

FAIRNESS AND WELFARE FROM A COMPARATIVE LAW PERSPECTIVE

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In the Middle Ages, civilian legal scholarship started to develop a theoretical structure capable of explaining and systematizing the whole gamut of Roman Law norms. This process culminated during the eighteenth and nineteenth centuries with the drafting of European and Latin American civil codes. After civilian codification was in practice, completed with the enactment of the German Civil Code (BGB), legal science started to decline in intellectual vitality. Though 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, this activity lacks the theoretical sophistication that marked pre-codification civilian studies. In great part, this is due to the fact that civilian jurists have completed, for all practical purposes, the process of rediscovery and systematization of Roman Law that laid the bases for codification.

In the last decades, North American legal scholars have produced an intellectual revolution in bringing to bear economics and moral philosophy upon the study of particular legal institutions. Economic lawyers and legal philosophers compete with each other in trying to provide the most successful explanation of different fields of common law.¹ The resulting paradigms have enriched legal scholarship in an unprecedented way. In this Article, I will try to determine whether, and, if so, to what extent, those theoretical studies can be helpful to explain private law as established in civil law jurisdictions. My aim is both intellectual and practical. Intellectually, I am concerned with the relative importance of fairness and efficiency in civil

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1. For a recent example of the controversy, defending the economic viewpoint, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

law. Practically, I am interested in redirecting the focus of civilian scholarship to the economic and philosophic foundations of law. Philosophical studies could also serve to restore the intellectual continuity between moral philosophy and civilian legal scholarship that was apparent until codification.

I. ECONOMICS AND MORAL PHILOSOPHY IN COMMON LAW SCHOLARSHIP

The idea that legal scholarship is a science accompanied the birth of American legal scholarship. As Dean Anthony Kronman says, Langdell defended the Hobbesian understanding of law and politics as a kind of geometry whose foundational principles could be discovered by natural reason.² 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. Instead of favoring a reconstruction from without, in the form of civil codes, Langdell maintained that law professors could reconstruct common law decisions from within to reach a “geometrical” system of legal principles.

Despite the Langdellian conception of common law scholarship as a formal science, American legal scholarship is not usually called a science. The reason possibly resides in the fact that, unlike civilian scholarship, it did not achieve a high degree of abstract systematization. It is only in the last decades, with the emergence of law and economics, that American legal scholarship is reaching a high degree of theorization and analytical complexity.³

It is worth noting the intellectual milieu in which law and economics arose. In the early sixties, Anglo-American moral and political philosophy was still under the sway of utilitarianism, which had gained a preeminent position during the nineteenth century through the work of followers of Jeremy Bentham, such as John Austin, James Mill, John Stuart Mill, and Henry Sidgwick. During the twentieth century, utilitarianism became dominant in American moral philosophy and exerted an influence on metaphysics and epistemology

2. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 170–85 (1993).

3. This has animated Professor Ulen to claim that legal scholarship is transforming itself into a new science. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, U. ILL. L. REV. 875 (2002).

through pragmatism. At the same time, realism and instrumentalism were the main intellectual forces in legal theory. Born as a reaction against Langdellian formalism, instrumentalism was reinvigorated by the legal revolution that started after *Lochner v. New York*. The instrumentalist conception of law prepared the terrain for the foray of economists into legal doctrine.

The works of Ronald Coase and Guido Calabresi gave rise to the emergence of a whole new approach to law, popularized in American law schools by Richard Posner. The economic approach to law revolves around the idea of efficiency or aggregate welfare. It basically maintains that legal rules can be explained as institutional attempts to maximize aggregate welfare. In American legal culture, the idea that legal rules are instruments for pursuing different social ends was very entrenched in the anti-formalist, realist movement. The novelty of law and economics is that it provides a unified analytical model to explain a vast array of seemingly unconnected legal rules. The fundamental premise of this model is that people are rational agents who choose their actions so as to maximize their individual utilities on the basis of a consistent order of transitive preferences.⁴ The model also assumes that there is an intelligible and coherent notion of efficiency or welfare in terms of which legal institutions can be assessed. The economic paradigm of law shares with utilitarianism the proposition that law may allocate benefits and burdens across different individuals so as to maximize general welfare.

Let me illustrate the economic explanation of law with two examples. My first example comes from tort law. In common law, negligence is traditionally understood in terms of the care that a reasonable person would take under the given circumstances. Notably, it was a judge who proposed a reinterpretation of negligence in terms of costs and benefits. Judge Learned Hand formulated, in *United States v. Carroll Towing Co.*,⁵ the famous rule that an agent is negligent when the burden of precautions needed to prevent an injury is less than the gravity of the injury times the probability that the in-

4. In the last years, economists had to cope with the finding of behavioral anomalies that beset the assumptions of rational choice theory. Law and economics scholars have begun to weaken those assumptions to account for different legal rules. In the text, I follow the classic exposition of law and economics as based on the *Homo economicus* postulate, because recent variations on the paradigm do not alter the propositions I defend. For a survey of the new literature, see, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

5. 159 F.2d 169, 173 (2d Cir. 1947).

jury will occur. Generalizing Hand's suggestion, law and economics defines negligence as want of efficient care, and maintains that the goal of tort law is to maximize efficiency in social areas where voluntary transactions cannot yield efficiency because of transactions costs.

I will take my second example from contract law. A body of literature has focused on the relative efficiency of such legal remedies for breach of contract as expectation damages and specific performance. According to mainstream law and economics, one end of contract law is, and should be, to secure optimal commitment to performing.⁶ This means that law should deter inefficient breach of contracts. Accordingly, expectation damages maximize social welfare because they allow breach when, and only when, performance is inefficient. Specific performance is also an efficient remedy, especially when renegotiation costs are low.⁷ The gist of the economic analysis is that the price of a contract is not an independent variable for legal analysis, but rather depends on background legal rules. If contract law compelled performance regardless of the cost to the seller (and renegotiation were too costly), the contract price would be higher than under expectation damages, and the surplus for both parties lower. The theory of efficient breach sees nothing wrong in breach per se. It solely focuses on the costs and benefits ensuing for both parties.

In the late fifties it became evident that utilitarianism, by exalting aggregate welfare and diluting ideas of right and wrong, was ill suited to give theoretical expression to the movement of civil liberties. Moral and political philosophers started to react against utilitarianism by elaborating on ideas borrowed from contractarian and natural rights theories that were prevalent in Western philosophy before the rise of utilitarianism. John Rawls's *A Theory of Justice*,⁸ which espouses a theory of distributive justice grounded on Kantian moral philosophy—although not on Kantian legal theory—was a major turning point in this shift toward contractarian and rights-based moral philosophy.

A few years later, the evolution of legal theory paralleled that of political philosophy. The economic approach to law began to produce explanations of a great diversity of legal fields. Such explanations competed with traditional understandings in common law and, fundamentally, with the well ingrained notion that the point of law is to

6. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 189 (3d ed. 2000).

7. See Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L.J.* 271 (1979).

8. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

realize justice. In its early formulations the economic paradigm of law was inclined to see law as enabling the working of free markets or solving its dysfunctions. Moral and legal philosophers would soon challenge this paradigm because of its insensitivity to the role of justice and fairness in law. The challenge was greatly facilitated by the evidence of anomalies in the economic explanation of common law. So, in the seventies and eighties, a number of North American legal philosophers led a process similar to that championed by Rawls in political philosophy. Just as Rawls's theorizing was motivated by the goal of laying Kantian, non-aggregative bases for a polity capable of blending civil libertarianism and the welfare state, the reaction against law and economics arose from a hostility to utilitarianism and unfettered free markets.

At present a large group of Anglo-American legal philosophers are embarked on the project of interpreting common law in accordance with moral ideas like fairness and autonomy. They take their cue from Kant and other rationalist natural law philosophers, and oppose the view of common law institutions as instruments to achieve aggregate welfare. The justice-based theories that have emerged from this theoretical project compete with law and economics, just as rights-based theories compete with utilitarianism in political philosophy. While legal philosophers in common law jurisdictions are engaged in a thorough analysis of legal rules in various fields, their counterparts in civil law countries often complain that jurists ignore philosophical contributions that could give legal doctrines greater clarity and precision. Although this is true, it is undeniable too that, beyond clarity and precision, positivistic legal philosophy has not much to offer to the doctrinal scholar. In general, positivism is concerned with the most abstract legal notions, like "validity" or "legal system," rather than with specific legal issues. To be sure, the appropriate handling of those concepts can dissolve many confusions and misunderstandings that crop up in legal studies. But the traditional legal philosopher cannot say much about concrete questions in tort law or contract law, for example. Legal philosophers in common law jurisdictions address specific issues and seek to provide accounts that rival in sophistication with those defended by their economic competitors. I will illustrate this new approach by referring, again, to tort law and contract law.

In a pioneering essay published in the early seventies, Professor George Fletcher uncovered the existence of two paradigms of liability

in tort law: the “paradigm of reciprocity” and the “paradigm of reasonableness.”⁹ While the latter is oriented toward the community’s welfare, the former presupposes a distinctive idea of fairness: “all individuals in society have the right to roughly the same degree of security from risk.”¹⁰ According to Fletcher, tort liability—in either the strict liability or the negligence variety—expresses the ideal of corrective justice in recognizing the victim’s right to recover for injuries resulting from nonreciprocal risks. Though Fletcher thinks that both paradigms are pervasive in tort law, he sets store by the paradigm of reciprocity. In effect, he contends that, since the paradigm of welfare is committed to the maximization of social utility, it fails to respect the value of individual autonomy. Jules Coleman, Stephen Perry, Ernest Weinrib, and Richard Wright, among others, have followed Fletcher in adopting a corrective justice reading of tort law.¹¹ Looking for the point of tort law practice as it really is, these philosophers defend a theory of tort law that is broadly inspired in Aristotle and Kant and that seeks to achieve greater explanatory power than the economic analysis of tort law. Specifically, they maintain that the economic approach leaves aside central moral aspects of tort law, such as the pattern of interaction in which the harm occurred or the kind of control which the defendant had over the harmful outcome. For instance, Wright argues that common law attaches lesser importance to the defendant’s utility than to the plaintiff’s one, which seems to contradict the assumptions of the economic approach. According to the corrective justice view, tort law is best explained by assuming that it embodies a non-consequentialist moral principle. In Coleman’s formulation, this principle holds that (i) a person is liable for any loss she wrongfully inflicts to another, and (ii) if a person is liable for another’s loss, she must fully compensate her. Coleman claims that corrective justice articulates abstract principles of fairness governing the allocation of life’s misfortunes.

9. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537 (1972).

10. *Id.* at 550.

11. See JULES L. COLEMAN, *RISKS AND WRONGS* (1992); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72 (Gerald J. Postema ed., 2001); Richard W. Wright, *Right, Justice and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 159 (David G. Owen ed., 1995); Richard W. Wright, *The Standards of Care in Negligence Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* at 249.

The second example is the philosophical account of contract law. According to Professor Charles Fried, a contract is an exchange of promises and, therefore, the breach of a contract is akin to the breach of a promise.¹² Fried grounds the moral obligation to keep one's promises on the fact that breaking a promise violates the autonomy of the promisee by abusing the trust one has generated by promising. Other legal theorists, like Randy Barnett, Peter Benson, and Alan Brudner, regard contractual obligation as a proprietary obligation, rather than as a promissory one.¹³ In making a contract, they claim, one consents to the transfer of one's property, defined either as a material thing or an economic value. On this view, contract law respects the plaintiff's proprietary rights arising out of a contract. Neither the promissory nor the proprietary account appeal to welfare maximization to explain contractual obligation.

II. ARE THE TWO PARADIGMS APPLICABLE TO CIVIL LAW?

As I said at the outset of this Article, I want to discuss whether the two paradigms are applicable to civil law. If civil law scholars introduced those paradigms into their inquiries, the nature of legal science could change again, as it changed after the emergence of the school of natural law. Even so, we cannot expect an automatic alignment of civilian scholarship with common law scholarship, particularly in private law. On account of the quite different historical evolution of common law and civil law, the relative explanatory value of the philosophical and the economic paradigms is different in each system of law. I will content myself with illustrating, through two examples, how civilian and common law institutions can be explained in terms of different theoretical paradigms.

I will commence with the philosophical paradigm, where the answer is easier. In historic terms, the 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

12. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

13. See ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* ch.3 (1995); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118 (Peter Benson ed., 2001).

their systems of natural law with a view to systematizing the fundamental principles of the *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.¹⁴ 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.¹⁵

One cannot understand German legal science, for example, without taking into consideration the influence of rationalist natural lawyers like Pufendorf and Kant. 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, there is no doubt that the philosophical paradigm can be brought to bear on the explanation of civil law. In fact, the philosophical paradigm is inspired in the rationalistic natural law school, which was historically associated with civil law. Paradoxically, the body of literature that North American legal philosophers are now producing provides an account of common law, a system historically unrelated to that intellectual tradition. One should expect that the philosophical paradigm has a more direct application to the understanding of civil law. I will argue that this is indeed the case.

My first 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 instance, under the irreparable injury rule, they would apply specific performance

14. 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.

15. FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 218 (Tony Weir trans., 1995).

only in the special circumstances in which damages are inadequate.¹⁶ 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.¹⁷ 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.¹⁸

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."¹⁹ 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 that an obligation to do becomes an obligation to pay damages in case of nonperformance.²⁰ 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.²¹ 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."²² Moreover, the German Code of Civil Procedure empowers courts to apply fines and imprisonment to compel the

16. However, Professor Laycock has shown that courts usually find that compensatory money damages are inadequate and, therefore, award specific performance. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991). I am grateful to Tom Ulen for calling my attention to Laycock's findings.

17. CODE CIVIL [C. CIV.] art. 1134, 1136 (Fr.).

18. CÓDIGO CIVIL [CÓD. CIV.] art. 505 (Arg.).

19. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 665 (5th ed. 1988).

20. C. CIV. art. 1142.

21. CÓD. CIV. art. 629.

22. § 241 BGB (Ger.) (translated in *THE GERMAN CIVIL CODE* (Simon L. Goren trans., Rev. ed. 1994)).

performance of an obligation to do when the act cannot be performed by a third party.²³

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 welfare maximization 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.”²⁴

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 (*e.g.*, high renegotiation costs).²⁵ 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 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 come to 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

23. § 888 ZPO (Zivilprozessordnung).

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

25. 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).

as primary remedy for breach of contract.²⁶ Well, 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 so. 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.²⁷ 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 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

26. See KAPLOW & SHAVELL, *supra* note 1.

27. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* ch.14 (1993).

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.²⁸ 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.²⁹ 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 his well-known analogy between law and language.³⁰

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.

My second illustration is civil liability. Most civil codes establish negligence as the fundamental paradigm of civil liability. In civil law, negligence requires causation and fault. Thus, Article 1382 of the French Code reads: "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation."³¹ The same text has been reproduced in Article 2315, paragraph

28. *Id.* at 85.

29. See RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY ch.3 (1999).

30. See FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., photo. reprint 1977).

31. C. CIV. art. 1382 (translated in THE FRENCH CIVIL CODE (John H. Crabb trans., rev. ed., 1995)).

A, of the Civil Code of Louisiana,³² and inspired Article 1109 of the Argentine Civil Code.³³ Since the traditional theory of civil liability in civil law requires fault, it is congenial to the idea of corrective justice.

As Professor Francesco Parisi has shown, the central position of the fault principle in civil law is the result of a long historical process that started with Aristotelian ethics and its influence on the three fundamental Roman law principles: *honeste vivere*, *suum cuique tribuere*, and *alterum non laedere*. Particularly, the latter canon provided the philosophical basis for the fact-based system of civil liability in the classical period. The *Lex Aquilia* introduced the requirement of *iniuria*, but lacked a general principle of civil liability. Thomas Aquinas and the humanist jurist Hugo Donellus contributed to the gradual emergence of a fault-based system of civil liability in continental Europe. Finally, the rationalistic natural law ideas of Hugo Grotius had a great intellectual impact on Jean Domat and Robert Pothier, whose works were the main sources for the drafting of the French Civil Code.³⁴

The articulation of the fault principle in European civil law is the result of centuries of interaction between ethical and juridical ideas. The basic assumption is that no one can be held liable for outcomes that are not attributable to her voluntary choices. The idea of corrective justice requires neutralizing the impact of chance or bad luck on legal liability. As a corollary of the ideal of corrective justice, the fault principle is deeply embedded in civil law. Because of the close historical links between natural law and civil law, philosophical accounts of tort law are more suitable for understanding the civilian system.

With the uprising of technical innovations and industrial production, and their accompanying risks for persons and property, the notion of fault would fade away in the civilian regime of liability. In fact, civil law started to relax the monolithic theory of civil liability by accepting nonfault solutions to improve the legal position of neighbors, pedestrians, consumers, and factory workers. Thus, French jurists and courts proposed the theory of risk to attenuate the principle of fault stated in Article 1382 of the Civil Code through an expansive con-

32. LA. REV. STAT. ANN. § 2315(A) (1997 & 2004 Supp.).

33. CÓD. CIV. art. 1109.

34. See James Gordley, *Tort Law in the Aristotelian Tradition*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 11, at 131; Francesco Parisi, *Alterum Non Laedere: An Intellectual History of Civil Liability*, 39 AM. J. JURIS. 317 (1994).

struction of Article 1384, first paragraph, which establishes civil liability for the act of the things that a person has in his custody.³⁵

It is not indisputable how to understand the relaxation of the fault principle in civil law. On the one hand, the economic paradigm can provide an elegant explanation of strict liability in terms of the economic principle of optimal deterrence. On the other hand, the philosophical paradigm could try to explain the shift toward strict liability in terms of corrective justice. As said above, George Fletcher has proposed an explanation of strict liability as implementing the victim's right to recovery from nonreciprocal injuries.³⁶ Fletcher's proposal suggests that it is an open question whether strict liability requires an economic, non-philosophical explanation. What is certain, however, is that the classical conception of civil liability in civil law can be easily explained in terms of corrective justice.

Philosophical fault-based accounts of tort law have multiplied in the last years. Paradoxically, those accounts are brought to bear on common law, in which the principle of fault never acquired the dominant position it traditionally had in civil law. In fact, in old common law cases, like *Weaver v. Ward*³⁷ and *Dickenson v. Watson*,³⁸ liability was regarded as arising from trespass and fault was not required. It was the interference with rights over one's own body or external things that was constitutive of the misconduct. Fault only appeared as a requirement of civil liability in the late Middle Ages, with the writ of trespass on the case. According to the orthodox historical view, a comprehensive system of fault-based liability only appeared in American law toward the middle of the nineteenth century as a way of subsidizing new industrial enterprises.³⁹ *Harvey v. Dunlop*,⁴⁰ in 1843, and *Brown v. Kendall*,⁴¹ in 1850, introduced the general requirement of negligence for civil liability. The Chief Judge of the New York court deciding the former case declared: "No case or principle can be found, or if found can be maintained, subjecting an individual

35. C. CIV. art. 1384. See 1 HENRI MAZEAUD & LEÓN MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE 81-88 (4th ed. 1947).

36. See Fletcher, *supra* note 9.

37. 80 Eng. Rep. 284 (1616).

38. 84 Eng. Rep. 1218 (1682).

39. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-10 (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 85-99 (1977).

40. 1843 Hill & Den. 193, 194-95 (N.Y. Sup. Ct.).

41. 60 Mass. 292, 296 (1850).

to liability for an act done without fault on his part.”⁴² Incredibly, American courts “discovered” this principle at least two centuries later than European law. Even after *Harvey v. Dunlop*, the prevalence of the fault principle was not beyond doubt. For instance, in *Hay v. Cohoes*,⁴³ a blasting case decided in 1849, the same New York court applied the old principle *sic utere tuo*, a trespassory doctrine that only requires invasion of land and causation of damage for civil liability. Moreover, in nineteenth century English law, negligence did not become a fundamental principle, as shown in the decision of the Court of Exchequer in *Fletcher v. Rylands*,⁴⁴ an escaping water case of 1865. Most clearly, Lord Bramwell held that the damages action was maintainable “on the plain ground that the defendants have caused water to flow into the plaintiff’s mines, which, but for the defendants’ act, would not have gone there.”⁴⁵ He added that “the defendants’ innocence, whatever may be its moral bearing on the case, is immaterial in point of law.”⁴⁶

It may be questioned whether strict liability was the traditional regime in common law before the rise of negligence. Professor Robert Rabin claims, for instance, that liability based on a fault principle prevailed “against a contrapuntal theme of no-liability, not strict liability.”⁴⁷ Rabin’s idea is that industrial damages cases were unprecedented in classic common law, and that American courts tended to resolve them from a start in fault terms. Thus, he quotes *Losee v. Clute*⁴⁸ and *Losee v. Buchanan*,⁴⁹ two steam boiler cases decided in 1873, where the court rejected the strict liability doctrine of *Rylands* and established that fault must be shown for the defendant to be held responsible for unintended injury. Along similar lines, Professor Gary Schwartz rebuts the subsidy interpretation of the supposed shift from strict liability to negligence by analyzing nineteenth century tort law as it developed in California and New Hampshire.⁵⁰ Schwartz shows

42. *Harvey*, 1843 Hill & Den. at 194; see also Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951).

43. 2 N.Y. 159, 161 (1849).

44. 159 Eng. Rep. 737 (1865).

45. *Id.* at 744.

46. *Id.*

47. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 938 (1981).

48. 51 N.Y. 494 (1873).

49. 51 N.Y. 476 (1873).

50. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

convincingly that compensation for personal injuries was often decided in negligence terms during the first half of the nineteenth century, and that strict liability was mostly confined to nuisance cases. In fields like transportation and textile factories, California and New Hampshire courts tended to favor the position of plaintiffs by means of the doctrine *res ipsa loquitur* and the denial of contributory negligence, and rejected pro-development arguments for justifying the assumption of industrial risks.

Leaving aside the controversies about the background against which the principle of fault acquired a decisive role in nineteenth century American law, there is little doubt that the traditional paradigm of liability in common law stresses invasion of property rights and direct or indirect harm resulting thereof, whereas the basic paradigm in civil law is grounded on a moralized idea of fault. 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 economics in civil law countries.⁵¹ 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.⁵² This

51. 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.

52. 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).

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.⁵³ 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.⁵⁴ This could explain why law and economics is more easily accepted in American legal circles than in British and European ones.

I have tried to explain why law and economics does not have an easy way into civil law. This is not to say that economic analysis is irrelevant to explain civil law. I have already indicated that the trend toward non-fault liability in civil law could be explained in terms of optimal deterrence. Furthermore, policy analysis manifests itself in times of codification or code amendment. I will provide two examples to show the importance of economic analysis for civilian legislation. My first example is the drafting of the German Civil Code (BGB). Professor Jürgen Backhaus claims that “[t]he [German] Civil Code was, in its ultimate form, passed with the explicit input of the leading economists of their time in Germany, and based on explicit economic reasoning.”⁵⁵ He reports that a group of economists, in particular Otto von Gierke, published articles in the *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* criticizing the first civil code drafts of 1887 and 1889. The economists’ critique led to the creation of a second committee in 1890, which issued a completely revised draft in 1895. Though Backhaus contends that the new draft,

53. See P. S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

54. See RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* (1996).

55. Jürgen G. Backhaus, *Otto von Gierke (1841–1921)*, in *THE ELGAR COMPANION TO LAW AND ECONOMICS* 313, 314 (Jürgen G. Backhaus ed., 1999).

finally passed in 1896, accorded better with the needs of a developed industrial market economy, he does not specify the revisions that allegedly produced such outcome.

My second example provides greater factual information. As is well known, all civil codes regulate real rights. Interestingly, the draftsman of the Argentine Civil Code, Dalmacio Velez Sarsfield, introduced in the code various rules that limit an individual's capacity to break up property bundles too much. Particularly, Article 2502 prohibits the creation of new types of real rights (*numerus clausus*).⁵⁶ In the footnote, Velez Sarsfield mentions the hindrances to economic exploitation posed by the decomposition of property in medieval Europe, particularly in Spain.⁵⁷ He justifies the provision by saying, "The multiplicity of real rights over the same goods is a fertile source of complications and conflicts, and can much damage the exploitation of those goods as well as the free circulation of real estate, perpetually embarrassed."⁵⁸ Moreover, in the footnote to Article 2503 he justifies the suppression of *emphyteusis* and of the surface right, which he expressly prohibits in Article 2614, along with all kinds of prohibitions on alienation.⁵⁹ The provisions of the Argentine Civil Code that guarantee the unity of ownership by preventing its voluntary disintegration have a clear economic foundation, recently systematized by Professor Michael Heller.⁶⁰ He studies how economic activities are affected by the decomposition of ownership rights into the hands of various holders. In advancing complete, united private ownership, Velez Sarsfield tried to avoid inefficiencies associated with the so-called "tragedy of the anti-commons," which occur when transaction costs, strategic behavior, or cognitive deficiencies prevent the holders of different property rights from coalescing back into a single bundle of rights. To be sure, Velez Sarsfield did not handle this modern notion, but he had a fine intuitive understanding of the underlying economic rationale of non-fragmented property. As we now know, the anti-commons tragedy threatens the effective use and disposal of property.

The role of policy analysis in times of legal change suggests that the civil code has economic foundations too. Bringing to light those

56. Cód. Civ. art. 2502.

57. *Id.*

58. *Id.* (author's translation).

59. Cód. Civ. art. 2503, 2614.

60. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

policy decisions might be a way of explaining abstract and formal notions. This possibility cannot be discarded beforehand. In fact, the increasing economic literature on civil law suggests that civil lawyers have much to learn from economic analysis.⁶¹

CONCLUSION

Both the philosophical and the economic paradigm may be helpful for understanding law, in either its civilian or common law variety. I have argued, though, that the relative importance of such paradigms is different in common law and civil law. Fairness and autonomy are more important values in civil law, given the philosophical roots of civil codes and civilian legal science. However, law and economics may be helpful to understand those fields of civil law that have been moving away from their classical individualistic structure toward collectivistic modes of welfare maximization.

61. See, e.g., 2 CIVIL LAW AND ECONOMICS, ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). For an economic analysis of the phenomenon of codification itself, see Jean-Michel Josselin & Alain Marciano, *The Making of the French Civil Code: An Economic Interpretation*, 14 EUR. J.L. & ECON. 193 (2002).