

# The Future of Legal Science in Civil Law Systems

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# The Future of Legal Science in Civil Law Systems

*Horacio Spector\**

I want to thank Professor Saul Litvinoff very much for his kind and generous presentation. I am very honored by the opportunity to give the Tucker Lecture, mainly because of the high prestige this Institute of Law has as a center of legal research in the civil law world. I am very grateful, too, because this lecture gives me a wonderful occasion to address an issue that has attracted my intellectual interest for a long time.

As Professor Litvinoff indicated, I will discuss the future of legal science in civil law systems, particularly in private law. I hasten to say that I will not try to predict what legal science *will be* in the coming years. That depends on a great variety of sociological and institutional factors that do not concern me today. I will rather focus on what legal science *could become* in civil law systems given the special features of civil law and the theoretical investigations that North American legal scholarship has been making in recent years.

## I. THE NATURE OF LEGAL SCIENCE

I am wary that the expression “legal science” will sound to many as a convenient label to exalt legal scholarship into a “hard” science, like physics or biology. Interestingly, the feeling of semantic manipulation will vary in intensity depending on the background legal system. While it will probably sound strange to common lawyers, the expression is natural in the civil law world, where legal scholarship has traditionally aspired to become a science-like discipline. Though Jhering’s “instrumentalism” and related jurisprudential outlooks have introduced widespread skepticism about the scientific status of civilian scholarship, as late as 1969 John Henry Merryman felt sure to declare: “The contemporary civil law world is still under the sway of one of the most powerful and coherent schools of thought in the history of the civil law tradition. We will call it legal science.”<sup>1</sup> Does civilian scholarship have a claim

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\* Professor of Law, Dean of the School of Law, and Vice Rector, Universidad Torcuato Di Tella. A version of this paper was delivered as the Tucker Lecture in the LSU Law Center on March 20, 2003. A related paper (forthcoming in the Chicago-Kent Law Review) was presented at the Special Workshop on Law and Economics and Legal Scholarship, 21st IVR World Congress, Lund, Sweden (August 12–18, 2003). I am grateful to my audiences on those occasions for their very helpful questions and comments.

1. John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 65 (1969).

to scientific status? How can we explain this contrast between common law scholarship and civilian legal science?

Science is usually defined as an intellectual enterprise purporting to explain and predict empirical phenomena. In fact, scientific theories abstract from the multifarious details of empirical facts and try to subsume them under abstract and universal propositions. At the same time, scientific theories must be subject to empirical testing, though philosophers of science disagree about the upshot of this requirement. While logical positivists maintained that observation data can verify scientific hypotheses, Karl Popper famously claimed that refutability of theories is the mark of science.<sup>2</sup> Leaving aside this discrepancy, the traditional view regards theorization (i.e., the construction of universal laws) and empirical testing as the two distinguishing features of science.<sup>3</sup> Yet a revisionist trend, led by Thomas Kuhn and Paul Feyerabend, challenged, during the 1960s, the claim that scientific theories entail testable empirical statements. Relying on a careful study of the history of science, proponents of this approach deny the possibility of a neutral observation language. If observation scientific language is bound to be theory-laden, there is no simple way of verifying or falsifying scientific propositions, and scientific explanation comes close to *Verstehen* (i.e., interpretation), the *bête noire* of empiricist philosophers. For simplicity's sake, I will not consider these revisionist views here. As I have shown elsewhere, such views do not allow so neat a demarcation between science and non-scientific disciplines and, hence, are more congenial to the idea that legal scholarship is a science.<sup>4</sup>

I said that civil law scholarship sees itself as a science-like discipline. One explanation of this is the high degree of abstract systematization that doctrinal studies achieved in the civil law world during the nineteenth century. As is well known, the shaping of European legal science began with the reception of Roman Law in the Early Middle Ages and culminated with the works of Savigny, Jhering, and the *Begriffsjurisprudenz* in the nineteenth century. In this long process legal science evolved from glosses and commentaries on the *Corpus Iuris Civilis* to abstract and complex theories.<sup>5</sup>

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2. A.J. Ayer, *Language, Truth, and Logic* (2d ed. 1936); Rudolf Carnap, *Testability and Meaning* (1950); Karl R. Popper, *The Logic of Scientific Discovery* (1959); C. Hempel, *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science* (1965).

3. Frederick Suppe, *The Search for Philosophic Understanding of Scientific Theories*, in *The Structure of Scientific Theories* (Frederick Suppe ed., 2d ed. 1977) (exposing the "received" theory of science and its theoretical alternatives).

4. Horacio Spector, *La base empírica en la ciencia jurídica*, 23 *Revista de Ciencias Sociales* 33 (1983).

5. Franz Wieacker, *A History of Private Law in Europe* (Tony Weir trans.,

The great civilian jurists sought to turn a vast array of legal materials flowing from different sources into a *coherent* and *complete* legal system premised on an abstract and orderly theoretical structure. For instance, Pandectistic legal science systematized German customary rules and Roman Law. That theoretical structure could be interpreted in two different ways. First, it might be conceived as the systematic reconstruction of spontaneous cultural patterns developed by a certain community. The Historic School, led by Gustav Hugo and Friedrich Karl von Savigny, emphasized the analogy between law and language as cultural manifestations of the spirit of a people.<sup>6</sup> Savigny thought that in primitive societies “law lives, like language, in the popular consciousness;” this “political element” of law is complemented and transformed in modern States by the systematic contributions of legal science, which he dubs the “technical element.”<sup>7</sup> In *Geist des roemischen Rechts*, Jhering elaborated on this conception of legal science by analogizing it to chemistry.<sup>8</sup> Chemistry is analytical in that it seeks to explain complex phenomena in terms of the behavior of simple bodies. In the same way, said Jhering, legal science reduces complex legal rules to simple notions through simple legal concepts. For instance, just as the chemist analyzes water as a compound of two molecules of hydrogen and one of oxygen, the jurist defines the complex notion of “hypothec” as a real right on immovable property made liable for the performance of an obligation. Thus, the civil jurist analyzes legal institutions, reduces them to simple notions, and combines such notions in different ways. The analogy between chemistry and legal science suggests an essentialist reading of legal definitions. When the jurist captures the essence or true nature of a legal concept, he displays the qualities of a real thing. This conception of legal concepts agrees with the Aristotelian conception of science as a body of propositions premised on essentialist, realist definitions. On this view, legal

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1995).

6. *Id.* at 300–16; William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. Pa. L. Rev. 1889, 2012–43 (1995).

7. See Frederick Charles Von Savigny, *Of The Vocation of Our Age for Legislation And Jurisprudence* (Abraham Hayward trans., photo. reprint 1975) (1831).

8. Rudolf von Ihering, *El espíritu del derecho romano* 488–90 (Trans. 2001). On Ihering’s conception of legal science, compare Antonio Hernández-Gil, *Jhering y el método de la construcción jurídica*, 10/11 *Revista de Ciencias Sociales* 315 (1976–77); Antonio Hernández-Gil & Alvarez Cienfuegos, *El estatuto científico de la construcción jurídica en Ihering*, 10/11 *Revista de Ciencias Sociales* 339 (1976–77); Enrique Zuleta Puceiro, *Paradigma dogmático y Ciencia del Derecho* (1981).

definitions are not a conventional way to convey or establish the meaning of legal terms, but true descriptions of the essence of legal institutions.<sup>9</sup>

Second, the theoretical structure of civil law could be viewed as the representation of natural moral laws or moral principles underlying positive law. To be sure, Grotius, Pufendorf, Kant, and other members of the rationalist school of Natural Law did not mean their systems of natural law to provide an account of positive law. Yet, we could interpret the fundamental principles of civil law scholarship, typically gathered in the so called "General Parts," as descriptions of abstract moral principles that are objectively true or valid. According to this interpretation, the analyses of juridical concepts would not be lexicographical or conventional definitions, but normative positions defended under the guise of definitions. This interpretation of legal science resembles Dworkin's reconstruction of common law. Dworkin claims that the fundamental point of common law is "to guide and constrain the power of government . . ." in such a way that ". . . force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."<sup>10</sup> The end of legal theory, according to Dworkin, is to reveal the most abstract moral principles underlying common law. In a similar vein, the end of legal science, on this interpretation, would be to reveal the most abstract moral principles underlying codified legal materials.

In either reading, legal science provides solutions that go beyond positive law, as literally construed. Contemporary legal philosophers in civil law jurisdictions reach the same conclusion when they claim that the theoretical structure of legal science serves to conceal its true normative role, conferring on contestable legal doctrines an aura of scientific objectivity. Civilian lawyers sometimes achieve this purpose through the fiction of a "rational legislator," a mythical character defined as a legislator who issues norms aiming at coherence, completeness, and efficiency. This fiction orients the interpretation of the code in the direction of their normative and political positions.<sup>11</sup>

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9. Karl R. Popper, *The Poverty of Historicism* §10 (2d ed. 1960) (criticizing methodological essentialism).

10. Ronald Dworkin, *Law's Empire* 93 (1986); Carlos Santiago Nino, *Los límites de la responsabilidad penal* 1-33 (1980) (discussing the possibility of applying Dworkinian legal methodology to Criminal Law Dogmatics); Horacio Spector, *Enunciados jurídicos y razones para actuar*, in *Decisiones normativas: Ensayos en homenaje a Julia Barragán* (John Harsanyi et al. eds., 1999).

11. Carlos Santiago Nino, *Consideraciones sobre la Dogmática Jurídica* (1974);

Civilian jurists also resort to a procedure called "legal induction." Let me illustrate this procedure with the principle that the debtor's patrimony is the common pledge of the creditors. Whereas this principle is laid down in article 3183 of the Louisiana Civil Code,<sup>12</sup> the Argentine Civil Code lacks a specific provision to that effect. However, Argentine jurists maintain that the principle can be inferred from the Code by "juridical induction" or "construction." They invoke various particular provisions that seem to be applications of that principle. For instance, article 961 states that any creditor has a right to revoke an act made by the debtor in fraud of his rights,<sup>13</sup> and article 962, paragraph three, requires that the credit founding the action have a date prior to the debtor's act;<sup>14</sup> there is no indication about the date of acquisition of the object of the fraud. The revocatory action can be seen as a consequence of the principle that the entirety of the debtor's property, present and future, is charged with the performance of his obligations. Still, the principle is not a logical deduction from any set of provisions in the Civil Code. It is the other way around. Jurists can explain those provisions by hypothesizing the principle.<sup>15</sup>

Legal concepts perform normative functions, their factual appearance notwithstanding. Typically, the civilian lawyer employs syllogistic reasoning grounded on propositions belonging to the theoretical structure of legal science to obtain legal solutions for concrete cases. For example, the definition of "juridical act" is a way of establishing, among other things, the conditions of enforceability of contracts. Endorsing a usual definition in civilian scholarship, the Argentine Civil Code defines, in article 944, juridical acts as "licit voluntary acts having as their immediate end to establish between persons juridical relations, or to create, modify, transfer, conserve or extinguish rights."<sup>16</sup> By deploying this concept, the Argentine Civil Code applies general rules of intention, fraud, and simulation to a diversity of acts. In its turn, the Code says that juridical acts made by essential mistake are unintentional and, hence, cannot be considered voluntary in the sense required by the definition of juridical act. An act made by essential mistake is not a juridical act in a strict sense;

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Leszek Nowak, *A Concept of Rational Legislator*, in *Polish Contributions to the Theory and Philosophy of Law* (Zygmunt Ziembinski ed., 1987).

12. La. Civ. Code art. 3183.

13. Cód. Civ. art. 961 (Argentina).

14. *Id.* art. 962.

15. Horacio Spector, *La dogmática jurídica: Algunos problemas epistemológicos*, 29 *Revista de Ciencias Sociales* 9 (1986) (analyzing "legal induction" as a form of deductive reasoning yielding counterfactual legal propositions).

16. Cód. Civ. art. 944.

therefore, the clause mandating nullity of acts made with essential error seems almost a corollary of the definition of "juridical act."

Principles in civil law are *defeasible* and, therefore, syllogistic reasoning sometimes fails because of exceptions in the intended premises. Let me illustrate this feature of civilian principles by appealing, again, to the concept of juridical act and one of its species—payment of an obligation. Article 926 of the Argentine Civil Code says that error concerning the main cause of an act, or the quality of the thing taken into consideration, makes the relevant act subject to annulment.<sup>17</sup> Since payment of obligations falls under the concept of juridical act, the rule should also apply to payments made by mistake. This means that payment made by error concerning the person is unintentional and, therefore, can be annulled. In fact, Article 784 of the Code says that he who by legal or factual mistake believes himself debtor and delivers a thing to someone else in putative payment is entitled to recover what was paid from the person who received it.<sup>18</sup> However, deductive strings across the formal structure can break down at certain points. For instance, article 785 establishes an exception to the rule of article 784. When the creditor has destroyed the title of the obligation as a result of payment, the person who paid by error cannot recover the thing, though he still has the right to recover an equivalent value from the true debtor.<sup>19</sup> Similarly, recovery is not possible when the payment was made in performance of a natural obligation.<sup>20</sup>

Legal science possesses a factual dimension, too. In effect, civilian doctrines are criticized and, eventually, given up when they face numerous counterexamples, that is, rules that are anomalous in light of such doctrines.<sup>21</sup> Let me illustrate this point with the theory of possession. As is well known, Savigny claimed that the foundation of the legal protection of possession is to avoid a wrong against the possessor (i.e., a violent behavior against his person).<sup>22</sup> In *Grund des Besitzschutzes*, Jhering argued that Savigny's theory did not accord with several provisions in Roman Law, among them the lack of protection of *detentio alieno nomine* (detention on behalf of another). He wrote: "In fact, if [possessory interdicts] are means of protection against the wrong committed on the person, if the possessory relation does not have but a subordinate importance, which reduces itself to the factual element of the situation, then it

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17. *Id.* art. 926.

18. *Id.* art. 784.

19. *Id.* art. 785.

20. *Id.* art. 516.

21. José Vilanova, *Elementos de Filosofía del Derecho* 49–50 (1977).

22. Friedrich Carl von Savigny, *Traité de la Possession en Droit Romain* 25 (Trans. 1870).

cannot be understood why the person who detains a thing must depend on the possessor to be protected from a wrong against his person."<sup>23</sup>

The program of turning legal scholarship into a science was not exclusive of nineteenth century civilian culture. It accompanied the birth of American legal scholarship too. According to Professor Anthony Kronman, Langdell defended the Hobessian understanding of law and politics as a kind of geometry whose foundational principles could be discovered by natural reason.<sup>24</sup> In contrast to the classical conception of common law as a realm of practical wisdom and experience, Langdell embraced the basic tenets of legal formalists such as Bentham and Austin, who thought that law could be reconstructed as a rational order. However, instead of favoring a reconstruction from without, in the form of Enlightenment codes, Langdell maintained that law professors could reconstruct common law decisions from within to reach a "geometrical" system of legal principles.

After the demise of legal formalism, the Langdellian conception of common law scholarship as a formal science progressively vanished from American legal culture. However, the triumphant instrumentalist movement pioneered by Holmes and Cardozo gave legal scholarship an experimental and empirical bent. Professor Thomas Ulen has recently argued that doctrinal studies in common law have for a long time been inclined to empirical testing.<sup>25</sup> One of his examples is the study conducted by Professor Stanley Henderson in the late 1960s about detrimental reliance as the basis of promissory estoppel. Among other findings, Professor Henderson showed that, over the previous ten years, in every case in which courts accepted a plea for promissory estoppel they did not see it as a separate basis of contract enforcement but just as an auxiliary rule to apply the standard principle of bargain promises. He also demonstrated that those cases invariably involved commercial negotiation, rather than gratuitous promises.

Anglo-American legal scholarship is not usually called a science, despite its traditional empirical bent. The reason possibly resides in the fact that, unlike civilian scholarship, it did not achieve a high degree of abstract systematization. However, in the last decades, with the emergence of law and economics and philosophical accounts of particular areas of common law, Anglo-American legal

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23. Rudolf von Jhering, *Teoría de la posesión: Del fundamento de la protección posesoria* 13 (Trans. 1892). The translation of the quoted passage is from the Spanish version.

24. Anthony Kronman, *The Lost Lawyer* 170–85 (1993).

25. Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 4 U. Ill. L. Rev. 875 (2002).



scholarship is reaching a high degree of theorization and complexity. This trend has animated Professor Ulen to claim that legal scholarship is transforming itself into a science.<sup>26</sup>

During the nineteenth century, civilian legal scholarship developed a theoretical structure capable of explaining and systematizing a vast array of particular facts and adopted a practice of subjecting scientific propositions to some kind of testing. These two traits may have provided some justification for calling it a "science." After the process of civilian codification was in practice completed with the passing of the German Civil Code (BGB), legal science started to decline in intellectual vitality. Today, civilian jurists are still engaged in the systematization of codified rules, and, in particular, of judicial decisions that seek to adjust the code to new economic, social, and technological circumstances. However, the isolation of such studies from law and economics and moral and legal philosophy—that is, the two mainstream theoretical paradigms in legal research—is increasingly affecting the nature of such scholarship. Just as civilian scholarship acquired its moment of splendor working in tandem with philosophical and historic studies, I suggest that it could catch up with present common-law scholarship by deepening its ties to moral and legal philosophy and law and economics.

## II. THEORETICAL PARADIGMS IN CIVILIAN SCHOLARSHIP

I want to discuss now whether law and economics and moral and legal philosophy are helpful to understand civil law, as they are proving useful to explain common law. I want to suggest that both paradigms are applicable to civil law. Yet I will claim that, because of the quite different historical evolution of the two systems of law, the relative value of each paradigm is different—moral and legal philosophy being more important in civil law. Therefore, we cannot expect an automatic alignment of civilian scholarship with common law scholarship.

The usefulness of legal philosophy to account for civil law should be deemed uncontroversial. In historic terms, the current philosophical paradigm originated as a way of understanding civil law. Let us be reminded that the philosophical approach to law nurtures itself from the rationalistic Natural Law theories that arose during the seventeenth and eighteenth centuries. Furthermore, Grotius, Pufendorf, and Kant constructed their systems of natural law with a view to systematizing the fundamental principles of the

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26. *See id.*

*Corpus Iuris Civilis*. As is well known, Roman Law was studied in continental Europe since the end of the eleventh century. By contrast, Professor Coing observes that English common law developed independently from Roman Canon Law.<sup>27</sup> Rationalistic Natural Law philosophy not only provided abstract foundations for fundamental Roman Law institutions, like possession, ownership, and contract, but also introduced the ideal of codification and, by doing so, transformed Roman Law into a formal system based on natural reason. On its influence on European legal science, Franz Wiacker remarks:

After Hobbes and Pufendorf . . . logical proof within a coherent system became the Law of Reason's very touchstone of the soundness of its methodical axioms. In the eighteenth century it started to put order into accounts of positive law, and thereby created the system which still dominates the statute-books and textbooks of the European continent.<sup>28</sup>

One cannot understand German legal science, for example, without taking into consideration the influence of Pufendorf and Kant, among others. In fact, the most abstract part of Savigny's legal theorizing can be regarded as a philosophical theory of civil law. Though all this fascinating intellectual process was overshadowed by codification during the nineteenth century, there is no doubt that civil law, because of its historic evolution, can be fruitfully understood with the aid of contemporary legal philosophy. However, the new body of literature on the philosophic foundations of private law—intellectually associated with the school of Rational Natural Law—is emerging, not in Europe to explain civil law, but in North America to account for common law. This is paradoxical, as common law developed without the systematic influence of moral philosophy. One should expect those philosophical accounts to be more directly applicable to civil law, given that such accounts took their cue from the School of Natural Law. Figure 1 indicates how civil law and common-law scholarship have reversed their traditional positions in terms of theorization.

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27. See Helmut Coing, *The Roman Law as Ius Commune on the Continent*, 89 L. Q. REV. 505 (1973). I take this to be consistent with the traditional intellectual influence of Roman Law on English judges.

28. Wieacker, *supra* note 5, at 218.

**Fig. 1. Features of civilian and common-law scholarship**

	Present situation	Historical development
Civilian scholarship	No theoretical paradigm	Systematic influence of rationalist Natural Law
Common-law scholarship	Two theoretical paradigms (law and economics and normative philosophy)	No systematic theoretical influence

I will content myself with illustrating, with one example, how civilian and common law scholarship can be amenable to different theoretical explanations. My example is remedies for breach of contract. Following classic Roman Law, common law instituted expectation damages as the primary remedy for breach of contract. Courts can only order specific performance under special circumstances (for example, if the object of the contract is not a fungible thing). In contrast, in civil law the primary remedy for breach of contract is specific performance, rather than money damages. For example, article 1134 of the French Civil Code declares that contracts must be performed in good faith, and article 1136 stipulates that an obligation to give implies an obligation to deliver the thing and to preserve it until delivery.<sup>29</sup> Similarly the Argentine Code stipulates in article 505 that the creditor, in case of nonperformance of a contract, has the right to choose among the following measures: to force performance of the obligation, to obtain performance by a third party at the debtor's expense, or to obtain appropriate damages.<sup>30</sup>

The authors of a well-known casebook on Comparative Law write: "The principle that obligations, especially contractual obligations, as a rule can be specifically enforced, and that ordinarily it is for the obligee and not for the court to choose between specific performance and a non-specific remedy, has been adopted in the overwhelming majority of civil-law systems."<sup>31</sup> However, this is only true of obligations to give. Civil law systems adopt different modalities with respect to obligations to do. The soft position is followed by the French Civil Code, which provides in article 1142

29. C. civ. arts. 1134, 1136 (France).

30. Cód. Civ. art. 505 (Argentina).

31. Rudolf B. Schlesinger et al., *Comparative Law* 665 (5th ed. 1988).

that an obligation to do becomes an obligation to pay damages in case of nonperformance.<sup>32</sup> The Argentine Civil Code follows Marcadé's interpretation of the French code. Thus, article 629 lays down that the creditor can obtain forced performance of an obligation to do, except when this requires exerting violence on the debtor.<sup>33</sup> The German Civil Code (BGB) adopts the hard position. In article 241, it states that "[t]he effect of an obligation is that the creditor is entitled to claim performance from the debtor."<sup>34</sup> Moreover, the German Code of Civil Procedure empowers courts to apply fines and imprisonment to compel the performance of an obligation to do when the act cannot be performed by a third party.<sup>35</sup>

The above difference indicates that civilian contract law and Anglo-American contract law are amenable to different sorts of explanation. Indeed, civilian contract law was influenced by the School of Natural Law and its emphasis on individual autonomy, while contractual remedies in common law rather echo the practicality of Roman Law. Under the influence of natural lawyers, the law of contracts in civil law was shaped around the value of individual autonomy, which makes it recalcitrant to instrumentalist accounts. As Professor Catherine Valcke observes, "[t]he three foundational principles of civilian contract law—freedom of contract, binding force of contract, and consensualism—were directly derived from Kant's postulate of the autonomous will."<sup>36</sup>

There are two arguments that support my suggestion. First, I have said that expectation damages are an efficient remedy for breach of contract. On the contrary, specific performance can only be vindicated as an efficient remedy under special conditions (for example, high renegotiation costs).<sup>37</sup> Since expectation damages are the primary remedy in common law, the economic paradigm provides a successful explanation of this feature of common law. On the other hand, the theory of contractual obligation as promissory obligation can nicely explain why specific performance is the fundamental remedy in civil law. In fact, the general provision of specific performance is a natural corollary of the idea that contracts are valid as an exercise of individual autonomy. This idea has exerted decisive

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32. C. Civ. art. 1142.

33. Cód. Civ. art. 629.

34. § 241 BGB (Germany) (translated in *The German Civil Code* (Simon L. Goren trans., Rev. ed. 1994)).

35. § 888 ZPO (Zivilprozessordnung).

36. Catherine Valcke, *The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Québec*, 46 U. Toronto L.J. 539, 567 (1996).

37. However, Professor Ulen argues that specific performance is more efficient than expectation damages because it avoids the need to estimate subjective values. See Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 Mich. L. Rev. 341 (1984).

influence on the development of civilian contract law. If the binding force of contracts depends on an act of the will, damages (both under the expectation and the reliance standards) could at most be a second best remedy.

Interestingly, economic lawyers reach a similar conclusion. Thus, Professors Kaplow and Shavell have argued that the explanation of contract law based on the duty to keep promises distorts common law, because it implies the adoption of specific performance as primary remedy for breach of contract.<sup>38</sup> When it comes to civil law, the result reverses. It is really the economic explanation that distorts civil law, because civil law does not allow breaking a contract and paying monetary damages, except when the obligee opts for the latter remedy or, under the French system, when the contract embodies an obligation to do. The idea of an efficient breach (in particular, of an obligation to give) is completely alien to civilian contract law. It is not economics, but rather moral philosophy that has the initial appeal to account for this aspect of civil law. This lends support to my contention that moral philosophy is in a better position to explain civilian contract law than the economic paradigm. At the same time, the latter paradigm seems to work well in common law.

Second, one possible explanation of the shift from damages to specific performance sees it as related to the view that natural law philosophers adopted with respect to the transfer of ownership and risk in sale. In Roman Law, as a rule, risk of damage or destruction passed to the buyer at the moment of agreement, but ownership only passed to the buyer with physical delivery. As Professor Alan Watson points out, Grotius, Pufendorf, and Barbeyrac thought that it was irrational to locate at different times the transfer of ownership and that of risk. Whereas Grotius and Barbeyrac defended the proposition that both ownership and risk must pass together to the buyer at the moment of agreement, Pufendorf affirmed that the transference should occur at the moment of delivery. Under the influence of Barbeyrac, the French Civil Code changed the Roman rule and provided that both ownership and risk get transferred to the buyer at the moment of agreement.<sup>39</sup> On the contrary, the Argentine Civil Code and the BGB followed Pufendorf's position and stated that risk and ownership pass together to the buyer, but at the moment of physical delivery.

Confronted with these enigmatic differences, the economic analysis of law seems unhelpful. From an economic viewpoint, it is

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38. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (2002).

39. See Alan Watson, *Legal Transplants: An Approach to Comparative Law* ch.14 (1993).

efficient to make an avoidable loss fall on the party who can at the cheapest cost reduce its risk and, therefore, get insured against it. But the kind of loss at hand is, by hypothesis, beyond the debtor's control. So one could suggest that the differences are almost accidental. Defending this interpretation, Watson writes: "the French rejection of the Roman rules on this point was not the result of social development, nor due to inherent practical weaknesses of the older system nor the consequence of an awareness of the logical necessity of their own preferred view."<sup>40</sup> Yet he fails to offer a theoretical explanation of accidental rules. One could suggest that many legal rules lack a specific rationale. Just as language rules, they are useful devices to coordinate individual action.<sup>41</sup> On this view, it does not matter when the transfer of risk and ownership takes place; it only matters that we all agree on one single rule. Perhaps Savigny had the idea of coordination in mind when he drew the analogy between law and language, to which I have earlier referred.<sup>42</sup>

One could also try a philosophical explanation. This explanation would be simple and plausible in French civil law. Let us be reminded that in the French Code ownership passes to the buyer at the moment of consent. This rule fits well the provision of specific performance as the primary remedy for breach of obligations to give. If the proprietary title passes to the buyer when the agreement is made, the buyer should obviously have the option to require delivery of his property. My point is not that the French drafters changed the Roman system of transfer of ownership by locating it at the moment of agreement because French law had already substituted specific performance for money damages as the primary remedy for breach of contract. Nor do I mean that the proprietary theory is the best philosophical account of civil law's preference for specific performance. Rather, I submit that both changes can be explained on the basis of the autonomy-based conception of contracts endorsed by the School of Natural Law. At those points where moral philosophy influenced civil law, law and economics is unhelpful, and the philosopher carries the day.

Despite this historical contrast between common law and civil law, legal philosophers in civil law jurisdictions usually ignore the kind of philosophical analyses that their colleagues in common law jurisdictions have been recently cultivating. Since the philosophical paradigm is largely a reaction to law and economics, the lack of interest might be due to the difficult and slow reception of law and

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40. *Id.* at 85.

41. See Russell Hardin, *Liberalism, Constitutionalism, and Democracy* ch.3 (1999).

42. See text accompanying *supra* note 7.

economics in civil law countries.<sup>43</sup> I suggest that we could explain this phenomenon by taking into consideration one fundamental feature of civil law.

In civil law, judicial decisions are grounded on formal reasons, that is, rules defined by its formal attributes, rather than on moral, economic, political, institutional, or other social considerations. Whereas the American judge, for example, is often expected to use policy-based reasoning to interpret precedents and to establish new rules, the civilian judge is bound to apply the civil code or the formal system of legal science that mixes itself with the code. Legal science is more formal than common law scholarship. Civil law reasoning typically starts from abstract premises and concepts and, therefore, gives little room to the kind of consequentialist, forward-looking reasoning on which law and economics relies. Economic considerations are not completely absent from legal science, but their role is a restricted one. When formal reasoning does not yield a definite answer to a legal question, the legal scientist usually resorts to the fiction of the rational legislator.<sup>44</sup> This means that in legal science, consequentialist, economic reasoning is limited to hard cases.

English law also has a formal system of legal sources, for precedents are formal reasons. Professors Patrick Atiyah and Robert Summers have thoroughly shown that the American and the British doctrines of the sources of law are very different in terms of formality.<sup>45</sup> In effect, *stare decisis* is a more rigid doctrine in British law, leaving little leeway to explicit policy analysis. It is American common law, rather than British law, that can be contrasted with civil law in terms of formality. In a similar vein, Professor Richard Posner has recently argued that British common law and European civil law are comparable in terms of formality. Both British and European judges train themselves in bureaucratic careers that accept as axiomatic the functional separation between the legislature and the judiciary. It is only in the United States where judges feel free to systematically employ consequentialist, instrumental reasoning.<sup>46</sup> This could explain why law and economics is more easily accepted in American legal circles than in British and European ones.

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43. See R. Cooter and J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 Int'l. Rev. L. & Econ. 261 (1991). See also the other articles published in this issue.

44. See Carlos Santiago Nino, *Consideraciones Sobre La Dogmática Jurídica* (1974); Leszek Nowak, *A Concept of Rational Legislator*, in *Polish Contributions to the Theory and Philosophy of Law* 137 (Zygmunt Ziemiński ed., 1987).

45. See P. S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law* (1987).

46. See Richard A. Posner, *Law and Legal Theory in England and America* (1996).

### III. CONCLUSION

I have argued that civilian scholarship could regain the intellectual splendor it enjoyed in the nineteenth century by resorting to the philosophic and economic studies that are now cropping up in common-law jurisdictions. I have also suggested that philosophy seems more important than economics in civil law, given the systematic influence of natural law on the shaping of civil codes and legal science. As I said at the beginning of this lecture, I cannot predict what the future of legal science in civil law jurisdictions will be. I have only tried to indicate a possible orientation that could enrich our understanding of civil law. This orientation could also allow common law scholars as well as civilian jurists to share an intellectual space and participate in the debate on the theoretical foundations of law. Many thanks for your attention.



