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Public Law, Private Law, and Legal Science

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Abstract

This essay explores the historical and conceptual connections between private law and nineteenth century classical legal science from the perspective of German, American, and Jewish law. In each context, legal science flourished when scholars examined the confined doctrines traditional to private law, but fell apart when applied to public, administrative and regulatory law. Moving to the contemporary context, while traditional private law scholarship retains a prominent position in German law and academia, American law has increasingly shifted its focus from the language of substantive private law to a legal regime centered on public and procedural law. The essay concludes by raising skepticism over recent calls to reinvigorate the Euro-American dialogue by focusing on traditional private law and scholarship.

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I. INTRODUCTION

Professor Haferkamp's paper concisely details the rise and fall of an autonomous legal science in Germany. According to Professor Haferkamp, the beginning of the nineteenth century saw the gradual concentration of power in the hands of the state and the creation of public law, which in turn necessitated the demarcation of a distinct field of private law. By the end of the century, however, many lost confidence in the view that private law is distinct from the state and society. In turn, this led to the demise of the autonomous conception of private law.[1]

* Assistant Professor, Villanova Law School. This paper is a slightly more formal version of the comments presented at the *Private Law Beyond the State* conference in Hamburg Germany, July 2007. The casual tone and light notation reflects the oral origin of these remarks. I would like to thank Ralf Michaels and Matthias Reimann for their helpful reactions to these comments.

1. *See* Hans-Peter Haferkamp, *The Science of Private Law and the State in*

The traditional narrative sees the creation of an autonomous private law as the work of the nineteenth-century German academics. Professor Haferkamp argues however, that this account undervalues the contributions of the nineteenth-century German judiciary. His paper thus moves our understanding of legal science away from the stereotypical emphasis on the jurist, and closer to the common law's model of legal transformation via the judiciary.[2]

There is a Talmudic dictum warning a student from speaking in front of his teachers.[3] Since the little I know about nineteenth century German law was taught to me by scholars present in this room, I will heed the Talmud's advice, and leave the discussion of the German legal science to Professor Haferkamp and the assembled experts. I thus direct my remarks to a discussion of: (i) public versus private law from the American perspective, (ii) an analysis of judicial law versus juristic law from the perspective of Jewish law, and finally (iii) an examination of the relationship between private law and legal science in each setting. Pulling these observations together, I conclude by questioning the viability of one of the goals of this conference—the creation of a transatlantic discourse anchored in private law scholarship.

II. TRANSITIONING PRIVATE INTO PUBLIC LAW

Despite more than a century of critique and deconstruction, the distinction between private and public law continues to influence the structure of legal thought in the civil law world, and of late, these categories have even migrated to common law systems.[4] Here, I join the voices of Professors Jansen and Michaels (and Merryman) to note that the contemporary American lawyer has trouble understanding what German scholars mean by private law.[5] For example, in U.S. discourse, the substantive area governing the state's ability to interfere with private property or contractual rights goes under the heading of due process and takings law, which are conceptualized as public rather than private law. In the American

Nineteenth Century Germany, 56 AM. J. OF COMP. LAW 667 (2008).

2. *See*, *e.g.*, Regina Ogorek, *Inconsistencies and Consistencies in 19th Century Legal Theory, in* CRITICAL LEGAL THOUGHT: AN AMERICAN GERMAN DEBATE (Christian Joerges & David Trubek eds., 1989).

3. *See* Babylonian Talmud, Eruvin 63a.

4. *See*, *e.g.*, ENGLISH PRIVATE LAW (Peter Birks ed., 2000). This two-volume treatise put out by Oxford's leading legal scholars has a distinctly civilian organization comprising of: (i) the law of persons, (ii) the law of property, (iii) the law of obligations, and (iv) litigation; *see also* Nicholas Kasirer, *English Private Law, Outside-in* OXFORD U. COMM. L. J. 249 (2003).

5. *See* Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization* 54 AM. J. COMP. LAW 843 (2006). *See also* John Merryman, *The Public Law-Private Law Distinction in European and American Law* 17 J. PUB. L. 3 (1968).

understanding, the Constitution's Bill of Rights, rather than any body of substantive private law, is what prevents the state from encroaching on the private sphere. Moreover, on some readings of the Constitution, the entire reason for having a Constitution and *public* law is to keep the state in check vis-à-vis the private property rights of the citizenry. [6]

Beyond this structural difference, however, over the past decades, there has been a considerable shift in the interaction between public and private law in the United States. For example, officially—as a matter of blackletter doctrine—to raise a due process claim against the government, one must begin by identifying a right to property as a matter of state common (private) law.[7] The Supreme Court continues to use this doctrinal model in cases where the alleged private law right fits rather neatly into traditional private law categories.[8] However, when the cases get harder, i.e., when the alleged right fits less comfortably into the traditional framework of private law, the Court abandons the private law discourse and analyzes the question as a matter of federal constitutional public law.[9]

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6. *See* Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 64 (2003). ("[A] major, if not the major reason that led to the framing and ratification of the United States Constitution, was to protect economic freedom."); *see also* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

7. S*ee* Bd. of Regents v. Roth*,* 408 U.S. 564, 577 (1972) (holding in the due process context that "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules . . ."); Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 ("[t]he hallmark of property, the Court has emphasized is an individual entitlement grounded in state law"); Phillips v. Wash. Legal Found, 524 U.S. 156, 165-68 (1998) (stressing in the takings context that the Constitution protects "traditional property law principles" that are "firmly embedded in the common law of the various States."); *see also* Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 897-98 (2000).

8. *See Phillips*, 524 U.S. at164 n.4 (1998), (addressing whether "the interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client or lawyer.").

9. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (holding, in the context of whether plaintiff had a right to public assistance monies, that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."); Bell v. Burson, 402 U.S. 535, 535-41(1971) (seemingly skipping the "property" inquiry in a due process challenge to the State of Georgia's decision to suspend a driver's license); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) ("[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause."); Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (adopting an avowedly federal definition of what constitutes property for due process purposes in the context deciding whether plaintiff maintained a property interest in a false advertising claim: "The hallmark of a protected property interest is the right to exclude others."); Town of Castle Rock,

The transition from traditionally private/common law to public law modes of reasoning has been a major theme in twentieth-century American law. While the private law elements of the common law are still around, their prestige has dwindled considerably and courts are reluctant to delve deeply into their doctrines to solve novel cases.[10] As with the due process example, the contemporary vogue is to frame the case as raising either procedural, statutory, or public law issues. Professor Haferkamp touches on an example from the close of the nineteenth century,[11] and this phenomenon has become more pervasive over the course of the twentieth. The reasons are complex and rest on the confluence of legal realism, the relegation of common law to the states in *Erie v. Tompkins*,[12] the rise of the administrative state, the increase in the power of the federal government vis-à-vis the states, the Warren Court's image of constitutionalism and the conservative reaction to it, as well as significant changes in the goals of legal education. But while the causes are complex, the effects are quite stark. In a number of ways, the following examples highlight the extent to which American legal identity has shifted away from traditional conceptions of private law and scholarship.

1. An examination of American law between 1940 and 1970 would have revealed that Karl Llewellyn and Grant Gilmore were widely considered amongst the leading legal theorists of their respective generations. Gilmore's *The Ages of American Law*[13] and *The Death of Contract*[14] are important landmarks in the narrative of American law, and Llewellyn is justly considered a principal architect of modern American legal thought.[15] In light of these

Colo. v. Gonzales, 545 U.S. 748, 761-69 (2005) (fully enmeshing federal constitutional doctrines and policies into the inquiry of whether the State of Colorado meant to create a property interest in a court-mandated restraining order).

10. *See* Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284 (2001); Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 63 WASH. & LEE L. REV. (forthcoming 2008).

11. Haferkamp, *supra* note 1.

12. Erie v. Tompkins, 304 U.S. 64 (1938).

13. GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

14. GRANT GILMORE, THE DEATH OF CONTRACT (1974).

15. Article 2 of the U.C.C. has had a major impact of the texture and structure of American contract law, even in contracts not formally governed by the U.C.C. In a different realm, Llewellyn's *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950), has been called, in the words of a leading scholar of statutory interpretation, "one of the most influential realist works of the last century" which "largely persuaded two generations of academics that the canons of construction were not to be taken seriously." *See* John F. Manning, *Legal Realism & the Canons' Revival*, 5 THE GREEN BAG 2d 283, 283-84 (2002). The article has been cited over 550 times in American law journals and was even the subject of a symposium in the Vanderbilt Law Review. *See Symposium: A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992). More recently Llewellyn was canonized by Professors David Kennedy and William Fischer in DAVID KENNEDY & WILLIAM FISCHER III, THE CANON OF AMERICAN LEGAL THOUGHT 131-61 (2006) (collection

accomplishments, it is easy to forget that both men were deeply engaged in the dark and technical corners of commercial law, and in fact were the drafters of Articles 2 and 9 of the U.C.C. respectively. In today's environment, a scholar choosing to work in commercial law sends a strong signal to his academic colleagues that he aspires to be a legal technician rather than a high-end academic theorist.[16] And while there might be spirited debate regarding who should be considered this generation's leading theorists, few nominations would come from the scholars involved in revisions to U.C.C. Articles 2 and 9. Undoubtedly, the current holder of the title "leading legal theorist" works in a specialized area of Constitutional law.

2. The shift away from private law is similarly evident when examining the heroes of the American bench. The traditional list would invariably include Justices Kent, Shaw, Story, Cardozo, and Holmes; judges who built their reputations around transforming traditional common law principles to new American settings.[17] As the twentieth century progressed, however, the popular image of the judge shifted considerably. The new judicial heroes (or villains) are the makers of twentieth century constitutional law: Justices Warren, Brennan, Marshall, Rehnquist, Scalia, and Thomas.[18]

3. Finally, transatlantic private law discourse is difficult because there is deep confusion as to what, exactly, is the subject of the conversation. As Professors Jansen and Michaels mentioned, private *ordering* (a political/ideological commitment to free markets and limited government intervention), rather than private *law* (a set of substantive doctrines), captures the imagination of American scholars. In a similar vein, recent conversations with American colleagues regarding the central issues in American private law produced the following themes: (i) tort reform (curbing liability of large corporations at the hands of state court juries), (ii) bankruptcy reform (making debt collection easier for banks and credit card companies), (iii) issues regarding the scope and distribution of intellectual property rights, (iv) post-Enron questions of corporate

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includes Llewellyn's *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931)).

16. *See* Larry Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403 (2007).

17. *See* GEORGE EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1988).

18. For the benefit of the German readers: Chief Justice Earl Warren presided over the Supreme Court from 1953-69. The Warren court significantly expanded the scope of Constitutional rights that citizens could assert against the government. Associate Justices William Brennan and Thurgood Marshall were the most liberal members of the Warren Court. By contrast, Chief Justice William Rehnquist (1986-2005) presided over a far more conservative court that rejected the Warren Court's legacy of social transformation through constitutional law. Associate Justices Antonin Scalia and Clarence Thomas are the leading exponents of originalism and textualism—interpretive methods designed to constrain the "legislation from the bench" that has come to typify the Warren Court.

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governance, and (v) the advisability of setting limits on executive compensation.

Whatever the merits of these proposals, these issues are private only in the most nominal sense of the term—they govern relationships between non-governmental entities. On the whole, however, they are conceptualized as questions of public policy that concern the administration of the national economy writ large. To be sure, conservative and liberal scholars vigorously debate the appropriate regulatory response to each issue. But the idea that legal questions can be resolved on the basis of a confined set of conceptually-related doctrines, or via application of the principles of corrective justice, is a position that few American liberals or conservatives are willing to promote.[19]

For these reasons I have argued that Peter Birks, a leading figure of Anglo-Continental private law thought in the late twentieth century, would have had difficulty securing tenure at even a third-tier American law school. This is true not only for Birks himself, but for any scholar whose approach to private law is predicated on the assumption that private law can be reduced to a confined set of legal doctrines where taxonomic classification does the work of solving the law's hard questions. For example, in discussing when a claimant can pull certain assets out of a bankrupt estate, Birks wrote:

> Some legal concepts [property] ought never to be deconstructed . . . .

19. For example, both the conservative and liberal wings of the U.S. Supreme Court maintain a thoroughly instrumentalist understanding of tort law that sees no differences between a common law tort action and an act of positive regulation enacted by the legislature. The Court's conservatives argued that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." Medtronic, Inc. v. Lohr, 518 U.S. 470, 510 (1996) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, J.J., concurring in part and dissenting in part) (quoting San Diego Building Trades Council v. Gaimon, 359 U.S. 236, 247 (1959)). Similarly, the more liberal Justice Breyer maintains that distinguishing between private law tort claims and positive legislation "would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Id.* at 504. *See also* Geier v. Am. Honda Motor Co., 529 U.S. 861, 871-72 (2000) (Justice Breyer, writing for the Court, rejected the distinction between common law tort actions and legislative regulatory regimes).

These statements contrast with the more traditional understanding that distinguished between "common law damages actions" and "positive enactments such as statutes and regulations." In articulating this view, Justice Blackmun based himself on a corrective justice theory that contrasts private law with positive acts of state regulation. ("Tort law has an entirely separate function—compensating victims—that sets it apart from direct forms of regulation.") *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 535-38 (1992) (Blackmun, J., concurring). *See more generally* Michael P. Moreland, *Tort Reform by Regulation*, 1 J. HEALTH & LIFE SCIENCES L. 39 (2007).

> The question whether a claim deserves priority in insolvency is an impossible question. By contrast, the questions whether the plaintiff has a proprietary interest, and, if so, from what moment that interest takes its priority, are technical conceptual questions, which a lawyer can hope to answer.
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> . . . Lawyers have no special competence in distributive justice. They cannot be expected to say who deserves what. But, given a decent law library and some time to do the work, a lawyer can be expected to say . . . whether on given facts a proprietary interest has arisen, and, if so, precisely of what kind.[20]

I can hardly imagine a statement more inimical to the entire thrust of twentieth-century American jurisprudence than these lines penned by Birks. This is because the defining feature of American legal thought is that traditional legal analysis is usually indeterminate and that outcomes could no longer be legitimated via the technical and conceptual analysis of legal rules.[21] For this reason, when I gave presentations at a number of U.S. law schools and put these statements of Birks on a power-point slide, the room quickly fell silent, save for the gasps of shock from the assembled professors. American academics literally *could not believe* that one of the most renowned figures of the English legal academy was so blatantly oblivious to the ideas that we have insisted on for over seventy years.[22]

III. JEWISH LEGAL SCIENCE

Like American and German law, Jewish law also saw the flowering of legal science during the nineteenth century.[23] However, because nineteenth-century Jews had neither a state nor politics in the usual sense of the term, the traditional explanation for the emergence of legal science—the separation of law from politics—does not directly apply to the Jewish experience. Moreover, the mutual

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20. Peter Birks, *The End of the Remedial Constructive Trust?* 12 TR. L. INT'L 202, 214-15 (1998).

21. For a comparative perspective, see James Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517 (2006).

22. *See* Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEG. STUD. 99 (2008); For a comparison of American and German perspectives, see Kristoffel Grechenig & Martin Gelter, *The Trasnatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, *available at* ssrn.com/abstract=1019437.

23. *See* Chaim Saiman, *Legal Theology: The Turn To Conceptualism in Nineteenth Century Jewish Law,* 21 J. L. & RELIGION 39-42, 94-100 (2005) [hereinafter Saiman, *Legal Theology*].

hostility between the early Zionists and the traditional Jewish scholars meant that the rabbinic tradition would play a relatively minor role in the nascent phases of Jewish statehood. Nevertheless, expanding the definition of politics to encompass non-state social movements reveals that Jewish legal science performed many of the same functions as its German and American counterparts. In each case, scholars sought to chisel out a block of law untainted by the influences of society and polity.

Jewish legal science was a response to the threat represented by Reform Judaism or its academic manifestation, *Wissenschaft des Judentums*. The *Wissenschaft* movement employed nineteenth-century German historical and text-critical methods to contextualize and demystify the formation of classical Judaism's core texts. While this project had its academic ends, its political goals were to enable Jewish assimilation into European society. These writers claimed that Jewish law and identity were far more contingent and malleable than assumed by traditional theology. The reformers argued that just as Jewish civilization had continually adapted to social and material conditions throughout the ages, the same should hold true as Jews moved out of the ghetto and into mainstream European society. [24]

Against this backdrop, traditionalist legal scholars, known as "*Briskers*," offered a version of Jewish law that was both apolitical and trans- or meta-historical. In terms of Western movements, this school bears similarity to the seventeenth-century view of the common law promulgated by Lord Edward Coke,[25] and the mid nineteenth-century form of German law that has come to be known as the "conceptual school" (*Begriffsjurisprudenz*). The *Briskers* denied that Jewish law responded to shifting understandings of human nature and society, and claimed instead that Jewish law was based on immutable legal principles that were independent of contingent social forces. The scientific approach, according to the Briskers, revealed that apparent changes to the legal order were predicated on preexisting legal concepts embedded within classical rabbinic texts, simply awaiting discovery by Jewish legal scientists.

IV. JURISTS' LAW VS. JUDGES' LAW

Professor Haferkamp's paper calls attention to the different ways that judges rather than jurists employed the concepts of legal science. Though Jewish law maintained a distinction between learned law (*torah lishma*) and the law that actually gets applied

24. *Id.*

25. *See* Gerald Postema, *Classical Common Law Jurisprudence*, 2 OXFORD U. COMM. L. J. 155, 155-57, 169-76 (2002).

(*halakha le'maaseh*) since late antiquity,[26] this distinction became more important over the course of the nineteenth century, when the role of the academic legal scholar was increasingly separated from judicial authority. While academic jurists generally focused on training future scholars and writing Talmudic commentaries, the work of rendering decisions was typically assumed by a *posek,* a scholar who became known as a decisor of Jewish law. (The very strangeness of the word decisor underscores the difficulty of comparing Jewish law to national law.) Somewhat paradoxically, the popular conception of Jewish law was driven by the learned law of the jurists rather than the decisions produced by the judge/*posek*.[27]

In the Jewish context, the distinction between scholar and judge enabled legal scientists to present the law as an autonomous discipline. The scientists' work stressed the conceptual unity and purity of a legal system untouched by the vicissitudes of the ages and untangled in what Langdell famously called the "skein of human affairs."[28] It was this autonomous image of Jewish law that was espoused in public and used to refute the claims of the Jewish reformers. Invariably, however, Jewish law had to come to terms with the issues of the day and address what we (but not they) call "the social." Here, the system reverted to a judge/*posek* who could quietly contravene the official jurist-law by finding a localized exception that applied only to the unique facts of a specific case. The work of the judge/*posek* allowed the law to change in practice even as the juristic discourse reaffirmed the immutable nature of the ancient principles of Jewish law.

V. LEGAL SCIENCE AND PRIVATE LAW

In light of the Jewish and American experiences, Professor Haferkamp's paper raises the question: to what extent the emerging prominence and independence of the German judiciary relieved the academic jurists from having to accommodate social considerations into their vision of law? In short, to what extent did judicial accommodationism enable academics to adopt their pedantic view of the Pandects?

A number of conference papers have already alluded to the connection between the legal science and private law, and if we are to follow Professor Gordley's suggestion, there is a deep connection between the death of traditional legal science and the death of private law.[29] Moreover, in each of the German, American, and

26. *See e.g.*, HANINA BEN-MENAHEM, JUDICIAL DEVIATION IN TALMUDIC LAW (1991).

27. *See* Saiman, *Legal Theology, supra* note 23.

28. *See* CHRISTOPHER COLUMBUS LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS viii (2d ed., Little, Brown & Co. 1879).

29. James Gordley, PLEASE INSERT TITLE 56 AM. J. COMP. L. 641 (2008).

Jewish contexts, traditional legal science proves most useful when addressing "core" private law doctrines of contract, tort, agency, and property, but tends to run out of steam when confronting social and political considerations that do not easily conform to doctrinal-analytic categories.

In terms of German law, the story has been told by many of the papers and needs no further elaboration. I would merely reiterate that the traditional, and to some degree ongoing, assumption is that core areas of private law are like the primary colors on an artist's palate—the basic doctrines from which more complex forms are derived.[30] Therefore, one must have a firm mastery of the basics before proceeding to more complex forms of contract and transaction.

Regarding the American common law, it is not surprising that the heyday of legal science in the late nineteenth century saw to it that contract, tort, and property dominated the first-year curriculum.[31] Conversely, more recent skepticism about the existence of "core private law doctrines" has lead to these subjects gradually receding from first-year curriculum.[32]

Perhaps the most dramatic illustration of the relationship between legal science and private law comes from the debates surrounding the formation of the University of Chicago's law school at the turn of the twentieth century. The Chicagoans sought to borrow one of the leading legal scientists, Professor J.H. Beale of Harvard, to serve as the inaugural dean of the new law school. Initially, there was considerable excitement over the idea of "establish[ing] a school on the model of Harvard."[33] However, when

30. *See* Nicholas Kasirer, *The Common Core of European Private Law in Boxes and Bundles*, 3 EUROPEAN REVIEW OF PRIVATE LAW 417 (2003) (discussing the use of visual imagery in comparative law).

31. For example, when Harvard's three-year curriculum was adopted in 1916, the law school offered twelve (12) credits of Property, eight (8) credits of Equity, six (6) credits of Contracts, seven (7) credits of Torts, and four (4) credit classes in: (i) Agency, (ii) Corporations, (iii) Partnerships, (iv) Shipping, (v) Sales, (vi) Bills of Exchange, (vii) Trusts, and (viii) Mortgages and Suretyships. Incidentally, the only "public law" courses that were offered were four (4) credits of Constitutional Law and two (2) credits of Municipal Corporations. Interestingly, in 1880, Constitutional law only merited one credit and before that, it did not even merit its own course, as it was taught as "Constitutional Law and Shipping." *See* John Reed, *Training for the Public Profession of the Law* 458 (1921); E. Gordon Gee & Donald W. Jackson, *Following the Leader: The Unexamined Consensus of Law School Curricula* 20 (1975); *see also* Robert Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. R. 339 (2007).

32. In 2006, Harvard Law School initiated a major overhaul of its first year curriculum which introduces new mandatory first-year courses by "devoting fewer class hours the traditional first-year curriculum." *See* Harvard faculty unanimously approves first-year curricular reform, *available at* http://www.law.harvard.edu/news/2006/10/06_curriculum.php (last visited Aug. 21, 2007). For the 2007-08 academic year, contracts, torts, and property were reduced to four credits each. *See also* Edward Rubin, *What's Wrong with Langdell's Method and What to Do About It*, 60 VAND. L. REV. 609 (2007).

33. FRANK ELLSWORTH, LAW ON THE MIDWAY 68 (1977). *See also* Thomas Grey,

Harvard's traditionalists heard that the proposed curriculum included not only contracts, torts, property, and agency, but also international law, administrative law, public officers, municipal corporations, and federal practice, the atmosphere cooled considerably. Beale, an advocate of what he called "pure law," saw the differences between Harvard and Chicago as "so fundamental that it is obviously necessary to choose one conception of the school or the other,"[34] thus declaring that he "could be of no use in . . . a school" following Chicago's path.[35]

While Jewish law does not maintain a distinction between public and private law, the Talmudic corpus does contain a vast body of law that roughly corresponds to what civilian lawyers call private law: contract, tort, property, agency, inheritance, trust, and family law. Moreover, the structure of reasoning promoted by the nineteenth-century Jewish legal scientists bears many similarities to the contemporaneous private law discourse of German and American scholars. Like the Roman jurists, the rabbis were far more adept at rationalizing fairly discrete rules of substantive private law than they were at discussing political theory, the legitimate scope of governmental power, constitutionalism, or most of what we call regulatory and administrative policy. Moreover, the rabbinic focus on conceptual private law questions is all the more notable since the Talmudic rules of contract were hardly the most pressing issue to a traditional society being ripped apart by the social-political forces of Zionism, communism, and rampant assimilation.

The intimate connection between private law and legal science in German, American, and Jewish law raises important questions. From the perspective of intellectual history, it gives us reason to consider the degree to which the flourishing of legal science is intrinsically associated with the substantive doctrines of traditional private law. But the issue is of more than historical interest. One of the central themes of this conference is whether the vacuum left by the shrinking nation state can be filled by a discourse of academic private law which looks beyond it.[36] While today's legal science is substantially different than that of the nineteenth-century dogmatists, the weight of Savigny's tradition (and the Roman one that stands behind it), continues to direct scholarly inquiry towards the traditional areas of Roman private law. Thus, European scholars have expended significant efforts identifying the common doctrines,

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Langdell's Orthodoxy, 45 U. PITT. L. REV. 1, 34-35 (1983).

34. ELLSWORTH, *supra* note 33, at 72.

35. *Id.* at 69.

36. *See* Michaels & Jansen, *supra* note 5, at 20-21; 26-27; REINHARD ZIMMERMAN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY (2001).

frames of reference, cores, and principles of European private law.[37] Of late, even the historically recalcitrant English lawyers seem to be moving away from the common law's traditional jurisdictional framing and speaking in the civilianized language of private law, the law of obligations and unjust enrichment.[38]

To the best of my understanding, the theory behind these harmonizing projects is that initial efforts should be directed towards the foundational and settled legal doctrines, which can then serve as the basis for engaging in more complex and contemporary legal problems. But whatever its logic in the Anglo-Continental setting, from the American vantage point, the Europeans are searching for something that either does not exist, or at the very least, is not all that important. To the extent there is a "common core" of American law, it is certainly anchored in questions of Constitutional law rather than the areas of traditional private law that are subject to the vagaries of state courts and legislatures. Moreover, even in those instances when doctrinal diversity amongst the several states is seen as problematic, American law most typically responds—not by looking to harmonize the substantive

37. *See*, *e.g.*, Principles of European Contract Law (PECL) prepared by the Commission on European Contract Law (Lando Commission), http://frontpage.cbs.dk/law/commission_on_european_contract_law/; *see also* the various texts published by the Study Group on a European Civil Code, http://www.sgecc.net; the Acquis-Group, http://www.acquis-group.org; the European Group on Tort Law (Tilburg Group), http://www.egtl.org; the Common Core of European Private Law Group (Trento Group), http://www.jus.unitn.it/dsg/common-core or the Academy of European Private Lawyers (Gandolfi Group), http://www.accademiagiusprivatistieuropei.it/. For more information on the Common Frame of Reference Project launched by the E.U. Commission and the relevant E.U. documents, see, e.g., http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm#developments. *See also* Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 690-95 (2002).

38. *E.g.,* ENGLISH PRIVATE LAW, *supra* note 4; ANDREW TETTENBORN, AN INTRODUCTION TO THE LAW OF OBLIGATIONS (1984); PETER BIRKS, UNJUST ENRICHMENT (2005); Andrew Burrows, *We Do This at Common Law and this at Equity*, 22 OXFORD J. L. STUDS. 1 (2002); *see also* the inter-Commonwealth listserv named the *Obligations Discussion Group*, archived at <http://www.ucc.ie/law/odg/home.htm.>. For a critical evaluation of these efforts, see e.g., STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERING (2001) (critiquing Peter Birks); J.N. Adams, *How Not to do Things with Rules*, 5 OXFORD J. L. STUDS. 446 (1985) (critical review of TETTENBORN, THE LAW OF OBLIGATIONS). Recently the Australian High Court has taken to criticizing the increasing civil law tenor of English law, see e.g., Farah Constructions Pty Ltd. v. Say-Dee Pty Ltd, [2007] HCA 22 at 154 (AU) ("[t]he restitution basis reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development."); *Roxborough v. Rothmans*, [2001] 208 CLR 516 at 544 and ("[t]o the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.").

rules of private law—but by pulling the issue out of its private law framing and recasting it as a constitutional, federal or procedural issue.[39] Because the core of American law revolves around the tension between individual liberties and the powers of the nation state, Americans are not quite ready to join their European brothers in looking beyond.

39. *See, e.g.,* Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008); Geier v. Am. Honda Motor Co. 529 U.S. 861, 871-72 (2000) (federal preemption of private law tort actions); Class Action Fairness Act of 2005, 28 U.S.C.A. § 1332(d)(2) (granting federal district courts greater authority in diversity class action suits and make removal easier so as to prevent forum shopping in state courts); Mertens v. Hewitt Associates, 508 U.S. 248 (1993); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (emaciation of trust law through the Supreme Court's interpretation of ERISA).