IX

Novus Ordo

Positivism and Conceptualism

Before the nineteenth century, jurists concentrated on bodies of law that had an authority that transcended political boundaries. The Roman texts were regarded as a *ius commune*, in force everywhere according to the medieval civilians. They were in force in France insofar as they had been received there and, according to Domat, the texts received for the most part reflected natural law. According to the *usus modernus pandectarum*, the Roman texts were in force in Germany and the Netherlands by custom because they rested on reason. The late scholastics, the iusnaturalists, and the rationalists had written about natural law—a law with an authority which was independent of the texts in force.

In the nineteenth century, jurists came to believe that they should interpret texts without regard to any higher principles on which they might rest. If there were such principles, it was not the task of jurists to investigate and apply them. The texts were authoritative simply because they were the law of a particular region, enacted or accepted by those with authority in that region. We can speak of this approach as "positivism," if we use the word with caution. The positivism of the jurists was not a philosophical view of the nature and sources of law. Rather, it was a belief about where the law was to be found so far as their work was concerned.

French jurists sought the law in French legislation such as the French Civil Code. German jurists centered their work on the Roman texts that were now regarded as a *gemeines Recht*, or German common law. Common lawyers thought that their law rested on the authority of decided cases. Certainly, they had always thought so, but now a change occurred in how the cases were understood. The common law ceased to consist of bodies of lore organized about writs or forms of action. As we will see, it was organized according to legal doctrines, many of which were borrowed from the Continent. Nevertheless, the Continental sources from which the doctrines were borrowed were not recognized as authoritative in themselves. Rather, the doctrines were thought to rest on the authority of the decided cases.

The jurists systematized law by concepts that they claimed to find in their sources. We can speak of this endeavor as "conceptualism," if, again, we are careful about the word. Conceptualism was not a philosophy. Rather, it was a method of explaining the law by identifying basic concepts and deriving from them as many rules as possible.

Thus the jurists began a new project that united positivism and conceptualism. Although work on the project began in the late eighteenth century and continued into the twentieth, for convenience we will call it the "project of the nineteenth-century jurists."

The project may have originated, in part, because of the jurists' disillusionment with the attempt to explain law by means of higher principles founded on human nature. That attempt seemed unlikely to succeed after the rise of modern critical philosophy, and all the more unlikely because of the efforts of jurists over the previous two centuries. In the work of the iusnaturalists, and of Domat and Pothier, the higher principles had become so indistinct and their links to legal doctrines so unclear that they may have seemed like platitudes and non sequiturs. The work of the rationalists may have seemed like a series of tautologies leading nowhere. The alternative seemed to be positivism: if the law did not rest on higher principles grounded in human nature, then it rested on texts with legal authority.

Positivism was linked to conceptualism. If the texts were the ultimate source of law, then a jurist must be able to derive his conclusions from the texts. If he could not do so, he was presenting his own opinions as if they were law. He was usurping legal authority. Therefore there must be concepts underlying the texts from which his conclusions could be derived.

These considerations help to explain why the project of the nineteenth-century jurists made sense to them. Yet, as with other projects that we have examined, this one too need not have been. Positivism and conceptualism were not the only possible response to the situation of the jurists, nor were they an obvious response.

Positivism

The nineteenth-century jurists' commitment to positivism depended on a new understanding of legal texts that was far from obvious. The French jurists now regarded legislation as the exclusive source of French law, and their Civil Code as one exclusive source of private law. In contrast, Portalis had thought that, to interpret the Code, one must look beyond it to Roman and natural law. German jurists came to regard Roman texts that were once accepted as the *ius commune* of Europe as forming a German *gemeines Recht*, the authority of which rested on the German *Volksgeist*—the "mind," or "spirit"—of the German people. Common lawyers restructured their law by borrowing extensively from Continental authorities, while claiming that their work rested on the authority of their own decided cases.

L'ecole de l'exégèse in France

The nineteenth-century French jurists implicitly rejected the view of Portalis, the chairman of the committee that drafted the French Civil Code. As we have seen, Portalis did not expect the Civil Code to be the sole authoritative source of French

law.[1] To interpret it, the judge could turn to the "natural light of justice and good sense," since law is based on "universal reason, supreme reason," founded on the very nature of things. He could also consult the "valuable collections for the science of laws" made by the Roman jurists. He could draw upon the learning of the "entire class of men" trained in legal science who had produced "compendia, digests, treatises, and studies and dissertations in numerous volumes." He was referring to compendia, digests, treatises, and studies and dissertations already written, not new ones concerned only with the texts of the Civil Code.

In the nineteenth century, however, the conviction grew that the Code should be interpreted exegetically without looking beyond its own texts. Thus the Code was treated as self-sufficient even though its drafters had not intended it to be, and even though, as we have seen, its drafter-in-chief had risked the defeat of his project rather than abandon his conviction that self-sufficiency was an unnecessary and impossible goal.

Charles Toullier, who wrote the first commentary on the Code soon after its enactment, tried to interpret it according to jurists who had written on natural law.[2] Later nineteenth-century authors did not. They usually said that they believed in a natural law, but their protestations were sentimental introductions to exegetical commentaries. The natural law, according to Alexandre Duranton, was promulgated by God and known to man through the light of natural reason.[3] According to Antoine Marie Demante, it was given by God, engraved on our hearts, inseparable from our reason, and invariably attached to our nature.[4] Charles Demolombe acknowledged its divine origin, its universality, and its immutability.[5] To deny that such a law exists, François Laurent said, would be to deny that there is a God and to deny that man is a spiritual being, thereby reducing man to a brute and law to a chain.[6] Raymond-Théodore Troplong said that to deny that the Creator engraved such a law on our hearts would be false and degrading.[7] Auguste Valette claimed that all nations recognize such a higher law and that the only people who do not are certain metaphysicians whose systems need not be considered.[8] Charles Aubry and Charles Rau defined the natural law as the ensemble of rules that would permit restraining a citizen by force.[9]

But their commentaries were innocent of any real attempt to determine what the natural law was or to interpret the Code in its light. Demante said that the Code

[1] *See* Chapter VI, pp. 150–53.

[2] Charles Bonaventure Marie Toullier, *Le Droit civil français suivant l'ordre du Code*, 4th ed. (Paris, 1824–37). As Ghestin and Goubeaux have observed, the fact that Toullier did not regard the texts as self-sufficient is good evidence that the drafters did not either: Jacques Ghestin and Gilles Goubeaux, vol. 1 of *Traité de droit civil*, 2nd ed. (Paris, 1983), §§ 142–45.

[3] Alexandre Duranton, vol. 13 of *Cours de droit français suivant le Code civil*, 3rd ed. (Paris, 1834), §§ 15–16.

[4] Antoine Marie Demante and Edouard Colmet de Santerre, vol. 1 of *Cours analytique de Code Civil* (Paris, 1883), § 4 (by Demante).

[5] Charles Demolombe, vol. 1 of *Cours de Code Napoleon* (Paris, 1854–82), §§ 6, 8.

[6] François Laurent, vol. 1 of *Principes de droit civil français* (Paris, 1869–78), § 4.

[7] Raymond-Théodore Troplong, vol. 1 of *De la vente* (Paris, 1837), Preface, xvii, n. 1.

[8] Auguste Valette, *Cours de Code Civil* (Paris, 1872), 2.

[9] Charles Aubry and Charles Rau, vol. 1 of *Cours de droit civil français* (Paris, 1869–71), § 2.

had to be interpreted in light of the natural law,[10] but his works were an echo of the natural law tradition rather than an effort to explain and apply the natural law. Duranton said that recourse to natural reason and equity should be the last resource of the interpreter.[11] Demolombe took as his motto "The texts before all else."[12] From the point of view of a jurist, he explained, there is only one true law: the positive law.[13] Troplong praised the jurist who measured his writings by the inflexible text of the Code.[14] Valette advised restraint in using principles of equity to interpret it.[15] Laurent claimed that the jurist should merely note defects in the Code, thus leaving to the legislator the task of bringing it into accord with natural law.[16] Aubry and Rau gave an account of interpretation that made no reference to natural reason or equity.[17]

They gave quite different reasons for reaching what was essentially the same conclusion. Duranton explained that, while natural law speaks to all men of virtue and intelligence, these men were simply too prone to make mistakes as to its secondary precepts.[18] Laurent thought that the natural law is revealed to the human conscience progressively as a people approaches perfection. The legislator, however, was supposed to prepare for it by interpreting statutes and noting their defects.[19] Troplong[20] and Valette[21] contented themselves with general remarks about the perfection and comprehensiveness of the Code. Demolombe agreed that, with a Code so complete, humane, and equitable, a case could scarcely arise in which natural law would be any different from positive law. Moreover, while there was a pre-existent, universal, and immutable natural law, to think about such a law was more appropriate to a philosopher or a moralist than a jurist. For a jurist writing about the Code, the one true law was the positive law.[22] Aubry and Rau claimed that, while there were absolute and immutable principles such as the personality of man, the right of property, the constitution of the family, and the liberty and obligatory force of contracts, one could not determine a priori the rules by which these principles should be developed. While the principles were immutable, the rules were contingent and variable.[23] The only point on which the French did agree, then, was that their task was to interpret the Code exegetically and insofar as

[10] Demante and Colmet de Santerre (n. 4), 1: § 23 (by Demante). On the other hand, he seems to have thought that recourse should be had to general principles of law or natural equity only in the rare instance in which a case is not covered by the letter or spirit of the statute, or the statutory text is so obscure as to have no true sense: Demante and Colmet de Santerre (n. 4), 1: § 28.

[11] Duranton (n. 3), 1: § 96.

[12] Demolombe (n. 5), 1: 1st preface, vi.

[13] Demolombe (n. 5), 1: § 8.53.

[14] Troplong (n. 7), 1: Preface, viii.

[15] Valette (n. 8), 1: 4. While acknowledging that the judge must consult general principles of law to find a solution when statutory provisions are absent, Valette maintained that it would be astonishing to find a case in which these provisions were wholly lacking, given the legislation enacted in the previous seventy years: Valette (n. 8), 1: 34–35.

[16] Laurent (n. 6), 1: §§ 5, 30. For a judge to decide a case by natural law is permissible only when the texts are insufficient, and then it is a necessary evil: Laurent (n. 6), 1: §§ 256–57.

[17] Aubry and Rau (n. 9), 1: §§ 40–41.

[18] Duranton (n. 3), 1: § 96.

[19] Laurent (n. 6), 1: § 5.

[20] Troplong (n. 7), 1: Preface, xii.

[21] Valette (n. 8), 1: 34–35.

[22] Demolombe (n. 5), 1: §§ 8–10.

[23] Aubry and Rau (n. 9), 1: § 2, n. 2.

possible without recourse to the natural law in which many said that they believed.[24] Although Philippe Rémy dislikes the phrase "school of exegesis" (*école de l'exégèse*), he notes that these jurists, "despite their great diversity," shared the same "work" or task. It was the "'explanation' or development of the Civil Code." He praises them for having undertaken it: "Sixty-five years of explanation are not too much to make a Code of 2000 articles of daily use to a civil lawyer."[25] Like these jurists, he considers French law to be an elaboration of the rules of the Code—a movement, as he describes it, "from the rule to the problems."[26]

As Portalis had said, however, many cases could not be covered by the express language of a Code provision. He expected that these provisions would be interpreted by the principles of a higher law. If that was not possible, then the question arose: by what principles could they be interpreted? As we will see, the answer of the nineteenth-century jurists was to extract principles from the texts that made sense to them, but which were quite different from those that had made sense to Domat, Pothier, or the drafters of the Code.

Pandektenrecht in Germany

In Germany, the view that became orthodox was developed by Friedrich Carl von Savigny. Like the jurists of the *usus modernus pandectarum*, Savigny regarded the Roman texts as authoritative as received and modified in Germany. Together with borrowings from canon law and customary law, they constituted the *gemeines Recht*, or German common law. For the jurists of the *usus modernus* school, as we have seen, these texts had authority because they rested on universal principles, and because they had been accepted by usage or custom, which, like legislation, was a source of law. Savigny did not believe that the texts rested on universal principles. He thought that there were no universal principles sufficiently definite to be of use to a jurist.[27] The texts were authoritative and had been received in Germany because the *Geist*—the mind, or spirit—of the German people had accepted them.[28] The *Volksgeist*—the unconscious mind or spirit of a people—is the source of its law.[29] It is manifested in "the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin."[30] The authority of the *gemeines Recht* did not rest on mere custom.

[24] *See* André-Jean Arnaud, *Les Juristes face à la sociétè du XIX* 2e *siècle à nos jours* (Paris, 1975), 53–60.

[25] Philippe Rémy, "Eloge de l'exégèse," *Droits Revue française de théorie juridique* 1 (1985): 115, 119.

[26] Rémy (n. 25), 121.

[27] Friedrich Carl von Savigny, vol. 1 of *System des heutigen Römischen Rechts* (Berlin, 1840–48), § 8.

[28] *See* James Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton, NJ, 1990), 125–31.

[29] Savigny (n. 27), 1: § 8.

[30] Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1840), 8.

Because the *gemeines Recht* was based on this common conviction, it possessed authority. For the same reason, it possessed unity. Savigny, Georg Friedrich Puchta, and Bernhard Windscheid described the *gemeines Recht* as a "natural whole."[31] Windscheid observed that "[t]he concept of *gemeines Recht* is related . . . to the extraordinarily important concept of the whole which is not the sum but the unity of its parts."[32]

Because it possessed unity, the *gemeines Recht* could be interpreted. The French Civil Code could not, because its provisions lacked unity. Their unity could not come from higher principles of "natural equity," as Portalis had thought.[33] There were no principles of natural law or equity that were sufficiently definite to be of use.[34]

Nor could unity come from the foresight of the legislator. Savigny argued, like Portalis, that it would be impossible for the Code to provide for "each [particular case] by a corresponding provision. . . . [T]his undertaking must fail because there are positively no limits to the actual variety of actual combinations of circumstances."[35]

In principle, Savigny said, it would be possible to draft provisions that could extend to any case that might arise. A code might then have another kind of unity—or, as Savigny put it, "a perfection of a different sort"—which one might call logical, or conceptual, unity:

> [It] may be illustrated by a technical expression of geometry. In every triangle, there are certain given features from the relations of which all the rest are deducible: thus, given two sides and the included angle, the whole triangle is given. In like manner, every part of our law has points by which the rest may be given: these may be termed leading axioms.[36]

The difficulty was that "to distinguish them, and to deduce from them the internal connection . . . is one of the most difficult problems of jurisprudence. Indeed, it is peculiarly this that gives our work a scientific character."[37] The drafters of the French Code had achieved nothing of the kind. Their Code was an amalgam of texts lacking this technical perfection.

Savigny and his followers believed that the *gemeines Recht* was a natural whole because it was an expression of the *Volksgeist*, and for that reason it had a logical or conceptual unity that allowed jurists to identify its legal axioms and to deduce their internal connections. The axioms and their connections were not rooted in human nature, as the rationalists had thought. Rather, they were rooted in the *gemeines Recht*. That was so even though, as Savigny and his followers recognized, the *gemeines Recht* was an amalgam of Roman, canon, and customary law, and even though, as the humanists had shown, the *Corpus iuris* was an amalgam of the opinions of different jurists writing at different times. Thus the school that Savigny founded has been called *Pandektenrecht*, because it regarded the Roman texts of the

[31] Savigny (n. 27), 1: § 10.
[32] Bernhard Windscheid, vol. 1 of *Lehrbuch des Pandektenrechts*, 6th ed. (Frankfurt am Main, 1887), § 1.
[33] Savigny (n. 30), 74–76. [34] Savigny (n. 30), 74–76. [35] Savigny (n. 30), 38.
[36] Savigny (n. 30), 38. [37] Savigny (n. 30), 38.

Digest or Pandects as authoritative. It has been called *Begriffsjurisprudenz* because its object was to understand the concepts underlying the Roman texts. It has been called the "historical school" because of its belief that the conceptual or logical unity to be found in the texts was the product of an historical process in which each text carried a deeper meaning than its author personally understood.

The rationalists had thought that, because the law possessed a logical unity, like mathematics, it must be based on concepts that, in their view, were as eternal and immutable as those of mathematics. Savigny used the analogy of mathematics to illustrate the conceptual or logical unity of the *gemeines Recht*. Neither Savigny nor his followers explained in a distinct way why the *Volksgeist* should produce a law with this conceptual or logical unity.[38]

Savigny believed that there is a *Menschengeist*, a mind or spirit of humanity. According to Savigny, "what operates in a particular people in only the general *Geist* of man (*Menschengeist*) which reveals itself in particular ways."[39] But the *Menschengeist* for Savigny did not play the same role as that of human nature for the rationalists. It was not a repository of coherent principles. As Okko Behrends observed, for Savigny it was "mystical," in the technical sense that its precepts, if there were any, transcend human understanding.[40]

Savigny never explained why, if the *Menschengeist* reveals itself in the *Geist* of particular peoples in particular ways, the German *Volksgeist* happened to manifest itself in a law in which the elements logically cohere and which jurists could show to be coherent. Did he mean that the *Menschengeist*, operating elsewhere, through the *Geist* of another people, might operate in a different way? Could there be a people, led by the *Menschengeist* and therefore human, that had no law? Or a people that had no coherent law? Or could there be a law that was coherent, although based on different concepts than the *gemeines Recht*? Savigny was not a philosopher seeking answers to these questions. He was instead a jurist defending the Roman texts and the jurists' role in expounding them against French ideas that he thought were unsound.

Savigny seemed to think that, because the *gemeines Recht* was a natural whole, then *ipso facto* it was a logically or conceptually coherent whole. Puchta came close to distinguishing the two. He said that the authority of legal concepts or principles does not depend exclusively on the *Volksgeist*.[41] They would have an intellectual authority even if they had not been received anywhere. He came close to the rationalist position that these concepts are invariable and timeless:

[38] Joachim Bohnert, *Über die Rechtslehre Georg Friedrich Puchtas* (Karlsruhe, 1975), 138–45. On the different explanations of Savigny and his followers, *see* Jan Schröder, *Recht als Wissenschaft Geschichte der juristischen Methodenlehre in der Neuzeit (1550–1933)* (Munich, 2012), 198–200.

[39] Savigny (n. 27), 1: § 21.

[40] Okko Behrends, "Geschichte, Politik und Jurisprudenz in F. C. v. Savigny's System des heutigen römischen Rechts," in *Römisches Recht in der europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker*, eds. Okko Behrends, Malte Diesselhorst, and Wulf Eckart Voss (Ebelsbach, 1985), 257 at 264.

[41] *See* Walter Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert: Die Herkunft der Methode Paul Labands aus der Privatrechtswissenschaft* (Frankfurt am Main, 1958), 78–79.

A law which did not originally develop among a people either has only inner scientific authority (as *raison écrite*) or also outer authority like that of indigenous law (or 'received law'). In the states in which Roman law does not have the latter authority today, it at least possesses the former, which is by no means insignificant. In most German states, however, it possesses both.[42]

Puchta was fortunate that Roman law did possess both forms of authority. If it possessed only the authority of received law, there would be another law, like that of the rationalists, which rested on reason alone and was not the law of any particular people. It is not surprising that some scholars have thought that Puchta returned to some form of natural law—although, as Hans-Peter Haferkamp has noted, that claim is hard to establish.[43]

Windscheid seems to have thought that, because the Roman law was built upon coherent principles and concepts, it had an intellectual force that explained both why it was accepted in Germany and why it could be interpreted by jurists. Like Savigny, Windscheid believed that the source of law was the *Volksgeist*. Nevertheless, he said, Roman law was received "by the custom, not of the *Volk*, but of the jurists," who were "directed by the overpowering intellectual force with which the Roman law confronted them."[44] Indeed, the Roman law had a decisive influence on all of Europe:

> . . . because its content in large part does not relate to the particularities of the Roman *Volksgeist* but is nothing else than the expression of general human relations, developed, however, with a mastery that no case law or legislation has since known how to achieve, and therefore of immediate value where civilized people live together. . . . The concepts of Roman law are always sharp and precise, and yet they are always elastic, always capable of opening to needs in life that are newly arisen and of making room for their requirements.[45]

Here, the German *Volksgeist* seems to mean a national genius for appreciating, appropriating, and developing concepts that are of significance "wherever civilized people live together." Nevertheless, for Windscheid, unlike the rationalists, these concepts were not universal:

> Roman law is not absolute law. There is no absolute law. In the area of law, as in other areas, truth is revealed only in the progressive work of the human spirit (*Menschengeist*). Nevertheless, Roman law resulted from the legal effort of that part of humanity which, among all other peoples that previously appeared in history, participated in the greatest contribution to legal culture. Roman law is not law, as little as Greek art is art, but the spiritual summit of humanity was reached by Greek art in no greater measure than by Roman law.[46]

While believing that the *gemeines Recht* possessed conceptual unity, the German jurists also recognized that it was based on Roman, canon, and customary law, and

[42] Georg Friedrich Puchta, *Lehrbuch der Pandekten* (Leipzig, 1838), § 3.

[43] Hans-Peter Haferkamp, *Georg Friedrich Puchta und die "Begriffsjurisprudenz"* (Frankfurt am Main, 2004), 444. *See* Christoph-Eric Mecke, *Begriff und System des Rechts bei Georg Friedrich Puchta* (Göttingen, 2009), 589–638; Bohnert (n. 38), 143–45.

[44] Windscheid (n. 32), 1: § 1.

[45] Windscheid (n. 32), 1: § 6.

[46] Windscheid (n. 32), 1: § 6.

that, as the humanists had shown, the Roman texts themselves had been written and understood in different ways at different times by different jurists. Puchta explained that, although elements had been taken from Roman, canon, and indigenous law, "each of these elements had to suffer modification" so that the *gemeines Recht* would form a "whole."[47] According to Heinrich Dernburg, they had been received "according to the German *Geist*, uniting ancient Roman legal ideas with German and modern ones," to form the *gemeines Recht*, which "was not established by legislation but formed in the womb of the *Volk* by custom, legal practice and science. . . ."[48] The *Volksgeist* was therefore responsible for the historical development of the *gemeines Recht* as a unified body of law that jurists could understand in terms of its underlying principles. Savigny said:

> With the progress of civilization, national tendencies become more distinct, and what would otherwise have remained common becomes appropriated to particular classes. The jurists now become an increasingly distinct class of this kind. The law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of community, now it devolves upon the jurists who thus, in this department, represent the community.[49]

In taking this scientific direction, the jurists were identifying principles that the law already contained and which were evidenced by the historical development in the way in which these texts were understood.[50]

Consequently, Windscheid described the school founded by Savigny as the heir of the humanists. It had taken a "new step in the science of Roman law"—a step that began "from the same point as in the 16th century."[51] Like the humanists, the German jurists understood the texts in their historical context. Yet they understood their historical meaning better by understanding the principles underlying the texts:

> Roman law was conceived as the result of a development that stretched over many centuries, and in this development one sought and found the explanation of the true sense of the *Corpus iuris*. Accordingly, the new school that arose [in the nineteenth century] is called the historical school. Its greatest name and acknowledged head is Friedrich Carl von Savigny. This school is principally distinguished from the historical school of the 16th century by the energy of its effort to understand legal principles (*Rechtssätze*) and powers (*Kräfte*) underlying actual relations and in this way to discover their inner life increasing attention to the sharp expression of concepts and to the demonstration of the systematic relationship between particular principles of Roman law. As to the last, the role of Georg Friedrich Puchta, the most significant of Savigny's students, is well known.[52]

Windscheid believed that, like the humanists, his contemporaries were engaged in an historical enquiry. Yet their enterprises seemed different. As Ernst Böckenförde noted, Savigny's belief that the *Volksgeist* was responsible for such an historical

[47] Puchta (n. 42), § 5.
[48] Heinrich Dernburg, vol. 1 of *Pandekten*, 5th ed. (Berlin, 1892), § 1.
[49] Savigny (n. 30), 28.
[50] *See* Wilhelm (n. 41), 22–23, 25–27.
[51] Windscheid (n. 32), 1: § 9.
[52] Windscheid (n. 32), 1: § 9.

development was not based on the study of history.[53] Rather, it was an attempt to resolve theoretical problems about why the law had authority and how it could rest on principles that were neither those of a higher law nor the prescriptions of a human legislator. He and his followers did not seek the historical meaning of texts, as the humanists did, by asking what the texts meant to their authors. They identified principles that made sense of the texts and therefore, they said, illuminated their historical meaning. As we have seen,[54] initially the humanists believed that when they recaptured the original meaning of the Roman texts, they would arrive at an art of science of law unified by common principles. Savigny and his followers thought that when they identified principles that were coherent and made the best sense of the texts, they were understanding historical meaning of the texts.

Anglo-American common law

In France, although the texts of the Civil Code remained the same, jurists changed their view of the authority of these texts. These texts were the private law of France sanctioned by the authority of the state. The German *Pandektists* interpreted the same texts as the *usus modernus pandectarum*, but now understood their authority differently. They were expressions of the German *Volksgeist* with a conceptual or logical unity that the jurist could investigate. In common law jurisdictions, the authoritative texts were the decisions of judges. But, again, the authority of these texts was now understood differently. The decided cases were understood to be authority for a restructured common law, with a structure and doctrines borrowed in large part from Continental jurists, although the writings of these jurists did not have comparable legal authority.

As mentioned earlier, English law had not traditionally been organized around general concepts such as ownership, possession, tort, or contract. English judges used cases to determine the scope of the writs recognized by the courts. Until the nineteenth century, to obtain relief, the facts of the plaintiff's case had to fit one of the existing writs, or "forms of action."

Frederic William Maitland predicted that, when the history of the common law is finally written, we will understand how the common lawyers arrived at "the great elementary conceptions, ownership, possession, contract, tort and the like."[55] Yet, as Charles Donahue has said, "[r]elatively little of the history of the forms of action seems to deal with 'the great elementary conceptions,' like ownership, possession, tort and contract."[56] In the nineteenth century, these conceptions and much else were borrowed by common lawyers from Continental authors. The common law

[53] Ernst Böckenförde, "Die Historische Rechtsschule und das Problem der Geschichtlichkeit des Rechts," *Collegium Philosophicum: Studien Joachim Ritter zum 60. Geburtstag* (Basel, 1965), 9 at 16. *See* Wilhelm (n. 41), 36–37.

[54] *See* Chapter IV, p. 116.

[55] Frederic William Maitland, "Why the History of English Law is Not Yet Written," in vol. 1 of *The Collected Papers of Fredric William Maitland* (Cambridge, 1911), 480 at 484.

[56] Charles Donahue, "Why the History of Canon Law is Not Written," Selden Society lecture, Old Hall of Lincoln's Inn, London, July 3, 1984 (London, 1986), 6.

was still said to rest on the authority of the decided cases. The decided cases were interpreted to support the borrowings.

As we have seen, the English courts were never clear about whether they were protecting ownership or possession until the Court of Queen's Bench decided *Asher v. Whitlock* in 1865.[57] They were not clear until the nineteenth century about whether the fault of the defendant mattered when the plaintiff sued for some harm that he had suffered. Before then, as Milsom and Fifoot pointed out, they failed to distinguish fault and strict liability.[58] It was not until 1865, in the now-famous case of *Raffles v. Wichelhaus*,[59] that an English court finally said, like the Roman jurists, that mistake could prevent the formation of a contract because the parties must consent to the same thing. These concepts had been basic to civil law since the time of the Roman jurists. The common lawyers were now seeking a more systematic account of their own law. These Roman concepts made sense to them.

In some areas of law, the systematization of the common law could not go as far as others. In property law, for example, it would have been hard to make sense conceptually of the common law estates in land and future interests, the rule against perpetuities, or the distinctions among easements, covenants, and equitable servitudes.

The same can be said of the law of restitution before twentieth-century scholars tried to fill the breach.[60] As John Dawson said, "any suggestion that the continuities [the courts] were creating added up to a 'law' of restitution would have been met for decades with disbelief."[61]

Tort and contract, however, were reorganized so far as possible along Continental lines. Here, the common lawyers were not borrowing Roman concepts. As we have seen, Roman law was a law of particular torts and contracts. Intead, they were borrowing from the structure that had been built by the late scholastics and passed on by iusnaturalists such as Grotius.

The late scholastics gave tort law a structure that it previously lacked. They described the distinctions among Roman actions as matters of Roman positive law, as well as the limits that the *lex Aquilia* placed on the types of harm for which one could recover. In principle, liability for harm was based on fault, which could be intentional or negligent, although Molina found room for strict liability. If harm was caused by fault, the defendant owed compensation for, as Soto said, "everything whatsoever of which a person can be unjustly deprived."[62] Grotius summarized their conclusions in words that affected the structure of all modern codes:

[57] 1 L.R. 1 Q.B.

[58] S. F. C. Milsom, *Historical Foundations of the Common Law* (London, 1981), 392–98; C. H. S. Fifoot, *History and Sources of the Common Law Tort and Contract* (London, 1949), 189, 191.

[59] 2 H. & C. 906, 159 E.R. 304 (1858).

[60] *See* pp. 261, 273–74. *See* D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), 299–302.

[61] John P. Dawson, "Restitution without Enrichment," *Boston University Law Review* 61 (1981): 563, 564.

[62] Domenicus de Soto, *De iustitia et iure libri decem* (Salamanca, 1553), lib. 4, Q. 6, a. 3.

"From . . . fault, if damage is caused, an obligation arises, namely, that the damage should be made good . . . Damage . . . is when a man has less than what is his . . . "[63]

The common lawyers borrowed this structure and used it to explain what they now called the common law of tort. They classified, as actions in tort, such traditional writs as trespass in assault and battery, trespass to land, trespass to chattels, libel, and slander. They adopted, as an organizing principle, the doctrine that a person was liable for harm caused by fault, drawing on Continental writers.[64] As on the Continent, fault meant "wrongful intent or culpable negligence."[65] "Negligence" was now recognized as a separate tort by common law judges,[66] with the approval of most of the treatise writers.[67] If negligence was actionable under this new tort, then the older forms of action—or many of them—had to be classified as "intentional torts" in which liability was based on wrongful intent. Sir Frederick Pollock, who would have been the last to acknowledge his great role in reshaping English law, claimed that, in the case of "personal wrongs," such as battery, assault, false imprisonment, slander, and libel, "generally speaking, the wrong is wilful or wanton. Either the act is intended to do harm, or, being an act evidently likely to cause harm, it is done with reckless indifference to what may befall by reason of it."[68] He concluded that "the Roman conception of delict agrees very well with the conception that appears really to underlie the English law of tort."[69]

One element of the Continental model was that, typically, liability rested on fault. Another element was that the defendant must have deprived the plaintiff of something to which he had a right. The common lawyers incorporated this second element by identifying the remedies provided by the traditional writs with different rights that the law sought to protect.

This step had already been taken by Blackstone. He distinguished actions that protected personal property (trespass to chattels and trover), those that protected real property (trespass to land), and those that protected the "personal security of individuals" against injuries to "their lives, their limbs, their bodies, their health or their reputations."[70] Injuries to personal security were redressed by actions for

[63] Hugo Grotius, *De iure belli ac pacis* (Amsterdam, 1646), II. xvii. 1–2.

[64] Ibbetson (n. 60), 164–68.

[65] Sir John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 4th ed. (London, 1916), 8.

[66] A first step was to hold that the plaintiff could not recover for bodily injuries that the defendant caused accidentally and without negligence. In the United States, this step was taken in *Brown v. Kendall*, 60 Mass. 292 (1850), in England, in *Stanley v. Powell* (1891) 1 Q.B. 86. As Prosser noted, it was then illogical not to do the same with damage to property: William L. Prosser, *Handbook of the Law of Torts* (St. Paul, MI, 1941), 77–78.

[67] For example, Francis Hilliard, vol. 1 of *The Law of Torts or Private Wrongs* (Boston, MA, 1866), 83–84, 104–05, 109; Salmond (n. 65), 9; Sir Frederick Pollock, vol. 6 of *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, 8th ed. (London, 1908), 8. Addison was an exception: C. G. Addison, vol. 2 of *Wrongs and Their Remedies: A Treatise on the Law of Torts*, ed. F. S. P. Wolferstan, 4th English ed. (Albany, NY, 1876), 691.

[68] Pollock (n. 67), 9.

[69] Pollock (n. 67), 17.

[70] William Blackstone, vol. 3 of *Commentaries on the Laws of England* (London, 1776), 119.

menace and assault in the case of threats, and, in the case of actual injury, by actions of battery for harm to life and limb, actions of malpractice and nuisance for harm to health, and actions of libel and slander for harm to reputation.

Although the treatise writers of the nineteenth and early twentieth centuries proposed different solutions, like Blackstone, they looked for a correspondence between forms of action and harms for which the plaintiff should be compensated. Francis Hilliard and C. G. Addison, who wrote two of the earliest treatises on tort law, explained that, for the plaintiff to recover, he must have suffered some "injury"[71] or "damage."[72] Pollock and Salmond, in their more systematic works, said that he must have suffered some "harm."[73] Later writers, such as Fowler Harper and William Prosser, spoke of the violation of "interests demanding protection"[74] or "legally recognized interests."[75]

A paradox of the enterprise was that the Anglo-Americans were drawing on Continental authority while, for the most part, insisting that only their decided cases had genuine authority. Not surprisingly, the traditional case law did not sit easily with Continental ideas either about fault or about rights in need of vindication.

Under the common law forms of action, the plaintiff could sometimes prevail when the defendant clearly was not at fault. He was liable for trespass to land even if, in good faith, he had thought that the land was his own. The defendant could not escape liability for battery, assault, false imprisonment, or defamation by proving that he had been innocently mistaken as to the identity of the victim, or the existence of a privilege, or whether a statement was defamatory. The treatise writers were in a difficult position. They could not scrap these rules without admitting that their conclusions were not supported by the decided cases, although Pollock at one point considered making that admission.[76] So instead they improvised.

According to Pollock, "[a] man can but seldom go by pure unwitting misadventure beyond the limits of his own dominion."[77] In all but "exceptional cases," strict liability would not result in "real hardship."[78] According to Lawrence Vold, the defendant was liable for mistakes in identity because "the risk . . . should be placed on the intentional wrongdoer rather than his innocent victim."[79] He did not explain why an actor who made a reasonable mistake should count as a wrongdoer. According to Jeremiah Smith, "an *intentional* entry standing alone and unexplained involves fault."[80] He did not ask why the law will not let such a person make an explanation. Sir John Salmond thought that the reason lay in "the evidential difficulties in which the law would find itself involved if it consented to make

[71] Hilliard (n. 67), 1: 83–84. [72] Addison (n. 67), 2.

[73] Pollock (n. 67), 6; Salmond (n. 65), 8.

[74] Fowler Vincent Harper, *A Treatise on the Law of Torts: A Preliminary Treatise on Civil Liability for Harms to Legally Protected Interests* (Indianapolis, IN, 1933), 5.

[75] Prosser (n. 66), 8–9. Similarly, *Restatement of Torts* § 1 cmt. d (1934) ("legally protected interests"); *Restatement (Second) of Torts* § 1 cmt. d (1965) (same).

[76] Pollock (n. 67), 15. [77] Pollock (n. 67), 16. [78] Pollock (n. 67), 11.

[79] Lawrence Vold, "Note," *Nebraska. Law Review* 17 (1938): 149.

[80] Jeremiah Smith, "Tort and Absolute Liability: Suggested Changes in Classification—II," *Harvard Law Review* 30 (1917): 319 (emphasis original).

any inquiry into the honesty and reasonableness of a mistaken belief which a defendant set up as an excuse for his wrongful act."[81] He did not say why the defendant was held liable even if there were no evidential difficulties.

A different approach was taken by Warren Seavy, Harper, Prosser, and the *Restatements*.[82] They said that the intent that mattered was not one to do wrong or harm. According to Seavy, it was the intention "to deal with the things or with the interests of others." He claimed that "[t]he liability of one whose words unexpectedly prove to be defamatory can be based, in most instances, on his intent to deal with another's reputation."[83] Similarly, Harper claimed that the intention that matters is "to violate a legally protected interest of the plaintiff."[84] In the case of trespass to land or chattels, the defendant need merely intend "the immediate effect of his act which constituted the interference with plaintiff's possession."[85] To be liable for defamation, "the defendant must have intended to publish the defamatory matter, i.e., he must have voluntarily published the statement which harms the plaintiff's reputation and thus invades his legally protected interests." But he need not have intended that anyone's reputation be harmed.[86] Similarly, Prosser said that the intention that matters is not a desire to do harm, but "an intent to bring about a result which will invade the interests of another in a way the law will not sanction."[87] He drew the same conclusions as Harper. So, too, did the *Restatements*.[88]

Neither were the common law writs a list of harms against which the law had decided to protect the plaintiff. Again, there was a problem of fit.

For example, the defendant was liable in battery if he had not hurt the plaintiff. A person who had been struck, but not physically harmed, could recover.[89] Some writers said that the reason was "the very great importance attached by the law to the interest in physical security,"[90] or that the interest "in bodily integrity" is one of the "most highly protected."[91] Salmond described the interest in question as "not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person."[92] Harper,

[81] Salmond (n. 65), 116.

[82] Beale had yet another explanation. He said that someone who enters land mistakenly thinking it is his own "acts on a mistake as to his own authority." The mistake cannot "give him an authority which in law or in fact he lacks": Joseph H. Beale, "Justification for Injury," *Harvard Law Review* 41 (1928): 553. He did not explain why one who enters land without authority and without believing that he has authority is liable only if the entry is negligent but one who makes such a mistake is liable without negligence.

[83] Warren Seavey, "Principles of Torts," *Harvard Law Review* 56 (1942): 72.

[84] Harper (n. 74), 41.

[85] Harper (n. 74), 55.

[86] Harper (n. 74), 504.

[87] Prosser (n. 66), 40–41.

[88] *Restatement of Torts* § 13, § 13 cmt. d, § 158, § 158 cmt. e, § 577, § 580 (1934); *Restatement (Second) of Torts* § 13, § 13 cmt. c, § 158, § 158 cmt. f (1965). In response to the constitutional challenges to no-fault liability, the *Second Restatement* changed its rules to include a requirement of fault for liability in defamation: *Restatement (Second) of Torts* §§ 580, 581.

[89] For example, Melville M. Bigelow, *Elements of the Law of Torts for the Use of Students*, 3d ed. (1886), 101 ("any forcible contact may be sufficient"); Salmond (n. 65), 382 (force may be "trivial").

[90] George L. Clark, *The Law of Torts* (Columbia, MO, 1926), 10.

[91] Seavey (n. 83), 72.

[92] Salmond (n. 65), 383.

Prosser, and the *Restatements* agreed,[93] and so they were able to redefine battery in a way that fit the cases and also corresponded to the harms that Salmond had identified: the plaintiff could recover for "unpermitted unprivileged contacts with [his] person,"[94] and for "harmful or offensive touching."[95]

A plaintiff could recover in an action of assault even if he had not been touched. According to the earlier treatise writers, the reason was the violation of a "right not to be put in fear of personal harm."[96] Yet the plaintiff could not recover always or only when he had been put in fear. As before, some, such as Seavy, said that the reason was the importance of personal security, as though that explained the matter.[97] Harper, Prosser, and the *Restatements*, however, redefined the right at stake as "the interest in freedom from apprehension of a harmful or offensive contact."[98] That interest corresponded to their more precise definition of assault: it required the "apprehension of a harmful or offensive contact," in which apprehension simply means the awareness that such a contact may imminently occur.[99] The law, then, was protecting a rarefied state of mind.

Similarly, the plaintiff's property was supposedly protected by an action for trespass to land, and his reputation by actions for libel and slander. Yet the plaintiff could recover for trespass if the defendant entered his land even if he did no physical damage. He could recover for libel and certain types of slander if the defendant "published" a defamatory statement, whether or not the plaintiff's reputation had suffered, or had suffered with anyone whose opinion mattered to him. This time, none of the treatise writers managed to describe the interest as stake so as to make it conform to the circumstances under which the plaintiff could recover. Some of them found reasons why the law would impose liability when no harm was done. Some said that the law "presumes,"[100] or "implies,"[101] damage. According to Cooley, it does so in the case of defamation because it would be "unjust" to deny recovery to a plaintiff who could not prove that he had been harmed.[102] According to Salmond, "[t]he explanation [is] that certain acts are so likely to result in harm that the law prohibits them absolutely and irrespective of the actual issue."[103] According to Seavy, the reason was that, like the interest in bodily integrity, the

[93] Prosser (n. 66), 44–45; Harper (n. 74), 38; *Restatement of Torts* ch. 2, titles of topics 1 & 2 (1934); *Restatement (Second) of Torts* ch. 2, titles, topics 1 & 2 (1965).

[94] Prosser (n. 66), 43.

[95] Harper (n. 74), 39. *See Restatement of Torts* §§ 13, 15, 18–19 (1934); *Restatement (Second) of Torts* §§ 13, 15, 18–19 (1965).

[96] Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract* (Chicago, IL, 1907), 161. *See* Francis M. Burdick, *The Law of Torts: A Concise Treatise on the Civil Liability at Common Law and Under Modern Statutes for Actionable Wrongs to Person and Property* (Albany, NY, 1913), 266.

[97] Seavey (n. 83), 72.

[98] Prosser (n. 66), 48; Harper (n. 74), 43 (same, but speaking of a "harmful or offensive touching"); *Restatement of Torts* ch. 2, title of topic 3 (1934); *Restatement (Second) of Torts* ch. 2, title of topic 3 (1965).

[99] Prosser (n. 66), 48; Harper (n. 74), 43; *Restatement of Torts* § 21 (1934); *Restatement (Second) of Torts* § 21 (1965).

[100] Hilliard (n. 67), 1: 87.

[101] Burdick (n. 96), 338.

[102] Cooley (n. 96), 30–31.

[103] Salmond (n. 65), 12.

interests in "reputation, together with those in the possession and ownership of land, are the most highly protected."[104] Some merely let the matter pass.

In a similar way, the common lawyers reclassified their actions of covenant and assumpsit as actions in contract. David Ibbetson notes that:

> As occurred with the law of torts at the same time, English lawyers began to use theoretical models to give a structure to contractual liability, and by 1800 the law of contract could be treated as an abstract entity distinct from the forms of action.[105]

Again, Ibbetson notes, the common lawyers borrowed from Continental authors.[106] As we have seen, Roman law was a law of particular torts and contracts. Again, the common lawyers borrowed this time from the structure that had been built by the late scholastics and passed on by iusnaturalists such as Grotius.

According to the late scholastics and iusnaturalists, there were two kinds of voluntary arrangements made for a *causa*, or reason, that the law would respect: contracts of exchange, and gratuitous contracts in which one party assisted another without recompense. In principle, both were binding. Still, if one party gratuitously enriched another by making a gift, the late scholastics and iusnaturalists believed that the law sensibly required a formality for the promise to be binding, which, in their ages, was notarization. They reclassified the particular contracts of Roman law as either acts of commutative justice or of liberality.

In common law, one could bring an action on almost any promise if one used a formality called "seal." Originally, a wax impression was made on a paper on which the promise was written. No formality was required to bring an action in assumpsit, and yet not every promise was enforceable. The promise, it was said, must have "consideration."

The treatise writers identified "consideration" with bargain or exchange. That gave the common law a structure that looked like the civil law. Gratuitous promises required a seal, just as gifts, in civil law, required the formality of notarization. As in civil law, exchanges did not.

Nevertheless, there were difficulties with identifying the civil law distinction between the two *causae* with the common law actions of covenant and assumpsit. One problem was that seal was an antiquated formality, unlike notarization on the Continent. Another problem was that "consideration" had never meant "bargain," or "exchange." The courts had found consideration in a variety of cases. Some were bargains or exchanges in the normal sense; some were not, for example promises of gratuitous loans and bailments.[107] The gratuitous loans and bailments were like the types of arrangement that Roman law had called loan for consumption (*mutuum*), loan for use (*commodatum*), and deposit (*depositum*). In the first two cases, the recipient of the loan was receiving a favor. He could consume or use the object, and

[104] Seavey (n. 83), 72.
[105] Ibbetson (n. 60), 215.
[106] Ibbetson (n. 60), 215, 217–21.
[107] A. W. B. Simpson, *A History of the Common Law of Contract* (Oxford, 1975), 416–52.

later return the same amount or the object itself. In the last case, the recipient was doing the favor of looking after another's object for a while without charge.[108] To refuse to enforce these contracts in assumpsit would have been odd. A person who had borrowed from another would then be liable only if he made such a promise under seal. Similarly, a promise made to a prospective son-in-law was enforceable even though it was not a bargain. English courts wanted to enforce such a promise, and so they said that the consideration was "natural love and affection."

Beginning with Blackstone, Anglo-American treatise writers identified "consideration" with the *causa* of a contract of exchange.[109] As Simpson said, they regarded consideration as a local version of the doctrine of *causa*.[110] Consequently, the common law treatise writers were faced with three alternatives. They could compromise their positivism by saying that the courts were wrong in claiming that such gratuitous arrangements had consideration. They could compromise their effort to systematize the common law by refusing to identify consideration with any specific concept such as bargain or exchange. Or they could say that there really was a bargain or exchange when a promise was made to a prospective son-in-law or by the recipient of a gratuitous loan or bailment.

The last of these alternatives might seem the least likely, but Pollock achieved it. He devised an ingenious definition of bargain or exchange that is still with us. He said that "whatever a man chooses to bargain for must be conclusively taken to be of some value to him."[111] To say that the parties had entered into a bargain or exchange therefore meant that the promisor was induced to give his promise by some change in the position of the promisee.[112] In the case of the prospective son-in-law, according to Pollock, the parent was induced to promise by a change in the promisee's position: marriage. In the case of the gratuitous loan, the borrower was induced to promise to repay the loan or to look after and return the object loaned by the lender's change in position: he parted with the object. One anomaly remained: the recipient of a deposit was not promising to look after an object because he wanted to be entrusted with something that he could not use. Yet, in the early case of *Coggs v. Bernard*, in which a carter agreed to transport a keg of brandy free of charge, the court said that "a bare being trusted with another man's goods, must be taken to be a sufficient consideration."[113] Otherwise, Pollock seemed to have succeeded. Pollock's doctrine was adopted in America by Oliver Wendell

[108] On the Roman contracts, *see* Chapter I, pp. 20–21.

[109] Blackstone (n. 70), 2: 442; John J. Powell, vol. 1 of *Essay Upon the Law of Contracts and Agreements* (London, 1790), 331; William Taylor, *A Treatise on the Differences Between the Laws of England and Scotland Relating to Contracts* (London, 1849), 16; William Wentworth Story, *A Treatise on the Law of Contracts* (Boston, MA, 1851), 431, n. 1; S. Comyn, vol. 1 of *Contracts and Agreements not under Seal* (Flatbuch, 1809), *8; James Kent, vol. 2 of *Commentaries on American Law* (Boston, MA, 1884), *630.

[110] A. W. B. Simpson, "Innovation in Nineteenth Century Contract Law," *Law Quarterly Review* 91 (1975): 247, 262.

[111] Pollock, *The Law of Torts or Private Wrongs*, 10th ed. (1936), 172.

[112] Pollock (n. 111), 164.

[113] 2 Ld. Raym. 909, 920, 92 Eng. Rep. 107, 114 (K.B. 1703).

Homes,[114] whence it passed by way of Williston[115] into the *First*[116] and *Second*[117] *Restatement of Contracts*. It is taught today as the "bargained for detriment" formula for consideration.

The formula is still used in the United States even though the cases that Pollock sought to explain are now dealt with by a new doctrine, that of promissory reliance. According to that doctrine, a promise is enforceable without either a formality or consideration if it induced the promisee to change his position in reliance that the promise would be kept. The parent is liable, supposedly, because the son-in-law married in reliance on his promise of financial assistance. The borrower's promises are binding, supposedly, because the lender relied upon them in making the loan. This is not the place to pursue the question, but one may doubt whether the doctrine of promissory reliance really resolves these cases.[118] Would a court really deny relief to a son-in-law who would have married for love, even if he had been promised nothing? The *Second Restatement* waffles by saying that the son-in-law will be assumed without proof to have relied.[119] Suppose that when Antonio, the merchant of Venice, loaned Bassanio money to woo the fair Portia, he was convinced he would never be paid back and made the loan only because he preferred to lose the money than to risk Bassanio's friendship. Should Antonio not be entitled to recover if Bassanio refuses to repay him, although, having won the fair Portia, Bassanio can afford to do so?

Conceptualism

The project of the nineteenth-century jurists was to find the law in authoritative texts and to understand the texts, so far as possible, by a set of concepts that were thought to underlie them. It combined positivism and conceptualism.

As noted earlier, both elements went together. They did not believe that, as jurists, their task was to understand the law through means of higher principles rooted in human nature. Rather, it was to find the law in texts invested with legal authority. If a jurist's conclusions were to have the same legal authority, they must

[114] The language just quoted is from later editions of his treatise on contracts, but the core of his theory of consideration was presented in the first edition, published in 1876, which he had sent in manuscript form to his friend Oliver Wendell Holmes. Holmes wrote back that the account of consideration "was the best which I had seen": Letter from Pollock to Holmes, December 16, 1875, in vol. 1 of *Holmes–Pollock Letters*, ed. M. Howe, 2nd ed. (Cambridge, MA, 1961), 276; Letter from Holmes to Pollock, June 17, 1880, in *Holmes–Pollock Letters*, 1: 14, 15. Holmes then published his own theory of consideration, which was similar: Oliver Wendell Holmes, *The Common Law* (Boston, MA, 1881), 293–94.

[115] Samuel Williston, "Consideration in Bilateral Contracts," *Harvard Law Review* 27 (1914): 503, 516–18.

[116] *Restatement of Contracts* § 75 (1932).

[117] *Restatement (Second) of Contracts* § 71(1) (1979).

[118] *See* James Gordley, "Enforcing Promises," *University of California Law Review* 83 (1995): 547, 574–78, 584–89.

[119] *Restatement (Second) of Contracts* § 90(2) (1979).

follow logically from these texts. Therefore there must be concepts underlying these texts from which conclusions can be deduced.

The nineteenth-century jurists rejected rationalism. Yet Karl Wieacker observed a parallel between rationalism and the conceptualism of nineteenth-century German *Pandektists*:

> [They] borrowed the method of forming a system and concepts and logically deducing legal decisions from the system and concepts from their predecessor Christian Wolff. . . . The subsequent development of [their] legal science shows that it never surrendered in principle the formalism of natural law, descending *more geometrico* from axioms to general concepts and from these to particular concepts and particular principles.[120]

There was a similar parallel between the method of the rationalists and that of nineteenth-century French and Anglo-American jurists, although they did not write with the logical rigor of the Germans. As noted earlier,[121] in Germany, a chasm had emerged between two approaches to law: that of the *usus modernus*, which was based on texts unsupported by principles, and that of the rationalists, which was based on principles unsupported by texts. The *Pandektists* tried to combine close attention to texts with the logical rigor of rationalism. In France, the humanist tradition was too strong. As Rémy observed, the French jurists wrote "often more oratorically, always more rhetorically," than a jurist would today.[122] They were more relaxed about principles and texts both before and after the Code was enacted. In England and America, the attempt to systematize law according to principle was too new. The holdings of the decided cases continually got in the way of attempts to explain them logically. Yet the French jurists and the common lawyers, like the Germans, based their conclusions on concepts supposedly extracted from their authoritative texts, in the same way as the rationalists based theirs on concepts that were supposedly immutable. Contemporary French and Anglo-American jurists, like the Germans, look back on the nineteenth century as an age of conceptualism.

At first sight, the parallel seems surprising. The starting points of the rationalists were at the other extreme from those of the nineteenth-century jurists. The rationalists believed that there is a higher law based on principles rooted in human nature. Leibniz and Wolff, following Suárez, thought that these principles are immutable. Correctly understood, they already prescribed the correct course of conduct under all possible circumstances. These ideas were based on philosophical principles that the rationalists understood and defended. As we saw, their idea of immutable principles depended on a metaphysical innovation: their idea of what it means for a thing to exist. Their idea that conclusions must follow with deductive certainty was based on an innovation in method or epistemology: their idea of how truth is known.

[120] Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (Göttingen, 1967), 373–74; Mecke (n. 43), 594. Bohnert noted that, despite all of the debate over the work of Savigny and his followers, one point of agreement has been its resemblance to that of the rationalists: Bohnert (n. 38), 125.

[121] See Chapter VII, p. 164. [122] Rémy (n. 25), 119.

The nineteenth-century positivists thought that there were no principles of natural law—or at least none that jurists need to consider. The law is found in texts with legal authority. They were not philosophers, and avoided the metaphysical and epistemological questions. Yet we have seen the resemblance in their work. A jurist's conclusions were to follow from authoritative texts rather than immutable principles, yet they must follow deductively or they would not have the same authority as the texts. Therefore it must be possible to demonstrate the correct application of higher principles under any circumstances that might arise. The nineteenth-century jurists seem unaware of the metaphysical and epistemological ideas that had led to a similar approach among the rationalists. They took a similar path not because they adhered to such ideas, but because they seemed to see no alternative.

Another innovation of the rationalists, as we have seen, was to disjoin legal concepts from higher principles that could give them content. The rationalists did so even though they thought that such concepts were to follow logically from the higher principles. The gap arose because, once the rationalists had defined the higher principles in terms of altruism, they were unable to get from those principles to concepts of private right. So they defined these concepts negatively in terms of their contrast to altruism.

In private law, for Leibniz and Wolff, the higher principle was that everyone should act for the happiness and perfection of others.[123] Private rights, such as tort, property, and contract, were defined negatively in terms of their contrast to altruism and in abstraction from any purpose that they served. Only a right holder is protected, and protected only in any use that he chooses to make of a right.

In international law, according to Wolff, "[e]ach nation ought to love and care for every other nation as itself."[124] Then Wolff uncoupled altruistic duty from strict or perfect right: "If one nation does not wish to do for another that which it is naturally obligated to do, that is wrongful but does not do the other an injury." The right of that nation is "imperfect."[125] Consequently, "no nation can coerce another to do for it those things that nations are naturally obligated to do for each other."[126]

Here, again, there was a parallel with the work of the nineteenth-century jurists. As we will see, the concepts that the French, the German, and the Anglo-American jurists used to interpret their law were not only much like each other, but also much like those of the rationalists. They were much like each other even though the French claimed that their law was based on legislation, the Germans, on the *gemeines Recht*, as received through the *Volksgeist*, and the Anglo-Americans, on their cases. Yet, like the rationalists, in private law, they defined property, tort, and contract in terms of rights that the right holder could use as he chose and in abstraction from the purposes served by recognizing these rights. In international law, they said that each state had the right to do as it chose, provided that it did no

[123] *See* Chapter VIII, pp. 183–84.
[124] Christian Wolff, *Ius gentium methodo scientifica pertractatum* (Frankfurt, 1764), § 161.
[125] Wolff (n. 124), § 159. [126] Wolff (n. 124), § 158.

wrong. "Wrong" was defined without regard to the purposes for which states are established and the reasons why they should have the rights that they do.

One reason why the rationalists came under fire was that they did not show how to get from concepts thus defined to concrete rules. The nineteenth-century jurists put considerable effort into doing so. Yet they encountered a series of problems that they took seriously, but were unable to resolve. Their failure to do so made them targets for critics in the twentieth century. Indeed, it became the project of twentieth-century jurists to expose this failure, and to find an alternative to positivism and conceptualism.

In the remainder of this chapter, we will see how the nineteenth-century jurists faced these problems. We will see that twentieth-century jurists were better at pointing to their predecessors' failures than finding alternative solutions. In the next chapter, we will examine the efforts of the twentieth-century jurists to find an alternative to positivism and conceptualism.

We will look first at some problems of international law, and then of private law.

International law

Positivism in itself created problems for the understanding of international law. If the law did not rest on higher principles, but on the legal authority of the state, what law could bind the state? How could the state bind itself, or be bound by another state's law?

Conceptualism added to the difficulty. The nineteenth-century jurists defined the rights of the state negatively, in terms of the right of the state to do as it chose, in abstraction from the purposes for which states were founded and on account of which they should have rights. The rationalists could not get to a more positive concept because there was a gap between their higher principle of altruism and one that could give content to the rights of states. The nineteenth-century jurists could not do so from any higher principle at all. There was no principle to obligate the state to act otherwise than it chose, and no reason why it should choose to apply another state's law.

International public law

One might conclude that, on such premises, there could not be an international law binding upon national states. Indeed, John Austin said that the "law of nations" is "law improperly so called." It consists only of "the opinions current among nations":[127]

> Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.[128]

[127] John Austin, *The Province of Jurisprudence Determined* (London, 1832), 146–47.
[128] Austin (n. 127), 136–37.

Many scholars agreed with Austin, although some reached his conclusions by a different route.[129] Those who genuinely believed that international law did not exist did not write treatises about it. Beginning in the early nineteenth century, those who did write treatises generally dealt with the problem in one of three ways.

Some bypassed the question of the theoretical foundations of international public law. The leading American jurist, Henry Wheaton, when considering whether international law rests on "principles of natural justice," answered:

> It may, indeed, have a remote foundation of this sort; but the immediate visible basis on which the public law of Europe, and of the American nations which have sprung from European stock, has been erected, are the customs, usages, and conventions observed by that portion of the human race in their mutual intercourse.[130]

The same approach has been taken by some treatise writers ever since.

Other jurists said that international law rests on the consent of the sovereign, which is manifested in a treaty or custom. The sovereign does bind itself—or at least agrees to do so. According to August Wilhelm Heffter, author of a leading German treatise, "[t]he truth is . . . that States do not admit any laws to be obligatory among them but those that result from reciprocal consent."[131] Today, some treatise writers also take that approach.[132]

A third approach was to claim that international law must be based on transcendent moral principles, yet without attempting to identify and apply these principles. The principles are posited simply so that international law can exist. This approach resembles that of certain nineteenth-century French jurists mentioned earlier, who, after declaring that there is a natural law, treated the Civil Code as comprehending all of the private law of France.[133] Thus, Robert Phillimere said in his leading English treatise on international law, there was "a moral sanction conferred on [it] by the fundamental principle of Right,"[134] by "natural law,"[135] which was part of God's law.[136] Similarly, according to Paul Pradier-Fodéré, author of a leading French treatise, one must grant "the necessary principle of a moral order superior to the human will which binds individuals, and makes nonobservation of a received custom or treaty a violation of law." To deny that principle would

[129] Austin's route was to define law as a command "distinguished from other significations of desire . . . by the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded": Austin (n. 127), 6. One can believe that international law is not law without subscribing to this definition. Moreover, only if one subscribes to this definition need one deny that international law is law. The iusnaturalists and Vattel recognized, and often bemoaned, the fact that international law could not be enforced.

[130] Henry Wheaton, *Elements of International Law*, 3rd ed. (Philadelphia, PA, 1846), 40–41. At one point he did say that one source of international law is "the rules of conduct which ought to be observed between nations and deduced from reason": Wheaton, *Elements*, 47.

[131] August Wilhelm Heffter and F. Heinrich Geffcken, *Das Europäisches Volkerrecht der Gegenwart auf den bisherigen Grundlagen*, 8th ed. (Berlin, 1888), § 3. Similarly, *see* George Grafton Wilson, *Handbook of International Law*, 2nd ed. (St. Paul, MN, 1927), §§ 2, 5.

[132] For example, Karl Doehring, *Völkerrecht Ein Lehrbuch* (Heidelberg, 1999), § 2; Louis Henkin, *International Law: Politics and Values* (Dordrecht, 1995), 27–28.

[133] *See* pp. 197–99.

[134] Robert Phillimore, vol. 1 of *Commentaries upon International Law* (London, 1859), § 62.

[135] Phillimore (n. 134), § 22.

[136] Phillimore (n. 134), §§ 33, 42.

"transform law into a simple science of material observation."[137] As before, a similar position is taken by some contemporary treatise writers.[138]

The jurists who took these positions wrote the same sort of books. After a short introduction on the foundation of international law, they discussed the same problems, looking for solutions to treaties, customs, and the opinions of other jurists—mostly their contemporaries. Even those who said that there were higher moral principles did not describe these principles systematically and use them to solve these problems.

For that reason, James Lorimer, a Scottish jurist, attacked them and almost everyone else who had written about international law since Vattel. According to Lorimer, Wolff and Vattel, despite their distinction between imperfect and perfect rights,[139] had preserved the great work of Suárez, Grotius, Pufendorf, and Barbeyrac,[140] which had been founded on that of "the scholastics":

> The value of what was indirectly effected by Thomas Aquinas, who, as in ethics and theology, stands out in solitary majesty, and by Soto, whom we may regard as the immediate founder of the dynasty of jurists which culminated in Grotius, when contrasted with the labours of the civilians—from Bartolus and Baldus down even to Bijnkershoek—consisted in this: that . . . the scholastic jurists remounted to nature, and sought to discover laws of which the validity was universal.[141]

"The conception of a law that had no deeper roots than 'sovereignty'" came later, said Lorimer, citing Austin:[142]

> From Vattel's time . . . till our own . . . the effort has been made to determine the consuetude, which is accepted as the common law, without reference to any absolute or necessary standard, and positive law is criticized or amended only in accordance with prevailing sentiments, or with such experience of its results as recent events are supposed to afford.[143]

Lorimer defined "the law of nations" as "the law of nature, realized in the relations of separate political communities."[144] He tried to develop and apply the principles of that law, while avoiding the "real fault of the elder jurists [which] was that they were not careful enough in circumstances of the State life in which they sought to realize the necessary law. . . ."[145] To do so was his project. It was not that of his contemporaries.

International private law

International private law, or conflict of laws, deals with the question of which law a court should apply when the laws of different jurisdictions differ. The nineteenth-

[137] Paul Pradier-Fodéré, vol. 1 of *Droit international publique Européen et Américain* (Paris, 1885), 21.
[138] For example, Charles Rousseau, *Droit international public*, 11th ed. (Paris, 1987), no. 13.
[139] James Lorimer, vol. 1 of *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh, 1883), 77–78.
[140] Lorimer (n. 139), 68–77. [141] Lorimer (n. 139), 68.
[142] Lorimer (n. 139), 75–76, 76, n. 1. [143] Lorimer (n. 139), 81.
[144] Lorimer (n. 139), 19. [145] Lorimer (n. 139), 80.

century pioneers were Joseph Story, who has been called "the father of American and English conflicts of law,"[146] and Friedrich Carl von Savigny, who has been credited with a "Copernican revolution."[147] They both tried to resolve the problem by reference to the same principle: the principle of territorial sovereignty.[148] "It is plain," Story said, "that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country":[149]

> For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield. . . .[150]

According to Savigny: "1. Every state can require that only its own law (*Gesetz*) is valid within its boundaries. 2. No state can require that its own law be accepted as valid beyond its boundaries."[151]

Nevertheless, both thought that, in choosing which law to apply, a court should consider such factors as where the suit was bought, where a person had lived or acquired a certain status, where a tort or crime was committed or harm done, where a contract was made or to be performed, and where property was located. As we have seen, these were much like the factors that the medieval jurists had identified. They had been repeated by later jurists. Story and Savigny knew of them through the seventeenth-century works of the Dutch jurists Ulrich Huber and Paul Voet.[152]

Neither Huber nor Voet, nor the medieval jurists, had tried to solve the problem by an appeal to the principle of territorial sovereignty. Some scholars believe that Huber did so.[153] He said that "the laws of each state have force within that state and bind all those who are subject to it but not others."[154] Yet, although different states might adopt differing particular laws, they might recognize the authority of bodies of law that extend beyond their boundaries and are the same in other states. "It often happens," he said, "that a transaction that occurs in one place is of

[146] *See* Albert A. Ehrenzweig, *Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty General Part* (Leyden, 1967), 53.

[147] *See* Friedrich K. Juenger, *Choice of Law and Multistate Justice* (Dordrecht, 1992), 37–38.

[148] Joseph H. Beale, vol. 3 of *A Treatise on the Conflict of Laws* (New York, 1936), § 72.

[149] Joseph Story, *Commentaries on the Conflict of Law, Foreign and Domestic* (Boston, MA, 1841), § 7.

[150] Story (n. 149), § 8. [151] Savigny (n. 27), 8: § 348.

[152] Harrison said of Huber's short essay "that in the whole history of law there are probably no five [quarto] pages that have been so often quoted, and possibly so much read": Frederick Harrison, *On Jurisprudence and the Conflict of Laws* (Oxford, 1919). According to Lorenzen, "they had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work": Ernest G. Lorenzen, "Huber's De Conflictu Legum," in *Celebration Essays to Mark the Twenty-fifth Year of Service of John H. Wigmore* (Buffalo, NY, 1987), 199 at 199.

[153] Donald Earl Childress III, "Comity as Conflict: Resituating International Comity as Conflict of Laws," *University of California at Davis Law Review* 44 (2010): 11, 20 (he "established conflict of laws as a discipline concerned with sovereign interests"); Alfred Hill, "Governmental Interest and the Conflict of Laws: A Reply to Professor Currie," *University of Chicago Law Review* 27 (1960): 463, 482 (he "stat[ed] unmistakably that the basic objective of the law of conflict of laws is to advance the governmental interests of the forum").

[154] Ulrich Huber, "De conflictu legum in diversis imperiis," Appendix III in Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws*, trans. W. Guthrie (Edinburgh, 1880), § 2.

different use and effect in others," because "after the dispersion of the Roman imperial provinces, the Christian world was divided into entirely different peoples, who are not subject to each other. . . . " Absent such a difference, one could apply the Roman *ius civile*. One could apply the *ius gentium* or law of nations. Indeed, one of Huber's first questions is which of these two bodies of transnational law should determine what to do when different local rules have emerged. The "fundamental rules," he said, "seem to have been sought in Roman law, but . . . they have more to do with the *ius gentium* than with civil *ius civile*."[155] Similarly, Voet discussed what to do when "statutes" conflict. A "statute" belongs to the *ius particulare* or *ius municipale*—to particular or local law—as distinguished from the *ius commune* or common law:

> The particular law is enacted by another legislator than the Emperor. I say particular law as opposed to the common law (*ius commune*), not insofar as [common law] is natural or international law, but insofar as it is the civil law of the Romans. . . .[156]

As we have seen, the medieval jurists thought that the Roman law was an *ius commune* in force everywhere absent local statutes or custom. Indeed, although they developed the rules that passed into "international private law," they did so without believing that there were any nations that possessed sovereignty. Principalities and states might vary the *ius commune* with the express or tacit permission of the emperor. But, as we have seen, in their eyes, the emperor was sovereign of the world.

As a result, Story and Savigny were using rules about conflict of laws that were devised to resolve quite a different problem. The rules had been fashioned to deal with local differences from a common legal system, not to decide which legal system to apply to a transaction. The problem of deciding what law to apply when a statute of Modena differed from one of Parma was simple by comparison. One would look to the law of Modena if it had a special rule about acquiring citizenship, or driving carts within the city, or the witnesses needed for a contract of sale, or the height to which a person could build—an example used by Iacobus, Cinus, and Bartolus.[157] Such variations aside, a court would apply the general law of persons, torts, contracts, or property of the *ius commune*. Story and Savigny were using rules like these to decide which general body of the law of persons, torts, contract, or property to apply. The result has been that, since the time of Story and Savigny, many applications of the rules of conflict of laws have seemed arbitrary. That is not

[155] Huber (n. 154), § 1.

[156] Paul Voet, *De statutis eorum concursu* (Leyden, 1700), § 1, c. 4, §§ 1–2. Story quoted these words to show that civilian writers used the word "statutes" to "mean, not . . . positive legislation [but] in contradistinction to the imperial Roman law, which they are accustomed to style, by way of eminence, the COMMON LAW, since it constitutes the general basis of the jurisprudence of all of continental Europe, modified and restrained by local customs and usages, and positive legislation": Story (n. 149), § 12.

[157] Iacobus de Arena Parmensis, *Super iure civile* (Lyon, 1541), to C. 8.53.1; Cinus de Pistoia, *Super codice cum additionibus* (Frankfort-am-Main, 1493), to C. 8.53.1; Bartolus de Saxoferrato, *Commentaria Corpus iuris civilis* (Venice, 1615), to C. 1.1 no. 26. *See* Chapter II, pp. 44–45.

surprising since rules devised to resolve one problem were now applied to a different one.

Another problem that has troubled scholars is that it hard to see how to get from Story and Savigny's principle of territorial sovereignty to the list of factors that they believed should determine which law to apply. In view of that principle, why should one country apply the laws of another in preference to its own? As Story acknowledged, "[e]very nation must be the final judge for itself" of when it should do so.[158] Savigny said that "the strict right of sovereignty might certainly go so far as to require all judges of the land to decide the cases that come before them solely according to the national law, regardless of the rules of some foreign law. . . ."[159]

Here, again, we see the gap between a basic concept defined negatively and in abstraction from purpose—the right of the state to do as it chooses—and any way in which to establish the content of that right. According to Story and Savigny, the concept of territorial sovereignty does not, of itself, lead to the rules that govern conflict of laws. They must be based on some other consideration.

For Story, the consideration that explained why one state would apply another's law was "comity":[160]

> Whatever extra-territorial force [laws] are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them, giving them effect . . . with a wise and liberal regard to common convenience and mutual benefits and necessity.[161]

For Savigny, the consideration was that "[t]he more multifarious and active the rule between different nations, the more will men be persuaded that it is not expedient to adhere to such a stringent rule. . . ." Consequently, nations have adopted the "opposite principle" of "equality in judging between natives and foreigners":

> [I]t is a consequence of this equality, in its full development, not only that in each particular state the foreigner is not at a disadvantage to the native . . . but also that, in cases of conflict of laws, legal relations are decided in the same way, whether the judgment is pronounced in this state or that.[162]

Thus the rules of international private law did not follow from the concept of sovereignty. They limited the implications of that concept on account of comity or expediency.

If Story and Savigny were right, then comity and expediency had led states not only to rules to govern conflict of laws, but also to the same rules—to rules the application of which often seemed arbitrary to the nineteenth-century jurists themselves, and which, we can see in retrospect, were designed for quite a different problem.

But the very fact that these rules did not follow from the concept of territorial sovereignty was troubling in an age of conceptualism. In the twentieth century, the American jurist Joseph Beale tried to show how such rules could be derived from

[158] Story (n. 149), § 33.
[159] Savigny (n. 27), 8: § 348.
[160] Story (n. 149), § 33.
[161] Story (n. 149), § 7.
[162] Savigny (n. 27), 8: § 348.

that concept, even though, in his day, a conceptualist approach to law was under attack. Drawing on A. V. Dicey,[163] Beale claimed that, because law is the creation of a sovereign state, it can never operate outside the territory of the state that created it. Therefore, when a state makes use of another state's law, it is not applying foreign law. Rather, it is enforcing a right that had vested in the plaintiff in a foreign territory according to foreign law: "The primary purpose of law being the creation of rights . . . the chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created it. . . . "[164] In the case of a tort, for example, that right arose in the state where the last event occurred necessary to give rise to the right. When the plaintiff sues successfully in another state, he is merely enforcing a right that already exists. Beale wrote this approach into the *Restatement of Conflict of Laws* of 1934, for which he served as Reporter. It was adopted by Oliver Wendell Holmes[165]—although he was one of the first critics of conceptualism.

Beale was attacked, notably, by Brainerd Currie, who started a revolt that has also been called a "Copernican revolution" in the conflict of laws.[166] Currie claimed to oppose Beale's conceptualist approach. Like Story and Savigny, he believed that the decision of one state to apply the law of another must rest on expediency—or, as he put it, on policy. Paradoxically, his analysis was based on the same principle as that of Story, Savigny, and Beale: the principle of territorial sovereignty. The power of Currie's attack was that he turned this principle against them. A state had the right to decide what law to apply within its own territory. Therefore it had the right to make its own judgment concerning expediency. Beale, like Story and Savigny, had assumed that their rules for resolving conflicts of laws subordinated every other policy of the state to whatever unclear policy underlay these rules. Their approach:

> . . . attributes to the choice-of-law rule a policy content of far greater importance than is normally attributed to the municipal law of the forum. This is a strange inversion of values. A choice-of-law rule is an empty and bloodless thing. Actually, instead of declaring an overriding public policy, it proclaims the state's indifference to the result of the litigation [although] the law of the state points to the *result* which alone can advance the social and economic policy embodied in that law.[167]

Before applying foreign law, Currie said, the state should consider the interest or policy on which that law was based and whether it conflicted with an interest or policy underlying its own law. The alternative would be to base international private law not on considerations of expediency, but, as Beale did, on what Currie called "metaphysical" conclusions about where a cause of action really arose.

[163] A. V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, 5th ed. (London, 1932), 17–25.

[164] Beale (n. 148), 1: § 8A.8; 3: § 73.

[165] *Cuba R. R. v. Crosby*, 222 U.S. 473, 478 (1912) ("when an action is brought upon a cause arising outside of the jurisdiction . . . the duty of a court administering justice is not to administer its notion of justice but to enforce an obligation that has been created by a different law . . . "). *See* Brainerd Currie, "On the Displacement of the Law of the Forum," in *Selected Essays on the Conflict of Laws by Brainerd Currie* (Durham, NC, 1963), 3 at 4–5; Ehrenzweig (n. 146), 55.

[166] *See* Juenger (n. 147), 146.

[167] Currie (n. 165), 52 (emphasis original).

The problem was, as Currie's critics pointed out, that it is hard to see what could be meant by the "interest" or "policy" of a state.[168] The state can enact whatever laws it deems to be expedient. It would seem, then, that there is a state "interest" or "policy" behind every law it enacts. But then, as David Cavers pointed out, the word "interest" merely expresses "the conclusion that the purposes of a statute or common law rule would be advanced by its application. . . . Since the rule emanates from the state, . . . the rule's purposes may reasonably be ascribed to the state."[169] If, however, the word "interest" is understood narrowly as that of the government, as distinct from that of a private party, the state often does not have an interest of its own in a law that it makes. As Albert Ehrenzweig noted, "'governments' are . . . 'interested' in the solution of conflicts problems in such exceptional cases as tax or currency matters."[170] Once again, it had proven impossible to bridge the gap between the concept that, by definition, the state can do as it chooses, and any way of giving content to this concept by explaining or limiting what the state should choose to do.

As Mathias Reimann has pointed out, for various reasons Currie's approach has had little impact in Europe. One reason is a belief that the state cannot act as it chooses. There are limits to the extent to which it can prefer its own interests over those of others. In the absence of any way in which to analyze these limits, European scholars have preferred the traditional rules because they, at least, seem to be neutral.[171]

Private law

According to the nineteenth-century jurists, the law was to be found by the exegesis of authoritative texts, not by examining higher principles on which these texts were based. As we have seen, for the French, the texts were those contained in legislation such as the Civil Code; for the Germans, they were found in *Corpus iuris*; in Anglo-American jurisdictions, in the decisions of common law courts. Despite the disparity in these sources, the French, the Germans, and Anglo-Americans arrived as the same basic concepts, supposedly based on their texts. Property was an unlimited right of the owner to use a thing as he chose. Any restraints on its exercise were limitations imposed by the law on a right that was, in principle or by definition, unlimited. A person was liable in tort if, by fault, he harmed another person. Contract was defined in terms of the will or consent of the parties. The parties' contractual obligations were those that they had willed to assume.

[168] Friedrich K. Juenger, "Conflict of Laws: A Critique of Interest Analysis," in *Selected Essays on the Conflict of Laws* (Ardsley, NY, 2001), 131 at 163–65.
[169] David F. Cavers, *The Choice of Law Process* (Ann Arbor, MI, 1965), 100.
[170] Ehrenzweig (n. 146), 63.
[171] Mathias Reimann, *Conflict of Laws in Western Europe: A Guide through the Jungle* (Irving, NY, 1995), 105, 109.

Having defined property, tort, and contract in the same way as the rationalists, the nineteenth-century jurists faced similar problems. There was a disjunction between the definitions of property, tort, and contract and any way in which to determine the limits or the content to the concepts so defined. One could not explain these rules in terms of the purposes of property, tort, and contract because these concepts had been defined without reference to any purpose that they served.

If property is defined as the exclusive and unlimited right of the owner to use what he owns as he chooses, it is hard to move from that definition to rules that protect a nonowner's use of a thing that belongs to another or limit the owner's use of it. If tort is defined by saying that a person owes a duty to compensate those whose rights he violates through his own fault, then there is a gap between this definition, and rules, and an account of why fault triggers a duty to compensate and what constitutes the violation of a right. If a contract is the will or consent of the parties, then there is no clear way in which to get from this definition to rules that sometimes bind the parties to obligations that they did not will or which bind them despite their wants, hopes, and expectations.

As we have seen, these problems arose for the rationalists. They dealt with them briefly. The nineteenth-century jurists, however, considered them closely. They wished to show that their concept explained the rules found in their authoritative texts.

The obstacles that they encountered drew the fire of twentieth-century jurists. One can better understand the efforts of the nineteenth-century jurists by considering the twentieth-century jurists' criticism. The twentieth-century critics, as we will see, did a good job of pointing out the nineteenth-century jurists' failures to resolve them, but never arrived at generally accepted solutions to these same problems. In the rest of this chapter, we will finish considering the project of the nineteenth-century jurists and also begin to consider that the twentieth century. The twentieth-century jurists sought an alternative to nineteenth-century conceptualism. In this chapter, we will discuss their difficulties finding generally accepted ways in which to resolve the problems that the nineteenth-century jurists faced. In the next, we will consider why they could not do so.

A word of caution, however: to say that jurists have not arrived at a generally accepted solution to these problems is not to disparage their work or to deny that some of their ideas, if followed up by others, might have led to generally accepted solutions. I particularly admire the work of Peter Birks, Melvin Eisenberg, Jacques Ghestin, and Hein Kötz. Nevertheless, jurists in the twentieth and early twenty-first centuries are still facing the same problems.

Property

The nineteenth-century conceptualists defined property in terms of the will of the owner. It is, in principle, the absolute and exclusive right of an owner to do as he chooses with what he owns.

In France, Aubry and Rau said that:

> [P]roperty . . . expresses the Idea [*sic*] of the most complete legal power of a person over an object and can be defined as the right by virtue of which a thing is submitted in an absolute and exclusive manner to the will and the conduct of a person.[172]

Laurent explained that a proprietor could use his thing however he wished until prohibited by law or until he injured the rights of others.[173] According to Demolombe, as "an absolute right property confers upon the master a sovereign power, a complete despotism over the thing."[174]

They claimed to have taken this concept of property from article 544 of the Civil Code.[175] It states: "Property is the right to enjoy and to dispose of things in the most absolute manner provided that one does not make a use of them that is prohibited by laws (*lois*) or regulations (*règlements*)."

This provision paraphrased a passage in Pothier: property is "the right to dispose of a thing at [the owner's] pleasure, provided he does not violate the laws or the right of another: *ius de re libere disponendi* or *ius utendi et abutendi*."[176] The meaning seems to be that an owner can use his right of property as he chooses, but that does not imply that the right is unlimited. Pothier was describing the rights of the holder of a French feudal estate, which were limited and not only by natural law: he was entitled to use and alienate the land freely, but he was liable for feudal rents and duties. Pothier did not have a principle of unlimited property rights in mind. There is no reason to think that Portalis did.[177]

The drafters of the Code do not tell us much about their theories of property. One has the sense that they wished to leave theoretical issues aside as much as possible.[178] So far as one can tell, however, they subscribed to the ideas of the iusnaturalists, and of Domat and Pothier. Portalis and Cambacérès explained the origins of property in the same way as did Grotius. The common ownership of all things gave way to a system in which property was acquired by taking possession

[172] Aubry and Rau (n. 9), 2: § 190.

[173] Laurent (n. 6), 6: § 101.

[174] Demolombe (n. 5), 9: § 543.

[175] A belief that is held by some legal historians: André-Jean Arnaud, *Les Origines doctrinales du Code civil français* (Paris, 1969), 180; Jean-Louis Halpérin, *L'Impossible Code civil* (Paris, 1992), 278; Adolphe Lydie, *Portalis et son temps "Le Bon génie de Napoléon"* (Paris, 1936), 275.

[176] Robert Pothier, "Traité du droit de domaine de propriété," § 4, in vol. 9 of *Oeuvres de Pothier*, ed. Bugnet (Paris, 1861). For similar passages, *see* Pothier, "Traité du droit de domaine de propriété," § 14; Pothier, "Introduction générale aux coutumes," § 100, in vol. 1 of *Oeuvres de Pothier*, ed. Bugnet (Paris, 1861).

[177] *See* Alfons Bürge, *Das französische Privatrecht im 19. Jahrhundert zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus* (Frankfurt-am-Main, 1991), 2–8. Villey and Arnaud found no evidence that earlier jurists who used language like that in article 544 had in mind a modern, individualistic conception of the proprietor's rights: M. Michel Villey, *La Formation de la pensée juridique moderne* (Paris, 1968), 239; Arnaud (n. 175), 180–83.

[178] Cambacérès explained, when presenting his first and third drafts, that it was not his task to decide theoretical controversies about the origin of property: Rapport fait à la convention nationale par Cambacérès sur le 1er projet de Code civil, séance du 9 août 1793, in vol. 1 of *Recueil complet des travaux préparatoires du Code civil*, ed. P. A. Fenet (Paris, 1827; reprinted 1968), 7; Discours préliminaire prononcé par Cambacérès, au Conseil des cinq cents, lors de la présentation du 3e. Projet de Code civil, messidor, an IV, in Fenet, *Recueil*, 1: 161.

of it.[179] The Tribunal of Lyon attacked the provision that became article 544 for failing to say that property rights were unlimited. According to the Tribunal, property rights should be based on the principles of "laisser faire" and "laisser passer." It is difficult to find all of these rights clearly enough expressed in the words "to enjoy and dispose of one's thing. . . ."[180] The court would have been more alarmed had it heard the Tribune Gillet defending the article before the *Corps Législatif*: "There is no property so absolute that it is not subordinated in some way to the interests of the property of another."[181]

The principle that property rights are unlimited is missing not only in the drafting history of the Code, but also in the early commentaries. Toullier and Duranton gave a traditional natural law account of property. It was once held in common, but private rights were established, according to Toullier, because otherwise no one would labor[182] and, according to Duranton, because of long, continued possession, which created a "moral relationship" between possessor and thing possessed.[183] Both cited jurists in the natural law tradition.

In Germany, jurists defined property rights in the same way as did their French contemporaries. According to Windscheid, property is the power to dispose of what belongs to a person according to his "will";[184] according to Puchta, it is "the exclusive authority to use and dispose of a thing,"[185] "the full legal subordination of a thing,"[186] and its "total legal subjection";[187] according to Friedrich Keller, the perfect and complete right over a thing.[188] Dernburg explained that "[t]he right to property grants, according to its definition, every power over a thing which is possible according to nature and law."[189] Arndts explained that "[p]roperty, according to its basic concept, is the right of a subject to complete domination over a physical thing."[190]

This concept of property was said to rest on the Roman texts. We have seen enough of the Roman texts concerning ownership to realize how differently the Roman jurists described property. The introductions to the *Digest* and the *Institutes* described a variety of less-than-absolute rights that a person could have in various sorts of things.[191]

[179] Portalis, Présentation au Corps législatif 28 ventose, an XII, in Fenet (n. 178), 11: 112–14; Cambarcérès, *Discours préliminaire*, in Fenet (n. 178), 1: 164. For similar remarks by Tribune Grenier, *see* Discussion devant le Corps législatif. Discours prononcé par le tribun Grenier, 6 pluviose, an XII (January 27, 1804), in Fenet (n. 178), 11: 157.

[180] Observations présentées par les commissaires nommés par le tribunal d'appel de Lyon, in Fenet (n. 178), 4: 95–96. *See* Bürge (n. 177), 7–8.

[181] Discussion devant le Corps législatif, discours prononcé par le tribun Gillet, 10 pluviose an XII (January 31, 1804), in Fenet (n. 178), 11: 331.

[182] Toullier (n. 2), 3: 41–46.

[183] Duranton (n. 3), 4: 202–03.

[184] Windscheid (n. 32), 3: § 167.

[185] Puchta (n. 42), § 123.

[186] Puchta (n. 42), § 122.

[187] Georg Friedrich Puchta and A. Rudorff, vol. 2 of *Cursus der Institutionen*, 3rd ed. (Leipzig, 1851), § 231.

[188] Friedrich Ludwig Keller, *Pandekten* (Leipzig, 1861), § 112.

[189] Dernburg (n. 48), 1: § 192.

[190] Ludwig Arndts, *Lehrbuch der Pandekten*, 9th ed. (Stuttgart, 1877), § 130.

[191] *See* Chapter I, pp. 18–19.

In fact, as mentioned earlier,[192] the nineteenth-century German jurists defined property in the same way as the eighteenth-century rationalists. The rationalists did not base this definition on Roman texts. Rather, they defined property and other private rights by contrasting them with the ultimate moral principle of altruism. It would be surprising if a definition of property arrived at in this way also happened to be embodied in the Roman texts.

Nineteenth-century Anglo-American jurists defined property rights in much the same way. According to Sir Frederick Pollock, a complete property right was the "exclusive and effective control of a thing in the highest degree possible, for this includes the power to deal with the thing, within the bound of what nature allows, at one's will and pleasure."[193] Christopher Columbus Langdell defined a property right formally, "as one which does not imply a correlative duty in another."[194]

In England and the United States, some legal historians have seen the failure of the nineteenth-century jurists to impose a principled limit on the rights of an owner as a result of the economic forces unleashed in the nineteenth century by capitalism and industrialization. One difficulty with this explanation was suggested in the Prologue. These historians explain the nineteenth-century jurists' ideas about property by means of events that happened to occur at the same time—the rise of capitalism and industrialization—without evidence that the two were linked in the minds of people then alive. Rarely, if ever, do these historians cite a jurist who defended his ideas about property by claiming that they would foster a free enterprise economy or the growth of industry. It is hard to see why the jurists would be so reticent about the real reasons why they were writing.

Another difficulty is that the attention of these historians has often been confined to Anglo-American law. As we have seen,[195] in the nineteenth century, the common lawyers began thinking in terms of bodies of law, such as property, tort, and contract, and organizing them systematically into doctrines with the help of many ideas borrowed from Continental authors. Thus, if one looks only at the law of England and America, it is easy to think that everything new in the common law was brand new, rather than borrowed, and then to identify it with the new economic conditions of the nineteenth century.

For example, Patrick Atiyah thought that property law changed in the nineteenth century as people began to think of themselves as owners with a right to dispose of their property as they chose.[196] But people had long had such a right: how, one wonders, did they think of their right to dispose of their property before the nineteenth century? According to Morton Horwitz, pre-nineteenth-century common lawyers had a "physicalist" conception of property "derived from land,"

[192] *See* Chapter VIII, pp. 188–89.
[193] Sir Frederich Pollock, *A First Book of Jurisprudence for Students of the Common Law*, 6th ed. (London, 1929), 172–73.
[194] Christopher Columbus Langdell, *Harvard Law Review* 13 (1900): 527, 537–38.
[195] *See* pp. 204–12.
[196] Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), 84–85.

which disappeared with the "abstraction of the legal idea of property."[197] But the abstraction of that legal idea dates at least to the late scholastics.[198]

Horwitz himself quoted the pre-nineteenth-century definition of Blackstone: property is the "sole and despotic dominion . . . in total exclusion of the right of any other individual."[199] He thought that Blackstone meant that an owner could use his property as he chose however much his use might interfere with that of others.[200] This conception of property was tolerated before the modern era because "the low level of economic activity made conflict over land use extremely rare."[201]

As we have seen, however, Pothier's definition in the eighteenth century was like Blackstone's. Neither Pothier nor Blackstone meant that there were no limits to an owner's right to interfere with others. Like Pothier, Blackstone drew on the iusnaturalists. He said that he was describing property not as generally conceived, but as it was in natural law. He gave a standard natural law account of how all things had once been in common and how private property rights had been instituted because of the disadvantages of this state, citing Grotius, Pufendorf, and Barbeyrac.[202]

People have noticed that uses of land may conflict ever since they began living near each other. The early common law cases forced pigsties[203] and breweries[204] out of villages. When the medieval civilians discussed conflicting uses of land, they were interpreting a Roman text that prohibited a cheese shop from discharging smoke that bothered people living upstairs.[205] Blackstone himself said that if one person's use interferes with another, "it is incumbent on him to find some other place to do that act, where it will be less offensive."[206]

Once the nineteenth-century jurists, like the rationalists, defined property as the right of the owner to do as he wished with what he owned, there was a gap between this definition and any rules that would protect nonowners or limit an owner's rights.

In some cases, the nineteenth-century jurists bypassed the problem. An example is the doctrine that one can use another's property in time of necessity. The doctrine was overlooked in France, although a few recent treatise writers have tried to read it into the Code.[207] It was ignored in Germany, and added to the German Civil

[197] For example, Morton Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (Oxford, 1992), 145.

[198] *See* Chapter III, p. 85. [199] Blackstone (n. 70), 2: *2. [200] Horwitz (n. 197), 31.

[201] Horwitz (n. 197), 31. [202] Blackstone (n. 70), 2: *2–5.

[203] *Aldred's case*, 77 Eng. Rep. 816, 9 Co. Rep. 57b (K.B. 1611).

[204] *Jones v. Powell*, Palm. 536 (K.B. 1628); *Rex v. Jordan*, cited in *Rex v. Pierce*, 89 E.R. 967, 2 Show. K.B. 327 (1683).

[205] D. 8.5.8.5. [206] Blackstone (n. 70), 3: *217–18.

[207] François Terré, Philippe Simler, and Yves Lequette, *Droit civil: Les Obligations*, 7th ed. (Paris, 1999), no. 704; Boris Starck, Henri Roland, and Laurent Boyer, "Obligations," vol. 1 in *Responsabilité délictuelle*, 4th ed. (Paris, 1991), nos. 300–01. The cases they cite do not show an acceptance of the doctrine by the courts. They concern what the Germans call *Notstand*, in which one person is threatened by another's property: Cour de cassation, 2e ch. civ., November 26, 1986, D.S. 1987 (defendant protected a spaniel by shooting two dogs that were attacking it). Or they are cases of negligence in which a person chose to risk the lesser of two harms: Cour de cassation, 2e ch. civ., April 8, 1970, JCP 1970. J.136 (defendant broke a glass pane to rescue the plaintiff, a

Code[208] only in one of the last drafts justified by an appeal to justice unsupported by theory.[209] In the United States, it was recognized without benefit of theory in judicial decisions at the turn of the century.[210] It is recognized in England, although the authority is scanty.[211]

At other times, the nineteenth-century jurists saw the problem clearly and tried energetically to resolve it. Despite the definition of property rights, sometimes the owner was not the only one protected: the possessor was protected as well. Despite the definition of property rights, sometimes the owner could not use his property as he wished: he could not do so because his use interfered with a neighbor.

The protection of a nonowner The problem of why a possessor who is not the owner should be protected was debated by two of the greatest nineteenth-century German jurists, Friedrich Carl von Savigny and Rudolph Jhering. Protection of the possessor without title seemed to contradict the proposition that the owner had the exclusive right to the use of property. The question, as Savigny put it, is "how possession, without any regard to its own lawfulness, can be a basis for rights."[212]

Savigny said that, by dispossession:

> An independent right of the person . . . is not violated but the situation of the person is altered to his disadvantage; the unlawfulness, which consists in the use of force against this person, can only be eliminated with all of its consequences by the restoration and protection of the factual situation to which the force extended.[213]

That answer is not perfectly clear. It suggests two rather different explanations for the protection of possession, each of which had its champions among the nineteenth-century German jurists. According to the first, the law protects the peace and order of society against unlawfulness and force. According to the second, the law protects the victim himself. The victim has a legally protectable claim against unlawful interference even though he does not have a legally protectable claim to possession.

The first explanation was accepted by Savigny's contemporary Rudorff.[214] Supposedly, relief is given merely because public order has been disrupted and

child, who was locked in the bathroom, and a fragment struck the child's eye); Trib. Charolles, March 13, 1970, JCP 1970. J.16354 (truck driver swerved to avoid hitting a third party and struck plaintiff's car).

[208] German Civil Code (*Bürgerlichesgesetzbuch*) § 904.

[209] *Protokolle der Kommission für die zweite Lesung des Bürgerlichen Gesetzbuches* VI, § 419, 214 (Berlin, 1899).

[210] *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

[211] John Murphy, *Street on Torts*, 12th ed. (Oxford, 2007), 305–06; W. V. H. Rogers, *Winfield and Jolowicz on Tort*, 17th ed. (London, 2002), § 25.29; K. M. Stanton, *The Modern Law of Tort* (London, 1994), 69.

[212] Friedrich Carl von Savigny, *Das Recht des Besitzes*, 6th ed. (Berlin, 1837), 9.

[213] Savigny (n. 212), 41.

[214] Rudorff, "Über den Rechtsgrund der possessorischen Interdicte," *Zeitschrift für geschichtliche Rechtswissenschaft* 7 (1831): 90, 110–14.

not because the plaintiff has a protectable interest. German critics objected that if the plaintiff has no protectable interest, then the unlawfulness or disruption of public order cannot merely consist in the fact that the plaintiff was deprived of possession. It must also be found in the unlawful or disruptive way in which the defendant deprived him of it. But, as Jhering noted, relief is given when there has been dispossession without violence or a breach of the peace,[215] for example when the defendant took the plaintiff's hat by mistake in place of his own.[216]

In the nineteenth century, most German jurists turned to the second explanation instead: the possessor should be protected against interference even though possession in itself is not worthy of protection. According to Gans, Puchta, Windscheid, Bruns, and Randa, the reason was that the possessor's will was actualized or expressed in his exercise of dominion over an object. The will was worthy of protection without regard to whether this exertion of dominion was rightful or wrongful.[217] To interfere with another's exercise of will was to interfere with his freedom or personality,[218] or to violate the principle that each person is the equal of every other.[219]

The advantage of this approach, as Puchta observed, is that the victim is protected simply because the act of dispossession itself interferes with his will, not because the act that interferes is unlawful in any other respect.[220] The difficulty is that the law does not protect people against any interference with their will. Rather, it protects them against dispossession. German critics made this point in various ways. Jhering argued that the law does not protect the will regardless of what is willed, but rather defines the circumstances in which the will is protected.[221] Heck noted that while one can always expand a word such as "personality" to cover any instance in which one gives relief, doing so does not explain why relief is given.[222]

Indeed, if the possessor is not the owner and is acting without right, the law is protecting the will to do something wrongful. Jhering objected that even if, in the abstract, the will should be protected, it is hard to see why the will to do wrong should be.[223] Moreover, the law is not simply protecting the will of the possessor,

[215] Rudolph von Jhering, *Über den Grund des Besitzschutzes Eine Revision der Lehre vom Besitz*, 2nd ed. (Jena, 1869), 8.

[216] Philippe Heck, *Grundriß des Sachenrechts* (Tübingen, 1930), §§ 3, 6.

[217] Eduard Gans, *System des römischen Civilrechts* (Berlin, 1827), 211–12; Georg Friedrich Puchta, vol. 2 of *Cursus der Institutionen*, 3rd ed. (Leiptzig, 1851), § 224; Georg Friedrich Puchta, vol. 1 of *Vorlesungen über das heutige römischen Recht*, ed. Rudorff, 2nd ed. (Leipzig, 1849), § 122; Georg Friedrich Puchta, "Zu welcher Classe von Rechten gehört der Besitz?," in *Kleine Zivilistische Schriften*, ed. F. Rudorff (Leipzig, 1851), 239 at 255–56; Windscheid (n. 32), 1: § 148; Carl Georg Bruns, *Das Recht des Besitzes im Mittelalter und in der Gegenwart* (Tübingen, 1848), § 58; Anton Randa, *Der Besitz mit Einschluß der Bestzklagen nach österreichem Recht*, 3rd ed. (Breitkopf, 1879), § 8.

[218] Puchta, *Vorlesungen* (n. 217), § 122, 243; Randa (n. 217), § 8.

[219] Windscheid (n. 32), 1: § 148, n. 6.

[220] Puchta, *Vorlesungen* (n. 217), § 122.

[221] Jhering (n. 215), 31–34.

[222] Heck (n. 216), Excurs I, 488.

[223] Jhering (n. 215), 31–34.

but settling a conflict among different people's wills. By taking an object, a dispossessor allows his will to override that of the earlier possessor. By keeping it, the earlier possessor allows his own to override the will of all those who come later. As Dernburg noted, respect for the will does not explain why the earlier possessor should win.[224] Nor does it explain why physical possession matters. If the law were merely protecting a person's will to appropriate an object, Jhering objected, it would protect that will however it were expressed, whether or not physical possession was taken.[225]

Jhering recognized that, to explain protection, one needed to identify some substantive right in need of protection. Like his contemporaries, however, he thought that the substantive right could not be possession itself. Instead, it was ownership. By protecting possession, the law gave a more effective protection to ownership.[226] The owner would not have to prove his title when dispossessed.[227] The protection given to possessors who were not owners was an "unavoidable consequence"—a "price" paid for protecting owners.[228]

Critics pointed out that Jhering's theory does not explain why a possessor is protected when he clearly is not the owner[229]—indeed, why he is sometimes protected even against the owner.[230] Moreover, it rests on the assumption that the person dispossessed is most often the owner—an assumption that Jhering himself had questioned.[231]

Dernburg recognized that the difficulty with all of these theories is a feature that they have in common: they give no reason to protect possession as such. According to Dernburg, possession should be protected because it is "the factual order of society (*tatsächliche Gesellschaftsordnung*), the given division of physical goods. It grants the individual directly the instruments of his activity, the means for the satisfaction of his needs."[232] If so, one might wonder, why is possession not a right belonging to the possessor? Dernburg denied that it is.[233] He explained that the owner, and not the possessor, has the right to possess. But if that is so, why should possession be protected?

Two common law jurists, Oliver Wendell Holmes and Sir Frederick Pollock, approached the problem by claiming that possession was a right, although it was not the same as ownership. Like the owner, the possessor has the right to deal with a thing as he chooses. The owner's rights, however, are good against all of the world, while the possessor's rights are good against everyone except the owner.[234] In Pollock's words, the possessor "may have all or most of the advantages of ownership against every one but the true owner, in other words, it may confer a relatively good title":[235] "[w]e treat the actual possessor not only

[224] Dernburg (n. 48), § 170.
[225] Jhering (n. 215), 37–38.
[226] Jhering (n. 215), 45–46.
[227] Jhering (n. 215), 47–54.
[228] Jhering (n. 215), 55.
[229] Randa (n. 217), § 8; Dernburg (n. 48), § 170; Heck (n. 216), Excurs I, 488.
[230] Randa (n. 217), § 8; Heck (n. 216), Excurs I.
[231] Jhering (n. 215), 25–27.
[232] Dernburg (n. 48), § 170.
[233] Dernburg (n. 48), § 169.
[234] Holmes (n. 114), 210–11.
[235] Pollock (n. 193), 178.

as legal possessor but as owner, as against every one who cannot show a better right . . . ."[236]

Pollock's idea avoided all of the troubles that German scholars had encountered once they denied that the possessor had a right to possess. To accept it, however, one can no longer define property as the conceptualists did: as the exclusive and unlimited right of the owner to do as he chooses with his own. Pollock did not suggest an alternative theory of property to replace the will theory.

The twentieth-century project was to find an alternative to the conceptualism of the past. Yet today, when French and German jurists explain why the possessor is protected, they merely recapitulate the theories of Savigny and Jhering.[237] It is as though the discussion was frozen a century ago, and on the conceptualist premise that only an owner can have the right to the use of a thing.

English jurists typically accept the theory of Pollock. Curiously, they have forgotten that it was developed by him in response to a German debate provoked by a will theory of property. They regard it as ancient and indigenous to the common law. In medieval English law, it is said:

> [T]he estate in land is based on the right of seisin or possession, of the land. . . . This reliance on possession as the basis of land ownership resulted in the common law taking the view that the acquisition of possession was itself the acquisition of a title to the land. Possession was the *root of title*.[238]

That view of English jurists is surprising since, as we have seen,[239] for much of the nineteenth century, English courts had said that possession was protected only because it was evidence of title. Moreover, Pollock himself did not claim that he had merely explained English law. He had developed a theory of why both English and Roman law protected possession:

> It may be worth remarking that in general terms the relations of possession and ownership in Roman and English law, the difficulties arising out of them, and the devices resorted to for obviating or circumventing those difficulties, offer an amount of resemblance even in detail which is much more striking than the superficial and technical differences. We cannot doubt that these resemblances depend on the nature of the problems to be solved and not on any accidental connection. One system of law may have imitated another in particular doctrines and institutions, but imitation cannot find place in processes extending over two or three

[236] Pollock (n. 193), 172.

[237] Jean-Louis Bergel, Marc Bruschi, and Sylvie Cimamonti, *Traité de droit civil: Les biens*, 4th ed. (Paris, 2000), nos. 124–25, 127; Henri Mazeaud, Léon Mazeaud, Jean Mazeaud, and François Chabas, *Leçons de droit civil, II. Les Biens: Droit de la propriété et ses démembrements*, 8th ed. (Paris, 1994), nos. 1413–14. Others give no explanation: *see*, e.g., Guy Raymond, *Droit civil*, 3rd ed. (Paris, 1996), no. 513.

[238] E. H. Burn and J. Cartwright, *Cheshire and Burn's Modern Law of Real Property*, 18th ed. (Oxford, 2011), 13 (emphasis original). Similarly, Kevin Gray and Susan Francis Grey, *Elements of Land Law*, 4th ed. (Oxford, 2005), § 3.23; Kevin Gray and Susan Francis Grey, "The Idea of Property in Land," in *Land Law: Themes and Perspectives*, eds. Susan Bright and John Dewar (Oxford, 1998), 15 at 18–19.

[239] *See* Chapter I, p. 24.

centuries, and whose fundamental analogies are externally disguised in almost every possible way.[240]

Contemporary English jurists have not recognized that Pollock was trying to resolve a problem that German conceptualists had created by their definition of property right. He was trying to do so by redefining that right. Conceptualism was redescribed as traditional common law.

The rights of an owner The problem of when an owner can use his land in a way that interferes with another was raised by the Romans and discussed by the medieval civilians.[241] It was bypassed by the late scholastics and iusnaturalists. It did not seem to be the sort of problem that could be resolved by their higher principles. But neither were they bothered by it.

The nineteenth-century conceptualists realized that restricting how an owner could use his land seemed to contradict their definition of property as the exclusive right of an owner to do as he chooses with what he owns.

French jurists acknowledged the contradiction. Limits to the owner's right had to be tolerated for pragmatic reasons. Life would become impossible if the law were to allow owners to exercise the rights that belonged to them in principle. According to Aubry and Rau, the "respective rights of [the] proprietors" of adjacent land were in a "conflict [that] cannot be resolved except by means of certain limits imposed on the natural exercise of the powers inherent in property."[242] Demolombe observed that if all proprietors could "invoke their absolute right, it is clear that none would have one in reality." What would be the result? "It would be war! It would be anarchy!" Similarly, Laurent thought that:

> According to the rigor of the law, each proprietor would be able to object if one of his neighbors released on his property smoke or exhalations of any kind, because he has a right to the purity of air for his person and his goods.[243]

If that were so, he admitted, the existence of towns would be impossible.[244] Thus they arrived at the curious position that, in principle, the law conferred rights on proprietors that they should not have and which the law prohibited them from exercising.

The nineteenth-century German jurists, like Liebnitz,[245] thought that the law might confer a right that was unlimited, by definition or in principle, and then limit the use of it. They described the Roman text that prohibited the owner of a cheese

[240] Pollock (n. 193), 179. [241] *See* Chapter II, pp. 37–39.
[242] Aubry and Rau (n. 9), 2: § 194. [243] Laurent (n. 6), 6: § 144.
[244] Laurent (n. 6), 6: § 144. In a later volume of his work, Laurent finally decided that "[t]he Code was wrong to say that the owner has the right to enjoy and to dispose of his thing in the *most absolute manner*. . . .": Laurent (n. 6), 20: § 417. Nevertheless, he did not suggest any other way in which property could be defined.
[245] *See* Chapter VIII, pp. 189–90.

shop from sending smoke onto upstairs premises[246] as a limitation of ownership by positive law (*gesetzliche Beschränkung des Eigenthums*).[247] According to Windscheid, the limitation was a good one because "reckless realization of the consequences of the concept of ownership is not possible without serious disadvantages." But the right to use one's property as one wishes is still a "consequence of ownership."[248] Positive law limited the owner's rights, as though the law no sooner conferred property rights on the owner than it had to take some of them back.

Jhering, who, as we will see, was one of the first to revolt against conceptualism, broke with the definition of the right of property as an unlimited right. Property rights would be worthless if a property owner either could disturb his neighbor at will or could not disturb him at all. An owner who could disturb his neighbors at will could make their land valueless by some pestilential use of his own. An owner who could not disturb them at all could not cook or use heat if his neighbors objected to the odors or smoke. Jhering concluded that an owner's rights must depend on the degree of interference and the normal use of land.[249] As we have seen, such a limitation had been proposed by Bartolus.[250] It was accepted even by nineteenth-century conceptualists such as Windscheid, who maintained that, in principle or by definition, an owner could use his property as he wished and the restraints imposed on him were statutory limitations of this right.[251] Jhering did not accept that definition of property, but neither did he propose another.

Jhering's rule was adopted by the German Civil Code.[252] A similar rule was adopted, independently it would seem, by the French and the common lawyers. The French Civil Code contained no general provision about disturbances among neighbors. French courts give relief, however, when a disturbance exceeds that which is "normal" among neighboring properties. What is normal is judged by the character of the locality.[253] In common law jurisdictions, an interference with a neighbor is actionable as a "nuisance" when it is "unreasonable."[254] Everyone agrees, however, that an interference may be "unreasonable" even when an owner was

[246] D.8.5.8.5. *See* Chapter II, pp. 37–39.

[247] Puchta, *Cursus* (n. 217), 2: § 231; Karl Vangerow, *Leitfaden für Pandekten-Vorlesungen* (Marburg, 1847), § 297 Anm. II; Windscheid (n. 32), 1: § 169.

[248] Windscheid (n. 32), 1: § 169.

[249] Rudolph von Jhering, "Zur Lehre von den Beschränkungen des Grundeigenthümers im Interesse der Nachbarn," *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 6 (1863): 81, 94–96.

[250] *See* Chapter II, p. 38.

[251] Windscheid (n. 32), 1: § 169. *See* Vangerow (n. 247), § 297 Anm. II.

[252] German Civil Code (*Bürgerlichesgesetzbuch*) § 906.

[253] Gérard Cornu, *Droit civil Introduction Les Personnes Les Biens*, 4th ed. (Paris, 1990), § 1096; Murad Ferid and Hans Sonnenberger, vol. 2 of *Das Französische Zivilrecht*, 2nd ed. (Heidelberg, 1986), § 3 C 191; Boris Starck, Henri Roland, and Laurent Boyer, *Droit civil: Obligations Responsabilité délictuelle*, 2nd ed. (Paris, 1985), § 310; Alex Weill, François Terré, and Philippe Simler, *Droit civil Les Biens*, 3rd ed. (Paris, 1985), § 309.

[254] For example, in England: Murphy (n. 211), 420; Rogers (n. 211), § 14.6; Margaret Brazier, *The Law of Torts*, 8th ed. (London, 1988), 32; Sir Basil Markesinis and Simon F. Deakin, *Tort Law*, 3rd ed. (Oxford, 1994), 419; in the United States: *Restatement (Second) of Torts* §§ 822, 826 (1965); William Keeton, Dan Dobbs, Robert Keeton, and David Owen, *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, MN, 1984), 629.

not careless, and so his conduct was not "unreasonable" as the term is understood in the law of negligence.[255] Although English and American jurists list several considerations that determine the "reasonableness" of an interference, the ones that matter are the extent of the interference and whether land is used in the way that is normal in a given locality.[256] The *Restatement (Second) of Torts* confused matters by suggesting that a court should consider "whether the gravity of the harm outweighs the utility of the actor's conduct."[257] But few courts have followed that suggestion.[258]

Again, however, it has been difficult for contemporary jurists to explain the rule that their legal systems have adopted. German jurists occasionally describe their law of *Immissionen* as a limitation on ownership, but they seem to have in mind not an abstractly defined concept of property, but the rights conferred on a proprietor by § 903 of the German Civil Code. They do not explain why such limitations should be imposed.[259] Some have pointed out that if neighbors could use their property in any way that they wish, one use would interfere with the other and both properties could become valueless.[260] That is the argument that Jhering made in the nineteenth century. But it is a purely negative argument that shows why the rights of owners cannot be absolute. It does not explain why their rights should depend on whether the interference is large and abnormal.

Some French jurists have said that the reason why a remedy is given is that to interfere with one's neighbors is an abuse of right (*abus de droit*).[261] As we will see in the next chapter, the doctrine of *abus de droit* was developed by twentieth-century jurists in revolt against conceptualism. Conceptualism, they said, had neglected the purposes for which the law recognizes rights. One has abused his

[255] In England: Murphy (n. 211), 420; Rogers (n. 211), § 14.6; Brazier (n. 254), 321; Markesinis and Deakin (n. 254), 419; in the United States: *Restatement (Second) of Torts* § 826(b)(1965); Keeton, Dobbs, Keeton, and Owen (n. 254), 629. *See* generally James Gordley, "Introduction," in *The Development of Liability between Neighbours*, ed. James Gordley (Cambridge, 2010), 23–24.

[256] In England: Murphy (n. 211), 425–26, 428–29; Rogers (n. 211), § 14.7; Brazier (n. 254), 322–27 (extent of the harm and suitability of the locality; she also says that the impracticability of preventing the interference and the social value of the plaintiff's activity bear on reasonableness, but she clearly does not mean that the plaintiff loses if his activity is of purely personal value and it is impracticable to prevent the interference); Markesinis and Deakin (n. 254), 427–33 (duration of interference and character of neighborhood; they also mention fault, but say that a nuisance is actionable without fault; they do mention the abnormal sensitivity of plaintiff's activity as bearing on reasonableness); Rogers (n. 211), 407–08 (extent of the harm and nature of the locality); in the United States: *Restatement (Second) of Torts* §§ 829, 831 (1965); Keeton, Dobbs, Keeton, and Owen (n. 254), 629 (amount of harm and nature of the locality; they mention the possibility of spreading losses by insurance or by shifting a loss to the general public, but they do not cite any cases that turned on this consideration).

[257] *Restatement (Second) of Torts* § 826(1) (1965).

[258] Jesse Dukeminier, James E. Krier, Gregory S. Alexander, and Michael H. Schill, *Property*, 7th ed. (Austin, TX, 2010), 734–35.

[259] For example, P. Bassenge, in Palandt, *Bürgerliches Gesetzbuch*, 5th ed. (Munich, 1996), to § 906, no. 1.

[260] H. Roth, in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, 13th ed. (Berlin, 1996) to § 906, no. 1.

[261] Their opinions are described by Starck, Roland, and Boyer (n. 207), §§ 315–25, and by Weill, Terré, and Simler (n. 253), § 313.

right to use his property as he chooses when he interferes with a neighbor's use of his own. As we will see, critics of the doctrine have pointed out that if the law does not give the proprietor the right to interfere with his neighbors, then one cannot say he is abusing a right when he does. Indeed, proponents of the doctrine seem to think that the right to property must be defined as the conceptualists said: as the right of the proprietor to do as he chooses without regard to the purposes that the law wishes to serve by recognizing such a right. Only when the right is defined as a conceptualist would define it is it possible for the proprietor to abuse it. Nor do the French jurists explain why an interference with another counts as an abuse only when it is large and abnormal for the area. Some French jurists have said that liability should be imposed because one person should not be allowed to create or profit from the risk that his activity will injure others.[262] They do not explain why he may not do so only when the interference is abnormal. Other French jurists have criticized this explanation without offering one of their own.[263]

In the United States, the most serious attempts to explain the law of nuisance have been made by members of the law and economics movement. We will discuss this at a later point.[264]

Tort

In tort law, for the nineteenth-century jurists, the defining or organizing principle was that one who harms another through fault, whether intentionally or negligently, is obligated to make compensation.

For the French jurists, fault was the only principled explanation of tort liability.[265] They based this conclusion on articles 1382–83 of the French Code, which imposed liability on one who intentionally or negligently caused another person a harm (*dommage*). René Savatier and Jean-Louis Halperin regarded this provision as another instance of the individualism of the Code. According to Savatier, it was "the corollary of the liberty of the individual."[266] Halpérin traced it from the Code to what he calls the individualism of the seventeenth- and eighteenth-century natural lawyers.[267]

The drafters of the Code had paraphrased Pothier, who said that a person is liable for an act by which "he causes damage to another through intent or malice," or "without malice but by inexcusable imprudence."[268] Pothier, in turn, had been

[262] Bergel, Bruschi, and Cimamonti (n. 237), no. 109.
[263] Mazeaud, Mazeaud, Mazeaud, and Chabas (n. 237), no. 1341.
[264] *See* Chapter X, pp. 303–05.
[265] Toullier (n. 2), 11: 138; Duranton (n. 3), 13: 741; Aubry and Rau (n. 9), 4: § 446; M. L. Larombière, vol. 5 of *Théorie et pratique des obligations* (Paris, 1857), 738, 767; Laurent (n. 6), 20: §§ 387, 550, 639.
[266] René Savatier, *Les Métamorphoses économiques et sociales du droit privé d'aujourd'hui*, 2nd ed. (Paris, 1959), § 2, 6.
[267] Halpérin (n. 175), 57.
[268] Robert Pothier, "Traité des obligations," §§ 116, 118, in vol. 1 of *Oeuvres de Pothier*, ed. M. Siffrein, nouv. ed. (Paris, 1821), 1.

paraphrasing Grotius.[269] As we have seen, although iusnaturalists such as Grotius, as well as Domat and Pothier, believed that a person should be liable for harm caused by fault, they did not subscribe to the same principles as the nineteenth-century jurists. They believed that liability for fault rested on higher principles concerning human duty, although they were often unclear about what these principles were.

Moreover, according to some of the earlier jurists, fault was not the only principled basis for liability. According to Molina, some activities were so dangerous that a person engaged in them should be liable without fault. Pufendorf claimed that a person who profited from an activity should be liable for the harm that it caused others absent fault. As we have seen, Pothier and Domat were not clear.[270] According to Pothier, masters were liable for torts committed by their servants even when they could not prevent them. Yet he added: "This has been established to render masters careful to employ only good servants."[271] Domat said that when harm is done by fierce animals that escape from a person's cutody (*garde*), that person is liable because, "as he profits from the use he can make from this animal . . . he should answer." But Domat said that he should also be liable as a matter of "equity and public interest," "because it is by his fault" that the animal escaped.[272]

This ambiguity passed into articles 1384 and 1385 of the Civil Code, which were based on the passages from Domat and Pothier just described. Article 1384 provides that "a person is liable not only for the damage he causes by his own act but also for that caused for the acts of persons for whom he is responsible or things that he has under his care (*garde*)." The article goes on to provide for the vicarious liability of parents, artisans, teachers, masters, and employers. Parents, artisans, and teachers may escape liability by proving that they could not have prevented the act that caused damage. No such privilege is given to masters and employers. Article 1385 imposes liability on those who own or use animals. Whether fault is the exclusive principle of liability is as ambiguous under these provisions as it is in the original texts of Domat and Pothier.

One can see the ambiguity in the legislative history of these provisions.[273] Bertrand de Greuille explained why masters and employers cannot escape liability for acts that they could not prevent in the same way that Domat had explained the liability of the owner of wild animals: "Is it not the service from which the master profits that has produced the evil that he is condemned to repair?" But he immediately followed this question by another that suggests that liability is based on fault: "Does he not have to blame himself for having given his confidence to men who are bad, clumsy, or imprudent?" He explained the liability of the owner of animals by stating the "general thesis" that "nothing that belongs to a person can

[269] *See* Chapter V, pp. 135–36.
[270] *See* Chapter VI, pp. 146–47.
[271] Pothier (n. 268), § 121.
[272] Jean Domat, *Les Loix Civiles dans leur ordre naturel* (Paris, 1771), liv. II, tit. viii, sec. 2, § 8.
[273] John Bell and David Ibbetson, *European Legal Development: The Case of Tort* (Cambridge, 2012), 60–62; James Gordley, "Myths of the French Civil Code," *American Journal of Comparative Law* 42 (1994): 459, 480–81.

injure another with impunity."[274] Tarrible and Treilhard, in contrast, seem to base liability exclusively on fault.[275]

The nineteenth-century jurists found it puzzling that masters and employers cannot escape liability by proving the absence of fault. Duranton and Larombière said that the masters could have been more careful in choosing whom to employ.[276] Laurent, Aubry, and Rau gave no explanation.[277] Laurent discussed the explanation of Bertrand de Greuille that the master profits from the work that gave rise to the injury, but he rejected it on the ground that the work "is the occasion, not the cause."[278] Thus even if one were disposed to see the recognition of fault as the sole basis of liability as an individualistic development, one does not find it unambiguously in the Code, but, again, one does in the commentators.

The German jurists explained liability in tort as the French nineteenth-century jurists did. Fault, for them, was a principle of accountability, but they did not explain why it gave rise to a duty to compensate the plaintiff. Windscheid simply said that a person is liable in tort "because he was at fault";[279] Puchta, that "every tort presupposes a relationship of accountability";[280] Arndts, that "every tortious act" presupposes "the element . . . indicated by the word fault."[281] All of them agreed that a person might be at fault through intention or negligence.[282] Arndts said that "what lies beyond [fault] is chance. . . . " But they did not explain what distinguished fault from chance, except to say that it was the basis for accountability.[283] Nor did they explain why one should

[274] Rapport fait par Bertrand-de-Greuille, Communication officielle au Tribunat, 10 pluviose an XII (January 31, 1804), in Fenet (n. 178), 13: 477.

[275] According to Tarrible, vicarious liability and liability for animals are based on the principle that "damage, to be subject to reparation, must be the effect of a fault or an imprudence on the part of someone," since otherwise "it is only the work of chance": Discours prononcé par le Tribun Tarrible, Discussion devant le Corps-Législatif, 18 pluviose, an XII (February 8, 1804), in Fenet (n. 178), 13: 488. According to Treilhard, some are liable for weakness, others, a bad choice, "all [for] negligence": Présentation au Corps Législatif, et exposé des motifs par Treilhard, 9 pluviose, an XII (January 30, 1804), in Fenet (n. 178), 13: 468. If so, one wonders why the Code does not include masters and employers when it enumerates the people who can escape vicarious liability by proving that they could not have prevented the act that causes damage. Treilhard does not mention them, and Tarrible seems to be unaware that masters and employers have not been included. After enumerating them and all of the other people who may be liable for the acts of another, Tarrible says that liability "is at an end with regard to all of them if they prove that they could not prevent the act that gives rise to it": Tarrible, Discussion devant le Corps-Législatif, in Fenet (n. 178), 13: 489.

[276] Duranton (n. 3), 13: 741; Larombière (n. 265), 5: 767.

[277] Aubry and Rau (n. 9), 4: § 447; Laurent (n. 6), 20: § 88.

[278] Laurent (n. 6), 20: § 588.

[279] Windscheid (n. 32), 1: § 101. He also said there that, sometimes, the defendant could be liable without fault: "Conduct may be tortious (*unerlaubt*) on account of its result in itself. . . . "

[280] Puchta (n. 42), § 255.

[281] Arndts (n. 190), § 85.

[282] Windscheid (n. 32), 1: § 101; Puchta (n. 42), § 255; Arndts (n. 190), § 85.

[283] Arndts did say that fault entailed "a relationship to the will of the party on the basis of which responsibility can be imputed to him": Arndts (n. 190), § 85. That relationship seems clear enough in the case of intentionally inflicted harm. But Arndts did not try to explain why it extended to negligent acts in which the harm was not intended—a problem that, as we have seen, writers in the Aristotelian tradition had resolved by considering the connection between the will and the virtue of prudence.

owe compensation. Windscheid simply noted that "[a] particularly important consequence of tortious acts (*unerlaubte Handlungen*) is the obligation to make reparation for the harm they have caused."[284]

Windscheid explained harm as a "*Rechtsverletzung*, that is the violation of a right." The conduct is not allowed because it is in conflict with the right of another person.[285] Ludwig Arndts explained that "[e]very tortious act . . . presupposes, objectively, a violation (*Verletzen*). . . ."[286] Again, there was no higher principle to explain the sorts of rights one should have and consequently the harms for which one should be compensated.

We have seen how differently the Roman authors of their texts had approached tort law.[287] Their law recognized particular torts, only one of which, an action under the *lex Aquilia*, required the defendant to have acted intentionally or negligently. In most of the texts, when the plaintiff can recover, he has been deprived of his property. Two texts implied that a father could recover for harm suffered by his son. There were other harms for which he could not recover, such as physical injury to the plaintiff himself.

As with property law, the German jurists defined tort in the same way as the rationalists. As we have seen, Leibniz and Wolff agreed that a person owed compensation if he harmed another through fault. Leibniz said that what was not the result of fault was the result of "chance."[288] He explained harm as depriving someone of what he ought to have—that is, as violating a private right. Leibniz said that a person is harmed if he is deprived of whatever he has whether acquired by "fortune or industry."[289] According to Wolff, "[t]he one to whom harm has been done has less than he ought to have."[290] The rationalists did not base this definition on the Roman texts. Again, it would be surprising if a definition of tort arrived at in this way were to be embodied in them.

As we have seen, nineteenth-century Anglo-American treatises on torts arrived at the principle that liability was based on fault by borrowing from Continental jurists. They recognized a tort of negligence and classified the traditional writs as "intentional torts." That distinction had been foreign to the case law that was said to support it.[291]

[284] Windscheid (n. 32), 1: § 102.

[285] Windscheid (n. 32), 1: § 101. A secondary principle was that one might be liable anyway if the defendant acts in a way that the law forbids: Windscheid (n. 32), 1: § 101.

[286] Arndts (n. 190), § 84.

[287] *See* Chapter I, p. 20.

[288] Gottfried Wilhelm Leibniz, "Elementa juris naturalis," in *Philosophische Schriften Erster Band 1663–1672*, ed. Akademie der Wissenschaften der DDR (Berlin, 1990), 433 at 434.

[289] Gottfried Wilhelm Leibniz, "De tribus juris praeceptis sive gradibus," in vol. 2 of *Textes inédits*, ed. Gaston Grua (New York, 1985), 606 at 607.

[290] Christian Wolff, *Jus naturae methodo scientific pertracta*, published as *Jus naturae* in ed. Marcellus Thomannus, in vols. 17–24 of *Gesammelte Werke II. Abteilung Lateinishce Schriften*, eds. J. École, J. E. Hofmann, M. Thomann, and H. W. Arndt (Hildescheim, 1972), II, § 580.

[291] *See* pp. 205–10.

Liability for fault Most nineteenth-century jurists regarded fault as the master principle on which liability in tort must depend. By "fault," they meant an action that is morally culpable. Like the rationalists, they did not explain why moral culpability should give rise to duty of compensation. Like the rationalists,[292] they did not tie the principle to any larger theory of human accountability. Nils Jansen has noted the tension between liability based on wrongdoing and liability based on compensation for harm done to another.[293] In my view, this tension has not marked the entire history of tort law. It is the result of a modern problem that arose with the rationalists and passed into the work of the nineteenth-century jurists.

The difficulties were seen at the end of the nineteenth century and became a target for critics. Jurists such as Josserand said that they could see no reason why the duty to make compensation should depend on whether a person who harmed another had been morally at fault.[294] The critics then found themselves on the other horn of a dilemma. If the fault is irrelevant to the duty to make compensation, then is all liability strict liability? If fault is relevant, but does not entail moral responsibility, then what can fault mean?

The dilemma is best understood by looking at the efforts that French jurists have made to escape it. Most jurists have concluded that fault, but not culpable misconduct, is required for liability under articles 1382–83 of the Civil Code. As Alain Bénabent has noted, the requirement of fault in the "moral" sense has been "abandoned": "[F]ault has become a purely objective idea consisting only of factual conduct that is juridically described as abnormal."[295] According to Boris Starck, Henri Roland, and Laurent Boyer, morality cannot matter since, on the one hand, "to cause a harm to another and then to abandon him to a miserable state because one was not at fault is inhuman, and in our sense, not moral. . . ." On the other hand, "it is not moral to place a burden on the author of an involuntary fault—negligence or imprudence—that can amount to millions of francs in damages."[296]

If a defendant need not be at fault in the ordinary or "moral sense," and, indeed, if he can be "juridically" at fault for events that he could not possibly prevent, the question is how to explain why liability is imposed by articles 1382–83. "Unfortunately," according to Starck, Roland, and Boyer, "authors are not in agreement among themselves as to the new basis of responsibility."[297] They describe three popular theories.[298] One is the theory of *risque-profit* according to which whoever

[292] *See* Chapter VIII, p. 188.

[293] Nils Jansen, "Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability," *Oxford Journal of Legal Studies* 24 (2004): 443.

[294] Louis Josserand, *De la responsibiité du fait des choses inanimées* (Paris, 1897), 6–8, 103–08.

[295] Alain Bénabent, *Droit civil: Les Obligations*, 12th ed. (Paris, 2010), no. 542.

[296] Starck, Roland, and Boyer (n. 207), no. 8.

[297] Starck, Roland, and Boyer (n. 207), no. 41.

[298] These theories are also described by François Terré, Philippe Simler, and Yves Lequette, *Droit civil: Les obligations*, 9th ed. (Paris, 2005), no. 685; Philippe Malaurie and Laurent Aynès, "Obligations," vol. 1 in *Responsibilité délictuelle*, 11th ed. (Paris, 2001), no. 25.

profited from an activity should be liable for the damages that activity caused.[299] This theory resembles the explanation of strict liability proposed by Molina on the basis of ideas of commutative justice, and in looser form by Pufendorf and Domat.[300] Indeed, it would serve better as justification for strict liability than for liability for fault.

The objection of Stark, Roland, and Boyer was that the theory did not go far enough. It imposed liability on a defendant engaged in a profit-making activity, not one conducted for other purposes.[301] Unlike the late scholastics, they did not regard any object that one pursued voluntarily as a gain.[302] For the French jurists, one solution has been to broaden the theory so that the defendant would be liable for any *risque crée*—any risk that he had created.[303] The difficulty is that if a person is liable for creating a risk, prudently or imprudently, regardless of its size, then, as Starck, Roland, and Boyer have noted, "it would be necessary to conclude that a person is always responsible," including "the victim of the harm . . . himself. . . . "[304]

The problem with these theories, according to Starck, Roland, and Boyer, is that they look at the question of liability "only from the standpoint of whoever caused the harm. . . . ":

> That way of reasoning is incomplete because it leaves out the point of view of the victim. . . . Everyone has the right to his life and his physical integrity, . . . to the physical integrity of the property that belongs to him, and more generally, to his physical and moral security.[305]

They concluded that the ultimate question is balancing a "right to act" against a "right to security."[306] They did not explain how a balance is to be struck. If the actor's conduct is normal and blameless, what will turn the balance? If it is abnormal and blameless, why should the abnormality matter?

All of these theories have been attacked by Henri Mazeaud, Léon Mazeaud, Jean Mazeaud, and François Chabas. According to these jurists, when proponents of a risk theory speak of "abnormal conduct," they do not mean conduct that is unusual or even unusually dangerous. For the proponents of risk theories, "abnormal conduct" means conduct that a prudent person would avoid. But if fault in the sense of imprudence does not matter, why should it matter what a prudent person would have done? If the criterion of abnormality is abandoned, according to the Mazeauds and Chabas, the only other is the creation of a risk. But that eliminates all criteria.[307] They have noted that, "except in a few cases" such as children and the insane, the law persists in imposing liability for fault in the ordinary sense, whatever

[299] Labbé, "Note," S. 1890.4.18, described by Starck, Roland, and Boyer (n. 253), no. 42.
[300] *See* Chapter VI, pp. 146–47.
[301] Starck, Roland, and Boyer (n. 253), no. 43.
[302] *See* Chapter III, p. 91.
[303] Described by Starck, Roland, and Boyer (n. 253), no. 44.
[304] Starck, Roland, and Boyer (n. 253), no. 45.
[305] Starck, Roland, and Boyer (n. 253), no. 58. For a similar criticism of the risk theories, *see* Terré, Simler, and Lequette (n. 207), no. 685, 686.
[306] Starck, Roland, and Boyer (n. 253), no. 58.
[307] Henri Mazeaud, Léon Mazeaud, Jean Mazeaud, and François Chabas, *Leçons de droit civil II. Obligations: théorie générale*, 5th ed. (Paris, 1998), no. 430.

the jurists may say.[308] That is as it should be, they have said, since there is no reason why it is more equitable to shift the loss to the innocent actor.[309]

The conceptualist's principle of liability for culpable misconduct has been discredited. Yet the French jurists have not found a coherent alternative. As Terré, Simler, and Lequette have observed, "[l]ogic has not necessarily received its due, either as to the sources of the rules, or as to a harmony which has vanished."[310]

Since the nineteenth century, leading German treatise writers have also denied that, in principle, liability for fault is based on moral culpability. According to Josef Esser, liability is imposed because of the "act," not the "actor," and without "the reproach of fault."[311] The reason is "a plausible division of risks," "an acceptable compromise between the interests of the injuring and the injured party."[312] It has been objected that the German Civil Code requires not only that the defendant act intentionally or negligently, but also that his action is "unlawful." For example, he is not liable if he intentionally struck the plaintiff in self-defense since it was not unlawful to do so. If he is liable for negligence, not because he was at fault, but simply because he behaved in the wrong way, it would seem that his liability is really for unlawful behavior.[313] The more fundamental problem is what the "interests" of either party have to do with imposing liability for conduct that the defendant could not help, except in the trivial sense that the defendant always has an interest in escaping liability and the plaintiff in holding him liable.

Today, leading English treatise writers also deny that, in principle, liability for fault is based on moral culpability. Heuston and Buckley, in their revision of Salmond's treatise, claim that "[t]here is no necessary element of 'fault' in the sense of moral blameworthiness. . . ."[314] According to K. M. Stanton, "the compensatory purpose" of tort law should not be "undermined by arguments founded on moral responsibility. . . ."[315] Unlike the French, they do not explain how fault should be reinterpreted.

Since the time of Oliver Wendell Holmes, American jurists have proposed theories to explain why fault in the moral sense should not matter. Holmes argued that if "a man is born hasty and awkward . . . his slips are no less troublesome to his neighbors than if they sprang from guilty neglect."[316] Leading contemporary

[308] Mazeaud, Mazeaud, Mazeaud, and Chabas (n. 307), no. 432.
[309] Mazeaud, Mazeaud, Mazeaud, and Chabas (n. 307), no. 429.
[310] Terré, Simler, and Lequette (n. 207), no. 673.
[311] Josef Esser and Eike Schmidt, *Schuldrecht* I *Allgemeiner Teil* 2 *Vertragshaftung, Schadensersatz, Personmehrheit im Schuldverhältnis Ein Lehrbuch*, 5th ed. (Heidelberg, 1976), 35. *See* Hans Brox, *Allgemeines Schuldrecht*, 10th ed. (Munich, 1982), no. 219.
[312] Esser and Schmidt (n. 311), 35.
[313] *See* Brox (n. 311), no. 219.
[314] R. F. V. Heuston and R. A. Buckley, *Salmond and Heuston on the Law of Torts*, 19th ed. (London, 1987), 216.
[315] Stanton (n. 211), 69.
[316] Holmes (n. 114), 108.

jurists, such as Stephen Perry[317] and Jules Coleman,[318] have argued that the defendant should be liable if he deviated from the standard of conduct that a reasonable person would normally observe, whether or not he is personally at fault. Their claim is like that of the French jurists who believe that the defendant should be liable, even if was not personally imprudent, if his conduct was abnormal. They then describe abnormal conduct as conduct that a prudent person would avoid. Richard Epstein has claimed that liability should be imposed regardless of fault if a case falls within one of four "causal paradigms." The paradigms, however, describe actions that people typically do not perform unless they are at fault:[319] the defendant applied force to the plaintiff's person or thing; he frightened the plaintiff; he compelled the plaintiff to act; or he created a dangerous condition that injured the plaintiff.[320] Epstein then described defenses by which the defendant can escape liability. They look like typical cases in which a person ordinarily would not be at fault. For example, he is not liable if the plaintiff blocked his right of way, and whether the plaintiff did so depends on applicable state traffic laws.[321]

These theories have not been generally accepted, perhaps because they are subject to criticisms like those of the Mazeauds and Chabas in France. The abnormal conduct for which liability is imposed is that which a prudent person would and could avoid. It is not merely conduct that is unusually dangerous, like that of person who unwittingly carries a contagious disease or who is blown off a building into a crowd. But if the personal fault of the defendant does not matter, why should it matter what a prudent person would have done?

In France, England, and the United States, the views of the jurists have had little effect on the results reached by courts. Whatever theory one adopts, the man born hasty and awkward would not escape liability. How could he prove that he was born that way or that, if he had tried, he could not have overcome his limitations? In France, the few cases in which a person is held liable for conduct that he demonstrably could not help are those of children and insane persons. Imposing

[317] Stephen Perry, "The Moral Foundations of Tort Law," *Iowa Law Review* 77 (1992): 449, 451–52; Stephen Perry, "Loss, Agency and Responsibility for Outcomes: Three Conceptions of Corrective Justice," in *Tort Theory*, eds. Ken Cooper-Stephenson and Elaine Gibson (North York, ON, 1993), 24.

[318] Jules L. Coleman, "Tort Law and the Demands of Corrective Justice," *Indiana Law Journal* 67 (1992): 349, 357. *See* Jules L. Coleman, *Risks and Wrongs* (Cambridge, 1992), 333–35; Jules L. Coleman, "The Mixed Conception of Corrective Justice," *Iowa Law Review* 77 (1992): 427, 428, 442; Jules L. Coleman, "Mental Abnormality, Personal Responsibility and Tort Liability," in *Mental Illness: Law and Public Policy*, eds. B. Brody and H. T. Engelhardt, Jr. (Dordrecht, 1980), 107; Jules L. Coleman, "Moral Theories of Torts: Their Scope and Limits: Part I," *Law and Philosophy* 1(3) (1982): 371, 376–78.

[319] On the normative character of Epstein's paradigms, *see* Ernest J. Weinrib, "Causation and Wrongdoing," *Chicago-Kent Law Review* 63 (1987): 407, 417; Perry, "Moral Foundations" (n. 317), 464; Gary T. Schwartz, "The Vitality of Negligence and the Ethic of Strict Liability," *Georgia Law Review* 15 (1981): 963, 988–89.

[320] Richard A. Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973): 151, 166–89.

[321] Richard A. Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability," *Journal of Legal Studies* 3 (1974): 165, 176.

liability on them is a recent development. The insane were not held to the standard of conduct of a normal person until the enactment of the Law of January 3, 1968, now article 489–2 of the Civil Code. By analogy, children were held to an adult standard by the *Assemblée plénière* of the *Cour de cassation* in 1984.[322] Despite the opinion of leading jurists, English courts have held children to the standard of care appropriate to their age,[323] and Canadian courts, applying English common law, have refused to impose liability on the insane.[324] American courts do not hold children to an adult standard, although, according the *Second Restatement of Torts*, they should hold the insane to the standard of a normal person. That was a question on which the *First Restatement* had reserved judgment. In any event, whether to impose liability on children or the insane is not the same question as whether other people should be liable for conduct that they cannot help. People whose conduct is the result of a physical disability are not held liable. The German Civil Code of 1900, while acknowledging that children and the insane are not at fault for failing to meet the standard of a normal adult,[325] holds them liable if, in the court's judgment, fairness requires that the damage be made good.[326]

Again, critics were more successful in discrediting the conceptualists' principle than in finding an alternative of their own.

The one great change has been the development of strict liability alongside liability for fault. Technological changes made it possible, without any fault at all, to cause ever greater amounts of harm. It seemed imperative to impose strict liability whether or not one had a good theoretical reason for doing so. To find such a reason would have been difficult for earlier jurists, although, as we have seen, Molina, Pufendorf, and Domat had justified strict liability on the ground that it prevented one person from taking risks for his own benefit that harmed another.[327] The task was particularly difficult for the nineteenth-century jurists. They had neither the theory of commutative justice relied on by Molina, nor the more indefinite higher principles of Pufendorf and Domat. Moreover, they had defined tort liability as a duty to make compensation for harm caused by fault.

In the end, courts and jurists recognized that nineteenth-century conceptual analysis could not deal with the problem. More acceptable results were reached. Yet no alternative and generally accepted explanation was found for these results.

American courts arrived at a coherent rule: the defendant is liable for harm caused by ultra-hazardous or abnormally dangerous activities. This rule was accepted by American courts and by the *Restatements of Torts*.[328] Yet American jurists did not find a coherent and generally accepted explanation for it. The most serious effort has been made by members of the law and economics movement,

[322] Cass., Assemblée plénière, May 3, 1984 (4th case), D.S. 1984. J.529.
[323] *Gough v. Thorne* [1966] 2 All E.R. 398 (C.A.).
[324] *Att'y Gen'l of Canada v. Connolly* [1989] 64 D.L.R. 4th 84 (Sup. Ct. British Columbia); *Buckley & Toronto Transp. Com'n v. Smith Transport Ltd.* [1946] 4 D.L.R. 721 (Sup. Ct. British Columbia).
[325] German Civil Code (*Bürgerlichesgesetzbuch*) §§ 827–28.
[326] German Civil Code (*Bürgerlichesgesetzbuch*) § 829.
[327] *See* Chapter VI, pp. 146–47.
[328] *Restatement (Second) of Torts* § 519 (1965).

which we will consider later. English courts have rejected the American rule. They adopted an odd one: a property owner is liable if he brought a "non-natural" thing on his land that "escaped" and did damage.[329] The language is taken from the nineteenth-century case of *Rylands v. Fletcher*.[330] The rationale is not at all clear. The French adopted a rule that seems stranger. As we have seen, article 1384 of the Civil Code imposes liability on a person for harm done by objects in his "custody." The meaning of the passage to the drafters is not clear.[331] The nineteenth-century French jurists interpreted it as a special case of liability for fault. Strangely, French courts have now interpreted it to mean that a person is liable without fault for harm done by any object in his "custody," however dangerous or innocuous the object may be, unless the harm was caused by *cas fortuit* or *force majeure*.[332] German courts have not adopted any general rule. They impose strict liability only as provided by a patchwork of special statutes. For example, the defendant is liable for the operation of trains,[333] aircraft,[334] automobiles,[335] and electric and gas installations.[336]

What is missing—and has been missing since the nineteenth century—is an explanation of why liability is imposed, sometimes for fault, and sometimes regardless of fault.

Harm For the conceptualists, as for the rationalists,[337] recovery in tort is based on the principle that one owes compensation for harm caused by fault. The rationalists said little about what constitutes a harm, except that it is a violation of another person's rights. The conceptualists tried to explain what constituted such a violation. The results of their efforts puzzled later jurists, but are still with us.

The nineteenth-century jurists saw two alternatives. One that prevailed in France was to say that the plaintiff could recover for any sort of harm that he might suffer. He had the right not to suffer harm. The other, which prevailed in Germany and then in common law jurisdictions, was to define a violation of rights for which one could recover in a more limited way. There must be a violation of an absolute right such as property, which is a right held against all of the world. There is no liability for violation of a relative right, such as one based on contract, which is a right against a particular person. Although this was a conceptualist solution, it is still with us, overlaid by efforts to account for it by considerations of policy.

Applying their broad definition of harm, French courts have allowed a plaintiff to recover for any harm that he has suffered, including economic losses, even though neither his body nor his physical property were harmed. Factory owners

[329] *Cambridge Water Co Ltd v. Eastern Counties Leather plc.* [1994] 2 A.C. 264; *Read v. J. Lyons & Co., Ltd.* [1947] A.C. 156 (H.L.).
[330] *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265; *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330.
[331] *See* pp. 236–37.
[332] The rule dates from Cass, ch. réun., February 13, 1930, D. 1930.1.57.
[333] *Haftpflichtgsetz* § 1(1). [334] *Luftvehkehrgesetz* § 33. [335] *Strassenverkehrgesetz* § 7.
[336] *Haftpflichtgsetz* § 2(1). [337] *See* Chapter VI, p. 188.

have recovered for profits that they lost when defendants cut off their supply of gas by breaking a pipe belonging to a third party.[338] A soccer club has recovered for profits that it lost when the defendant negligently killed a star player.[339] A bus company has recovered for the profits that it lost when defendants negligently caused a traffic jam and their potential customers either walked or took cabs to their destinations.[340]

Nevertheless, applied consistently, this approach would lead to results that the French courts have been unwilling to accept. They have limited recovery even though they cannot explain why it should be limited. For example, they did not allow a partnership to recover for the deals that were not consummated because the company president who was negotiating them was negligently injured.[341] They did not allow creditors to recover the sums that they would never be repaid because the borrower was negligently killed.[342] In each case, they denied relief without admitting that they were limiting the definition of harm. But it is hard to know how seriously they took the reasons that they gave. Although French law allows recovery for "the loss of a chance," according to the *Cour de cassation*, the partnership could not recover because consummation of the deal under negotiation was not "certain." Although a plaintiff is not denied relief because he could have insured himself against a loss, the creditor was denied relief because he could have purchased insurance on the life of the debtor.

The preliminary draft of the German Civil Code contained a provision like that of the French: "One who has caused another harm (*Schaden*) by intention or by negligence by an unlawful (*widerrechtlich*) act or omission is obligated to make him compensation."[343]

The members of the First Commission accepted the *Pandektists*' general principle governing recovery in tort law: the plaintiff could recover for a violation of a right.[344] A question raised at its first meetings was:

> [W]hat is to be understood as the "violation of a right": only the violation of a right which receives an absolute protection or any violation of the legal order by an act prohibited by law as contrary to the legal order . . . ?[345]

The Commission chose the first alternative. As a general principle, the plaintiff could recover only for the violation of an "absolute right." It noted that a "right of

[338] Cass., 2e civ. ch., May 8, 1970, Bull. civ. 1970. II. no. 160.
[339] Cour d'appel, Colmar, April 20, 1955, D. 1956.Jur.723.
[340] Cass., 2e civ. ch., April 28, 1965, 1965 D.S.Jur.777.
[341] Cass., 2e civ. ch., June 12, 1987, JCP 1987. IV. 286.
[342] Cass., 2e civ. ch., February 21, 1979, JCP 1979. IV. 145.
[343] *Teilentwurf des Vorentwurfs zu einem BGB, Recht der Schuldverhältnisse* no. 15, § 1.
[344] *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Recht der Schuldverhältnisse*, Teil 1, *Allgemeiner Teil* I, ed. Werner Schubert (Berlin, 1980), 657 ("the sphere of rights of each person must be respected and left untouched by all other persons; whoever acts contrary to this general command of the law without there being any special grounds for justification has by that alone committed a tortious act [literally, a nonpermitted act, *unerlaubte Handlung*]").
[345] *Protokolle der Kommission zur Ausarbeitung eines Bürgerlichen Gesetzbuchs* (1881–89), in vol. 3 of *Die Beratung des Bürgerlichen Gesetzbuchs*, eds. H. H. Jakobs and Werner Schubert (Berlin, 1983), 971–72.

obligation" (*obligatorisches Recht*), such as a contract right, is not "absolute." An absolute right could be violated by anyone. A right of obligation "cannot be violated by anyone except the debtor."[346] That conclusion followed, supposedly, from the definition of the violation of a right.

The result, after several amendments, was § 823(1) of the German Civil Code, which enumerated certain of the absolute rights: "One who intentionally or negligently unlawfully violates the life, body, health, freedom, property or similar right (*sonstiges Recht*) of another is obligated to compensate him for the harm that thereby ensues."[347]

This provision does not permit recovery for pure economic harm—harm that results when none of these enumerated rights has been violated—as the *Reichsgericht* held soon after the Code was enacted.[348] That limitation is the result of the conceptualist approach that the Commission had taken from the nineteenth-century jurists: one defines a right and then deduces the consequences.

In the early twentieth century, the same approach was taken by jurists in England and the United States. According to J. F. Clerk and W. H. B. Lindsell, "interference with rights of service or with rights of contract generally is not actionable." In that respect, such rights differed from rights such as property, which were "unqualified."[349] A similar principle was adopted in the eighth edition of C. G. Addison's treatise on torts, which was published in 1906 after his death by William Gordon and Walter Griffith.[350] They said that because negligence is the breach of a duty, the plaintiff is therefore liable only "where there is an obligation toward the plaintiff." "It follows," they said, "that if there is no duty to be careful there is no action for negligence."[351] Similarly, in 1910, Sir John Salmond said that

[346] *Protokolle der Kommission zur Ausarbeitung eines Bürgerlichen Gesetzbuchs* (n. 345), 984, 986–87.

[347] Section 704(1) or an earlier draft provided: "The violation of life, body, health, freedom and honor are also [along with property] to be regarded as the violation of a right." The provision was changed by adding the phrase "similar right," since it had proved impossible to enumerate all of the absolute rights, and deleting the right to one's honor, since it had been decided on independent grounds that a plaintiff should not recover money damages for violations of his honor, a view that has since been corrected by decisions of the *Bundesgerichtshof*: *Bundesgerichtshof*, 1954, EBGHZ 13, 334.

[348] *Reichsgericht*, April 11, 1901, ERGZ 48, 114; *Reichsgericht*, February 27, 1904, ERGZ, 58, 24.

[349] John Frederick Clerk and William Harry Barber Lindsell, *The Law of Torts*, ed. W. Paine, 3rd ed. (London, 1904), 11. They cited *Cattle v. The Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453, in which the plaintiff was not allowed to recover the extra expenses that he incurred when the defendant's negligence caused the flooding of a third party's land on which he was building a tunnel. In that case, however, the court had rested its decision on different considerations—that the damage was "remote" and that recovery would unduly multiply the number of possible plaintiffs: *Stockton Waterworks*, 457, as noted by Robby Bernstein, *Economic Loss*, 2nd ed. (London, 1998), 11. At another point, Clerk and Lindsell do suggest that the case turned on the remoteness of the damage: *Law of Torts*, 133.

[350] Charles Greenstreet Addison, *A Treatise on the Law of Torts or Wrongs and their Remedies*, eds. William Gordon and Walter Griffith, 8th ed. (London, 1906). Although they styled themselves "editors," Gordon and Griffith had found it necessary to rewrite the treatise extensively because it was unsystematic, they said, compared with the treatises of Sir Frederick Pollock, and Clerk and Lindsell. Since it contained "little or nothing about the law of Negligence," they had written the chapter on that subject from scratch: Addision, *Law of Torts*, viii. They also cited *Stockton Waterworks* (n. 349) as an illustration.

[351] Addison (n. 350), 701.

"nuisance is actionable only at the suit of the occupier or owner of the land affected by it; not at the suit of strangers whatever pecuniary interest they may have in the non-existence of the nuisance."[352] He also said that "[n]egligent injury to property gives an action to the owner of that property, or to other persons having some proprietary interest therein, but not to mere strangers who are thereby subjected to pecuniary loss."[353] In later editions, Salmond generalized the principle: "He who does a wrongful act is liable only to the person whose rights are violated."[354] Thereafter, the same principle was endorsed in a long series of English cases stretching from 1911 to 1969.[355]

It made its way to the United States in 1927 in the landmark opinion of Oliver Wendell Holmes in *Robbins Dry Dock and Repair v. Flint*,[356] in which Holmes once again adopted a conceptualist solution despite his complaints about conceptualism. In that case, while a steamer was in dry dock, its propeller was damaged as a result of the defendant's negligence. The plaintiff had chartered the steamer and sued for the profits that he lost during the delay resulting from the repair of the propeller. Reversing the circuit court, Holmes held that he could not recover because "[t]he injury to the propeller was no wrong to the [plaintiff] but only to those to whom it belonged."[357]

In some cases, applying the rule straightforwardly leads to results that courts are not willing to permit. They have either refused to apply the rule or done so less than

[352] John William Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 2nd ed. (London, 1910), 10. For that principle, he cited there *Stockton Waterworks* and *Anglo-Algerian Steamship Co. Ltd. v. The Houlder Line, Ltd.* [1908] 1 K.B. 659, in which the defendant had negligently damaged a third party's dock and the plaintiff was not allowed to recover for the loss he suffered when his ship was unable to use it. As in *Stockton Waterworks*, the court had not mentioned this principle, but spoken of the remoteness of the harm (at 665) and the danger of multiplying possible plaintiffs (at 668). Indeed, the court noted that the plaintiff could recover: at 664–65. Salmond was speaking of what are now called cases of public nuisance if the plaintiff were specially affected. The rule is now said to be different in nuisance than in negligence, but the court was writing before that difference came to be accepted.

[353] Salmond (n. 352), 10.

[354] Salmond, *Law of Torts*, ed. W. T. S. Stallybrass, 8th ed. (London, 1934), 133. Whether the English treatise writers who first put forward this argument knew that German jurists had already done so is another question. That is certainly a possibility for Salmond. He was surely familiar with the German Civil Code and may have known of the work of the First Commission as well. His select bibliography in his book *Jurisprudence* shows a thorough knowledge of German writing on private law and a special admiration for Bernard Windscheid, one of the most distinguished members of the First Commission. He described Windscheid as "one of the most distinguished German exponents of modern Roman law" and his book, *Lehrbuch des Pandektenrechts*, as "an admirable example of the scientific study of a legal system": John William Salmond, *Jurisprudence or the Theory of the Law* (London, 1902), 654. Stone has suggested that he used ideas taken from Windscheid in that book: Julius Stone, *Legal Systems and Lawyers' Reasonings* (London, 1964), 141. *See* Alex Frame, *Salmond Southern Jurist* (Wellington, New Zealand, 1995), 63.

[355] *La Société Anonyme de Remorquage à Hélice v. Bennets* [1911] 1 K.B. 243, 245–46, 248; *Elliott Steam Tug Co. Ltd. v. Shipping Controller* [1922] 1 K.B. 127, 140; *Morrison Steamship Co. Ltd. v. Greystoke Castle* [1947] A.C. 265, 280, 305–06 (H.L.); *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 730–31; *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.)* [1955] A.C. 457, 484; *Electrochrome Ltd. v. Welsh Plastics Ltd.* [1968] 2 All E.R. 205, 206; *Margarine Union GmbH v. Cambray Prince Steamship Co. Ltd.* [1969] 1 Q.B. 219, 251.

[356] 275 U.S. 303 (1927). [357] *Robbins Dry Dock* (n. 356), 308.

straightforwardly. In *People's Express Airlines v. Consolidated Rail Corp.*,[358] a commercial airline recovered when it was forced to evacuate its premises because the defendant negligently allowed a dangerous chemical to escape from a railway tank car. The court refused to apply the rule that denies recovery when no physical harm has occurred. "The challenge," the court said, "is to fashion a rule that limits liability but permits adjudication of meritorious claims."[359]

In other cases, German and English, as well as American, courts have refused to apply the rule. The best known are those in which plaintiffs lost money that they loaned or invested in the enterprise of a third party on the basis of false information on its financial condition negligently furnished them by a defendant with which they did not have a contract.[360] German courts, however, have claimed that the plaintiff was not recovering in tort, but on a contract, even though the two had never entered into a contract.

Once again, although later jurists found the conceptual analysis of the nineteenth century to be inadequate, they did not find an alternative. The court in *People's Express* did not suggest one. Lord Denning defended the old rule by an appeal to a miscellany of policy considerations, some of them conclusory, such as "this is a hazard that we all run," or "the risk of economic loss should be suffered by the whole community," or "the law provides for deserving cases."[361] One commentator has said that the purpose of the rule is to avoid "indeterminate liability," that there is no reason why a person should protect another's "business interests" as distinct from his "property," and that an "individual's property is to some extent constituted by his property."[362] These are attempts ex post to defend a rule that ex ante rested on conceptual reasoning that is not acceptable today.

Contract

The nineteenth-century jurists defined contract in terms of the will of the parties.

According to the French jurists, and many modern scholars, that definition was enshrined in the Civil Code. They pointed to article 1134: "Agreements legally formed take the place of law for those who have made them. They can only be

[358] 495 A.2d 107 (N.J. 1985).

[359] *People's Express Airlines* (n. 358), 111. In contrast, in Germany, when the defendant negligently blocked the only passage to a canal leading to a mill, a shipper under contract to pick up grain at the mill recovered for the profits that he lost because one of his ships could not leave the canal, but not for those that he lost because another one could not enter and pick up the grain. The court treated the ship trapped in the canal as one that had been physically disabled, and so claimed that it was applying the rule: *Bundesgerichtshof*, December 21, 1970, BGHZ 55, 153.

[360] *Hedley Byrne & Co. Ltd. v. Heller & Ptnrs., Ltd.* [1964] A.C. 465 (H.L.); *White v. Guarante*, 372 N.E. 315 (N.Y. 1977); *Bundesgerichtshof*, February 13, 1979, NJW 1979, 1565; *Oberlandesgericht*, Munich, July 13, 1956, BB 1956, 866. The courts stressed that the information was prepared or supplied to a definite person or group. Plaintiffs have not recovered when information was prepared for general circulation among an indefinite number of actual or potential investors or creditors: *Credit Alliance Corp. v. Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985).

[361] *Spartan Steel & Alloys Ltd. v Martin & Co (Contractors) Ltd.* [1973] 1 Q.B. 27 (C. A.).

[362] Murphy (n. 211), 96.

revoked by mutual consent or for reasons authorized by law. They must be executed in good faith."

The statement that agreements "take the place of law" for the parties was a paraphrase of a passage in Domat, who himself had taken it from a collection of decretals promulgated by the medieval Pope Boniface VIII,[363] who in his turn had taken it from the *Corpus Juris Civilis*.[364] As Alfons Bürge observed, the passage says that agreements take the place of law; it does not say anything about autonomy.[365] Yet, according to many modern scholars, this text proclaimed the autonomy of the will[366] and the freedom of contract.[367] Indeed, it exalted contract to the same level as law.[368]

It is not clear to what extent the makers of the Code understood and accepted the principles of the iusnaturalists, and of Domat and Pothier. These jurists had believed that, while a party entered into a contract by consent or will, nevertheless the terms of the contract were not merely expressions of their will. Rather, they were—or ought to be—terms consistent with justice. Nevertheless, the articles of the Code and the remarks of the drafters are more consistent with that understanding of contract than the one that emerged later in the century. Articles 1108 and 1131 require the contract to have a lawful *cause*. Article 1104 explains that, when a contract is "commutative" (*commutatif*), "each of the parties commits himself to give or do a thing that is regarded as the equivalent of that which is given or done for him." Article 1135 provides: "Agreements are obligatory not only as to that which is expressed in them but also as to all the consequences that equity, usage or statute give the obligation according to its nature." Apparently, we are still in a world in which contracts have a "nature," in which certain consequences follow according to "equity" from that "nature," and in which the nature of some contracts requires, in principle, an exchange of equivalents.

The drafters may have drawn on the ideas of the earlier jurists more on account of familiarity than understanding or conviction. Yet, on the rare occasions on which they speak about the basic principles of contract law, their statements are consistent with these ideas. According to Portalis:

> The freedom to contract cannot be limited except by justice, good mores and public utility . . . .
>
> There are situations as to which justice is clearly manifested. A partner, for example, wishes to divide all of the profits of a partnership without taking part in the risks. The claim

[363] VI 5.13.85. [364] D. 50.17.23. [365] Bürge (n. 177), 64–65.

[366] For example, Cornu (n. 253), 1: § 289; Halpérin (n. 175), 279; Christian Larroumet, vol. 3 of *Droit civil*: *Les obligations Le contrat*, 4th ed. (1998), § 116; F. Marty and P. Reynaud, vol. 1 of *Droit civil: Les Obligations*, 2nd ed. (Paris, 1988), § 33; Mazeaud, Mazeaud, Mazeaud and Chabas (n. 307), 1: § 43; 2: § 116.

[367] For example, Ghestin and Goubeaux (n. 2), § 137; Marty and Reynaud (n. 366), 1: § 33; Alex Weill and François Terré, *Droit civil: Les Obligations*, 4th ed. (Paris, 1986), § 10.

[368] For example, Jean Carbonnier, vol. 2 of *Droit civil*, 11th ed. (Paris, 1977), 66, and vol. 4: 35; Mazeaud, Mazeaud, Mazeaud, and Chabas (n. 307), 1: § 43; Savatier (n. 266), § 2; Weill and Terré (n. 367), § 18; Alex Weill and François Terré, *Droit civil: Introduction Générales*, 4th ed. (Paris, 2979), § 96.

is revolting. One need not look outside such an agreement for an iniquity that is perpetrated by the letter of the agreement itself.[369]

Cambarcérès explained: "Every contract is essentially an exchange; it presupposes therefore the return of an equivalent. . . ."[370] Portalis said that, "undoubtedly . . . good faith, reciprocity, and equality are required in contracts. . . ."[371]

Again, the Code itself said that the parties were bound to all of the consequences that the laws, equity, and custom attach to their agreement,[372] paraphrasing Domat.[373] As we have seen, Domat, like the late scholastics and iusnaturalists, had said that terms are read into contracts according to "natural equity," such as a warranty into the contract of sale.[374] The seller might disclaim the warranty if the "equity" of the contract was preserved by lowering the price.[375] That was hardly the view that the will of the parties in and of itself is the source of such terms. The drafters seem to have held the earlier view. Bigot-Préameneu said that the provisions of the Code were based on features that were "inherent in the contract, which differentiate its nature and effects."[376] Lacuée, a critic of the draft, objected that the Code might "extend obligations well beyond the limits the contract debtor consented to give them" by "imposing on the debtor obligations that he could not have foreseen." Tronchet, for the drafting committee, answered:

> The contract of sale, for example, admits obligations that are the natural result of the contract because they are drawn from its essence, and that they have their effect although they are not expressed at all. Such, among others, is the warranty.[377]

These remarks, it must be emphasized again, are scraps of thought thrown out as the occasion demanded, and while they indicate a familiarity with the work of the earlier jurists, they do not imply a serious commitment to it or even anything more than a superficial understanding of it. Nevertheless, they certainly do not indicate that the old theory had been abandoned for a new one that contract is merely the will of the parties, and that the justice or injustice of the terms does not matter.

According to Halpérin, the Code magnifies the importance of the individual will, since it allows property to be transferred as soon as the parties assent to a sale, rather than upon delivery, as Roman law provided. He acknowledges that the drafters took this provision from iusnaturalists such as Grotius,[378] but he believes,

[369] Portalis, Discours préliminaire prononcé lors de la présentation du projet de la Commission du gouvernement, in Fenet (n. 178), 1: 510.

[370] Rapport fait à la convention nationale sur le 2^{e} projet de Code civil, par Cambacérès, séance du 23 fructidor, an II (September 9, 1794), in Fenet (n. 178), 1: 107.

[371] Portalis (n. 369), 1: 513.

[372] Code civil art. 1135.

[373] Jean Domat, *Les Loix civiles dans leur ordre naturel*, 2d ed. (Paris, 1713), liv. I, tit. i, sec. 3, § 12.

[374] Domat (n. 373), liv. I, tit. i, sec. 3, § 12.

[375] Domat (n. 373), liv. I, tit. i, sec. 4, § 2.

[376] Présentation au Corps-Législatif, et exposé des motifs, par M. Bigot-Préameneu, in Fenet (n. 178), 13: 329.

[377] Tronchet, Discussion du Conseil d'état, Procès-verbal de la séance du 7 pluviose an XII (January 28, 1804), in Fenet (n. 178), 14: 54–55.

[378] Hugo Grotius, *De iure belli ac pacis libri tres* (Amsterdam, 1646), II. xii. 15.1. *See* Samuel Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), V.v.3; Domat (n. 373), liv. I, tit. ii, § 7.

partly for this reason, that Grotius espoused a new theory of contract that stressed the will.[379] We have seen, however, that Grotius took this principle, and many others, from the late scholastics.[380]

Similarly, the nineteenth-century German jurists defined contract in terms of the will, or consent or agreement, of the parties, without limiting, in principle, what could legitimately be willed.[381] Contract, they said, is a type of *Rechtsgeschäft*—a term that is virtually untranslatable, but which English writers have called a "legal transaction," a "juristic act," or an "act-in-law." A *Rechtsgeschäft*, in the words of Windscheid, is "a private declaration of will (*Willenserklärung*) intended to produce a legal effect." The legal effect "is always the production, extinction, or modification of legal rights." *Rechtsgeschäft* includes more than contract. A last will and testament also is a private declaration of will intended to produce a legal effect. Windscheid explained:

> The most important distinction to be drawn among *Rechtsgeschäfte* is that between unilateral and bilateral acts. Either the *Rechtsgeschäft* comes into being through the declaration of one person's will [as in the case of a last will and testament], or the agreement of several persons' wills is necessary. More precisely, in the latter case the will declared by one person must be grasped and held firm by the will manifested by others. A bilateral *Rechtsgeschäft* is commonly termed a contract.[382]

Although they claimed to be interpreting the Roman texts, these ideas were distant from the Roman law of particular contracts in which only some contracts bound the parties upon consent, and in some the parties were bound to whatever good faith required. Again, their ideas were like those of the rationalists. As we have seen,[383] Leibniz and Wolff described the freedom of the parties to contract on any terms they choose as conceptually limitless. In Leibniz's view, Luig observed, contract law is "fundamentally governed by the principle of the freedom and equality of the citizens. This equality is also realized in the freedom to make a law for one's own contractual relations through the *lex contractus*. . . ."[384] Again, it would be surprising had the Roman texts happened to embody these same ideas.

In common law jurisdictions, contract was defined as mutual assent.[385] As A. W. B. Simpson has said, the will of the parties became "a sort of Grundnorm

[379] Halpérin (n. 175), 57, 130, 207. [380] *See* Chapter III, p. 97; Chapter V, p. 137.

[381] Savigny (n. 27), 3: § 134; Puchta (n. 42), §§ 49, 54; Windscheid (n. 32), 1: § 69.

[382] Windscheid (n. 32), 1: § 69. For similar accounts, *see* Savigny (n. 27), 3: § 134; Puchta (n. 42), §§ 49, 54; Arndts (n. 190), § 58.

[383] *See* Chapter VIII, p. 189.

[384] Klaus Luig, "Leibniz als Dogmatiker des Privatrechts," in *Römishes Recht in der europäischen Tradition Symposion aus Anlass des 75 Geburtstages Franz Wieacker*, eds. Okko Behrends, Malte Diesselhorst, and Wulf Eckart Voss (Ebelsbach, 1985), 213 at 239.

[385] Kent (n. 109), *477; Dodd, "On the Construction of Contracts: Assent—Construction," *The Legal Observer* 12 (1836): 249, 249–50; Peter Carey, "A Course of Lectures on the Law of Contract: Lecture I," *The Law Times* 4 (1845): 463, 505; Theophilus Parsons, vol. 1 of *The Law of Contracts* (Boston, MA, 1860), *399; Theoron Metcalf, *Principles of the Law of Contract* (New York, 1878), 14; Sir Frederick Pollock, *Principles of Contract* (London, 1885), 23–24; Samuel Leake, *Elements of the Law of Contract* (London, 1867), 12; William Anson, *Principles of the English Law of Contract* (London, 1889), 13; Louis Hammon, *General Principles of the Law of Contract* (St. Paul, MN, 1912), 38.

from which as many rules of contract law as possible were to be inferred."[386] As a consequence, the terms of a contract were whatever the parties chose them to be. Thus, as Joseph Story said:

> [E]very person who is not from his peculiar condition under disability is entitled to dispose of his property as he chooses; and whether his bargains are wise and discreet or profitable or unprofitable or otherwise are considerations not for courts of justice but for the party himself to deliberate upon.[387]

Again, the common lawyers claimed to have found this principle in their sources. But as we have seen,[388] before the rise of conceptualism, the common lawyers had not been thinking in terms of contract, let alone a will theory of contract. They had been thinking in terms of writs such as covenant and assumpsit.

As in the case of property, English and American historians have tended to assume that whatever was new in the common law of contract was a nineteenth-century innovation rather than a borrowing. Grant Gilmore said that contract, as a legal category, was invented by Christopher Columbus Landgell.[389] Atiyah claimed that the idea of will was new. "[T]raditionally," he said, "a contract was primarily conceived of as a relationship involving mutual rights and obligations; there was not necessarily an implication that the relationship was created by a conscious and deliberate act of will . . . ."[390] Horwitz believes that the generic sale was first recognized in the nineteenth century. Before that time, he thinks, contract was simply a means of transferring title to specific property. As we have seen, however, contract was systematically organized as a distinct body of law by the late scholastics.[391] The idea that all contracts are entered into by consent goes back to the Romans.[392] The generic sale was recognized in the Middle Ages and subjected to papal legislation.[393] Again, a source of difficulty is that their familiarity with Anglo-American law leads historians to assume that what changed in the common law in the nineteenth century was brand new, and changed because of nineteenth-century conditions, not because of borrowing from abroad.

In any event, in the United States, the definition of contract as the will of the parties touched off a constitutional crisis. American courts have the power to review the constitutionality of legislation. The American Constitution contains a clause providing that no one can be deprived of life, liberty, or property without due process of law—a clause that was construed to protect contract rights. From 1905,

[386] Simpson (n. 110), 266.

[387] Joseph Story, vol. 1 of *Commentaries on Equity Jurisprudence as Administered in England and America*, 14th ed. (Boston, MA, 1918), 337.

[388] *See* p. 210.

[389] For example, Grant Gilmore, *The Death of Contract* (Columbus, OH, 1974).

[390] Atiyah (n. 196), 37.

[391] *See* Chapter III, pp. 93–98.

[392] *See* Chapter I, p. 20; Chapter II, pp. 47–48.

[393] Accursius, *Glossa ordinaria* to C. 4.48.2 to *veneant* (Venice, 1581), X 5.19.6; James Gordley, "The Origins of Sale: Some Lessons from the Romans," *Tulane Law Review* 84 (2010): 1437, 1456–57. *See* generally Wolfgang Ernst, "Gattungskauf und Lieferungskauf im romischen Recht," *Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte, Romanistische Abteilung* 114 (1997): 303.

when the Supreme Court decided *Lochner v. New York*,[394] until 1937, when it retreated in *West Coast Hotel v. Parrish*,[395] the Court held that the terms on which parties contract were up to them unless some public interest was at stake. Otherwise, their right to contract on whatever terms they chose was violated. For example, the state could require a ten-hour day for railway engineers because safety depended on their alertness, but it could not do so for bakers, since the wholesomeness of their bread did not depend upon how long they worked.[396]

In a famous dissent, Oliver Wendell Holmes objected that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[397] The majority of the Court would have denied that its decision depended on the theories of Herbert Spencer or anyone else. It may be that the majority was sympathetic to Spencer's theories, or opposed to social legislation, for the same reasons as many conservatives who were not jurists. But the majority claimed to be deciding the case according to law. Nineteenth-century contract law had provided the Court with the minor premise of its argument. The major premise was that the US Constitution protected contract rights. The minor premise might have been taken from Joseph Story: whether one's "bargains are wise and discreet or profitable or unprofitable or otherwise are considerations not for courts of justice but for the party himself to deliberate upon." Judge Peckham, speaking for the Court in *Lochner*, affirmed "the general right of an individual to be free in his person and in his power to contract. . . ."[398]

When he stated that principle, Story was not thinking of the problems of industrialization or capitalism. The principle was that of his European and American contemporaries, and of the rationalists before them. Like them, he could see no other source of contractual obligations than the will of the parties, and no limits in principle to what the parties might will. Neither could the majority of the Supreme Court.

Indeed, the critics of the Supreme Court themselves could see no source of contractual obligations other than the will of the parties. Their criticism was not that some terms of a contract are substantively unfair and that legislation may be needed to provide fair ones. Rather, it was that the party with stronger bargaining power could impose his will on the other. Charles McCurdy has pointed to Richard Ely's *Studies in the Evolution of Industrial Society* in 1903 as typical of the reform literature of the time.[399] Assume that people are equal, Ely argued, and "each one can guard his own interests individually, providing only the hampering fetters of law should make way for a reign of liberty." But instead behind the contract lies "inequality in strength of those who form the contract. . . . Wealth and poverty, plenty and hunger, nakedness and warm clothing, ignorance and learning, face each other in contract, and find expression in and through contract."[400] These

[394] 198 U.S. 45 (1905). [395] 300 U.S. 379 (1937).
[396] *Lochner v. New York*, 198 U.S. 45, 57–59 (1905). [397] *Lochner* (n. 396), 75.
[398] *Lochner* (n. 396), 57.
[399] Charles W. McCurdy, "The 'Liberty of Contract' Regime in American Law," in *The State and Freedom of Contract*, ed. Harry N. Scheiber (Stanford, CA, 1998), 161 at 162.
[400] Richard Ely, *Studies in the Evolution of Industrial Society* (New York, 1903), 402.

arguments were tracked by Roscoe Pound in his famous essay in 1909, "Liberty of Contract."[401] As McCurdy noted, Oliver Wendell Holmes wanted to say in an opinion that "to suppose that every other force may exercise its compulsion at will but that the government has no authority to counteract the pressure with its own is absurd." He backed down when his fellow justices objected.[402] One can see why they did. According to Ely and Pound, the terms of all contracts are determined by relative bargaining power, much as the motions of particles are determined by the vectors of opposing forces. They proposed no standard for determining which interplay of forces was just or unjust, any more than a moral standard could apply to the motion of a particle. Consequently, they proposed no standard as to when the state could justly intervene. It is no wonder that, in the opinion of the *Lochner* majority, there was no middle ground between holding all state intervention to be unconstitutional or allowing the state to change the terms in any contract where there had been a difference in bargaining power—which is to say, in almost any contract. The constitutional protection of contract would be meaningless.

Relief from terms to which one consented Having defined contract in terms of the will of the parties, the nineteenth-century jurists, like the rationalists,[403] believed that, in principle, the parties could contract on whatever terms they chose. They then had to explain why the texts that they regarded as authoritative did give relief from unfair terms, at least under some circumstances. As the previous remarks suggest, that task was not easy. We will consider one example: relief for an unjust price.

In France, despite the arguments by Berlier,[404] the French Civil Code provided that the seller can rescind a sale of land when he has received less than five-twelfths of its value,[405] the value to be determined as of the time of sale.[406] As we have seen, Portalis, Cambacérès, and Tronchet explained that the nature of a commutative contract required equality.[407]

In Germany, relief for an unjust price had been curtailed in Prussia in 1794. It was abolished in Bavaria in 1861, in Saxony in 1863, and in commercial matters by the *Allgemeines Handelsgesetzbuch* of 1861. Nevertheless, Roman law remained the

[401] Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 454.

[402] McCurdy (n. 399), 183. [403] *See* Chapter VIII, p. 189.

[404] J. Locré, vol. 12 of *La Legislation civile, commerciale et criminelle de la France* (Paris, 1826–31), 65.

[405] French Civil Code (*Code civil*), art. 1674.

[406] French Civil Code (*Code civil*), art. 1675.

[407] Portalis, Discussion du Conseil d'état, Procès-verbal de la séance du 21 nivose an XII (January 12, 1804), in Fenet (n. 178), 14: 46–47. He had made the argument about the nature of a commutative contract in Portalis, Discussion du Conseil d'état, Procès-verbal de la séance du 30 frimaire an XII (December 22, 1803), in Fenet (n. 178), 14: 43; Cambacérès, Discussion du Conseil d'état, Procès-verbal de la séance du 30 frimaire an XII (December 22, 1803), in Fenet (n. 178), 14: 43; Tronchet, Discussion du Conseil d'état, Procès-verbal de la séance du 7 pluviose an XII (January 28, 1804), in Fenet (n. 178), 14: 63. *See* pp. 249–50.

chief object of university study, and with it the Roman text on which the doctrine of *laesio enormis* had been based.[408]

Anglo-American courts of equity refused to enforce an "unconscionable" contract. I have shown elsewhere that nineteenth-century American courts regularly refused to do so when an exchange was one-sided.[409] Although a party denied relief in equity could still sue for damages at common law, his damages would be awarded by a jury that might be reluctant to award much on such a contract. In any event, one historian has found only two reported cases in which a plaintiff who was denied specific performance still managed to recover damages.[410]

Nevertheless, many of the nineteenth-century jurists said that, in principle, there should be no relief for an unjust price. According to Demolombe, value was "subjective," "variable," and "relative."[411] Laurent said that the value of things was not "absolute": things worth one amount "from a commercial point of view" might be worth a different amount to the parties because of the "needs, tastes and passions."[412] Duranton, Colmet de Santerre, and Marcadé claimed that the relief supposedly given for an unjust price was really given for some "defect in consent"—for fraud, mistake, duress, or some sort of moral constraint.[413] Glasson thought that although relief violated the "principle of freedom of contract," it was an exception justified on grounds of "humanity."[414]

German jurists regarded relief as an exception to the normal rules of contract law. The basic principle was contained not in the Roman text that gave relief to one who sold land at less than half its just price, but in another text, mentioned earlier, which said that "it is permitted by nature for one party to buy for less and another to sell for more, and thus each is allowed to outwit the other."[415] That text must state the general principle, they said, because contracts are made by the will of the parties, and hence relief for an unjust price is contrary to the nature of a contract. Consequently, that text, according to Windscheid, stated a principle rooted "in the nature of a contract of sale":[416] according to Vangerow, one "lying in the nature of things."[417] It must be so, Holzschuer said, because relief for a disparity in price interfered with "the binding force of contracts."[418] Nevertheless, as in other situations, once the German jurists declared a principle, they were willing to make exceptions to it. Windscheid asked: "Are there not limits to the advantage one contracting party can take of the other?"[419] Some jurists pointed to the

[408] *See* Chapter I, p. 35.
[409] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 154–58.
[410] Ralph A. Newman, "The Renaissance of Good Faith in Contracting in American Law," *Cornell Law Rev*iew 54 (1969): 553, 559.
[411] Demolombe (n. 5), 24: § 194. [412] Laurent (n. 6), 15: § 485.
[413] Duranton (n. 3), 10: §§ 200–01; Demante and Colmet de Santerre (n. 4), 5: § 28 *bis*; Victor Marcadé, *Explication théorique et pratique du Code Napoléon* (Paris, 1859), 357–58.
[414] Ernest Glasson, *Eléments du droit français* (Paris, 1884), 550, 553.
[415] D. 19.2.22.3. [416] Windscheid (n. 32), 3: § 396, n. 2.
[417] Vangerow (n. 247), 3: § 611, n. 1.
[418] Rudolf von Holzschuher, vol. 3 of *Theorie und Casuistik des gemeinen Civilrechts* (Leipzig, 1864), 729–30.
[419] Windscheid (n. 32), 2: § 396, n. 2.

language of the text that provided a remedy to the seller of land: relief was given because "it is equitable" (*humanum est*).[420] They disagreed about how broadly to read the Roman text that provided for relief. Some jurists wished to limit relief to sellers of land because it was an exception.[421] Others wished to extend it to buyers and to kindred contracts because such relief would be equally equitable.[422] They agreed, however, that to give relief was to make an exception to the normal rules of contract law.

English and American jurists also thought that, in principle, relief should not be given because a price was unjust. Some made arguments about value like those of Demolombe and Laurent. Value, according to Joseph Story, "must be in its nature fluctuating and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another man would."[423] According to Chitty and Metcalf, there were "no means" for determining whether an adequate price had been paid.[424] William Wentworth Story thought that the determination would require "a psychological investigation into the motives of the parties,"[425] a view also held by Addison.[426] Pollock quoted Hobbes' attack on Aristotle's concept of a just price: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give."[427]

Moreover, to give relief would interfere with the freedom of the parties to contract on whatever terms they chose. As noted earlier,[428] Joseph Story said that whether a person's bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon.[429] A similar argument was made, along with the argument about value, by Chitty, Addison, Metcalf, and William Wentworth Story.[430] It was also advanced in one form or another by Leake, Taylor, Bishop, Smith, Newland, and Hammon.[431]

The Anglo-American treatise writers then had to explain why courts of equity refused to enforce an "unconscionable" contract. As A. W. B. Simpson observed,

[420] Vangerow (n. 247), 3: § 611, n. 1 (describing the views of others); Carl von Wächter, vol. 2 of *Pandekten* (Leipzig, 1881), § 207, 472–73.

[421] Holzschuher (n. 418), 3: 729–30; Vangerow (n. 247), 3: § 611; Wächter (n. 420), 2: § 207. Some wanted to limit relief to sellers on the grounds that sellers who accepted a low price were more like to have been needy than buyers who paid a high one: Puchta (n. 42), § 364; Keller (n. 188), 333.

[422] Johann Seuffert, vol. 2 of *Praktisches Pandektenrecht* (Wurzburg, 1852), § 272.

[423] Story (n. 387), 1: 339.

[424] Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal and upon the Usual Defences to Actions Thereon* (London, 1826), 7; Metcalf (n. 385), 163.

[425] Story (n. 109), 435.

[426] Charles Greenstreet Addison, *A Treatise on the Law of Contracts* (London, 1911), 12.

[427] Pollock (n. 385), 172, quoting Thomas Hobbes, *Leviathan* I.xv. 102.

[428] *See* p. 252.

[429] Story (n. 387), 1: 337.

[430] Chitty (n. 424), 7; Addison (n. 426), 12; Metcalf (n. 385), 163; Story (n. 109), 435.

[431] Leake (n. 385), 311–12; William Taylor, *The Laws of England and Scotland Relating to Contracts* (London, 1849), 17; Joel Prentiss Bishop, *Commentaries on the Law of Contracts* (Chicago, IL, 1907), 18; John William Smith, *The Law of Contracts* (Philadelphia, PA, 1847), 96; John Newland, *Contracts within the Jurisdiction of Courts of Equity* (1821), 357; Hammon (n. 385), 692.

they did so by inventing a new rationale. They claimed that a disparity in price matters because it is considered as "evidence of fraud, not as an independent substantive ground, and not as constituting hardship."[432] If the courts of equity had acted in accordance with this rationale, they would have stopped giving relief almost entirely. When a fraud is committed, there will often be a disparity in price, but it will rarely be the only evidence of fraud or the best evidence. The victim of fraud in any normal sense will know what the other party did to defraud him. A court concerned only about fraud would hear the testimony of both parties, and consider the disparity in price in deciding who to believe. As I have shown elsewhere, most often, when courts of equity found a contract to be unconscionable, there was no allegation of fraud in the ordinary sense. No one claimed that a fact had been concealed or misrepresented. Yet the courts gave relief anyway.[433] Indeed, had it been otherwise, the courts would not have needed a doctrine of unconscionability, but only one that gave relief for fraud.

In support of their principle, the Anglo-American treatise writers cited a common law rule that a contract was enforceable only if it had consideration and that a court would not examine the adequacy of consideration. Most of the statements quoted earlier about the indeterminacy of a fair price and the interference with parties' freedom were made in discussing this rule. Yet, as Simpson observed, the rule was made by judges who were not dealing with hard bargains.[434] As we have seen, the judges found consideration not only in contracts of exchange, but also in gratuitous promises such as gifts to prospective sons-in-law, and gratuitous loans and bailments.[435] They found consideration in promises that involved multiple parties, in which the transaction was not one-sided when the role of all of the parties is taken into account. In these cases, to require consideration to be adequate would have defeated the very purpose that the judges were trying to achieve, which was to enforce a promise in which consideration was not recompense. Thus it came to be said, in a famous passage from *Sturlyn v. Albany*,[436] that "when a thing is done, be it never so small, this is a sufficient consideration to ground an action." In *Sturlyn*, the plaintiff had leased to a third party, who had granted his estate to the defendant. The plaintiff asked the defendant to pay the rent, which he promised to do if the plaintiff would show him a deed proving that the rent was due. The showing of the deed was said to be consideration for the paying of the rent. As Simpson noted, the case has nothing to do with the enforcement of hard bargains.[437] As I have shown elsewhere, neither did practically all of the cases in which American courts invoked the rule against examining the adequacy of consideration. In some cases, the price had been set by a procedure designed to prevent questions of unfairness from arising. Some involved aleatory contracts, in which the price does not seem unfair considering the risk involved. In

[432] A. W. B. Simpson, "The Horwitz Thesis and the History of Contracts," *University of Chicago Law Review* 46 (1979): 533, 569.
[433] Gordley (n. 409), 154–57.
[434] Simpson (n. 107), 445–49.
[435] Simpson (n. 107), 416–52.
[436] Cro. Eliz. 67, 78 Eng. Rep. 327 (Q.B. 1587).
[437] Simpson (n. 107), 447.

some, one party received a benefit de facto, although the rights that he purchased were legally invalid. Some involved gifts, for example made by a dying man to those who had cared for him in his illness, or by a philanthropist to a college that would name a fund after her. Some involved reliance, as when one person guaranteed another's credit. As noted, some involved three-party situations in which the consideration was not inadequate given the role of the third party.[438] The enforcement of hard bargains has been no more than the occasional consequence of a rule that the courts used to make more promises enforceable.

In the twentieth century, relief has become more accepted. In France, special statutes have been enacted that give a remedy to those who pay an excessive amount for fertilizer, seeds, and fodder,[439] or for a rescue at sea,[440] or after an aviation accident,[441] or to those who receive too little when selling artistic or literary property.[442] Sometimes, courts have given relief despite the limitations of the Civil Code by declaring that the contract was procured by fraud, duress, or mistake, even though the victim had neither been told a lie nor threatened, and his only mistake concerned the value of what he bought or sold.[443]

The first draft of the German Civil Code of 1900 abolished relief for a one-sided bargain entirely. But in the final version, § 138(2) gave a remedy whenever one party obtained a "disproportionate advantage" by exploiting the difficulties, indiscretion, or inexperience of the other party. Since 1936, German courts have been willing to give relief for a violation of "good morals" (§ 138(1)) if the contract is sufficiently one-sided, even if such a weakness was not exploited.[444]

In the United States, § 2–203 of the Uniform Commercial Code allows a court to give relief in law or equity when a contract to sell goods is severely unfair. Section 208 of the *Second Restatement of Contracts* provides for similar relief in other types of contract. American courts have held the price to be unconscionable when home appliances were sold for over three times their usual retail price,[445] and when homeowners were charged extravagant amounts for windows and side walls.[446]

Although English courts are more conservative,[447] they have given relief, for example, when a woman was not compensated for signing a release of her interests in her house.[448] The judge quoted with favor the requirements set down in a nineteenth-century case: "What has to be considered is, first, whether the plaintiff

[438] Gordley (n. 409), 151–54.
[439] Law of 8 July 1907.
[440] Law of 29 April 1916, art. 7.
[441] Law of 31 May 1925, art. 57.
[442] Law of 11 March 1957.
[443] Cass. req., January 27, 1919, S. 1920. I. 198; Cass. civ., November 29, 1968, Gaz. Pal. 1969. J. 63; Cour d'appel, Douai, June 2, 1930, Jurisp. de la Cour d'appel de Douai 1930.183; Cour d'appel, Paris, January 22, 1953, Sem. jur. 1953. II. 7435.
[444] *Reichsgericht*, March 13, 1936, ERGZ 150, 1. Although, according to the courts, paragraph one will be applied when there is not only a "disproportionate advantage," but also a "reproachable intent" on the part of the advantaged party, where the advantage is disproportionate, the intent will be presumed: Hein Kötz, *Vertragsrecht* (Tübingen, 2009), no. 229.
[445] *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (Sup. Ct 1969); *Frostifresh v. Reynoso*, 274 N.Y. S. 2d 757 (Sup. Ct 1966), *rev'd as to damages*, 281 N.Y.S. 2d 964 (App. 1967).
[446] *American Home Improvement Co. v. MacIver*, 201 A.2d 886 (N.H., 1964).
[447] Richard Stone, *The Modern Law of Contract*, 7th ed. (London, 2008), § 13.9.
[448] *Cresswell v. Potter* [1978] 1 WLR 255 (Ch.). *See* Chitty (n. 424), § 15-002.

is poor and ignorant; second, whether the sale was at a considerable undervalue; and third, whether the vendor had independent advice."[449]

Few jurists today would claim that to give relief when an exchange is one-sided violates the basic principles of contract law. On the other hand, there is no generally accepted way of explaining relief.[450]

A frequent explanation is one that we saw earlier:[451] that the parties are in an "unequal bargaining position."[452] Those who favor this explanation owe more than they admit to the will theories. They account for relief not by explaining how the terms of a contract could be unjust, but by suggesting that one person is imposing his will on another unless the two parties have equivalent bargaining strength. Yet parties very rarely have equal bargaining strength in the sense meant by these authors. One cannot give relief every time such parties contract. Even if one could, it would impossible to tell what terms they would have agreed upon had their strength been equal. In any event, courts give relief only when the price deviates from the one that would be set in a competitive market. Yet that price has nothing to do with bargaining strength: in a competitive market, the parties do not bargain.

These points have been made by members of the law and economics movement. Again, they have their own explanation why relief is given, which we will consider later.[453]

Consent The nineteenth-century conceptualists said that contracts are formed by will or consent. Like the rationalists, however, what they said about consent was negative. Consent was private and self-regarding. A party was free to choose as he wished, consulting only his own expectations and desires. That definition raised a problem. Suppose a contract defeats a party's wants and desires. Did he consent? It seems odd to say that he consented to something he did not want. But if a party can escape whenever his wants and expectations are defeated, contracts would not be binding. Here, again, jurists did not find—and have not yet found—a solution on which they can agree.

[449] *Fry v. Lane* (1888) 40 Ch.D. 312.

[450] Charles Fried endorses "the liberal principle that the free arrangements of rational persons should be respected": Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA, 1981), 35. Yet even he concedes that "some bargains, though they meet all the tests I have set out so far, seem just too hard to enforce": Fried, *Contract as Promise*, 109. His explanation is that a random event has caused the breakdown of what he calls a "functioning social system," or "political system of social redistribution," within which exchange normally takes place: Fried, *Contract as Promise*, 109–10. He seems to be groping toward the idea of a system of commutative and distributive justice without getting there.

[451] *See* pp. 253–54.

[452] Bénabent (n. 295), nos. 165, 173; Lawrence Koffman and Elizabeth Macdonald, *The Law of Contract* (London: 1992), 3, 5; W. David Slawson, *Binding Promises: The Late Twentieth Century Reformation of Contract Law* (Princeton, NJ, 1996), 23 at 38. *See* Stefanie Rollof in Peter Westrmann, *Erman Bürgerliches Gesetbuch Handkommentar*, 12th ed. (Cologne, 2008), §§ 305–10, no. 1.

[453] *See* Chapter X, pp. 307–08.

Article 1110 of the French Civil Code provided that "[e]rror is only a ground for the nullity of a contract when it falls on the substance itself of the object of the contract."[454] This article paraphrased Pothier,[455] who was paraphrasing Pufendorf, who was drawing either on the late scholastics or the Roman text that said that there was no consent if the parties had made an error in *substantia*. As we have seen, the Romans were impressing a philosophical word into service with no distinct idea of what it meant.[456] The late scholastics had given the text an Aristotelian meaning.[457] Things with the same substantial form or substance were the same kind of thing. A person who did not know the substance of the performance to which he consented literally did not know to what he was consenting.

The explanation of the late scholastics made sense in an Aristotelian world in which different kinds of things differ in nature, substance, or essence. It is hard to say what it could have meant to the nineteenth-century jurists. Nevertheless, some of them repeated it. Those who did not often went to one of the extremes just described. Some said that a party was not bound if the contract did defeat his wants and expectations, or, to put it another way, if he would not have contracted had he known the truth. Others said that, in principle, a mistake was irrelevant even if it did defeat a party's hopes and expectations.

Sticking with tradition, some French jurists said that an error in "substance" is one that concerns the nature or species of an object. Colmet de Santerre said that it must concern a quality absent which its "nature" would be different.[458] Demolombe said that it must concern the "principal" or "characteristic" quality of a thing that individualizes it, makes it proper to a given use, or gives it is name.[459] Aubry and Rau said that the error must concern "the properties which, taken together, determine [its] specific nature and distinguish it according to common notions from things of every other species."[460] Some French jurists take this position today.[461]

[454] Leading French jurists thought that this article applied only to errors regarding a property of an object: e.g. Demante and Colmet de Santerre (n. 4), 5: §§ 14 *bis*, 16 *bis*, 1; 27 *bis*, 1–3 (written by Colmet de Santerre); Demolombe (n. 5), 24: §§ 88, 124–27, 164, 171, 181–84; Laurent (n. 6), 15: §§ 450–53, 458, 484. Such an error rendered consent "impure" in contrast to an error in physical identity, in which case there was a complete absence of consent. In the former case, an action had to be brought to avoid the contract. In the latter, it was void ab initio. The Code did not say that an error in substance affected the "purity" of consent, and did not mention any other kind of error. The drafters paraphrased Pothier. They did provide that, in the case of error in substance, as in the case of fraud or duress, an action had to be brought to rescind the contract. They may have done so because they were following a Roman text that said that, in a *stipulatio*, a promise induced by mistake, fraud, or duress is not simply void, but gives rise to an *exceptio*. Or they may have done so because the requirement makes procedural sense, or because they were working in haste, or because they wanted to keep matters simple. It is not likely that they did so because they held a new view of the effect of consent that they never so much as mentioned.

[455] Robert Pothier, "Traité des obligations," § 18, in vol. 2 of *Oeuvres de Pothier*, ed. M. Bugnet, 2nd ed. (Paris, 1861), 1.

[456] *See* Chapter II, p. 94. [457] *See* Chapter II, p. 94.

[458] Demante and Colmet de Santerre (n. 4), 5: § 16 *bis* ii (written by Colmet de Santerre).

[459] Demolombe (n. 5), 24: § 89.

[460] Aubry and Rau (n. 9), 4: § 343 *bis*. [461] Raymond (n. 237), no. 238.

Borrowing the phrase, nineteenth-century English and American judges said that a contract is void for an error in "substance."[462] Some English courts and commentators still say that relief will be given if, because of the mistake, a performance is "essentially different" than the one contemplated.[463] It is not surprising that most contemporary jurists reject that solution.[464]

Seeing the difficulties, Laurent claimed that an error would vitiate consent if the parties would not have contracted had they known the truth. Some French jurists take that position today.[465] The error must concern a quality that the parties had principally in view[466]—one that led them to contract[467] and which was the "determining" motive.[468] A similar position was taken by the nineteenth-century German jurist Ferdinand Regelsberger[469] and by those American jurists who said that relief should be given if a mistake was "material."[470] At the turn of the twentieth century, the Italian jurist Fubini pointed out the trouble with it: "If a party could always avoid a contract because of a quality of importance to him alone, agreements will be subject to grave uncertainty."[471] Anyone who wants to escape from a contract must have made a mistake so important that otherwise he would not have contracted.

[462] In *Sherwood v. Walker*, 33 N.W. 919, 923–24 (Mich. 1887), the court said that a contract was void because the error was one in "substance" rather than "in some quality or accident." In England, Lord Blackburn said, in dicta, that English law was the same as civil law—relief would be given for an error in "substance": *Kennedy v. Panama Royal Mail Co.* (1867) L.R. 2, Q.B. 580, 588. This language was quoted favorably by Lord Warrington and Lord Atkin in *Bell v. Lever Brothers, Ltd.* [1932] A.C. 161, 207, 219. Lord Atkin added, in dicta, that a contract is void if the mistake concerned a quality that made the object "essentially different": *Bell*, at 218. Lord Thankerton said the mistake must concern a quality that is "essential": *Bell*, at 235.

[463] *Associated Japanese Bank Ltd. v. Credit du Nord S.A.* [1988] 3 All E.R. 902, 913; *Bell v. Lever Bros.* [1932] A.C. 161, 218 (claiming nevertheless that relief would be denied if a work believed to be by an old master were discovered to be a modern copy, at 224); Chitty (n. 424), vol. 1 in *General Principles*, 30th ed. (London, 2008), § 5–051; Michael H. Whincup, *Contract Law and Practice: The English System with Scottish, Commonwealth and Continental Comparisons*, 5th ed. (Alphen an den Rijn, Netherlands, 2006), § 10.13.

[464] Jacques Flour, Jean-Luc Aubert, and Éric Savaux, *Les obligations 1. L'acte juridique*, 14th ed. (Paris, 2010), nos. 196–97; Mazeaud, Mazeaud, Mazeaud, and Chabas (n. 307), *Leçons de droit civil II. Obligations: théorie générale* no. 166.

[465] Flour, Aubert, and Savaux (n. 464), nos. 196–97; Philippe Malaurie and Laurent Aynès, *Cours de droit civil 6 Les obligations*, 10th ed. (Paris 1999), no. 403; Bénabent (n. 295), no. 82.

[466] Ambroise Colin and Henri Capitant, vol. 2 of *Cours élémentaire de droit civil français*, 7th ed. (1932), no. 38; Georges Ripert, Jean Boulanger, and Marcel Planiol, vol. 2 of *Traité élémentaire de Planiol*, 4th ed. (1952), no. 199.

[467] Colin and Capitant (n. 466), no. 38.

[468] Colin and Capitant (n. 466), no. 40; Ripert, Boulanger, and Planiol (n. 466), no. 199; Jacques Mestre, "Obligations et Contrats Speciaux. 1. Obligations en général," *Révue trimestrielle du droit civil* 88 (1989): 736, 739.

[469] Ferdinand Regelsberger, vol. 1 of *Pandekten* (Leipzig, 1893), § 142.

[470] For example, Story (n. 387), 152; Clarence D. Ashley, *The Law of Contracts* (Boston, MA, 1911); Clarence D. Ashley, "Mutual Assent in Contract," *Columbia Law Review* 3 (1903): 71, 72. The younger Story and Bishop explained that a mistake was material if, but for the mistake, the parties would not have contracted: William Wentworth Story, *The Law of Contracts Not Under Seal* (Boston, MA, 1851), 405, 419; Bishop (n. 431), 297–98.

[471] Fubini, "Contribution à l'étude de la théorie de l'erreur sur la substance et sur les qualités substantielles," *Revue trimestrielle de droit civil* 1 (1902): 301, 309–11.

Led by Savigny, German jurists went in the opposite direction. He claimed that an error in a party's hopes and expectations could not vitiate consent. He argued that if the actual will of a party did not correspond to what he had declared his will to be, there was no genuine declaration of will and consequently no contract. Relief is given for that reason, he claimed, and not because of a mistake that the party made in deciding whether to contract.[472] In order for this solution to work, Savigny recognized that a "sharp distinction" must be drawn "between the will itself and that which precedes it in the soul of the person who wills."[473] A party might decide to buy a certain object for various reasons, but his will was his decision to buy that object. "The will itself," Savigny said, "is an independent event, and it alone is important for the formation of legal relations." One cannot "link" this event with the process of decision as though the process were part of its "essence."[474]

This solution, or a variant of it, was generally accepted by nineteenth-century German jurists.[475] It passed into § 119(1) of the German Civil Code, which provides that a *Rechtsgeschäft* is void when a party is in error as to the content of his declaration of will.

Nevertheless, some, including Windscheid, noted that Savigny's solution did not work in the cases put by Ulpian that were described earlier: copper was sold for gold, lead for silver, or vinegar for wine.[476] If a party decided to buy a certain ring or a certain cask and declared his will to do so, his declaration did correspond to his will, as Savigny had defined it. He would not have made that decision if he had known that the ring was made of copper or lead, or that the cask contained vinegar. According to Savigny, however, the will of the party was his final decision expressed in his declaration of will, not the considerations on which it had been based. Savigny tried to resolve the problem by saying that some properties of a thing were bound up with its identity. These were the properties that made it a thing of a certain kind, "according to the concepts dominant in actual commerce." If a party declared his will to buy a certain thing falsely believing that it possessed these properties, then his will did not respond to his declaration.[477]

In England, that solution was borrowed by Pollock, who said that relief should be given for a mistake in an "attribute" of an object that constituted "a difference in

[472] Savigny (n. 27), 3: § 135. [473] Savigny (n. 27), 3: § 114.

[474] Savigny (n. 27), 3: § 114; similarly Puchta (n. 42), 77.

[475] Puchta (n. 42), 77; Windscheid (n. 32), 1: § 76. Among the variants were the theories of Hölder, which asked whether the will of one contacting party corresponded to that of the other: Eduard Hölder, "Die Lehre vom error," *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 14 (1872): 561, 568, 574; Zitelmann, who asked whether the will of the party corresponded to the legal result that the law was now asked to bring about: Ernst Zitelmann, *Irrtum und Rechtsgeschäft* (Leipzig, 1879), 341–42; and Brinz, who made the bizarre claim that a contract was void when a party indicated that he wanted one thing, but willed another, although the reason was not the discrepancy itself, as Savigny had thought, but that such a party was unaware of what he was doing and so lacked the will to act: Aloys Brinz and Phillip Lotmar, vol. 4 of *Lehrbuch der Pandekten* (Berlin, 1894), § 525. In all of these theories, relief was granted, not because of a mistake that led a party to decide as he did but because his decision did not correspond to something else: the will of the other party, the legal result to be brought about, or the declaration of what he willed.

[476] D. 18.1.9. *See* Chapter I, p. 11.

[477] Savigny (n. 27), 3: § 137.

kind" according to "the course of dealing."[478] Like Savigny, he said that, in such a case, no contract had been formed because a party's declared will differed from his true will.[479] A similar approach has been taken in recent times by Werner Flume and Sir Guenter Treitel. Flume rejected the idea that a person who points to a ring or says "this ring" is merely indicating "a 'something' defined by space and time . . . ." Rather, he has a picture (*Vorstellung*) of the object and "grasps it as having a certain composition."[480] Treitel believed that "[s]ome particular quality may be so important to [the parties] that they actually use it to *identify* the thing."[481]

At this point, as Fubini noted, the jurists had come full circle. This solution is like that of Aubry and Rau, who said that a mistake must concern a property that gives a thing its "species" or "specific nature" according to "common notions."[482] It is as hard to see why "actual commerce" would be any more likely than "common notions" to be concerned with which differences in properties constitute difference in species or kind rather than in quality or degree. Some nineteenth-century German jurists objected that Savigny's solution contradicted his own principles.[483] If the significance of a characteristic to a party did not matter, its significance according to "commercially dominant concepts" should not matter either. Windscheid accepted Savigny's solution despite the difficulty because, he admitted, he could not think of anything better.[484]

A version of it passed into § 119(2) of the German Civil Code, which provides: "A mistake over those characteristics of a person or a thing that are regarded as essential in commerce counts as an error in the declaration." Modern German scholars have been unsuccessful in explaining what that might mean. It is not helpful to be told that such a characteristic includes "all factors that contribute to value,"[485] unless one actually proposed giving relief for any mistake as to a factor that affects value. It is not helpful to be told that error in such a characteristic is a type of error in motive that invalidates the contract by way of exception, unless one is told why the exception is made and how widely it extends.[486]

Some jurists concluded that the problem was insoluble. If the will of the parties had no intelligible meaning, the contracts were not formed by the will of the

[478] Pollock (n. 385), 436. [479] Pollock (n. 385), 392–94.

[480] Werner Flume, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* 2 *Das Rechtsgeschäft*, 2nd ed. (1975), 477. His position was adopted by Medicus: Dieter Medicus, *Allgemeiner Teil des BGB Ein Lehrbuch*, 7th ed. (Heidelberg, 1997), no. 770.

[481] Guenter Treitel, *The Law of Contract*, 10th ed. (London, 1999), 267 (emphasis original).

[482] Fubini (n. 471), 309–10.

[483] Ernst Bekker, "Zur Lehre von der Willenserklärung: Einfluss von Zwang und Irrthum" [Review of A. Schliemann, *Die Lehre vom Zwange* (Rostock, 1861)], *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 3 (1861): 180, 188–89; Achill Renaud, "Zur Lehre von Einflusse des Irrthums in der Sache auf die Gültigkeit der Kaufverträge mit Rücksicht auf v. Savigny: Der *error in substantia*," *Archiv für die Civilistische Praxis* 28 (1846): 247, 247–54; M. Hesse, "Ein Revision der Lehre von Irrthum," *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 15 (1877): 62, 101.

[484] Windscheid (n. 32), 1: § 76a.

[485] Hans Brox, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*, 11th ed. (Cologne, 1987), no. 372 ("*alle wertbildende Factoren*").

[486] Medicus (n. 480), no. 744; Heinrich Palm in Peter Westrmann, *Erman Bürgerliches Gesetbuch Handkommentar*, 12th ed. (Cologne, 2008), § 119, no. 41.

parties. Oliver Wendell Holmes in the United States and Siegmund Schlossmann in Germany developed "objective" theories in which contract was defined as a set of legal consequences that the law assigned to what the parties said, whatever they may have willed. But they, too, found it difficult to explain why the law gave relief for mistake.

According to Holmes, a mistake prevented the formation of a contract if the parties contradicted themselves outwardly. For example, if one party said that he would buy "this barrel of mackerel" and the barrel contained salt, the language was contradictory. No object was both "this barrel" and "of mackerel." Consequently, no contract was formed.[487] Holmes recognized the difficulty. A taciturn party who merely said that he wanted "this barrel" would be bound, while a loquacious one who described what he wanted in more detail would be released for the most insignificant discrepancy between the goods and his description. Holmes responded, in a famous phrase that he used more than once: "The distinctions of the law are founded on experience, not on logic."[488] To put it another way, Holmes could not see how his own solution could be logically defended.

Schlossmann thought that relief should depend on whether it is "fair and equitable to grant protection against the legal consequences of his transaction to a person who was in error as to the characteristics of an object."[489] "[T]he person in error is human, and therefore it is equitable" to help him, "insofar as it can be done without serious damage to more or less equally important interests of the other party."[490] This statement is like that of a modern French jurist. The judge must maintain "an equilibrium between the protection of the party who was deceived and a certain juridical security assured to the other party."[491] These statements seem to mean only that the protection of each party is important and that their needs for protection must somehow be accommodated.

Twentieth-century jurists have improvised. Some have said that both parties must have been mistaken about a characteristic that they knew to be important.[492] They do not explain why the mistake must be mutual if mistake vitiates one party's consent and a contract requires the consent of each party. Moreover, as French critics have noted, relief cannot be given because of what both parties happened to know. A sale of land cannot be avoided if both parties knew that the buyer intended to pay for it with money that he inherited, and in fact he inherited nothing.[493]

Others have tried to steer a path between the two extremes just described: of claiming that a party is not bound when he did not receive what he wanted or expected, or saying that his wants and expectations do not matter. It has been hard

[487] Holmes (n. 114), 310–11. [488] Holmes (n. 114), 312.
[489] Siegmund Schlossmann, *Irrthum* (Jena, 1903), 46.
[490] Schlossmann (n. 489), 47. [491] Bénabent (n. 295), no. 75.
[492] Raymond (n. 237), no. 236; Larroumet (n. 366), 3: no. 338. Edwin Peel, *The Law of Contract*, 13th ed. (London, 2011), 8-001; *Restatement (First) of Contracts* § 503 (1932). Allan Farnsworth notes that while that was the traditional view, courts have given relief for unilateral mistake, and not only when a mechanical error was made in compiling a bid, although that is the most frequent case: E. Allan Farnsworth, *Contracts*, 3d ed. (St. Paul, MN, 1999), 631, 635.
[493] Mazeaud, Mazeaud, Mazeaud, and Chabas (n. 307), no. 166; Paul Esmein, Marcel Planiol, and Georges Ripert, *Traité pratique de droit civil français 6 Obligations* (Paris, 1952), no. 177.

to find such a middle path. To do so, jurists have tried to identify some state of mind that influenced a party, but is not simply what he wanted or expected. Some jurists asked whether a party assumed the risk that he would be mistaken. Others have asked whether his mistake concerned a fundamental or basic assumption.

Arthur Corbin popularized the first approach, which was incorporated into the *Second Restatement*:[494] a party will not receive relief if he assumed the risk that the facts are not as he hoped. In the words of the *Second Restatement*, a party bears a risk when "he is aware . . . that he has only limited knowledge . . . but treats his limited knowledge as sufficient." P. S. Atiyah in England and Paul Kramer in Germany have taken a similar approach.[495] The trouble is that a party cannot be bound simply because he went ahead, realizing that his knowledge is limited. Anyone would do so unless he thought himself omniscient.

In the United States, Samuel Williston borrowed a solution that German jurists had developed to resolve a different problem: when relief is given for changed and unforeseen circumstances. Most of the *Pandektists* denied that relief should be given. Windscheid argued that it should on the grounds that a contract is subject to an "undeveloped condition" (*unentwickelte Voraussetzung*) that circumstances do not change.[496] His contemporaries found that phrase meaningless: a party either willed to make his contract subject to a condition or he did not. The doctrine was not included in the German Civil Code, although Windscheid warned that if it was thrown out the front door, it would come back through the window. Indeed it did. The financial upheavals of the First World War and the great German inflation led the courts to hold that relief could be given for "failure of the basis of the transaction" (*Wegfall der Geschäftsgrundlage*), although no one knew quite what it meant.[497]

Borrowing the idea, Williston said that a mistake vitiates consent if it goes to a "fundamental assumption"[498] of the parties. A version of this approach passed into the *First*[499] and *Second Restatements of Contracts*. According to the *Second Restatement*, to invalidate a contract, a mistake must concern "a basic assumption on which the contract was made."[500] The *Second Restatement* adopted the same formulation to describe when relief is given for changed circumstances.[501] A number of Anglo-American scholars have agreed.[502]

It has been as hard for the Americans as for the Germans to explain what is meant by a "basic assumption." This phrase could refer to the importance of a belief to the

[494] Arthur Corbin, vol. 3 of *Contacts* (St. Paul, MN, 1963), § 598.

[495] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, 1995), 227; Ernst A. Kramer, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, ed. Franz Jürgen Säcker, 4th ed. (Munich, 2001) to § 119, no. 114.

[496] Windscheid (n. 32), 1: 75–78.

[497] Codified in 2002 at § 313 German Civil Code (*Bürgerlichesgesetzbuch*).

[498] Samuel Williston and George Thompson, *A Treatise on the Law of Contracts* (1937), § 1544.

[499] *Restatement (First) of Contracts* § 502 (1932).

[500] *Restatement (Second) of Contracts* § 152(1) (1981).

[501] *Restatement (Second) of Contracts* § 261.

[502] Melvin A. Eisenberg, "Mistake in Contract Law," *California Law Review* 91 (2003): 1573, 1624; Peel (n. 492), 8-001; Chitty (n. 424), 1 *General Principles* 5-017.

parties.[503] But then a party would not be bound by a contract when he was mistaken about something sufficiently important to him. As we have seen, that solution does not explain the binding force of contracts. Alternatively, a basic assumption could refer to an event in the mind of a party: he took something for granted and acted on it. Eisenberg and Farnsworth use the example of a person who takes it for granted that the floor exists and will support him.[504] But it is hard to see why a person should obtain relief because he took something for granted. Many losing contracts are made by people who did not question their assumptions about the durability of the market for mainframe computers, or the capacities of the equipment that they bought, or the tastes of the friends for whom they purchased presents. Moreover, the propensity to question one's assumptions varies from one person to the next. It would be odd to deny relief to the timorous and yet grant it to the sanguine.

Unjust enrichment

As described earlier, although common law jurisdictions borrowed much else from Continental jurists in the nineteenth century, the law of unjust enrichment was an exception. Common law jurists had little to say on the subject until the twentieth century.[505] Continental writers, in contrast, had recognized unjust enrichment as an independent body of law since the time of the late scholastics. Nineteenth-century French and German writers put a good deal of thought into the subject. Their problem is that, as we have seen, the late scholastics had founded it, like the law of contract and tort, on the principle of commutative justice, taken from Aristotle and Aquinas, that no one should be enriched at the expense of another.[506] Grotius based the law of unjust enrichment on the same principle, although he did not mention commutative justice.[507] As noted earlier, however, the nineteenth-century jurists had difficulty with the idea of giving relief for an unjust price. They did not believe that, in principle, exchange required equality, nor did they believe in a theory of commutative justice. Why, then, should the mere fact that one party was enriched at another's expense be a ground for relief?

[503] *Restatement (Second) of Contracts* § 152 comm. b (1981).

[504] Eisenberg (n. 502), 1622; Farnsworth (n. 492), 624.

[505] In 1937, the American Law Institute published a *Restatement of Restitution*, although John Dawson noted that it merely "patched the parts together and gave the subject a name": Dawson (n. 61), 564–65. The first comprehensive American treatise was only published by George Palmer in 1978: George E. Palmer, *The Law of Restitution* (Boston, 1978). In that year, Lord Diplock insisted emphatically that "there is no general doctrine of unjust enrichment recognized in English law"; there were merely "specific remedies in particular cases": *Orakpo v. Manson Investments Ltd.* [1978] A.C. 95, 104 (H.L.). Nevertheless, Sir Robert Goff and Gareth Jones had already published a treatise on the English law of restitution, which was followed in 1985 by a still more systematic work by Peter Birks: Peter Birks, *An Introduction to the Law of Restitution* (Oxford, 1985). Perhaps impressed at the degree of order that these treatise writers had found in the decided cases, English courts have now recognized a general principle of liability for unjustified enrichment: *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A. C. 548. But skepticism has continued: *see* Chitty (n. 424), 1 *General Principles*, 30th ed. (London, 2008), § 29–011.

[506] *See* Chapter III, pp. 85–86.

[507] *See* Chapter V, 134–35.

As we have seen, in France, the idea of equality in exchange was alive in the minds of the drafters of the Civil Code and in the work of the early treatise writers. So it was with unjust enrichment. The French Civil Code did not speak of a principle of unjust enrichment. It mentioned two cases in which Roman law had given an action: when money had been paid by mistake (article 1376), and when benefits had been conferred on another without his own approval (article 1372). Here, the drafters followed Domat, who had classified these cases as obligations "that arise without an agreement," without mentioning unjust enrichment.[508] The reason was not that Domat or the drafters were breaking with the natural law tradition. As we have seen,[509] Domat was trying to classify Roman rules for pedagogical reasons in a way that facilitated learning, not in a way that corresponded to the principles on which they were based. The drafters paraphrased him.

According to Toullier, the two cases mentioned by the Code were instances of a broader principle: "the legislator commands what it just," and does so "because it is just that no one enrich himself at the expense of the other."[510] The Code, following Justinian, had classified these cases as "quasi-contracts," but it had given a bad definition of "quasi-contract." According to article 1371, "quasi-contracts are purely voluntary human acts which result in an obligation to a third party or the other party." The correct rule, according to Toullier, was that "[a]ny licit act of a man which enriches one person by a detriment to another obligates the one who this act enriches to return the thing or the amount by which he was enriched."[511] That principle explained the protection of property: one could reclaim it even from a party who had innocently come into its possession. It "completed" the Code, since the same principle explained liability for harm caused tortiously under article 1382. To that extent, the principles of the late scholastics and iusnaturalists passed into the first treatise written on the French Civil Code.

With an exception soon to be noted, an explanation of the Code in terms of a broader principle disappeared from the treatises of mainline nineteenth-century jurists. Laurent conceded that the two situations mentioned in the Code were based on "equity,"[512] but he said that these were the only two situations in French law in which the plaintiff could recover:

> [O]ne cannot have a quasi-contract without law because the obligations that result are found in the law. . . . One invokes equity in vain: equity is a stranger to the law in the sense that by itself, it neither creates a right nor an obligation.[513]

Larombière said of the two situations mentioned in the Code that "it is not necessary to seek their source elsewhere in natural principles of good faith, justice and equity which forbid one to be enriched at the expense of another."[514] Nevertheless, he said, given the definition of quasi-contract in the Code, which

[508] Domat (n. 373), liv. II, tits. iv, vii. [509] *See* Chapter VI, p. 143.
[510] Charles Bonaventure Marie Toullier, vol. 11 of *Le droit civil français suivant l'ordre du Code*, 5th ed. (Paris, 1842), no. 15.
[511] Toullier (n. 510), no. 20. [512] Laurent (n. 6), 20: no. 308.
[513] Laurent (n. 6), 20: no. 309. [514] Larombière (n. 265), 5: art. 1371, no. 3.

does not mention enrichment at another's expense, but defines a contract as a voluntary act, there were many other obligations in the Code that fell under the definition.[515] Similarly, Demolombe criticized Laurent, but his own examples of other quasi-contracts were drawn from the Code, like those of Larombière.[516] So were the examples that Duranton gave of additional quasi-contracts.[517]

The exception was the leading treatise of Aubry and Rau, in which they said:

> Payments made without a *cause*, that is to say (*hoc sensu*) for a future *cause* that is not realized or for an already existing *cause* which has, however, ceased to exist, as well as those that have in view a *cause* that is contrary to law, to public order, or to good mores, and, finally, those that are obtained with the aid of illicit means, give rise, in principle to an action for repayment, independently of any error on the part of the person who has made them. . . .

Here, the principle became that a payment without a *cause* can be recovered. Aubry and Rau were doubtless aware of a Roman text that said that a plaintiff could reclaim a performance that had been made *sine causa*, or without a basis or a reason[518]—a text that the Romans neither generalized nor explained. In all likelihood, however, Aubry and Rau were following the explanation that Savigny had given in a volume of his *System des heutigen Römishen Rechts* published in 1841.[519]

Although Roman law had no general law of unjust enrichment, it recognized actions called *condictiones*. Savigny noted that these could not be classified as actions in tort, contract, or for the return of property or restoration of possession. He noted that they:

> . . . are unquestionably available and they appear to us at first glance to be extremely various. Nevertheless, they allow themselves to be traced back to a very simple principle which has developed from this variety by a simple organic process of formation without the intervention of legislation.[520]

The principle is not simply that one party could not be enriched at another's expense. The principle is that he could not be enriched without a legally recognized ground—a *Grund*, a *causa*, or, as Aubry and Rau put it, a *cause*:

> Accordingly, we can employ the expression, an enrichment without ground (*grundlos*) out of our assets (*Vermögen*) provided the concept of enrichment is limited in a manner appropriate to those relationships. Specifically, the *causa* is gone or was already missing for the transfer of a right from one person to another, as is the case in a loan after notice to repay or the payment in error of what is not due.[521]

[515] Larombière (n. 265), 5: art. 1371, no. 6. [516] Demolombe (n. 5).
[517] Duranton (n. 3), 13: no. 654. [518] D. 12.7.1.3.
[519] In its first edition, their treatise was a translation of a German work on the French Civil Code by Zacariae. They themselves were from the German-speaking region Alsace, where Aubry taught at the University of Strassburg from 1833 until its annexation by Germany in 1871. They added the treatise in subsequent editions, making it more their own work. Between the second edition (1844) and the third (1856), they added the explanation for recovery just quoted.
[520] Savigny (n. 27), 5: 511.
[521] Savigny (n. 27), 5: 526.

Despite occasional doubts about whether the various Roman actions could be subsumed under a single principle,[522] Savigny's solution became standard among German jurists.[523]

Savigny said that, for an action to lie, one party had to be enriched at another's expense without a "ground." Holzschuer said that the law "cannot tolerate the having (*Haben*) without a legal ground because one person is enriched through damage to another."[524] Seuffert said that, absent a legal ground, it was "right and equitable" for there to be an action.[525] Yet they did not explain whether the enrichment is in itself an evil to be remedied. If not, why should there be an action? If so, why, in principle, is there no remedy outside the law of unjust enrichment, for example in the law of contract for an unequal exchange?

Savigny's answer was that, in contract, there was a legal "ground" for the enrichment:

> It is otherwise with a sale at a low price where, indeed, the buyer is enriched at the expense of the seller but nevertheless without any lack of a *causa*, that is, the legal ground of the alteration, but only as to the material evaluation of worth, which lies entirely outside the legal sphere.[526]

He did not explain why, if the enrichment of one party at another's expense was an evil to be remedied, the enrichment of a buyer at the expense of a seller "lies entirely outside the legal sphere."

Savigny's reliance on the concept of "legal ground" seemed circular to some jurists. It seemed to mean that the defendant must repay what he had gained unless there was a legal ground for keeping it—in other words, that the defendant is required to repay the gain except when the law does not require him to do so.

Windscheid tried to avoid the circularity by devising a different explanation. He also thought that an action would lie only when one party was enriched at the expense of another, although the principle had to be limited: "[T]he fact that one person is enriched in an unjust manner from another's assets gives rise to an obligation for him to explain to the disadvantaged person why he is richer."[527] Nevertheless, the principle that "enrichment from another's assets by itself and as such gives rise to an obligation to compensate the other person for the disadvantage . . . is incorrect at this level of generality. . . ."[528] For Windscheid, the limitation was not that there must be no legal ground for the enrichment. Rather, the enrichment must be unjust.

It is usually unjust, he said, if a person was enriched through another's assets without that other person's consent. It is not unjust if the enrichment occurred

[522] Vangerow merely speaks of them as actions "on grounds similar to contract" (borrowing from Justinian's term "quasi-contractus"): Vangerow (n. 247), 3: kap. 5. Wächter described the standard explanation as "usual" without expressly endorsing it: Wächter (n. 420), § 218.

[523] For example, Puchta (n. 42), § 307; Arndts (n. 190), § 340; Dernburg (n. 48), 2: § 138; Holzschuher (n. 418), 3: § 265; Seuffert (n. 422), 2: § 435a.

[524] Holzschuher (n. 418), 3: § 265, note.

[525] Seuffert (n. 422), 2: 435a.

[526] Savigny (n. 27), 526.

[527] Windscheid (n. 32), 2: § 421.

[528] Windscheid (n. 32), 2: § 421, n. 1.

with the other party's consent, although there are exceptions.[529] The law might have deprived the will of that party of its force either for his own protection, as in the case of a minor, or on account of public order, as in the case of illegally high interest rates.[530] Or the will of that party might be ineffective because it was subject to what Windscheid called an "undeveloped condition," or *unentwickelte Voraussetzung*.[531] As we have seen, this was the idea that he used to explain relief for changed and unforeseen circumstances, and one that his contemporaries rejected. Here, it enabled him to go beyond the strict view that a mistake counted legally only if there was a discrepancy between a party's conscious will and its outward expression. It allowed him to apply a broader concept of what mistakes mattered and to apply that concept to explain the law of unjust enrichment. This explanation, however, was only as sound as his concept of an "undeveloped condition," and that was an idea that his contemporaries did not accept.

Moreover, neither Savigny nor Windscheid explained why the law gave an action when one party was enriched at another's expense only sometimes and not generally. As we have seen, Windscheid, like Savigny, thought that relief for an unjust price lay beyond the principles of the law of contract.

In France, matters changed in 1892, when, despite the opinion of most nineteenth-century jurists, the *Cour de cassation* allowed recovery:

> . . . because this action is based on the principle of equity that prohibits one from enriching himself through a detriment to another, and the exercise of this action, not being governed by any statutory text, is not subject to any determinate condition; it is enough, for it to be recognized, that the plaintiff alleges and offers to prove an advantage that he would have had through a sacrifice or a personal act that was obtained by the party against whom he brings the action. . . .[532]

That statement was considered too broad. The court qualified it in 1914 by imposing a limit that, as French jurists have noted,[533] was taken from Aubry and Rau: there would be an action "where the assets of one person were enriched at the expense of another without a legitimate *cause*. . . ."[534]

For there to be an action, French jurists now agree, there must be an enrichment at the expense of another that is without *cause*.[535] According to Alain Sériaux, one reason for the limitation "without cause" is that if the principle were not limited, the entire law of obligations "would be considered as a series of particular applications" of it.[536] That, as we have seen, is precisely what the late scholastics had in

[529] Windscheid (n. 32), 2: § 422.
[530] Windscheid (n. 32), 2: § 423.
[531] Windscheid (n. 32), 2: § 423.
[532] Cass. req, June 15, 1892, D. 1892.1.596; S. 1893.1.281.
[533] Jacques Flour, Jean-Luc Aubert, and Eric Savaux, *Les obligations* 2 *Le fait juridique*, 10th ed. (Paris, 2003), no. 37; Alain Sériaux, *Droit des obligations*, 2d ed. (Paris, 1998).
[534] Cass., May 12, 1914, S. 1918–19.1.41.
[535] Flour, Aubert, and Savaux (n. 533), nos. 38, 44; Sériaux (n. 533), no. 87; Alain Bénabent, *Droit civil: Les Obligations*, 5th ed. (Paris, 1995), nos. 486, 491; Philippe Malaurie, Laurent Aynès, and Philippe Soffel-Munck, *Droit civil Les Obligations*, 4th ed. (Paris, 2009), no. 1015.
[536] Sériaux (n. 533), no. 87.

mind when they explained the law of obligations in terms of commutative justice. Another reason is that there are instances in which an action cannot be brought even though one person was enriched at another's expense. One is a contract at an inequitable price, which the late scholastics and iusnaturalists believed to be a basis in principle for relief, but which the French jurists still regard as an exception to general principles of contract.[537] Another is a person whose business draws customers away from his competitor[538]—a case that the late scholastics would not regard as taking away anything that belonged to the competitor. They would have said that to give a remedy would take away the right of the defendant to sell what he could.[539]

Cause was then defined "as a legal justification for the enrichment."[540] The *cause* is "quite simply, . . . the technical notion that expresses the general idea . . . that the action . . . must not disturb the positive legal order by permitting an alternation of its rules."[541] Thus enrichment at another's expense is prohibited unless it has a *cause*, and it has a *cause* whenever it is permitted. It need not be permitted by an express text of the Civil Code. If a person takes away business from a competitor, "the liberty of commerce and industry justify the enrichment."[542] In other words, the action can be brought except when it cannot.

Section 812(1) of the German Civil Code provided that "one who has received something through another's performance or at his expense in some other way without legal basis (*ohne rechtlichen Grund*) is obligated to give it back." It was like the solution of Savigny rather than Windscheid, except that it did not say expressly that one party must have been enriched at another's expense.

In the twentieth century, however, German jurists attacked Savigny's principle. It was incorrect to say that an action could be brought when one party was enriched at another's expense and there was no legal basis (*Grund*) for the enrichment. In 1934, Walter Wilburg claimed that it was impossible to formulate any general rule as to when enrichment is unjustified.[543] Ernst von Caemmerer argued that one cannot regard an enrichment as unjustified when the person enriched has no contractual or statutory claim to be. A person might renounce a right that is consequently acquired by someone else. Or he might open a tourist hotel in a hitherto unknown village, or build a dam, thereby enhancing the value of neighboring properties.[544] Other jurists pointed out that "enrichment may be due to the

[537] Flour, Aubert, and Savaux (n. 533), no. 33; Sériaux (n. 533), no. 87; Bénabent (n. 535), no. 491.

[538] Flour, Aubert, and Savaux (n. 533), no. 33; Bénabent (n. 535), no. 491.

[539] *See* Chapter III, pp. 87–88.

[540] Bénabent (n. 535), no. 491. Malaurie, Aynès, and Soffel-Munck (n. 535), no. 1068 ("The cause constitutes the legal title constituting justifying the enrichment or impoverishment"); Sériaux (n. 533), no. 90 ("There is enrichment without a cause . . . when the person enriched cannot invoke any legal title justifying his enrichment").

[541] Flour, Aubert, and Savaux (n. 533), no. 44.

[542] Bénabent (n. 535), no. 491.

[543] Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (Graz, 1934), 5–6.

[544] Ernst von Caemmerer, "Grundprobleme des Bereicherungsrechts," in vol. 1 of *Gesammelte Schriften*, ed. Hans G. Leser (Tübingen, 1968), 370 at 374–75.

display of particular skills in (lawful) competition."[545] Von Caemmerer concluded that, in many cases, "third parties are advantaged without a contractual or statutory claim to be. But they are not unjustifiably enriched, and there is no action in unjustified enrichment against them."[546]

Here, von Caemmerer is no longer conceiving of enrichment at other parties' expense as a taking or using something that belongs to the other party, or that the other party has the right to use. A party relinquishes his right to what he abandons. He does not have the exclusive right to any benefit that his use of his own property may confer on others, or to sell to his competitor's customers. As a result, von Caemmerer's approach made the problem both easier than that of Savigny and more difficult. It became easier in that von Caemmerer did not have to explain, as Savigny did, why, if enrichment at another's expense was bad, the principle did not extend throughout the legal system, mandating, for example, an equal exchange in contract law. It was harder in that one could now see no evil that the law of unjust enrichment sought to correct, or, for that matter, any general principle on which it rested.

Von Caemmerer did not seek a general principle: "[W]hen it is a question of applying a general clause that is framed in so broad and general a way as the maxim of unjust enrichment," one cannot find "abstract and general criteria of application." A jurist, "like a judge in a system of case law," must identify "groups of cases and types of claims."[547] Building on the work of Wilburg and without intending to be exhaustive, he described four major ones, of which two are important to the present discussion: (1) the defendant made an encroachment (*Eingriff*) on the plaintiff's property; (2) the plaintiff rendered the defendant a performance (*Leistung*), which was without a legal basis (*Grund*), in the sense that the purpose the plaintiff was pursuing was not achieved.[548] Today, his typology is widely accepted. It is found in most German textbooks and commentaries.[549]

It has proven hard, however, to give these categories a definite meaning without recourse to a general principle. An *Eingriff* cannot mean that the defendant destroyed the plaintiff's property or interfered with the plaintiff's use of it. If he did, that would be grounds for an action in tort. When von Caemmerer speaks of *Eingriff*, he has in mind cases in which the defendant used or consumed the plaintiff's property: for example, he consumed the plaintiff's heating oil, believing in good faith that it was his own.[550] Moreover, in order to tell whether the plaintiff has an action, one must determine whether the plaintiff had the exclusive right to the use of the resources in question. As Reinhard Zimmermann has noted, von

[545] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, 1990), 889.

[546] Von Caemmerer (n. 544), 375.

[547] Von Caemmerer (n. 544), 391.

[548] The others are: the plaintiff incurred expenses (*Impensen*, *Aufwendungen*, today, commonly, *Verwendungen*) improving the defendant's property; and the plaintiff paid another's debt and now claims recourse (*Rückgriff*) against the defendant. The first cannot be discussed here without an excursus into the differences on the subject between modern civil law and older law. The second matters only where the law allows the plaintiff's payment to discharge the other's debt.

[549] Zimmermann (n. 545), 889–90.

[550] Von Caemmerer (n. 544), 378.

Caemmerer's category of *Eingriff* cannot be applied without asking "who was entitled to the right with regard to which there was interference."[551] But then we are back to defining *Eingriff* as an enrichment through consumption, or the use of something that belonged to the plaintiff or which the plaintiff had the exclusive right to use. That would take us back to the principle against unjust enrichment, as understood by the late scholastics and iusnaturalists.

Moreover, it would be hard to determine what belongs to the plaintiff and what he has the exclusive right to use without considering why people have exclusive entitlements to resources. Like the earlier jurists, von Caemmerer believed that the reasons why the plaintiff recovers in such cases are implicit in the very establishment of private rights to resources:

> The meaning of property law is that the owner is assigned the authority to use, to profit from and to consume the object ('*uti, frui, abuti*'). The advantage that the encroacher derives from the consumption or use of the object is therefore unjustified. The encroacher must give back to the owner the value that he would in fairness have had to pay had he known how matters were. In this group of cases, the enrichment is considered to be unjustified because it is in contradiction to the purpose pursued by the legal order in the assignment of property.[552]

Wilburg said the same.[553] If they were right, then we must determine the purpose that the legal order was pursuing in establishing property rights in order to determine whether the plaintiff had an exclusive entitlement on which the defendant has encroached. Unlike the late scholastics and iusnaturalists, however, von Caemmerer and Wilburg did not present a theory of the purposes of property law, although they acknowledged that their solution depended upon these purposes. Indeed, since the rationalists, property had been defined in abstraction from its purpose.

Von Caemmerer's category of *Leistung ohne Grund* is definite only if we can determine the meaning of *Leistung* and *Grund*. For von Caemmerer, *Leistung* does not simply mean that the plaintiff incurred expense that conferred a benefit on the defendant. He would do so by building a tourist hotel in a hitherto unknown village. It must mean that he incurred expense in order to benefit the defendant. We have come back to a principle that the defendant must be enriched at the plaintiff's expense and, in this case, that the plaintiff must have intended that he be.

The *Grund* or "legal basis of the performance," according to von Caemmerer, "is a contractual or statutory claim—also a 'natural' or 'moral' obligation."[554] To ask whether there is a *Grund* raises the problem of circularity that Windscheid may have found with Savigny and which stands out among contemporary French writers. It comes close to saying that there will be an action except when the law says that there will not. In England, Peter Birks' reason for regarding the "principle against unjust enrichment . . . with suspicion" was that "as soon as steps are taken to bring it down to earth it begins to say nothing other than that the law ought not to

[551] Zimmermann (n. 545), 890. [552] Von Caemmerer (n. 544), 378.
[553] Wilburg (n. 543), 28. [554] Von Caemmerer (n. 544).

be ignored"—that is, that "[t]here are circumstances in which the law does not permit one person to be enriched at the expense of another."[555]

Birks tried to explain the law not by a general principle, but by looking "downward to the cases."[556] Like Windscheid, he tried to identify situations or "factors" that make it unjust for the defendant to have been enriched. In some cases, the defendant has been enriched "by subtraction" from the plaintiff's assets, and the "transfer" of wealth is unjust if it was "non-voluntary" on the part of the plaintiff or "freely accepted" by the defendant. In other cases, the defendant was enriched by committing a wrong, and the type of wrong explains why the enrichment is unjust.[557]

A difficulty with giving relief when a transaction is "non-voluntary" is the one that led Windscheid to speak of the failure of a *Voraussetzung*, and "undeveloped condition" of an expression of will. As Sonja Meier has pointed out,[558] what sort of involuntariness will matter depends on the type of transaction in question. In a certain sense, whenever a party regrets having made a contract, the transaction was "involuntary." Circumstances have arisen—possibly including his own change of mind—which he did not anticipate when he committed himself.

Meier also pointed out that Birks cannot account for instances in which one cannot identify any unjust factor other than the enrichment itself. Her example was a payment made *ultra vires* by an entity that had no authority to authorize it.[559] One might, of course, add "payments *ultra vires*" to the list of "unjust factors," but then, as Meier pointed out and as Birks realized, his approach would lose whatever explanatory power it had.[560] Or one might say that such payments are recoverable for "policy reasons,"[561] but that explanation is not helpful unless one can say what these reasons are. Before his premature death, Birks surrendered and adopted the Continental approach that a remedy should be given when the defendant was enriched without reason—*sine causa*.[562]

[555] Birks (n. 505), 23. [556] Birks (n. 505), 23.
[557] For a chart, *see* Birks (n. 505), 106.
[558] Sonja Meier, *Irrtum und Zweckverfehlung: Die Rolle der unjust-Gründe bei rechtsgrundlosen Leistungen in englischen Recht* (Tübingen, 1999), 396–405.
[559] Sonja Meier, "Unjust Factors and Legal Grounds," in *Unjustified Enrichment: Key Issues in Comparative Perspective*, eds. David Johnston and Reinhard Zimmermann (Cambridge, 2002), 37 at 62–65.
[560] Meier (n. 559), 64–65; Peter Birks, *Unjust Enrichment* (Oxford, 2003), 98.
[561] Chitty (n. 424), 1 *General Principles* § 20-028, n. 142. [562] Birks (n. 560), 87–143.