.3 (in Attorney-General v. Guardian Newspapers, 3 ALL ER 316, 343 (1987), “the European Court seem[ed] to feel that the ‘unwritten’ common law may itself be unfair to those it purports to govern.”)

See Stein, id. at 5 (discussing the use of terms such as “harmonization” and “coordination” in the European treaties, and the European Court of Justice as initiating the use of the term “uniformity”); and Nial Fennelly, The Area of “Freedom, Security and Justice” and the European Court of Justice - A Personal View, 49 Int. & Comp. L.Q. 1 (2000) (including numerous specific European Court of Justice references to its aspirations of legal uniformity).

See Stein, supra note 284.

Cf. John McCormick’s reference to “the empirical fact of diminishing state ability to address issues of bureaucratic accountability, economic regulation, and social justice under emerging conditions of what has been variously referred to as internationalization, regionalization, multilateralism, Post-Fordism, and, most fashionably, globalization.” John P. McCormick, Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State, 9 Yale J.L. & Human. 297, 299 (1997); and Nora V. Demleitner, Combating Legal Ethnocentrism: Comparative Law Sets Boundaries, 31 Ariz. St. L.J. 737, 746-747 (1999) (describing legal systems’ “mix[ing], intersect[ing] and cross-fertiliz[ing]”).

Posner, supra note 47, at 58.

See Jhering, Geist des römischen Rechts supra note 11.

See Levasseur, supra note 75, at 762-763; Moreteau, supra note 171 at 277; and Whitman, Legacy of Roman Law, supra note 12, at 44-45.
civil law militates against another goal of the European Union: namely, cultural autonomy.

A growing literature is analyzing the European Court of Justice's encroachment on cultural autonomy as it purports to adjudicate economic issues. The word "purports" may seem to suggest a disingenuousness on the part of the European Court of Justice that I do not mean to convey. Rather, the nature of economic, political, legal and social issues is such that they are too intertwined to be capable of the sort of separation and isolation that would allow the Court to adjudicate one sort of issue without affecting the others. Thus, whether or not the European Court of Justice intends to adjudicate issues beyond its sphere of competence, we are seeing that such issues are inextricable from those legitimately falling within European competence; consequently, they too are subject to European homogenization.

I have used the word "homogenization" to describe the ongoing European blending of civil-law and common-law legal methodology because it implies an admixture resulting in a single, new product or byproduct, what we visualized earlier as the intersection of two sets. This means that the resulting admixture does not preserve its constitutive parts in their original composition. If the insights of Romanticism can be applied to law, they surely teach us that the loss of the common-law and civil-law perspectives, as they have existed for centuries and millennia, is the loss of two perspectives of the world, of universes perceived, experienced and developed along different paths.

The differentiations that human societies have developed, and, still more, the will to differentiate, often are blamed for the extremism of virulent nationalism, with attendant exclusion and persecution of minorities. But the twin attributes of differentiation and

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292 The area of higher education is another instance of potentially huge significance and implications of the subsumption of the cultural under the economic, by recategorizing cultural phenomena under the rubric of an economic matter. The Presentation Paper of the European Socrates educational program declares that education is of central importance to Europe’s economic future. As a matter of economics, education becomes subject to harmonization. The description of education’s importance as dwelling in the realm of the economic is not an untenable or unreasonable position inasmuch as the idea links education to the future economic potential of Europe’s youth. The Europeanization of education, however, also concerns the deepest issues of the Member States’ traditions and heritages, with massive cultural implications. See Presentation of the Socrates Program, available at http://europa.eu.int/eucomm/dg22socrates.html. I am grateful to Nicole de Montrichet of France’s CNRS for bringing to my attention current European educational issues in her talk, The Impact of Europeanization on Higher Education in France, Address at the University of Pittsburgh, Center for West European Studies and European Union Center (Feb. 15, 2000).

293 German enthusiasm for Europeanization has been attributed to Germans’ associating the celebration of cultural diversity with the horrors of the Nazi persecution of minorities: “By the end of their second World War, the Germans had had their patriotism beaten out of them. Where other nations can look proudly back upon their past, the Germans can see only the Third Reich which, like a gigantic and menacing boulder, blocks from sight whatever good and noble events might have preceded it. Since they can’t look back, the Germans look ahead: they are the keenest Europeans...” Inga Markovits, Reconcilable Differences: On Peter Quint’s The Imperfect Union, 47 Am. J. Comp. L. 189, 210 (1999) (book review). Some of the impressions I garnered from teaching a summer course in a German law school in June-July, 1999, were confirmed by Professor Markovits’ account, which I read after my return from Germany. Colleagues and students in Germany had expressed an enthusiasm for the European Union that struck me as both unalloyed and even
belonging also have resulted in the infinite richness that the multitude of human cultures provides. Both the philosopher of ideas, Isaiah Berlin, and the philosopher of language, George Steiner, agree that the human need for differentiation has been a constant throughout history. In analyzing the mystery of language multiplicity, Steiner has questioned the phenomenon's seemingly dubious connection to the "Darwinian paradigm ... of evolutionary benefit." Here is how he attributes evolutionary benefit to the seemingly inexplicably un-Darwinian proliferation of mutually incomprehensible languages on earth:

Even when it is spoken by a handful of the harried remnants of destroyed communities, a language contains within itself the boundless potential of discovery, of re-composition of reality, of articulated dreams, which are known to us as myths, as poetry, as metaphysical conjecture and the discourse of law.

Yves Duteil, the French poet, composer, singer and politician, wrote the following lines, composed in the classical French tradition of alexandrins:

Dans cette langue belle aux couleurs de Provence
Où la saveur des choses est déjà dans les mots
C'est d'abord en parlant que la fête commence
Et l'on boit des paroles aussi bien que de l'eau

(In this beautiful language of the colors of Provence
Where the flavor of things already is in the words
It is first in speaking that the celebration begins
And one drinks of the spoken words as well as of the water)

naive, as though the European Union had an infallible formula for realizing a future of peace and prosperity. They seemed uniformly undisturbed by the univocal quality of the European Union. Their apparent unquestioning faith in its self-representation as a vehicle for humanitarian politics caused me to wonder if the Nazi past might not be, as Professor Markovits has suggested, a factor in conclusions based more on unreflective faith than on logic. My impressions differ significantly from Professor Markovits', however, in that the German people I met did look backwards. I was greatly moved by my German students' active concern about law's potential for preventing dictatorship and injustice. Their nation's past was an ever-present frame of reference, often explicit, occasionally clearly implicit, for their analysis of legal issues. While I fear that some German enthusiasm for the European Union may be excessive and at times less than fully lucid, I feel the highest regard for the earnest young people whom I taught. Nor was the willingness to look backwards the exclusive province of the young. Among the memories I will treasure for life are the days I spent with a retired professor of law and his wife, whose voices were of the Germany Hitler interrupted.


Id. at xiv. Accord, Umberto Eco, Méconnaitre les langues produit de l'intolérance, in l'Express, No. 2494, Apr. 22-28, 1999, at 12 ("Moi je suis pour le polylinguisme. La diversité des langues est une richesse.") ["I support polylinguism. The diversity of languages is a richness."] See also id. at 11: "La langue a des raisons que la raison ne connaît pas." ("Language has its reasons that reason ignores.") Eco's remark also is an implicit reference to Pascal's "Le cœur a ses raisons que la raison ne connaît pas" ("The heart has its reasons that reason ignores"). My colleague, George Taylor, has informed me that Steiner's view of diversity's containing evolutionary benefit in and of itself has parallels in the scientific theory of the contemporary biologist Ernst Mayr. For a study decrying the consequences of language extinction, and linking the phenomenon to loss of diversity in the world's ecosystem, see Daniel Nettle & Suzanne Romaine, Vanishing Voices: The Extinction of the World's Languages (2000).

In addition to being the mayor of a small town in France and one of the country's most popular songwriters, Yves Duteil also happens to be a descendant of Alfred Dreyfus.

Even the field of mathematics recognizes that there may be "different models of the same set of axioms," an insight that generated exciting mathematical developments. In our era, Einstein substantiated the idea that we can perceive only from within our particular frames of reference: "[W]hat one observe[s] from ... are private frames of reference, each being its own center ... . As long as the frames [are] unmoving, or move[] uniformly with respect to one another, each ... appear[s] at rest to its occupant ... ."

While Einstein’s theory of relativity (not relativism) does not negate the concept of truth, history teaches that monolithism may lead to absolutism, to the idea of a single truth rather than multiple truths, and to the denial of value pluralism, including the denial both of the validity of different paths leading to different answers, and of value in the survival of difference. The diversity of distinctive traditions may be compared to what Richard Feynman has described as "the freedom to doubt," a freedom wrested at inestimable human cost over centuries of struggle with state and church institutions. Isaiah Berlin predicted that "a unified answer in human affairs is likely to be ruinous."

From its beginnings, the European Union has recognized the vital importance of cultural autonomy and diversity, and, thus, it also implicitly recognizes the corresponding immensity of loss that would ensue if diversity were to succumb to uniformity, a loss that may be of meaning and of meaningfulness: "No matter how few or many, how ill or well conceived, distinctions everywhere and anywhere have made for meaning ... . Meaning needs a content set in a context, which needs in turn what holds the two apart."

The paradox of Europe, and perhaps the greatest challenge it faces today, may be

298 Kaplan, supra note 67, at 173.
299 Kaplan, supra note 67, at 184 (emphasis omitted). For a rendition of a British judge’s account, published in the London Times on August 9, 1946, of what the common-law legal culture represents in terms of larger values of tolerance and freedom, and the judge’s fear that the common law would become overwhelmed by the civil-law tradition in the post-war collectivist age, see Radbruch, supra note 11 at 30-31. See also id. at 49-50, for the argument that the common-law legal system is correlated to disempowering potential autocrats. Radbruch saw in the jury system and in the force precedents exert on judges, the impossibility of undue judicial usurpation of power. Radbruch also believed that legal positivism in the common-law legal culture signifies the affirmation of law ("Bejahung des Rechts"). rather than, as in Germany, an affirmation of enacted law, extending even to such laws as were enacted under Hitler ("Bejahung des Gesetzes"). Id. at 49. The fear that the particular would succumb to the general at the cost of nothing less than the soul of British greatness also was voiced by John Stuart Mill: "The greatness of England is now all collective; individually small, we only appear capable of anything great by combining; and with this our moral and religious philanthropists are perfectly content. But it was men of another stamp that made England what it has been; and men of another stamp will be needed to prevent its decline." John Stuart Mill, On Liberty, 86 (World Classics ed.) (quoted in John Stuart Mill and the Ends of Life, in Berlin, Four Essays On Liberty, supra note 4, at 194).
300 See Feynman, supra note 186, at 112. Cf. the recent characterization of Isaiah Berlin as exemplifying a "permanent readiness to doubt" that was both "steadfast ... and rational ... ." Blokland, supra note 240, at 19; and of Learned Hand as characterized by a "commitment to the doubting spirit." Gunther, supra note 51, at 552.
301 Berlin, Roots of Romanticism, supra note 21, at 146.
302 Kaplan, supra note 67, at 194. Cf. Berlin, Four Essays On Liberty, supra note 4, at iii: "To contract the areas of human choice is to do harm to man in an intrinsic, Kantian, not merely utilitarian, sense. The fact that the maintenance of conditions making possible the widest choice must be adjusted - however imperfectly - to other needs, for social stability, predictability, order, and so on, does not diminish their central importance."
that its goals are mutually incompatible. Conscious recognition and assessment of the incompatibility and irreconcilability of Europe’s twin goals of economic and legal uniformity, on the one hand, and cultural pluralism, on the other hand, may be the first steps towards formulating lucid compromises that would permit both objectives to be realized at least partially, before either is sacrificed irretrievably.

Any thoughtful progression towards the future requires an understanding that the decision-making methodologies of today will be confronting tomorrow’s unforeseen eventualities. However much the past and present can instruct as to the future, they nevertheless are horizons that demarcate, define and, inevitably, that also restrict, our imagination. According to Socrates, as recounted by Plato, insight or imagination is needed not just for creativity, but to maintain reason itself. A univocal Europe may provide no more than an illusion of certainty, its answers impoverished by the extent of its loss of recourse to the once distinctive traditions that merged to form it. A plurality of voices lacks certainty, or the ring of certainty, but unicity does not imply truth, however much it may be mistaken for truth, just as multiplicity may be mistaken for confusion, and confusion for ignorance. It is perhaps useful in this context to remember that, “[i]n order to make progress, one must leave the door to the unknown ajar ...” One should beware of according to any single entity what Habermas calls “a monopoly on definition.”

The idea of univocal certainty has been rejected even within that most universal and formal of systems in which at least some active participants believe that truths are discovered, not invented; namely, mathematics:

303 For a thoughtful attempt to resolve Europe’s dilemma, see Neil MacCormick, Democracy, Subsidiarity, and Citizenship in the “European Commonwealth,” 16 Law & Phil’y 1 (1997). See also Kirchner, supra note 13, at 678 (“The dilemma of the integration approach is that it has not yet developed the valid theoretical framework necessary to determine the optimal degree of integration”); id. at 680-686 (describing possible analytical approaches to resolving the dilemma). For the optimistic suggestion that intermediate solutions are feasible for the European Union, and that legal integrationism is not irreconcilable with legal pluralism, see Carol Harlow, Voices of Difference in a Polyphonic Community, Harvard Jean Monnet Working Papers 3/00, at 35, available at http://www.law.harvard.edu/program/JeanMonnet (last visited Aug. 9, 2000).

304 See Feynman, supra note 186, at 115. Cf. Kaplan, supra note 67, at 34 (“What facilitates thought impoverishes imagination.”)

305 See Plato, Republic, supra note 187, at 242 (praising number theory for “forc[ing] the mind to arrive at pure thought by the exercise of pure thought,” and distinguishing pure thought from that which takes cognizance of the “material things which can be seen and touched”). Id. See also id. at 236 (“Mathematical knowledge might be ... better achieved by a disembodied soul which had no sensible [i.e., of the senses] experience.”) Accord, Hampshire, supra note 68, at x-xi. According to Kant, “Plato ... realized that our faculty of knowledge feels a much higher need than merely to spell out appearances according to a synthetic unity, in order to be able to read them as experience. He knew that our reason naturally exalts itself to modes of knowledge which so far transcend the bounds of experience that no given empirical object can ever coincide with them, but which must nonetheless be recognized as having their own reality, and which are by no means mere fictions of the brain.” Critique of Pure Reason, in Immanual Kants Werke, 257 et seq. (Ernst Cassirer et al. eds., 1918) (quoted in Ernst Cassirer, Kant’s Life and Thought, 252 (trans. James Haden, 1981)).

306 One might also evoke in this context Habermas’ reminder that “because no one has direct access to uninterpreted conditions of validity, ‘validity’ (Gültigkeit) must be understood in epistemic terms as ‘validity (Geltung) proven for us.’” Habermas, Between Facts and Norms, supra note 11, at 14.

307 Feynman supra note 186, at 115. See also Geertz, supra note 264, at 64 (the “history of modern times has ... consisted of one field of thought after another having to discover how to live on without the certainties that launched it”).

308 Habermas, Between Facts and Norms, supra note 11, at 426. Accord, Hampshire, supra note 68, at 52 (decrying what he calls “mono-moralism”).

309 See my discussion of the issue of whether mathematical truths are invented or discovered in Curran,
There is no denying the great advantages that rich formal systems have to offer us. They chase false insights away and bring those that cohere with our axioms into a language where they can be spoken of with their peers. Here new linguistic structures may coalesce that will contribute to further insights. The sense of a single truth grew from the prior half of doing mathematics, grown apart from its legislative twin. There those insights were gained in ways that we cannot describe and indeed hardly grasp, and which by their very nature cannot be formalized. The answer to Bishop Berkeley’s query is that in fact we do best proceed at first when our ends, objects and methods are still pliable, lollygagging around within green precincts of certainty: for the idea of a single way that things are belongs to this morning half - so of course we cannot expect it to survive the serious afternoon. The world may not only be more singular than we think, it may be more singular than we can think.\(^{310}\)

The corollary point that Isaiah Berlin made throughout his life’s work is that “ends collide ... one cannot have everything. Whence it follows that the very concept of ... a life in which nothing of value need ever be lost or sacrificed ... is not merely utopian, but incoherent.”\(^{311}\) Montesquieu suggested some two centuries ago in *De l’esprit des lois* that the greatness of genius may reside in knowing which circumstances call for uniformity, and which for differences.\(^{312}\) Still greater genius may be required to accommodate the goals of uniformity and difference simultaneously in the European Union, or to acknowledge that they are not amenable to simultaneous accommodation.