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Against a European Civil Code

*Pierre Legrand**

The invention of the new that would not endure the resistance of antinomy would be a dangerous mystification.

Jacques Derrida¹

I propose to heed Nietzsche's advice: 'Handle deep problems like cold baths: quickly into them and quickly out of them.'² The 'deep problem' I wish to address here concerns European legal integration. Specifically, I want to consider a propoundment which is apparently meeting with increasing favour in various political, professional and academic circles: that of a European Civil Code.³ The paradox is noteworthy: while nineteenth-century civil codes ruptured aspects of the commonality that had previously linked continental legal cultures, a civil code, it is now thought by many, will cement a legal unity across European legal cultures. The question is: should the idea of a European Civil Code be supported? My answer is, emphatically: no, it should not. I have divided my argument into three parts.

Europe is plurijural

A comparatist will discern, in today's European Union, two legal traditions referred to by anglophones as the 'civil law' (an imperfect but received designation) and the 'common law.'⁴ Notwithstanding the influences and interferences that have punctuated the incessant dialogue between these two traditions, they are immediately recognisable as discrete and stable discursive formations inviting meaningful reference to them as autonomous epistemological clusters, and permitting the comparatist to dismiss the charge that she is fabricating

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This article owes much to the year I spent as Visiting Professor (*Professeur associé*) at the Université de Paris I (Panthéon-Sorbonne) and the Université de Paris II (Panthéon-Assas) in 1995–96. I have been most fortunate in being able to depend, once again, on Linda Rae Legault's expert guidance in the formulation of the argument. The usual disclaimer applies. Translations are mine.

- 1 Derrida, *L'autre cap* (Paris: Editions de Minuit, 1991) p71 ('L'invention du nouveau qui ne passerait pas par l'endurance de l'antinomie serait une dangereuse mystification'). The author addresses the ongoing process of integration within the European Union.
- 2 Nietzsche, *Die fröhliche Wissenschaft* (Stuttgart: Kröner, 1976) No 381, p 299 (originally published in 1882) ('[I]ch halte es mit tiefen Problemen wie mit einem kalten Bade — schnell hinein, schnell hinaus').
- 3 eg Resolution [of the European Parliament] on Action to Bring into Line the Private Law of the Member States, Off J EC 1989 C158/400 (26 May 1989); Resolution [of the European Parliament] on the Harmonization of Certain Sectors of the Private Law of the Member States, Off J EC 1994 C205/518 (6 May 1994). Both resolutions call for a 'European Code of Private Law.' See also Hartkamp *et al* (ed), *Towards a European Civil Code* (Nijmegen: Ars Aequi Libri, 1994); Lando, 'Principles of European Contract Law' (1992) 56 *RabelsZ* 261; Gandolfi, 'Pour un code européen des contrats' [1992] *Revue trimestrielle de droit civil* 707; Gandolfi, 'Per la redazione di un "codice europeo dei contratti"' [1995] *Rivista trimestriale di diritto e procedura civile* 1074.
- 4 I regard the Scandinavian countries as forming part of the civil law world, if as peripheral constituents: eg Sundberg, 'Civil Law, Common Law and the Scandinavians' (1969) 13 *Scandinavian Studies in Law* 179.

a reductionist differentiation.⁵ While, as far as the two legal traditions are concerned, the differences between them predominate over their similarities, they each contain within themselves a range of legal cultures whose similarities *inter se* outweigh their differences. Specifically, the civilian legal cultures represent diverse states of equilibrium (or different stable solutions) on the theme of the Gaian institutional system — a condition which differentiates them, as a group, from common law jurisdictions which, as a group, do not offer any meaningful variation on the Gaian institutional theme.⁶

The notion of 'legal tradition' implies, among other features, an idiosyncratic cognitive approach to law. In other words, there have developed, and there exist, both a civil law and a common law *mentalité* — two different ways of thinking about the law, about what it is to have knowledge of law and about the role of law in society.⁷ For example, the two legal traditions differ in their understanding of facts, rules and rights. Moreover, they foster different views of the nature of legal reasoning, of the role of systematisation and of the management of historical time.⁸ An important feature of the civilian's contemporary epistemological construct (although not a necessary one as Denmark, Finland and Sweden continue to remind us) is the civil code. The code, as a purportedly self-contained and self-referential system, illustrates the deep-seated conviction held by civilian jurists that the lived experience ought no longer to be privileged (codes have 'a Spartan quality that is unforgiving of spontaneity and insensitive to the foggy or the strange'⁹), that the lived experience can be reduced to propositional knowledge in the form of a

5 Perhaps an analogy can assist the refutation of the view that the identification of two legal traditions within the European Union is but the outcome of a theoretical construction. Let us suppose that I have in front of me this morning's editions of *The Times* and the *Frankfurter Allgemeine*. Let us assume, further, that I choose to focus on the main article on p3 in each newspaper and that I decide to consider every fifth sentence within that article. I will soon be identifying what I will regard as regularities or patterns with respect, for example, to the capitalisation of nouns and the location of verbs within sentences. I will also conclude that, as far as these two grammatical features are concerned, the two newspapers (or, rather, the languages they use) differ. In a sense, of course, I am constructing these differences, for they are based on my understanding of what a capital letter, a noun and a verb are. Yet these differences must also be acknowledged to exist in a meaningful way before I ever come to them and pretend to elucidate them. In other words, the differences must be assumed to be there even before my perceptual or interpretive apparatus is engaged. For instance, words in the English and German languages are arranged in a certain order in advance of when I come to them with my view of what 'order' is, that is, even before I purport to incorporate them into my cognitive world. While the differences may need me to come to light and to come to light as part of a particular explication, they do not need me to exist. *Is there not noise when a tree falls in the forest without anyone there to hear it?* The same must be true of the differences between the civil law and common law worlds. Before the comparatist ever comes to the study of legal traditions, there are centuries of history that have, independently from her construction, produced differences between the civil law and common law traditions that are as recognisable as those between the German and English grammars.

6 For the importance of the thought of Gaius in Western legal history, see generally Kelley, 'Gaius Noster: Substructures of Western Social Thought' (1979) 84 *Am Histor Rev* 619; Watson, 'The Importance of Nutshells' (1994) 42 *Am JCL* 1.

7 I am aware of how legal cultures from civilian jurisdictions can differ among themselves. Indeed, the opposite view would be untenable if one accepts, as I argue one must, the interconnectedness between law and society, between law and culture. Moreover, there are clearly differences at the level of legal cultures within the same jurisdiction. I am not, therefore, suggesting that the notion of *mentalité* is monolithic either within a given legal tradition or within a legal culture. A rewarding ground of investigation for the comparatist is, indeed, to elucidate *para-mentalités*.

8 I explore these epistemological distinctions in my 'European Legal Systems are not Converging' (1996) 45 *ICLQ* 52, 64–78. For a reflection on the way in which an awareness of discrepant cognitive formations must inform the theory and practice of comparative legal studies, see my 'How to Compare Now' (1996) 16 *LS* 232.

9 Schneider, *Culture and Enchantment* (Chicago: University of Chicago Press, 1993) p40.

panoptic and autarkic body of rules of law,¹⁰ and that it is useful to organise the lived experience (and the law) in this way.¹¹ Thus, the civilian proceeds to reason from the social and legal perspective embodied in the *code*. At variance with the civil law's distinctive manner of arranging reality which goes so far as to aim to account for the entire field of *possibility*, the common law, for its part, offers a *challenge* to the effort of structuring the world into a single determinate rationalisable order. I connote the idea of 'contest' advisedly, for the common law has largely fashioned itself through a strategy of resistance to civil law hegemony.¹²

Early traces of reaction to civilian thought appear in Bracton, who registered the opposition between 'Englescheria' and 'Francigena.'¹³ More than four centuries later, an anonymous tract — which the catalogue of the Bibliothèque Nationale de France in Paris attributes to Coke — would also attempt to define the common law by emancipating it from its oppositional form so that it could be regarded as indigenous rather than as a by-product of an early configuration of the civil law tradition. Hence the pamphlet's bold title: *Argumentum Anti-Normannicum: or an Argument proving, from Ancient Histories and Records, that William, Duke of Normandy, Made no absolute Conquest of England by the Sword; in the sense of our Modern Writers*.¹⁴ This argument, and others like it,¹⁵ show how the irrecusable (and irreducible) epistemological chasm arising between the two legal traditions represented within the European Union is not the outcome of a purely stochastic process. On the contrary, *it has been wanted* in the sense that it is the result of a doctrine of refusal expressed by English lawyers who lived before us. Indeed, it is that sentiment of dissentience that led common law lawyers to *suppress* actual civilian influences on the common law in order better to affirm its Englishness — a contradiction which is already apparent in Glanvill.¹⁶ Yet Johan Huizinga observes with characteristic perspicacity that any fantasy sustained by a culture is a valuable clue for coming to know that culture;¹⁷ the energies directed towards imagination, projection and a sense of idealised community also tell a story.¹⁸ Thus, justified or

10 For a typical view, see Bernardi, *Nouvelle théorie des lois civiles* (Paris: Garnery, 1801) p 70: 'Suppose an individual is placed successively in all the situations to which human life is susceptible and in all the relationships in which he may be with others, then we will see arising from this a kind of legal novel which will reveal the relationships of this individual with others and the rules to which they are subject.' ('Qu'on suppose un individu placé successivement dans toutes les situations dont la vie humaine est susceptible, et dans tous les rapports où il peut être avec ses semblables, on verra naître de là une espèce de roman légal, qui fera connaître les relations de cet individu avec ses semblables, et les règles auxquelles elles sont soumises'). Bernardi, an earnest advocate of civil codification in France, regarded the civil code as 'the most excellent book': *ibid* p 50 ('le livre par excellence').

11 For a reflection on the significance of civil codes within the civilian *mentalité*, see generally my 'Antiqui juris civilis fabulas' (1995) 45 Univ Toronto LJ 311. See also my 'Strange Power of Words: Codification Situated' (1994) 9 Tulane ECL Forum 1.

12 In this sense, the common law occupies the civil law's 'negative space.' For the notion of 'negative space,' see Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (New York: Vintage, 1989) p 63.

13 Bracton, *On the Laws and Customs of England* (ed Woodbine, trans Thorne, vol II) (Cambridge, Mass: Harvard University Press, 1968) pp 379–382 (originally published c 1230).

14 The document was published in London by John Darby in 1682.

15 For an erudite exposition of the common law's willed assertion of indigenoussness with substantial reference to relevant historical materials, see Goodrich, *Oedipus Lex: Psychoanalysis: History, Law* (Berkeley: University of California Press, 1995), and my review [1996] Cambridge LJ 372.

16 Glanvill, *De Legibus et Consuetudinibus Regni Angliae* (ed Woodbine) (New Haven: Yale University Press, 1932) p 184 (originally published c 1187), where the editor notes, for example, that Glanvill's prologue is often a silent imitation of the foreword to Justinian's Institutes and shows that the text borrows, without attribution, well-known passages from the Digest.

17 Huizinga, *The Autumn of the Middle Ages* (trans Payton and Mammitzsch) (Chicago: University of Chicago Press, 1996) p 62 (originally published in Dutch in 1919).

18 For a general reflection on the necessary and constitutive role of the unconscious in the delineation of political identity and destiny, see Rose, *States of Fantasy* (Oxford: Oxford University Press, 1996).

not, the assertion of difference by the common law constitutes the foundation of the meaning which the common law ascribes to itself as common law. Not surprisingly, the French historian, Fernand Braudel, tells us that 'a civilisation is characterised much more by what it disdains, by what it does not want, than by what it accepts.'¹⁹

There is an array of reasons, largely historical and psychological, explaining why a legal community is (or is not) attracted to a particular genre of cultural product. It is clear, however, that the specific cultural form that is retained — such as a civil code — has significant connections with the wider social order within which a legal community operates. For one thing, '[k]nowledge orders events [and] [d]ifferent forms of knowledge engender different ordering schemes.'²⁰ Therefore, matters of epistemology are not just questions of abstract reasoning; they also raise — and perhaps primarily so — issues of social order. Whether as cause or effect, the absence of a civil code in England, for example, is not unrelated to sociological findings that the English 'feel definitely uncomfortable with systems of rigid rules,' that there is even to be found in England 'an emotional horror of formal rules,' and that the English 'pride themselves that many problems can be solved without formal rules.'²¹ After all, as Geoffrey Wilson aptly observes, '[i]t cannot ... be accidental that both Anglo-Saxon reasoning in general and "common law" reasoning in particular should be regarded by outsiders as pragmatic.'²² And, whether as cause or effect, the presence of a civil code in Germany is not foreign to sociological findings that the Germans 'have been programmed since their early childhood to feel comfortable in structured environments' and that they 'look for a structure in their organizations, institutions, and relationships which makes events clearly interpretable and predictable' to the point where 'even ineffective rules satisfy [the] people's emotional need for formal structure.'²³ The French political geographer, André Siegfried, embraces in a succinct formula important aspects of the difference I wish to emphasise: 'We believe in written law, in Roman law, a law with sharp edges, based on suspicion, realism, pessimism which contrasts with English law based on custom and trust.'²⁴

The depth of the fundamental differentiation between the civil law and common law *mentalités* is possibly best captured if we approach them as two *moralités*. In

19 Daix, *Braudel* (Paris: Flammarion, 1995) p 279 ('Une civilisation se caractérise beaucoup plus par ce qu'elle dédaigne, par ce dont elle ne veut pas, que par ce qu'elle accepte': being the transcript of an interview with Jean-Claude Bringuier broadcast in August 1994). Cf Frye, *The Critical Path: An Essay on the Social Context of Literary Criticism* (Bloomington: Indiana University Press, 1971) p 105: 'A society enriches itself by what it includes; it defines itself by what it excludes.'

20 Feyerabend, *Farewell to Reason* (London: Verso, 1987) p 111.

21 Hofstede, *Cultures and Organizations* (London: McGraw-Hill, 1991) pp 145, 121 and 121, respectively.

22 Wilson, 'English Legal Scholarship' (1987) 50 *MLR* 818, 830–831.

23 Hofstede, n 21 above, pp 121, 116 and 121, respectively.

24 Siegfried, 'Introduction générale' in Siegfried (ed), *Aspects de la société française* (Paris: LGDJ, 1954) p 21 ('Nous croyons au droit écrit, au droit romain, un droit aux arêtes dures, fondé sur la méfiance, le réalisme, le pessimisme, qui fait contraste avec le droit anglais fondé sur la coutume et sur la confiance'). Cf Maurois, *Mes songes que voici* (Paris: Grasset, 1933) p 288: 'From Rome, and perhaps also from a long pastoral life, France holds a taste for legal exactitude, for precise phrases and texts. England leads her political life without a constitution, renders justice without a code. France wants written charters and signed guarantees. The Englishman holds as dangerous the pretension to contain a universe featuring unforeseeable floods. The Frenchman believes in plans, in symmetrical edifices, in firm and well-conceived designs.' ('De Rome, et peut-être aussi d'une longue vie paysanne, la France tient le goût de l'exactitude juridique, des formules et des textes précis. L'Angleterre mène sa vie politique sans constitution, rend la justice sans code. . . . La France veut des chartes écrites et des garanties signées. L'Anglais tient pour dangereux de prétendre endiguer un univers aux crues imprévisibles. Le Français croit aux plans, aux édifices symétriques, aux desseins fermes et bien conçus').

this context, Michael Oakeshott's distinction between what he regards as 'the two forms which ... compose ... the moral life of the Western world' is apposite.²⁵ The one form of moral life is described by Hanna Pitkin as 'reflective, rationalistic, principled, and articulate.'²⁶ Oakeshott outlines its workings thus: 'the rule or the ideal is determined first and in the abstract ... This task of verbal expression ... is not only to set out the desirable ends of conduct, but also to set them out clearly and unambiguously and to reveal their relations to one another. ... For the right or the duty is always to observe a rule or realize an end, and not to behave in a certain concrete manner.'²⁷ In its other form, argues Oakeshott, 'the moral life is a *habit of affection and behaviour*; not a habit of reflective *thought*, but a habit of *affection and conduct*. ... There is, on the occasion, nothing more than the unreflective following of a tradition of conduct in which we have been brought up.' How, then, is this particular form of the moral life acquired? 'No doubt ... what is learnt (or some of it) can be formulated in rules ...; but [we do not], in this kind of education, learn by learning rules What we learn here is what may be learned without the formulation of its rules.' Oakeshott adds: 'the sort of moral education by means of which habits of affection and behaviour may be acquired ... gives the power to act appropriately ... but ... does not give the ability to explain our actions in abstract terms'; moreover, 'the habits of conduct which compose [a moral life in this form] are never recognized as a system.' As Pitkin observes, the two *moralités* are constituted in different ways. In the former case, it is 'deductive' in the sense that the rules that structure it are posited prior to the practices that apply it. Not so in the latter case where no rules pre-exist to the practice. What regularities arise emerge out of the practice itself and get their meaning from that practice.²⁸

The civil law and common law must, therefore, be seen as two discrete epistemological formations with the latter having elected, to borrow from Oakeshott once more, not to formulate itself as rules (although the possibility to do so was technically open to it) and not to fashion itself as a system, that is, *to take the road not travelled*.²⁹ These epistemologies are conditioned by, and constantly reinforce in their turn, deeply-embedded world-views within the societies in which they have developed to the point where there can be found — unsurprisingly, I should think — a pattern of congruence between a legal culture and a culture *tout court*.³⁰ A recent

25 Oakeshott, *Rationalism in Politics* (London: Methuen, 1962) p 61.

26 Pitkin, *Wittgenstein and Justice* (Berkeley: University of California Press, 1972) p 52.

27 Oakeshott, n 25 above, pp 66–67. The quotations that follow in the body of the text are all from *ibid* pp 61–64 (original emphasis).

28 Pitkin, n 26 above, p 52.

29 The fact that the two legal traditions have between them a certain number of describable relationships and that they can, *in this sense*, be seen as an inter-epistemological entity does not deprive them of their fundamental epistemological individuality. One such connection is underlined by Geoffrey Samuel who notes that, within both traditions, the law is concerned with relations between persons or between persons and things: see Samuel, *The Foundations of Legal Reasoning* (Antwerp: Maklu, 1995) p 28.

30 As culture shapes legal culture, legal culture fashions culture. How could it be otherwise when law is connected in a myriad of ways to the development of other discursive systems to the extent that '[a]ny culture is thoroughly saturated with law': Marcic, *Rechtsphilosophie* (Freiburg: Rombach, 1969) p 43 ('Alle Kultur vom Grund auf ist rechtlich durchtränkt'). See also Thompson, *The Poverty of Theory* (London: Merlin Press, 1978) p 288: 'I found that law did not keep politely to a "level," but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theater of Tyurn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.'

discussion of physical experimentation in France and England, showing that the credibility of experimental accounts has historically relied on different criteria in the two countries, affords a good example of the interdependencies that can be established between law and other fields of knowledge within a given culture.³¹

For the French, an experimental account produced in the eighteenth century would be found convincing only if it had led its author to the formulation of a scientific law. The expectation within the interpretive community was that scientific measurements ought to reveal regularities sufficiently persistent to adopt the form of laws. The need to privilege this argumentative strategy regularly required physicists 'to do violence to the narrative of measurements so that it would obey the discourse of the law.'³² In sum, for French physicists such as Coulomb, Laplace or Lavoisier, 'physical reality *can* and *must* be described in terms of simple, general, universal and immutable laws.'³³ The English, for their part, insisted that the persuasiveness of an experimental narrative must depend on the way in which it makes it possible for others to replicate the empirical demonstration on which it reports. Thus, an account would be regarded as credible only if it contained all the information, even in its finest detail, that would permit replication of the relevant experiment. Specifically, this concern for repetition led English physicists to use simple instruments, since an instrument could not be considered as making proof if it could not be reproduced. Accordingly, when Cavendish felt constrained to resort to a complex instrument for his work on electricity, he promptly apologised. To summarise: 'on the one hand the oracles of natural law, eternal and universal, on the other the high priests of empirical *savoir faire*, able to generate everywhere and always the ritual of the production of the factual experiment, each time identical to itself.'³⁴ Let us now consider the way in which the French and English legal cultures address the matter of factual data, and replicate the differentiation between 'guardians of the law and masters of the fact' just identified among physicists.³⁵

In France, as any decision of the Cour de cassation makes apparent, the aim is rapidly to eliminate any trace of the conjuncture and to establish an idea or a concept. Therefore, the facts are immediately inscribed within a pre-existing theoretical order where they soon vanish. It is that order itself — and certainly not the facts — which is regarded as the fount of legal knowledge; the emphasis is on universals. Let us take what is possibly the most famous French judgment in the area of civil liability this century, the *Jand'heur* decision.³⁶ Who remembers the facts of *Jand'heur*? Who can say, for example, whether a man or a woman, a child or an adult, was struck by the vehicle? Who can say whether the vehicle — a car or a van — was driven by an employee in the course of employment or by an individual in a private capacity? What French jurist recalls those facts today?

31 See Licoppe, *La formation de la pratique scientifique: le discours de l'expérience en France et en Angleterre (1630–1820)* (Paris: Editions La Découverte, 1996) pp 299–304.

32 *ibid* pp 293–294 ('faire violence au récit des mesures pour qu'il vienne se soumettre au discours de la loi').

33 *ibid* p 293 ('une réalité physique pouvant et devant être décrite en termes de lois, simples, générales, universelles et immuables').

34 *ibid* p 304 ('D'un côté les oracles de la loi naturelle, éternelle et universelle, de l'autre les grands-prêtres du savoir-faire empirique, capables de susciter partout et toujours le rituel de la production du fait d'expérience, chaque fois identique à lui-même').

35 *ibid* p 292 ('Maîtres du faire et gardiens de la loi').

36 *Ch réun*, 13 February 1930, D.P.1930.1.57, note Georges Ripert, *rapport* Le Marc'hadour; S.1930.1.121, note Paul Esmein. It is, of course, unusual for a French civil case to be known by one of the parties' names, an occurrence which attests to the decision's exceptional significance.

Much more importantly, what French jurist considers those facts as *relevant*? The facts were never more than stepping-stones on the way to a normativisation of the problem at hand. The *Jand'heur* decision, therefore, soon assumed a normative life of its own at the conceptual level. Nowadays, whether for lawyers, professors or students, it stands for a normative proposition and for nothing else. In the process, the facts which provided the Cour de cassation with this interpretive occasion have simply been obliterated from the French legal imagination.

For the common law lawyer, however, any construction of an ordered account of the law firmly rests on the disorder of fragmented and dispersed facts.³⁷ A common law decision is inscribed in its facts and can never be dissociated from them so that, whenever a case is called into active service again, the facts on which the earlier judgment was based will be regarded as forming an integral part of the judgment itself. For example, when the House of Lords, in the 1995 case of *White v Jones*,³⁸ reflected upon the relevance of the 1979 decision in *Ross v Caunters*,³⁹ it immediately noted that the earlier case had involved a situation where 'the solicitor did nothing at all for a period of time, with the result that the testator died before his new testamentary intentions could be implemented in place of the old.'⁴⁰ In other words, that fact was regarded as inseparable from the judgment in *Ross v Caunters*. Another illustration is offered by the way in which the House of Lords treated the nineteenth-century decision of *Rylands v Fletcher* in its 1993 decision of *Cambridge Water Co v Eastern Counties Leather plc*.⁴¹ The earlier case, it was then observed, had been 'concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape.'⁴² At common law, the facts are therefore inextricably tied to the life of the case so that a decision never sheds its particularistic features. As Geoffrey Samuel writes, in English law '[I]legal development is not a matter of inducing rules, terms or institutions out of a number of factual situations and applying these rules, terms or institutions to new factual situations. Rather it is a matter of pushing outwards from within the facts themselves. It is a matter of moving from one *res*, say a public highway, to another *res* like private property.'⁴³

The civil law is, thus, best understood as a law of the *system*, where the emerging contingencies of life readily find themselves being subsumed under one or other of the available categorical umbrellas with all the confidence that comes from the attribution of *significance* to the act of categorisation and to the criteria allowing for a separation of the categories. On the contrary, the common law does not operate *sub specie scientiae*. It emphatically remains a law of the *item* where the fact continues to matter above all else. In other words, the civil law is centripetal in that it submits to the order of the posited text of law from which it gets its warrant and to which, therefore, it always seeks to return. The common law reveals a different rhetorical strategy, for it studies antecedent discourses (the 'precedents') strictly as a propaedeutics towards the elaboration of other, present discourses.

37 The disorderly facts in question are only available through law reports which, until the creation of the Incorporated Council of Law Reporting in 1864, were themselves in a most disorderly state. See generally Munday, 'Bentham, Bacon and the Movement for the Reform of English Law Reporting' (1992) 4 *Utilitas* 299.

38 [1995] 1 All ER 691.

39 [1979] 3 All ER 580 (Ch).

40 n 38 above, 700 (Lord Goff).

41 [1994] 1 All ER 53.

42 *ibid* 70 (Lord Goff).

43 Samuel, n 29 above, p 195.

What came before is relevant in as much as it fulfils an exemplificatory function. Common law discourse is not second-degree discourse nor a gloss. Rather, it is its own discourse constantly broadening its field by moving away from an earlier (equally self-contained) discourse. The common law is centrifugal.

The different view of what it is to have knowledge of the law harboured by civilians and common law lawyers has not been affected by increasing European legal integration at the level of rules and institutions. While jurists may not have escaped an ‘intensification of consciousness of the world as a whole,’⁴⁴ they still come to the interpretation of the law with an idiosyncratic ‘pre-understanding’ — what Gadamer calls a ‘*Vorverständnis*.’⁴⁵ These pre-judices (I use the term in its etymological, not in its negative, or acquired, sense) are actively forged through the schooling process — the universe of meaning — in which law students are immersed and through which they learn the values, beliefs, dispositions, justifications and the practical consciousness that allows them to consolidate a cultural code, to crystallise their identities and to become professionally socialised. Indeed, even before they reach law school, students will have assimilated a cultural profile — whether English or Italian or German — which will colour in a most relevant way their legal education experience, and their internalisation of the narrative and mythology to which they will be exposed. Each English child, for example, is a common-law-lawyer-in-being long before she even contemplates going to law school. As a result, and irrespective of the development of a common corpus of posited law around the Treaty of Rome, common law lawyers continue to think about law as common law lawyers and civilians continue to think about law as civilians, a fact which calls to mind Feyerabend’s observation: ‘It is true that nations . . . frequently establish some kind of contact, but it is not true that in doing this they create, or assume, a “common metadiscourse” or a common cultural bond.’⁴⁶ There remains, in each of the two legal traditions represented within the European Union, an irreducible element of autochthony constraining the epistemological receptivity to globalisation and, therefore, limiting the *possibility* of effective legal integration itself.⁴⁷

Why European plurijurality is under threat

Beyond translating the civilians’ profound commitment to the aestheticisation of the legal and their predictable support for familiar legal forms, the idea of a European Civil Code is principally the product of two phenomena, both of which must be resisted.

Administrative convenience

The proposal in favour of a European Civil Code reflects the advance of a European Union bureaucracy consisting largely of uprooted civil servants often entertaining an ambivalent relationship with their national legal culture. Not

44 Robertson, *Globalisation* (London: Sage, 1992) p 8.

45 The German word appears in Gadamer, *Wahrheit und Methode* (Tübingen: J.C.B. Mohr, 4th ed, 1975) p 252.

46 Feyerabend, n 20 above, p 274.

47 See generally my ‘Legal Systems in Western Europe: The Limits of Commonality’ in Jagtenberg, Örcüü and de Roo (eds), *Transfrontier Mobility of Law* (Deventer: Kluwer, 1995) pp 63–84.

surprisingly, therefore, legal cultures are soon instrumentalised and made subservient to the governing ethos of capital and technology which itself thrives on abstract generality, on false universals, on illusory stability and predictability (Weber's *Beamtenstaats* rides again!). Indeed, the European Union offers a particular articulation of universality which is almost entirely market-oriented and economic, emphasising trade and investment, and the economies of production and distribution. In that spirit, the prevailing concern is for the systematic unification of all that is perceived to be calculable and controllable. An illustration of this ethically deficient globalism, or uncreditable cosmopolitanism, is the proposal in favour of a European Civil Code which is, thus, best apprehended as the agent of a dogma of (assumed) administrative efficiency for which particularisms undermine legal regulation. It is the support of a process of normalisation that is, in effect, a process of subjugation of the local which becomes stigmatised as deviant.⁴⁸

Fear

The promotion of a European Civil Code also reflects fear which manifests itself in at least two ways. There is fear of what is unknown. For most civilians, the common law tradition remains a curiosity. And civilians react to the unknown in the way that can be expected: they refuse to question it or to allow themselves to be questioned by it. The tendency is, therefore, to ignore the unknown or to minimise its impact. Cognitive psychology teaches us that the quest for similarities and differences is tied to the recognition by the individual of a certain image of herself and with a measure of self-assertion. Thus, difference will be better accepted if it allows the enhancement of the individual in her own eyes and (seemingly) in the eyes of others. This is why similarity by projection or projective identification, which consists in attributing to another features that we confer on ourselves, is the more current approach to cultural interaction.⁴⁹ The civilian, like any individual, is better able to accept the idea that the common law lawyer belongs to *her* world than admit that she has something of the common law lawyer in her. The result is a constant attempt by civilians to stress the imbrication of the civil law in the common law world at different stages of the latter's history and thereby to attenuate the common law's claim to differentiation.⁵⁰

But fear adopts another form which is well described in a French contribution to the *Harvard Law Review* appearing shortly after the Great War: 'divergences in laws cause other divergences that generate unconsciously, bit by bit, these misunderstandings and conflicts among nations which end with blood and

48 Disappointment with the European Union's bureaucracy is expressed even by commentators who are sympathetic to the idea of extensive legal integration in Europe. See eg Zimmermann, 'Civil Code and Civil Law: The "Europeanisation" of Private Law Within the European Community and the Re-Emergence of a European Legal Science' (1994-95) 1 *Columbia J Euro Law* 63, 73-80.

49 eg Vinsonneau, 'Appartenances culturelles [,] inégalités sociales et procédés cognitifs en jeu dans les comparaisons inter-personnelles,' *Bulletin de Psychologie* (1994) vol XVIII, No 419, p 422. For a philosophical reflection reaching parallel conclusions, see Gadamer, *Truth and Method* (trans Weinsheimer and Marshall) (London: Sheed & Ward, 2nd ed, 1993) p 14 (originally published in German in 1960; see n 45 above for the bibliographical reference to the original edition): 'To recognize one's own in the alien, to become at home in it, is the basic movement of spirit.'

50 eg Zimmermann, 'Der europäische Charakter des englischen Rechts' (1993) 1 *Zeitschrift für Europäisches Privatrecht* 4; Graziadei, 'Changing Images of the Law in XIXth Century English Legal Thought (The Continental Impulse)' in Reimann (ed), *The Reception of Continental Ideas in the Common Law World 1820-1920* (Berlin: Duncker & Humblot, 1994) pp 115-163.

desolation.⁵¹ No doubt the same preoccupation animated the German comparatist, Ernst Rabel, as he prefaced the 1949 issue of his *Zeitschrift für ausländisches und internationales Privatrecht*, the first to appear since the end of the Second World War: 'After such fearful turmoil, our age requires more than ever that the West consolidate its law-making powers. We must work with renewed courage toward the reconciliation of needless differences, the facilitation of international trade, and the improvement of private law systems.'⁵² The point of a European Civil Code, then, becomes the taming of international tensions or, to put it more bluntly, the attenuation of the risk of war. The desire to assimilate the common law tradition is thus linked, for civilians, to the fact that nationalist forms, which are associated with a territory, terrify.⁵³

Undeniably, the idea of a European Civil Code is political in the sense that it purports to respond to perceived *political* imperatives.⁵⁴ In the process, it seeks to produce a new separation between the legal-political function and social life.

European plurijurality must survive

The promotion of a European Civil Code effectively represents an attack on pluralism, a desire to suppress antinomy, a blind attempt at the diminution of particularity. Through the ages, there have developed a thousand ways of eliminating 'other' cultures. They all have had in common the desire to institute a unity, that is, a totalitarianism. Culture in the singular always represents an act of power.⁵⁵ What is a European Civil Code if not a project seeking to reduce the diversity of legal discourses within Europe? How can the promotion of a formalistic and conceptualistic model, such as a pan-European civil code, not be understood as reflecting a decision to overlook the point of English exceptionalism

51 Lepaulle, 'The Function of Comparative Law' (1921–22) 35 *Harvard L Rev* 838, 857.

52 Rabel, 'Zum Geleit' (1949–50) 15 *Zeitschrift für ausländisches und internationales Privatrecht* 1 ('Mehr denn jemals, nach einem noch schrecklicheren Wirrsal, braucht unsere Zeit die Zusammenfassung der rechtsbildenden Kräfte des Abendlands. Beherrzter als früher muß an der Ausgleichung grundloser Gegensätze, an der Erleichterung des internationalen Rechtsverkehrs, an der Verbesserung der Privatrechtssysteme gearbeitet werden').

53 Legendre, *Jour du pouvoir: Traité de la bureaucratie patriote* (Paris: Editions de Minuit, 1976) pp 57, 246.

54 This assertion ought not to surprise, for ultimately *all* civil codes are political, as I argue in my 'Strange Power of Words: Codification Situated' (n 11 above). A recent illustration is offered by the 1994 Quebec civil code's insidious marginalisation of the anglophone minority in Quebec as part of a broader political project seeking to achieve the effacement of the anglophone presence from the collective memory of Quebec society. See my 'Civil Law Codification in Quebec: A Case of Decivilianization' (1993) 1 *Zeitschrift für Europäisches Privatrecht* 574; 'The Civil Code of Quebec: Semiotic Musings Around an *accent aigu*' in Kevelson (ed), *Conscience, Consensus and Crossroads in Law: Eighth Round Table on Law and Semiotics* (New York: Peter Lang, 1995) pp 195–214; 'Bureaucrats at Play: The New Quebec Civil Code' (1995) 10 *Brit J Canadian Studies* 52; 'De la profonde incivilité du *Code civil du Québec*,' *Revue interdisciplinaire d'études juridiques* (1996) No 36, p 1.

Attempts to present my argument in a Canadian forum have been rebuffed on three occasions by three law professors, all from McGill University in Quebec, acting as referees for the *Canadian Bar Review* (1994), the *Dalhousie Law Journal* (1994) and *Cité libre* (1995), respectively. I keep on file as much of the relevant correspondence as I have been able to obtain. It is tempting to see in this strongly defensive reaction to my critique of the Quebec civil code a typical case of civilian censorship motivated by a wish to repress certain disturbing facts about a text which, because of its foundational importance for the legal cultures that have adopted it, has traditionally legitimated the civilian's authority within his community. I discuss the centrality of censorship in the civilian tradition in my '*Antiqui juris civilis fabulas*' (n 11 above).

55 De Certeau, *La culture au pluriel* (Paris: Editions du Seuil, 1993) p 213.

which is not to be found in unreflective nationalistic closure as much as in the specificity of a cultural tradition that has wanted to retain (and has wanted to convince itself that it was retaining) its pragmatic and particularistic character in defence against the slide into the strict legal positivism characteristic of continental civilian cultures?⁵⁶ Not everything is acceptable to an interpretive community, for each legal tradition has its own special rhetorical force: it persuades through an idiosyncratic epistemology and style. The idea of a rigid system of rules conceived as a set of abstract structures capable of functioning in a world distinct from that of social reality, in a world where ‘the law becomes a sort of reality imposed upon the social data, shaping it, and becoming in the end more “true” than the facts,’⁵⁷ never seduced common law lawyers who simply cannot relate in the same way to the tropes of dogmatic certitude and truth.⁵⁸ Historically, the common law evolved as a remedial complex centred upon the importance of pleadings.⁵⁹ The basis of the English writ was a procedural structure encompassing a factual situation against which the potential plaintiff would compare the facts of his dispute. If the facts matched, he would secure access to the royal courts.⁶⁰ Thus, the common law aimed to remedy any wrong correctly presented, and the courts sought to do justice between contestants through the drawing of *factual* isomorphs.⁶¹ English judges continue to disclaim any interest (or any competence) in rationalising the law as a system of posited rules.⁶² The common law *mentalité* remains embedded in the mechanics of dispute resolution and in its factual categories of thought.⁶³ There is no *Wissenschaft* at common law!⁶⁴

The power of a European Civil Code would lie not only in its ability to provide an officialised construction of reality, but also in its capacity to limit alternative

56 Arnaud, *Pour une pensée juridique européenne* (Paris: Presses universitaires de France, 1991) p 152.

57 Ellul, *Histoire des institutions*, vol III: *Le Moyen Age* (Paris: Presses universitaires de France, 9th ed, 1982) p 27 (‘Le droit devient une sorte de réalité imposée au donné social, le mettant en forme, et finissant en somme par devenir plus “vrai” que les faits’).

58 Indeed, Michael Foley refers to ‘an instinctive, and even fearful, acceptance of genuine indeterminacy’ in the English people: Foley, *The Silence of Constitutions* (London: Routledge, 1989) p 114.

59 There are many narratives. For a recent overview, see Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Oxford University Press, 1991) pp 61–79, 257–289.

60 Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 2nd ed, 1981) pp 33–36.

61 In French law, however, the argument from symmetry between posited rules may carry considerable weight. For an illustration of the value of rule-based symmetry to a leading French jurist, see note Jacques Ghestin, *sub Ass plén*, 29 March 1991, J.C.P.1991.II.21673, *concl* D.H. Dontenville.

62 *eg ex parte King* [1984] 3 All ER 897, 903 (CA, Griffiths LJ); *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, 824 (HL, Lord Simon).

63 This point shows, incidentally, why it is unwarranted to infer a convergence between the civil law and common law worlds on the basis that cases have assumed new prominence in the former tradition. A ‘case’ will never carry the same cognitive significance for a German jurist as it does for an English lawyer. A judicial decision at common law textualises aspects of Englishness which themselves are a function of an intricate construct involving a sense of national, religious, linguistic and geographic identity. Only if we refuse to see a case as a quasi-encyclopaedic cultural formation transporting historical and social accretions and only if we adopt a desultory instrumentalistic view of the law which leads us to draw nice clear lines between ‘legal’ questions and political, religious or social issues can we find evidence of a trend towards convergence of legal traditions on the ground of resort to judicial decisions.

64 *eg* Stein, ‘The Tasks of Historical Jurisprudence’ in MacCormick and Birks (eds), *The Legal Mind: Essays for Tony Honoré* (Oxford: Oxford University Press, 1986) p 293. For an example of a typical misreading of the common law tradition where it is observed, without any supporting evidence, that, along with French, German and Italian jurists, common law lawyers perceive their work as ‘scientific,’ see Amselek, ‘Propos introductif’ in Amselek (ed), *Théorie du droit et science* (Paris: Presses universitaires de France, 1994) p 8.

visions of social life. Pierre Bourdieu aptly refers to this phenomenon as the 'effet de codification', or 'codification effect'; the symbolic ascendancy of the code finds itself amplified on account of the fact that codification involves the homologation through publicisation of a permanent form privileging the representation of concrete situations in a language of specific legal consequence that purports to be at the same time a language of general coherence. In this sense, the rhetorical strength, or '*vis formae*,' of a code, formalised and universalised (and formally universalised),⁶⁵ is infinitely more potent than that of any inevitably discontinuous series of directives issuing from the European Commission. Because a code 'encourages a sense of closure, a sense that what is found in a text has been finalised, has reached a state of completion,'⁶⁶ the collection of legal norms within the new code would monopolise legal discourse in ways that would arbitrarily, but effectively, exclude alternative views of justice. Indeed, it has never been acknowledged within the civilian community that a critic can accomplish opportune and important acts beyond acceptance of the articles of the code as *articles of faith*, that is, as establishing the Truth of the law (and of the world). While the goal of the civilian is to capitalise on the phenomenon of institutionalisation which favours collective adherence to the Text, exegetical loyalty denies that critique can perform a dynamic contrapuntal function in the face of established dogma.⁶⁷ It confines the field of legitimate interpretation to a 'reworking [of] the material of others.'⁶⁸ To observe, in the language of Roland Barthes, that 'as soon as there is somewhere a mutation of the discourse, there ensues a vulgate and its exhausting procession of immobile sentences,'⁶⁹ leaves open the question of what, in the face of the grim pageant of conformity and acquiescence, would happen to 'the uncodified, the enchanted, the intractable, the histrionic'?⁷⁰ I argue that the common law rationality would rapidly and decisively find itself marginalised and that common law lawyers would soon be expected to transfer their basic epistemological loyalties to the civilian model — an intellectual formation that remains fundamentally inconsonant with their sense of justice. The communion assumed to be epitomised by a European Civil Code would in fact represent, beyond the sum of words, the excommunication of the common law way

65 Bourdieu, 'Habitus, code et codification,' *Actes de la recherche en sciences sociales* (September 1986) No 64, pp41-43.

66 Ong, *Orality and Literacy: The Technologizing of the Word* (London: Routledge, 1983) p 132. I am transposing the author's observation with respect to print.

67 For an exploration of the sacralisation of the civil code by its interpretive communities, see my '*Antiqui juris civilis fabulas*' (n11 above) and the references cited therein. See also Oudot, *Observations sur l'enseignement du droit civil en France* (Paris: Joubert, 1844) p 10; Llewellyn, *The Case Law System in America* (ed Gewirtz, trans Ansaldi) (Chicago: University of Chicago Press, 1989) p 86 (originally published in German in 1933), who regards the sanctification of the code 'almost as a matter of sociological necessity'; Batiffol, *Problèmes de base de philosophie du droit* (Paris: LGDJ, 1979) p 292, where the author identifies among judges and commentators 'a preoccupation of loyalism towards the legislator' ('un souci de loyalisme à l'égard du législateur'); Constantinesco, *Traité de droit comparé*, t1: *Introduction au droit comparé* (Paris: LGDJ, 1972) p 127, who notes that 'the phenomenon is known and verified everywhere' ('(c)'est là un phénomène connu et vérifié partout'); Goyard-Fabre, *Essai de critique phénoménologique du droit* (Paris: Klincksieck, 1972) p 32 (note 79), who observes that codification, because it marks the 'immobilisation of all the elements within a legal system,' is 'sterilising' ('l'immobilisation de tous les éléments d'un système juridique'; 'stérilisante').

68 Goody, *The Domestication of the Savage Mind* (Cambridge: Cambridge University Press, 1977) p 117.

69 Roland Barthes par Roland Barthes (Paris: Seuil, 1975) p 57 ('dès qu'il y a quelque part une mutation du discours, il s'ensuit une vulgate et son cortège épuisant de phrases immobiles').

70 Sontag, 'Writing Itself: On Roland Barthes' in *A Susan Sontag Reader* (New York: Vintage, 1983) p 429.

of understanding the world and the relegation to obsolescence of its particular insights. Ironically, the officialised exclusion of the common law rationality would be happening at a time when the interaction between civil law and common law cultures is possibly more sustained than at any other moment in European history, and at a time when English, the modern language of the common law,⁷¹ is fast becoming the unofficial European *lingua franca*. The repudiation of the common law would also leave common law lawyers at odds with the culture they inhabit which would continue to articulate its moral inquiry according to traditional standards of justification. In effect, common law lawyers would find themselves compelled to surrender cultural authority and to accept unprecedented effacement *within their own culture*.

Specifically, the proposal in favour of a European Civil Code can be criticised on four grounds.

Arrogance

To promote the adoption of a European Civil Code is arrogant, for it suggests that the civilian representation of the world is more worthy than its alternative and is, in short, so superior that it deserves to *supersede* the common law's world-view.⁷² The obvious objection arises: what recommends that particular discursivisation of reality over others? It would be more heuristic to claim that civil law and common law, as two competing forms of epistemological inquiry which develop in part beneath consciousness, are two modes of knowledge production potentially able to offer equally plausible accounts of the world. We can think of them as two languages. Is it clear that understanding would be promoted if the variety of language present within the European Union was replaced by a commonality, say, through a merger of French, English and German?

Reality cannot be apprehended in its quiddity which remains inscrutable; in fact, the etymology of the term informs us that reality is precisely that thing (*res*) which ultimately *resists* understanding.⁷³ Reality can only be constructed, not found. The meaning of any object or event is a function of the perspective or frame of reference in terms of which the object or event is *ascribed* meaning. Different languages, because they confront it in different ways, thus offer different accounts of reality. No language can pretend to exhaust reality; no language offers a standpoint from which reality would be wholly visible. Rather, each language represents a choice which conditions the answers to be given by reality. Although they all address reality, languages can never be reduced to a single description of it. Imagine, for example, a spherical, bouncy object. An anglophone will call it 'ball.' A francophone will call it 'balle,' *but only if it is small*. Otherwise, she will refer to it as a 'ballon.' In other words, there is one spherical, bouncy object and two

71 Only in 1731 was English law officially made to move beyond the antiquated and bastardised form of French in which it had mainly expressed itself until then. For authoritative reflections on the early language of the common law, see eg Pollock and Maitland, *The History of English Law* (ed Milsom) vol I (Cambridge: Cambridge University Press, 2nd ed, 1968) pp 80–87 (originally published in 1895); Baker, *Manual of Law French* (Aldershot: Scolar Press, 2nd ed, 1990).

72 John Merryman has identified this feeling of superiority *vis-à-vis* other legal traditions as constituting a distinctive feature of the civil law tradition itself: Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 2nd ed, 1985) p 3.

73 cf Latour and Woolgar, *Laboratory Life [:] The Construction of Scientific Facts* (Princeton: Princeton University Press, 2nd ed, 1986) p 260 (note 17).

renditions of it through two languages ('ball' and 'balle'). The descriptions vary to the extent that the word 'balle' connotes the idea of smallness in the way the English 'ball' does not. The illustration shows that the complexity of reality will not always be fully captured by a single language: the notion of size is not rendered by the English 'ball.' These narratives, then, are complementary more than they are adversarial in that their combination allows for a more insightful perspective on the reality they each attempt to represent. Thus, the bilingual anglophone will better be able to explain what she sees — will know more about the 'ballness' of the ball — if she can say: 'This is a ball, what the French would call a *balle*.' Unsurprisingly, studies reveal that 'bilinguals are more sensitive to semantic relations between words, are more advanced in understanding the arbitrary assignment of names to referents, are better able to treat sentence structure analytically, are better at restructuring a perceptual situation, have greater social sensitivity and greater ability to react more flexibly to cognitive feedback, are better at rule discovery tasks, and have more divergent thinking.'⁷⁴

A rewarding analogy can be drawn between the bilingual and the bijudicial brain which is similarly able to offer a more sophisticated interpretive grid than if steeped exclusively in one legal tradition. By complementing the findings of one partial perspective *qua* representation of reality — say, the civil law tradition — with the findings of another representation of the world — for example, the common law tradition — the European lawyer is in a position to create a global picture which is more comprehensive and, therefore, more insightful in terms of understanding reality. For example, it may help to appreciate the interaction between two individuals wishing to deal in oranges to be able to call not only on the idea of 'meeting of the minds' (the orthodox view of what a contract is in the civil law world), but also on that of 'bargain, or exchange of promises' (the classical view of contract at common law). Difference, in other words, need not be perceived in antagonistic terms, as in the eyes of those who propose to suppress it through the adoption of a European Civil Code. It must be seen that difference need not be regarded as a malediction. While a dichotomy marks a 'severance' and 'isolates,' difference is a 'comparison' and 'relates.'⁷⁵ Difference is salutary. In reminding lawyers that although there may be *one concept* of contract across Europe, there exist at least *two conceptions* of contract,⁷⁶ difference fulfils a positive role. It contributes its own *vis affirmativa*, allowing for a richer appreciation of reality.⁷⁷

74 Grosjean, *Life with Two Languages: An Introduction to Bilingualism* (Cambridge, Mass: Harvard University Press, 1982) p 223. See generally Romaine, *Bilingualism* (Oxford: Blackwell, 1989) pp 99–109; cf Edwards, *Multilingualism* (London: Routledge, 1994) pp 66–71.

75 Geertz, *After the Fact* (Cambridge, Mass: Harvard University Press, 1995) p 28.

76 For applications of the distinction between 'concept' and 'conception,' see eg Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) p 5; Dworkin, *Law's Empire* (London: Fontana, 1986) pp 90–94.

77 The exigencies of representation have subordinated difference to identity (that is, to uniformity) ever since Plato drew a distinction between the original and the copy, and between the copy and the simulacrum. Because only Courage is Courageous — because only the Idea is not anything else than what it is — those who are courageous can only hold a simulacrum of the quality of courage. Their courage is not identical to Courage; it is different from Courage. And, because it is different, it is inherently 'less than,' hence a failed imitation, a negative. The challenge for comparative legal studies is to reverse the intellectual movement which infeodates difference to identity: see generally Deleuze, *Différence et répétition* (Paris: Presses universitaires de France, 1968) esp pp 82–89, 165–168, 340–341, 349–350.

Fallaciousness

To suggest that Europe is, through a European Civil Code, returning to some golden age when it boasted a law common to its various constituent parts, a *jus commune*, is misleading. The fact is that there never was a *jus* that was truly *commune*: 'In terms of civil science [the] [c]ommon [l]aw was not only the *ius proprium* of England; it had in effect seceded from the *ius commune*.'⁷⁸ As a result, 'English lawyers were excluded from this lingua franca.'⁷⁹ In the words of Brian Simpson, '[u]niversity law, with th[e] exception [of equity], never had any profound influence upon the common law system.'⁸⁰ In sum, 'it is artificial to treat England as a true adherent of the *jus commune*.'⁸¹ The idea of a European Civil Code is, therefore, predicated on the *exclusion* of European legal history which *never* featured a law common to all European States. A European Civil Code partakes of an ahistoricist reinvention of Europe, for what has long characterised Europe is precisely the cultural heteronomies within the whole.⁸²

Backwardness

The advocacy of a European Civil Code marks a retrograde step since it privileges faith in a centralised political authority and in formalist truth. Because it suggests that the whole of the law governing the daily lives of citizens can be reduced to a set of neatly organised rules, a code is not a propitious endeavour in that it runs against the more progressive view that law simply cannot be captured by a set of rules, that 'the law' and 'the written rules' do not coexist, and that there is, indeed, much 'law' to be found beyond the rules. By adhering to a 'law-as-rules' representation of the legal world, a code becomes an epistemological barrier to an appreciation of the complexity of legal knowledge.⁸³ In other words, a code leads the jurist astray by suggesting that to have knowledge of the law is

78 Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1990) p 182. See also Kelley, 'Elizabethan Political Thought' in Pocock (ed), *The Varieties of British Political Thought, 1500–1800* (Cambridge: Cambridge University Press, 1993) pp 64–65: 'There never was a serious threat of a "reception" of Roman law [in England], and its political associations [with absolutism and popery] ensured that common lawyers would continue to resist its influence.'

79 Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992) p 180.

80 Simpson, 'The Survival of the Common Law System' in *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987) p 394.

81 Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Leiden: Sijthoff, 1978) p 198.

82 eg Derrida, n 1 above, pp 75–77: 'the duty to answer the call of European memory dictates respect for difference, the idiomatic, the minority, the singular and commands to tolerate and respect everything that does not place itself under the authority of reason' (original emphasis) ('le devoir de répondre à l'appel de la mémoire européenne ... dicte de respecter la différence, l'idiome, la minorité, la singularité ... [et] commande de tolérer et de respecter tout ce qui ne se place pas sous l'autorité de la raison'). Elsewhere, the author insists on the fact that 'this responsibility towards memory is a responsibility towards the concept of responsibility itself which regulates the justice and the justness of our behaviour, of our theoretical, practical and ethico-political decisions': Derrida, *Force de loi* (Paris: Editions Galilée, 1994) p 45 ('Cette responsabilité devant la mémoire est une responsabilité devant le concept même de responsabilité qui règle la justice et la justesse de nos comportements, de nos décisions théoriques, pratiques, éthico-politiques').

83 For the concept of 'epistemological barrier' ('obstacle épistémologique'), see Bachelard, *La formation de l'esprit scientifique* (Paris: Vrin, 1989) *passim* (originally published in 1938). For an application to law, see generally Miaille, *Une introduction critique au droit* (Paris: François Maspero, 1976) pp 37–68.

to have knowledge of the rules (and that to have knowledge of the rules is to have knowledge of the law!). Assuredly, it is not because we will have the same *loi* or *Gesetz* (for example, a directive) that we will have the same *droit* or *Recht*: *jus* is not reducible to *lex*. In its quest for rationality, foreseeability, certainty, coherence and clarity, a civil code thus strikes a profoundly anti-humanist note. While the imperatives of certainty must evidently be borne in mind, the common law experience suggests that codes are not a prerequisite to their attainment. It is, in any event, simplistic to assume that codes beget certainty.⁸⁴

The idea of a European Civil Code belongs to another era. It is a remnant of the authoritarian world of Napoleon.⁸⁵ It is a legacy of the simplified and mechanistic universe of positivists such as Anthoine de Saint-Joseph and Ernest Moulin.⁸⁶ Concerned to establish a civil code for Europe, these two authors, to borrow the colourful language of a modern commentator, 'took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones.'⁸⁷ Even then, however, this kind of facile exercise was being decried as 'instant erudition.'⁸⁸ It remains the case today that the making of a European Civil Code can only assume an operation performed '[u]nder the hypnotic spell of formal rationality' which gestures in the direction of scientificisation or technicisation and its reductive urge.⁸⁹ Accordingly, the resurrection and institutionalisation at the European level of a capricious world of concepts, definitions and categories betraying an allegiance to the trappings of cognitive objectivity and a detachment from the life-world cannot but be apprehended as a *damnosa hereditas*.

A transnational construction like the European Union should be seen as offering, rather, the opportunity to *break* with the idea of a legal unity enforced in the name of abstract naturalism and to reach *beyond* a mode of apprehending social relations which has traditionally been linked to the state, such as a civil code.⁹⁰ Legal positivism and the closed system of codes which the fetishism of rules commands must be regarded as obsolete. We have, after all, resolutely entered the era of complexity. Thus, legal monism (that is, the exclusive and unchallenged supremacy of written law) has given way to a multiplicity of legal sources, or to polyjurality. Likewise, political monism (that is, the unquestioned supremacy of the nation-state) has yielded to the persuasion of supranational and infranational powers. Moreover, linear and deductive rationality have been replaced, for many, by an anarchical attitude towards thought processes. Finally, promethean temporality (that is, the

84 For a demonstration of this assertion, see Gordley, 'European Codes and American Restatements: Some Difficulties' (1981) 81 Columbia L Rev 140.

85 At a time when he was busy reinventing himself for posterity, Napoleon is reputed to have said that he had wished to achieve 'the unity of codes' and that he had wanted 'a European Code': De Las Cases, *Mémorial de Sainte-Hélène: Journal de la vie privée et des conversations de l'empereur Napoléon à Sainte Hélène* (London: Colburn/Bossange, 1823) vol IV, part VII, p 126 ('l'unité des codes') and vol III, part V, p 310 ('[u]n Code Européen').

86 See de Saint-Joseph, *Concordance entre les codes civils étrangers et le Code Napoléon* (Paris: Cotillon, 2nd ed, 1856); Moulin, *Unité de législation civile en Europe* (Paris: Dentu, 1865).

87 Friedman, *A History of American Law* (New York: Simon & Schuster, 2nd ed, 1985) p 676.

88 Alberdi, *El Proyecto de Código civil para la República Argentina* (Paris: Jouby & Roger, 1868) p 5 ('erudición á vapor'), where the author refers to de Saint-Joseph (n 86 above).

89 Friedman and Teubner, 'Legal Education and Legal Integration: European Hopes and American Experience' in Cappelletti, Seccombe and Weiler (eds), *Integration Through Law*, vol I: *Methods, Tools and Institutions*, bk 3: *Forces and Potential for a European Identity* (Berlin: de Gruyter, 1986) p 373.

90 Arnaud, n 56 above, pp 198–200, 202. See also Oppetit, 'Droit commun et droit européen' in *L'internationalisation du droit: Mélanges en l'honneur de Yvon Loussouarn* (Paris: Dalloz, 1994) p 314, who castigates European law for 'expressing the most exacerbated legal positivism' ('[l]e droit européen exprime le positivisme juridique le plus exacerbé').

idea of time directed towards a future governed by reason and law) has made way for legal forms characterised by precariousness and provisionality.⁹¹

Impracticality

A European Civil Code reveals a utopian enterprise, for it suggests that legal cultures which purport to give normative strength to forms of behaviour developed in historically different contexts can be unified.⁹² In fact, a European Civil Code would fail to effect the universal reach for which it stands. What good is a common text of reference when one legal tradition, the civil law, institutes the normal — the statutory provision — as *its* referential source of law and the other, the common law, establishes the pathological — the case — as *its* prototypical source of law? What good is a common text of reference if it is internalised differently by the two legal traditions which it claims to unify — that is, if it is ascribed a different meaning because of the incompatible styles of interpretation and application at work?⁹³ And how could the internalisation process not differ when one legal tradition, the civil law, operates at the deductive or axiomatic stage while the other, the common law, functions in the descriptive or inductive mode, which it regards as being most congruent with its sense of morality?⁹⁴ What point, then, a unitary text of reference in the absence of a unitary rationality and morality to underwrite and effectuate it? What good is a ‘common rule’ when one legal tradition, the common law, has not wished to acknowledge the notion of ‘rule’ as civilians understand it?⁹⁵ Addressing French civilians, Roger Perrot sounded an important warning: ‘we rather easily delude ourselves through the idea that men and institutions can be transformed by dint of cleverly examined juridical norms.’⁹⁶ In point of fact, unity can only arise from a commonality of experience, which assumes a commonality of meaning, which presupposes in turn a symbolic commonality.

Conclusion

The French philosopher, Jean-François Lyotard, has written that our times — which he refers to as the ‘postmodern’ era (but which we need *not* characterise as such) — reveal an incredulity towards meta-narratives.⁹⁷ Such scepticism, it is to be fervently hoped, will find itself reinforced as civilians within the European

91 Van de Kerchove and Ost, *Le système juridique entre ordre et désordre* (Paris: Presses universitaires de France, 1988) p 116. See also Ost, ‘Jupiter, Hercule, Hermès: trois modèles du juge’ in Bouretz (ed), *La force du droit* (Paris: Esprit, 1991) pp 248–249.

92 Arnaud, n 56 above, p 298.

93 For Gadamer, ‘application’ is an essential aspect of ‘interpretation’: see Gadamer, n 49 above, p 311. See also Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991) p 207.

94 I borrow an argument applied to science in Blanché, *L’épistémologie* (Paris: Presses universitaires de France, 3rd ed, 1983) p 65.

95 n 8 above and accompanying text.

96 Perrot, ‘De l’empreinte juridique sur l’esprit de la société française’ in Siegfried (ed), *Aspects de la société française* (Paris: LGDJ, 1954) pp 191–192 (‘nous nous berçons assez facilement de cette idée qu’on transforme les hommes et les institutions à coup de normes juridiques savamment étudiées’). According to Pierre Legendre, ‘the French, more than any other people, believe in the transformative power of laws’: Legendre, *Trésor historique de l’Etat en France* (Paris: Fayard, 1992) p 63 (‘Les Français, plus qu’aucun autre peuple, croient à la puissance transformatrice des lois’).

97 Lyotard, *La condition postmoderne* (Paris: Editions de Minuit, 1979) pp 7–8.

Union continue to agitate in favour of the *idée fixe* of civilianising (or, as they no doubt mean, 'civilising') the common law through their cabal for the adoption of a European Civil Code. As Michael Green reminds us, '[a] civilization ... attempts to melt down different peoples, ethnic groups, and cultures who do not share the same fundamental beliefs, values and attitudes into a common framework of beliefs and values'; '[i]t attempts to break down intrinsic and organic systems of meaning and replace them with those of the dominant culture.'⁹⁸ It is a curious fact that Europe should apparently want to do to itself what it did to much of the world through colonisation, that is, 'extirpate "the root of diversity"', by engaging in the effective denial of sites of contestation within itself.⁹⁹ But simple formulas will not solve complex situations today any more than they did in the past. Culture remains the most insistent admonition directed at law to recognise its own limits. That different meanings and practices should flow from a unitary text, for example, ought not to surprise because globalisation of the world cannot change the reality of varied historical traditions. This is why the feasibility of European legal integration rapidly becomes as problematical as the idea of integration of European societies itself. The integration of a group of legal cultures does not appear any more realistic than would the integration of the different world-views privileged by a wide range of societies. *How, indeed, can indigenous ways of thinking that have contributed crucial ingredients of personhood, that have supplied a sense of self-esteem and morality, that have defined success within a community, be unified?*

In suggesting the adoption of a European Civil Code, civilians promote a modality of experience which is uniquely theirs. In the process, they impugn the common law tradition and its rationality which demonstrates that there is no historical or conceptual necessity for a legal culture to operate by way of general rules or under the sway of sophisticated intellectual systems, and which shows that it is perfectly possible, for example, to 'conceive an injury was done when an impartial spectator would be of opinion he was injured.'¹⁰⁰ However, the specificity of Europe — and this is where legal history can be adduced as compelling evidence — lies not in the abolition of difference, but in the deft management of it,¹⁰¹ in the assumption of pluralism, in the acceptance of a coexistence of non-harmonised rationalities on its territory, in the willingness to enlarge the possibility of intelligible discourse between legal traditions, and in the steady practice of a politics of inclusion ensuring an equal presence for the two legal traditions represented in its midst. In short, difference must be understood and the temptation to reduce it resisted.¹⁰² Significantly, Europe's distinctive circumstances throughout its history have repeatedly involved the recognition of insurmountable alterities arising from within.¹⁰³ The aim must now be not only to reactivate the aptitude to tolerate difference in Europe which is disappearing as fast as the move towards a European Civil Code is becoming stronger, but moreover to foster the willingness of civilians to open themselves to a different way of thinking about the law. If they are not to be placed under a serious and self-imposed

98 Green, 'Codes of Civilization and Codes of Culture' in Kevelson (ed), *Codes and Customs* (New York: Peter Lang, 1994) pp 112 and 113, respectively.

99 Césaire, *Discours sur le colonialisme* (Paris: Présence africaine, 1955) p 57 ('extirpé "la racine de diversité"').

100 Smith, *Lectures on Jurisprudence* (ed Meek, Raphael and Stein) (Oxford: Oxford University Press, 1978) p 17 (originally written in 1762–63).

101 Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in *Local Knowledge* (New York: Basic Books, 1983) pp 215–216.

102 Pouillon, 'L'oeuvre de Claude Lévi-Strauss,' *Les Temps Modernes* (1956) No 126, p 152.

103 De Certeau, n 55 above, p 202.

handicap while operating in a pluricentric world consisting in part of the common law tradition, civilians must show themselves to be receptive to the otherness of the common law mind,¹⁰⁴ that is, they must learn to regard the common law tradition as presenting an alternative *for* them (in the sense of a contrapuntal cognitive and experiential possibility that is defensible and potentially enriching) as opposed to an alternative *to* them (in the sense of an inchoate and impertinent apprehension of the legal that must be regretted and obliterated). They must recognise in the common law world the existence of a different, equally legitimate approach to the assuagement of the human need for order, rather than see in it nothing more than a peripheral — and, therefore, expendable — legal culture. They must attempt to penetrate the network of intersubjective meanings of the common law tradition, and of the European societies it has served through its past and present historical conditions. Not only do they have to act, therefore, like Zarathustra towards his visitors whom he finds waiting for him as he returns to his cavern, that is, ‘with affable curiosity,’¹⁰⁵ but they must actually attest to *empathy*, if not *admiration*, for the common law *mentalité*.

In the face of a globalisation that operates in a deracinating world of contracts and markets, it falls to identity politics to fulfil a humanising role. To allow difference to act as the pertinent dialogical vehicle between European legal traditions is, of course, vastly more complicated than designing a ‘cognitive intoxicant’ such as a European Civil Code purporting to institute a homogeneous legal culture oriented only towards one centre through reliance upon a textual form which the common law tradition has never wanted to acknowledge for itself.¹⁰⁶ Yet, in the face of incommensurability across legal traditions, the *understanding of diversity* must be seen as the only way to attenuate the heterogeneity of meaning that acts as an impediment to communication, and to foster the respect due the variety of lived experiences that sustain intersubjective world-views and practices across European interpretive communities. The civil law and common law discourses, each with its own internal grammar, *must* be apprehended as reflecting different world-views. The question is: how can each of them be accommodated on its own terms so that one is not found to be doing violence to the other (and to the idea of pluralist or participatory democracy), that is, to be *terrorising* the other?¹⁰⁷ One element of reply can at least be offered: localised signifying systems must fall beyond *Ordnung*.

‘Cultural Pluralism or Brave New Monotony?’ asks Feyerabend.¹⁰⁸ For the self-respecting comparatist envisaging, as she must, law as culture, cherishing, as she

104 Gadamer, ‘Text and Interpretation’ (trans Schmidt and Palmer) in Michelfelder and Palmer (eds), *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany: State University of New York Press, 1989) p 26.

105 Nietzsche, *Also sprach Zarathustra* (Stuttgart: Kröner, 1975) p 309 (originally published in 1883–85) (‘mit leutseliger Neugierde’).

106 The expression is Schneider’s: n 9 above, p 40.

107 cf Lyotard, n 97 above, p 103: ‘Terror means the efficiency derived from the elimination or the threat of elimination of a partner out of the game of language we were playing with him. He will be silent or will assent not because he has been disproved, but because he has been threatened not to be allowed to play’ (‘On entend par terreur l’efficience tirée de l’élimination d’un partenaire hors du jeu de langage auquel on jouait avec lui. Il se taira ou donnera son assentiment non parce qu’il est réfuté, mais menacé d’être privé de jouer’).

108 Feyerabend, n 20 above, p 273. For a similar view of uniformity as raising a state of emergency, see also Jacob, *Le jeu des possibles* (Paris: Fayard, 1981) p 118: ‘In the field of cultural diversity hangs the threat of monotony, uniformity and ennui’ (‘dans ce domaine [de la diversité culturelle] pèse la menace de la monotonie, de l’uniformité et de l’ennui’).

must, the value of difference as *principium comparationis* and advocating, as she must, a morality of alterity by reading legal traditions *against* one another and by rejecting the strategy of compulsive reduction of otherness to sameness, the reply is easy and might well take the form of a brief quotation from a German philosopher, allowing me to end as I began. Adorno despised the aggregate. In his view, '[t]he whole is the false.'¹⁰⁹

109 Adorno, *Gesammelte Schriften*, vol IV: *Minima Moralia* (Frankfurt am Main: Suhrkamp, 1980) p 55 (originally published in 1951) ('Das Ganze ist das Unwahre').