Shall We Dance?

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ABSTRACT: This essay seeks to investigate why the conceptions of Law belonging to civil law and common law traditions are so hard to bridge, as well as to propose perspectives for a dialog between comparative legal scholars from both systems, by showing what one law experience has to learn from the other.

KEYWORDS: 1. Comparative Law. 2. Civil Law. 3. Common Law.

TÍTULO: Vamos dançar?

RESUMO: O presente artigo busca investigar por que as concepções de Direito pertencentes às tradições da família romano-germânica e da common law apresentam tão difícil aproximação, bem como propor perspectivas para um diálogo entre comparativistas dos dois sistemas, apresentando o que uma experiência jurídica tem a aprender com a outra.

PALAVRAS-CHAVE: 1. Direito comparado. 2. Sistemas romanistas ou de civil law. *3. Sistemas de* common law.

I used to think of every presentation as a job talk. Since someone in the audience might one day be in a position to hire a scholar who does the kind of work I do, I designed my remarks to be clever enough to be memorable, but not so rude there'd be anything to hold against me. Though I've never misrepresented what I think, I've avoided certain topics and there are thoughts I've never mentioned. Last year, when I turned fifty, I made two resolutions — first, I'd try never to do anything I didn't enjoy, and second, when asked to speak, I'd try never to say less than the truth. Of course I didn't want to be uncivil, but I would not let anything less than compassion dissipate my courage.

One thing I know but have never said aloud before is this — with rare exceptions, no one in America cares what civil lawyers do in the private law.[1] The exceptions are those comparativists — I'm one of them — paid, tenured, and promoted for studying the civil codes and making intriguing and outlandish claims, such as that we in America should

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[1] If proof is needed, see RICHARD CAPPALLI, *At the Point of Decision: The Common Law's Advantage over the Civil Law,* 12 *Temp. Int'l & Comp. L.J.* 87 (1998).

consider adopting this or that civilian institution. But we're all cranks. In a country as populous as the United States, you can find fifty examples of anything.

The proof of American disdain for the civil law is that we today do not borrow civilian institutions — and rarely even consider importing into our legal system products of civil law ingenuity. [2] The current revision process of the Uniform Commercial Code (the "UCC" or the "Code") offers a suitable example.[3] These revisions, which began in the late 1980s — the first full-scale revisions since the Code became widely adopted twenty-five years earlier — will be completed during the next two or three years. As far as I know, nothing in the revisions has been influenced by the civilian codes. During the drafting process, one American colleague suggested that our sales law could benefit by adopting ideas from the Vienna Convention on Contracts for the International Sale of Goods ("CISG" or the "Sales Convention"),[4] but none of his suggestions was accepted, even though his approach would have contributed to unifying the laws governing domestic and international sales of goods in the world's largest economy.[5]

American lawyers may seem particularly narrow-minded in this regard, since civilians are increasingly fascinated with American law — from the law of products liabilities, which resulted in an EU Directive, to the doctrine of informed consent in tort law, and the duties of corporate directors and the like in the law of business associations. In a stunning article, Wolfgang Wiegand catalogued the extent of the European borrowings and suggested that the reception of American law in Europe is similar in scale and importance to the original Continental reception of Roman law. [6] Moreover, while few American law students take the time to round out their American legal education with a course of study devoted to the civilian codes, the civilians continue to send their best graduate students to our LL.M. programs.

Yet, despite enormous good will on the part of civil law scholars, very little of our

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[2] See Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 *Am. J. Comp. L.* 195 (1994). For the importation of civilian ideas into the common law during the 19th century (which was then a more common occurrence), see MATHIAS & DIANN (ed.), *The Reception of Continental Ideas in the Common Law World*, 1820-1920 (1993).

[3] The Uniform Commercial Code covers much of the private law of commercial transactions in the United States - the sale and lease of goods, negotiable instruments and the bank collection of checks, funds transfers, letters of credit, bulk sales, bills of lading and warehouse receipts, the sale of investment securities, and secured transactions in personal property. These matters are governed largely by state law, and virtually all American states have adopted some version of each of the various articles of the Code.

[4] See PETER WINSHIP, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 *Loyola L. Rev.* 43 (1991).

[5] A rare provision in the revised Code based on a comparative study is, I should probably admit, a provision for which I myself am somewhat responsible. I was Reporter for the provision on the seller's cure of defective performance in the UNIDROIT Principles of International Commercial Contracts, and was later asked by the Article 2 Drafting Committee to redraft that provision for inclusion in the Code.

[6] See WOLFGANG WIEGAND, *The Reception of American Law in Europe*, 39 *Am. J. Comp. L.* 229 (1991).

thought processes finds its way into the civilian discussion.[7] LL.M. students from civil law countries are generally delighted by the year they spend in the States, but they almost universally return home with the view that their own legal systems are superior to ours. To the extent there is borrowing, it is our rules that are borrowed and not the way we talk about them. I have never encountered a civil lawyer or law professor who believed anything could actually be learned from American legal thought. Of course there is constant talk of unification and the need to accommodate foreign legal ideas and concepts, but civil lawyers do not approve of the apparent chaos that our system presents.

This lack of understanding and exchange is particularly odd given the massive cultural interpenetration in both directions during the past half century. The American fascination with things foreign, especially everything European, reaches back before the birth of our nation. Even today, the NEW YORK TIMES never criticizes anything that happens in Paris — ever, no matter what the circumstances — just as it never praises anything that happens in the state of New Jersey. New Yorkers feel a privileged relationship to Paris, as though nothing in the world as much resembles a great metropolis as another great metropolis. All over America we have set up cappuccino makers on our counter tops and cafe awnings on our sidewalks. We collect wines from Europe and Chile, we enjoy the cuisines of France and Thailand, we listen to what is now called world music, we borrow fashion, furniture, and religion from every country we visit. Borrowing is if anything more far-reaching in the other direction — foreign interest in American culture is too extensive to require documentation — from jeans, skateboards, and Coca-Cola to American blockbuster films that can be enjoyed in the cinemas of every major city on earth, to translations of American fiction stacked up in the bookstores, to MTV, professional basketball, the computer, and the internet. Our cultures today depend on imports from abroad, and it is in this context mystifying that civil and common lawyers have so little to say to one another.

The question I would like to address is why these differences of legal conception have proved so difficult to bridge. I believe I have an answer, though it will encourage no one. I believe that both systems entered into a legitimation crisis with the collapse early in the 20th century of a cherished legal axiom — the proposition that the process of resolving a legal dispute coincides with the process of legal construction, in other words, the conviction that cases are decided by working through the code provisions.

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[7] For a demonstration of the insurmountable difficulties, see MARIAN PAVCNIK and LOUIS WOLCHER, *A Dialogue on Legal Theory Between a European Legal Philosopher and His American Friend,* 35 *Tex. Int'l L.J.* 335 (2000).

Once it became clear that the two processes — the process of coming to a decision and the process of explaining the result — though interconnected, greatly differed, the law could no longer aspire to certainty, theretofore one of its primary virtues.[8] The rule of law had been upended — it became as difficult to know what goes into a judicial opinion as it is to ascertain the contents of a sausage. Neither of our legal systems was able to stare into the bright light of this discovery for very long, and each has taken refuge in inadequate alternatives, cover-ups, and camouflages that most of us recognize for exactly what they are. Most interesting, each system attempted to regain self-respect after the trauma by taking refuge in diametrically opposed visions. As a result, today, each system — to the extent we engage with one another at all — sees in the other a reminder of its own inadequacy, a trace of the truth we cannot confront, the truth that we cannot explain what we do. In the end, the thesis of this paper is that truth does not set us free. But then that's something that everyone who knows anything at all about truth already knows.

One initial caveat: this paper is not intended to be read as history. Like Bergson, I do not believe that events in the past cause things to occur in the future. Thus, my references to concepts that also occur in historical scholarship — causation, claims about what scholars in the past actually thought, and the like — are meant as metaphor. Mine is a speculative attempt to understand an undeniable structure, the peculiar relationship between the civil and the common law, systems that rotate, without encountering one another, around some dark star.

My one basic historical claim is this — by about 1930, a new conception of the law — a set of ideas we know in America as legal realism but that is known by other names abroad — managed to present a coherent, though unruly, alternative to 19th century formalism. One of the principal accomplishments of this way of thinking about the law, which I will designate as Realism for short, was the analytical operation to which I referred earlier — the Realists distinguished between the process of resolving a legal dispute and the process of explaining the result. That I take it is the point of the story that so amused Llewellyn — *'Judgment for the plaintiff, runs the old anecdote of Marshall; 'Mr. Justice Story will furnish the authorities'*.[9]

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[8] 'The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.' OLIVER WENDELL HOLMES, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 465-66 (1897).

[9] KARL LLEWELLYN, *The Bramble Bush: On Our Law and Its Study* 33 (1930).

The Europeans came to a similar understanding, often even earlier than the Americans — François Gény saw it in the course of his free scientific research, as did Philipp Heck and the interest jurisprudes, Eugen Ehrlich and the so-called free law school, and Alf Ross and the Scandinavian legal realists. Today the idea still surfaces in discussions of civilian legal methodology — *It continues to be useful to note that the question concerning the actual making of a legal decision must be strictly distinguished from the question of the acceptability of a given legal construction. The distinction between the two questions is important because the answer to either one of the questions yields fundamentally nothing as far as the answer to the other is concerned: questionable motives do not turn a good construction into a bad one, and praiseworthy motives do not turn a bad construction into a good one.*[10]

The differences among these different theories have been frequently parsed,[11] but those differences are irrelevant here. I want only to examine the different lessons that Americans and civilians seem to have drawn from the Realist premise. Both have recognized the latent risk of uncertainty in the law, and both have done what they could to circumvent it. American legal scholars accept Llewellyn's diagnosis that the law stands on clay feet — It's turtles all the way down, as some like to say[12] — and have now largely abandoned the belief that the legal norms produce certainty. Instead, when the time comes to explain a norm, we take refuge on ground outside the quagmire of the legal system, hoping to find solid footing for the law in other disciplines.[13] Thus, in America, the Realist vision represents the baseline for the discussion — both for those few who adhere to it and for those who seek to find certainty beyond the law. The civilians have instead sought to reinforce the law, to plug the dike against the risk of uncertainty. To this end, the civil law represses the Realist insight, and yet because much of the modern civil law represents an effort to guarantee certainty, the Realist vision continues to structure the attempts to avoid it. In the end, two complimentary and incompatible sorts of blindness prevent us from coming to terms with the fundamental importance of the imagination in resolving legal disputes under a code.

To begin, I need to dwell for a moment on Realism's traumatic insight. I rely on a familiar exposition of these ideas, probably their first formal presentation in the United States, in the lectures Karl Llewellyn gave to the entering class at the Columbia Law

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[10] HANS-JOACHIM KOCH & HELMUT RÜßMANN, *Juristische Begriindungslehre* 1 (1982) (my translation).
[11] See, e.g., JAMES HERGET & STEPHEN WALLACE, *The German Free Law Movement as the Source of American Legal Realism*, 73 *Va. L. Rev.* 399 (1987).
[12] See JOSEPH SINGER, *Radical Moderation*, 1985 *Am. B. Found. Res. J.* 329, 329-30 (reviewing Bruce Ackerman, *Reconstructing American Law* (1984)).
[13] For comment on the trend, see ROGER CRAMTON, *Demystifying Legal Scholarship,* 75 *Geo. L.J.* 1 (1986).

School in the week before classes began in the Fall of 1929. Even today these ideas strike some as radical, and I cannot imagine what their first audience might have thought as they listened. Probably the entering students were scribbling in the margins of their notepads and wondering what they'd find in the cafeteria for lunch. Few could have understood what Llewellyn was saying. [14]

Llewellyn distinguished between two models of the law, the first being the understanding of the law generally accepted when he began teaching, the second being the new model he proposed to replace it. I will call the two models here Law I and Law II. To eliminate any suspense, let me explain that I believe civilian lawyers have to some extent returned to the pre-Llewellyn conception of law, to Law I, to avoid the consequences of his truth, while in America, Law II serves as a baseline for legal thinking — though few of my colleagues adhere to Llewellyn's views, many believe they have overcome him. Both pre-Moderns and Postmoderns are busy escaping the consequences of Modernism.

According to Law I, the law consists of rules (whether derived from statute or case law) which are applied to facts to decide cases. Legal science is a science because the rules are applied similarly by each adjudicator — personalities are irrelevant — and (if judges act appropriately) there should be nothing outside the law that influences the legal result.

Llewellyn rejected this view. He believed, instead, that rules don't decide cases, judges do. Moreover, he believed that the internal resources of the law are insufficient to resolve a legal dispute — in other words, no rule or legal argument ever clinches the debate. A good legal argument can always be made on both sides of every case, and judges, when resolving disputes, are always deciding against coherent legal positions. To decide correctly, they have recourse to everything they hold to be true about the law and the world. Though the rules guide the analysis, they don't determine the result. It would perhaps be more accurate to conceive of rules as a product of the case resolution, a vocabulary judges use to summarize the problem area they have discussed. For Llewellyn, the law consists of the discussion about how judges resolve disputes — whether among the judges themselves, in the law school classroom, or around the law firm conference table.

In other words, the presence of a rule never prohibits an activity or forecloses a result.

[14] The lectures are still in print. See KARL LLEWELLYN, *The Bramble Barb,* supra note 9.

It is impossible to predict the legal result by looking at the content of the legal norms. Today in American law, if a party's only argument is to point to the text of a contract or a statute — if there is no prudential argument about why the world would be a better place if the party were to win — that party is probably going to lose. As it turns out, this does not prevent certainty — in many cases, even difficult cases, experienced lawyers will agree on how the case should come out, though they might each explain the result in a different way.

The aspect of the Realist vision that especially terrifies the Europeans is what I will call the personality of the law — it matters whether your lawyer is competent, it matters which judge your case draws. The system works only as well as we work — legal expertise, professional responsibility, attention to detail, they all count. Yet though professional skill matters, we still don't know exactly how to teach it, we are even unable to define a good lawyer, and we can't agree, after several centuries of observation, how judges decide cases. In THE BRAMBLE BUSH, Llewellyn already recognized the problem of the personality of the law and proposed a solution — his theory of the Nietzschean judge (my term, not his). Weak judges, those without the ability to manipulate the legal rules to reach the result they think just, are constrained by the system. Great judges, wise judges, those who can prestidigitate to achieve any result, will use their abilities to obtain more perfect justice. This explanation, though brilliant and perhaps accurate — Llewellyn was thinking of the opinions of Justice Cardozo — reassures no one.

This is the moment in the discussion when a civilian lawyer may ask for proof. Even the generous reader will want some example of a case in which the rules don't matter. I have an example ready, though it is not of the type I think the civilian is expecting. The civil lawyer is familiar with cases in which judges take the law into their own hands, lawless decisions, those that ignore the dictates of the code. Such an example proves nothing, the civilian would say, only that the judge made a mistake. And the civilian would be right.

But that is not the nature of my example. Instead, to demonstrate that the presence or absence of the rule does not determine the result, I present two examples, two cases otherwise identical except that the rule that governed the first case was not applied in the second.

Let me offer into evidence the *MCC-Marble* case,[15] one of the few federal circuit court decisions under the Sales Convention. The parties entered into an agreement evidenced by a writing. Buyer claimed that the parties had orally agreed that the pre-printed terms on the verso would not become part of the contract. Under the UCC, we resolve such questions by applying the parol evidence rule, which prevents a party from relying on agreements made prior to or contemporaneously with the execution of the writing to the extent the writing was integrated, which means to the extent the court finds the writing was intended to represent the final expression of the terms of the contract.[16] In *MCC-Marble*, the trial court granted summary judgment for Seller on the theory that, since the writing was integrated, Buyer may not introduce the oral agreement into evidence. The appellate court reversed and remanded for trial, correctly observing that the Sales Convention, which governed the transaction, does not contain a parol evidence rule.[17]

There we have it, the rule-oriented lawyer might say, under American law, the parol evidence rule prevents Buyer from introducing the oral agreement into evidence while under CISG, a more modern and commercially flexible set of rules, the trier of fact has access to all relevant information. The presence or absence of the parol evidence rule seems to determine the result.

Yet, as the appellate court itself admitted, under both the UCC and CISG the trial court has to ask the same questions. In commercial transactions it is always possible for parties to agree that their rights and obligations are to be governed exclusively by a writing and that preliminary agreements and negotiations will have no further effect. Under both sets of norms, the judge will have to ask what the parties intended. The parol evidence rule provides the questions the judge should address to the transaction. Whether under the regime of the parol evidence rule or outside it, the court will ask whether, given all the facts and circumstances of the case, the bargain in fact of the parties should be construed to include the pre-printed terms on the back of the written form.

In other words, the presence or absence of the parol evidence rule does not determine the result. The courts are always obligated to make sense of the transaction in front of them, regardless of the rules that apply to it. Legal rules provide the judge with questions to ask about the transaction. The rules don't determine the result, but they do

[15] *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998).
[16] See UCC 5 § 2-202.
[17] See CISG art. 11 (2d sent.).

assist the judge, by enumerating some of the relevant factors, when the time comes to focus the issues.

To repeat, Llewellyn held that legal disputes cannot be resolved solely on the basis of the internal resources of the law – the legal norms present in the statutes and court decisions. Instead, a judge evaluates the facts and circumstances of the case, integrates those elements with the legal sources into an imaginative whole, and decides the dispute based oil the judge's vision of the purpose of the transaction. In other words, there is a regulative system of norms by which to judge the parties' conduct, but the rules never formulate those norms in all their complexity. Llewellyn recommended that we look at that normativity directly and not limit ourselves to the outline provided in the statute. To their credit, American legal scholars have not, in general, denied the validity of Llewellyn's insight — though I have done no empirical research, I believe the majority of American legal scholars acknowledge the power of Llewellyn's thought. Very few suggest we should instead return to the jurisprudential theories incorporated in the first Restatements of Law, to the ideas of Joseph Beale and Samuel Williston. Rather American legal thought, when interpreting a norm, seeks to ascertain the norm's purpose, and that purpose is always found beyond the confines of the law in some social policy. Thus, in American law, when a solid foundation for the law is needed, it is sought in neighboring disciplines. Since there is no room here to catalogue the variety of fields in which footing has been sought, a brief reference to three such fields perhaps will suffice.

One of the first theories to attempt to resolve the questions raised by Realism is known today as legal process theory. The legal process theorists implicitly accepted Realism's vision of the challenge, and they sought a neutral, apolitical solution. They developed criteria and methodologies for resolving cases without resort to the personality of the individual judges — ideas such as allocating decision-making to those institutions with the resources to make the decisions. Judicial law-making, for example, should be restricted to issues that do not require extensive fact-finding. The law, for these thinkers, became a subdivision of political science, a method of allocating institutional competence among the branches of government.

Critical legal studies pushed Llewellyn's idea yet further. To the critical theorists, recourse to the facts and circumstances of the case does not produce a unique resolution. The answer continues to depend on an ideological perspective — either the perspective of the individual judge (whether a particular judge is pro-tenant, pro-

consumer, or committed to racial equality) or, much more importantly, of the ideology incorporated as the subtext of legal doctrine, statutes, and decisions. In other words, there is certainty in the decisions even if not in the law — judges will follow the mandates of ideology. To change the law means to criticize that ideology — in the end, there is no distinction between law and politics.

Law-and-economics thinkers also refuse to fall back behind the level of the debate Llewellyn created. Those theorists accept Llewellyn's suggestion that case decision requires an evaluation of all the facts and circumstances. Indeed they too push beyond him, suggesting that each decision requires evaluation of facts not directly before the court — to the second-order considerations, the incentives a decision would give to others. Since rational actors will use the rules promulgated by the decisions in their market choices, courts should seek to mimic the market, to decide as the parties would have decided had a market transaction been available. Moreover, law-and-economics scholars claim that the law has always tended to follow the efficiency principle, even unbeknownst to the judges who were making the decisions. The law, in other words, is but a subdivision of economics.

Out of these and other theories grows an American consensus about the nature of legal norms – each statutory provision and each judicial decision floats on its own bottom. Each is designed to accomplish a purpose. If the rule promulgated by a statute or decision does not accomplish its purpose, the rule or decision must be jettisoned and replaced by one better crafted. The structural aspects of a code cannot override the need to advance the proper societal purpose. In this way, the law has collapsed into its neighboring disciplines and lost its identity. The law is politics or economics, the law is metaphor or power — the law, in the current American vision, is anything and everything except for one thing, it is not and cannot be a separate and independent enterprise — the law can be anything and everything except law.

Once again the current revision process of the Uniform Commercial Code provides a dramatic example of the way we think about the law. The code revision process has become a forum for economic debate and a struggle among political constituencies, leaving the UCC drafters to seek a temporary truce in the partisan debates rather than well-crafted norms. Representatives of the various areas of practical activity affected by the law, the law's 'consumers'— sellers and buyers, secured parties and debtors, users and licensors of software – come to the table and participate directly in the drafting. Each constituent group implicitly threatens to hold the final product hostage before the

legislature if its demands are not met. Law results from the momentary compromise the various political forces achieve on the afternoon an issue comes up for debate. Some provisions are negotiated word by word, with the goal of resolving nothing, since each side hopes it will gain leverage and additional clout at some later moment in the process. [18] In the 1950s, Fred Beutel, one of the nation's leading commercial lawyers, called an early draft of one of the Code's articles an unfair piece of class legislation. [19] Today instead, since competing groups participate directly in the drafting, the Code has evolved into an explicit political compromise.

The irony is that while those revising the Code attempt to avoid the difficulties that arise from the truth discovered by Realism, they will inevitably be defeated by another aspect of the same truth. The drafters are aware that the rules do not generally decide the cases. In order to create certainty, they resort to extremely explicit drafting, formulating ironclad rules that leave neither loopholes nor weasel words. But of course no amount of drafting can mandate how the judges read the statute. Though they will rarely succeed in constraining the judges, the drafters' attempt produces technocratically worded – and even incomprehensible – provisions.

The civilians have followed a different path – or rather many different paths. The contemporary civil law presents such a diversity of traditions it cannot be summarized in a few statements or examples, and only rare generalizations apply to the entire civilian universe. Nonetheless, I would like to offer one generalization and two examples that seem to me representative.

The generalization is this – no civilian jurisdiction with which I am familiar has accepted the Realist insight as the premise of its debates.[20] Rather, to the extent these systems recognize the problem to which Realism points, they have taken measures to correct the shortcomings, they believe they have overcome the problem by adopting

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[18] See, e.g., UCC § 9-626 (b) (revised 2000).

[19] See FREDERICK BEUTEL, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, 61 *Yale L.J.* 334, 335 (1952).

[20] I am aware that civil lawyers may not immediately (if ever) recognize themselves in the portrait I paint. And of course it goes without saying that civilian judges do not mechanically apply norms to reach their results – in fact it is very hard to formulate a sentence about how cases are decided in the common law that does not equally apply to cases decided in the civil law. Everywhere – not just in America – judges, not rules, decide cases. And everywhere precedents can be as authoritative as statutes. See, e.g., ERNST RABEL, *Deutsche und amerikanisches Recht,* 16 *RabelsZ* 340, 345 (1951); MITCHEL LASSER, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System,* 104 *Yale L.J.* 1325 (1995); KONRAD ZWEIGERT & HEIN KÖTZ, *An Introduction to Comparative Law* 268-71 (Tony Weir trans., 3d ed. 1998); VERNON PALMER, *From Embrace to Banishment: A Study of Judicial Equity in France,* 47 *Am. J. Comp.* L. 277 (1999).
The difference is how we talk about what our judges do. While we in America justify all our rules and explain all our court decisions on the basis of social policy, the civilians generally insist that judicial creativity is invoked chiefly in the case of gaps in the code. See, *e.g.,* CARL BAUDENBACHER, *Some Remarks on the Method of Civil Law,* 34 *Tex. Int'l L.J.* 333 (1999).

prophylactic measures to guarantee the necessary degree of certainty. Two common civilian methods to assure certainty are, first, the emphasis on structure and, second, the encouragement of systemic convergence. These two ideas will serve as my examples.

Common lawyers passing through civil law educational institutions are puzzled at the energy devoted to elaborating the proper conceptual structure or framework for discussing legal issues. Since the structure differs in each civilian jurisdiction, I will limit myself to a pair of examples.

German private law is universally esteemed for the rigorous structure its scholars have elaborated for resolving legal disputes governed by the BGB. In private law questions, German jurists are taught to locate the remedies provision, the Aspruchsgrundlage, and to follow the cross-references in the code to the proper result. The method is more complex than it sounds, since general questions are discussed in the BGB before particular issues, and each question must first be characterized according to its level of abstraction. Though in some private law fields, such as unjust enrichment, some believe the law has exceeded a reasonable degree of subtlety and sophistication, there is no question that German conceptual thinking has had a powerful influence on legal systems throughout the world.

French law has elaborated different structures of analysis. These structures are just as rigorous — and just as mandatory — as German principles of legal construction. One such structure is that of judicial opinions, particularly those of the French Cassation Court, which traditionally are written as a single short paragraph – in fact in grammatical form they are but a single sentence. Another French law structure is the form of the exposé, which is used to present an overview of a legal question. The structure of the exposé — known as the plan — consists of a short introduction and two equal parts, each divided into two equally-balanced subparts. The genius of the structure is its ability to facilitate a discussion of the contradiction underlying any legal topic.

Despite the virtues of these structural thoughts, a foreigner cannot help feeling they are somewhat obsessive. Of course the modern German legal tradition, after its disastrous experience with a wholly different understanding of the personality of law during the

Third Reich,[21] may feel attention to detail is required. The complex structure of legal construction in the German civil law may represent a bastion against the return of Nazi jurisprudence as much as it responds to the insights of progressive German legal thinkers from earlier in the century, but the fact that these two dilemmas are identified, though understandable, is precisely the problem. The enemy is always the same — the risk that a judge will deviate from the structure of the law and decide according to personal interest, belief, or whim. However many caveats are mentioned along the way, by emphasizing a structure that channels thought from conceptual premises to the correct conclusion, the German system teaches its students that the correct substantive result can be derived from the structure of the code.

The French structures create a similar feeling of excess. A three-word phrase in a Cassation Court opinion can revolutionize a field of the law, yet the court itself never explains its innovation. Equally odd, in fact absurd, are the mandatory bipartite structures adopted by French law for all forms of legal scholarship, whether three-page case commentaries, twenty-page law review articles, or thousand-page treatises. I have unsuccessfully searched for the origin of this dualist structure. It is not in Gaius, an ancestor of the Civil Code, nor in Pothier, from whom some of the Code was transcribed, and also not in the Code itself. I don't find the dualities in Aubry & Rau nor even in the treatise writers from the beginning of the 20th century — Josserand, Colin & Capitant, and the like. I can't be certain what causes this arbitrary structural tic, but this ossified structure seems for all the world to hide something — perhaps it is a fortification against the Realist truth that rules don't decide cases.

Due to the current efforts to unify European private law, Llewellyn's insight raises greater stakes in Europe than elsewhere. If judicial decisions depend on a judge's personality and culture rather than on the substance of the rules, unification of European law will be much more difficult than even the skeptics have predicted. For this reason, perhaps, the Europeans employ a different means to avoid the Realist insight. Many who favor a European Civil Code have adopted from Rabel's work on the unification of sales law[22] the notion of convergence, and assert that since the domestic civil laws of the European countries are converging — under the pressure of globalization — few serious choices will have to be made, and, even more important, once the rules are formulated, adjudication in different cultures will not threaten

[21] See BERND RÜTHERS, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtordnung im Nationalsozialismus* (4th ed. 1991).
[22] See ERNST RABEL, *Das Recht des Warenkaufs: Eine rechtsvergleichende Darstellung* (vol. 1 (1936), vol. 2 (1957)).

uniformity.

The concepts of structural rigor and convergence permit the civilians to avoid confronting the inevitability of uncertainty in private law adjudication. I suspect civil lawyers quietly take comfort in the Weberian judgment that their rationally organized system of laws is superior to the common law version of kadi jurisprudence that depends on prophetic pronouncements by individual judges — judges with a recognizable personality.

Of the various responses I have discussed to Llewellyn's insight — phenomena I have tried to explain as reactions to the indeterminacy of legally formulated norms — one of them, the notion of convergence, is at best wishful thinking. Even in Rabel's extraordinary investigation of the sales laws of the world, convergence was more postulated than demonstrated — with regard to each sales issue, Rabel concluded that all legal systems had adopted something closely resembling the German law solution. Moreover, the projects his work inspired — first the 1964 Hague conventions[23] and now CISG — have not demonstrated the convergence Rabel postulated. The Hague conventions were adopted by few states, while the official records of the Vienna conference on the Sales Convention reveal that, to the extent uniformity was achieved, it resulted more from horse-trading than convergence, and on the most difficult questions, CISG contains different rules to accommodate opposing points of view.[24]
Moreover, some voices in the European discussion have suggested that European private law is not converging.[25] Though the position has been challenged,[26] even Europeans who take the unification of European private law seriously have analyzed the situation and concluded that the European systems are still much too far apart to yield a common normativity.[27]

On the other hand, each of the other two insights — the importance of contextual analysis and the need for structure — results from a correct, though one-sided,

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[23] The Uniform Law on the International Sale of Goods ("ULIS") and the Uniform Law on the Formation of Contracts on the International Sale of Goods ("ULF").
[24] Neither the civil nor the common law representatives, for example, were willing to compromise on the question of the primary remedy, so while the Convention permits civil law countries to award specific performance, common law countries will award money damages. See CISG art. 28. In the North-South debates, the developing countries won special rules for the timing of the notice of non-conformity, see id. arts. 39, 44, and the socialist countries were able to prevent the abolition of the Statute of Frauds for the contracts their trading companies conclude. See id. arts. 11-12.
[25] See, e.g., PIERRE LEGRAND, *Against a European Civil Code*, 60 *Mod. L. Rev.* 44 (1997).
[26] See ALAN WATSON, *Legal Transplants and European Private Law* (2000) (Ius Commune Lectures on European Private Law).
[27] See EWOUD HONDIUS, *Towards a European Civil Code: General Introduction*, in Arthur Hartkamp, et al. (eds.), *Towards a European Civil Code 3* (2d ed. 1998).

understanding of the Realist vision. Systematic rigor and the evaluation of all the facts and circumstances have each found solid footing in the law because each represents one aspect of the way law actually works.

The civilian focus on ordering permits a focus on craft and a fabulous precision in resolving cases. Though we in America reject this civilian understanding, perhaps because it is important to our self-image to have passed beyond not only Law I but also Llewellyn's Law II, some American jurists have long lamented that American legal education fails to provide an appreciation of the common law as a coordinated system.[28] Moreover, there is nothing in Llewellyn that precludes us from focusing on the craft of the law, on the proper structure and ordering of our norms. What prevents us from taking craft seriously is not Law II, not Llewellyn's insight, but rather the reductionist attempt to repress the truth of Realism by collapsing law into its neighboring disciplines.

Llewellyn suggested that the rules never clinch the argument, not that they don't matter. He spent twenty years of his life as the chief reporter for the Uniform Commercial Code. One of Llewellyn's primary contributions to the law of sales is precisely in terms of systematicy, and it is worth dwelling for a moment on his discovery in order to demonstrate that not all change in the law is result-oriented. Llewellyn perfected the solution to a problem that has plagued sales law since the Romans, namely the distinction among sales remedies — especially between the *actio redhibitoria* that remedies non-conformity of the goods and the rules for general breach of contract that govern other types of non-performance.[29] In the civil law, particularly in German law, the remedies for defective delivery are more limited and have a shorter statute of limitations than actions for non-delivery.[30] As a result, German lawyers still today are obligated to debate whether a particular breach of the sales contract is best characterized as non-delivery or as defective delivery — if, for example, I promise to deliver an elephant to the zoo and instead deliver a giraffe, have I failed to deliver the promised goods or have I delivered a defective elephant?

Llewellyn wished to transfer all such discussions from the terrain of abstract theory to the terrain of practice — he wanted to focus on the actions of the parties rather than on

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[28] See WESLEY HOHFELD, *The Relations Between Equity and Law*, 11 *Mich. L R.* 537, 540 n. 3 (in fine) (1913).
[29] The problem also arose under the British Sale of Goods Act. Williston laid the initial groundwork for the solution in the American Uniform Sales Act.
[30] Compare BGB §§ 320-327 (non-delivery) with §§ 459-480 (non-conformity).

the interplay of legal concepts.[31] To accomplish this, he shifted the terms of the debate from the type of breach to the question whether the buyer accepted (or revoked acceptance of) the goods, whether the buyer properly rejected, and whether the buyer properly refused the seller's offer of cure.[32] Llewellyn realized that a code cannot eliminate disputes, but it can move them from a conceptual terrain to one capable of resolution by evidence of practical action. Llewellyn never retreated from his insight that the decision process differs from the explanation process, but he nonetheless respected the role of structure in the law. A well-crafted code can focus the discussion in terms that are helpful, facilitating rather than inhibiting the consideration of relevant practical issues.

We have a lot to learn from the civilians, who tend to view a code as a well-organized set of remedies provisions that cross-reference prerequisites located throughout the code. A code should assure judges that, if they consider the enumerated factors, they will not inadvertently skip relevant considerations during the course of their evaluation. In other words, a judge should not create an ad hoc framework for the discussion of each case but rather should employ the framework used for other cases. A well-elaborated structure —this is one aspect of the craft of the law — contributes to the law's principal undertaking, which is to decide like cases alike The structure also provides a system for anchoring the decisions after they have been made, making it possible to locate relevant precedent in the course of subsequent disputes. Unfortunately, American lawyers and judges tend instead to guess at the central issue in the case, and, once they have fastened on something, they argue it to the exclusion of everything else. Much of the time the issues the courts discuss with such energy become irrelevant when the case is properly analyzed. My colleague and I were able to fill a casebook with cases in which the courts proved incapable of following the proper analysis through the UCC.[33]

I should probably point out that my acceptance of this aspect of the civilian vision puts me at odds with those of my colleagues who believe that the content of the individual norms can be altered at will. If structure is an essential element of a code, each norm does not float on its own bottom, and an alteration of any one norm has an effect

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[31] 'The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or tide passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.' UCC § 2-101 Comment.
[32] See RICHARD HYLAND & DENNIS PATTERSON, *An Introduction to Commercial Law* 392-93 (1999).
[33] See ID.

throughout the system.

Now to Llewellyn's other insight, the one American law has preserved as the baseline of our discussion, the proposition that cases can only be properly decided if based on an analysis of all the facts and circumstances. This principle too is valid. Once we ascertain the framework provided in the code, the work, namely the analysis, has yet to begin. The facts and circumstances still have to be evaluated. Those facts can be evaluated differently by different judges — reasonable people can differ and there are no absolutes. In fact it is an axiom of the philosophy of science that an infinite number of theories can be generated to explain any state of affairs. A number of competing legal theories are possible, even within a code's analytical framework, and whenever two of those theories are reasonable, and they often are, a legal dispute arises, and must be resolved, resolved by an evaluation of all of the facts and circumstances of the case, weighed in the light of the judge's aspiration to do justice. The specific content of the rules does not dictate the result. Instead, in the image of the much-regretted Michel Pecheux, the cases offer us the opportunity to tinker with the formulation of the rules to get them nearer the correct result in every case.

In other words, the law consists of two seemingly incompatible processes, one captured by the civilian vision of the law, the other by that of the common law. In the civil law, judges follow the rules for fear of unbalancing the structure, while in the common law, judges reinterpret the rules as they decide the cases. The law is both the process of step-by-step reasoning from one code provision or case precedent to the next, and a holistic evaluation of the facts and circumstances of each case. Once again, perhaps an example is useful.

I propose we examine briefly the Nanakuli case.[34] In Nanakuli, Buyer, a paving contractor, sued Seller, its asphalt supplier, for breach of a requirements contract. Buyer argued that Seller breached the contract by failing to 'price protect' Buyer when Seller raised its prices — failing to delay its price increases until Buyer had purchased sufficient asphalt to fulfill its current obligations to third parties. The issue was whether price protection was required by trade usage and good faith, even though it contradicted the terms of the written contract. The court held that price protection was contractually required.

[34] See *Nanakuli Paving and Rock Co. v. Shell Oil Co., Inc.,* 664 F.2d 772 (9th Cir. 1981).

The evaluation of Buyer's claim requires an examination of the remedies provisions and of the UCC's provisions governing trade usages and good faith. But that is not how a common lawyer would reason to the result. Instead, we might imagine the hypothetical discussion the parties' business representatives might have if they had sat down to settle the matter without their lawyers. Seller might begin by pointing to the written contract that did not obligate Seller to price protect. Buyer would point to Seller's long-term practice of price protection. Seller might respond that the fact it had protected Buyer in the past did not bind it to do so in this case. Buyer might mention that it had justifiably relied on price protection when it concluded paving contracts with third parties. Seller might claim that the previous instances of price protection involved smaller quantities of asphalt and smaller price increases (the increases complained of took place during the 1973-74 oil embargo). Buyer might then argue that Seller knew that Buyer was entering into fixed price paving contracts and therefore Seller took the risk of the increases.

At this point in our simulation, the real questions for decision emerge — which of the two parties should bear the risk for a massive price increase for which neither is responsible, and what role should be played by the fact that it was in the interest of both parties that Buyer enter into government paving contracts without escalator clauses. If the court decides the risk belongs on Seller, it must then confront the second-order considerations, the consequences for future adjudication, particularly whether it is wise in these circumstances to rewrite the contract, to interpret exceptionally broadly a usage that contradicts the terms of the signed written agreement.

In summary, common lawyers and civilians, in flight from the terrifying truth of Realism, have each taken refuge in a different cave. The law is neither of two naive extremes — it is not a formalist application of rules to facts, and it is not a decisionistic application of one's favorite principles from politics or economics. Until the civilians face the uncertainty Realism demonstrates in the law, until they are willing to live with it, draw consequences from it, and reason from it, no American lawyer — including me — will be able to follow civilian legal discussion with interest. On the other hand, Americans have to learn that legal analysis has to take place within the structure elaborated by the law — even though the rules do not decide the cases, they provide the terms in which the discussion must be carried out. Until American lawyers accept that there is a craft to the law and that legal argument is distinct from politically (or economically) correct results, the Europeans — and I side with them in this — have no

reason to take American legal scholarship seriously.

It may seem impossible to reconcile these two ideals — the need to follow the structure of the Code and, at the same time, to evaluate freely all the facts and circumstances of the case. But in fact the effort needed to understand statutes and facts requires the same judicial imagination. It would be impossible to think legally about the facts without the vocabulary provided by the code, just as it would be impossible to understand the purpose of the code provisions without imagining how they would apply to different hypotheticals. Law is the product of the imagination, or it is nothing at all.

One final, more personal example. As the result of a lifelong passion for old stone, I have spent more time than necessary or even useful strolling through ancient ruins, particularly the ruins of Roman provincial cities. On my first encounter with a Roman city, I orient myself, without recourse either to guide or guidebook. I locate the forum, the main axes (the decumanus maximus and the cardo maximus), the tepidarium and caldarium in the baths, the temple cellae, the proscenium in the theater, the curia and basilica, the pomerial road just within the walls, and sometimes I can even locate the comitium and the aerarium, the cisterns, the palaestra, and a postern gate. I try to decipher the Latin inscriptions to determine to which gods the buildings were dedicated. When I have gone as far as I can on my own, I consult my guidebook and see how well I have done.

I was fortunate enough last year to spend several days examining the ruins of Palmyra in the midst of the Syrian desert. After a day and a half, I looked up a guide who had been recommended to me — Ibrahim, a thin leather-skinned, white-haired Palmyrene who had been guiding for fifty years and who told me he knew every stone at the site. I told him I'm a law professor, I'd spent a lifetime studying Roman civilization, and I'd already combed over the ruins at Palmyra a number of times. I told him I'd like to see the subtleties he usually doesn't have time to show his clients. He told me he was booked for the day, but a few dollars convinced him to give me an hour at dusk.

We met as the sun was setting through the monumental arch at the entrance to the mile-long colonnaded street.

'What are you looking at?' he asked.

I pointed up to the arch. 'A triple arch, from about 300 AD, reign of Septimus Severus, with typical floral and geometric designs,' I said, as proud as a first-year law student who for once has done the reading.

'Don't look up there, Professor, look down here,' he said. 'What do you see?' He was pointing to the ground beneath the arch. 'The street.'

'Right, the street, but what's special about the street?' 'You mean because it's so long?'

'So, Professor, this is your first visit to a Roman city.' 'No, I told you, I've seen a lot of Roman cities.'

'Have you ever seen a street like this? Why isn't it paved?'

I thought about it for a moment. 'Maybe they didn't get around to it. Or they didn't have the resources.'

'They didn't have the resources? At Palmyra?' He looked at his shoes and shook his head. I was wasting his time. 'They didn't pave the street because camels lose their footing on stone. The caravans passed down this street after they paid their taxes.'

I knew the City of Palms, the Bride of the Desert, was a caravan city, but I had never thought about what that meant. As we walked down the wide gravel street, Ibrahim painted for my imagination an Orientalist vision of the shops lining the colonnade, filled with silks purchased from the caravans and food and rugs to be sold to them. Then we stopped inside the Tariff Court and examined the three gates, each ten meters high, that pierced its back wall.

'What do you make of the height of the portals?' Ibrahim asked. Once again I was stumped. 'Maybe they were preparing for a visit from the Emperor.'

'From the Emperor!' he repeated. 'Why would the Emperor want to come to Palmyra?'

He shook his head again. 'No, this is the camel entrance. The caravans came from the east, traveling by night across the desert from the Euphrates.' Ibrahim pointed to the darkest part of the sky, a cobalt blue already twinkling with stars. 'They arrived at dawn and followed Zenobia's wall around the city until they arrived here, where they camped

until the city opened. In the morning, the camels entered the courtyard one by one, the duty was collected, and then they passed through that gate into the agora.'

He rotated his body, following with his eye and the forefinger of his outstretched hand the curve of the caravan route along the city's northern fortifications, then followed the camels past the portico into the city and waved for me to follow him into the agora.

'What do you think happened in the agora, Professor?'

'It must have been the market place, and perhaps the site of political discussions.'

'There's a raised marble platform over there, the speaker's platform,' Ibrahim said.

'Who do you think spoke there?'

'The politicians?'

'The auctioneer. He auctioned the goods brought from the East. When the goods were sold, and when the travelers had purchased supplies, they watched a show in the theater and then, around midnight, they exited the city under the arch and set out for Damascus or Apamea.'

By the time Ibrahim left me I could hardly hear myself think. Though I was alone in the moonlight, the ancient caravan city of Palmyra had come to life around me. I saw the caravaners laughing and clapping each other on the back as they thronged out of the theater, I saw them at their last minute errands in the candlelight of the colonnade, I imagined how they collected the animals grazing just beyond the walls, loaded their heavy wool rugs, and mounted their camels. I felt the pulse of a living city. It had never before occurred to me to think of those who inhabited those cities, to consider the urban agglomerations themselves as living organisms.

The legal norms as we find them in the codes are the arteries and squares of the city — the forum, the decumani, the cardines, the entire centuriation grid. The facts and the circumstances of the cases are the stones scattered over the archaeological site. Our job is to use the law and the facts to bring the transaction to life, to imagine how it was lived and breathed by human beings like ourselves. For that task we need the law and the facts, but also our imagination. Law is an art, like writing and painting, a creative

activity. The law is an art, and we should respond as artists when someone criticizes us for not following the rules.

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