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Notes • Discussions • Book Reviews

Against Parochialism in Contract Theory: A Response to Brian Bix

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1. Introduction

There is plenty to agree with in Brian Bix's recent article problematizing universal and general theories of contract law (Bix 2017).[1] Bix is certainly right to note that most contract theorists—and private law theorists, for that matter—are typically silent about the types of claims they make and the scope and ambitions of their theories.[2] He is also right about the mismatch between the usually (implicit) universal scope of theories and their parochial focus on one or a small number of related national jurisdictions.[3] Finally, I entirely agree with Professor Bix's worries about the Dworkinian identification between the logical space occupied by adjudication and legal theory (Bix 2017, 394),[4] as well as with his concerns about the theoretical inflation that characterizes contemporary contract theory (Bix 2017, 396).

Despite these agreements, in this partial response I wish to suggest that Bix's concerns about *universal* theories of contract law should not lead us towards a preference for localized, parochial theories of contract law.[5] What I wish to suggest, more precisely, is that Bix's concerns should not lead to *parochialism*—i.e., the idea that local or parochial theories of contract law are always preferable to universal theories. On the contrary, as this paper argues, there are good reasons to think that a universal approach to contract theory might be warranted. For this purpose, Section 2 explains what I take to be the right subject matter to be theorized by universal contract theory, and in what sense this approach is—and is not—"universal," as well as the kind of argument that should be put forward to defend such an approach. Sections 3 to 6 contain the substance of the argument in favor of this transnational and universal approach towards contract theory. Finally, Section 7

[1] Which refines and extends prior arguments made in Bix 2007 and 2013, 147–62.

[2] A notable exception is Smith 2004.

[3] Others have already noticed the worrying parochialism of most contemporary Anglo-American contract theory. See Murphy 2014, 152.

[4] For Dworkin, legal theory is the "silent prologue" to adjudicative decisions. See Dworkin 1986, 90.

[5] Thus, I leave aside in this response Bix's arguments against general theories of contract law.

concludes and suggests that, at least in one respect, a universal approach can even be preferable over more local approaches.

2. "Universal" Contract Theory

Universal contract theory should theorize *institutional practices* of contract law. By an *institutional practice*, I understand "a sort of technical term meaning any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure" (Rawls 1955, 3 n. 1). The focus should thus be on the forms of activities specified by the systems of contract law and the institutional definitions of rights, duties, and remedies that they generate. An institutional practice, moreover, in the way I am using the term, is a system of *rules*, i.e., authoritative legal norms.[6] Institutional practices of contract law, then, are systems of legal norms which regulate exchange by defining, *inter alia*, what constitutes an enforceable contract, as well as how contracts should be interpreted, performed, and enforced.[7]

Of course, the institution of contract law can also do other things. In addition it might, as it in fact does in certain jurisdictions, enforce unilateral undertakings which do not amount to "exchange."[8] It might also give rise to other legal institutions—think, for instance, about partnership agreements, or contracts of marriage. From jurisdiction to jurisdiction, contract law might also encompass larger or smaller areas of human interaction. But I am not too concerned, in this paper, with demarcating or policing contract law's boundaries. My concern, rather, is whether contract law, understood as a system of legal norms that regulates the exchange of goods and services, can be usefully and legitimately theorized from a "universal" perspective.

As such a system, contract law provides individuals with rights-creating powers (Hart 1994, 41). It is a set of power-conferring rules (ibid., 96; Raz 1999, 104–6) that enables individuals to create and alter private rights and duties (Barnett 2010, xix). When a contract is validly executed (and it is a crucial role of contract law that it determines the conditions of such validity), correlative primary rights and duties arise. At the same time, contract law also imposes secondary duties in cases of breach of those primary duties. Its rules are thus also duty-imposing.[9]

From this perspective, what universal contract theory should theorize are the "salient features of a modern municipal legal system" (Hart 1994, 100, 240) of contract law. Thus, the subject of analysis should not be a particular jurisdiction but the practice of contract law, the characterization of which is given by the core features

[6] Because of this broad use of the term *rules* as legal norms, it should be understood that the term as I use it does not exclude, as some discussions in jurisprudence could suggest, standards or formally enacted legal principles.

[7] For this characterization, I reviewed several comparative contract law and American contract law textbooks, all of which showed a remarkable degree of consistency in the topics covered. See, just as examples, Barnett 2010; Beale, Bishop, and Furmston 2007; Beatson 2002; Bix 2013; Farnsworth et al. 2008; Graziano 2009; Levasseur 2008; and Zweigert and Kötz 1998, 323–536.

[8] See, e.g., Restatement (Second) of Contracts par. 90 (1979).

[9] Because of this, Klass (2008) is right when he labels the rules of contract law as *compound rules*.

and central institutions of such institutional practice as it has been developed in different jurisdictions. For this purpose, salient examples from certain jurisdictions can certainly be used—but only as examples of a larger class. Thus, the object that universal contract theorists should try to explain lies not in specific sets of particular rules, but rather in the general type of practices with similar sets of rules that perform a certain function: that of regulating and enforcing voluntary agreements for exchange. The focus should thus be the practice of contract law in general, rather than a particular system. This suggests that, while it is true that there is a problematic divergence between the universal claims of certain theories of contract and their rather narrow scope (Bix 2017, 392), building local theories is only one possible solution. The other possibility is to expand the scope of the theories, so they can ground their universal claims.

But all of this has just been assertion. Moreover, it immediately raises a host of questions, many of which have been highlighted by Bix's argument. Can we assume that different jurisdictions have the same practice of contract law? Are we dealing with a single and unitary topic?[10] What does it mean to say that contract theory is "universal"? After all, if a practice is a system of norms, and the norms in different legal systems are different, then it seems obvious that such legal systems have different practices of contract law—and a universal theory of contract thus seems implausible.

Before starting to provide an answer, I should note that the problem, in my view, cannot be solved in abstract or conceptual terms, without due consideration for the actual historical practices one is theorizing. The idea that universal theories of a doctrinal area of law should attempt to explain *conceptually possible* versions of the doctrinal area (Bix 2017, 392) is wrongheaded. A *universal* theory of contract law that concerned itself with conceptually possible practices that only exist in the theorists' mind would certainly be absurd—as well as uninteresting. We are theorizing an actually existing legal institution with a history and a tradition, and we should be wary of any attempt to propose or defy a theory or set of theories on the basis of purely conceptual grounds affirmed independently of that history and tradition.[11] Because of this, a universal theory of contract law should not ignore contract law's history and tradition. Its object should be the institutional practices of contract law that have actually existed and continue to exist. Whether such a universal approach towards an area of law is warranted depends on the specific area of law and its historical and substantive features across jurisdictions, not on the theory's ability to explain *conceptually possible* practices of contract law. In some cases, historical and comparative divergence might be enough to make a universal approach unwarranted or implausible. In some others, however (as is the case with contract law, in my view), there might be enough convergence to ground a less local approach. In any case, the answer turns on the contingent features of the area of law (rather than on generally applicable methodological considerations about the theories' ability to explain and justify conceptual possibilities). In the case of contract law, precisely, the features of this area of law across jurisdictions ground the theoretical plausibility of a universalist or transnational approach. This is what my argument attempts to

[10] See Bix (2013, 149–50), raising this doubt in his earlier work.
[11] A similar claim at the level of general jurisprudence is made in Atria 2016.

show—and what a persuasive argument against universal theories of contract law would need to deny.

The argument, however, will be inevitably nuanced. Indeed, there is no extended consensus as to whether Western private law systems are convergent—or, at least, converg*ing*—or divergent.[12] The idea of broad convergence across legal systems famously (Zweigert and Kötz 1998, 36) led to the notion of a *praesumptio similitudinis*, according to which beneath the differences at the local level might lie important similarities, or even identities, in legal solutions to the same fundamental problems. There is, moreover, an important level of convergence in the legal texts of different Western systems of contract law. In fact, within private law, it seems that contract law presents the greatest degree of uniformity (Smits 2002, 187). However, at the same time it is undeniable that, as Legrand (1996, 56) argues, rules and doctrinal concepts are insufficient to ground the claim that two (or more) legal systems are convergent, because rules and concepts are only the surface of legal cultures. Because of this, "the similarity of rules is in most cases an unreliable indicator of the convergence or divergence of legal systems" (Merryman 1981, 385). Thus, even if the legal texts are identical—because, for instance, of legal transplants—this is not enough to claim that the legal systems they are part of are convergent. The point, in any case, cuts both ways: While it is true that convergence at the level of specific rules does not imply convergence of legal systems, at the same time divergence at the level of specific rules is compatible with a deep-level or functional convergence of legal systems (Sacco 1991, 13).

It would be myopic to deny that the substantive content of contract law is to some extent different across legal systems, and that there are important differences among legal cultures, all of which means that we are in fact in the presence of different practices. Nevertheless, they may still be different forms, instances, or prototypes of the same *kind* of practice. Thus, these different instances or prototypes could be connected by something weaker than perfect identity, but still be the same *kind* of practice. Despite all their differences, diverse systems of contract law (at least in Western legal cultures, if not beyond) are structurally and functionally consistent: They all legally regulate exchange by defining, *inter alia*, what constitutes an enforceable contract, as well as how contracts should be interpreted, performed, and enforced.

So Bix's intuitions about the singularity of each practice are to some extent true, but they should not be exaggerated to the point of denying that each practice is a different instantiation of contract law. Nor should they lead us to assume a parochial perspective in contract theory. On the contrary, these different instances of contract law are, in their historical development and current existence, structurally similar enough to provide the subject of universal contract theory, under which particular jurisdictional systems are taken to be only *examples* of the general class. A broad and transnational approach, going beyond superficial and apparent differences, might thus be warranted.[13] In the next sections, I provide further arguments that support this universal approach.

[12] For a European overview, see Smits 2002, 103–5.
[13] In a similar vein, see Mattei 1997, 808–81.

3. Surface Convergence: Rules and Doctrines

I start with the surface of legal texts and rules. Here, divergence exists only *to some extent*: At least some rules have been transplanted from one system to another.[14] Such is the case, for instance, with the foreseeability rule in contract damages (Ferrari 1993). That rule, established in the common law in *Hadley v. Baxendale* (1854),[15] was directly taken from Robert Pothier (Gordley 2000, 1848; Perillo 2005, 267; Simpson 1987, 197–201), whose statement was later taken as the basis for Article 1150 of the French *Code Civil* (Barrientos 2007). The common law rule is thus, basically, identical to a French rule (Ferrari 1993, 1264). Moreover, the rule stated by Pothier, and adopted in the French *Code Civil*, was later transplanted to Belgium (which basically transplanted the French Civil Code in its entirety), Italy, Portugal (Ferrari 1993, 1264),[16] and the Chilean *Código Civil* (Barrientos 2007),[17] which would later be influential in the codes of Argentina, Mexico, Venezuela, and Uruguay (see Peirano 1964), and would become the blueprint for the civil codes of Colombia, Ecuador, and a few other countries (Bravo Lira, 1982, 93).[18] So, in this case, many legal systems have transplanted the same rule with regards to foreseeability.[19] There is at least textual, surface convergence.

At a second level, even across jurisdictions with different legal texts and historical traditions, the conceptual structure of contract doctrine is quite similar. For instance, the nineteenth-century systematization of contract law in the common law world was done through the borrowing, by treatise writers, of civil law categories (Gordley 2000, 1847–8; Simpson 1990, 326–7; Zimmermann 1996, 570). The conceptual structure of the common law of contracts has thus been heavily influenced by the civil law tradition, and particularly by the work of French treatise writers such as Robert Pothier. As Perillo (2005, 267) writes, "[t]he whole structure of the common law of contracts and sales is based largely on Pothier's treatises on obligations and sales." These civil law ideas were crucial, as Pound (1938, 7) noted, in the development of early American private law.

A few examples demonstrate this doctrinal influence. One is provided by offer and acceptance. Before the nineteenth century, the common law had no operative concepts of offer and acceptance, and the enforcement of promises turned basically on the issue of consideration. Offer and acceptance were introduced in decisions such as *Adams v. Lindsell* (1818)[20] and *Mactier's Administrators v. Frith* (1830),[21] "in

[14] Alan Watson (1974; 1976; 1978) has been the main analyst of legal transplantation and its relation to legal change. I am unpersuaded about the plausibility of explaining all or most legal change in terms of legal transplants. But it seems equally implausible to completely deny the historical fact of transplantation. Legal transplants explain at least part of legal change and evolution (besides other obvious influences, such as economic, social, and political forces). For an exploration of the ambiguity of Watson's views, and an interpretation of legal transplants that is similar to the one I briefly stated, see Ewald 1995. For critical analysis of the notion of legal transplants, see Legrand 1997 and Teubner 1998.

[15] *Hadley & Anor v Baxendale & Ors* [1854] EWHC Exch J70.

[16] Cf. Mattei 1994, 201, noting the influence of the French *Code Civil*.

[17] For a general account of the Chilean *Código Civil* as an example of ingenious and selective transplantation by Andrés Bello, see Mirow 2000.

[18] On the particular case of Colombia, see Hinestrosa 2006.

[19] For an overview of transplants from civil law to the common law, beyond foreseeability, see Tetley 2000, 712–6.

[20] *Adams & Ors v Lindsell & Ors* EWHC KB J59 (1818).

[21] *Mactier's Administrators v. Frith*, 6 Wend. 103 (N.Y. 1830).

which Pothier's name appears no less than nine times in citations" (Perillo 2005, 277). The introduction of offer and acceptance in the common law was thus directly influenced by Pothier—who in this aspect followed Grotius and Pufendorf (Zimmermann 1996, 571).

The examples of Pothier's influence could be multiplied.[22] And his case is not unique.[23] Pollock's theory of contract law, for instance, "was derived from the German jurist Friedrich Karl von Savigny's *System des Heutigen romischen Rechts*" (Simpson 1990, 331).[24] More recently, Llewellyn's work on the Uniform Commercial Code was influenced by German sources (Whitman 1987).

Another example of the civilian influence on the common law is provided by the doctrine of consideration, perhaps the most idiosyncratic feature of the common law of contracts, which still shows influences from civil law and the notion of *causa* (see Lorenzen 1919 and Zimmermann 1996, 554–6). In this respect, early treatise writers viewed consideration as a common law version of that continental concept (Gordley 2000, 1848–49). Blackstone, for instance, explained consideration on the basis of the *ius commune* understanding of *causa* during the seventeenth and eighteenth centuries (Guzmán Brito 2003, 377), and thus followed the same influences that were relevant for his contemporary civil law scholars (ibid., 389; similarly, Teeven 1990, 120).

Nowadays, the direct influence of civil law on the decisions of common law courts has mostly disappeared (Stein 1966). However, the influence of civil law is still traceable in the conceptual structure—and even in several central rules—of the common law of contracts (Simpson 1987, 180–1). The central organization and doctrinal concepts of contract law are the same in most major Western legal systems (Benson 1996, 24; Gordley 1992, 1).

The relationship, moreover, has not been one-sided. There has also been the influence of common law on civil law, both at the level of legal texts and that of scholarly ideas.[25] For instance, the recent reform of French contract law was at least partly influenced by an attempt to make it more attractive vis-à-vis the common law of contracts (Downe 2016, 44). As a consequence, the reform unsurprisingly included some common law institutions. One example is the approach towards contract interpretation. Traditionally, French law approached the issue of contract interpretation as a matter of determining the subjective intention of the contracting parties (Valcke 2009, 83–6). Under the new Article 1188, however, this criterion is supplemented with an interpretive standard based on what a reasonable person would have understood in the situation of the contract (see Smits and Calomme 2016, 1047). Arguably, this

[22] For instance, Pothier's influence is evident in *Taylor & Anor v Caldwell & Anor* [1863] EWHC QB J1. According to Perillo (2005, 279), this case "ushered in the modern doctrine of impossibility of performance." See also Simpson 1987, 194–5, and Zimmermann 1996, 816–7.

[23] As Pound (1938, 7) claims, "Savigny had quite as much influence on the later texts on Contracts as Pothier had had on the earlier decisions." Moreover, similar stories have been told about the influence of civil law on common law scholars, such as John Austin and Joseph Story. See Hoeflich 1985.

[24] See also Mattei 1994, 202. This was part of the attention that Pollock displayed towards Roman and Continental civil law, due to the influence of James Bryce, regius professor of civil law at Oxford. See Duxbury 2004, 23.

[25] This influence should not be surprising, given the changes in "intellectual leadership" in Western law during the twentieth century, and the consequent influence of American law in the civil law. See Lenhoff 1951, 1966; Mattei 1994; and Wiegand 1991.

new rule brings together the traditionally distinct approaches of French and common law to contractual interpretation.[26] Before that, the Dutch Civil Code (1992) was also influenced by English common law in the areas of undue influence, anticipatory breach, and misrepresentation (Smits 2003, 555).

Moreover, given the current economic reality and the pervasive influence of American law firms in corporate contracting and international commercial litigation, as we shall see in the next section, this tendency towards the incorporation of common law institutions within civil law jurisdictions will in all probability continue to grow.

4. Towards Greater Surface Convergence

The tendencies towards convergence across systems of contract law are not just limited to mutual influences between major civil law and common law jurisdictions. Efforts aimed at the harmonization and *Europeanization* of contract law, while premised on the existence of divergence[27]—though, again, comparative study might show the supposed divergence to be illusory, and thus lead to convergence (Sacco 1991, 3)—may generate greater forms of convergence in the contract law of diverse jurisdictions.[28]

Such is the case, for instance, with the European Principles of Contract Law[29] or the Draft Common Frame of Reference (see Study Group and Acquis Group 2009). A similar case, in the realm of international sales law, is provided by the Convention on Contracts for the International Sale of Goods, which has been characterized as "a leap forward" towards the international unification of commercial sales law (Zeller 2000), and is expressly committed—in Article 7(1)—to uniformity.[30] Beyond sales law, the UNIDROIT Principles of International Commercial Contracts [31] similarly "reflect concepts that are shared by most of the world's legal systems and, thus, in some sense, serve as an international restatement of contract law" (Faria Estrella 2016, 240). Despite their *soft law* character, these principles have been influential in the civil and commercial reforms of Russia, Estonia, Lithuania, Latvia, and China (ibid., 242–52). These and other instances of international efforts aimed at harmonization or unification can be an important force in fostering surface-level convergence between different legal systems of civil law and common law.

Other forces might also be an important catalyst for greater trends towards convergence, particularly through the influence of American common law on civil law jurisdictions. One force which can be particularly important in the realm of

[26] On this distinction, see Valcke 2009. On the "reasonable person" standard in English law, see *Smith v Hughes* (1871) LR 6 QB 597.
[27] Indeed, their very purpose is "to ease the friction between different contract regimes" (DiMatteo 2002, 570).
[28] Though, admittedly, in some instances this impact has been rather slight. For an analysis of the English and Welsh cases, see Beale 2006.
[29] For an account of their elaboration, see Lando 1983.
[30] Article 7(1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." For an analysis of the interpretive implications of this rule, see Ferrari 1996.
[31] For a useful overview, see Perillo 1994.

commercial contracting is the relevance of American law firms and their common-law-trained attorneys in international commercial arbitration. This phenomenon has been widely recognized as a strong force towards the "Americanization" of the procedural aspect of international commercial disputes (see Dezalay and Garth 1998; Elsing and Townsend 2002; and Rubinstein 2004), but it is plausible to assume that the mindset of American attorneys and their legal culture will also be, in the long term, influential on the substantive views of commercial arbitration practitioners.

At a more general level, the predominant role of English as an almost universal academic language, the influence and prestige of American law schools, and American influence on mass culture will undoubtedly continue to foster the cultural weight of American common law, American legal scholarship, and American solutions to legal problems.[32] The same can be said of contractual practices. The example of relatively recent forms of contracting, such as leasing, factoring, and franchising, is telling in this regard (Smits 2003, 557). Particularly important in driving this influence is the globalization of contractual markets and the practices of multinational corporations—both of which have been recognized as a force "toward a relatively uniform global contract and commercial law" (Shapiro 1993, 38), and more specifically, toward "the global Americanization of commercial law" (ibid., 39).

Another important form in which contract law across jurisdictions tends to converge, beyond the mutual influences of common law and civil law, is provided by the law of contracts in mixed jurisdictions,[33] which is commonly seen as a useful model for the future harmonization of contract law (Smits 2007, 1188). This makes sense since, far from being a marginal phenomenon in a world of "pure" systems of civil law or common law, mixed jurisdictions are instead extremely evident cases of the confluence of civil law and common law elements that exists in most, if not all, Western legal systems.[34] Indeed, historically speaking, civil law and common law have been distinct but related, mutually influential legal families (Helmholz 1990).[35] "Mixed jurisdictions"—which are, again, extreme forms of a common phenomenon—include several systems.[36] In all of these systems, the surface convergence between common law and civil law texts—as well as other, non-Western sources—is already a reality, and might lead towards greater degrees of convergence.

5. Deep-Level Convergence

Now of course the immediate response suggests itself. Existing surface-level convergence in legal texts and doctrinal concepts, as well as forces fostering this convergence, does nothing to show that there is deep-level convergence: The same legal texts and concepts can play different roles and lead to different practices. What

[32] As argued with regards to Law and Economics in Mattei 1997, 86.
[33] For an overview of mixed jurisdictions, see Palmer 2012.
[34] As argued in Palmer 2007. See also Mattei 1997, 71.
[35] On the tendencies towards divergence and convergence between civil law and common law, see Merryman 1981.
[36] Examples are Louisiana, Quebec, St. Lucia, Puerto Rico, South Africa, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia, the Philippines, Sri Lanka, Scotland, the North African countries, Iran, Egypt, Syria, Iraq, and Indonesia (Tetley 2000, 679).

really matters is the deeper legal culture and the shared understandings it fosters, along with its underlying normative commitments and implicit worldview.

However, there is some convergence even at this deeper level. First, the socioeconomic functions performed by contract law are the same across legal systems. This does not mean that we should ignore differences in rules and legal cultures. But we should note that beneath different rules and legal cultures—as functionalist comparative lawyers stress, particularly in areas of private law (Siems 2014, 24)—could lie different attempts to tackle the same problems (Gordley 2007, 3).[37] As Zweigert and Kötz (1998, 37) write, "even if the legal institutions in different systems are historically and conceptually quite different, they may still perform the same function in the same way." Beneath all instances of practices of contract law, the regulated conduct is always voluntary exchange. And, as I have claimed, such regulation is achieved by sets of rules that—although sometimes different in substance—perform the same functions.

The second point supporting deep-level convergence is particularly important for theories concerned with normative justification. Across different systems, normative foundations beneath different rules and concepts, and even legal cultures, can be similar, particularly if those systems share a similar political culture. Surface differences do not necessarily reflect differences in normative foundations (Gordley 2011, 31). On the contrary, the same normative foundations might underlie different legal practices, particularly of polities—like Western liberal democracies—that share similar political values.

This is not a new idea. As the classical doctrine of *determinatio* shows, normative principles need to be filled out by legal institutions, and such institutions can respond differently, at different times and places, to the same underlying principles (Finnis 1980, 284–9; Honoré 1993, 2–4). As Waldron (2010, 2) puts it quite aptly for the case of contract law:

> [N]atural law principles may indicate the importance of keeping promises [...] but the positive law of contracts, with its detailed rules on contract-formation, offer-and-acceptance, consideration, and breach and liability, will be the product of human work. These details are not given as matter of the initial apprehension of natural law.

Note that in order to see that the point of *determinatio* is correct we do not need to endorse a natural law theory, or the view that the principles underlying all legal systems are necessarily the same. The only point is that differences in rules, doctrines, and cultures—which, in the case of Western contract law, as I have argued, are not widespread—are not enough to conclude that we are before different practices with different foundations. On the contrary, different rules, doctrines, and cultures are compatible with identical normative foundations. And this is particularly true when such rules, doctrines, and cultures, as I have stressed, perform—admittedly in different ways—similar functions. Thus, a universal approach to contract theory can be warranted.

Moreover, historical evidence about the philosophical origins of contemporary contract doctrine shows that most justifications of the rules of contract law across

[37] See Fletcher (1998, 5, 23) for an analogous perspective towards criminal law (and what he terms its "universal grammar").

systems can be traced back to the late Scholastics' effort in interpreting Roman rules from the perspective of Aristotle's and Aquinas's philosophy. This path goes through medieval jurists and the late Scholastics,[38] then through Grotius, Pufendorf, and their followers Domat and Pothier (Simpson 1987, 179), and ends with the nineteenth-century treatise writers who relied on their doctrines (Gordley 1992, 4–6; see also Doris 2005 and Teeven 1990, 180), which in turn influenced common law judges (Gordley 1992, 134). Of course, we might not want to hold the late Scholastics' account of contract law as authoritative for our contemporary institutional practices. But the understanding of contract law in the different systems of the Western legal tradition is connected to a clearly identifiable corpus of thought found in the writings of Francisco de Vitoria, Domingo de Soto, Luis de Molina, and Leonardus Lessius. Not just as a logical point, but as a historical matter as well, similar philosophical and normative foundations can underlie different rules and practices.

All I have said is consistent with the fact of theoretical pluralism about contract law's foundations. Indeed, the first thing to note about theoretical disagreement is that it is simply not the case that different jurisdictions are committed to different values—as if each of them were committed to one single value, and as if theoretical pluralism were a consequence of jurisdictional diversity. On the contrary, theoretical pluralism exists *within* each jurisdiction.[39]

What I have said so far is also consistent with the undeniable truth that some systems might be more consistent with some underlying principles rather than with others. But, even here, we should be cautious about making swift judgments about each jurisdiction's underlying foundations. For instance, it is a commonly held view that American contract law is more committed to efficiency than, say, civil law systems,[40] and particularly that the remedial regime of American contract law is inconsistent with strong moral norms of promise-keeping (Friedmann 1995; Shiffrin 2007). However, this judgment seems, at least in principle, inconsistent with the logical distinction between rights and remedies: Under that distinction, there is no logical or normative requirement for remedies to replicate primary rights.[41] Moreover, it is inconsistent with all the aspects in which American and common law contract doctrines *do* undeniably commit themselves to the view that parties are under a strong duty to perform.[42] Finally, and as the next section will argue, from a functional perspective, it might be the case that the supposed difference between American (and, more broadly, common law) and civil law remedies is more apparent than real.

[38] See, particularly on freedom of contract, Decock 2013.
[39] As Mark van Hoecke (2004, 189) writes with regard to contract interpretation in France, Germany, and England, "the same competing theories and conceptions are largely to be found in each of those legal systems."
[40] The contrast has been highlighted, among others, by Grechenig and Gelter (2008), Hesselink (2002), and Lanneau (2014).
[41] For a classical exposition of the distinction, see Austin 1875, chap. XLV. I explore this issue in detail in Jiménez 2018.
[42] On American contract law, claiming that "[m]uch detail in the law of contract is understandable only with reference to this principle that a part's fair expectation of return performance deserves protection," see Farnsworth et al. 2008, 691. On English contract law, see, similarly, Beatson 2002, 499.

6. An Example: Remedies for Breach of Contract

It is thus true that, across jurisdictions, there is some heterogeneity in texts, doctrines, and underlying legal cultures. But such heterogeneity is not pervasive. Moreover, it is compatible with sufficient similarities in conceptual structures and taxonomies and socioeconomic and internal functions, as well as in normative principles. Because of this, a universal approach might be theoretically plausible.

An example is provided by contract remedies. Of course, in this respect there are differences among legal texts. But at a functional level, there is broad consistency: The remedial scheme aims to give the promisee what she contracted for (specific performance) or something just as good (expectation damages).[43]

In the common law, the expectation remedy is the general rule; specific performance is only available when damages are inadequate (Gordley 2007, 390). The particular case of American contract law is synthetized in the *Restatement (Second) of Contracts*, which states that "[s]pecific performance [...] will not be ordered if damages would be adequate to protect the expectation interest of the injured party."[44] In modern German law, according to Article 241 of the *Bürgerliches Gesetzbuch*, the starting point is theoretically the opposite; Parties are entitled to demand specific performance as a general matter (Zimmermann 1996, 776), though they can demand expectation damages in cases where performance is no longer possible (Zweigert and Kötz 1998, 472). Before French contract law was reformed in 2016,[45] it granted, through Article 1184 of the *Code Civil*, an alternative option—specific performance *or* avoidance—generally in all bilateral contracts; specific performance was actually available only for obligations to transfer. For other types of obligations, specific performance was not available, and the only remedy was avoidance along with expectation damages (Dondorp 2008, 280).[46] After the 2016 reform, in case of breach, French contract law [47] allows the promisee to suspend her performance, as well as to obtain specific performance, a reduction in price, resolution, or expectation damages.[48] This path is consistent with recent efforts at harmonization, such as the European Principles of Contract Law (Chapter 9) and the Latin American Principles of Contract Law (Section 2 of the Principles). Finally, mixed jurisdictions remain consistent with this trend of providing performance or something just as good. In the case of Scots law, specific performance is the primary remedy for breach of

[43] "When one party breaches a contract, the central purpose of most legal systems is to put the aggrieved party in the position in which it would have been had the contract been performed" (Farnsworth 2008, 928). On this trait of contract law as a supportive mechanism, see Murphy 2014, 168.

[44] Restatement (Second) of Contracts par. 359(1) (1979).

[45] Ordinance No. 2016-131 (2016). For an overview, see Rowan 2017. For an overview of the French law of contract remedies before the reform, see Whittaker 2008, 349–59.

[46] Due to these limitations, French courts developed a special coercive technique called the *astreinte*. When judgments require a debtor to perform her obligation, courts may order that for each day that the debtor is in default she must pay an amount of money (*astreinte*) to the plaintiff. Under the jurisprudence of the Court of Cassation, the *astreinte* has a penal character. It is not a provisory payment of damages, but neither is it a standard penalty, since the amount paid goes directly into the pockets of the creditor. For a more detailed analysis, see Zweigert and Kötz 1998, 475–9.

[47] For a much more thorough overview in the recent literature, see Rowan 2012.

[48] Article 1217 of Ordinance No. 2016-131.

contract (Macgregor 2008, 70). In Louisiana, specific performance is the standard and preferred remedy (Hogg 2011, 353).

This admittedly superficial overview illustrates that although the rules are certainly different, there is a considerable convergence in the conceptual structure and function of remedies. They enforce contractual duties by ordering performance or something that is equally good from the perspective of the promisee. All systems allow for compensatory damages as a general matter (and the principles governing damages are, basically, the same).[49] In addition, they all make specific performance available in the case of unique goods—although their starting points are quite different (Gordley 2007, 390–1).[50] As Gordley (2000, 1848), highlights, here "the difference scarcely matters in practice. […] If goods are not fungible or hard to get on the market, both civil and common law courts will order specific performance." In this way, remedies enforce the contractual duty, and thus vindicate the promisee's expectation and protect the integrity of the practice. This should not be surprising, since, as Murphy (2014, 168) puts it, "[t]he most obvious way to support the practice of making and keeping agreements is to enforce them—by ordering performance or something just as good."[51] This is what, consistently, most Western legal systems do.

7. Conclusion (and a Note on Normative Evaluation)

As the example shows, by seeing different practices as instances of the same class we are not necessarily obviating differences between them. But this perspective allows us to see that our pretheoretical understanding, in the sense that all these different systems have *contract law*, should not be abandoned. In this sense, we should keep in mind that both at the level of the ordinary discourse of international legal practitioners and in the context of comparative contract scholarship, as Bix (2017, 398), reminds us, we are able to talk productively about *contract law*, without talking at cross purposes or getting lost in translation. Thus, for example, contract law, along with other areas of law, has been the focus of a project devoted to finding a *common core*,[52] which attempts to become a "tool for unearthing deeper analogies hidden by formal differences" (Bussani and Mattei 1997, 340). The mere project of finding a common core presupposes that there are different instances of a certain practice (in this case, contract law) that can be identified and singled out for this purpose.

[49] As Perillo claims, this is again explained by Pothier's influence: "Joseph Pothier's *Traité des obligations* was the basis of the damages principles of the modern Civil Law and of the Common Law of England and the United States." The rule in *Hadley v Baxendale* (n. 15), for instance, is exactly the same rule established in the French *Code Civil* and in the many codes based on the French model (Perillo 2005, 271–2).

[50] This should not be surprising, given the influence of canon law on the training of the early chancellors who introduced specific performance as an equitable remedy. See Farnsworth 1970, 1152.

[51] The Romans were quite aware of this. "[O]bligatio in classical Roman law implied both 'duty' and 'liability': a relation existed in terms of which the debtor ought to (i.e. was 'bound' to) perform whatever he had promised to perform (or, in the case of delict, to compensate the victim); only if he failed to comply with this duty did he become liable in the sense that his body and/or property were exposed to execution" (Zimmermann 1996, 5).

[52] See the Common Core of European Law project at http://www.common-core.org/.

Of course, it is crucial to give greater precision to our pretheoretical intuitions about contract law, in order to get a clear and precise picture of the object we are talking about (that is, after all, the purpose of this paper). But we should not lose sight, in the process, of the extended consensus with regard to the central and core institutions of contract law.[53] Neither should we sink into a quietist attitude, refusing to say anything about contract law unless it is directed at a specific time and place. We can be aware of each practice's particular and distinctive nature without denying their underlying similarity.[54] Such a similarity is significant enough to warrant a universal approach to contract theory.

This, of course, leaves space for other, more local or parochial approaches to contract theory. The argument is against *parochialism*: the idea that there is something inherently preferable about such approaches. However, I wish to suggest that, at least in one respect, a universal approach might be preferable. An adequate theory of contract law should arguably facilitate its normative evaluation and critique, showing its defects and inconsistencies (Bix 2017, 395), and serving to criticize rather than legitimize injustice (Bix 2017, 401). A transnational approach might thus make us more aware of the ways in which our local and parochial rules and institutions of contract law are idiosyncratic, which could be a good indication of the fact that they may be normatively defective. Indeed, such an approach might illuminate the ways in which other legal systems and legal cultures grapple with the same issues our system and culture grapple with—and the ways in which the local solutions of our own system are, at least comparatively, normatively defective.[55] This is an important service for critical evaluation that a local theory would not be able to provide.

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[53] On consensus and its validity as a starting point for contract theory, see Smith 2004, 9.

[54] A similar approach (which has influenced the argument defended here) on the methodology of comparative law has been expounded by Valcke 2004. For her, the comparative lawyer must approach legal systems with an awareness of both their unity and their plurality, staying away from two extremes, which she labels *naturalistic* and *positivistic*. A naturalistic approach reduces law to a preestablished set of ideas about juridical morality, thus seeing each system as simply an instantiation of such preexisting ideas. A positivistic approach sees law as a pure matter of sovereign will, thus allowing for each system's distinctive character (and for the plurality of different systems), but failing to see the similar ideas underlying those different systems.

[55] Here, I follow Waldron 2005.

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