

THE FUTURE OF THE ECONOMIC ANALYSIS OF LAW IN LATIN AMERICA: A PROPOSAL FOR MODEL CODES

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INTRODUCTION

As an academic discipline within legal scholarship, law and economics—which had been largely confined to the Anglo-American common-law world—has made considerable inroads in civil-law countries during the last decade of the twentieth century and first decade of the twenty-first century.¹ Nonetheless, what has been a renewing force in legal scholarship in North America has fared less well in northwest Europe, or at least south of the Rio Grande and in southwest Europe.² Why has the economic approach to law been so successful in the Anglo-American common-law world, and less so in European and Latin American countries rooted in civil-law tradition? This paper suggests that a divergence in attitudes toward legal science among civil-law and common-law lawyers accounts for the comparative success of law and economics in both legal systems, an idea we will expand upon throughout this study. This paper suggests that 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 econom-

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1. For the past four decades, the world of legal scholarship has been under siege from the forces of law and economics. See James L. Huffman, *From Legal History to Legal Theory: Or is it the Other Way Around?*, 40 TULSA L. REV. 579, 580 (2005) (discussing the penetration of law and economics and critical legal studies into the classroom over the last thirty years). In Latin America, the movement has barely begun. Law and Economics started in the United States, and from there spread to Europe and Latin America. See JAMES R. HACKNEY, JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY (2007) (placing the discipline within American jurisprudence); John Linarelli, *Law and Economics: The International Library of Critical Writings in Economics*, 17 WIS. INT'L L.J. 509, 509–10 (1999) (book review) (providing a brief history of the discipline).

2. Law and economics has been part of the curricula for several decades now in most Anglo-American law schools but, as an academic discipline, it remains notoriously absent from the curricula in most Latin American law schools.

ics. In particular, this paper proposes that we must venture on an unconventional intellectual odyssey for common-law scholars: the drafting of an ALACDE³ model law and economics civil and commercial code for Latin American countries as a way of bringing academe and the legal community south of the Rio Grande into the law and economics fold.

An alternative viewpoint is offered by Thomas S. Ulen and Nuno M. Garoupa.⁴ They argue that widely-differing levels of competitiveness in higher legal education in the United States and Europe explain differences in the reception of law and economics. These two viewpoints are interrelated. We believe that, within the civil-law world, law and economics is more likely to become dominant in Latin America than in Europe because the change-resisting hand of the old guard is less heavy.⁵ The myriad systematic and endemic weaknesses of large public universities in Latin America has opened the doors of academe to fast-growing competition from new private universities.⁶

As a direct result of the region's present state of development, law schools in Latin America and the Caribbean are institutionally open to change. If the instrument of change wears local clothing, successful introduction becomes even more likely. Hence, we have chosen to use a code—a code can be adopted as a return to Latin America's own intellectual traditions. Therefore, we blend Ulen and Garoupa's wisdom with our own in suggesting a new-generation model law and economics civil and commercial code for Latin America.

I. LAW AND ECONOMICS IN LATIN AMERICA

Comparative law, with a longer history as an academic discipline in many parts of the world, remains a relatively minor field in the United

3. Established in 1995, the Latin American and Caribbean Law and Economics Association (ALACDE) groups all the main countries of Latin America and the Caribbean. Its dual mission is to promote awareness, advancement, and development of legal research employing the tools of economic analysis, and to keep law schools in Latin America and the Caribbean abreast of the latest findings and groundbreaking work in the field. The organization maintains its own Web site (<http://www.alacde.org>) and holds an annual meeting at varying locations throughout the area.

4. Thomas S. Ulen & Nuno Garoupa, *The Market for Legal Innovation: Law and Economics in Europe and the United States* (Univ. of Ill. Law and Econ. Research Paper No. LE07-009, 2007), available at <http://ssrn.com/abstract=972360>.

5. The relative malleability of Latin America is demonstrated by Chile's remarkable and successful free-market revolution. Chile adopted free-market reforms a generation before Europe.

6. See Daniel C. Levy, *Latin America's Private Universities: How Successful Are They?* 29 COMP. EDUC. REV. 440 (1985) (comparing Europe to Latin America in reliance on public institutions to perform the tasks of higher education).

States.⁷ In many ways, law and economics is a still-young field of research, although its progress has been stunningly swift and many scholars now even speak of a new law and economics.⁸ Comparative law and economics, as defined by Ugo Mattei, is even a newer field.⁹ In the civil-law tradition, it is typical to speak of the comparative method, as opposed to the scientific method—by which something entirely different is meant from scientific rigor as it is understood in North America, where the proper significance of scientific methodology is clearly identified with the experimental method and the principle of verifiability.¹⁰ The sole test of a theory is whether it works: the most important aspect is whether the theoretical predictions fit the experimental facts, rather than the overall plausibility of the underlying assumptions.¹¹ In the North, the social sciences (of which economic science is a prominent example) struggle to maintain their status as scientific fields of inquiry. Their basis is often of a more theoretical nature, and establishing an empirical basis for the social sciences is more elusive and imprecise than, say, in physical, chemical, and biological oceanography—which an ocean of empirical evidence supports. In the South, on the other hand, “legal science” is a term uncritically accepted, more akin to systematic legal knowledge. Legal science is an autonomous body of knowledge in its own magisterial and systematic form, and there is less tension with the epistemological underpinnings of the discipline.¹²

Legal science, as it is understood in the South, is redolent of the scientific rationalism incubated on the European continent since the Enlightenment. Some of the obvious flowerings of this long-standing ratiocinative

7. See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 672 (2002) (discussing the origins of comparative law in the United States within the last five decades).

8. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (discussing the growing influence of a number of scholars in this field of law).

9. See generally UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997). See also Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149 (1998) (reviewing MATTEI, *supra*, and providing an overview of Mattei's view of Law and Economics). For further discussion of the evolution of comparative law and economic theory, see Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT. L. REV. 521 (2004).

10. See Rogers, *supra* note 9, at 161–73 (discussing comparative and scientific methodology).

11. In economic science, a classic statement is Milton Friedman's 1953 methodological essay, in MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3–43 (1953).

12. See Horacio Spector, *The Future of Legal Science in Civil Law Systems*, 65 LA. L. REV. 255 (2004) (discussing social science, physical science, and legal science, and the effect of science in the variance of theoretical explanations in civilian and common-law scholarship). The North American legal academy appears to be embracing empirical approaches. The 2006 annual meeting of the Association of American Law Schools was conducted under the theme “Empirical Scholarship: What Should We Study and How Should We Study It.” See Association of American Law Schools, Meeting Theme, <http://www.aals.org/am2006/theme.html> (last visited Mar. 6, 2006).

tradition stem from the work of natural lawyers, who, back in the seventeenth century, grafted the idea of a science of law¹³ on the centuries-old civilian tradition in the *ius commune* of scholarly doctrine as a subsidiary source of legal authority.¹⁴ This emphasis on rationalism and abstract thought has left a lasting impression within the orbit of continental European legal culture. Legal education on the continent, which derives from the reception of Roman law at Europe's great universities, is a traditionally academic discipline taught by a professorial staff. As a result, legal scholarship continues in continental Europe and Latin America largely in a theoretical rationalist framework, through national codification all the way down to legal positivism in the law today.¹⁵

Within the confines of Anglo-American legal culture, on the other hand, legal education remained—well into the last quarter of the nineteenth century—in the hands of legal practitioners. Moreover, legal education remained in the empirical mould of legal apprenticeship: the British philosophical tradition of empiricism prevailed. In the empirical tradition, anything not measurable, quantifiable, or scientifically verifiable is regarded as meaningless. Anglo-American philosophers, anchored by their empiricism, are pragmatists. Within Anglo-American academic circles, the dominant paradigm of law and economics has always been open to revision in the light of experience. Law and economics, in particular, developed from the extreme empiricism of logical positivism. Under the influence of members of the Vienna Circle, who espoused an anti-metaphysical and scientific-minded philosophy, the “ordinalist revolution” of the 1930s established a form of logical positivism as the dominant philosophy of economics.¹⁶

In North America, until the last quarter of the nineteenth century, law had not been considered a science, but an art, “the art of the lawyer and the art of the judge,”¹⁷ until a German-inspired brand of systematic legal science was successfully transplanted into the case method of the common law by scholars, such as Dean Christopher Columbus Langdell¹⁸; much of

13. See M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 96 (1986).

14. See *id.* at 96–99 (discussing how early modern jurists rejected medieval customs in favor of Roman civil sources as authority).

15. For a discussion of the history and development of legal scholarship and education in Latin America, see ROGELIO PÉREZ-PERDOMO, *LATIN AMERICAN LAWYERS: A HISTORICAL INTRODUCTION* 102–04 (2006).

16. Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?*, 22 J. ECON. LITERATURE 507, 521–22 (1984).

17. Jerome Frank, *Why not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 923 (1933).

18. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994) (contextualizing Langdell's accomplishments); Thomas C. Grey, *Langdell's*

this thrust was undone by legal realism, led by proto-realists such as Justice Oliver Wendell Holmes, who demystified judge-made law and, under the influence of a new wave of German jurisprudence,¹⁹ pointed to the indeterminate nature of legal institutions and the social, political, and business interests and individual preferences that were behind legal decisions.²⁰

Law and economics has had its major impact largely because of the disarray of legal scholarship in North America, after the legal realists undid much of the edifice constructed by the Langdellians with their aspiration to legal science.²¹ By strengthening the empirical claims made for legal scholarship and incorporating the economic methodology to the study of law (through the application of not just cost-benefit analysis, but also statistics, price theory, the modern assumption of ordinal utility and revealed preference, transaction cost economics, and blackboard game theory) the new economic approach to law is beginning to look like an evermore attractive option to many legal scholars.²²

However, the renewed claims to legal science²³ made by law and economics in Anglo-America may have less impact on legal scholars in Europe and Latin America.²⁴ For one thing, law and economics must compete with other schools of legal thought, such as contemporary legal soci-

Orthodoxy, 45 U. PITT. L. REV. 1, 32–34 (1983). See also Michael H. Hoeflich, *Savigny and His Anglo-American Disciples*, 37 AM. J. COMP. L. 17, 18–23 (1989) (discussing the impact of German scholar Savigny on creative jurists and legal scholars in the United States).

19. This wave of German jurisprudence is evidenced in RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* 33 (Isaac Husik trans., Augustus M. Kelly Publishers 1968) (1877). See also LAPIANA, *supra* note 18, at 110–22; James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994) (reviewing *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820–1920* (Mathias Reimann ed., 1993) and *DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND* (Marcus Lutter, Ernst C. Stiefel & Michael H. Hoeflich eds., 1993)) (examining legal transplants of civil law to common law).

20. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 131–71 (1983).

21. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 914–17 (suggesting that legal scholarship is becoming more scientific as a shift in paradigm from Langdellian doctrine).

22. Today Anglo-American scholars glimpse the possibility of legal theory as a unified field of social science. See Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC'Y 50 (1995).

23. Some Latin American legal scholars confuse law and economics with a current subject taught in law schools: *derecho económico* or *direito econômico*, a legal discipline that covers the full panoply of economic regulation and state-centric economic policies; this academic discipline unblushingly endorses protectionism and grants a seal of approval to ill-conceived forms of state intervention.

24. Thomas S. Ulen and Nuno Garoupa argue that widely-differing levels of competitiveness in higher and legal education in the United States and Europe explain differences in the reception of law and economics. Ulen & Garoupa, *supra* note 4, at 14–60.

ology, which has a more rationalist, and less empirical foundation²⁵—or with more philosophically-inspired schools of legal thought, such as legal hermeneutics.²⁶ Also, with their true rationalist turn of mind, the interests of European and Latin American legal scholars may lie in the more abstract, and less pragmatic, realms of speculation of legal philosophy. The economic approach is not seen as necessarily furthering jurisprudence.²⁷ Legal science is already thought of as an autonomous subject, inviting magisterial and systematic conceptual elaboration. This view is easily supported in a legal system where law has been the subject of written and systematic codification, where legal doctrines are extensively cross-referenced and indexed, and where legal decisions are based on a legal doctrine that is itself the subject of systematic treatment in secondary literature, such as legal treatises, which are understood to be sources of legal authority.²⁸

II. ARGUING FOR THE CODE

Accordingly, legal scholars may ask themselves what alternative approaches to the legal order would look like from an economic point of view. 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 basic 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 may seem counterintuitive to the common-law attorney,²⁹ 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.³⁰ An ALACDE model civil and commercial code will make the economic analysis of law acceptable to a

25. See generally John P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State*, 9 YALE J.L. & HUMAN. 297 (1997) (discussing legal sociology).

26. See generally Ioannis S. Papadopoulos & Mark Tushnet, *Legal Hermeneutics at a Crossroads: Giuseppe Zaccaria's Questioni de Interpretazione (1996)*, 8 CARDOZO J. INT'L & COMP. L. 261 (2000) (discussing legal hermeneutics).

27. BRIAN Z. TAMANAHA, *LAW AS MEANS TO AN END: THREAT TO THE RULE OF LAW* 118–20 (2006) (criticizing the instrumental nature of law and economics).

28. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 57–60 (2d ed. 1985).

29. See generally Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000) (discussing codification in civil- and common-law systems, and addressing the traditional notion that common-law systems are uncoded).

30. Reinhard Zimmermann, *Civil Code or Civil Law?—Towards a New European Private Law*, 20 SYRACUSE J. INT'L L. & COM. 217, 219–20 (1994).

new generation of Latin American lawyers, judges, and legal scholars as the new scholarship is recast in the familiar moulds of the civil law. Nothing excites civilian lawyers more than commissions for codification.³¹ Law and economics must adapt to Latin America. Our suggested adaptation is the use of codification.

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 mould into a common-law mould. 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 courts.³² In the same way, a successful adoption of law and economics must recast the economic understanding of law into an ALACDE model civil and commercial code for Latin American countries. The impulse toward technocratic professionalism in Latin America provides just the right environment to reward such an initiative.³³ If this initiative is taken by ALACDE, there is even the possibility that a Latin American country might adopt the new codes or refer to their provisions in the process of revising codes. Latin American countries are anxious to improve the accountability and efficiency of government as well as to reduce corrup-

31. Unfortunately there is no perfect analog for the real-world importance of codification in the common law. However, the Uniform Commercial Code is a useful comparison. The U.C.C. was drafted by two groups, the National Conference of Commissioners on Uniform State Laws and the academic American Law Institute. Now the U.C.C. 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 the 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 and commercial code, enacted by the legislature.

32. See LAPIANA, *supra* note 18, at 55–131.

33. See YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 17–31, 202–16 (2002) [hereinafter DEZALAY & GARTH, PALACE WARS]; Yves Dezalay & Bryant Garth, *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 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) [hereinafter LEGAL CULTURE]; Larissa Adler Lomnitz & Rodrigo Salazar, *Cultural Elements in the Practice of Law in Mexico: Informal Networks in a Formal System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 240–46 (Yves Dezalay & Bryant G. Garth eds., 2002); Sergio López-Ayllón & Héctor Fix-Fierro, “Faraway, So Close!”: *The Rule of Law and Legal Change in Mexico, 1970–2000*, in LEGAL CULTURE, *supra*, at 319–27; ROGELIO PÉREZ-PERDOMO, LATIN AMERICAN LAWYERS: A HISTORICAL INTRODUCTION 120–23 (2006); Rogelio Pérez-Perdomo & Lawrence Friedman, *Latin Legal Cultures in the Age of Globalization*, in LEGAL CULTURE, *supra*, at 3–12.

tion, and are willing to undergo very substantial restructuring to improve the efficiency of their legal systems, recognizing its value for achieving sustainable economic growth.³⁴

The Chicago program in Chile after 1973 was achieved at a cost of detention, torture, and assassination.³⁵ However much this program provided an inspiration for nations around the world to chuck 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 technopols³⁶ shares a common dream to integrate their oft-beleaguered nations into global commodity and financial markets.³⁷ 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 law and economics civil and commercial codes. At the very least, an ALACDE model civil and commercial code should provoke some needed debate about the economic analysis of law. The ALACDE codes would infuse economics into the language of private law in Latin America,³⁸ while simultaneously making the most basic insights of law and economics more our own.

Everybody agrees that law must change and develop in the twenty-first century, except when this change and development involves the ex-

34. 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); Edgardo Buscaglia & Jan van Dijk, *Controlling Organized Crime and Corruption in the Public Sector*, 3 FORUM ON CRIME & SOC'Y 3 (2003); Eric Heyer, Note, *Latin American State Secrecy and Mexico's Transparency Law*, 38 GEO. WASH. INT'L L. REV. 437, 440–43 (2006) (discussing reforms, corruption, and public accountability); Linn Hammergren, *Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress* (Mar. 2002) (unpublished manuscript), available at <http://www.pogar.org/publications/judiciary/linn2/latin.pdf> (discussing political reforms).

35. JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 187–90 (1980).

36. See generally Jorge I. Domínguez, *Technopols: Freeing Politics and Markets in Latin America in the 1990s*, in *TECHNOPOLS: FREEING POLITICS AND MARKETS IN LATIN AMERICA IN THE 1990S*, at 1–49 (Jorge I. Domínguez ed., 1997).

37. See generally *id.* (discussing the impact and role of technopols on how many Latin American countries have moved toward greater global commodity by abandoning authoritarian regimes and state-directed economic strategies for democratized politics and freer markets).

38. 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.

pansion of North American legal hegemony beyond its own borders.³⁹ This, of course, is creeping 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.⁴⁰ In this vein, Ugo Mattei has pointed to Reinhard Zimmermann’s use of the authority of Roman law to cope with the fear of the “Americanisation of European law.”⁴¹ 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.”⁴² In much the same way that the German legal theoretician Friedrich Carl von Savigny feared the hegemony of the French revolutionary ideology of codification,⁴³ modern European legal scholars resent the relationship between North American hegemony and law and economics.

What we propose is far from pushing for the “Anglo-Americanization of Latin American law.” Instead, in adopting the new paradigm of law and economics, Latin Americans will 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.⁴⁴ Scholars of Latin America will take the best North 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.⁴⁵

39. See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383–87 (2003).

40. See Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 44 (1993) (discussing how the intrusiveness of law may be particularly American, and the how this intrusiveness is viewed as “Americanization”).

41. Ugo Mattei, *The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments*, 21 HASTINGS INT’L & COMP. L. REV. 883, 886–87 (1998).

42. *Id.* at 886. Zimmermann made this point in *Der europäische Charakter des englischen Rechts*. *Id.* at 886 n.13 (citing Reinhardt Zimmermann, *Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen civil law und common law*, 1993 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 4).

43. See *id.* at 884–85. On Savigny, see PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 115–23 (1999).

44. See generally LAPIANA, *supra* note 18.

45. 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 jurídico*, *l’ordre juridique*, *die Rechtsordnung*). As a result, the immediate future augurs well for the prospects of the economic analysis of law in developing countries.

The crux of ALACDE's overall strategy must lie 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. Nothing would be left of civil law if we removed Roman law. Roman law is a well-worn but still-useful tool, which should serve as a paradigm, or model, for modern legal systems. An ALACDE model civil and commercial code will be a conscious project to restate Roman law's usefulness for coping with today's problems. As an almost-perfect private law system, Roman law is eminently amenable to a state-of-the-art fusion with law and economics.⁴⁶ Through our project, 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, an ALACDE model civil and commercial code will restate Roman law for Latin American countries.

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. Under our proposal, somewhat like Savigny's undertaking,⁴⁷ a vast (and unheralded) collaboration between law and economics scholars and legal historians will place our efforts squarely within the civilian tradition that we have inherited. Two seemingly incongruous academic disciplines—rational choice theory and area studies⁴⁸—will be brought together in a (sometimes uneasy) mix of universal and empirically verifiable explanations with a historian's eye for contextual detail.⁴⁹ Sensitivity to what drives a particular 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,

46. Obviously the Roman law of personal status is an historical anachronism that long ago outlived its purpose.

47. 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.

48. Many Latin American and Caribbean scholars, perhaps as "native anthropologists," are impatient with much work in Latin American studies at U.S. universities. Rather than funding area-studies programs, U.S. universities ought to encourage the development of scholarship in Latin America itself. That is what the ALACDE codes project would presuppose.

49. 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.

judges, and legal scholars.⁵⁰ May we be inspired to bring Latin America law to the cutting edge of twenty-first century legal science, and move past the ultimate monument of nineteenth century civilian legal science, the German Bürgerliches Gesetzbuch of 1900. We believe that, within the civil-law world, Latin Americans may take the lead and pull away from Europeans in this emerging legal science.

It is our 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. One such scholar, Alfredo Bullard—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.⁵¹ Rather than “schizophrenic,” we would use another adjective: “path dependent”(economic jargon for the idea that history determines the outcome of legal development).⁵² 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.⁵³ 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* (the free law

50. The redactors will be legal historians and the drafters will be economic-minded legal scholars. The ALACDE model law and economics civil and commercial codes will show sensitivity to the nuances of the legal culture in which Latin American lawyers, judges and legal scholars operate.

51. See ALFREDO BULLARD GONZÁLES, DERECHO Y ECONOMÍA, EL ANÁLISIS ECONÓMICO DE LAS INSTITUCIONES LEGALES [LAW AND ECONOMICS: AN ECONOMIC ANALYSIS OF LEGAL INSTITUTIONS] (2003). 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 HOUST. J. INT'L L. 467, 467 n.* (2005) (listing de Soto's biographical information).

52. See JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991) (tracing the origins of modern contract doctrine back to the late Scholastic philosophers).

53. See JUAN JAVIER DEL GRANADO, CONTROVERSIA DE IMPERIO LEGIS ET EMBLEMATA DE ORIGINI IURIS (2003) (emphasizing the humanist strands within late Scholastic writings, largely overlooked by twentieth-century neo-Thomist readings).

movement) 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.

III. DEFENDING THE PRIVATE LEGAL ORDER

Accordingly, one of the most important tenets of the economic analysis of law—that the common law is efficient⁵⁴—will be rethought into its civilian counterpart—that the Roman law is efficient. Paul Rubin has recently surveyed the ongoing debate in law and economics regarding the efficiency of the common law. Many different explanations have been proposed, from evolutionary models to Hayekian arguments.⁵⁵ 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, l'ordre juridique, die Rechtsordnung*) of the common law (except perhaps an unrecognized contribution to this debate by Richard Epstein).⁵⁶ This paper argues that the system of private law tends to be more efficient as common-law/Roman-law judges make their decisions cohere with what is already settled by the existing legal order. 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 an ALACDE model civil and commercial code will open up for us.⁵⁷ The common law and Roman law are efficient, simply put, because we are dealing with systems of private law.

54. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 25–26, 573–75 & n.1 (6th ed. 2003).

55. Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 *SUP. CT. ECON. REV.* 19 (2005).

56. 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 *U. CHI. L. REV.* 837, 864 (1996) (reviewing EPSTEIN, *supra*).

57. What tends to efficiency is the legal order of the common law/Roman law, a system of law that recognizes and upholds private property and contractual exchange, with an ability to promote internal financial intermediation to support wealth creation.

Why is the Roman law efficient? The legal order does not embody the civil law—as many in the North 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, codifications of civil law in Latin America have 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, the accumulated wisdom and experience of the Roman people for over a thousand years, the embodiment of a model private law system.

Codification on the continent has been in disrepute since Natalino Irti suggested that Europe was in an era of “de-codification.”⁵⁸ According to Professor Irti’s positive 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 civilian 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 Constitution. 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.⁵⁹ The whole concept of the private legal order becomes a *passé* notion.

Another 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 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 as a way to obfuscate and

58. NATALINO IRTI, *LA EDAD DE LA DESCODIFICACIÓN* (Luis Rojo Ajuria trans., Bosch ed. 1992) (1979); NATALINO IRTI, *NICHILISMO GIURIDICO [LEGAL NIHILISM]* (2004).

59. On the constitutionalization of civil-law systems, see Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 *TEX. INT’L L. J.* 1 (2006).

cloud what might be the very 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.⁶⁰ 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'école de Bordeaux* counter-posed a society of mutual cooperation, 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 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. In Latin America, the pendulum-like nature of formalist legal interpretation swung from absolute concepts of private property,⁶¹ the will of the contracting parties as having the force of law between parties,⁶² 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.

60. See, e.g., PIO CARONI, PRIVATRECHT: EINE SOZIALHISTORISCHE EINFÜHRUNG 58–61 (1988); PIO CARONI, LECCIONES CATALANAS SOBRE LA HISTORIA DE LA CODIFICACIÓN (Aquilino Iglesia Ferreirós trans., Marcial Pons ed. 1996) (1991); see also CSABA VARGA, CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON (Sándor Eszenyi et al. trans., 1991) (discussing codification as an exercise of state power).

61. Such as those property rights granted in France, as seen, for example, in CODE CIVIL [C. CIV.] art. 544 (Fr.).

62. Again, as seen in the French system. C. CIV. art. 1134 (Fr.).

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 positive rights and economic entitlements, a so-called doctrine of *mittelbare Drittwirkung* of fundamental rights⁶³ 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 Constitution; such a requirement serves as a vital prophylactic protecting the private legal order from constitutional scrutiny and government overreaching.

We 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. More often than not, 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).

Professor Alejandro Guzmán 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.⁶⁴ As an example, he cites Chile's land reform legislation of 1967,⁶⁵ enacted, and its implementation begun, by Salvador Allende, the democratically-elected socialist president, and summarily nullified by General Augusto Pinochet's military government. 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.

63. See Günter Dürig, *Grundrechte und Zivilrechtsprechung* [Basic Rights and Civil Jurisdiction], in *VOM BONNER GRUNDGESETZ ZUR GESAMTDEUTSCHEN VERFASSUNG* 157–90 (Theodor Maunz ed., 1956).

64. See Alejandro Guzmán Brito, *Codificación, Descodificación y Recodificación del Derecho Civil Chileno*, 90 *REVISTA DE DERECHO Y JURISPRUDENCIA Y GACETA DE LOS TRIBUNALES* 39 (1993) (Chile); Alejandro Guzmán Brito, *La Codificación Civil en Iberoamérica: Siglos XIX y XX*, 55 *ANUARIO DE DERECHO CIVIL* 15 (2002) (Chile).

65. Ley de Reforma Agraria, No. 16.640 (1967).

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.⁶⁶ Roman law opposed social norms deeply rooted in Northern European feudal society.⁶⁷ Must we forget that Roman law laid the foundation for the rise of commercial society?⁶⁸

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 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.⁶⁹

Some scholars may venture to suggest that an ALACDE model law and economics civil and commercial code, as a fascinating intellectual odyssey, will by force have the de/merit of being openly ideological. Let us turn the tables on all of these oh-so-intellectually-honest critics. Praxis is the central problem of theory. Not only will a set of code provisions based

66. James Q. Whitman, *The Disease of Roman law: A Century Later*, 20 SYRACUSE J. INT'L L. & COM. 227, 227–30 (1994); see also James Q. Whitman, *The Moral Menace of Roman law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L. J. 1841 (1996).

67. HEINRICH BRUNNER, GRUNDZÜGE DER DEUTSCHEN RECHTSGESCHICHTE [FUNDAMENTALS OF GERMANY'S HISTORICAL JURISPRUDENCE] (1919).

68. It is imprecise to speak of the property absolutism of Roman law, despite the triptych *ius utendi, fruendi, et abutendi* (the right to use, enjoy, and destroy). The Romans clearly took a cautious and restrained view. Roman law imposed limits on the use and enjoyment of private property under public policy rationales or with an eye to preserving the use, enjoyment, and value of neighboring properties.

69. See CARLOS AUGUSTO RAMOS NÚÑEZ, CODIFICACIÓN, TECNOLOGÍA Y POSTMODERNIDAD: LA MUERTE DE UN PARADIGMA 82–85 (2000); Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal System: Towards Decodification and Recodification*, 11 J. TRANSNAT'L L. & POL'Y 163, 177–81 (2001).

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. An ALACDE model civil and commercial code will 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 such a project will spur other schools of legal thought on to proffer code provisions that reflect their own particular view of law. 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. Our task at the moment, 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 us explain: much legal scholarship in the United States is spinning its wheels. Europeans and Latin Americans can make new contributions to the field. European and Latin American civilian legal scholars are conversant with the concept of the private legal order. For us, legal reasoning involves a sort of structural intellectual exercise where we fit legal questions into a wider framework of law and justice. The Germans even recognize *das Postulat der Einheit der Rechtsordnung* as a source of legal authority. However, no one in the civilian world is able to define exactly what is meant by the private legal order. Here is where law and economics can have a major impact in European and Latin American legal scholarship.

The economic approach to law reveals a wide panorama of just how private property rights and the law of obligations, where social norms are ineffective, redress informational asymmetries, align incentive effects, allow for pricing mechanisms, permit credible commitments, reduce monitoring costs, mitigate governance costs and decentralize decision making about resource allocation, and facilitate the channeling of savings into productive investment through financial intermediation.⁷⁰ The civilian concept

70. We do not attempt to survey the law and economics literature on private law. A few examples suffice. See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate*

of the private legal order can even become a source of legal authority in the future, not as 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, but as a well defined and understood wealth-maximizing principle (based on ordinal, not cardinal, utility) underlying private law itself. Private law can move back into the front and center of the legal order, instead of having the Constitution and public law be the fulcrum of the legal order.

Through the private legal order, we get the benefits of a market economy. “The decentralised initiatives of thousands of individuals and companies develop new services and products that no government official could imagine, let alone bring to market.”⁷¹ The role of government is limited to resolving conflicts and fostering life and liberty; defining and defending private property under the law; protecting the free and open exchange of goods, services and ideas; and limiting private use of force and deception. The economy becomes highly competitive as increased autonomy is ceded to private firms and individuals, and bona fide markets for labor, capital, and technology are developed. Increased competition brings the discipline of free markets to all corners of the economy—every industry, every company, every worker, and every transaction. The private legal order is efficient because governance costs are low and incentive effects are high.

IV. DRAFTING THE CODE

A scholar will respond that the task of drafting of an ALACDE model law and economics civil and commercial code is easier said than done. Latin American countries have changed their constitutions with unusual and bewildering alacrity.⁷² Like the United States 215 years ago, the European Union is deep into its first constitutional convention, seeking to resolve the issues of federal and state power that Anglo-Americans are still fighting over. Europe is undertaking a far-reaching political experiment with a European constitution. Many scholars would not have recommended

Coasean Trade, 104 YALE L.J. 1027 (1995); Avery Wiener Katz, *An Economic Analysis of the Guaranty Contract*, 66 U. CHI. L. REV. 47 (1999); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S457–58 (2002); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006).

71. Richard Epstein, Editorial, *Free Markets Demand Protection*, FIN. TIMES (London), Oct. 13, 2003, at 21. Professor Epstein has a long-standing interest in the economic analysis of Roman law, and we owe a debt of gratitude to him for fruitful discussions. Frank Buckley is another Anglo-American law and economics scholar with civilian interests, who has generously contributed to this proposal with his focus on private law.

72. Mauricio García-Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 FLA. J. INT'L L. 133, 140–42 (2004).

such an undertaking, since it will secure aspirational or second-generation rights and abstract constitutional legality as it is practiced in many European member countries today, and reduce the diachronic representativeness of public law institutions. *Si momentum requiris, circumspice!* In contrast, civil and commercial codes in Latin American countries have remained substantially unchanged since their passage.⁷³ One reason is that the codes are perceived as a restatement of legal science, explicated by treatise writers. Another reason is the daunting complexity of the codes themselves. Civil and commercial codes are massive undertakings involving scrutiny of all aspects of private law. However, new technologies make it easier to rewrite and update codes. Computers and the use of the Internet and e-mail allow scholars to work with large texts and to cooperate irrespective of distances.

We must realize that we need to work together through the ALACDE, rather than working alone as individual scholars, in our respective countries, or in self-imposed exile in the United States and elsewhere. The more other Latin American scholars are empowered by their participation in the ALACDE, the better off we are. As individual scholars, our drive for reform will remain ineffective and our efforts are likely to be rebuffed. Do we not face disappointing limitations in our own countries? Do not nepotism, inefficacy, lack of funding, dilapidated infrastructure, mind-numbing inefficiency, and multi-layered corruption rule the day? Do we not face in Latin America an all-pervading, initiative-stifling culture apparently dedicated to preserving inefficiency and indecisiveness? It is important that such an endeavor be inclusive, and allow the concerted participation of other scholars, even if the result is less than cutting-edge legal science. A code crowded with arguments in the overly mathematical style of modern economics, which presents highly stylized models that only a few legal scholars can understand, would have less impact than a code that simply injects key law and economics concepts into legal doctrine at a very basic level. Nonetheless, through such a code, the language of the law, and even the terms of legal discourse, will have changed in Latin America. This in itself is a great accomplishment, and more significant, than any a scholarly work built on sensitivity to theoretical advance and on careful assessment and use of data. The more mathematical and advanced scholarship may

73. See M.C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291 (2001); M.C. Mirow, *The Code Napoléon: Buried but Ruling in Latin America*, 33 DENV. J. INT'L L. & POL'Y 179, 191-94 (2005); M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 TUL. J. INT'L & COMP. L. 83 (2000) [hereinafter Mirow, *Power of Codification*].

take place through the innovative e-journal model,⁷⁴ and this scholarship may influence treatise writers who will write commentaries and annotations to an ALACDE civil and commercial code, in a peculiarly civil-law fashion.

This proposal must be viewed as a shared academic enterprise that would effectively bring us together and serve as a means of providing a competitive edge to our national economies. In Latin America, there is an urgent need to strengthen inter-university cooperation and to promote academic exchange. The grave problem of Latin American academe is that we lack a wider scholarly community, such as exists in the United States or Europe, and transnational academic exchange is quite limited. Even though much individual effort is centered on intellectual production, we fail to read each other's works and the fruits of this intellectual production are not shared. The economic approach to law, because it is a new field capable of advancing upon now-dominant doctrinaire approaches, can bring together bright academics, who are in quite insular and marginal situations in each respective Latin American country, and top legal scholars from the United States. The ALACDE may take the lead in putting forth bold proposals for the region. We envision this proposal in particular as a connector. It can be the place where Latin America's many distinct legal academic communities, often walled off from one another by national borders, come together on common ground. Inter-university cooperation between Anglo-American and Latin American law faculties will be strengthened, and for the first time there will be a wider Latin American academic community of legal scholars, as opposed to the fragmented groups of scholars that exist now. An ALACDE model civil and commercial code will raise our consciousness, further our knowledge, expand the network of scholars belonging to the ALACDE, and develop leadership ability to transform the region. It will set a new generation of civil-law scholars thinking together about how they can work towards changes that will improve the region.

It is a cliché, but like all good clichés, it is worth repeating: in order for us really to "make that leap," we will need to establish a fundamental change in the mindset of the people involved with the project. Scholars of Latin American law frequently operate in an overbearingly closed-off academic environment, dominated by professor "barons" who treat their positions as feudal fiefdoms, in which researchers are not so much employed as indentured. Is it any wonder that we often fail to provide new insights and inject fresh ideas into academic discourse, or that the "army of consultants

74. David A. Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace*, 30 AKRON L. REV. 183 (1996).

and staffers in the area of judicial administration”⁷⁵ at the United States Agency for International Development (USAID), the World Bank, the United Nations Development Fund, and the Inter-American Development Bank, who do not even hold academic appointments or enjoy prestige as practitioners in their own countries, carry out often ill-conceived legal reforms at great expense in impoverished Latin American countries? We need to stop jockeying for position among ourselves as leadership hopefuls,⁷⁶ and agree to pursue a common agenda, and turn to educating our fellow legal scholars about law and economics. We must be inclusive and allow for participation in the ALACDE, where “inclusion” will not be a catchword, but will be a passion. That must be our preoccupation, our plan of action. Does anyone seriously doubt that urgent action is needed?

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.⁷⁷ Though we fail to see how his particular criticisms can be extended to our ALACDE model codes, which are meant to foster greater discussion and debate on law and economics among Latin American scholars, his cautionary notes may be worth reflecting on after we finish our project, and may very well 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.⁷⁸ 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

75. Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345, 374–76 (2000).

76. There is, of course, a link between aspirations for leadership and the international institutions just mentioned. “International strategies refer to the ways that national actors seek to use foreign capital, such as resources, degrees, contacts, legitimacy, and expertises—which we pluralize in order to highlight the competing forms and technologies—to build their power at home.” DEZALAY & GARTH, *PALACE WARS*, *supra* note 33, at 7.

77. James Gordley, *Codification and Legal Scholarship*, 31 U.C. DAVIS L. REV. 735 (1998); see James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981).

78. See Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 667–69 (1998). In restatements, a group of top legal scholars boil down the best judicial decisions from throughout the United States into a set of rules that are relatively easy to look up, understand, and apply.

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.

A civil or commercial code is certainly more than simply a filing system for legal doctrines, or a giant clothes rack on which to hang legal doctrines so that they look tidier. A legal scholar who has not been trained in the civil-law system may not appreciate fully, or even adequately, what is going on under the rubric of the private legal order. The unified view of the legal system does not spring from whether a doctrinal compendium is the work of one or a multitude of stylistically-challenged treatise-writers. Something so complex as Roman law was obviously not the work of one person. It is the result of a constantly refined tradition. The debate today is not over whether to suppress private property (that argument is now historical), but over the kind of institutional structures that should run alongside markets. There is just too much at stake to let the civilian concept of the legal order pass. What is at stake is whether the concept of a legal system that recognizes and upholds private property and contractual exchange will have any remaining meaning at all.

The concept of the legal order was superfluous, redundant, and even unnecessary under socialism, where social coordination was achieved under the micro-managing, heavy-handed control of the central government. Rather than through the certainty of interpretation and consistency of application under an existing legal order, socialism operated through “direct political control” and central planning, by the supremacy of bureaucratic centralism over freedom. Law itself became an instrument with which to smash the enemies of the socialist state. Nor do socialist utopias seriously consider a need for the concept. Under Marxist theory, the police, the courts—the law itself—“wither away.”⁷⁹

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 rational-

79. Evgeny Pashukanis argues that both law and the state will progressively diminish as socialism develops. EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (Barbara Einhorn trans., Chris Arthur ed. 1978).

ity, 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.⁸⁰

V. FACING THE CURRENT CRISIS

With Latin America struggling to survive global financial turmoil, the Bretton Woods institutions—the World Bank and International Monetary Fund (IMF)—are often (and often unfairly) the target of severe criticism in the region. About fifteen years after countries in Latin America, including Argentina and Mexico, opened their economies to global markets, a majority of citizens have yet to experience the benefits of the market economy. Conditions are bleak for Latin America. Unemployment is rising, wages and living standards are falling, and with the economic reversals have come social unrest and signs that economic reforms are being stymied. Many developing countries having IMF-sponsored privatization programs have experienced anti-privatization demonstrations. A new consensus in Latin America is plain to see. It questions the wisdom of the economic model currently embraced, which provides policy prescriptions that seem to worsen the already-bad situation in these countries—liberalizing prices, opening up markets, privatizing state enterprises, raising interest rates, and reining in public spending.⁸¹ However, this does not mean developing economies should turn their backs on the capital markets or abandon the goal of opening markets. We simply must insist that economic development in developing countries requires an acceptance of the benefits of the market economy.⁸² Stalinist central planning sought to direct the national economy from the center. But its collapse in the former communist states has been even more complete than the historical failure (and current menace) in Latin America of leftist populism—with its spiraling tendency toward demagoguery.

80. See generally 2 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* (1976).

81. To be sure, Latin American economists were forced to try something new after the disastrous 1980s, characterized by runaway debt and inflation, economic recession, and high unemployment. Entering the 1990s, planners opted to abandon protectionism and embrace economic orthodoxy. They cut social spending, liberalized trade laws, sold off state companies, and lowered tariffs. Governments eliminated subsidies on food, transportation, and electricity.

82. To succeed in the new millennium, we must not abandon this economic orthodoxy of free trade, privatization, and global economic integration. We must continue our move away from state-centered economics.

Those who oppose the Bretton Woods institutions include the fringe extremists, the moderately critical, and everything between.⁸³ The leftist mainstream in Latin America, long suspicious that the IMF is simply a tool for U.S. economic orthodoxy, argues that its harsh policy prescriptions have forced millions into poverty and unemployment. Clearly, the interface between national economies and the international capital markets is a potential danger area for any government.⁸⁴ However, rather than Latin American governments being unduly cautious before they open up, governments must take a more comprehensive perspective of development—one that encompasses economic and structural legal issues. Along with orthodox economic policy prescriptions in Latin America, legal prescriptions for how to make the law work best must be proposed, discussed, legislated, implemented, and followed-up in virtually all Latin American countries; economics must be partnered with law and economics.

More is needed in Latin America than a rerun of the property-title revolutions that enriched Western Europe and America in the eighteenth and nineteenth centuries, or General Douglas MacArthur's magnificent property-titling program in post-War Japan.⁸⁵ Something a bit more substantial is needed. In Latin America during the twenty-first century, we must privatize—and deconstitutionalize—the private legal order along with economic liberalization and privatization.

Robert D. Cooter and Hans-Bernd Schäfer have argued against the so-called “Washington consensus”—under which Washington-based institutions such as the International Monetary Fund, the World Bank and the U.S. Treasury prescribe active government-led strategies for foreign investment-driven development to improve the economies of developing economies—and support their arguments by stating that economic growth arises from private information to which the government is not privy.⁸⁶

83. Timothy A. Canova, *Financial Liberalization, International Monetary Dis/order, and the Neoliberal State*, 15 AM. U. INT'L L. REV. 1279, 1281–83 (2000).

84. A well-capitalized and well-regulated banking system is a prerequisite for capital account liberalization; this is the hard lesson taught by Mexico's financial crisis of 1994. Foreign bond markets are treacherous for any country without a robust fiscal position; this is the hard lesson taught by Argentina's debt crisis of 2002. The latter's crisis also demonstrates the urgent need for some form of bankruptcy protection for sovereigns. See Daniel K. Tarullo, *Neither Order Nor Chaos: The Legal Structure of Sovereign Debt Workouts*, 53 EMORY L.J. 657 (2004).

85. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 10 (2000). The Peruvian Marxist organization, Shining Path, has paid a tribute of sorts to de Soto's anti-poverty activism: two unsuccessful attempts to assassinate him.

86. Robert D. Cooter, *Innovation, Information, and the Poverty of Nations* 4 (Berkeley Program in Law & Econ., Latin Am. & Caribbean Law & Econ. Ass'n [ALACDE] Ann. Papers, Paper No. 15, 2005), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1014&context=bple>.

Economists need to work with economic-minded lawyers.⁸⁷ This need has already been expressed, if indirectly, in the works of Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny.⁸⁸ Their empirical work suggests that the legal system plays a powerful role in determining national economic development. Alas, the evidence is there! Now a generation of legal scholars has to pick up the baton left by these business school professors and run with the same panache. Once we start regurgitating the same doctrinaire scholarship, that will be the end of the ALACDE.

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 the most investor-friendly legal environment. It is not one of the infusion 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.⁸⁹ Instead, the problem we face is a failure of the legal system to ensure law and order so that property and contract rights are respected, as well as a failure to implement the rule of law through a system of checks and balances aimed at limiting the abuse of state power. It is the failure, particularly telling in terms of the deficiencies of the legal system as a whole, to provide the legal infrastructure necessary for markets to function. It is, moreover, the general failure of internal financial intermediation in Latin American countries.

Financial intermediation occurs both through debt and equity markets (between short-term capital supply and long-term capital demand). A lack of access to capital means that even where entry costs are relatively low, entry into too much economic activity becomes cost-prohibitive for people with wealth constraints, and there is less shadow competition around the

87. More is needed in Latin America than a re-run of property-title revolutions. Economists—and in particular, Hernando de Soto, who seems uninterested in law and economics—need to collaborate with economic-minded lawyers.

88. See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2002); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1132 (1997) [hereinafter La Porta et al., *Legal Determinants*].

89. 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 *ECON. J.* 14 (1939). For examples of economic growth models, see also Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 *Q.J. ECON.* 65 (1956); Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 *REV. ECON. & STAT.* 312 (1957).

entire economy to impose market discipline. Economics textbooks all suggest that the lack of competitive market discipline ultimately leads to higher prices and lower quality. The 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.⁹⁰ 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 of the above point to the biggest myths there are—namely, that equity markets exist in many Latin American countries, other than equity markets for bonds or securitized debt instruments, and that a privatized system of Social Security may create them.

The full scope of financial intermediation is path dependent on our legal system, which is a product of sixteen centuries of Western life and experience and legal history. We may expect to fill in a very big hole in our understanding of how the legal system and financial intermediation fit together only through the study of comparative law and economics of the private legal order. A new-generation ALACDE model code is a step in that direction. Such a code may offer a larger and much more integrated view of the components of the private legal order. Comparative law and economics will grow substantially with the drafting of an ALACDE model civil and commercial code for Latin American and Caribbean countries, which will innovate upon legal doctrines in the civil-law tradition. The process must repair, rather than replace, useful elements already extant in the tradition. Legal transplants become ineffectual and largely inoperative

90. 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. Rather than enforce antitrust laws, governments must reduce government obstacles to competition in the private sector.

because they fail to fit into the existing legal order and spawn very high transaction costs (as economists call them), owing to the differences in aims, cultures, and legal traditions.⁹¹

VI. PROJECTING THE CODE

In what follows in this paper, we will suggest some broad outlines for a new-generation ALACDE model law and economics civil and commercial code for Latin American countries. The codes must not be a vehicle—under any circumstances—for legal borrowing from other legal systems, nor for the legal transplantation of common-law doctrines into the civil law. Instead, civil-law doctrines have to be modified and even expanded, recreated with doctrinal consistency, tweaked for contemporary tastes, culled from Latin American doctrinal writings, retouched, and sometimes recast, constructed out of Roman law sources with contemporary resonances, and combined, merged, and modified with economic concepts and phrases.

Throughout this proposal, we have asserted that this project must adapt law and economics to Latin America, that it must take shape along civilian lines and within civilian moulds. Following established structures within the framework of private legal ordering, this project is best viewed as a continuation of the well-established tradition of codification in Latin America. Successful codifications in the region occur when a particular constellation of factors are present. A certain dissatisfaction with or perceived need for reform of present law often sparks the process. Nonetheless, such hopes for change are not enough. Successful codification projects take root in periods of political and economic stability. They also require a sufficient number of dedicated and legally talented individuals who have incentives to make a new code a priority. Codes in the region historically have been the work of a single individual who drafts for and guides the project under the auspices of a legislative committee. The role of the key figure should not be underestimated.⁹² Adequate sources and resources for such a project are also necessary.⁹³

Many of these hurdles are lowered by the collective nature of this project. By using blogs and web pages for the project, the drafters and commentators can intellectually gather at the same space with little cost.

91. See, e.g., ROBERT CHARLES MEANS, *UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW: CORPORATIONS AND CORPORATION LAW IN NINETEENTH-CENTURY COLOMBIA* 271–79 (1980).

92. M.C. Mirow, *Individual Experience in Legal Change: Exploring a Neglected Factor in Nineteenth-Century Latin American Codification*, 11 SW. J. L. & TRADE AM. 301 (2005).

93. See, e.g., Mirow, *Power of Codification*, *supra* note 73, at 108–12.

Sources and ideas are easily accessed and shared. Nonetheless, it is understood that these model codes are far from legislation. Special interests and individual political forces often greatly transform pristine proposed laws into something quite different from the text and intent of the drafters.⁹⁴

This project's methodology makes an important contribution to law reform in the region. We recognize that there are aspects of legal systems in Latin America that work. We view these areas of adequate functioning as "pockets of legality." Law reform projects within the region frequently try to offer remedies based on an incorrect assumption that entire legal systems are completely broken and beyond repair and that whatever ruins of law and order remain should be razed to the ground. These projects would then build new edifices from scratch. We disagree with this approach and find more in many countries to provide sound starting points for incremental, effective, and responsible reform tailored to the historical and cultural aspects of law in the region. These pockets of legality—codification, the private legal order, Roman law—provide the existing foundation for our proposal.

Latin American legal scholars must work within a mould steeped in tradition but not bound by it. The pandect system must be maintained, as this is such a well-understood part of the legal ordering. The civil code must be organized along the general lines of Gaius' and Justinian's Institutes: persons, things, and modes of acquisition (reducing the scope of the law of successions, expanding the scope of the law of obligations), but not including actions or procedure,⁹⁵ and divided into three books, each subdivided into titles, which, in turn, may be further subdivided into chapters, and the chapters into sections. The commercial code must cover merchants, company law, and commercial obligations, and may be expanded to include a variety of non-contractual commercial subjects such as *fidei commissa*, industrial property, tax law, negotiable instruments, securities regulation, and unfair competition.

We suggest that the basic concepts of law and economics may be readily transferred into the ALACDE codes, beginning with the economic

94. The authors thank Professor Alejandro Garro for reminding us of this aspect of the legislative process, particularly in the Latin American context.

95. The proposed law-and-economics codes will restate substantive civil and commercial law; codes of procedure would require greater innovativeness and creativity, and may be embarked upon later. These codes would move toward privatized or private-led models of adjudication. Our civil procedure, ironically, stems from the canon law's inquisitorial process instead of the Roman law's adversarial process.

understanding of property rights.⁹⁶ Another major line of economic thought to be incorporated is the economic distinction between property and liability rules. In the law of obligations, delicts are areas that must be enlarged, while always drawing from or innovating on Roman-law concepts. As the system for civil extracontractual responsibility is strengthened, then the need for the enforcement of penalty clauses in the civil code is undermined.⁹⁷ As practitioners in Latin America are aware, when faced with the inefficacy of enforcement of contractual promises, civil matters are too often transformed into penal complaints.⁹⁸ The strengthening of civil contractual and extracontractual liability⁹⁹ (delicts), may lead to a “depenalization” in Latin American countries. It is an irony that in the Roman law, private redress carried quasi-penal sanctions, while Latin American penal law punishes wrongdoers and redresses injuries. Rather than a law of delict or civil wrongs redressable by compensation, we get a different order of public regulatory law under the weight of bureaucratic inertia (or worse) where civil liability follows penal liability, where everything is penalized and debtors are subjected to debtors’ prisons.

The ALACDE codes may present agency theory as a set of tools that can be used to address a fundamental issue that continues to underpin the civilian legal tradition—the underdevelopment of agency law in Roman law. A modern civilian doctrine of agency law will be built through the use of the tools of agency theory, and a modern civil-law doctrine of *fides* will be incorporated into company law to support investor relations. *Fides* when acting on one’s own behalf or for others may be of a contractual- and quasi-contractual nature as in *communio*.¹⁰⁰ Courts in Latin America should exercise wide latitude in protecting the interests of minority shareholders in private companies¹⁰¹ as well as in a wide assortment of other

96. A largely unrecognized fact in law and economic literature is that the tragedy of the commons has long been a trope of the Roman lawyers. See FERNANDO VÁZQUEZ DE MENCHACA, II CONTROVERSIARUM ILLVSTRIVM ALIARVMQVE VSV FREVENTIVM LIBRI TRES, at lxxxviii (1564).

97. See Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 651–55 (2001); Ugo Mattei, *The Comparative Law and Economics of Penalty Clauses in Contracts*, 43 AM. J. COMP. L. 427, 434–38, 441 (1995). See generally Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988).

98. STEPHEN ZAMORA ET AL., MEXICAN LAW 560 (2004).

99. See Tomlinson, *supra* note 97.

100. See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999).

101. Latin American commercial law provides weak legal protections for minority shareholders, which include supermajority voting rules and allocating directors to large-block minority shareholders. See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471, 511–12 (1999); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1151–52 (1998); La Porta et al., *Legal*

relationships that involve Roman law *fides*. Legal doctrine may examine in what relationships *fides* exists, exactly what constitutes a betrayal of *fides* and the legal consequences generated by such a violation. *Fides* will probably be found to exist in *fiduciarius/fidiecommissarius*, *mandator/mandatary*, tutor/ward, corporate director/officer-corporation and shareholders,¹⁰² *socius/societas*, and major shareholders/minority shareholders relationships (the categories should not be exclusive). When the incentive structure is efficient, courts should uphold *bene agere* to mitigate the rigors of civil and commercial law in accordance with underlying social norms.¹⁰³ It cannot be denied that conducting business with and on behalf of other people involves uncertainty and risk. This is why the Roman consensual contracts are frequently open-ended and rife with gaps (incomplete contracts).¹⁰⁴ In civil and commercial life, we are called upon to act with *bona fides*. However, the mechanics of building cooperation and *fides* among economic actors is hard enough and monitoring and evaluating the performance of people we rely on is costly. For all we know, they may shirk their responsibilities or misappropriate our assets. Accordingly, courts may be called on to make ex post determinations regarding whether people have acted *contra bonam fidem*, which are necessarily context-dependent.¹⁰⁵ Moreover, as noted above, some relationships in which *fides* exists require greater measures of loyalty, candor, due care, and information from people willing to respond to and promote the interests of others, even at cost to their own interests—levels much higher than the ubiquitous *Treu und Glauben* required between parties to an arms-length commercial

Determinants, *supra* note 88. Beyond these basic measures, the law allows for the rights of inspection, proposal, and withdrawal.

102. Latin American commercial law establishes personal liability for company directors and officers. However, these rules cannot really be enforced except in exceptional circumstances, which makes them illusory and theoretical. Lastly, a lack of liquidity of shares, and a shortage of market makers, mean it is difficult for shareholders to exit a corporation, which is scarcely effective in imposing market discipline on managers. Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540 (1995).

103. In a civil society, *fides* as a legal concept should be both essential and seen as an entry point for efficient social norms into commercial law. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694–96 (1996).

104. It is difficult to specify all the possible outcomes ex ante, or to know which details will be important ex ante.

105. In cases of apparent conflicts of interest, self-dealing, and misappropriation, the courts may require people to prove that they acted with *fides*. It is essential that the burden of proof shifts. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1045 (1991). Different standards of care are appropriate in different relationships. For example, a tutor often is required to act with *diligentia quam in suis* in managing the assets of his ward, whereas the officer of a corporation may only be liable for *culpa lata*.

transaction.¹⁰⁶ Courts in Latin America must create ex ante incentives for people to act appropriately in order to support civil and commercial relationships and investor relations in the region. The *ius honorarium adiuvandi, vel supplendi, vel corrigendi iuris civilis* was perennially relevant to Rome's increasingly complex commercial life.

The two-fold division of private law has been current since the late-medieval period, when the first commercial laws were adopted in Italian cities as *leges speciales* to regulate trade. A useful reorganization would be to group secured transactions together in both the civil and commercial codes. Security interests are the modern equivalent of the ancient practice of exchanging hostages to cement bonds of fealty. The assets pledged as collateral will be more valuable to debtors than creditors (to the hostage-givers than the hostage-takers), so civilian courts must be willing to enforce the forfeiture of collateral despite the prohibition of *leges commissoriae*.¹⁰⁷ Commercial and securities laws provide a legal platform to facilitate financial intermediation through equity. These laws offer a range of protections to aid the liquidity and value of shares, including limiting liability, restricting attempts to limit the transferability of shares as well as protecting market makers from insider trading,¹⁰⁸ requiring disclosure of essential information by publicly-traded companies, and protecting the interests of minority shareholders from tunneling and asset shifting to and from associated companies.

To appeal to a Latin American audience, full respect must be given to the most basic distinctions of the Roman-law based system. Thus, the classical Roman law classification of contracts into nominate and innominate requires that both civil and commercial codes have articles that allow parties to break out of the usual moulds and design atypical contracts. Much commercial activity is hindered because contracts and legal entities in the civil world are pigeonholed by default contractual forms and rules with a long history. The nature of contracts is defined by legal custom and legal doctrine, and enforced by the notary publics who may redraft documents as they are entered into public records, or by judges who are prone to redefine legal arrangements to fit usual moulds.

106. See RUDOLF MEYER, *BONA FIDES UND LEX MERCATORIA IN DER EUROPÄISCHEN RECHTSTRADITION* (1994).

107. CODE THEOD. 3.2.1; see Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 731–32 (1989).

108. See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *What Works in Securities Laws?*, 61 J. FIN. 1 (2006). However, lower standards of disclosure may impact market makers more than insider trading. Stanislav Dolgoplov, *Insider Trading and the Bid-Ask Spread: A Critical Evaluation of Adverse Selection in Market Making*, 33 CAP. U. L. REV. 83, 133 (2004). See HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 77–91 (1966).

The French Code Civil expressly disallows precedential force.¹⁰⁹ In stark contrast, an ALACDE model civil and commercial code will authorize use of prior judicial decisions as persuasive authority. This new judicial authority should not be feared; the persuasive authority of prior judicial decisions is narrow and fact specific. Moreover, it is possible to incorporate Llewellynian hermeneutics and situation-sense, through customary law or reasonable standards, into an ALACDE model civil and commercial code, and resurrect if not reinvent nearly defunct casuistic devices that perhaps date back to antiquity, or our vigorous Castilian-Roman traditions.¹¹⁰ The idea of *fides* in Roman law, and the ex post oversight of Roman *praetors* and *aediles*, should provide a model for reform of civil-law systems of today.¹¹¹

If the ALACDE codes are ever adopted by a Latin American or Caribbean country, the *Allgemeiner Teil* must clarify that the binding authority of the codes—that is, their possible recognition as positive law—derives not from the will of elected representatives, but from how the pieces of the private legal order fit together as interpreted by judges and case law.¹¹² Rather than the legal order being a subsidiary source of law as in the German Bürgerliches Gesetzbuch, it will be front and center now. The articles themselves will serve as an interpretive guide for judges to the content of the legal order. Law and economics scholarship will shed light on the private legal order in traditional civilian fashion. Accordingly, rather than detailed legal rules, sound legal doctrines based on the merger of Roman law with law and economics will be explicated by scientific treatises.

109. C. CIV. arts. 5, 1351 (Fr.).

110. See LOS CÓDIGOS ESPAÑOLES: CONCORDADOS Y ANOTADOS, vols. 2–5 (Antonio de San Martín ed., 2d ed. 1872) (reprinting the *Código de las Siete Partidas*).

111. We are, of course, aware of the complex nature of the claim. “Cujas (the story may be apocryphal), when asked to apply his learning to contemporary problems, would reply merely: ‘Quid hoc ad edictum praetoris?’ It was a heroic answer, for in the name of pure scholarship he was in effect denying European civilization the use of one of the principal canons by which she was accustomed to guide herself.” J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 10–11 (1987).

112. Only now, in this first decade of the twenty-first century, may law and economics have finally made important inroads in setting forth a complete theory of law-making. See Juan Javier del Granado, *An Economic Analysis of Legal Reasoning* (Berkeley Program in Law & Econ., ALACDE, Paper No. Jan4_07, 2007), available at SSRN: <http://ssrn.com/abstract=959308>. See DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 318 (2000) (recognizing that law and economics lacked “[a]n adequate theory of the mechanisms that generate legal rules narrowly defined—statute and common law”).

CONCLUSION

It is high time that we realize that it is precisely the scientific nature of our new economic understanding of legal institutions, a new legal science, which will allow us to craft new legal institutions within existing frameworks rather than jettisoning parts of our legal system and filling in the gaps with foreign doctrines that do not fit into the existing legal order. Now is the moment, we suggest, when the academic interest of economic-minded lawyers in Latin America with a stake in the region must be transformed into a more relevant and immediate timetable for action. We must expand our pockets of legality. Legal scholars have an obligation to do work that is not merely interesting as an intellectual enterprise but also helps the region to govern itself.