

Presenting the next-generation civil code of the twenty-first century: The restatement of civil law along the lines of law and economics.

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Abstract

A new-generation law and economics civil code is presented as a conscious project to restate Roman law's usefulness for coping with today's problems. Private law aligns incentives for people to coordinate efforts and share information in a decentralized social order and market economy. Through law and economics, Roman law will renew itself. As a paradigmatic private-law system, Roman law is eminently amenable to a state-of-the-art fusion with law and economics. Sensitivity to what drives a legal culture is vital to a project meant for generating interest in law and economics among a new generation of Latin American lawyers and judges. I feel that the economic approach to law can only have an impact within the legal and social environment of Latin American countries if law and economics adapts to Latin America's civilian legal tradition. My adaptation is the recodification of civil law in the 21st century along the lines of law and economics.

Presentation

Why has the economic approach to law been so successful in the Anglo-American common-law world, and less so in Latin American countries rooted in civil-law tradition? If the economic approach to law is to have an impact within the legal and social environment of Latin American countries, law and economics must adapt to Latin America, instead of expecting Latin America to adapt to law and economics. My suggested adaptation is a civil code drafted from a law and economics perspective for Latin American countries as a way of bringing academe and the legal community in Latin American countries into the law and economics fold.<sup>2</sup>

Legal scholars in the Anglo-American common law can overlook the connection between particular ordinances and the underlying framework of justice or order. A concrete embodiment of the fruits of law and economics scholarship is necessary for the economic approach to be fully appreciated in Latin American civil law. For law and economics not to offend, not to appear alien, it must be redesigned in line with civilian methodology. Although the idea of a unified codification

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<sup>2</sup> Juan Javier del Granado, *De iure civili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI en Latinoamérica y el Caribe (desde el análisis económico del derecho)* (2018), available at <https://biblio.juridicas.unam.mx/bjv/detalle-libro/5285-de-iure-civili-in-artem-redigendo-nuevo-proyecto-de-recodificacion-del-derecho-privado-para-el-siglo-xxi-en-latinoamerica-y-el-caribe-desde-el-analisis-economico-del-derecho> .

may seem counterintuitive to the common-law attorney,<sup>3</sup> it is familiar to the civil-law attorney whose domestic private law is already codified, and for whom "civil code" and "civil law" are interchangeable terms.<sup>4</sup> A civil code will make the economic analysis of law acceptable to a new generation of Latin American lawyers, judges, and legal scholars as the new scholarship is recast in the familiar molds of the civil law.

Nothing excites Latin American lawyers more than commissions for civil codification. The Anglo-American lawyer will find no perfect analog for the real-world importance of codification in the common law. However, the Uniform Commercial Code is a useful comparison. The Uniform Commercial Code was drafted by two groups, the National Conference of Commissioners on Uniform State Laws (now called the Uniform Law Commission) and the academic American Law Institute. The Uniform Commercial Code provides the entire United States with the ability to easily do business across state lines secure in the almost uniform legal rules regarding commercial transactions.

The importance of commissions for codification in civil-law countries may also be compared to the power of common-law judges. In common-law systems, judicial decisions are a direct source of law. In civil-law systems, such as those that exist in Latin America, legal scholarship is a direct source of legal authority. Central to this authoritative legal scholarship is a systematic restatement of private law, embodied in a civil code, enacted by the legislature.

As a direct result of the region's present state of economic underdevelopment, policymakers in Latin America are institutionally open to change. If the instrument of change wears local clothing, successful introduction of law and economics becomes even more likely. Hence, I have chosen to use a civil code—a code presented as a return to Latin America's own intellectual traditions.

Law and economics in the South must ape the success of Langdellians in the North, when they were able to transplant legal ideas of systematic legal science from a civil-law mold into a common-law mold. Thus, at the end of the nineteenth century, a bright young generation of technocrats in the United States who were well-connected and well-educated were able to pass off the systematization (that is, the logical ordering together) of all laws—a characteristic of the civil-law tradition—as a scientific ordering together of case law, embodied in currently reported opinions of North American appellate courts.<sup>5</sup>

In the same way, a successful adoption of law and economics must recast the economic understanding of law into a civil code for Latin American countries. The impulse toward technocratic professionalism in Latin America provides just the right environment to reward such

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<sup>3</sup> See generally Gunther A. Weiss, "The Enchantment of Codification in the Common-Law World," 25 *Yale Journal of International Law* 435 (2000) (discussing codification in civil-and common-law systems, and addressing the traditional notion that common-law systems are uncoded).

<sup>4</sup> Reinhard Zimmermann, "Civil Code or Civil Law?—Towards a New European Private Law," 20 *Syracuse Journal of International Law and Commerce* 217, 219-20 (1994).

<sup>5</sup> See William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* 55-131 (1994).

an initiative.<sup>6</sup> Latin American countries are anxious to improve the accountability and efficiency of government as well as to reduce corruption, and are willing to undergo substantial restructuring to improve the efficiency of their legal systems, recognizing its value for achieving sustainable economic growth.<sup>7</sup>

The Chicago program in Chile after 1973 was achieved at a cost of detention, torture, and assassination.<sup>8</sup> However much this program provided an inspiration for nations around the world to discard the old economic model and adopt free-market and free-trade policies —echoes of Chilean-style economics survive around the world to this day— the terrible things that were done cloaked economic-inspired reform in Latin America in a pallor of illegitimacy. Today, democracy is thriving across Latin America and a new generation of technopols<sup>9</sup> shares a common dream to integrate their oft-beleaguered nations into global commodity and financial markets. Today, democracy has also produced new populist regimes prone to socialist reforms and dictatorial power that make positive change even more compelling.

All who seek such change hope this may be accomplished by more democratic means, perhaps by adopting a law and economics civil code. At the very least, a civil code will provoke some needed debate about the economic analysis of law and serve —as civil codes are used in Latin American countries— as a teaching tool. A civil code will infuse economics into the language of private law in Latin America, while simultaneously making the most basic insights of law and economics more our own.<sup>10</sup>

Everybody agrees that civil law must change and develop in the twenty-first century, except when this change and development involves the expansion of Anglo-American legal hegemony beyond its own borders.<sup>11</sup> This, of course, is creeping Anglo-Americanization and is to be fiercely resisted. With paranoia about the “Americanization of European legal culture” running rampant, European legal scholars are geared to preventing vagabond and debased American legal thinking from flooding their shores.<sup>12</sup> Ugo Mattei has pointed to Reinhard Zimmermann’s use of the authority of

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<sup>6</sup> See Yves Dezalay, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* 17-31, 202-16 (2002); “Patterns of Foreign Legal Investment and State Transformation in Latin America,” in *Legal Culture in the Age of Globalization: Latin America and Latin Europe* 489-98 (2003).

<sup>7</sup> For further discussion of legal reforms in Latin America to deal with corruption, accountability, and economic issues, see Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* (1998)

<sup>8</sup> James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* 187-90 (1980).

<sup>9</sup> See generally Jorge I. Dominguez, “Technopols: Freeing Politics and Markets in Latin America in the 1990s,” in *Technopols: Freeing Politics and Markets in Latin America in the 1990s* 1-49 (1997).

<sup>10</sup> Although all law and economics scholars would agree that economics is relevant to the study of law, there is disagreement as to the proper role of economics in the analysis of the law. Many scholars may actively disagree with a project that seeks to replace the jargon of the law with that of economics. I avoid this snare.

<sup>11</sup> See Ugo Mattei, “A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance,” 10 *Indiana Journal of Global Legal Studies* 383-87 (2003).

<sup>12</sup> See Martin Shapiro, “The Globalization of Law,” 1 *Indiana Journal of Global Legal Studies* 37, 44 (1993) (discussing how the intrusiveness of law may be particularly American, and the how this intrusiveness is viewed as “Americanization”).

Roman law to cope with the fear of the “Americanisation [sic] of European law.”<sup>13</sup> In Mattei’s words, Zimmermann “goes so far as to suggest that the common law is nothing more than a modernized (and corrupted) evolution of Roman law.”<sup>14</sup> In much the same way that the German legal theoretician Friedrich Carl von Savigny feared the hegemony of the French revolutionary ideology of codification,<sup>15</sup> modern European legal scholars resent the relationship between American hegemony and law and economics.

My law and economics civil code is far from pushing for the “Anglo-Americanization of Latin American law.” Instead, in adopting the new paradigm of law and economics, I make it over; much in the way Langdell ripped apart civil-law legal science and continental attempts to rationalize whole systems of law by codification and refashioned a common-law legal science based on the case method. Scholars of Latin America will take the best Anglo-American legal scholarship over and rethink and refashion it into a new legal science, within the vein of the Latin American tradition of intellectual critique as well as academic scholarship, to meet the new demands of development in emerging Latin American economies.

Much of the work done in law and economics to date focuses on the developed world. The work done on the developing world has been more limited. Nonetheless, although it has turned in meager results to date, the prospects for the success of the field could hardly be brighter. The present state of knowledge is at a sort of tipping point. Law and economics is now in a position to co-opt civilian methodology, where civil-trained legal scholars will be able to undertake a searching inquiry of the private-legal order (*el ordenamiento juridico privado, l’ordre juridique privé, die Privatrechtsordnung.*) As a result, the immediate future augurs well for the prospects of the economic analysis of law in developing countries.

Like Zimmermann’s, the crux of my overall strategy lies in a return to the study and use of Roman law, with an eye toward introducing law and economics into Latin America. Some Latin American legal scholars may object that Roman law scholarship is a thing of the past, but nothing could be further from the truth.<sup>16</sup> Nothing would be left of civil law if we removed Roman law. Roman law is a well-worn but still-useful tool, which could serve as a paradigm, or model, for modern legal systems.

As an almost-perfect private law system, Roman law is eminently amenable to a state-of-the-art fusion with law and economics. Through law and economics, Roman law will renew itself. The central claim of law and economics —that the common law is efficient— has a corollary in the efficiency of Roman law. Latin American legal scholars can turn to a long and resilient tradition of Roman law within their own legal system, without legal transplants. Accordingly, my law and

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<sup>13</sup> “The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments,” 21 *Hastings International and Comparative Law Review* 883 (1998).

<sup>14</sup> Zimmermann made this point in “Der europäische Charakter des englischen Rechts: historische Verbindungen zwischen civil law und common law,” 1 *Zeitschrift für europäisches Privatrech* 4 (1993).

<sup>15</sup> On Savigny, see Peter Stein, *Roman law in European History* 115-23 (1999).

<sup>16</sup> See Juan Javier del Granado, “The genius of the Roman Law from a law and economics perspective”, 13 *San Diego International Law Journal* 301-349 (2011).

economics civil code is a conscious project to restate Roman law's usefulness for coping with today's problems.

Roman legal scholarship in Latin America will be undergirded by a powerful new approach. Or rather, law and economics scholars will work toward the renewal of a very old tradition. My project, somewhat like Savigny's undertaking,<sup>17</sup> entails a vast (and unheralded) collaboration between law and economics scholars and legal historians. It will place our efforts squarely within the civilian tradition that we have inherited. Two seemingly incongruous academic disciplines—rational choice theory and area studies—<sup>18</sup> are brought together in a (sometimes uneasy) mix of universal and empirically verifiable explanations with a historian's eye for contextual detail.

Rational choice theory and area-studies programs go their incommensurable ways. It seems to stretch a bit far that we can present penetrating arguments about diverse matters in disparate, sometimes antithetical, fields. However, we must reconcile rational-choice inspired law and economics with the need for inter-cultural awareness. Sensitivity to what drives a legal culture is vital to a project meant for pedagogic purposes or for generating interest in law and economics among a new generation of Latin American lawyers, judges, and legal scholars.

I believe that, within the civil-law world, Latin Americans may take the lead and pull away from Europeans in this emerging legal science. This civil code brings Latin America law to the cutting edge of twenty-first century legal science. It moves beyond that ultimate monument of nineteenth century civilian legal science, the German *Bürgerliches Gesetzbuch* of 1900.

It is my hope that this timely merger between traditionally separate academic fields—Roman law and law and economics—may help to heal the bitter rift between economic and civilian legal scholarship. Today in Latin America, many scholars view with skepticism the bitter rift that divides the traditional and doctrinaire approaches to legal studies and the application of economic analysis to law, which is preoccupied with the consequences of laws and judicial decisions in a variety of fields.<sup>19</sup>

One such scholar, Alfredo Bullard González (whose backyard research has come to resemble that of his Peruvian compatriot Hernando de Soto) has observed, as he has put it, that Latin American law is “schizophrenic” in its doctrinaire reliance on formal legal categories.<sup>20</sup> Rather than

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<sup>17</sup> The nineteenth century German historical school belongs in the rear guard of European Romanticism. It was a reaction to the turmoil of the French Revolution, the unrelieved rationalism of the Enlightenment, and the onset of the Industrial Revolution.

<sup>18</sup> As a former associate director of the Center for Latin American Studies at the University of Chicago, I can say many Latin American scholars, perhaps as “native anthropologists,” are impatient with much work in United States universities. Rather than funding area-studies programs, United States universities ought to encourage the development of scholarship in Latin America itself.

<sup>19</sup> See Mario Castillo Freyre and Ricardo Vásquez Kunze, *Analizando el análisis, autopsia del análisis económico del derecho por el derecho civil* (2004).

<sup>20</sup> See Alfredo Bullard Gonzales, *Derecho y Economía: El Análisis Económico de las Instituciones Legales* (2nd ed. 2006). Hernando de Soto has served as an economist for the GATT, president of the Executive Committee of the Copper Exporting Countries, and as governor of Peru's Central Reserve Bank. See Hernando de Soto, “Property, People, and Prosperity: Address to the Houston World Affairs Council,” 27 *Houston Journal of International Law* 467, note 467 (2005) (listing de Soto's biographical information).

schizophrenic, I would use another adjective: “path dependent.” Latin American law has become overlaid with an unnecessary degree of legal formalism through history. After the European enlightenment, civilian legal science departed from the pragmatic stance of Roman lawyers and the humanist concerns of the late Scholastic pandectists. The rationalist turn of mind of civilian lawyers transposed legal reasoning into a jurisprudence of legal concepts, quite contrary to the humanist turn of mind of the Peninsular and American Luso-Iberian legal tradition.<sup>21</sup>

During the nineteenth century, moreover, French sociological jurisprudence reinforced the belief that the law was intelligible and could be reduced to a scientific system. In Germany, during the twentieth century *die Freirechtsbewegung* would oppose and expose the absurdity *der bislang vorherrschenden technischen Begriffsjurisprudenz*, much as the legal realists in the United States opposed the notion of a pristine legal science and recognized the confluence of real-world forces at work in legal decisions. In Latin America during the twenty-first century, it falls upon the proponents of the economic analysis of law, who take a consequentialist approach to legal scholarship, to break free from the grip of excessive legal formalism.

Accordingly, one of the most important tenets of the economic analysis of law, that the common law is efficient,<sup>22</sup> will be rethought into its civilian counterpart: that the Roman law is efficient. Many different explanations for the efficiency of the common law have been proposed, from evolutionary models to Hayekian arguments.<sup>23</sup> One that has never been articulated by common-law scholars is that what tends to be efficient, however, is the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) of the common law. The common law and Roman law are efficient, simply put, because we are dealing with systems of private law.

Among common lawyers, perhaps only Richard A. Epstein has proposed —although in not so many words— that the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die*

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<sup>21</sup> See Juan Javier del Granado, *Æconomia iuris: un libro de derecho del siglo XVI* (2010) (emphasizing the humanist strands within late Scholastic writings, largely overlooked by twentieth-century neo-Thomist readings).

<sup>22</sup> See generally Richard A. Posner, *Economic Analysis of Law* 25-26, 573-75 & n.1 (6th ed. 2003).

<sup>23</sup> Paul H. Rubin, “Why Is the Common Law Efficient?,” 6 *The Journal of Legal Studies* 51 (1977); George L. Priest, “The common law process and the selection of efficient rules,” 6 *The Journal of Legal Studies* 65 (1977); John Goodman, “An Economic Theory of the Evolution of Common Law,” 7 *The Journal of Legal Studies* 393 (1978); Richard A. Posner, “Utilitarianism, Economics, and Legal Theory,” 8 *The Journal of Legal Studies* 103 (1979); Robert D. Cooter and Lewis Kornhauser, “Can Litigation Improve the Law without the Help of Judges?,” 9 *The Journal of Legal Studies* 139 (1980); Paul H. Rubin, “Common Law and Statute Law,” 11 *The Journal of Legal Studies* 205 (1982); Robert D. Cooter and Daniel L. Rubinfeld, “Economic Analysis of Legal Disputes and Their Resolution,” 27 *Journal of Economic Literature* 1092 (1989); Robert Cooter, “Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms,” 86 *Virginia Law Review* 1577 (2000); Todd J. Zywicki, “The rise and fall of efficiency in the common law: A supply-side analysis,” 97 *Northwestern University Law Review* 1551 (2003); Paul H. Rubin, “Micro and Macro Legal Efficiency: Supply and Demand,” 13 *Supreme Court Economic Review* 19 (2005); Nicola Gennaioli and Andrei Shleifer, “The Evolution of Common Law,” 115 *Journal of Political Economy* 46 (2007); Thomas J. Miceli, “Legal Change: Selective Litigation, Judicial Bias, and Precedent,” 38 *The Journal of Legal Studies* 157 (2009); Nuno Garoupa and Carlos Gómez Ligüerre, “The Syndrome of the Efficiency of the Common Law,” 29 *Boston University International Law Journal* 287 (2011).

*Privatrechtsordnung*) is efficient as a system of private law.<sup>24</sup> I believe that the system of private law tends to be more efficient as common-law judges/Roman-law *praetors* frame legal questions in a way that coheres with what is already settled by precedents in private litigation. Of course, an assertion that such logical or analogical coherence (or autopoiesis) is a necessary proposition of the legal order may be a civilian thought, quite alien or extraneous to common-law thinking. Yet, that this is the true explanation of the overall efficiency of the private-legal system becomes evident if we look at the legal order from the civil-law perspective, which this law and economics civil code opens for us.

The legal order does not embody the civil law —as many French lawyers would have it— as a formalistic system along the lines of the axiomatic and deductive reasoning postulated by the Natural lawyers. Nor does it embody the procedural instrumentalism of *das Postulat der Einheit der Rechtsordnung* of German law, with its tone of social-scientific rationality at its blandest and most perfectly value-neutral. More modestly and simply, the civil law displays a coherence —not so much a geometry or rigorous instrumental precision— that is based on the Roman law: the Roman law as the be-all and end-all of the civil law.

Why is the Roman law efficient? The *corpus iuris ciuilis* brings together the accumulated legal wisdom and experience of the Roman people for over a thousand years. The classical Roman law that Justinian recovered in the sixth century is the embodiment of a model, paradigmatic private-law system.

Codification on the European continent has been in disrepute since Natalino Irti suggested that Europe was in an era of “de-codification.”<sup>25</sup> According to Professor Irti's descriptive assessment, codes no longer are comprehensive statements of European private law. Special legislation creates micro-systems of law that do not fit into the existing order of private law. This plurality of micro-systems based on legal principles, which are *sui generis*, have left the civil code relegated to the margins. Codes become just one more micro-system among the others. What is law?—becomes entirely unanswerable, a heretical affront to a civil-law mindset. The only point of convergence between the various micro-systems of law, which differ ideologically and methodologically and clash occasionally, is the law of the political constitution of the state. Perhaps only this one point of convergence in public law remains. Accordingly, civil and commercial codes in Europe are demoted to the category of residual laws. The constitution is suddenly left front and center, and private law, cut out at the core of the civilian legal system.<sup>26</sup> The whole concept of the private-legal order becomes a passé notion.

Another civilian advocate takes the decline of codification beyond the Savignian romantic brand of criticism to German codification *als ein “undeutsches” Gebilde ohne Volksgeist*. Rather than criticizing codification for exerting a stultifying effect upon the growth of the law, Pio Caroni

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<sup>24</sup> See Richard A. Epstein, *Simple Rules for a Complex World* (1995). As a reward for his considerable efforts, Epstein has even been accused, in jest, of having a “Napoleonic complex.” See John Harrison, “Richard Epstein's Big Picture,” 63 *University of Chicago Law Review* 837, 864 (1996) (reviewing Epstein, *supra*).

<sup>25</sup> *L'età della decodificazione* (1999).

<sup>26</sup> On the constitutionalization of civil-law systems, see Miguel Schor, “Constitutionalism Through the Looking Glass of Latin America,” 41 *Texas International Law Journal* 1 (2006).

applies Marxist critical theory (akin to critical legal studies in the United States, although he himself might object to this characterization of his ideology-unmasking activity). Codifications simply serve to obfuscate and cloud what might be the simple and real social interests that must inform the law: the complex but intuitively appealing mix of social policies, commonly identified as the principled basis for the social-democratic notion of the welfare state.<sup>27</sup> According to Professor Caroni's assessment, the relentless emphasis of French revolutionary ideology and even of German legal science on making the law more accessible, clarifying ambiguities, and permitting reform is nothing short of a devious cover—a thick grey smoke screen in order to evade, deny, and otherwise shield and protect the shoddy self-interests of the money-obsessed, petty bourgeoisie. Professor Caroni's unconvincing, critical legal platitudes purport to “explain” how the legal order embodied in private-law codes, as legal instrumentalities, shut out the social interests that undergird a more interventionist, welfare-state approach to the economy—perhaps because of the very unrealistic and unrealizable nature of its demands.

The criticism of the so-called bourgeois values of French-derivative civil law has long been fashionable in civilian legal circles. During the nineteenth century, the sociological jurisprudence *d'ecole de Bordeaux* counter-posed a society of co-operation, ownership, and control to a capitalist and individualist form of society based on private property, giving pseudo-scientific credence to an ethos of solidarity. Accordingly, in Latin America, especially in the years after the Bolshevik October Revolution of 1917, legal scholars sounded a call for the socialization of private law. Socialistic ideals held that to ensure the flowering of society, capitalism had to be tamed and harnessed towards social objectives. Accordingly, legal scholars established the legal doctrines of the social function of private property, the social function of contracts, and notion that the corporations should apply their assets for social purposes rather than for the private profit of owners.<sup>28</sup> In Latin America, the pendulum-like nature of formalist legal interpretation swung from absolute concepts of private property,<sup>29</sup> the will of the contracting parties as having the force of law between parties,<sup>30</sup> and business entities as juridical persons, to an equally abstract concept tagged with a social function or purpose. Later, an attempt was put forth to turn the private-legal order on its head, through a sweeping constitutionalization of private law.

I beg to disagree with Professors Irti and Caroni. Far from jettisoning the concept of the private-legal order from our legal lexicon, we note that the idea behind it is still very much alive in the civilian legal tradition of Latin America. Often, special legislation respects the existing legal order; supplements existing legal precepts; or completes the concise, clear, compact, intrinsically useful, and justified order embodied in the civil law (based on Roman law).

In practice, the core system of codified private civil and commercial law has proven remarkably stable and resilient. Although Latin American constitutions have created a virtual panoply of

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<sup>27</sup> See *Privatrecht: Eine sozialhistorische Einführung* 58-61 (1988)

<sup>28</sup> Matthew Mirow, “The Social-Obligation Norm of Property: Duguit, Hayem and Others”, 22 *Florida Journal of International Law* 191 (2010); “Origins of the Social Function of Property in Chile”, 80 *Fordham Law Review* 1183 (2011); “Rerum Novarum: New Things and Recent Paradigms of Property Law”, 47 *University of the Pacific Law Review* 183 (2016).

<sup>29</sup> Such as those property rights granted in France, as seen, for example, in *Code civil* article 544.

<sup>30</sup> Again, as seen in the French system. *Code civil* article 1134.

positive rights and economic entitlements, a so-called doctrine of *mittelbare Drittwirkung* of fundamental rights<sup>31</sup> has been slow to develop. Despite the supposed indirect, or second order, effect through private law of fundamental rights in Europe, in theory such a doctrine gives the government leeway to crack down on private autonomy whenever it desires. Rather we would propose that disputes between private persons fail to raise constitutional issues. A minimum requirement of state action is needed in order to invoke the political constitution; such a requirement serves as a vital prophylactic protecting the private-legal order from constitutional scrutiny and government overreaching.

Professor Alejandro Guzman Brito of the Pontifical Catholic University of Valparaiso shrewdly shoots back that special legislation in Latin America seldom undermines, or is contrary to, the existing order of private law.<sup>32</sup> As an example, he cites Chile's land reform legislation of 1967,<sup>33</sup> enacted, and its implementation begun, by Salvador Allende, the democratically-elected socialist president, and summarily nullified by General Augusto Pinochet's military government in 1973. This reform and its misguided social policy did undermine the civil law, not through its expropriation of large landholdings to redistribute the property to smaller farmers, which follows a well-established legal doctrine squarely within the civil-law (Roman law) tradition, but in instituting a varied regime of landholding based on communal ownership models and the disappointed aspirations of that long-lost socialist dawn.

This Chilean professor of Roman law wryly comments that this reform and its misguided social policy harkens back to Europe's feudalistic legal past. We must recall the resistance that Roman law evoked in early-modern, or Renaissance —whatever you want to call it— Northern Europe, when feudal law was sidestepped, the Roman law received, and Roman law scholarship was looked at as unbrotherly and uncommunal.<sup>34</sup> Roman law opposed social norms deeply rooted in Northern European feudal society.<sup>35</sup> Must we forget that Roman law laid the foundation for the rise of commercial society in the European continent?

In addition to decodification, private law in Latin America, as in Europe, has undergone a process of recodification. Either through new provisions consistently incorporated into codes or because of shifts away from precise and extensive governmental regulation, which has been accomplished through statute or administrative oversight, some areas once pulled out of the code through “decodification” may now return to the code through “recodification.” This may occur as socialist legislation is replaced or transformed by more market-oriented governments. Thus, the law governing employment contracts might have first been located within the broad contractual language of a civil code. Upon greater state regulation of employment, newer, highly-specific

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<sup>31</sup> See Gunter Durig, “Grundrechte und Zivilrechtsprechung,” in *Grundgesetz zur gesamtdeutschen Verfassung* 157-90 (1956).

<sup>32</sup> See Alejandro Guzman Brito, “Codificación, Descodificación y Recodificación del Derecho Civil Chileno,” 90 *Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales* 39 (1993); “La Codificación Civil en Iberoamérica: Siglos XIX y XX,” 55 *Anuario de Derecho Civil* 15 (2002)

<sup>33</sup> *Ley de Reforma Agraria*, No. 16.640 (1967).

<sup>34</sup> James Q. Whitman, “The Disease of Roman law: A Century Later,” 20 *Syracuse Journal of International Law and Commerce* 227, 227-30 (1994); see also “The Moral Menace of Roman law and the Making of Commerce: Some Dutch Evidence,” 105 *Yale Law Journal* 1841 (1996).

<sup>35</sup> Heinrich Brunner, *Grundzüge der deutschen Rechtsgeschichte* (1919).

provisions would be reflected in the labor code: the decodification stage. With a reduction of state oversight of labor or the adaptation of newer provisions into civil code, employment contracts may once again find their governing law located in the civil code: the recodification stage.

Some scholars may venture to suggest that a law and economics civil code, as a fascinating intellectual odyssey, will by force have the de/merit of being openly ideological. Let us turn the tables on all these oh-so-intellectually-honest critics. Praxis is the central problem of theory. Not only will the set of code provisions based on the principles of law and economics serve as a model for legislators and codifiers to come, but also the provisions will serve to refine and concretize ideas about law and economics generally.

I unabashedly seek privatize, recodify, and deconstitutionalize private law in Latin America. Latin American government officials privatized their economies since the 1990s, forgetting that their legal systems had been socialized, decodified and constitutionalized during much of the twentieth century. Perhaps my civil code project will spur other schools of legal thought on to proffer code provisions that reflect their own view of law. As my colleague Matthew Mirow submitted when together we suggested this codification project: “How exciting to compare parallel provisions on, say, the nature of property, drafted from a wide variety of perspectives. What language might critical legal studies theorists and socialists settle on to define property? How would code provisions on property reflect ideas of restitution for slavery or racial oppression from a critical race or LatCrit theory perspective? How would critical feminist theorists draft their provisions? What aspirations might be reflected in realist provisions? Imagine what we would learn about the nature of property, law, and ourselves with such a set of provisions.”<sup>36</sup> My task now, however, is to move forward with the contours of our own project.

Civilian legal methodology is presently at a point where it can co-opt law and economics away from Anglo-American legal scholars. Let me explain: much legal scholarship in the United States is at a standstill. Latin Americans can make new contributions to the field. Latin American civilian legal scholars are conversant with the concept of the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung.*) For us, legal reasoning involves a sort of structural intellectual exercise where we fit legal questions into a wider framework of law and justice. Germans lawyers even recognize *das Postulat der Einheit der Rechtsordnung* as a source of legal authority. However, no one in the civilian world can define exactly what is meant by the private-legal order. Here is where law and economics can have a major impact in legal scholarship.

The economic approach to law reveals a wide panorama of just how private property rights and the law of obligations, in concurrence with institutions that support market making, where social norms are ineffective, redress informational asymmetries and incentive incompatibilities, allow for pricing mechanisms, permit credible commitments, reduce monitoring costs, mitigate governance costs, decentralize decision making about resource allocation, and facilitate the channeling of savings into productive investment.<sup>37</sup>

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<sup>36</sup> Presentation on May 30, 2005, during the IX Conference of the Latin American and Caribbean Law and Economics Association, held at Boalt Hall School of Law, University of California at Berkeley.

<sup>37</sup> I do not attempt to survey the law and economics literature on private law.

Private law can move back into the front and center of the legal order, instead of having the political constitution of the state and public law be the fulcrum of the legal order. Through the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung,*) we get the benefits of the market economy. "The decentralized initiatives of thousands of individuals and companies develop new services and products that no government official could imagine, let alone bring to market."<sup>38</sup>

Precisely what is likely to fascinate and inform the civil-law attorney may be unlikely to attract anywhere near as much interest from the common-law attorney. We ask common-law scholars to acknowledge their need to keep an open mind.

James Gordley has argued that codification interferes with the work of legal scholars.<sup>39</sup> Though I fail to see how his particular criticisms can be extended to my law and economics civil code, which is meant to foster greater discussion and debate on law and economics among Latin American scholars, his cautionary notes address core problems that must be confronted in our legal system. Gordley argues that when current civil and commercial law is consolidated into codes, the law becomes etched in stone. Accordingly, legal institutions are fossilized and become impediments to legal development. Codification in Anglo-America has, of course, taken a subtly different form and use: the interpretive guides formally known as legal restatements.<sup>40</sup> These codifications have no force of law on their own, but they have exerted a substantial impact on the development of the common law and on related scholarly treatises, which are free to embrace or reject restatement teachings. Gordley himself would not argue that North American restatements have hindered the development of legal scholarship in the United States. In the past, these works have proved highly influential and have contributed to legal scholarship in the United States.

Latin Americans, in the twenty-first century, must move from a public-law-centered order of aspirational or declaratory law to a private-law-centered order of transformative law. Markets empower people as much as democracy enfranchises them. Today positive second-generation rights may answer a very atavistic part of ourselves, the deep-rooted koinonial instinct to satisfy the known needs of our fellows. Yet as F. A. Hayek understood, this human inclination corrupts or destroys the market's rationality, which is based on impersonal exchanges between relative strangers. The constitution's declaration of so-called second-or third-generation rights ("freedoms to" as opposed to "freedoms from") is well-intentioned, but it misleadingly implies the possibility of socialist utopian fantasies.<sup>41</sup>

The problem we face in connection with the Latin American civil-law legal system is not one of putting in place investor-friendly laws, tailoring a more investor-friendly legal regime, or creating

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<sup>38</sup> Epstein, "Editorial, Free Markets Demand Protection," *Financial Times* (London), Oct. 13, 2003, at 21. Professor Epstein has a long-standing interest in the economic analysis of Roman law, and I owe a debt of gratitude to him for fruitful discussions.

<sup>39</sup> James Gordley, "Codification and Legal Scholarship," 31 *University of California at Davies Law Review* 735 (1998); see "European Codes and American Restatements: Some Difficulties," 81 *Columbia Law Review* 140 (1981).

<sup>40</sup> See Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 *University of California at Davies Law Review* 659, 667-69 (1998).

<sup>41</sup> See generally 2 Hayek, *Law, Legislation and Liberty: The Mirage of Social Justice* (1976).

the most investor-friendly legal environment. It is not one of infusions of capital through foreign direct investment. Nor is it one of international aid programs designed to fill in financing gaps as measured by the sophomoric application of out-of-date and out-of-touch growth models.<sup>42</sup> Instead, the problem we face is the failure of the private-law system to provide the legal infrastructure necessary for markets to function. My law and economics civil code is designed to support market makers.

It addresses, moreover, the general failure of internal financial and investment intermediation in Latin American countries. A lack of access to capital means that even where entry costs are relatively low, too much economic activity becomes cost-prohibitive for people with wealth constraints, and comparably less shadow competition imposes market discipline throughout the entire economy. Economics textbooks all suggest that the lack of competitive market discipline ultimately leads to higher prices and lower quality. This lack of shadow competition also hobbles Latin American countries with inefficiency, listlessness, underemployment, an informal economy, lost economic opportunities, lack of global competitiveness, nepotism, cronyism, promotions and rewards based on know-who rather than know-how, unnecessarily high staff levels, and rent-seeking politics—all leading to a lack of real choice in products and services and low national job-creation figures.

Ineffectively, governments in Latin America —saturated with statist culture— step in as financial intermediaries to fill the void, channeling domestic saving away from taxpayers and to a compendium of government waste, mismanagement, and pilfering of the public purse on an exceptional scale.<sup>43</sup> High deficit financing requirements further lead to the unfortunate practices that permeate the economy: uncontrolled tax evasion, standard double accounting, and a habit of under-reporting payrolls and understating revenues and profits. Investors are denied transparent, consistent, and reliable financial information; valuation and pricing of the assets and liabilities of companies become problematic for passive investors.

All the above point to the biggest myth there is—namely, that equity markets exist in many Latin American countries, other than investment markets for bonds or securitized debt instruments, and that a privatized system of Social Security may create them.

In what follows, I will point out the broad outlines of my proposed draft for a next-generation civil code of the twenty-first century. My civil code is not a vehicle —under any circumstances— for legal borrowing in Latin American countries from other legal systems, nor for the legal transplantation of common-law doctrines into the civil law. Instead, civil-law doctrines have been modified and even expanded, recreated with doctrinal consistency, tweaked for contemporary tastes, culled from Latin American doctrinal writings, retouched, and sometimes recast,

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<sup>42</sup> See generally William Easterly, *The Elusive Quest for Growth* (2001). The Harrod-Domar model of economic growth has been used naively to predict how much people must save and invest to keep an economy growing. See Evsey D. Domar, “Capital Expansion, Rate of Growth, and Employment,” 14 *Econometrica* 137 (1946); R.F. Harrod, “An Essay in Dynamic Theory,” 49 *The Economic Journal* 14 (1939). For examples of economic growth models, see also Robert M. Solow, “A Contribution to the Theory of Economic Growth,” 70 *Quarterly Journal of Economics* 65 (1956); Robert M. Solow, “Technical Change and the Aggregate Production Function,” 39 *Review of Economics and Statistics* 312 (1957).

<sup>43</sup> Antitrust enforcement is a self-contradictory instrument for promoting competition in Latin America insofar as what stifles competition in the region is state intervention in the economy.

constructed out of Roman law sources with contemporary resonances, and combined, merged, and modified with economic concepts and phrases.

First surprise for my fellow law and economics scholars—I have discarded the term “transaction costs” from this civil code. The project is meant to enable the next generation of Latin American lawyers, judges, and legal scholars to appreciate the state-of-the-art legal scholarship that the economic approach to law has to offer.

The field of law and economics has undergone a paradigm shift from transaction cost economics to mechanism design theory. That scholars have yet to recognize this major change is due in part to the multitude of theoretic developments currently underway within the economic approach to law.<sup>44</sup> Perhaps law and economics scholars have yet to recognize the change, because it has occurred almost imperceptibly. Already, at the end of the 1980s, when Robert D. Cooter and Thomas S. Ullen brought out their second-generation manual, they were not only “more eclectic in accepting philosophical and humanistic traditions of legal thought”, but also began to apply the insights of game theory to the field.

If called on to put in plain words what mechanism design theory is, I would say it as an attempt to (partially) generalize game theoretical approaches through reverse mathematics.<sup>45</sup> Today, law and economics scholars are wont to speak of information asymmetries and incentive incompatibilities rather than of the hackneyed transaction costs of yesteryear. The Myerson-Satterthwaite Theorem in mechanism design theory<sup>46</sup> provides an intriguing counterpoint to the Coase Theorem in transaction cost economics.<sup>47</sup> Mechanism design theory has been called the engineering side of economics.<sup>48</sup> A civil code like this one, engineered from the perspective of mechanism design theory, will no doubt influence the next generation of Latin American lawyers, judges, and legal scholars more than a traditional transaction-cost approach.

Second surprise for my fellow law and economics scholars—the civil code recognizes the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) as

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<sup>44</sup> Scholars may be confused, accordingly, about in which direction the field is moving. William H.J. Hubbard believes that behavioral economics is the major paradigm shift in law and economics, “Quantum Economics, Newtonian Economics, and Law,” 2017 *Michigan State Law Review* 425 (2017).

<sup>45</sup> Reverse mathematics was developed by philosophers who wished to grasp the connection between mathematics and logic. So, they went backwards. They asked which axioms were needed to prove specified theorems, rather than the other way around.

<sup>46</sup> Roger B. Myerson and Mark A. Satterthwaite, “Efficient Mechanisms for Bilateral Trading,” 29 *Journal of Economic Theory* 265 (1983).

<sup>47</sup> Ronald H. Coase, “The Problem of Social Cost”, 3 *The Journal of Law and Economics* 1 (1960); reprinted in *The Firm, the Market and the Law* 95-156 (1988). Coase himself sharply criticized George J. Stigler’s formulation of the Coase Theorem which had done so much to make him famous, *The Theory of Price* 113 (3rd ed. 1966). Stigler hadn’t simplified Coase’s analysis; it was simple. See Robert D. Cooter, “The Cost of Coase”, 11 *The Journal of Legal Studies* 1 (1982).

<sup>48</sup> Leonid Hurwicz claims, in *Designing Economic Mechanisms* 1 (2006), to have first developed mechanism design theory as a useful benchmark and common language for comparing alternative economic systems against the backdrop of the socialist calculation debate of the 1950s.

embodying the same normative hierarchy as the political constitution of the state, that is, public law no longer supersedes private law.<sup>49</sup>

Private law is defined as a system that serves to decentralize the social order, by implementing information and incentive mechanisms in such a way that people with information will make decisions and people with incentives will take actions within the market economy.<sup>50</sup> Conversely, public law centralizes the social order, by implementing top-to-bottom command and control mechanisms in such a way that officials without information will make decisions and bureaucrats without incentives will take actions within the administrative apparatus of the state.

Private law and public law are radically different legal institutions.<sup>51</sup> Public-law institutions fail to consider information asymmetries and incentive incompatibilities that private-legal institutions are designed to solve.

Accordingly, the legitimacy of private law does not flow from the sovereign, but from millennia of useful application and the instrumental value of private law to human life.<sup>52</sup> Accordingly, if a Latin American country were to adopt this law and economics civil code, rather than promulgate it as an act of legislation, the sovereign would recognize its normative authority as immemorial custom and as an integral part of the rule of law.

Third surprise for my fellow law and economics scholars—in typical civilian fashion, the civil code recognizes law and economics scholarship as a source of law.<sup>53</sup> Those private legal institutions described in the *corpus iuris ciuilis* —the Digest is case law— that law and economics scholars recognize as embodying the modern private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) are incorporated to supplement the civil code.<sup>54</sup>

Fourth surprise for my fellow law and economics scholars—the system of Pandects is entirely reworked along the lines of law and economics and new standardized forms are introduced into civil law in a systematic way. Only Native American communities are excluded from the reach of civil law.<sup>55</sup> As mine is an American codification, the civil code recognizes that Native Americans should be governed by their own customs and authorities,<sup>56</sup> but establishes mechanisms for these communities to opt into the civil law.<sup>57</sup>

The way that civilian scholars organize the texts of Roman law (or Pandects) is called the system of Pandects. The economic analysis of Roman law suggests a new *Pandektensystem* within the civil law tradition. Rather than classifying legal institutions along the lines of “persons,” “property,” and “actions,” a law and economics approach suggests a new arrangement of civil law. In its place, the

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<sup>49</sup> *De iure ciuili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI en Latinoamérica y el Caribe (desde el análisis económico del derecho)* at Preliminary title, article 9.

<sup>50</sup> *Idem* at Preliminary title, article 3.

<sup>51</sup> *Idem* at Preliminary title, article 1.

<sup>52</sup> *Idem* at Preliminary title, article 4.

<sup>53</sup> *Idem* at Preliminary title, article 5.

<sup>54</sup> *Idem* at Preliminary title, article 4(2).

<sup>55</sup> *Idem* at Book I, title I, article 9.

<sup>56</sup> *Idem* at Book I, title I, article 9(1).

<sup>57</sup> *Idem* at Book I, title I, article 9(4).

civil code systematizes the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) along the lines of “persons,” “property” and “obligations and institutions that support market making.”<sup>58</sup>

Within the book on “persons,” the civil code recognizes that the economy needs both a decentralized market as well as organizations for the centralized management of resources, and institutes both the family and business entities.<sup>59</sup> The civil code establishes organizations with limited liability to separate the management of businesses from the investment in businesses.<sup>60</sup> Moreover, the civil code establishes donations under mode (Roman-type trusts).<sup>61</sup>

Within the book on “property,” the centuries-old civil law category of “modes of acquiring property” is replaced with a new category of “modes of maintaining property over time.”<sup>62</sup> Among the modes of maintaining property over time, the civil code lists accession, specification, confusion, commingling, usucaption, as people, property, and the attachments between things will change through time. The law of succession — which occupied two-thirds of the French *code civil* of 1804— is brought back into the book on “property” and included as another mode of maintaining property over time, as people will move, leave, or perish through time.<sup>63</sup> As a structural norm of the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung,*) the civil code specifies how these modes of maintaining property over time avoid situations of co-ownership between multiple property holders whenever possible.<sup>64</sup>

New standardized forms of rights in the property of others, such as private mineral rights and private intellectual rights, are added to the book on “property.”<sup>65</sup> The classical Roman mode of maintaining property over time of specification is applied to the private intellectual rights of patent holders.<sup>66</sup> (Specification is a form of accession when something new is created as a result of the intermingling of one’s property with that of another person.) As a structural norm of the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung,*) the civil code underscores the limited duration of standardized forms of rights in the property of others.<sup>67</sup>

New standardized contractual forms, such as “insurance,” “annuity,” “electronic draft,” “electronic note,” “pledge” and “suretyship” contracts, are all added to the book on “obligations and institutions that support market making.”<sup>68</sup> Moreover, the notarial association is given the faculty of expanding the list of standardized contractual forms recognized under the civil code.<sup>69</sup> As a

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<sup>58</sup> *Idem* at Books I, II and III.

<sup>59</sup> *Idem* at Book I, titles II and V.

<sup>60</sup> *Idem* at Book I, title V, article 2.

<sup>61</sup> *Idem* at Book I, title V, article 23 and title VII generally.

<sup>62</sup> *Idem* at Book II, title IV.

<sup>63</sup> *Idem* at Book II, title IV, articles 14-17.

<sup>64</sup> *Idem* at Book II, title IV, article 2 and title IV generally.

<sup>65</sup> *Idem* at Book II, title II, articles 9-11 and title III.

<sup>66</sup> *Idem* at Book II, title IV, article 9.

<sup>67</sup> *Idem* at Book II, title II, article 2.

<sup>68</sup> *Idem* at Book III, titles XV, XVII and XXI-XXII.

<sup>69</sup> *Idem* at Book III, title I, article 14.

structural norm of the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*,) the civil code underscores that all remedies under the law of obligations are invariably to be for money damages, thus allowing for efficient breach when the circumstances change.<sup>70</sup>

Notably, the civil code recognizes both consensual obligations —those that arise from consent— and relational obligations —those that arise from the relationships entered into among people who must trust one another in the decentralized market economy and social order—. <sup>71</sup>

The civil code defines good faith as another institution which serves to complete incompletely stipulated obligations.<sup>72</sup> The civil code clarifies that not all contractual or relational obligations must be performed in good faith—only those which are typically left incompletely stipulated by either by the parties or by the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) itself.<sup>73</sup> The civil code specifies that stipulated-damages clauses —when parties anticipate future damages and contractually agree to a certain award damages in the event of breach— are to be celebrated in good faith.<sup>74</sup> (Although frowned upon at common law, stipulated-damages clauses are a common practice in civilian jurisdictions.)

Incompletely stipulated consensual obligations are particularly problematic and expensive when the *causa* or reason of a contract is precisely that one party is better positioned than the other to acquire private information.<sup>75</sup> In these situations of asymmetric information, the civil code applies relational obligations which are subsidiary to the incompletely stipulated consensual obligations. As tutors, under the civil code, managers and agents are expected to subordinate their interests entirely to that of their principals.

The civil code incentivizes revelation of privately-held information through default rules.<sup>76</sup> The private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) enables parties to stipulate out of implicit legal rules that are not essential to the standardized contractual form. The civil code provides parties an incentive to reveal private information to avoid the civil liability that the legal system imposes by default.

Law and economics suggests the “depenalization” (“de-criminalization” in common law) of the legal system and the expansion of the system of civil delicts, including the intentional delicts under *dolus* which have all but disappeared from present-day civil law. As a structural norm of the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*,) the civil code clarifies that people ordinarily must bear their own losses.<sup>77</sup> Only extraordinarily does the legal system assign civil liability to those who cause losses.<sup>78</sup> The civil

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<sup>70</sup> *Idem* at Book III, title III, article 3.

<sup>71</sup> *Idem* at Book III, titles I and VI.

<sup>72</sup> *Idem* at Book III, titles IV; see also Book I, titles III-IV, Book II, title VI, Book III, titles VII-VIII.

<sup>73</sup> *Idem* at Book III, title IV, article 2.

<sup>74</sup> *Idem* at Book III, title V.

<sup>75</sup> *Idem* at Book III, title XIV, article 6 and Book I, title V, article 14.

<sup>76</sup> *Idem* at Book III, title I, article 5.

<sup>77</sup> *Idem* at Book III, title IX, article 1.

<sup>78</sup> *Idem* at Book III, title IX, article 3.

code clarifies that courts may find negligence where necessary to publicize information about comparative costs of taking precautions.<sup>79</sup> Thus, a finding of civil liability for civil delicts under culpa publicizes private information regarding cost effective precautions and fixes standards of care in different cases. The civil code clarifies that courts may find strict liability where necessary to publicize information about dangerous activities or situations where parties cannot take precautions.<sup>80</sup> Thus, a finding of civil liability for civil quasi-delicts, irrespective of culpa or dolus, publicizes private information that precautions cannot be taken in different cases.

Fifth surprise for my fellow law and economics scholars—the civil code brings together the entire sweep of the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung.*) That I bring together civil and commercial law is unsurprising. However, financial and securities regulations are recodified along with the rest of the civil law.<sup>81</sup> Notably, the laws of civil procedure and evidence, in addition to legal rules for auctions, are brought back under the civil law.<sup>82</sup>

The nineteenth century codifications of civil law placed “civil procedure” in the hands of the state and professional judges. Thus, Napoleon, to excoriate the excesses of past legal practice, promulgated all matters relating to civil procedure as a separate code, the French *Code de Procedure Civile* of 1807. Bringing procedural law back into the realm of private civil law (privatizing legal procedure) is the most effective way to improve civilian legal systems. The law and economics civil code reincorporates privatized procedural law through the reintroduction of Roman-type trial proceedings, where judges frame legal issues and juries determine facts.<sup>83</sup> Under the civil code, litigation before a jury becomes a private contract. To litigate their claim or offer a defense, the parties must stipulate before the judge that they will abide by the jury’s sentence. The new contract novates the earlier obligation that formed the basis for their claims, defenses, or counterclaims—no matter what their nature.<sup>84</sup> After the new contract, the pre-existing obligations cease to exist. Accordingly, the private-legal order (*el ordenamiento juridico privado, l'ordre juridique privé, die Privatrechtsordnung*) institutes a private system of legally-binding arbitration without appeal under the oversight of the judge.

Sixth surprise for my fellow law and economics scholars—the civil code substitutes private litigation for public regulation. Like the Roman *iuris prudentes*,<sup>85</sup> I favor letting markets self-regulate against the background of an effective system of private law. The draft eliminates labor law. Employment contracts are “at will” and are treated like any other standardized consensual contract for put hire.<sup>86</sup> The draft eliminates consumer protection law, other than incentive-compatible mechanisms for information revelation. The system of costless standardized contracts

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<sup>79</sup> *Idem* at Book III, title IX.

<sup>80</sup> *Idem* at Book III, title X.

<sup>81</sup> *Idem* at Book III, title XXIII.

<sup>82</sup> *Idem* at Book III, titles XXV and XXVII.

<sup>83</sup> *Idem* at Book III, title XXV, article 2.

<sup>84</sup> *Idem* at Book III, title XXV, article 10.

<sup>85</sup> Because Roman private law enabled the private sector to decentralize the management of resources effectively, the Roman economy of the second century B.C. achieved levels of prosperity that remained unparalleled until the late eighteenth century A.D. with the beginning of the Industrial Revolution.

<sup>86</sup> *Idem* at Book III, title XII.

and costly unstandardized contracting before a notary public effectively avoids predatory contractual provisions. The draft eliminates antitrust law. Antitrust regulation seeks to promote competition through state intervention. That is self-contradictory, considering that most limits on competition are themselves created through state intervention.

Seventh surprise for my fellow law and economics scholars—the civil code combines legal norms with social norms. As a structural norm of the private-legal order (*el ordenamiento jurídico privado, l'ordre juridique privé, die Privatrechtsordnung,*) the civil code explicitly removes legal regulation from countless areas where the private enforcement of social norms is more effective than formal legal sanctions

The civil code creates a competitive environment of bounded private domains within which both central planning and social norms can operate, effectively removing public regulation from private spaces and replacing it with private initiative. Within the boundaries of private property or of legally protected possession, private property holders or possessors are able to manage resources without any interference from others. Where social norms are more effective in private ordering, a property owner might allow these informal norms to operate within the domain that he controls.<sup>87</sup> The civil code also includes gratuitous standardized contract forms, such as the consensual contract of mandate and the real contracts of deposit and commodatum.<sup>88</sup> Gratuitous contracts may seem odd from a modern vantage-point. However, through these contracts, social norms serve to complete private ordering.

As a structural norm of the private-legal order (*el ordenamiento jurídico privado, l'ordre juridique privé, die Privatrechtsordnung,*) the civil code frowns upon certain violations of relational obligations, which carry the type of stigma reserved for criminal convictions in modern society. In addition to legal liability, the civil code imposes a reputational punishment, *infamia*.<sup>89</sup> Thus, the private enforcement of social norms can act to reinforce the efficacy of formal legal sanctions. In this manner, the area of family relations with effective divorce and co-parental provisions is left largely to social norms.<sup>90</sup>

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<sup>87</sup> *Idem* at Book II, title I, article 4(1).

<sup>88</sup> *Idem* at Book III, titles XIII, XVIII-XIX.

<sup>89</sup> *Idem* at Book I, title III, article 9(3) and title IV, article 9(3).

<sup>90</sup> *Idem* at Book I, title II, article 5.