
THE NECESSITY OF CONVERGENCE IN PRIVATE LAW

RICHARD A. EPSTEIN*

I. CONCERNING CIVIL AND NATURAL LAW

All peoples who are ruled by laws and customs partly make use of their own laws, and partly have recourse to those which are common to all men; for what every people establishes as law for itself is peculiar to itself, and is called the Civil Law, as being that peculiar to the State; and what natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations, as being the law which all nations employ. Therefore the Roman people partly make use of their own law, and partly avail themselves of that common to all men, which matters we shall explain separately in their proper place.¹

This oft-quoted passage from *The Institutes of Gaius* sounds anachronistic to the modern ear, but the thesis of this Article is that, by staking out a strong claim for the convergence across diverse and separate legal systems, Gaius set private law on the right course for the better part of two millennia. To Gaius, the differences between legal systems were differences in form, which are critical in the day-to-day operation of any legal system but are all in the service of common ends. Namely, all successful private law systems aim to protect four fundamental relationships: the formation of marriage, the transfer of property, the enforcement of promises, and the control of private violence in all its various forms. The

*. Laurence A. Tisch Professor of Law, the New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, the University of Chicago. This paper was prepared for a conference on the convergence and divergence of legal systems, sponsored by the Classical Liberal Institute, and held at NYU Law School on November 2 and 3, 2018. My thanks to Jeremy Rozansky, University of Chicago Law School class of 2019, and Tiberius Davis and Denis Rondeau, University of Chicago Law School class of 2020, for their excellent research assistance.

1. G. INST. 1.1 (S. P. Scott, ed., trans., 1932). There is a parallel passage in the *Institutes of Justinian*. See J. INST. 1.2.1 (J. B. Moyle, trans., Clarendon Press 5th ed. 1913).

first three are amenable to the use of formalities in important transactions. The fourth, obviously, is not.

This is not to say that the substantive law in any of these areas is *identical* across all times and all legal systems. But the more modest claim is true: the variations across and within legal systems are likely to arise, as Professor Saul Levmore pointed out some time ago, on second-order questions that are so close on the merits that disagreement and inconsistencies are as likely to emerge.² But on matters that do go to human survival, those differences disappear. No community, however constituted, could long tolerate theft, trespass, murder, rape, or refuse to enforce any commercial promise. Quite simply, the control of aggression and advancing the gains from trade are too important to admit differences.

The natural law framework seized on these facts and should be understood in that light. But starting about one hundred years ago, resistance to Gaius's formulation arose. There are few phrases today that make the modern lawyer recoil more than the two words "natural reason" or their close sidekick, "natural law." To most modern lawyers—Professor John Finnis is the most notable exception³—the use of the term "natural" in legal discourse represents a giant categorical mistake. The laws of nature are those of physics, chemistry, and biology. These laws have to do with relationships between cause and effect in an immoral world devoid of interests, passions, emotions, and desires. The rules all refer to natural regularities, so that it is otiose to act as if a falling rock could disobey the laws of gravity. Human rules are strictly human inventions or, as David Hume—himself a Scotsman trained in Roman law—said long ago, the "artificial" conventions that structure human relationships.⁴ Law, therefore, is just an instrumental tool that lets societies govern themselves. But for all his terminological tangles, Hume's position is a less precise version of Gaius's:

You may be thinking that if justice is granted to be a human invention then it too must be flimsy and impermanent in that way; but the cases are quite different. The interest on which justice is founded is the greatest imaginable, and extends to all times and places. It couldn't possibly be served by any other invention.⁵

2. See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 49 (1987).

3. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23–30 (Paul Craig ed., 2d ed. 2011) (discussing the philosophy of law and religious ethics).

4. DAVID HUME, *A TREATISE ON HUMAN NATURE*, BOOK III: MORALS 257 (Jonathan Bennett ed. 2017) (1740), <https://www.earlymoderntexts.com/assets/pdfs/hume1740book3.pdf>.

5. *Id.* at 322.

To avoid giving offence, I must here remark that when I deny that justice is a natural virtue, I am using the word ‘natural’ only as opposed to ‘artificial’ In another sense of the word, no principle in the human mind is more ‘natural’ than a sense of virtue, so no virtue is more ‘natural’ than justice. . . . Though the rules of justice are artificial, they aren’t simply *decided on* by some one or more human beings. And there’s nothing wrong with calling them ‘laws of nature’, if we take ‘nature’ to include everything that is common to our species, or even if we take it more narrowly to cover only what is inseparable from our species.⁶

Indeed, right after these statements Hume goes on, somewhat inaccurately, to state the central propositions of a just society dealing with the stability of ownership and the transfer of property, topics on which he clearly derives his basic classification from Justinian.⁷ (Gaius had not yet been rediscovered when Hume wrote.) In *A Treatise on Human Nature, Book III: Morals*, Hume addresses “[t]he rules that settle who owns what.”⁸ He begins by noting that “the stability of ownership is not only useful but outright necessary for human society,” and then proceeds to address the particular rules that resolve that question in individual cases.⁹ Ultimately, his list is straight from Justinian: (1) occupation, (2) prescription, (3) accession, and (4) inheritance.¹⁰ With these preliminaries established, it is possible to see why Gaius’s (as expanded in Justinian) position makes sense, by seeing how the overall system fits together.

First, neither Gaius nor Hume believe that some historical authoritative figure, whether divine or human, promulgated the law, nor does either appeal to some theory of logically necessary ethics to explain the emergence of any set of universal rules. Neither formulation hints at any kind of Kantian inevitability. Both think in terms of instrumentalist justifications for the law, obtained through the slow accretion by customary practice. Thus Hume writes: “[t]he rule concerning the stability of ownership comes into existence gradually, gathering force by a slow progression and by our repeated experience of the drawbacks of transgressing it; but that doesn’t detract from its status as a human convention.”¹¹

6. *Id.* at 260.

7. J. INST. 1.2.1.

8. HUME, *supra* note 4, at 260.

9. *Id.* at 260. For a discussion of the contrast between Locke’s labor theory of value and the traditional view on occupation as expressed by Gaius, Justinian and Hume, see *infra* text accompanying notes 36–38.

10. *Id.* at 261. For a brief commentary on each of these four modes, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 120–40, 234–41 (1962).

11. HUME, *supra* note 4, at 254.

In political terms, this last observation means that natural law arises before any state is in a position to generate the applicable rules. In light of the position of both Gaius and Hume, critics of the natural law tradition seriously misfire if, having satisfied themselves that laws do not enjoy the status of either logical or factual truths, they claim that laws are arbitrary dicta that societies can accept or reject at their will. Natural law, as an organizing concept, lasted for two millennia for good reason: it worked. Indeed, it only gave way during the progressive era in the United States under the legal realist movement, which often rested on the incorrect view that the imprecise nature of language makes it difficult to formulate legal rules at all,¹² or challenging to imply a set of sensible terms into any contract, statute, or constitution.¹³ But the natural foundations are made of far sturdier stuff than its critics suppose. Natural law allowed successful societies to put together legal rules in order to maximize human well-being or flourishing in light of the laws of nature, including those of physics, chemistry, and, of course, biology. The uniformity that we see in the organization of *private* law practices reflects these underlying constraints on social organization.

My general claim about universality only applies to *private* law, which governs the relationships of ordinary individuals with each other on a plane of parity *before* the rise of the state. In practice, the well-organized state entrenches these rules in ways to improve its overall stability. Indeed, this is a view of natural law that is associated with John Locke and his *Two Treatises of Government*. It is wholly antithetical to Thomas Hobbes's earlier view on the same subject as expressed in his renowned work, *Leviathan*.¹⁴ Hobbes portrayed natural law as the system in which all individuals could do whatever they wanted in order to advance their self-interest because "the cardinal virtue" in the state of nature was the use of force and fraud so long (and until) one meets the strong resistance of some power.¹⁵ In a state of nature, everyone keeps what he gains no matter how he gains it. On this grim view of human nature, the formation of any state

12. See Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL'Y. 583, 601 (2016).

13. See Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295, 298–99 (2017).

14. THOMAS HOBBS, *THE LEVIATHAN* (Prometheus Bks. 1988) (1651).

15. *Id.* at 66. Hobbes's exact formulation was as follows:

To this warre of every man against every man against every man, this also is consequent: that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall vertues. Justice, and Injustice are none of the Faculties neither of the Body, nor Mind.

Id.

will surely flounder for two reasons. First, the equilibrium will unravel. So long as one person thinks it advantageous to stay out, he poses a peril to all others and will inspire others to leave, until the defections snowball. Second, even if that problem can be surmounted, no leaders will know how to lead because they are bereft of any body of experience or judgment on which to rely.

Public law is, or at least can be, a very different beast. It necessarily arises in the city or state long after customary practices have created the body of rules that cope successfully with cooperation and conflict among ordinary individuals, often within a familial context. In contrast, any public law system, following Hobbes, often gives primacy of place to the arbitrary power of the sovereign who is now said to be the author (or at least ratifier) of all private law. Roman republicanism developed a complex system of divided checks and balances to guard against arbitrary power,¹⁶ which informed American constitutionalism, as evidenced by the references to ancient institutions and practices found, for example, in *The Federalist Papers*.¹⁷ But arbitrary power arises whenever one person or a small group manages to aggrandize their monopoly on the use of force within the territory, to use the useful definition of Max Weber.¹⁸ It is not likely that anyone can devise a normative set of political practices from the Roman maxim, *quod principi placuit legis vigorem habet*—that which is pleasing unto the prince has the force of law.

Private law is quite different given the absence of one dominant person who can rig the rules of the game. In contrast to the public format, private law works under a built-in “impartial spectator” (Adam Smith)¹⁹ or “veil of ignorance” (John Rawls) constraint,²⁰ because individuals do not know

16. For an informative account on these connections, see M. N. S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* 46–49 (1994).

17. It is worth noting that *The Federalist Papers* were published under the name of Publius and explicitly referenced Roman institutions, history, and practice. *THE FEDERALIST* NO. 6, at 24, 27 (Alexander Hamilton) (Buccaneer Books 1992); *THE FEDERALIST* NO. 70 at 356, 361 (Alexander Hamilton) (Buccaneer Books 1992); *THE FEDERALIST* NO. 38 at 182, 189 (James Madison) (Buccaneer Books 1992); *THE FEDERALIST* NO. 63 at 321–22, 324–25 (James Madison) (Buccaneer Books 1992).

18. MAX WEBER, *POLITICS AS A VOCATION* (1919), reprinted in *MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H.H. Gerth & C. Wright Mills eds., trans., Routledge 1991) (defining the state as “a human community that (successfully) *claims the monopoly of the legitimate use of physical force* within a given territory” (emphasis in original)). Weber’s definition needs a lot of work to deal with dual sovereignty under the American constitution, for which clear lines are needed to separate state from federal spheres of sovereignty, both necessarily in the same territory.

19. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 100–01 (MetaLibri 2006) (1759).

20. JOHN RAWLS, *A THEORY OF JUSTICE* 118–25 (Harvard Univ. Press rev. ed. 1999).

whether they will be injurers or victims, buyers or sellers, property owners or outsiders in any particular transaction. People are therefore forced to take a neutral perspective in formulating any rule. That process need not generate efficient rules. For many primitive societies were destroyed by internal conflict, even before being overwhelmed by external forces. But the position of ignorance pushes people toward an efficient solution: the rules that tend to lead to the largest level of social output. Since the pressures from scarcity and human imperfections exert a constant influence across different cultures, the solutions will tend to converge at least on matters of principle, because it is just too costly to flout the basic conditions of survival or what ancients and moderns alike, writing manifestly in the natural law tradition, dramatically called “self-preservation.”²¹

II. THE PHYSICAL AND BIOLOGICAL PRECONDITIONS OF CONVERGENCE

A. PHYSICS AND FORCE

So, what are those conditions? They derive from the rules of physics and biology.

We start with the laws of physics, which contain terms such as force and power that are commonly carried over into every functioning legal system. This universal translation from physics to law does not represent some singular intellectual blunder endlessly repeated by all societies all over the world. The translation of the physical to the legal resonates because of this lockstep progression in three stages. First, the law of physics drives the development of language (and its universal grammar),²² which in turn drives legal relations, including the prohibition on the law of force.

A person who has and can wield force against another has a huge advantage. The threat of the use of force can secure capitulation by individuals who prefer the surrender of property to the loss of life. Gravity is a universal constant. Height is always an enormous advantage, because the force of gravity is with you and not against you, which puts the underdog,

21. CICERO, DE OFFICIIS 13, ¶ 11 (T.E. Page et al. eds., Walter Miller trans., William Heinemann 1913) (c. 44 B.C.E.).

First of all, Nature has endowed every species of living creature with the instinct of self-preservation, of avoiding what seems likely to cause injury to life or limb, and of procuring and providing everything needful for life—food, shelter, and the like. A common property of all creatures is also the reproductive instinct (the purpose of which is the propagation of the species) and also a certain amount of concern for their offspring.

Id.

22. For the early claim, see NOAM CHOMSKY, SYNTACTIC STRUCTURES 49–50 (8th ed. 1969).

literally taken, at a disadvantage. It is not for nothing that the holder of power receives the title “your highness,” while lower orders have to kneel and thus disarm themselves. People worry about having to fight an uphill battle, and fairness comes out of competing on a level playing field.

Leverage matters for power, just as Archimedes said that it would. It is for that reason that common law said that duress in the narrowest sense of the word always involves the creation of a choice—either surrender what you own or I shall inflict worse harm on you, your family, and your property. The reason duress is improper is not that it denies all choice, but that it denies, as Justice Holmes said, the choice that all individuals value most: the refusal to deal with other human beings at all by going their separate ways.²³ This notion is built into a universal grammar. The nominative refers to the person who exercises the force and the accusative to the person or thing to whom that force is directed. “He hit me” becomes the dominant mode of physical transformation. That transformation in turn becomes the causation of harm once it is demonstrated that the physical transformation from the application of force reduces the value of the person or thing to whom it is applied.²⁴ It is one thing to chisel a sculpture out of stone. It is quite another to destroy it, even if the same chisel can be used for both tasks.

B. BIOLOGY AND MARRIAGE

Next comes biology. Here the imperative is reproduction so that persons can survive across generations. For human beings, the period of maturation everywhere is slow so that some provision has to be made to take care of the young before they are able to take care of themselves. For procreation and childrearing, the traditional forms of marriage are key. These tasks require the cooperation of male and female at both stages, typically through monogamous relationships, but often polygamous relationships as well. The legal rules create a “natural obligation” for parents to take care of children, long before the creation of the state, which rely on the common genetic bond to keep the relationship stable over time.

At this point, Gaius is surely correct that marriage is a uniform social arrangement. Hume, ever the nonskeptic, writes of “the natural appetite between the sexes, which brings them together and keeps them together ‘as a two-person society’ until their concern for their offspring binds them

23. *Union Pac. R.R. v. Pub. Serv. Comm’n.*, 248 U.S. 67, 70 (1918) (Holmes, J.) (“It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.”).

24. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 166 (1973).

together in a new way.”²⁵ Because marriage is an important and infrequent relation (one does not get married every Tuesday), societies use formalities to mark off preliminary negotiations from actual marriage. That combination of high value and low frequency apply as well to land transactions and wills. Hence these transactions also generate requirements of formality, writing, and recordation. Historically, the same ceremony of mancipation—an uneasy cross between conveyance and fictitious judgment—applied to marriage and the conveyance of land and valuable herd animals.²⁶ Thus, on this point, Gaius is again correct to note that these forms—rituals, writings, witnesses, and recording—may vary from culture to culture even if the institution of marriage does not. The need for forms holds both when marriage is conceived of as a voluntary transaction between husband and wife, and, as was common historically, a conveyance of a daughter from the wife’s family to the husband, where dowries and obligations of support went hand in hand. Yet formalities often break down, so that all legal systems develop back-up rules, typically by allowing the perfection of title by long use—whether by cohabitation, adverse possession, or prescription. It was just these rules governing the “bonitar[y]” owner.²⁷ These are again rules that can admit of no exception even if the particulars of the prescriptive entitlement can vary.

C. PROPERTY

The laws of physics and biology also set the conditions for the convergence, across societies, of the basic rules governing the acquisition and transfer of property. The rules governing the acquisition of private property reveal two distinct patterns and are resource specific.

For example, in no society do the rules governing water rights parallel those for land, chattels, and animals, which differ in lesser ways among themselves. The water rights start with the notion of common (*res commune*) property in a state of nature, whereby no one is in a position to exclude all others or to divert water solely for private use.²⁸ Again, the basic physics drives all water law systems because total privatization of the rivers and paths leads to endless balkanization. The value of water for transportation, for recreation, and for fishing are all lost if that water is put into a barrel. By

25. HUME, *supra* note 4, at 251.

26. See G. INST. 1.119 (discussing marriage); G. INST. 2.14, 2.18, 2.22–23.

27. *Id.* at 2.40 (discussing “bonitarian” ownership which is the fancy civilian term for the Latin which talks about these things as “*in bonis*,” or among the goods).

28. See, e.g., J. INST. 2.1.1–5.

the same token, in riparian systems some removal of water from the river is consistent with the preservation of the remainder for common use, which remains key to the overall picture. At no point, however, do the principles of riparian rights rely on the Lockean “labor theory” of property acquisition.²⁹ To be sure, any water properly taken out of a river is privately owned. But the customary rules place very different restraints on removal that have little or nothing to do with the two standard Lockean constraints: leave as much again and as good—which under scarcity can never be achieved—or the prohibition against waste.³⁰ Every riparian system rejects the notion of temporal priority for earlier riparians. It is designed to maximize total value subject to a distributional constraint of rough parity.³¹

Historically, legal enforcement followed these natural law rules. But the intensive use of water for transportation, fishing, and recreation could lead to overconsumption, which needs to be curbed without altering the basic relations among the various stakeholders, and the so-called public trust doctrine is a modern permutation whereby the Crown or state takes over operation of the river, not as an outside owner, but as a trustee whose duty is to maximize the value of the resource for all stakeholders.³² Like other trustees, the public trustee is bound by rules against self-dealing and receives the protection of the business judgment rule for standard management decisions.

The rules for the occupation of land, animals, and chattels take the converse form, where temporal priority controls: prior in time is higher in right. But prior in doing what? The Roman and common law rule on priority keyed it to occupation,³³ a term that Hume used correctly in his *Treatise*,³⁴ coupled with his sound awareness of the common property status of air and

29. See JOHN LOCKE, *LOCKE’S SECOND TREATISE OF CIVIL GOVERNMENT* 26 ¶ 27 (Lester DeKoster ed., William B. Eerdmans Pub. 1979) (1690).

Whatsoever then he removes out of the state of nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.

Id.

30. *Id.* at ¶¶ 24, 32.

31. For further discussion on this topic, see Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, 11 *SOC. PHIL. & POL.* 17 (1994); Richard A. Epstein, *Property Rights in Water, Spectrum, and Minerals*, 86 *U. COLO. L. REV.* 389, 401 (2015).

32. See Richard A. Epstein, *The Public Trust Doctrine*, 7 *CATO J.* 411, 411–12 (1987).

33. See, e.g., *G. INST.* 2.66.

34. HUME, *supra* note 4, at 262.

water.³⁵ Locke, on the other hand, makes a cosmic error by adopting the so-called “labor” theory of acquisition, under which people acquire property by mixing their labor with some external thing.³⁶ So, why is the difference so critical? Under the occupation theory, the prospective taker need only do as *little* as possible to demarcate his property from the rest of the world. Hence the owner does not have to dissipate the surplus that he derives from efficient management, use, and development of the asset in order to perfect title in land or by capture of an animal. Obviously, there can be disputes as to when possession is acquired, whether it be by hot pursuit, wounding, or capturing. But these are low-level differences that do not reflect any major change in world view, given that they result in practice in the same outcome more than ninety-nine percent of the time.³⁷ By contrast, Locke’s labor theory of value makes it appear, wrongly, as though title is acquired only to the extent that labor is added, a decidedly Marxist conception wholly at odds with the common law rule.³⁸ The relative efficiency of the two rules should be instantly apparent. The labor theory of value results in a massive waste of resources, incentivizing prospective takers to labor as much as possible to claim the thing. If it takes \$100 of labor to acquire land worth \$100, why labor at all?

To be sure, a labor theory of value is relevant whenever two or more parties, as commonly happens, contribute inputs of property or labor jointly to the creation of a new product. In these cases, to get the right incentives, the best solution seeks to normalize the rate of return so as to maximize the total surplus from the property.³⁹ When it takes two ships to beach or capture a whale, the second crew has to divide the value with the first. Likewise, the finder who reports the whale to the ship that killed it receives, by custom, compensation for the services rendered, but cannot keep the whale or its sperm oil.⁴⁰ Again, these basic rules apply everywhere. The major weakness of these rules is that they lead to excessive capture of whales, but this is best handled by rules that limit catches, not by altering the rules of acquisition. And those institutional rules that set catch limits or other forms of hunting and fishing restrictions all require legislation or treaty for their implication.

35. *See id.* at 256.

36. LOCKE, *supra* note 29, 26 ¶ 27.

37. *See* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1230 (1979).

38. For discussion, see Richard A. Epstein, *The Basic Structure of Intellectual Property Law*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 25, 27–36 (Rochelle C. Dreyfuss & Justine Pila eds., 2018).

39. For the rules on whale divisions, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW 191–206 (1991); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 198–99 (Quid Pro Law Books 2010) (1881).

40. *See* *Ghen v. Rich*, 8 F. 159, 162 (D. Mass. 1881).

We also see a convergence in the law of property transfers. Normally, standard contracts transfer property, but in some cases, transfer arises by mistake or theft. Here are three examples. First, consider the situation where *A* takes possession of land owned by *B*. Whether on purpose or by mistake, *B* always has the chance to recover that property for a decent interval before the statute of limitations runs. But *A* immediately gets good title against the rest of the world so that property does not fall into limbo once it is improperly taken. Thus, if *A* sues a later taker, *T*, *T* cannot defend by showing that *B* has the full title. Second is the circumstance where *A* mixes his labor or property with that of *B*. If *A* does it on purpose, he loses all claims. But if the action is done by mistake, the question arises how to respect the contributions of both parties.⁴¹ Where the union can be easily undone, it is best to return to the status quo ante. But where the merger cannot be undone, the law allocates the thing to one party—usually the one who adds a distinctive component, preferring, for instance, the sculptor over the purveyor of the stone—but gives the other party just compensation for the material transferred. Last is the common situation where *A* takes the goods of *B* and sells them to *C*. If *C* knows that the goods are stolen, he has to return them to the owner. If he does not, there are complex rules to determine whether *A* or *C* prevails, and these differ as much within as across societies. But no one protects the thief. The basic natural law uniformity holds firm.

D. TORT

This preoccupation with force is found through the law; for example, in the formation of the law of torts, physical aggression is always the greatest danger to social peace. Thus, the early English law of trespass starts with the direct application of force from one person to another. That rule applies to a person who puts his hand on your body, which in the Roman law carried with it the evocative name *corpore corpori*, or “by the body to the body.” But at this starting point, the same incremental extensions took place in both Roman law and common law systems. If you touch the clothing on the body, you touch the body as well. And if you use a stick, the transmission of force extends from the hand through a fixed object. Arrows and bullets are the direct application of force, even if they are no longer in the grasp of the archer or shooter, whether or not the blow was direct or a ricochet that just changed the direction of the arrow or bullet.

So casuistic extension is now tied to physics. Causation in law, as in life, has nothing whatsoever to do with some philosophical abstraction about

41. For discussion, see G. INST. 2.73–79; J. INST. 2.1.25–.34.

“necessary” and “sufficient” conditions. The universality of physics explains why the laws of nature bear such a close connection to natural law. The physical reality is necessarily carried over into the grammar of every language by the use of a familiar list of transitive verbs—hit, pull, punch, kick, with a subject and a direct object. Indeed, in some complex cases both English and Latin use the hyper-transitive of the form “*A* made *B* hit *C*,” where *B* is both actor with regard to *C* and an object with respect to *A*. *B* is usually rendered in the accusative, so that *A* bears the ultimate responsibility. The difficult legal choices arise whenever *A* is out of the picture so that *B* becomes *C*’s only source of relief—a situation too infrequent in dealing with physical torts to destabilize any legal system.

This incomplete account sets the stage for many complications, of which I will mention only several here. The first involves joint causation, which in this narrow model occurs when $F1 + F2$ combine, additively, to cause the damage. Now deciding individual responsibility is much more difficult when some minimum level of force, F_x , has to be satisfied before physical harm—say the breaking of skin or bone—takes place. Thus, there is no clear apportionment mechanism between two forces, where $F1 > F2$, when the minimum force needed for harm is less than $F1 + F2$. Is either person alone responsible for the whole, or should the loss be split, and if so, how? Now the laws of physics do not explain the separation between parties, even if all these quantities are precisely known.⁴² The problem takes on a special application, again in all systems, where $F1$ is supplied by the plaintiff and $F2$ is supplied by the defendant—in other words, on how contributory causation relates to contributory negligence.⁴³ No matter the legal system, this problem of joint causation is not advanced by the common, if illicit, strategy of converting a problem of physics into a pseudo-logical problem, by asking whether $F1$ or $F2$ is a necessary or sufficient condition. This formulation breaks down as the number of contributing forces increases, their relative size decreases, and purely natural forces contribute to the overall harm.

The rules governing force leave an enormous gap in every legal system: when the application of direct force ends, what happens to the theory of causation? To the modernist who thinks in terms of “but for” causation, the question is not worth a second thought. Nonetheless, the but for theory goes

42. For a gallant exploration of these complications, see generally Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts; An Economic Theory*, 80 COLUM. L. REV. 1399 (1980).

43. For further discussion on this very problem, see Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 179–80 (1974).

off the rails because it starts at the wrong end of the barrel. All serious theories of causation work out from direct causation; they do not work in from wildly remote theories of causation. No one argues that “but for the (negligent) discovery of America by Columbus, this accident would never happen,” which is why “but for” causation has no hold in civil law systems that start with *corpore corpori* cases.⁴⁴ Instead, causal arguments were historically extended through the “analogous action”—the *actio in factum*—to cover cases that the Romans called “*causam mortis praestare*,” or furnishing a cause of death.⁴⁵ The paradigmatic case was giving poison to someone who drank it of her free will, not knowing that it was poison. Similarly, cases in which one person set a trap for another—i.e., a concealed condition which represented apparent safety—into which someone else fell, was held liable as well even though the direct force came from the action of gravity on the body of the person. None of these cases involve the direct application of force, but in all systems the plaintiff’s mistaken action does not sever the causal chain as some “*novus actus interveniens*,” or new and intervening act. This argument is not peculiar to Roman law, for the exact same transformation took place in early English law with the rise of the action on the case—in other words, for particular facts—where the stock example was a horse stumbling over a log left in the road.⁴⁶ The plaintiff’s innocent application of force does not sever causal connection with the underlying dangerous condition.

When combined, these two theories of causation explain the tort of nuisance as with the release or noisome odors or fumes that that make their way from the defendant’s property—some directly and some not. These nuisances can be sprawling affairs, which place heavy pressure on private lawsuits, so that administrative remedies tend to dominate (except in cases of concentrated discharges by a few persons against a few persons). But since these permutations rest on undisputed physical facts, the substantive variations across legal systems are minor, even if the formal devices of joinder or regulation differ, at least in name, just as Gaius predicted.⁴⁷

44. For discussion, see REINHARD ZIMMERMAN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 988–96 (Oxford Univ. Press 1996) (1990).

45. DIG. 9.2.6–8 (Ulpian, Ad Edictum 18) (Theodore Mommsen et al. eds., Univ. of Pa. Press 1965).

46. See, e.g., *Reynolds v. Clarke* (1725) 92 Eng. Rep. 410, 412–13 (KB).

47. See, e.g., RESTATEMENT (SECOND) OF TORTS § 433B (AM. LAW INST. 1965).

E. CONTRACT

The law of contracts facilitates the gains from cooperation and exchange. The first element of this project, of course, is to create some agreement between two (or more) parties. In some cases, this is easily accomplished with minimal fuss and bother, most notably in cases of the rapid exchange of low-valued goods and services, where speed is of the essence and formalities are unimportant. But many transactions, such as marriage, sale of land, formation of complex organizations, are for greater value and last far longer. In these situations, the second part of Gaius's general rule, dealing with formality, kicks in to ensure the validity of the transaction. I have already mentioned the Roman use of mancipation for the transfer of land, certain herd animals, and slaves,⁴⁸ as well as marriage.⁴⁹ In medieval England, livery of seisin was a standard form for the conveyance of land, at least before it gave way to the deed under the Statute of Frauds.⁵⁰ Similarly, in contract law, the Romans required the match of an explicit question and answer system for stipulations—unilateral contracts that were used for the creation of debts and the delivery of property.⁵¹ These formalities vary of course with time and technology. No Roman contract was verified by e-signature.

For our purposes, what matters is the uniform logic that determines the selective use of formalities. All contracts are subject to dispute about contractual language and performance. Any system of formality tries to limit the possibilities of error and fraud by the use of general precautions before the event. Such formalities help minimize the pressure on dispute resolution costs subsequent to formation by, among other things, dealing with the pesky problems of mistake, fraud, and duress that could arise over the life of a contract.⁵² The overall ideal is to minimize the sum of both ex ante and ex post costs of administration and reduce uncertainty over the life of a transaction. This is usually done by ex ante precautions, both at the time of formation and over the course of the performance (for example, lien waivers).⁵³ Note that these formalities are never intended to limit the substantive terms of the agreement, either on price, subject matter definition, or conditions, and thus are quite different from regulations (for example,

48. See G. INST. 2.15–18.

49. *Id.* 1.119.

50. See Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 436 (1928).

51. See G. INST. 2.92–116.

52. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799–801 (1941).

53. Richard A. Epstein, *Compounding Errors: Why Heightened Regulation and Taxation Are Bad Antidotes for Recessions and Income Inequality*, 17 THEORETICAL INQUIRIES L. 711, 723–24 (2016).

minimum wage or rent control) that impose substantive limitations on the terms of transactions and thus the possibilities of gains from trade. The exact remedial sanctions against the various parties can surely vary—consider nonenforcement, damages, and criminal punishments—but the basic entitlements remain remarkably constant throughout.

To be sure, there are some appropriate substantive limitations, which are usually tied to externalities against third persons that correlate with social costs. The two most salient candidates are contracts—now called conspiracies—to use force against third parties, and, in more modern times, contracts that impose unreasonable restraints of trade.⁵⁴ The rules against conspiracies to commit murder or robbery are rigorously enforced, precisely because the evident gains from cooperation between the coconspirators *increase* the probability and severity of an admitted negative externality, and hence have to be curbed.

Once the formality question is answered, the question of contract classification begins, and here too the Roman distinction between *bona fide* (good faith) contracts and *stricti iuris* (strictly enforced) contracts comes to pass. The line here is best illustrated by the extreme cases. The real risk in a loan contract is nonrepayment, for which there are few if any excuses. So the general rule is to have a strict law subject to a number of limited exceptions, each of which tends to be specially pleaded. But in a contract for sale, hire, or any permutation between them (for example, a contract for hire, with an option to buy), the obligations are much more fluid, and the sequence of performance on such matters as inspection or delivery are harder to identify. The *bona fide* limitation makes it clear that optimal cooperative behavior is required, but in the absence of any clear knowledge of what steps should be undertaken, the law retreats to a more global perspective.⁵⁵ So the basic good faith provision uses its generative capacity to articulate certain terms that help efficiency. For example, warranties of title protect against superior claimants, while warranties of merchantability cover defects in the condition of the sold product, both of which carry over into modern law in their original

54. See *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347, 347 (Q.B.); see also *Standard Oil Co. v. United States*, 221 U.S. 1, 72–77 (1911) (carrying forward the limit on unreasonable restraints on trade into modern times).

55. See G. INST. 3.137.

Likewise, in contracts of this description the parties are reciprocally liable, because each is liable to the other to perform what is proper and just; while, on the other hand, in the case of verbal obligations one party stipulates and the other promises; and in the entry of claims one party creates an obligation by doing so, and the other becomes liable.

Id.

form.⁵⁶

Complex contracts also raise sequence of performance issues where the performance of the seller, say, depends upon the performance of certain conditions by the buyer. For example, I do not have to deliver a large appliance to your home unless there is a safe mode of entry. As the permutations increase, the decision tree becomes more critical, and for each deviation from standard, a question could be asked: whether the party in breach is given the option to cure, whether damages or rejection or both is appropriate, and so on. These and similar arrangements arise everywhere in the law of sales, hire, agency, and partnership. Cooperation is required everywhere.

The matter is made more difficult because incompleteness of terms is a fixed feature of contracting. Yet once discharge by performance is not complete, one has to deal with implied excuses—mistake and frustration—and the choice of remedies. Ideally these issues are resolved by an explicit provision, and just that happens when a problem is recurrent and large. As to damages, restitution, reliance, and expectation damages cover many cases,⁵⁷ but, most emphatically, *not* the case of consequential damages after breach—for example, the lost profits that come when a small part in an airplane malfunctions, disabling the craft.⁵⁸ Thus, to eliminate the need to deal with complex mitigation issues, it becomes necessary to craft particular terms that set out the initial (or maximum) liability for breach in contracts for the carriage of goods. The standard form requires a designated sum that is small relative to the total damages, but large relevant to the price of the contract of carriage. That gives some assurance of delivery to the party whose goods are shipped, and a strong incentive to the party who receives and uses the goods to take steps to mitigate damages, which often involves the simple expedient of shipping the same goods by a different carrier over a different route. Again, these issues are not bound by time and place; the convergence tends to survive in modern times, unless of course displaced by statute.

56. U.C.C. § 2-312 (AM. LAW INST. 2018) (addressing title); *Id.* § 2-314 (addressing merchantability).

57. See L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 53–57 (1936).

58. See Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 108 (1989).

CONCLUSION

The progression of this article runs as follows. It is evident that human beings have some traits in common and some on which they differ. The common traits drive every society to rules that understand that all persons fear death by the use of force and must guard against those forms of aggression and the close substitutes to it—for example, poisoning or setting traps. It also means that they must have ways in which to marry and propagate which, under the principles of natural love and affection, lead parents to care for each other, and in the other sense of care, care for their children. The law of property must regulate the acquisition, use, and transfer of various kinds of resources. Contract law facilitates gains from trade by bolstering the security of transactions, often by the use of formalities that reduce the overall cost of contractual enforcement. Hard cases are ever-present at the margins, but for the vast bulk of routine transactions, legal rules are relatively constant across time and space.

This collection of rules and practices were developed without regard to any conscious theory of utility or wealth maximization—concepts that were alien throughout much of our legal history. But the ancients did have a conception of human flourishing, which does supply the needed link between natural law theory and utilitarianism.⁵⁹ The translation is not that difficult to see. Flourishing looks like a biological term that applies to individual well-being. But it is easy to transform it into a social concept by noting that the flourishing of one cannot arise by attacking someone else's person or property, or breaching promises. The effort to secure human flourishing for all anticipates the view that all social changes should be in search of Pareto improvements whenever possible,⁶⁰ with only narrow exceptions in cases of extreme imbalance.⁶¹ I have long championed the view, and I have yet to see any powerful or systematic evidence to the contrary.

59. See Richard A. Epstein, *From Natural Law to Social Welfare: Theoretical Principles and Practical Applications*, 100 IOWA L. REV. 1743, 1772 (2015) [hereinafter Epstein, *From Natural Law to Social Welfare*]; Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 711, 719–29 (1989).

60. Epstein, *From Natural Law to Social Welfare*, *supra* note 59, at 1766–72.

61. Perhaps the most dramatic instance in which prior property rights were overridden because of the huge overall differences in output was *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

