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The Art and Science of Critical Scholarship: Postmodernism and International Style in The Legal Architecture of Europe

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*1054 I. Introduction

This Article is a critique of several contemporary modes of thought in European legal scholarship. It intends to shed light on some interesting phenomena within legal ideology. [FN1]
Removing a legal ideology from its original context and applying it to a new situation can transform its meaning. [FN2] For example, a progressive movement born in the United States becomes conservative when transplanted into the European institutional context. [FN3] The study of the Americanization of European law has offered many examples of such fascinating ideological twists. [FN4]

Critical Legal Studies, born in the United States, has developed, at least in its second generation, [FN5] an identity built around two fundamental pillars: progressive political views and postmodernism. The ultimate aim of this movement is to challenge and change the system from the left. [FN6] On the contrary, postmodernism within the European legal context is politically quite conservative. It has refused all major attempts at legal change and consequently has protected the cultural status quo. [FN7]

Structuralism characterizes both the self-portrait of Critical Legal Studies in the United States and a rather large portion of European comparative law scholars. [FN8] However, postmodernism, [FN9] as a condition *1055 of legal analysis, has only very recently been discovered in Europe. [FN10] Moreover, in the European context, its political ambiguity becomes very clear. [FN11] This Article discusses the political implications of the postmodern condition in the making of European law. [FN12] It looks at contemporary movements in art and architecture to understand and gain perspective on the postmodern condition in European law. We believe that some of the trends that have developed in art and architecture theory, provoking the decline and demise of the modernist paradigm and the incremental development of a new, postmodern sensitivity, share important characteristics with current movements in law. [FN13]

*1056 Seeking parallels between the law, art, and architecture makes sense given the typically postmodern inclination to receive and elaborate on stimuli from different kinds of cultural movements. It is also consistent with an approach to the law as part of a more complex normative system, such as that of Critical Legal Studies and of other postrealist schools of thought in the United States. [FN14] If rationality and legitimacy of power are culturally contingent notions, changing in time and space within a Kuhnian model, the area of relevant legal knowledge widens to include zones such as literature, the arts, and philosophy, precluding to the law the possibility of finding autonomous, independent foundations. [FN15] Consequently, we analyze the branches of European Legal Scholarship not only as scientific schools of thought, but also as artistic and architectural movements.

Because legal scholars are neither artists nor scientists, but actors in a political game, the political impact of the postmodern condition becomes more relevant in law than in other branches of knowledge. If this is the case, then it becomes fundamentally important to understand and characterize the contribution of postmodern European scholars in terms of right and left. What matters, of course, is not just what these scholars say (or do not say) but also, and very importantly, what impact their teaching has on the legal landscape of Europe.

Only in this broader scenario is it possible to evaluate the impact of American critical legal thinking in Europe, by assessing whether the political leftist message of struggle, critique, and, perhaps, sentimental utopia is actually maintained. This Article will show that, so far, the development of postmodern thinking in Europe has contributed to conservative rather than progressive agendas.

Part II sets the scene by introducing the interpretive categories and the dramatis personae of the story that we wish to tell. Part III approaches the different institutional backgrounds transforming
the political impact on postmodern critical thinking in Europe. Part IV highlights the hidden conservative agenda behind the emphasis that some European legal scholars place on the division between common law and civil law. Part V discusses the contribution of American Critical Legal Studies in Europe as an injection of postmodern self-consciousness. Part VI discusses analogies between critical legal approaches and postmodern movements in art and architecture. Part VII approaches the issue of codification as a postmodern comparative legal project as opposed to an International Style endeavor.

II. Setting the Scene

A. Modernism, Postmodernism, and Critical Thinking

Postmodernism is an ambiguous term that is rich in meaning. It hosts its enemy, modernism, within its own walls by evoking what it wishes to overcome and perhaps destroy. It is contradiction, refusal, and denial. An observer has found in the verses of Italian poet, Nobel laureate Eugenio Montale, a nicely fitting definition: "Non domandarci la formula che mondi possa apri... Codesto solo oggi possiamo dirti, cio che non siamo, cio che non vogliamo." [Don't ask us for the phrase that can open worlds... This, today, is all that we can tell you: what we are not, what we do not want.]

Postmodernism is a trendy term in legal literature. The metaphor of Europe as an entity to be built, and of legal scholarship as a "building" or a "city planning" exercise, evokes an analogy between the work of a legal scholar and that of an architect. And architecture is possibly the discipline in which postmodernism has found its most privileged and visible expression. It is inevitable, when choosing interdisciplinary analysis as an approach, that the comparisons drawn seem stereotypical to the specialist. Yet accepting this limitation does not diminish its effectiveness.

The term postmodern was first used systematically in literature by American critic Ihab Hassan and has subsequently been used in the social sciences and semiotics, but only in architecture has it inspired lines of thought that, from criticism and historiography, have found their way into praxis. Only in architecture, thus far, has postmodernism been able to become the common denominator of theories, trends, and practical experiences. A closer look at some architectural doctrines allows for the detection of unexpected analogies to recent trends in comparative law confirming the Zeitgeist of a common cultural environment permeating every corner of contemporary knowledge.

Since law, as architecture, has a deep practical dimension, it makes sense at the outset to discuss a little further the practical meaning of the modernist-postmodernist metaphor.

In architecture, postmodernism sprang up as a reaction to a certain type of modernism, the so-called International Style, which is a stylistic vulgate and, according to many observers, a corrupt version of modernism. Even if modernism is a complex and contradictory term that can be characterized differently according to when and where it is observed, it can nonetheless be noted that postmodern sensitivity flourished after 1945 in opposition to the hegemony of modernism that some have defined as "high" or "universal." Deeply motivated by social needs, mainly the postwar reconstruction effort, this epiphany of the modern movement is positivist, rationalist, and antitraditionalist.

This modernist perspective perceives urban reconstruction as based on rational and abstract criteria, technologically efficient urban plans, and an austere and functionalist architecture. An eloquent example of this modernist approach can be found in the buildings designed by Le Corbusier. Standing on pilotis--strong and relatively tall pillars--his buildings are even physically
separated from land. The ultimate result of such a high degree of abstraction, due to the cosmopolitan and universalistic flavor of modernism, is a yearning for uniformity and a denial of local and traditional codes: Form follows *function. Diversity between buildings can only be justified by different functions. Another significant example can be found in the work of Robert Moses, the post-World War II creator of New York's project of urban development, which is marked by rigorous rationalism and functionalism. [FN24]

In contrast to the uniformity and functionalism of modern architecture, postmodernism proposed differentiation, pluralism of languages, and the eclectic interbreeding of styles, and thus created a continuous interplay of allusions and citations. [FN25] From the postmodern perspective, a dwelling is not just a functional necessity. It is a cultural experience that rediscovers traditional and local elements. According to leading postmodern architect Paolo Portoghesi, [FN26] postmodernism recognizes that it is time to relearn, as if from a lost primer, the grammatical rules governing the language of places. Such rules make places familiar and recognizable, with the ultimate aim being the reconstruction of identity and the giving of meaning. [FN27]

Complexity, ambiguity, differences, and tensions are then the leitmotifs of postmodern architecture that emphasize contradictions and oppositions rather than hiding them. In contrast to the typically modernist ambition of a universal language, postmodernists oppose the idea of an eclectic interbreeding of languages and codes. Postmodernism marks the defeat of the universalistic ideal of modernity. If the tower of Babel had been completed, suggests philosopher Jacques Derrida, there would be no architecture. [FN28] Only the impossibility of the tower, the symbol of a logocentric ideal of a dominion granted by a universal language, allows architecture to have a history.

*1060 The fascinating parallel between these developments in architecture and the exercise of "building legal Europe" in which scholars are involved today will be explored later. For the time being, it is sufficient to note that the introduction of postmodernism as a heuristic category in the law is mostly due to American Critical Legal Studies. The nature and consequences of these origins completes the setting of our scene.

B. Dramatis Personae

Today, Europe is importing a large amount of American legal ideology. There is no doubt that the American legal academy is the front-runner in postmodern developments that have reopened the issue of the nature of law and the relationship between law, society, ideology, cultural phenomena, and intellectual movements. [FN29] However, from a European perspective, one can occasionally question the originality of some of the insights stemming from these developments. They should, nevertheless, be appreciated as evidence of genuine methodological anxiety that have given scholars the chance to challenge and question many assumptions taken for granted by lawyers. In the United States today, the idea of law as a complex aggregate of social, cultural, linguistic, and normative praxis is a common perception fostered by a variety of "law and" movements. Consequently, the understanding of law cannot be attempted without the methods and paradigms that govern social sciences or humanist disciplines. [FN30]

This message of cultural pluralism has been received in Europe by those scholars whose job it is to monitor the legal world for interesting developments—comparative lawyers. Hence, a variety of American academic discourses have become internationally relevant, and a number of American scholars have become international intellectual leaders. But, if it is true that any intellectual movement worth its salt is indeed interested in becoming international, it is also true that, in the law, the chances of internationalization of a school of thought are intimately connected with the
general phenomenon of diffusion of the law of the country in which the movement develops. *1061 For example, there is no doubt that Gény's worldwide impact is very much due to the general prestige experienced by French law in the first half of the nineteenth century. The same is true of German scholars such as Jehring, Gierke, Ehrlich, and others, whose critique was aimed at a leading hegemonic legal system.

Similarly, since World War II when the wind changed and the American legal system became hegemonic, American legal realists and legal economists have seized their opportunity. Becoming a visible school inside a hegemonic legal system carries with it worldwide fame. Leading scholars of Critical Legal Studies (Crits) are today well known, translated, and studied in Europe. A recent conference in Amsterdam devoted to Duncan Kennedy's work illustrates this point. [FN31]

The two most recent phenomena of intellectual colonization, Law and Economics and Critical Legal Studies, both have clear political ideologies. While one could debate the presumption that market-oriented economists are bound to be conservative, [FN32] there is little doubt that the Crits are the product of a leftist elite born and developed at Harvard. Just like the Glossators and Commentators from Bologna, the Humanists from Montpellier, the School of Salamanca, and Roman-Dutch jurists from Leyden, [FN33] the Crits have managed to diffuse their message in a remarkably influential way.

The hypothesis advanced in this Article is that the process of transplanting Critical Legal Studies from the American to the European context has transformed the message. The ideological orientation of the message has proven to be contingent, while the consciousness of postmodernism is perhaps a more lasting contribution.

This contribution unfolds at the heart of the Western empire and, more precisely, at the heart of the chain of production, transmission, and diffusion of knowledge: the Euro-American academic system. When observed in this broad context, it is by no means just another story of cultural submission or pedantic imitation of trendy American approaches in the European context. Indeed, the cultural, philosophical, and political reference points of the Crits are, to a major *1062 extent, of European origin, and the use of such intellectual references in legal discourse is not entirely novel. As a consequence of a long-lasting tradition of leftist legal thinking, European scholarship, politically and intellectually close to the Crits, seems quite original and genuinely adapted to the local context. It is only marginally (perhaps rhetorically) influenced by the actual content of the prestigious American model that it seems to receive. [FN34] This aspect of originality in the reception is a genuine difference compared to what has happened in the domain of Laws and Economics. In Europe, scholars engaged in the economic analysis of the law are much more deeply influenced by the American literature and have been quite acritical of its reception. [FN35]

For the limited purpose of setting the scene, it will be enough to say that the ideological flavor of all we are talking about is rather rich, and, consequently, the opposing political ideologies, progressive and conservative, are clearly an issue. In Europe, progressive legal thinking has never been a leading force, but this does not mean that it has been marginalized by the Academy. Kathedersozialismus in Germany and Uso alternativo del diritto in Italy can be considered different but interesting examples of progressive thinking of the last century that enjoyed a quite direct impact on legal scholarship. And certainly the "Second International" political platform has contributed to the production of modes of thought that became relatively successful in the law around Europe: it is sufficient to think about the idea of "social function of property rights." [FN36]

As a consequence of this relatively mainstream status of leftist academic thinking, some
skepticism and a bit of irony might have characterized the first reception offered to American legal scholars exporting Gramsci and the school of Frankfurt to the old continent. From the perspective of a European leftist intellectual, traditionally biased against "Uncle Sam" and U.S. political hegemony, the scholarly output of the Crits could have been perceived as the ultimate in arrogance. [FN37] After all, even the word "critical" was already part of the *1063 identity of European leftist scholars and had been for quite a long time. In France, the Revue critique de droit international privé and the Revue critique de législation et de jurisprudence and, in Italy, the Rivista critica del diritto privato could be called to the stand as witnesses in an intellectual copyright infringement case.

In a sense, the early lukewarm reception of Critical Legal Scholars by their leftist counterparts in Europe makes this story more interesting and far more complicated than it would have been if we were discussing another direct pattern of reception of law from the United States. The scene is not one of a cocktail party of a group of Harvard radicals meeting their leftist counterparts from Bremen, Paris, or Turin, nor is it one of American academic gurus meeting their European followers, as is very often the case when economists are involved. The story is one of American and European scholars, quite independent from each other, who may never have met if not for comparative law.

In Europe, the political process of integration has fostered the development of a practical agenda for comparative lawyers, a real "comparative project" in which no one can afford to be parochial. Because comparative law has offered rather interesting opportunities to seize visibility and influence, many scholars from different personal and political backgrounds have been attracted to the discipline. Such differences in political background, the natural interest of comparative legal scholars in movements and methodologies from abroad, and the interdisciplinary ambitions of some European comparativists led to the rediscovery and eventual acceptance of the American Critical Legal Studies in Europe. [FN38]

Duncan and David Kennedy's willingness to travel--one of the most interesting fringe benefits of comparative law--and the very nationally diverse graduate student body at Harvard created the conditions for the birth of the "New Approaches" to comparative law. This movement has played an important role in giving Critical Legal Studies some visibility in the quite traditional old circles of Euro-American professional comparativists. [FN39]

The New Approaches movement in America has attracted interest, well beyond the scholarly merits of the "New Approaches *1064 to Comparative Law Symposium" held in Utah (Utah Symposium), because traditional comparative law, as carried on in the United States, has experienced a strong current of criticism from a variety of perspectives that are beyond the scope of this Article. [FN40] Also in Europe, in the age of postmodernism, comparative law has started to redefine its methods and objectives by attempting to carry on some interdisciplinary research that is able to monitor the reaction of different legal systems to contemporary values, modes of thought, and cultural and economic phenomena. [FN41]

Before the Utah Symposium, some scholars in a number of Italian circles had noticed the above-mentioned analogies between Critical Legal Studies and the School of Sacco in comparative law. As a consequence of the intellectual curiosity stimulated by these observed analogies, the Utah Symposium and a number of subsequent events organized by the New Approaches group, have been quite well attended by Italian comparativists. Duncan Kennedy's delivery of the Cardozo Lectures in Law at Trento (presenting for the first time the core of the "Critique of Adjudication") in 1995, and Rodolfo Sacco's Keynote speech (1996) at one of the Harvard conferences organized by David Kennedy and attended by many in the New Approaches group can be seen as evidence of
a quite remarkable reciprocal interest.

Indeed, while most European comparativists were embarking on the "building of legal Europe" exercise, the interest of mainstream Italian comparativism has been, for quite a long time, theoretical and methodological. Such theoretical interest, while certainly attracting some individual scholars from other legal systems, [FN42] was able to become a sort of quality requirement in Italy because of Sacco's major academic influence and power in the 1980s and 1990s. There is not one book on comparative law produced in Italy in the last twenty years in which the author does not use--or, more often, misuse--the word *formant* [FN43] in order to identify himself as an insider, or at least as a friend, of "the Circle of Trent." [FN44]

Again, the scene is not only that of a power game between Italian academics over the appointment to the relatively large number of comparative law chairs established over the past fifteen years. The theory of "legal formants," used by many only as a passport to academic positions, has been a genuine step forward in jurisprudence. Its impact of critique on mainstream academic thinking by showing contradictions and discursive strategies has not been much different from that of the American Critical Legal Studies. Before looking more closely at this aspect, we need, however, to discuss further the political issues.

III. Identity and Tradition: European Conservative Ideology Transformed by the Left in the United States and Returned to Europe?

Tradition is a vague word that is difficult to define. [FN45] It conveys a sense of continuity, a process of accumulation of meaning and sense that is not dependent on one individual but on a transmission chain that goes from generation to generation. It is not dependent on the present, nor is it projected into the future. Rather, it is rooted in the past. A social tradition can be seen as the product of a spontaneous accumulation of knowledge, practices, and skills internalized by all members of a given group. It is the path followed, or believed to have been followed, by a group in the course of its history. It can be studied, perceived, and understood not logically, but archeologically. [FN46]

Identity, also a vague word, is for the individual what tradition is for the group. [FN47] It is a condition of the self that one can accept or refuse, like or dislike, but that is part of one's heritage, being, and belief. Identity is always constructed in relation to the longer or shorter, thicker or thinner cultural tradition to which one belongs. [FN48] It can be constructed in favor of or in opposition to tradition, but there is always a relationship between the two. Identity is usually constructed in opposition to, denial of, or contradiction with "the other." [FN49]

Tradition itself is not an ontological concept; rather, it is an idea constructed (sometimes invented) in relation to a number of opposite concepts. Revolution and reform can be seen as such opposites. Revolution conveys the idea of an extreme, of a break with the path followed thus far. Revolution means sudden and radical social, political, or intellectual change. Thus, revolutions always target the present state of affairs. However, revolutions do not necessarily look to the future in the way tradition is necessarily rooted in the past. [FN50] History has presented us with traditional revolutions, such as the Iranian Revolution, whose aim was the restoration of the past. [FN51] Hence, revolutions require some further characterization or some different conceptual opposites to be understood and characterized in political terms useful for our purposes.

Revolutions stand in a dialectic relationship not only with tradition but also with reform. [FN52] The opposition between revolution and reform dwells not so much in the means of the change (history has presented us with revolutions that are not violent) but in the more or less radical and extreme rhetoric used to advocate change from the status quo. Reform recognizes that some aspects
of the present state of affairs have to be realistically acknowledged, if only because they are immune from sudden change. Revolution attempts to force a radical change of the status quo. It does not acknowledge value or strength in the status quo; rather, it denies and tries to remove it. The opposition between reform and revolution, nevertheless, cannot be construed as a clear-cut one; it is problematic. Present changes in the European landscape, for example, resist clear-cut classification. Consequently, the perception of a change or a program of change as reformist rather than revolutionary does not necessarily determine the course of events. *Revolutions usually fall short of getting rid of the past. Reforms usually end up modifying the very attribute of the tradition that they were appreciating and willing to safeguard. Examples abound, particularly in the law. The October Revolution, as well as the French Revolution, fell short of radically changing the fundamental structure of private law. In many African contexts, attempts to put customary law in writing (to make it easier to understand and to predict) have completely transformed its educational and peacekeeping function. Indeed, the high degree of discretion necessary to consider all the details (often the seemingly irrelevant ones) was simply incompatible with the simple "reform" of putting it in writing. [FN53]

Reform and tradition are themselves conceptual opposites. The former emphasizes the idea of change, an incremental trial and error process, in a direction perceived as desirable. The latter emphasizes the idea of continuity, a safeguarded state of affairs that evolutionary changes, reforms, and revolutions might have betrayed, but that "exist" and can be restored when necessary, even by revolutionary means. Reform emphasizes the future, tradition the past. [FN54]

Just as trust can only be constructed in a relationship with betrayal, it is the same with tradition and reform. [FN55] Continuity and change cannot be reconciled unless change is reactionary in the sense that it aims at restoration. And restoration is a change itself, not continuity. When there is change, there is no continuity, and when there is continuity, there is no change. [FN56]

Despite the logical opposition, if one is sensitive to the "discourse" aspect of the notions we are discussing, there are some analogies between reform and revolution that should be taken into consideration. For example, a reformist project can be used to hide a conservative agenda which in fact aims at no change. A traditionalist project can aim at a deep change, such as a reactionary revolution. How many African political dictators talk about "reform to be carried on only in the respect of tradition" in order to avoid change? How many projects of "reform only in respect of tradition" in European law today hide conservative agendas aiming to safeguard the status quo in order to avoid changes in the relationship of power? [FN57]

We now turn our attention back to Europe and the law. In the discourse over the "building of Europe," tradition and identity play a major role in both political and in legal circles. [FN58] It is important to attempt to reach some clarity about the political connotations of such discourses. Today, the rhetoric of identity and tradition is used by both the right and the left. We do not believe, however, that this political promiscuity makes these notions neutral. [FN59] It only makes it dangerous to use them without caution or to capture political influence. Most importantly, comparative lawyers are now enjoying a particular kind of political influence, which derives from the fact that, for the first time, they have been invited to participate at the highest level of legal discussion because the European agenda is, whether one likes it or not, a comparative project.

Identity, mostly because of its tendency to construct "the other" in order to exclude it, is a word loaded with high-tension political content. [FN60] Its historical roots are at least traceable to the reactionary political and cultural programs beginning in the nineteenth century. Researching its roots is the job of the historian. [FN61] We find it in Savigny, as in Nietzsche, Hitler, and
Karadzic. It is a notion that originates from the right in Europe. For a short time, however, it was appropriated by the left, particularly in the United States, and from there it has been re-exported to Europe with a new leftist political connotation.

In the United States, where the failure to integrate the black community cannot seriously be questioned, an alternative has been the preservation of the identity of minority groups. For the left, it was certainly a better alternative than destruction. The platform of preservation of identity show aspects that make it, in some circles, more desirable than integration and eventual assimilation. Think of the identity of the Jews and of the debate, within the Jewish community, between those favoring integration and those condemning it. [FN62] The refusal to assimilate may end up being the only policy safeguarding survival as a social group. For the left, the wide use of the rhetoric of identity made the failure of the dream of Brown v. Board of Education somewhat more acceptable. [FN63]

In our opinion, the protection of the identity of the group sounds acceptable when used to preserve the Inuit or the Cherokee. The same logic looks inadequate when used for numerically substantial minorities that might one day become majorities, as is the case in present-day California where whites are a numerical minority. This inadequacy is possibly not only a matter of numbers, but also of political representation and the failures of the political process to represent such numerical realities. It would be rational for the left to fight for protection of the identity when the alternative is destruction. When the alternative is integration through effective participation in the political process, fighting for identity risks becoming, even in America, a conservative platform risking the acceptance of the status quo and (seen from the left) of defeat. Think about it: Plessy v. Ferguson [FN64] granted "separate but equal" facilities to blacks. Can you imagine a better environment for the development of "cultural identity" than a school bus (or a class or a playground) where black children are not exposed to the pernicious influence of spoiled sons or daughters of rich suburban attorneys or doctors?

Now, let us turn the argument to reach the point of the recapture of cultural identity as a right-wing concept in Europe today. Suppose that rich, white, suburban children claim that their cultural identity is threatened by the integration of black children. From this perspective, would not Brown be a case that denies rich, white, suburban children their own cultural identity? A political platform claiming to protect such a majority social group on "identity" grounds would clearly be conservative.

And this is exactly what is happening today in Europe. More or less openly conservative and nationalist leaders are attempting to insulate local European identities from the effects of integration and the granting of rights to immigrants. We are not racist, the argument goes, we are only trying to protect the cultural identity of our people against the threat of Islam. [FN65]

This approach is not only a natural return to nationalist nineteenth-and early twentieth-century rhetoric of leaders like Austria's Heider or France's Le Pen, it is also a threat, transmitted in a more subtle way by modern, right-wing leaders to decent, moderate, self-perceived centrist voters. This political rhetoric has not been directly challenged by the left, particularly not by the self-proclaimed reformist left, which can be found in the governments of modern, Western "globalized" states.

Identity is a post-American melting pot myth upon which Europe was never built. Assimilation has never been a realistic goal in Europe. The paths of each European state in joining the European Union have been too different. The "cultural identity" of the French, the Germans, and the Italians is too strong even to imagine interbreeding and actual assimilation within a "new" European
culture. Being European is a relational state of mind for Europeans. It can be defined only in the negative--we feel European only when we are in the United States or in the Third World. We do not feel European at home; rather, we feel German, Dutch, Italian, or French. This is why political champions of European cultural identity are so strongly opposed to Islamic immigration and why proponents of Norwegian identity were so strongly against joining the European Union. [FN66]

From these different perspectives stems the major difficulty in generalizing comparisons between Europe and the United States. A building symbolizing the United States can be designed in the international style. At the same time, it could probably still capture, in a positive way, the idea of being American. It could sit in Washington, San Francisco, Chicago, or Atlanta and still be at home; it could work anywhere. The contribution of local and state culture would not be absent, but they would seem overwhelmed by the shared values and attitudes, in a word, by the national identity.

A building that symbolizes Europe has yet to be conceived. It would have to reflect different, strong, and local political identities and styles. It would have to contain some Italian, some French, and some German influence. It must make them coexist--it cannot assimilate them. A building symbolizing Europe may not fit in any European *1071 town; it would have to be made strongly contextual to fit the differences in landscape. Hence, it would not be European anymore. It would have to be postmodern. It would, therefore, have to give up the universal ideal and nothing more than a "rhizome" would come out of it. [FN67] Perhaps Europeans would feel their identities reflected in it only in comparison to the building symbolizing America. We have already experienced something similar in the saga over the design of the Euro--finding a bridge that was universal enough to appear on a European banknote was a major problem. But, eventually, the Euro was created.

IV. Reinventing the Common Law versus Civil Law Traditions: American Leftist Legal Thinking Turns to the Right in Europe

Much of the above discussion of identity could be repeated for tradition. So we will avoid an exercise in repetition and will instead focus on the particular notion of tradition that is relevant in the small niche of comparative law. Scholars define legal traditions in a variety of ways, sometimes calling them families of legal systems, sometimes calling them legal models or patterns. [FN68] They usually disagree on how many legal traditions can be detected in the world today, as well as on which countries belong to which tradition, i.e., on the boundaries of legal traditions. Further discussion of this topic is unnecessary here except to note that a legal tradition is not a synonym for the history or development of law in a given country. Rather, it is the aggregate of development of legal institutions (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law. The idea of a legal tradition includes the law, as well as the way in which lawyers think about the law, be it consciously or by means of unconscious professional practices. At times, tradition is referred to as mentalité, stressing the cognitive element; [FN69] at other times, such aggregation of professional practices, due to the academic affiliation of a particular subsection of the legal profession, [FN70] leads to discussion of "comparative legal cultures." A legal tradition can be seen as a routine followed by a number of actors in the legal marketplace in order to reduce information costs in the transfer of their professional knowledge. [FN71] No matter how one wants to define a legal tradition, it is certain that the two different paths followed by common law and civil law countries in their century-long developments have been characterized as such. [FN72]

A legal tradition is different from a school of legal thought not only because there are many schools of thought within one legal tradition, but also because some schools of thought develop in more than one legal tradition. Membership in one legal tradition is not exclusive, because tradition
is not an ontological entity; [FN73] rather, it is an interpretive entity largely defined by a sense of belonging and identity. [FN74] Such a feeling of belonging can extend to more than one tradition. France, for example, belongs both to the Western legal tradition and to the civil law tradition. To this important point, we shall return shortly.

Within the idea of legal tradition, there is a sense of continuity and stability. Comparative lawyers believe that some fundamental aspects that determine whether a given legal system belongs to a specific legal tradition are even resistant to change by the highest sources of law within that system. [FN75] Just like in the famous Woody Allen movie, Bananas, where it was grotesque that the dictator of a tiny Latin American state, San Marcos, would attempt to change the country's language to Swedish in order to accomplish modernization, it would be similarly grotesque that a legislator would attempt to change the legal tradition of Switzerland into the common law with a stroke of his pen. Despite the intentions of such a hypothetical legislator, Switzerland would not become part of the common law tradition because it shares almost none of its legal history with common law countries and because the professional identity of Swiss lawyers is intimately linked to the civil law tradition. Modern Swiss lawyers have not received certain features of the common law tradition as part of their professional heritage, such as the language, the taxonomy of the common law, the art of pleading, the technique of cross-examination, the case law technique, and the fundamental dichotomy between common law and equity. Rather, Swiss lawyers are imbedded in a legal environment and trained in legal skills that may be interpreted as fundamentally similar to those of other countries tied to the civil law tradition.

This does not mean that possible evolutions, revolutions, or incremental reforms cannot lead the Swiss legal system far from the fundamental aspects that are considered to make up the civil law tradition. The conflict between continuity (tradition) and change (reform or revolution) should, however, be acknowledged.

The movement of a system "belonging" either to the civil or common law tradition away from its traditional context in the direction of aspects considered typical of another tradition (so-called convergence) can and does happen. [FN76] The reactions of scholars observing such phenomena seems to be deeply affected by their political views. The more or less conservative nature of such views, whatever the rhetoric used to describe it, seems reflected in their attitude toward changes. Those who have conservative values may regret or even resent change because they consider loyalty to and continuity of the tradition as a value. Those who are progressive, or who may be at least skeptical toward the value of tradition, perhaps because they consider it a fundamentally "invented" entity, acknowledge the change and question the tradition either as an "existing" or as an interpretive device.

This is exactly the point that must be made in a political evaluation of some of the postmodern critical comparative law scholars in Europe. In sharp contrast to their intellectual models, their political views toward legal change can be seen as fundamentally conservative. To be sure, the political orientation of postmodernism as an intellectual movement is an issue that is deserving of a paper in itself. [FN77] Postmodernism is considered a reactionary movement by many critics, including the philosopher Habermas [FN78] and the architect Bruno Zevi. [FN79] Nevertheless, its aspects, which are emphasized more by the American Critical Legal Scholars, such as communitarianism and the rediscovery of sentiments, show a clear inclination toward the left.

European scholars flying the flag of postmodernism, to the contrary, develop a strongly conservative attitude toward legal evolution. Such scholars are imbedded in the intellectual tradition of *1073 comparative law, which is built almost entirely around the contrasts between
civil law and common law. [FN80] This contrast gets elevated to a quasi-religious status—a faith like the dogmas of unity and Trinity in Christianity. Thus, postmodern European scholars reach the absurd conclusion that legal transplants are impossible, that the importation of the concept of "good faith" into the arsenal of English judges is nothing more than an illusion, and that even the evidence of converging features in different legal systems is only a distorted interpretation due to a misunderstanding of modern hermeneutics. [FN81] Hidden normative agendas are created and criticized behind humble attempts to do some data gathering or to use different methodological approaches that might challenge the dogma.

There is a need to understand the causes, consequences, and strategies that might explain the conservative output of this brand of European critical scholarship. We believe that the explanation of this evolution comes entirely from the professional ideology of comparative law. The common law versus civil law dichotomy was born as an interpretive foundational category of comparative law in different moments characterized by sharply contrasting theories. [FN82] "When Maitland was young"—to use a suggestive image introduced by an Italian commentator a few years ago—the comparison between England and France began to attract attention. [FN83] Indeed, the differences at the time were very marked: the forms of action were really governing from the grave, the Napoleonic Code was brand new and the propaganda of the exegetic school was persuaded that the code was really the only source of law; at the time, there was no merger between common law and equity as later became the case in England and the United States. Later on, at the time of the Paris Congress whose centennial is celebrated this year in New Orleans, more sharp contrasts developed. Not only France, but also Germany, together with most civil law countries, had a code, while, at that time, there were no codes in significant common law jurisdictions. The great season of the Pandectist school was leaving the impressive image of a very strong doctrine in civil law, while in the common law countries, judges were not yet suffering any significant scholarly competition. [FN84] *1074 Stare decisis was reaching the peak at which it remained, at least in England, until the 1950s when comparative law went through what can be seen as its "third foundational moment" in Europe and the United States.

This third phase has been dominated by the towering figures of refugee scholars who have immigrated to the United States. These masters had political and personal reasons to stress the differences among legal systems—particularly those between the United States and Europe—in order to show appreciation for the hosting legal culture and to advocate change in Europe. The image of the civilian judge as a depressed bureaucrat, contrasted with the towering and fearless figures of his English and American colleagues, offered an easy explanation for the lack of legal resistance to the trashing of the rule of law experienced by continental Europe between the two world wars. [FN85]

But the seeds of the first sweeping converging analysis were planted at that very moment. The methodologies used by Schlesinger in the United States, [FN86] David in France, [FN87] Zweigert in Germany, [FN88] and Gorla in Italy [FN89] all began in one way or another the construction of a broader new family of legal systems: the Western legal tradition. [FN90] The fundamental analogies that these scholars were beginning to uncover—mainly the professional nature of the most relevant sources of law in the West—have been emphasized by subsequent evolutions within the common law and the civil law. It will be enough here to mention the convergence taking place in the binding nature of precedents, [FN91] the increased political assertiveness of the judiciary caused by the creation of special constitutional courts and by developments in administrative justice, [FN92] the major international impact of the first great common law codification: the Uniform Commercial Code, the indisputable increase in the role of legal *1075 scholarship in England, and the changing role of public law in common law countries.
Legal systems never are, but always become. The religious safeguard of a tradition, a concept rooted in stability and continuity, forces its followers to disregard the broader picture of change and to insist on details of continuity. Does the distinction between causa and consideration really matter in the world of international contracts produced by mega-law firms?

Lawyers are assigned a conservative function in society. There may be occasional situations in which they perform progressive roles, but the development of a professional legal system cannot be understood outside the function of protecting the fundamentally unequal distribution of property rights. The institutions protecting property rights and the status quo in wealth distribution are both formal and informal. [FN93] Culture is certainly an informal institution that performs a major role in helping formal institutions resist revolutionary change. [FN94] Promoting professionalism and the interests of lawyers as a culture [FN95] is one way to make the present distribution more acceptable and, in particular, to justify within a "professional project" the large share of this wealth that goes into the pocket of lawyers who know the arcane and the subtleties of the civil law versus common law distinction. [FN96] There is nothing in academia that grants success more than a direct challenge to shared wisdom. Directly and ideologically questioning the gradual convergence and the change in significance of the common law versus civil law distinction in present times is certainly one such strategy within the small community of comparative lawyers. [FN97] This strategy consequently keeps the comparative law community closed in itself, harshly discussing arcane issues in a lingo understandable only to insiders and losing the chance of a real (hopefully critical) contribution to the ongoing project of the building of Europe and, more broadly, to the creation of the global jurist. [FN98]

*1076 Critical thinking questions the political status quo. It is open to change, even when such change is revolutionary. It does not offer new weapons to the already rich legal arsenal of tradition and continuity by construing professionalism as culture. Culture, of course, is an entity much easier to defend than professionalism, because it does not involve dissimulation and strategic thinking by a socially privileged elite. [FN99]

The development of a "Western style," [FN100] which is attempting to become in the law what the "international style" has been in architecture, calls for a reconsideration of the importance and role of the distinction between civil law and common law. But such distinction is not in need of construction (or reinvention) as an immutable tradition. To the contrary, it needs to come to terms with and find its proper role in the complex picture of transnational law. There is a need for creative critical thinking and for a genuine and serious effort to understanding the global political stakes. There is a need to develop a thorough comparative jurisprudence able to offer its contribution to the understanding of what is going on in the law today. Perhaps there is even a need for a Seattle in the law. [FN101] Certainly, there is no need for conservative thinking, rooted and motivated in a small professional tradition such as that of comparative law and dressed up as leftist critical thinking.

V. Self-Consciousness of the Postmodern Condition in Comparative Law and Critical Legal Studies

Postmodernism is an intellectual mood permeating every field of knowledge. This Part explores yet another face of critical thinking in Europe by drawing parallels between postmodern developments in Critical Legal Studies and postmodern developments in comparative law. The hypothesis that we wish to test is that both Critical Legal Studies and some approaches to comparative law have developed from a structural (modernist) approach to a condition of postmodern consciousness by progressively getting rid of different aspects of positivism.

*1077 A. A Changing Epistemological Background
One of the most important, and perhaps most original, contributions of Critical Legal Studies in the United States is the second generation self-consciousness of postmodernism, \[FN102\] with its consequent original approach to the law as narrative, something fundamentally different from the traditional view of a scientific and objective approach to the law. One should appreciate the crucial role that, in the evolution from a monolithic to a pluralistic logic, has been played by developments in the natural sciences and epistemology. To begin with, the revolutionary and foundational moments of contemporary science can be traced to Einstein's relativity theory, to Heisenberg's indeterminacy, and to Godel's theorem. All of these are direct challenges to the idea of a world governed by deterministic relationships and to the project of a "mathesis universalis" as a tool for a general description of reality. Post-positivistic epistemology, moreover, has determined the progressive increase of skepticism in considering science as the tool of knowledge "par excellence." Kuhn's vision of scientific development as a succession of paradigms, whose validating criteria are not truth but persuasion, was the first step. \[FN103\] Rorty, refuting the possibility of a general theory of representation valid as a paradigm of rationality and objectivity for all knowledge, has reached a conception of science and, in particular, of philosophy, in which the key role is played by solidarity and consent in a pluralistic and open dialogue between theories. \[FN104\] Finally, Feyerabend has conducted a thorough battle against dogmatic empiricism, proposing an anarchic and pluralistic methodology whose final result is the dissolution of the very ideas of science and reason in the wider domain of human activities leading to the construction of visions of the world: mythology, theology, metaphysics, and the arts. \[FN105\]

B. Structuralism and Functionalism in Comparative Law

Despite the achieved postmodernist consciousness, Critical Legal Scholars still possess quite visible traces of influences from structuralism--the very same ones that deeply characterize the work *1078 of Sacco and his school. Sacco's theory of legal formants can indeed be considered the first application of a theoretical and methodological line of scholarship, known as structuralism, to the law. Structuralism developed in social and cognitive sciences, but has also been applied in mathematics and biology. Structuralism aims to understand a system by observing the relationship between the elements ("formants" in Sacco's terminology) that make up the structure of the system. Beginning with linguistics (Ferdinand de Saussure, \[FN106\] Noam Chomsky, \[FN107\] Roman Jacobson, \[FN108\] Emile Beneviste \[FN109\]), structuralism has found its way into anthropology (Claude Levi Strauss \[FN110\]), psychoanalysis (Jacques Lacan \[FN111\]), psychology (Jean Piaget \[FN112\]), philosophy (Louis Althusser, \[FN113\] Michel Foucault \[FN114\]), semiotics (Umberto Eco \[FN115\]), and, finally, into the law. Structuralism attempts to develop a scientific method by describing the laws that govern the relationship between the elements of the structure and between the structure and the system in its totality.

At times, structuralism in comparative law is opposed to functionalism. The use of the dichotomy of structuralism and functionalism stresses the relative predominance in structuralism of the form of the system (how the system develops as a historical accumulation of meanings) over its aim. To the contrary, functionalism in the law, as in architecture, stresses the predominance of the function (or aim) of the system over its form (external look). In this sense, "common core" methodology can be considered functionalist when it emphasizes how the solutions to actual social conflicts (the function of the legal system) are in fact much more common between different legal systems than one might feel when considering the way in which the solution is reached (determined by the structure of the legal system as an accumulation of meanings). Functionalist comparative law has its most distinguished exponents in *1079 Zweigert and Kötz \[FN116\] and in some works of Comparative Law and Economics. \[FN117\]
In comparative law, however, the structuralism-functionalism dichotomy cannot be effectively used in setting an alternative view of the world. It might, at most, convey the idea of integrative comparativism (emphasizing analogies), as opposed to contrastive comparativism (emphasizing differences), with all the limits in the possibility of generalization of this dichotomy, as described by its very proponent, Schlesinger. [FN118] The structuralism-functionalism dichotomy in comparative law is confined within the debate over analogies and differences, a debate that has long characterized any comparative discipline and that has, in Europe today, assumed a very intense normative flavor linked as it is with the making of legal Europe as a comparative law project.

Neither structural nor functional comparativism seem thus far to have fully overcome the idea of law as science, within that positivistic notion of science that has been questioned in epistemology. [FN119] From this perspective, a further examination of the parallels between critical legal studies (an approach fully coherent with post-positivistic epistemology) and structuralist comparative law can prove quite instructive. Developments located at the core of legal scholarship indeed make our picture even more complex.

C. Postmodernism and Positivism in Comparative Law and Critical Legal Studies

As discussed elsewhere, [FN120] Critical Legal Studies in America can be seen as postmodernist developments of legal realism, while the European structural school shows aspects of postmodernist developments of previous mainstream movements in comparative law, *1080 whose primary example can be found in Schlesinger's functional work.

Postmodernism constructs previous movements as a historical past from which present work can freely borrow whatever is needed or liked. Both Critical Legal Scholars and structural comparativists have put the previous mainstream tradition in context as a historic experience. They have approached their intellectual fathers with the detachment that can stem only from the sense of being part of a different, subsequent movement. It has been natural to freely take some elements from such historic experience. There is a clear consciousness that the different context and timing makes the departure from the model rather radical. Moreover, the relationship with what can be considered real changes entirely. Participative interpretation is stressed both by Sacco and Kennedy, and the interpreter, as a storyteller or as a hidden law giver, [FN121] seizes a very central role in the picture. The bigger difference between structural comparativism and critical legal scholarship, then, seems located at the level of political ideology. Nevertheless, this conclusion would not seem fully accurate since the ties with positivism either in law (Critical Legal Studies) or in science (structural comparativism) have not been fully severed.

The "Thesis of Trent" was set forth, in the mid-eighties, as a manifesto of the structural school. [FN122] There, one can find a difference between descriptive and normative comparison, between the is and the ought that is entirely modern and that is completely absent from the work of the Crits. This attitude turns into a denial of any political activism of comparative legal scholars, since political platforms are confined outside the world of description and into the world of the ought. Structural comparativism, much like positive economic analysis, claims to be compatible with a variety of political ideologies. [FN123] To the contrary, the Crits, in their various guises, all share a leftist ideology of social change that gives lawyers a role in it. In the structural school there is, however, a fundamental tension between this modern positivistic conception (probably stemming from the desire of structuralism to be a scientific method) and the theory of *1081 participative interpretation that Esser and Sacco have developed in Europe. [FN124]

Both critical legal studies, with respect to realism, and structural comparativism, with respect to previous comparative mainstream thought, might not have entirely cut the umbilical cord with
positivism. However, the aspects of positivism affecting the two approaches are different. Positivism can mean at least two things. The belief in the distinction between the is and the ought is the sense in which, between social sciences, economics can be considered positivistic and is the sense in which the "Thesis of Trent" can also be considered positivistic. [FN125] The belief that positive law is only what is backed by the political force of a state, and that the legal order is therefore limited by the domain of the state, is the sense of positivism fully developed by Kelsen on the continent and Austin in England. [FN126] In this sense, theCrits, as their Realist predecessors, are positivistic because they are concerned with a political dynamic of decision making, which is limited by the domain of the American legal and political system. The Crits (and their successors, race theorists) develop their ideological critique of the law as a political battle within the arena of one legal and political system, that of the United States. Its peculiarities and its political tensions absorb their action.

Because of its very subject matter, positivism, in this second meaning, has always been absent in mainstream comparativism. This critical attitude toward state-centrism is indeed the fundamental contribution of comparative law to jurisprudence. Like anthropology, economics, political science, sociology, and linguistics, legal scholarship should also proceed first by comparative analysis and only at a later stage (when we have understood the nature of a legal problem) be concerned with the peculiarities of each national legal system. [FN127] But participative interpretation and the seeds of postmodernism as a challenge to the "is-ought" distinction [FN128] were entirely absent in the mainstream comparative law tradition and might be considered the fundamental postmodern contribution of Sacco's comparativism in Europe.

Both the Crits and European comparativists took from American legal Realism the attitude of looking at what really matters in the law, beyond the rhetoric contained in the law in the books. But in the civilian context, beginning from the clear perception of the crucial role of legal scholarship (the most visible among unofficial sources) does not allow the narrow realist notion that what matters are only cases or other official decision-making processes (such as administrative adjudications). On this basis, it has been possible to see the law as conditioned by a much broader variety of factors; the unofficial (not only legal scholarship but culture in general) and unconscious ones are as important as the official and the conscious. [FN129]

The following step of this evolution, which clearly distinguishes the actual rules from the description of the rules, is the emphasis on the interpreter as ultimate storyteller who participates in the power game of constructing legitimacy. This final step is visible both in the Comparative Law and Economics idea of efficiency as a legitimating process [FN130] and in the critique of interpretivism as a strategy characterizing European legal culture. [FN131]

D. The Consciousness of the Postmodern Condition in the American and European Context

Both Critical Legal Studies and structural comparativism might be viewed today as being in the process of getting rid of the residual aspects of positivism, hence carrying to its ultimate consequences the consciousness of the postmodern condition. Critical Legal Scholars are opening their perspective to the global legal order by considering the complexity and the private as well as the public nature of its economic actors. Hence, they are beginning to shed their state-centric form of legal positivism by fully appreciating the pluralism of expression of political forces. Some structural comparativists, on the other hand, are reconsidering this belief in the scientific nature of their inquiry, in the possibility to distinguish the is from the ought, and in the neutral role of the comparativist as an external observer. Hence, the modernist and positivistic aspects of comparative legal scholarship *1083 as interpreted by the School of Sacco and most clearly set forward in the "Thesis of Trent" in the late 1980s, are now being reconsidered.
Postmodernism is what remains after noticing the methodological analogies between Sacco and Kennedy and after fully appreciating the political differences between the two schools. Postmodernism questions looking at the comparative project as a positivistic science. It suggests a more complex framework, in which a conception of science in accord with present day epistemology allows us to seek parallels between comparative law and a variety of means of expression, including art and architecture. [FN132]

Some scientific and positivistic biases of the structural manifesto require revision and normative suggestions. These are indispensable to making comparative law an interesting exercise of critique-understandable beyond the initiated circles. Comparative law can be a progressive project only if it aims at change. Perhaps advocating change requires a normative theory, or perhaps it requires only a recognition of such a possibility. [FN133]

Such postmodernist critique of comparative law is a major contribution that stems from and has contributed to its convergence with Critical Legal Studies. It is a progressive contribution that emancipates structural comparative law from a conservative positivistic bias.

VI. Modernism, Postmodernism, and Critical Thinking

The previous pages should be enough to demonstrate the state of methodological tension characterizing the discussion on the is and the ought of European law from the comparative perspective. Such a discussion is possibly more determined by passion than by rationality. There is a tension based on constructed methodological oppositions, on issues so complex in nature that they escape any black and white approach: the tension between those who claim a pure positive value of comparative law and those who claim its normative function, [FN134] the tension between structuralism and functionalism, the blend of integrative and contrastive approaches and discrete and holistic *1084 approaches, [FN135] and the tension between modernist and postmodernist projects. An American observer has recently suggested that such basic dichotomies might be, themselves, misguided, as if they were aligned with each other in some inherently logical way. [FN136]

Nothing better than the postmodern image of the "rhizome," as traced by Deleuze and Guattari, can capture the methodological and practical tensions characterizing European comparative law today. [FN137] And the nature of the reception of American Critical Legal Studies in Europe is better understood with the help of this symbol. The rhizome is essentially an aggregate of ramifications, roots, insertions, and connections with no hierarchy and no unity. It evokes a variety of very different signals; it cannot be captured either as a unity or as a variety. It does not have a unitary essence but, to the contrary, is made of dynamic variations. It is the icon of postmodernism. It captures, better than any word, the "theoretically nomadic" condition of postmodern thought. Indeed, postmodern thinkers freely move around different domains of knowledge. Their domains of knowledge interbreed and contaminate each other.

One final point needs to be emphasized. The picture of the rhizome reflects the contradictory, diverse, nonhomogeneous nature not only of law, but of European culture in general. Postmodernism perfectly adapts to and protects such status quo. Hence, the politically contradictory nature of postmodernism is confirmed in Europe. On the one hand, as a challenge to positivism, it allows comparative law to advocate change in an openly normative style. On the other hand, it offers a fashionable rhetoric to those who advocate tradition and continuity.

The situation is possibly different in the United States. In the United States, the academic culture and the leading philosophy have been consistently pragmatic. They have been unitary and
monistic in their pragmatism compared to Europe, where, if nothing else, England has prevented idealism from becoming hegemonic. In that context, postmodernism has been able to develop as a radical critique of both formalist and realist paradigms competing with each other for cultural hegemony in the legal academy. Postmodern critical thinking has advocated a return to localism, to form, and to complexity. It has challenged the American dream, the realist market pragmatism, and the simplifying assumptions [FN138] of the leading paradigms of research. [FN139] The rhizome could never have been a symbol for American scholars, who tend to seek simplification. It is the opposite of it.

To the contrary, the rhizome in Europe is the symbol of continuity and the status quo of legal formalism. In Europe, any chance of success for a leftist critical project must confront this situation. Aside from the rhizome, there is a need to introduce, perhaps for the first time, some values of modernity. A number of premodern aspects of European society still strike the observer. For example, formalism, a value symbolizing class division, has never been replaced by informality and equality. It is difficult to deny that the latter, rather than the former, are progressive values that critical thinkers should pursue. Interestingly, the story repeats itself in the law. Formalism, a postmodern value, is still hegemonic in European law. [FN140]

VII. A Postmodern Civil Code?

Is there any compatibility between the postmodern condition perfectly fitting the state of European law and the ideal of a code? What lesson may postmodern self-consciousness offer to the debate over codification? The focus on the code is important because we believe that this issue has a clearly political nature and that it can be understood only in that context. [FN141] Today, European comparative lawyers are divided on a number of issues, the civil code being the most central and paradigmatic of the nature of the division. While it is true that functionalists stress analogies over differences, it is not necessarily true that they are in favor of codification. They are usually in favor of a "common legal culture," but they do not necessarily advocate the code. [FN142] Structuralists may also have different opinions, although, generally speaking, they tend to be very keen in their defense of "diversity" in legal culture. [FN143]

If we substitute for the structuralist-functionalist dichotomy the modern-postmodern dichotomy, the picture is not greatly modified. European postmodernist scholars are sometimes openly against the *1086 European code [FN144]: some assume the need to preserve the traditions in European legal culture, [FN145] while some, more cynically, argue for the necessity of "irony" in the commitment to the preservation of the professional tradition in Western law. [FN146] Generally speaking, if postmodernism marks the rediscovery of local history and knowledge, of pluralism of styles and languages, in opposition to the universal vocation of the International Style, there is a direct opposition with the ideal of a rational, abstract, universal code.

Thus, in approaching the issue of codification, another contrast within a highly divided scholarly debate seems to emerge: a postmodern attitude, which is generally opposed to the code--considered the symbol of International Style unifying efforts--versus a modernist attitude, favoring all building efforts of a general European private law, including a code. While the first position is Euro-skeptical and emphasizes concerns for diversity and identity, the second is Euro-friendly and emphasizes its commitment to a stronger Europe. [FN147] That the code qualifies as a tool for territorial uniformity is shown by its history. Despite some recent dissent, [FN148] there is little doubt that the ideal of a uniform national territorial legal order has been behind nineteenth- and twentieth-century codification projects without significant exception. [FN149] Thus, the only issue would be where to place the borders of the territory. If the borders coincide with the state, then codification may be kept where it is today. If the borders are extended to include the entire
European territory, then a uniform legal order with a European code is necessary.

Unfortunately, the solution to dilemmas posed by the issue of European codification does not smoothly follow from the political decisions concerning Europe nor from such a territorial approach. Nor can the political posture towards Europe be addressed as an issue of right or left. For example, a majority of European mainstream *1087 scholars who certainly cannot be considered postmodernist, but who, to the contrary, are leading figures of a functionalist International Style in the law, are openly against the civil code. [FN150] And although many legal scholars do not openly take political sides, attacks to the code come from the right as much as from the left. [FN151]

Moreover, one needs to acknowledge that nineteenth-century ideals openly advocating a hard codification and a common language have been abandoned by today's comparativists. No one who is not a comparative legal amateur would still take seriously the rhetorical package that inevitably comes with ambitious efforts of radical legal change, such as a hard codification effort. Cultural sensitivity, either actual or pretended, is always introduced as a value in comparative law. "Soft law" is a trademark characterizing even the most ambitious efforts to find common rules, such as in the Lando Principles and the UNIDROIT Principles. [FN152] Introducing such products as "soft law" signals cultural sensitivity and respect for differences.

The interpretations of recent converging trends within the Western legal tradition as projects of international governance aimed at a distinction between "us" and "them" suggest that some of these declarations of cultural sensitivity dominating comparative law might be suspect. [FN153] Nevertheless, the fact remains that, compared to other approaches to law, the comparative approach has developed a tradition of legal sensitivity that is difficult to deny. [FN154] Consequently, if the building of legal Europe is to learn something from its comparative nature, the universal and rationalistic ideal of nineteenth century codification must be abandoned. In the present, critical postmodern scenario, the much discussed issue of a European civil code needs to be approached in a new light, outside of the sterile nineteenth-century Thibaut versus Savigny paradigm. [FN155]

Once comparative law faces, as it does in present-day Europe, direct, practical application of theoretical tensions, such as the ones discussed in the previous pages, the issue of codification needs to be appreciated in its full dimension, including the political and symbolic one. In other words, once the postmodern condition of present-day *1088 European law is recognized, should we, nevertheless, aim for ultimate uniformity and adopt its symbol, the code? If the answer is yes, what would a postmodernist code look like?

It is interesting to observe that the debate over the code is considered to be value-neutral and not politically loaded. Even when its political nature is not denied, it is certainly not characterized as an issue of the right rather than one of the left. The whole debate is carried on within the paradigm of law (and legal culture) as an objective science (both in the structuralist and in the functionalist approach) and disregards insights stemming from the postmodern conception of it as art, symbol, or passion. From this political perspective, we must evaluate the normative impact of modernism and postmodernism within the institutional environment of today's Europe.

The realistic acknowledgment of this institutional background shows that, within European legal culture, postmodernism might become an easy legitimization of a status quo that is often chauvinistic in the defense of national tradition, its locally-produced law, and its local bar.

Thus, within an ideal of radical critique, the code becomes a historic occasion to shake up the status quo. As discussed above, although the opposition cannot be interpreted in black or white if it
wishes to adapt to the present European situation, change can be revolutionary or reformist. Aiming at revolutionary change in the law is almost invariably a failure. The code as a revolutionary moment in the law is dead, together with the more extreme modernist and rationalist approaches to knowledge and science. Thus, the change desired by those who advocate the code has more the nature of the law reform. It must respect and recognize some value in the present in order to effectively change the aspects of it that are less desirable. The postmodern condition of European law has to be acknowledged with realism when advocating the code. But legal continuity and an inefficient local professional routine, which unfairly disadvantage the weak in favor of the strong, must be challenged. The promotion of such a routine and such a professional project into "legal culture" and the conservative implications of such attitude have to be revealed.

Modernism is not fairly represented by certain caricature extremes of the International Style. The progressive aspects of modernism, particularly those that are emphasized by the new wave of antiformalist historicism in architecture, can sustain a culturally sensitive codification project.

Acknowledging the political nature of the choice between universality and diversity, and the cultural construction of it, we suggest that the code should take into consideration the different progressive contents of both modernism and postmodernism in building legal Europe. Pluralism and difference must be emphasized only when they do not become nostalgic safeguards of a status quo. Universal learning and common solutions must be emphasized only when they do not degenerate into cultural imperialism. To the contrary, they should be used as strong weapons against traditionalism and conservative agendas.

From this perspective, the typically postmodern recognition of a "pluralistic rationality" does not necessarily mean the demise of the codification project. Nevertheless, the attitude of respect for diversity and multiplicity, aiming at fragmentation and hybridization, suggests new grounds, a new philosophy, and new contents for the code that are better able to consider the new "Geist." What becomes crucial from this perspective is the capacity of the European code to contain norms at the appropriate semantic level.

It is true that the articles of a code are only words in need of institutional interpretation. These words, however, evoke fundamental institutional arrangements themselves located at a number of levels. Moreover, they have a highly symbolical value: respect or disrespect for a tradition, preference for continuity rather than for change, exclusion rather than inclusion, formalism rather than antiformalism, and emphasis on protection of the weak rather than on risk-taking. Consequently, in Europe we should detect a semantic level compatible with the postmodern preference for multiplicity and diversity.

Receiving the suggestions of some architectural schools, the postmodern civil code should play on a "duplicity of canons." It should recognize a fundamental structure, made of mandatory rules, performing the basic function of market governance throughout Europe. Such a modernist functional structure, however, should coexist with a postmodern aggregate of narrative default rules that might well be different from one country to the other and that perform the function of making the code contextual and reflexive of local values and style. In fact, generally speaking, modern and postmodern do not point at rigid chronological eras. Rather, they are flexible ideals, so it is not contradictory to suggest modern attitudes in the postmodern world.

Indeed, even in the European legal context, in which postmodernism is currently the dominating and paradigmatic condition, the civil code, with its strongly symbolic function, can express values such as newness, unity, and progress, which are typically modern but are able now to perform a
renewed decorative function. [FN160] Such decorative function ends up being educational, so that the code would be the forum in which political choices legitimized by the political process (rather than constructed as neutral) could be spelled out.

The decorative function of such fundamental political programs should, however, refrain from falling into another aspect of postmodernism that makes it at odds with the ideal of change in Europe: i.e., that it should not remain at a purely formalistic level. On the contrary, it should strive to be translated into a body of rules transmitting a set of incentives coherent with the program spelled out in the political choices.

In practice, it is possible that the mentioned modern values of unity, reconstruction, and progress are bound to be defeated. The very strongly postmodern institutional background in which such major attempts to change and progress would take place are likely to make the conservative forces, which are hegemonic in the European legal profession, prevail. Indeed, the modern and progressive utopian ideal of a unitary source of law will have to come to terms with the linguistic pluralism. Translations, short from being aseptic and neutral, affect, at least in part, the meaning of the norm by putting it in a different language allusive to different legal paths. [FN161] Moreover, the myth of innovation and change is likely to be defeated by the strongly conservative attitude of its professional interpreter, at least in the short run. Nobody believes that the code still maintains a monopoly over *1091 the sources of law. Thus, it will have to compete in different legal systems with a plurality of other local formants of different comparative strengths.

Realism forces us to recognize that the postmodern code might end up with a merely pedagogic and symbolic function. The task of progressive scholarship would first be to make sure that the local semantic variations are confined as much as possible to the level of default rules that do not bind, but narrate. Second, it must ensure that the aggregate of "intertexts" [FN162] that might vindicate the local and contextual dimension do not carry their traditional impact far enough to affect the progressive political options contained in the mandatory rules.

The body of common mandatory principles, in turn, openly functional in its simplicity, should contain viable political options and the minimal conditions to achieve a common market. As realists, we recognize the power of the rhizome. There is a need to avoid using it as a justification of the most unbearable lightness of the postmodern condition: the return to formalism and the market as a governing agency, rather than an institution to be governed.

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[FN1]. The sense in which the notion of ideology is used will be developed throughout this Article. A useful discussion of the term may be found in Terry Eagleton, Ideology 1-31 (1991).


[FN4]. In political theory today, the notions of left and right are being reevaluated. See Anthony Giddens, Beyond Left and Right: The Future of Radical Politics 8-11 (1994).

[FN5]. According to Gary Minda, Postmodern Legal Movements 114-16 (1995), a first generation of Critical Legal Scholars, relying on structuralist methodology, was followed by a second generation, applying postmodern strategies of deconstruction to legal doctrines and cases. See also Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage (2000).


[FN9]. The word "postmodern" has constantly been questioned, and many scholars have stressed its ambiguity. Even Jean-François Lyotard, a leading postmodernist, suggests that it is a bad term. See Jean-François Lyotard, Regole e paradossi, in La pittura del segreto nell'epoca postmoderna, baruchello 35 (Feltrinelli, 1982) (reprinted from the magazine Alfabeta dated May 24, 1981). According to the famous definition of Ihab Hassan, the word postmodern "evokes what it wishes to surpass or suppress, modernism itself, [,and] thus contains its enemy within." Ihab Hassan, The Question of Postmodernism, 6 Perf. Arts J. 30, 31 (1981). When one considers the variety of disciplines using the term and their inevitable sectorial ideology, it is no surprise that the structural complexity of the term ends up in semantic ambiguity and instability. Nor is it possible to use it as a clear historiographical concept for purposes of periodization. From the historical perspective, it cannot be used for rigid chronological determinations but only as a dominant cultural characterization, as a flexible ideal-type determining a given mode of thought. See generally Jean-François Lyotard, Le Postmoderne expliqué aux les enfants (1986); Fredric Jameson, Postmodernism, or the Cultural Logic of Late Capitalism, New Left Rev., July-Aug. 1984, at 53. As a consequence, it is possible to find modernist attitudes within the postmodern and vice-versa without denying that postmodernism is the paradigmatic condition of contemporary Western societies.

[FN10]. See, e.g., Erik Jayme, Osservazioni per una teoria postmoderna della comparazione giuridica, 1997 Rivista di diritto civile [Riv. dir. civ.] 813, 816.
For example, the "School of Sacco," also known as the "Circle of Trent," is not characterized as being either Marxist or postmodernist. Within this European school of thought, there are both politically progressive and politically conservative scholars, as well as scholars committed to a modernist "International Style" tradition and scholars whose self-perception can be considered "postmodern."

The methodological manifesto of this group of Italian scholars can be found in Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law (pt. 1), 39 Am. J. Comp. L. 1, 4 n.6 (1991). It is based on a clear distinction between a positive and a normative function of comparative law that is entirely modern in spirit. See discussion infra Part VI.C. A critical appraisal of the "Thesis of Trent" by P.G. Monateri, a disciple of Sacco, can be found in Pier Giuseppe Monateri, Comparazione, critica e civilistica: Diritto e latenza normativa a dieci anni dalle Tesi di Trento, 1998 Riv. crit. dir. priv. 453.

See generally Europe's Other: European Law Between Modernity and Postmodernity (Peter Fitzpatrick & James Henry Bergeron eds., 1998).

See Jayme, supra note 10.

See Minda, supra note 5.


See Hassan, supra note 9, passim.

Paolo Portoghesi, Postmodern: l'architettura nella società post-Industriale 7 (1982).


A Westlaw search using the search term "postmodern" shows 111 articles with the word postmodern in the title and more than 2500 articles discussing the concept.

See Bussani, supra note 3.

Law's practical dimension also affects the way in which legal scholarship is conducted. For a recent critique of the modern style of American legal scholarship that advocates a higher degree of scholarly purity, see Paul W. Kahn, The Cultural Study of Law (1999).

David Harvey, The Condition of Postmodernity (1990). Harvey discusses hegemonic post-1945 modernism, often mannerist and redundant, which, according to him, had a tight-knit relationship with the dominant institutional powers. See id. He also notes that art, architecture, and literature became institutionalized activities in a society whose predominant political and economic attitude was a new capitalistic version of the Enlightenment's project for human emancipation. See id. From Harvey's perspective, it is clear that the establishment's official ideology adopted a particular type of modernist aesthetics and used it in relation to the power of big business and cultural imperialism, with a certain lack of sensitivity. See id.

Analogous evaluations of late modernism come from other critics. Leonardo Benevolo stresses
that, while modernist architecture spread throughout the world after World War II, the
modernist movement lost its unity and coherence. See 2 Leonardo Benevolo, Storia
dell'architettura moderna 958-59 (3d ed. 1966). The death of the great masters and the new
need for large-scale projects marked the crisis of the hegemonic paradigm and posed new
challenges. See id.; see also Kenneth Frampton, Modern Architecture: A Critical History
(1992). Frampton notes that at the beginning of the sixties it was evident that the reductive
codes of certain modernist architecture had led to a progressive impoverishment of the urban
environment.

[FN24]. See Harvey, supra note 23, passim.

[FN25]. The first direct attack on the ideals of modernist architecture came from the American
economist, Jane Jacobs, in a textual manifesto that stresses the boredom, monotony, and alienation
provoked by abstract and uniform products of the modernist tradition. See Jane Jacobs, The Death
and Life of Great American Cities (1961). For an analysis of postmodernism as a "condition of
work," see Magali Sarfatti Larson, Behind the Postmodern Façade (1993). The theoretical path of
postmodern architecture can be reduced to a few fundamental texts. See, e.g., Charles A. Jencks,
The Language of Post-Modern Architecture (1977); Robert Venturi et al., Learning from Las Vegas
(1972). However, we need to consider that some hostility to postmodernism is evident among some
of the world's leading experts. See, e.g., 1 Bruno Zevi, Storia dell'architettura moderna 445 (10th
ed. 1996).

[FN26]. Portoghesi, supra note 17, at 59.

[FN27]. For an interpretation of a dwelling as culture and a prerequisite in the reconstruction of
identity, see Martin Heidegger, Bauen, Wohnen, Denken, in Vorträge und Aufsätze 145 (1954).

[FN28]. Jacques Derrida, Architetture dove il desiderio puo abitare, Domus, Apr. 1986, at 17, 20-
24.

[FN29]. See Wolfgang Wiegand, The Reception of American Law in Europe, 39 Am. J. Comp. L.
229 (1991); see also Ugo Mattei, Why the Wind Changed: Intellectual Leadership in Western Law,

[FN30]. See Jane B. Baron, Law, Literature, and the Problems of Interdisciplinarity, 108 Yale L.J.
1059, 1059-62 (1999); Marc Galanter & Mark Alan Edwards, Introduction: The Path of the Law
Anys, 1997 Wis. L. Rev. 375, 376; Edward L. Rubin, Law and the Methodology of Law, 1997 Wis.
L. Rev. 521, 565.

[FN31]. The conference, "Critical Legal Thinking in Europe," took place in Amsterdam on May 15,
2000.

[FN32]. For an interesting discussion on the political connotation of law and economics, see Paul
H. Brietzke, New Wrinkles in Law ... and Economics, 32 Val. U. L. Rev. 105 (1997). See also
Robin Paul Malloy, Law and Market Economy: Reinterpreting the Values of Law and Economics
(2000); Nicholas Mercuro & Steven G. Medema, Law and Economics: From Posner to
Postmodernism (1997).


[FN34]. For more about the notion of "prestige," see Grande, supra note 2; Alan Watson,


[FN37]. At least this was the feeling of the one coauthor of this Article who, in the 1980s, had already passed his teenage years.

[FN38]. See Pier Giuseppe Monateri, "Cunning Passages": Comparazione e ideologia nei rapporti tra diritto e linguaggio, 1999 Riv. crit. dir. priv. 353; Frankenberg, supra note 7; Teubner, supra note 7.


[FN40]. For an example of such criticism, see Symposium, New Directions in Comparative Law, 46 Am. J. Comp. L. 597 (1998).

[FN41]. See Jayme, supra note 10, at 814.


[FN43]. The term "legal formant" can be considered a sort of international trademark of the School of Sacco. For a concise discussion of the term, see Schlesinger et al., supra note 33; Sacco & Monateri, supra note 34.

[FN44]. The methodological manifesto of the School of Sacco was formalized in the "Thesis of Trent" in 1985. See Sacco & Monateri, supra note 34.


[FN46]. See Michel Foucault, Surveiller et Punir (1975); Michel Foucault, L'Archéologie du Savoir (1969); Michel Foucault, Histoire de la sexualité I: La Volonté de Savoir (1976); Michel Foucault, Histoire de la sexualité II: l'usage des plaisirs(1978); Michel Foucault, Histoire de la sexualité III: Le souci de soi (1984).


[FN49]. For an application in the law of such construction of the self in opposition with the other, see P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origin of the "Western Legal Tradition"*, 51 Hastings L.J. 479 (2000).


[FN54]. One may talk about a reformist tradition, but this conveys the image of the process and not of the merits. Hence, tradition and reform can be seen as conceptual opposites. Between tradition and reform there seems to be a relationship of higher incompatibility than between tradition and revolution. Reform cannot be aimed at restoring the tradition. It is aimed at modifying it, perhaps only slightly. Where there is reform, the tradition is modified; where the tradition stands, there is no reform. It is the very respect of reform for tradition, the positive relationship between the two notions, that allows these two to coexist. Almost paradoxically, their coexistence also makes them incompatible.

[FN55]. See James Hillman, Betrayal 24 (1964). There is a more similar relationship among tradition, reform, and revolution than between love, friendship, and hate. It is easier for love to turn into hate and hate into love than friendship into love and love into friendship.


[FN58]. The most important recent discussions of tradition in the law may be found in H. Patrick Glenn, Legal Traditions of the World (2000) and Christian Atias, Présence de la tradition juridique, 22 Revue de la Recherche juridique 387 (1997).

[FN59]. According to Monateri, supra note 49, the use of Western legal tradition hides a project of international governance. We only believe it might be used to construct a difference and to hide racist value judgments.


[FN67]. See infra text accompanying notes 136-137.

[FN68]. See Glenn, supra note 58, passim.


[FN70]. See Antonio Gambaro, Western Legal Tradition, in 3 New Palgrave Dictionary, supra note 34, at 687.


[FN72]. The best description of the notion of legal tradition is still the one provided by John Henry Merryman, The Civil Law Tradition passim (2d ed. 1985).

[FN73]. See Maurizio Ferraris, Non ci sono gatti, solo interpretazioni, in Diritto, giustizia e interpretazione 129 (Jacque Derrida & Gianni Vattimo eds., 1998).

[FN74]. See Glenn, supra note 58.

[FN75]. See Gambaro, supra note 70.


[FN79]. See 1 Zevi, supra note 25, at 445.


[FN81]. Legrand, Fragments, supra note 7; Teubner, supra note 7.


[FN90]. See Harold J. Berman, Law and Revolution (1983); Gambaro, supra note 70.


[FN94]. See generally Writing Culture: The Poetics and Politics of Ethnography (James Clifford & George E. Marcus eds., 1986).


[FN97]. For such a strategy, see Legrand, Fragments, supra note 7; Legrand, Le droit comparé, supra note 7. On the strategic invention of the idea of Western legal tradition, see Monateri, supra note 49, passim.


[FN99]. See Kennedy, supra note 8, passim.


[FN101]. The antiglobalization protests of Seattle are symbols of radical reconsideration of established values. See István Mészáros, L'alternativa alla società del capitale (2000).

[FN102]. See Minda, supra note 5.


[FN106]. See Ferdinand de Saussure, Cours de Linguistique Générale (1916).

[FN107]. See Noam Chomsky, Syntactic Structures (1957).


[FN113]. Louis Althusser et al., Lire le capital (1965); Louis Althusser, Éléments d'Autocritique (1974).

[FN114]. See, e.g., supra note 46.


[FN116]. See Zweigert & Kötz, supra note 88.


[FN118]. In a sense, Sacco's structural comparative style does not disregard the function of the law (alternative legal formants may perform the same function in two systems, or different functions might be performed by the same formant). By the same token, Schlesinger's common core approach is partly structuralist in stressing how procedural institutions and their organization are the true central aspect of the civil law versus common law dichotomy. See Schlesinger, supra note 82.

[FN119]. See supra text accompanying notes 103-105.


[FN122]. See supra note 11.

[FN123]. See Mark Blaug, The Methodology of Economics 129 (1980); Milton Friedman, Essays
in Positive Economics 3 (1953).


[FN125]. See Friedman, supra note 123.


[FN127]. Even today, most jurists believe that local technicalities of the law affect the solution of a problem at the local level. However, if scholarship is aimed at understanding and explaining legal phenomena, it cannot do so if it is focused only on parochial contingencies. A deeper understanding of legal problems is impossible when using an approach that remains entangled in local technicalities that preclude understanding of the larger picture. See Kahn, supra note 22.


[FN130]. See Gambaro, supra note 121.


[FN132]. See supra Part I.

[FN133]. From an insider's perspective, that might be considered reformist rather than revolutionary. See George P. Fletcher, Comparative Law as a Subversive Discipline, 46 Am. J. Comp. L. 683 (1998).


[FN139]. See Duncan Kennedy, Law and Economics from the Perspective of Critical Legal Studies, 3 New Palgrave Dictionary, supra note 34, at 465.

[FN140]. Cf. Muir Watt, supra note 42.

[FN141]. See Mattei, supra note 57.


[FN144]. See Legrand, Fragments, supra note 7; Legrand, Le droit comparé, supra note 7.

[FN145]. See Teubner, supra note 7.

[FN146]. See Pier Giuseppe Monateri, Remarks at the Anti-Formalism About Law and the Legal Profession: Comparative and Historical Perspectives Conference at Harvard Law School (April 16-17, 1999).

[FN147]. An attempt to understand the sociology of the present movement aiming at the building of legal Europe can be found in Martin Shapiro, The Common Core: Some Outside Comments, in Making European Law: Essays on the 'Common Core' Project 123 (Mauro Bussani & Ugo Mattei eds., 2000).


[FN151]. Cf. Mattei, supra note 57.

[FN152]. For a critical discussion of such projects, see Bussani, supra note 3.


[FN154]. For a discussion of the risks incurred by traditionalists, see supra Part IV.

[FN155]. See Graziadei, supra note 135.

[FN156]. See 1 Zevi, supra note 25.

[FN157]. Postmodernism is often considered a highly formalistic exercise. Indeed, what it redisCOVERS of the past is mostly the form. This formalist attitude is again an aspect of European culture that is safeguarded by postmodernism. See generally Feldman, supra note 5.

[FN158]. See Jencks, supra note 25, at 130-32. Jencks notes that the general formula of postmodern architecture is "double coding." Id. Modernist architecture claimed to use a single universal language; postmodern architecture carries on a double discourse, applying two stylistic codes at the same time: the modern code and at least one other language or code (e.g., the classic or the baroque), with the final result of being able to speak on at least two levels simultaneously. Id.
[FN159]. See Jean-François Lyotard, La condition postmoderne (1977); Jameson, supra note 9.

[FN160]. On the rediscovery of a decorative function in post modernism, see Jameson, supra note 9.


[FN162]. The notion of intertext is discussed by R. Barthes, Texte (Théorie du), in 15 Encyclopaedia Universalis 1013, 1013-17 (1968). The intertext is a general body of anonymous formulas the origin of which is always difficult to locate; it is an aggregate of unconscious or automatic references. On the epistemological ground, the concept of hypertext leads to the theory of the text and to the dimension of sociality: the ultimate language reaches the text without following a distinct genealogy or a voluntary imitation but by means of dissemination. This is an obvious analogy to the structuralist notion of cryptotype and of mute law. See Sacco, supra note 129.