**Title:**

**Permission Text:**
This document is included in TransLex by kind permission of the Virginia Journal of International Law Association.

**Table of Contents:**
Pacta Sunt Servanda: A Meditation

**Content:**

**Pacta Sunt Servanda: A Meditation**

RICHARD HYLAND

*for Friedrich Kessler*

Difference can be disconcerting. A good example is the differing commitment to the enforcement of promises in the common and civil laws. In an American law school, the first-year course in contracts is devoted to exploring why some promises, though actually made, are not enforceable, and why others, though never expressed, are nonetheless held to be binding. We are trained to find ways of getting around or out of contracts, and, as lawyers, we occasionally even counsel clients to breach them. Civil lawyers, on the other hand, are much more committed to elaborating a legal mechanism to enforce as precisely as possible those promises that are actually made and intended. This part of their law is more systematized and coherent than is ours. These differences suggest that

more is at stake than simply deciding where a particular loss should fall.

Civilians justify their system by reference to the maxim *pacta sunt servanda*. This "basic and it seems universally accepted principle of contract law" means, in the civil law, that promises are binding. (Dietrich Maskow, "Hardship and Force Majeure," 40 Am. J. Comp. L. 657, 658 (1992).) As Rene David has explained, "the principle satisfies our philosophical and moral views: it is proper for individuals to be bound by their promises." (René David, *Les contrats en droit anglais* para. 101 (2d ed. 1985).) To the civilian mind, the maxim is entirely self-evident. "The notion seems at first sight so clear and simple that it should require no explanation or comment." (Manfred Lachs, "Pacta Sunt Servanda," in 7 Encyclopedia of Public International Law 364 (1984).) "The rule 'pacta sunt servanda' is therefore not only a basic legal norm, it is equally as much an ethical rule, that is, a self-evident value . . . ." (Alfred Verdross, "Le Fondement du droit international," in 16 Académie de droit international, Recueil des Cours: 1927, at 247, 286 (1928).) According to this interpretation of the *pacta* maxim, then, the role of the law is to provide a state sanction for moral norms. This point, so obvious to civil lawyers, is much less so to anyone trained in the Holmesian tradition.

Curiously, even in an age of multiculturalism such as our own, it does not seem to be proper to deal with difference in comparative law simply by accepting it. Of course difference is recognized and, on some levels, even encouraged. Yet, at the same time, gentility dictates that it is always to be dissolved. However different things may seem, the dominant method in comparative law usually seeks to demonstrate that the differences are merely apparent. What is to be sought is a deeper level at which the legal systems in question share a common vision. Unfortunately, the difference symbolized by the *pacta* maxim does not disappear easily. Scholars trained in the two legal systems virtually always reach a point-and it is precisely the point made by the maxim-at which agreement becomes impossible.

I had long wondered about this difficulty when it occurred to me that the difference between the two systems may in fact owe something to the maxim itself. It is odd, after all, that one of the principal differences between the two predominant systems of private law in the modern world is continually reduced to three words from a dead language that are rarely translated. It is also curious that, in a discipline committed to authority, a footnote never iden-
tifies the source of the Phrase. Is it possible that there is a difference here of a more fundamental sort?

Delenda est Carthago. For a beginning, it is perhaps enough simply to try to translate the *pacta maxim*. René David believed the proper translation to be this: "commitments that have been made must be performed." (David, *Les contrats en droit anglais* para. 101.) American Courts, however, generally adopt a translation that applies the maxim only to agreements: "agreements must be obeyed" (*United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1362 (9th Cir. 1991)); "agreements must be respected" (*Nike Int'l, Ltd. v. Athletic Sales, Inc.*, 689 F. Supp. 1235 (D.P.R. 1988)); "agreements must be observed" (*Mo. Hous. Dev. Comm'n v. Brice*, 1988 WL 142978 *3 (E.D. Mo.)).

The dispute about whether to apply the *pacta* maxim to all promises or only to those that produce agreements is only one of the interesting translation questions. Another is how to express the obligation. There are several different ways to state the concept of obligation or necessity in Latin: *necesse est*. . . , *debemus*. . . , *oportet*. . . . The question is why the *pacta* maxim took the gerundive, a construction that was rarely, if at all, employed in popular speech in Rome. (J.B. Hofmann, *Lateinische Syntax und Stilistik* 368-69 (1965).) The basic sense of the construction is that the noun qualified by the gerundive is a fit object for the verbal action: *iudex laudandus* (a judge fit to be praised). When the gerundive is used periphrastically, the idea of fitness is transformed into the notion of necessity: *iudex laudandus est* (The judge must be praised). (See E.C. Woodcock, *A New Latin Syntax* 158 (1958).) The gerundive seems to be a peculiarity of the Italic languages (Lionel Horton-Smith, "Concluding Notes an the Origin of the Gerund and Gerundive," 18 *Am. J. Philology* 439, 449 (1897)), and one that developed quite late-there seems to be no evidence of it in the inscriptions prior to 186 B.C. (1 Raphael Kühner, *Ausführliche Grammatik der Lateinischen Sprache* § 171 (F. Holzweissig ed., 2d ed. 1912).) Almost everything about the origin of the construction is unclear. (L.R. Palmer, *The Latin Language* 281 (1954).) Particularly, there seems to be no Indo-European equivalent to the -ndo- stem, no precedent for the assumption by an active gerund of a passive meaning, and no account of how the form acquired the force of necessity. For all practical purposes, in other words, it is a phenomenon peculiar to the Latin language.

Part of the force of the *pacta* maxim comes from the fact that it is one of the rare Latin phrases still cited today in the law to employ the gerundive, and the only one I have found that is affirmative rather than negative. Most Latin legal phrases, whether of Roman or later origin, are stated in the present indicative. A survey of the indices of recent treatises in the civil law yields these examples:

*Actori incumbit probatio*  
*Actor sequitur forum rei*  
*Cessante ratione legis, cessat eius dispositio*  
*Contra non valentem agere non currit praescriptio*  
*Culpa lata dolo aequiparatur*  
*Electa una via non datur recursus ad alteram*  
*Error communis facit ius*  
*Fraus omnia corrupit*  
*Impossibilitum nulla est obligatio*  
*In pari causa turpitudinis cessat repetito*  
*Nemo auditor propriam turpitudinem allegans*  
*Nemo dat quod non habet*  
*Nemo legem ignorare censetur*  
*Nemo plus iuris in alium transferre potest quam ipse habet*  
*Perculum est emptoris*
There is also another aspect to the philological context, one that will be familiar to anyone who has taken even a year of
Latin in high school or college. One of the most memorable phrases of Roman antiquity was formulated in precisely the
same construction. The phrase is Cato's Delenda est Carthago. Pliny reported Cato's remark in the course of telling the
celebrated tale of the Libyan fig. (Pliny, Naturalis Historia 15.20.74-76.) Apparently Cato once arranged to drop a Libyan
fig in the Roman senate as he shook out the folds of his toga. As his fellow senators were admiring the size and beauty of
the fruit, Cato asked how recently they thought the fig had been plucked from the tree. They all agreed that the fruit was
fresh. It was picked two days ago, Cato explained, in Carthage—“so near is the enemy to our walls.” (Id. 15.20.75.) In this
passage, Pliny reported the famous phrase in indirect discourse and noted that it was with this comment that Cato
concluded all of his orations in the senate: namque pernitali odio Carthaginis flagrans nepotumque securitatis anxius,
cum clamaret omni senatu Carthaginem delendam (Burning with a mortal hatred of Carthage and anxious in regard to the
safety of his

descendants, at every meeting of the senate he used to vociferate "Carthage must be destroyed!"). (Id. 15.20.74.)

There must be something particularly intense about the phrase, because the ancients themselves had some difficulty
translating it. Both Diodorus Siculus and Plutarch seem to have had independent evidence of Cato's words, and both
translated them in the same manner: ????????? ?? ????? (Carthage must not exist). (Diodorus Siculus, Library of
History 34/35.33.3; Plutarch, Marcus Cato 27.1.) Both must have believed that none of the Greek constructions that
convey simple necessity - ??? . . . . . . - adequately express the thought. Moreover, if the phrase meant simply that
Carthage must be destroyed, an adequate translation was available. The historians might simply have chosen one of the
several Greek verbs that convey the idea of utterly destroying a city and constructed it in the form of the verbal adjective
ending in "-----"-?????, which, like the Latin gerundive, also conveyed the idea of necessity-something
like ????????? ??????????? ???. They rejected this translation, perhaps because it would have highlighted the act of
destruction, and selected instead a more abstract version that focused an the result. Appian took up the same translation.
(Appian, Punic Wars 8.10.69.)

One of the peculiar characteristics of the phrase is the cold and distant manner with which it expresses the notion of duty.
The subject whose duty is involved is not mentioned; nor is there any indication of the source of the duty-the speaker is
not the Biblical God addressing an individual conscience in the language of “Thou shalt” and “Thou shalt not.” There is
also no suggestion of dialogue - individual weakness and excuse are not relevant here. As thus understood, the delenda
phrase accords completely with Cato's vision of society. He believed so thoroughly that the only role of the individual is to
serve the glory of the collective that his history of Rome, the Origines, describes Roman military victories without naming
the generals, and dates the events without the traditional reference to the names of those who were consuls at the time.
His famous phrase, like his entire life, dedicated as it was to the struggle against Hellenism and luxury, and in favor of the
rude, simple pleasure of hard work, is the expression of duty in the form of military discipline. The notions of conquest and
the defense of the homeland are expressed as much in the grammatical construction as in the words themselves. In fact,
grammarians often use military examples to illustrate it. (See, e.g., Carla Buck, Comparative Grammar of Greek and Latin
310 (1933) (bellum gerendum

Page: 411

est).) Delenda is a statement of absolute; social necessity to which there can be literally no excuse, to which all other
concerns, no matter how weighty, whether of family, of life, or of fortune, must necessarily yield, lest the polity itself be
eradicated.

There is yet another reason to believe that the delenda phrase implies special intensity. That is because Carthage was in
fact destroyed-brutally and completely. After six days of the fiercest street-fighting recorded in antiquity, the city was
looted, burned, and razed. (T. Dorey & D. Dudley, Rome Against Carthage 173 (1972).) The fire raged for a week.
Thousands of Carthaginians perished, either consumed by the flames or crushed by the falling stones. Some of the
survivors were sent to Rome as slaves. Other inhabitants were wedged, dead or alive, into potholes to make the roads
passable. Imprecations were spoken against further settlement, and the city was plowed under the earth. (Theodor
Mommsen, Römische Geschichte 449 (1932).) This colossal act of destruction has always been considered the direct
result of Cato's phrase. As Plutarch noted, “[i]n this way Cato is said to have brought to pass the third and last war against
Carthage.” (Plutarch, Marcus Cato 27.1.)

Cato's phrase demands the fusion of absolute social duty with merciless execution and, as such, suggests the destructive
potential of moral obligation. Catonian virtue raises duty to one's group to the level of an absolute, and reduces
responsibility to anything else to zero. I therefore suggest the following translation for the delenda phrase: "As a matter of imperative social necessity, Carthage must, at all costs and for all time, be totally annihilated." To understand the pacta maxim in context, then, means to translate it analogously: "As a matter of imperative social necessity, commitments must, at all costs and without exception, be completely performed." Other translators have rendered the phrase in a similar way: "The given word must be kept, the promise must be performed whatever it costs; pacta sunt servanda." (2 Henri Mazeaud et al., Leçons de droit civil (Obligations: théorie générale) para. 721. (F. Chabas ed., 8th ed. 1991).) This may be as close as we can come today to a translation of the two phrases. If this translation is accurate, one might then ask why, in the civil law, the keeping of promises or agreements should be considered to be a matter of life and death.

Pacta conuenta . . . seruabo. The pacta maxim is not found in the Digest. What most closely resembles it is Ulpian's report of the

Page: 412

praetor's rule - probably of the Republican age but later interpolated - quoted in the chapter De pactis: Ait praetor: "Pacta conuenta, quae neque dolo malo, neque aduersus leges plebis scita senatus consulta decreta edicta principum, neque quo fraus cui eorum fiat facta erunt, seruabo" (The praetor says: "I will enforce agreements in the form of a pact which have been made neither maliciously nor in contravention of a statute, plebiscite, decree of the senate or edict of the emperor, nor as a fraud on any of these"). (Digest 2.14.7.7.) The original edicts have been so thoroughly rearranged and interpolated that we will probably never know exactly what this phrase meant. (See generally Slavomir Condanari-Michler, "Pactum," in 18 Paulys Real-Encyclopädie 2127, 2128 (1942).) As we have the text, the praetor simply states his practice of adjudication. "[T]he test of what should constitute an enforceable pactum lay in the discretion of the individual Praetor. He might or might not grant an action, according as the particular agreement set up by the plaintiff did or did not appear to him a valid one." (William H. Buckler, The Origin and History of Contract in Roman Law 158-59 (1895).) There is no attempt to assert or impose a moral duty.

Pactum is one of the oldest words in the Latin dictionary. In the nonlegal literature, the term seems to have signified any kind of agreement. As a legal term, it may originally have meant an agreement to make payment in expiation of a crime: Si membrum rupsit, ni cum eo pacit, talio esto (If one person maims another, let there be retaliation in kind, unless there is a pact). (Twelve Tables 8.2.) In the Digest, the De pactis chapter is included at the end of one of the books devoted to judicial procedure and seems to be largely concerned with agreements not to sue, though pactum probably had a broader meaning even for the classical jurists. The glossators seem to have believed that the Romans used pactum as the general name for agreement, and the term contractus, in contrast, to indicate a pactum sufficiently clothed with a vestimentum that it would be enforced. The truth is considerably more complex. (See György Diósdi, Contract in Roman Law 119-35 (J. Szabó trans., 1981).) It seems that some pacta were enforced while others were available merely as an exception: as Ulpian wrote, Sed cum nulla subest causa, propter conventionem hic constat non posse constituui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem (But when no causa exists, it is settled that no obligation arises from the agreement; therefore, a naked agreement gives rise not to an obligation but to a defense). (Digest 2.14.7.4.) Many

Page: 413

have attempted to explain which pacts were enforceable and which were not. (See, e.g., Paul Girard, Manuel élémentaire de droit romain 629-41 (7th ed. 1924).) Happily, it is not necessary to resolve these issues before proceeding.

What is important here is that the pacta maxim is not Roman. Whatever the Roman jurists believed about the enforceability of agreements, they did not phrase their belief in terms of pacta sunt servanda. In fact, the opening of the De pactis chapter provided the perfect opportunity to state the idea in this way. There, Ulpian commented that it is equitable and right for agreements to be observed: Huius edicti aequitas naturalis est. quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt seruare? (There is a natural equity in this edict. For what so accords with human faith as that which individuals have decided among themselves to observe?). (Digest 2.14.1.pr.) Even as late as the reign of Justinian, the Roman jurists did not conceive of the performance of promises as a matter of urgent social necessity.

A brief look at the writings of Cicero - who was not only a philosopher but also a successful lawyer, and even served for several years as praetor - may help to explain why Roman thinking about the enforcement of promises could not accurately be expressed in terms of the pacta maxim. If pacta sunt servanda stands for the proposition that the law should follow morality, Cicero's De officiis would seem to be exactly the right place to look for it. That essay is perhaps the most important classical source for the natural law tradition. For that reason, in fact, "[i]t is arguable that the De Officiis is
the most influential secular prose work ever written." (A.E. Douglas, "Cicero the Philosopher" in Cicero 135, 149 (T.A. Dorey ed., 1965.)) Cicero believed that the civil law must conform to the universal ethical principles of the law of nature. To the extent it fails to do so, it may still be law, but it is bad law: *atqui nos legem bonam a mala nulla alia nisi naturae norma dividere possimus* (But in fact we can perceive the difference between good laws and bad by referring them to no other standard than Nature), (Cicero, *De legibus* 1.16.44.) Since Cicero believed that good laws are based on morality, he might logically have recommended that the law adopt the moral notion that we are bound by our promises.

In fact, Cicero explicitly rejected the maxim in two separate passages in *De officiis*. The essay is divided into three books. The first two consider in turn the concepts of moral goodness and expediency. The third attempts to reconcile the two ideas. In the third book, Cicero asked whether agreements and promises must always

Page: 414

be performed: *Pacta et promissa semperne servanda sint*, *QUAE NEC VI NEC DOLO MALO*, ut praetores solent, *FACTA SINT* (The question arises also whether agreements and promises must always be kept, "when," in the language of the praetors' edicts, "they have not been secured through force or criminal fraud"). (Cicero, *De officiis* 3.24.92.) Cicero then examined three hypotheticals and concluded that promises need not be kept when they become inexpedient to those who made them or to those to whom they were made: *Ergo et promissa non facienda* (Promises are, therefore, sometimes not to be kept). (Id. 3.25.95.) Even after reading this passage, however, there may be some doubt about Cicero's position. In the third book, after all, Cicero attempted to reconcile the demands of moral goodness with those of expediency. When the question is posed in this way, expediency will always win some concessions. What though of moral goodness itself? It might seem that a natural law philosopher would hold that, on the level of morality, one's word is one's bond. For Cicero, however, that was not the case. Cicero took up the question directly in the first book and concluded there too that promises are not to be kept if the consequences of keeping the promise would be harmful: *Nec promissa igitur servanda sunt* (Promises are, therefore, not to be kept). (Id. 1.10.32.) Cicero considered the case of a lawyer who has agreed to appear for a client in court, and whose child then falls ill. Cicero held that the lawyer is morally permitted to breach the promise of representation. However we ourselves might decide this particular case, Cicero's understanding is clearly correct. The law often compels the performance of promises that morality would excuse. The law is more rigid and formal than is morality. What Cicero's reflections demonstrate is that morality does not require that promises always be kept. The origins of *pacta sunt servanda* must lie elsewhere.

There is one thing left to say about Cicero: in his writing, Cato and Carthage are everywhere. For example, what has survived of his *De re publica* opens with a discussion of the heroes who, from love of country, delivered Rome from the menace of Carthage. Cato is Cicero's primary illustration. Moreover, the principal speaker in the dialogue, the character who seems to voice Cicero's own views, is Scipio Aemilianus, the Roman general who destroyed Carthage at the end of the Third Punic War. In *De senectute*, another of Cicero's dialogues, Cato himself discourses with two younger companions on the virtues of old age. The eminently wise Laelius, the principal speaker in *De amicitia*, perhaps

Page: 415

Cicero's most exquisite dialogue, remarked that, if anyone ever was wise, it was Cato- *si quisquam, ille sapiens fuit*.

(Cicero, *De amicitia* 2.9.) Cato is also present as a model citizen throughout *De officiis*.

Cicero's continual invocation of Cato the Censor is not a coincidence. The two shared a fundamental principle about the morality of action, namely that the greater good is to be strictly preferred to the lesser: *contra officium est maius anteponi minori* (It violates moral duty to prefer the lesser good to the greater). (Cicero, *De officiis* 1.10.32.) For Cicero, as for Cato, no good, with the possible exception of the preservation of Rome itself, could ever be taken as an absolute, including the performance of agreements and promises, whether made by states or individuals. Neither Cato nor Cicero felt obligated to avoid death and destruction when they believed that the greater good required it. For Cato, the preservation of the Roman republic required the destruction of Carthage. Cicero probably agreed. As his Laelius saw it, Cato, by overthrowing the two deadliest foes of the Roman empire - Carthage and Numantia - thereby put an end not only to existing wars but to future wars as well. (Cicero, *De amicitia* 3.11.) For Cicero, the preservation of the republic required the execution of the Cataline conspirators without trial as well as the assassination of the tyrant Julius Caesar. This was the morality of Rome that was so shrewdly observed and powerfully expressed by Machiavelli: *Non può per tanto uno signore prudente, nè debbe, osservare la fede, quando tale osservanzia li torni contro e che sono spente le cagioni che la fecero promettere* (A prudent leader cannot, and should not, keep a promise when performance turns to disadvantage and the reasons that induced the promise have vanished). (Machiavelli, *Il Principe* ch. 18 (Quomodo fides a principibus sit servanda (When a promise must be kept by a prince)).)
**Pacta quantumcunque nuda servanda sunt.** The *pacta* maxim, slightly altered, appears as an unofficial heading to the first chapter of the *De pactis* title of the *Decretals* of Gregory IX (Pacts, however naked, must be kept). (*Decretales Gregorii P.IX* 1.35.1 *summarium*, in 2 *Corpus iuris canonici* 203-04 (E. Friedberg ed.,1881).) The chapter incorporates the holding from a case brought at the Council of Carthage in 348 by Antigonus, a bishop of one of the North African bishoprics. (See *Concilia Africanae*, A.345-A.525, in 149 *Corpus Christianorum* (Series Latina) 3, 9 (C. Munier ed., 1974).) Antigonus had agreed with Optantius, another bishop, to divide their congregations. Optantius allegedly violated the agreement. Gratus, who was presiding, held that the breach violated Church discipline, the Scriptures, and the prevailing peace. The Council responded, apparently unanimously: *Pax servetur, pacta custodiantur* (Peace should be preserved, pacts should be respected).

The facts of the case from the Council report were excised when the holding was incorporated into the *Decretals*. The gloss recounted some of the particulars, but omitted the fact that the agreement between the two bishops seems to have been concluded with proper formalities - *manus nostrae tenentur et pittacia* (our signatures are binding as are the documents) (both the Latin text and the translation are uncertain). Moreover, because the heading was not present when the *Decretals* were initially promulgated, it has no legal force. Like the other *summaria*, it may have been taken from the decretalist literature and inserted by a 15th century editor. Though it is impossible to be certain, the source may have been the Cardinal Hostiensis, in whose *Lectura* the following sentence appears: *Caveat ergo sibi is qui consentit, quia pacta, quantumcunque etiam nuda, secundum veritatem evangelii sunt servanda* (Therefore care must be taken by whoever consents, because pacts, however naked, according to the Scriptures, must be kept). (Hostiensis, *Lectura in quinque libros decretalium gregorianarum*, I, *de arbitris* 9.6 (Venice 1581).)

It is often claimed that the *pacta* maxim originated with the canonists. The canonists did, in fact, reverse what they understood to be Roman formalism and held that an exchange of promises was sufficient to bind the parties. All that should count is consent - *solus consensus obligat*. Legal historians generally argue that the *pacta* maxim reflected this evolution. In the words of Paul Collinet: "It was left to canon law to take the final step of proclaiming the rule *pacta sunt servanda* which represents the triumph of the effect of the concurring wills." (Paul Collinet, "The Evolution of Contract as Illustrating the General Evolution of Roman Law," 48 L. Q. Rev. 488, 494 (1932).) René David explained the origin of the maxim as follows: "[P]acta sunt servanda: the law of contract should be relieved of rules with obscure origins, liberated from its connection to rites and magic, rendered autonomous in relation to the law of property. The validity of a contract should no longer depend either on a prescribed form or on the transfer of possession." (David, *Les contrats en droit anglais* para. 186.)

---

**Page: 417**

What is doubtlessly correct is that the canonists were instrumental in the evolution from formalism to consensualism and therefore contributed substantially to the modern law of contract. What is less certain is how the *pacta* maxim is connected to this process. Hostiensis - the cardinal-bishop of Ostia, who is also known as Henricus de Segusia and called variously in the literature *Pater canonum et doctor supremus, fons et monarcha iuris, lumen lucidis simum Decretorum* - played a central role in this development. (See generally Clarence Gallagher, *Canon Law and the Christian Community* 21-85 (1978).) He accepted as a general principle that, in canon law, a promise must be performed, even if formless: *Vt modis Omnibus servetur etiam si sit nudum secundum canones . . . quia inter simplicem loquelaum & iuramentum non facit Deus differentiam* (In all cases a promise is to be performed, even if naked according to the canons . . . because God does not distinguish between simple words and an oath). (Hostiensis, *Summa aurea*, I, *de pactis* 6 (*Quis sit effectus*)) (Venice 1570).) Moreover, whereas the legists recognized a *nudum pactum* only as an exception, the canon law provided it with an action: *ex pacto nudo datur actio* (An action may be based on a naked pact) (*Lectura*, I, *de pactis* 1.1); *nos ex nudo pacto actioe damus* (We provide an action based on a naked pact). (Hostiensis, *Summa aurea*, I, *de pactis* 1.3). According to Hostiensis, the action on the simple agreement arises from natural equity, which the judge is to prefer whenever the positive law diverges from it. Equity requires that one's acts correspond to one's words. (See generally François Spies, *De l'observation des simples conventions en droit canonique* 54-63 (1928); Jules Roussier, *Le Fondement de l'Obligation contractuelle dans le Droit classique de l'Eglise* 20-29 (1933).)

Thus, in his chapters on pacts, Hostiensis fully accepted both the proposition that promisors are morally obligated to keep their promises and the idea that the law should follow the principles of moral equity. The *pacta* maxim so fully expresses these ideas that one might expect it to appear at this point in his text. Yet it does not. The reason may well be that Hostiensis had not yet discovered the general force of the principle. Whenever he employed the three words that make up the *pacta* maxim, either he qualified them or he appended them as an afterthought. For example, the Passage quoted...
above, which may have provided the source for the *summarium* in the *Decretals*, appears not in the chapter on pacts but rather in the chapter on witnesses. Moreover, it does not state a general rule but rather asserts a contradiction between the Scrip-

Page: 418

tures and Roman formalism (*quantumcunque etiam nuda, secundum veritatem evangeli*). The other uses Hostiensis made of the phrase are even more limited: *semper pacta, novissima sunt servandâ* (The most recent agreements must always be respected) (Hostiensis, *Lectura*, I, *de transactionibus* 1.6); *pacta inter partes habita servanda sint* (Formal pacts among the Parties must be kept) (Hostiensis, *Lectura*, III, *de prebendis & dignitatisibus* 11.7). Another indication that, for Hostiensis, the words had not yet attained the status of a general principle is that he employed them as frequently in the negative as in the positive: *pactorum non liceret iudici immutare, illicita aut servanda non essent* (Judges may not alter pacts, but illicit pacts need not be kept) (Id. 11.8); *si pactum, conventum a re privata remotum sit, non est servandum* (If the pact does not concern private matters, it is not to be enforced) (Hostiensis, *Lectura*, I, *de transactionibus* 8.6, quoting *Digest* 2.14.27.4).

Some explanation is needed for why Hostiensis, who did so much to ensure the triumph of consensualism, did not conceive of *pacta sunt servanda* as a fundamental principle and formulate it as a maxim. There seem to be at least two contributory factors. The first is that the canonist justification for consensualism was far broader than the *pacta* maxim. The canonists held that promises are binding on the promisor because, following the Augustinian critique of mendacity, they believed that a broken promise amounts to a lie: (See R. Naz, "Pacte," in *6 Dictionnaire de droit canonic*ique 1181 (R. Naz ed., 1957).) Taken to its logical conclusion, this principle would require a finding that all promises are binding, even those that have no legal consequences. The principle fails to explain why the law finds it especially compelling to enforce agreements. Whenever the justification for the *pacta* maxim is sought in traditional conceptions of morality, this difficulty reasserts itself. René Davids discussion again proves exemplary: "All commitments - at least those that their beneficiary has accepted - must be kept." (David, *Les contrats en droit anglais* para. 186.)

The second reason Hostiensis did not assert a greater degree of generality for the *pacta* maxim concerns the philosophy of science that informed his research. In this regard, his principal difficulty was that he wrote almost four centuries before Galileo. As is well known, Galileo produced not only a set of new and, at the time, astonishing ideas about the workings of nature, but also a radically new conception of how to construct a scientific theory. (See Hans Welzel, *Naturrecht und materiale Gerechtigkeit* 106 (4th ed. 1980).)

Page: 419

In his *Discorsi*, for example, Galileo sought to discover the trajectory of a shot fired from a cannon. (See Galileo Galilei, *Dialogues Concerning Two New Sciences* (H. Crew & A. de Salvio trans., 1914).) He concluded that the trajectory generally traces a parabola. To reach this result, he separated the movement into its elements, namely movement along a plane and a free fall. Galileo found that, for the purposes of the theory, distinctions must be made that are not empirically observable. In other words, science constitutes a series of abstract objects and provides each with its own theory. Empirical phenomena are understood as the product of the interaction of the different abstract elements.

Without this method of abstraction, general principles do not arise. Instead, there is simply the attempt to state a rule and its many exceptions in the same breath. For example, when commenting on the holding from the Council of Carthage, Hostiensis chose to emphasize the exceptions rather than the general principle: *[Pacta custodiantur,] legitima . . . dum modo non sint contra leges, vel contra bonos mores, & nisi dolo fiant . . . . Nec servandum est pactum aliui damnosum . . . nec servandum est, sivergat in detrimentum salutis aeternae, vel corporalis* (Legitimate [pacts should be respected] . . . as long as they are not illicit or violative of good morals and there has been no fraud . . . . A pact that harms others is not to be kept . . . nor is it to be kept if it causes harm to spiritual or bodily health). (Hostiensis, *Lectura*, I, *de pactis* 1.6 in fine.) Given the convergence of these several factors - as well as others, such as the school doctrine of the iustum pretium or fair price (see James Gordley, "Equality in Exchange," 69 *Cal. L. Rev.* 1587, 1604-17 (1981)) - I would be surprised if *pacta sunt servanda* were to be found as a general principle in the medieval sources.

Nonetheless, the triumph of Christianity did provide one of the essential elements for the elaboration of the *pacta* maxim: it began the reevaluation of the accomplishments of the Roman Empire. Augustinus, for example, thought that, in their struggle for conquest, the Romans endured much suffering for merely material reward, while the real reward is in the City of God. (Augustinus, *De civitate dei contra paganos* 5.17 in fine.) As far as the Punic Wars were concerned, the final defeat of Carthage was ultimately as damaging to Rome as it was to the Carthaginians: "[W]hen in the last Punic War, Rome's rival in imperialism was destroyed root and branch . . . from then on the Roman republic was so overwhelmed by
ills piled on ills that in her days of prosperity and security, which were the source from which, as morals yielded to
corruption, those ills accumulated, Rome stands out as more hurt by Carthage in so speedy a fall, than in so long an
opposition previously." (Id. 3.21.) This heavily moralizing condemnation of Roman imperialism has attracted followers in
modern times, and the responsibility for the Roman excesses is often laid at Cato's feet. "At the conclusion of each
session in the senate, Cato used to say: 'And I also believe that Carthage must be destroyed,' and Cato was a true
Roman. The Roman vision thus revealed itself as the cold abstraction of domination and power, as the simple egotism of
one's own will against others, which produces no moral transcendence . . . " (G.W.F. Hegel, Vorlesungen über die
Philosophie der Geschichte 3.2, in 12 Werke 374 (E. Moldenhauer & K. Michel eds., 1970).)
The radical revision of attitudes toward conquest that took place in early Christianity may help to explain the odd
coincidence that the sole source in the Decretals for the rule concerning pacts is a case decided in Carthage. Once the
Council heard about the broken promise and the clash of jurisdictions, the bishops agreed that, in order to preserve
peace, the agreement must be respected. Might the site of the gathering have had some impact on the result of the case?
The ground where Carthage once stood seems to have troubled even the minds of generals. Caesar himself, who once
passed the night near the spot, dreamt that he saw a whole army weeping. (Appian, Punic Wars 8.20.136.) Scipio
Aemilianus, the general who gave the order to destroy the city, was overcome with grief as he watched Carthage burn.
The depth of his emotion, reported by the Greek historians, is inseparably tied to the memory of the destruction of the
city. As Appian described it: "Scipio, beholding this city, which had flourished 700 years from its foundation and had ruled
over so many lands, islands, and seas, as rich in arms and fleets, elephants, and money as the mightiest empires, but far
surpassing them in hardihood and high spirit (since, when stripped of all its ships and arms, it had sustained famine and a
mighty war for three years), now come to its end in total destruction - Scipio, beholding this spectacle, is said to have
shed tears and publicly lamented the fortune of the enemy. After meditating by himself a long time and reflecting on the
inevitable fall of cities, nations, and empires, as well as of individuals, upon the fate of Troy, that once proud city, upon the
fate of the Assyrian, the Median, and, afterwards of the great Persian empire, and, most recently of all, of the splendid
empire of Macedon, either voluntarily or otherwise the words of the poet escaped his lips:-

The day shall come in which our sacred Troy
And Priam, and the people over whom
Spear-bearing Priam rules, shall perish all.

Being asked by Polybius in familiar conversation (for Polybius had been his tutor) what he meant by using these words,
Polybius says that Scipio did not hesitate frankly to name his own country, for whose fate he feared when he considered
the mutability of human affairs. And Polybius wrote this down just as he heard it." (Id. 8.19.132 (quoting Homer, Iliad); see
generally A.E. Astin, Scipio Aemilianus 282-87 (1967).)
In other words, the site of Carthage provokes reflection. It seems today to be universally acknowledged, as it was in
antiquity, that a breach of the treaty between the two states provoked the final Punic War. Some, without choosing sides,
report only that the treaty was broken: "This second treaty between the Romans and the Carthaginians lasted fifty years,
until, upon an infracion of it, the third and last war broke out between them." (Appian, Punic Wars 8.1.2.) Some accept
the Roman view that Carthage broke the treaty. (See Diodorus Siculus, Library of History 32.1.) Others hold that Rome
breached. (See William Harris, War and Imperialism in Republican Rome234-40 (1979).) Still others, surmise that Rome,
following its traditional practice (see 1 Coleman Phillipson, The International Law and Custom of Ancient Greece and
Rome 411-13 (1911)), deceitfully manipulated Carthage into a position in which breach was the only alternative. (See
Theodor Mommsen, Römische Geschichte at 427-33.) The debate has been in progress since antiquity-Polybius having
already reported the same arguments. (Polybius, Histories 36.9.) What everyone acknowledges is that the treaty was
breached and that war and devastation were the results. Interestingly, the first two Punic Wars also seem to have been
provoked by treaty breach-once again, in both cases, there is some likelihood that it was Rome that breached. (See Dorey
& Dudley, Rome Against Carthage 3-5, 30-35.) The holding at the Council of Carthage clearly acknowledged this
connection between broken promises and the risk to peace. Thus, the pacta maxim may have begun its long evolution as
a reaction to the Roman destruction of Carthage, as well as, implicitly, to the rigor of Cato's injunction. The two adages
would then be linked by more than a common grammatical construction.
**Pacta servanda sunt.** By the time Samuel Pufendorf came to consider the question of the binding effect of simple agreements, he possessed the two essential ingredients needed to formulate *pacta sunt servanda* as a maxim and to raise it to a general principle. First, he was trained in the modern scientific method; and second, he had developed a theory of natural law that could make good use of the maxim.

Pufendorf had studied in Jena with Erhard Weigel, a philosopher, mathematician, and astronomer, whose local fame was due to his house, which, because it possessed a deep shaft through which the stars could be seen during the day, was celebrated in a well known hexameter about the sights to be seen in the small town:

*Ara, caput, draco, mons, pons, vulpecula turris, Weigeliana domus; septem miracula Jenae*

(An altar, a head, a dragon, a hill, a bridge, the fox tower, The home of Weigel; the seven wonders of Jena).

Weigel believed that the pursuit of knowledge in all disciplines requires recourse to the mathematical method. (Erik Wolf, *Grosse Rechtsdenker* 320 (4th ed. 1963).) As a result, Weigel formulated a moral philosophy that owed nothing to theology and everything to mathematics: *Mathesis non sit pars Philosophiae . . . sed quod sit ipsissima Philosophia* (Mathematics is not merely a part of philosophy . . . but rather is philosophy itself). (Erhard Weigel, *Philosophia Mathematica* 2.62 (Jena 1693).) This is also what Weigel taught to his students Leibniz and Pufendorf, and what he later elaborated in his treatise, *Arithmetische Beschreibung der Moralweisheit*.

Weigel probably taught Pufendorf the basic elements of the Galilean method of theory construction. Galileo's work was followed closely in learned circles of the time and had a profound effect on the natural law theorists. (See Welzel, *Nature und materiale Gerechtigkeit* at 105; Franz Wieacker, Privatrechtsgeschichte der Neuzeit 307 (2d ed. 1967).) On the basis of this method, Pufendorf was able to distinguish a set of general principles-applying to all contractual transactions-from the more specific rules valid only for each type of contract. As a result, Pufendorf was apparently the first to isolate the general part from the special part of the law of obligations. (Wieacker, *Privatrechtsgeschichte der Neuzeit* at 310.)

The pacta maxim also fit well into Pufendorf's theoretical construction. One of the main topics of discussion among political theorists at the time was the work of Thomas Hobbes. Like Hobbes and other political thinkers of the Baroque, Pufendorf was commit-
of collective safety. The reason is not difficult to discover - it lies in the lust for power and the cupidity that tempts both individuals and states. (Id.) At this point in the argument, Pufendorf found it useful to provide an example of the human potential for enmity. He cited the description given by Velleius Paterculus of the relations between the Romans and the Carthaginians: *Aut bellum inter eos populos; aut belli praeparatio, aut infida pax fuit* (There subsisted between these two nations, either war, or preparations for war, or unsettled peace). (Id. (quoting Paterculus, *Historia Romana*).)

Because they are moral entities, Pufendorf concluded, human beings cannot live without law. One source of that law is the law of nature. Based on his examination of the human condition and the initial but fragile state of peace, Pufendorf thought it clear that sociality is the fundamental law of nature: "Every human being, so far as possible, should cultivate and preserve toward others a social attitude, which is peaceful and agreeable at all times to the nature and end of the human race." (Id. 2.3.15.) As a result of what has been described as one of the bitterest scholarly debates of the Baroque period, Pufendorf ultimately managed to unseat theological conceptions of natural law, such as those viewing it as a remnant of our prelapsarian knowledge of God, and replace them with his secular derivation of natural law from the socialitas that is innate in human nature. (Hans Welzel, *Die Naturrechtslehre Samuel Pufendorfs* 31-51 (1958).)

Sociality, in turn, Pufendorf explained, is only partially secured by the norms that constitute the law of nature. Without more, they are insufficient to maintain peace. The gaps in the law of nature must be filled by agreement: "Although the nature and kind of agreements entered into by individuals . . . depend an each person's judgement, yet the law of nature commands, in a general way and indefinitely, that human beings enter into agreements of some kind or other, since without them social relations and peace . . . cannot be preserved." (Pufendorf, *De jure naturae et gentium libri octo* 3.4.1.) One of those agreements is the rulership pact, the agreement between the ruler and the multitude by which the state is constituted. (Id. 7.2.8.) But pacts of all kinds, both private and public, are necessary to fill out the framework created by the law of nature. The only hope for peace and security is for those pacts, once made, to be performed.

At this point, after seventeen centuries or so of preparation, the foundation for the *pacta* maxim had been laid. The heading of the relevant section in Pufendorf's treatise announces the maxim without qualification - *Pacta servanda sunt*. (Id. 3.4 *summarium.*) Pufendorf began the section by anchoring the maxim in his construction: *Si quae autem inter homines ineuntur pacta, illa sancte ob servanda esse, sociabilis natura hominis requirit* (Now whenever human beings enter into any agreements, human sociability requires that the agreements be faithfully observed). (Id. 3.4.2.)

Of course there was nothing original in Pufendorf's belief that it is important to keep one's word. The idea became almost a commonplace during the rise of consensualism. In fact, Pufendorf may have imported into the learned tradition statements occasionally found in the *Partikularrechte*, the regional laws of the late medieval and early modern periods. Already in the 13th century, Beaumanoir had begun to separate the rule from the exceptions: *Toutes convenences sont à tenir, et por ce dit on: "Convenance loi vaint" exceptées les convenences qui sont fetes par malveses causes* (All agreements are to be kept, and for this it is said: "Agreement conquers law" except agreements that are made for an improper reason). (2 Philippe de Beaumanoir, *Les coutumes du Beauvoisis* 34.2 (Comte Beugnot ed., Paris 1842).) The 16th century law for the city of Freiburg, later much copied, affirmed the same principle: *Wer bedechtlich zusagt der sol es halten* (Whoever deliberately agrees must perform). ("Nüwe Stattrrechten und Statuten der loblichen Statt Fryburg im Pryssgog gelegen," para. 8. in Lothar Seuffert, *Zur Geschichte der obligatorischen Verträge* 99 (1881.).) Grotius shared the same view, which he stated by paraphrasing Ulpian: *nihil esse tam congruum fidei humanae, quam ea quae inter eos placerunt servare* (nothing is so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another). (Hugo Grotius, *De jure belli ac pacis libri tres* 2.11.1.4 (F. Kelsey trans., 1925) (5th ed. 1646) (paraphrasing *Digest* 2.14.1.pr.,.) Grotius was so indebted to the classical jurists that he continued to conceive of the issue, as did they, in terms of identifying the circumstances that render a promise binding. The fact that Grotius did not himself formulate the *pacta* maxim suggests that a more fragile view of the social contract, such as Pufendorf's, is the true foundation of the maxim. It is possible, of course, that the maxim was originally formulated by one of Pufendorf's natural law predecessors, though it remains unlikely that anyone had quite as successfully integrated it into a system, or, to be precise, constructed a system around it.

This was Pufendorf's contribution, and yet it is unclear whether he recognized the extent of his originality. He repeatedly affirmed that the savants had always agreed that simple verbal pledges must be kept. (Pufendorf, *De jure naturae et gentium libri octo* 3.5.9.) Either he truly believed that he had borrowed the thought from the ancients, or he simply wished to camouflage his invention. In fact, here the story comes full circle. Pufendorf justified his sweeping claim that the
scholars had always accepted that promises must be kept by quoting both the passage from Ulpian that opens the De pactis chapter in the Digest and Cicero's affirmation of the importance of good faith in De officiis. (Id. (quoting Cicero, De officiis)

Page: 426

1.7.) Furthermore, Pufendorf invoked the Augustinian view that breaking a promise is equivalent to deceit. (Id. 3.4.2.) It is also of interest that the numerous exceptions that prevented Hostiensis, in his caution, from raising the maxim to a general principle posed no problem for the scientific method of Pufendorf. After stating the pacta principle as broadly as possible, Pufendorf noted some important exceptions to the rule, including a few of the very cases that Cicero had considered. He then concluded his revisionist history of the tradition by adding Machiavelli to the list of his predecessors. (Id. 4.2.8 (quoting Machiavelli, Istorie Fiorentine).)

Throughout his discussion of the maxim, Pufendorf was explicit about what he thought was at stake. On his mind was war: Quin & ex decepta tide iustissimae querelarum, bellique causae pullulare sunt idoneae (Nay more, from broken faith can arise the most just reasons for recriminations and war). (Id. 3.4.2.) In the field of international law, of course, Pufendorf was an acute observer. Many today believe that the lack of respect for international agreements is a cause of war (see Louis Le Fur, "La force obligatoire des traités," 10 Archives de Philosophie de droit et de Sociologie juridique 85 (1940)), and that a state that single-mindedly begins to prefer its own interests to its treaty commitments is often well along the path to war. (See Virginia L. Gott, "The National Socialist Theory of International Law," 32 Am. J. Int'l L. 704, 713 (1938).)

This strain of Pufendorf's thought has had an extraordinary influence on modern doctrine in international law. For one thing, the pacta maxim has been codified as the heading to article 26 of the Vienna Convention on the Law of Treaties. (1155 U.N.T.S. 331.) As one commentator has remarked, "the basic principle pacta sunt servanda [has been] designated by the Commission as "the fundamental principle of the law of treaties."" (Ian Sinclair, The Vienna Convention on the Law of Treaties 83 (2d ed. 1984).) Apparently, no international tribunal has ever repudiated the rule or questioned its validity. (Harvard Draft Convention on the Law of Treaties art. 20 comment, 29 Am. J. Int'l L. 977 (Supp. 1935).)

Other theorists have gone even further. Alfred Verdross, for example, has argued that the binding force of international agreements is logically prior to any particular agreement and therefore cannot itself be the result of an international treaty. For this reason he called the pacta maxim the Grundnorm, the basic norm of all international law. (Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft 28-33 (1926).) In this view, the norm that is at

Page: 427

the origin of all positive international law is, in a way, a moral principle, but, as Cicero taught, not in the sense that it is required by our moral intuitions. Rather it is a consequence of a conception of society that fears the fragility of the original state of peace. In this way, this basic norm of international law seems to record the memory of the destruction of Carthage.

Malitius non est indulgendum. The pacta maxim has also left its imprint an civilian codifications in the private law. Many of those codifications proclaim that contractual agreements are binding on the parties. The provision in the French Code limits the obligation to agreements properly formed: Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites (Contracts that are legally formed have the force of law for those who made them). (Code civil art. 1134 (Fr.).) However, the qualification vanishes in the later codifications: Il contratto ha forza di legge tra le parti (A contract has the force of law among the Parties) (Codice civile art. 1372 (It.)); Las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes, y deben cumplirse al tenor de los mismos (The obligations born of contracts have the force of law among the parties to the contract, and must be performed according to their terms) (Código civil art. 1091 (Sp.)).

What is intriguing to note, from across the water, is how natural the pacta conception of the binding force of agreements has become to those trained in the civil law system. The principle is now so firmly rooted in civilian learning that its codification seems to be an embarrassing and unnecessary banality: "The Provision here subject to commentary contains more of an oratorical affirmation with a pleonastic flourish than a true and effective normative statement; it is, even according to the basic principles of its editors and the proper economy of the Código civil, doctrinally gratuitous considering the traditional conception of private law . . . . Despite the sweep of the formulation, it is, therefore, a provision of little doctrinal importance and, as a consequence, of very limited practical utility . . . . (Agustín Luna Serrano, in 2 Cándido Paz-Ares Rodríguez et al., Comentario del Código civil art. 1091 (1991).)
A primary impact of codifying the pacta maxim has been to encourage a particular interpretation of the role of legal norms, namely the view that they are designed to sanction the performance of moral duty. In this conception, the keeping of promises is considered to be a moral obligation, and the law of contract is viewed as the legal means to enforce that obligation: "The legal obligation that requires performance from every party to a contract is nothing other than the moral duty to respect one's word." (1 Jacques Flour & Jean-Luc Aubert, Droit civil: les Obligations para. 69 (1975).) Several standard features of the civil codes can be traced directly to this idea, one of which may serve as an example: it is the moralizing conception of the nature of contractual remedies.

Many modern civilian codifications conceive of the purpose of contractual remedies as a sanction for the breach of a moral obligation. This conception yields two related consequences. The first is the preference for specific performance over money damages as the primary remedy for breach of contract. The contractual bond is considered to be a matter of such urgency that the aggrieved party, at least in principle, may always compel the other party to perform. In fact, this is how German law codifies the pacta idea: "On the basis of the obligation, the obligee has the right to demand performance from the obligor." (BGB § 241.) Frequently, when civilians are asked to justify their preference for specific remedies, they simply restate the pacta maxim in other words: "The obligor must perform the obligation at the time and in the manner agreed upon . . . . [If] the obligor persists in refusing to perform, the law provides the obligee with the right and the means to compel performance . . . ." (7 Marcel Planiol & Georges Ripert, Traité pratique de droit civil français § 770 (2d ed. 1954).)

A second related element of this conception of contractual remedies has to do with money damages. Because the pacta idea converts the legal remedy into a sanction for the breach of a moral obligation, the degree of fault involved in the breach becomes a matter of importance. Thus, in the French Code, the party who breaches inadvertently is liable only for foreseeable damages, while the party who breaches intentionally or fraudulently is responsible for all damages proximately caused. (Code civil arts. 1150-51.) When called upon to justify this result, one French authority cited one of the rare gerundives that I have been able to locate in a civilian treatise: Malitia non est indulgendum (Malice must not be indulged). (2 Marcel Planiol, Traité élémentaire de droit civil § 234 (11th ed. 1932) (quoting, with slight modification, Digest 6.1.38).) The same principles apply as well in Italian and Spanish law. (See Codice civile arts. 1223, 1225 (It.); Código civil art. 1107 (Sp.).)

The pacta idea and its effects may seem so natural to civilian readers that it may come as a surprise that other visions of contractual obligation are possible. The central issue is the proper relationship between morality, the one hand, and the law of contract on the other. The canonists recognized a moral element in the breach of a legal obligation when they classified a breached promise as a lie. Pufendorf raised the stakes considerably. For him, promises were morally binding less as a matter of everyday morality than as a result of social necessity. It is not our conventional moral intuition but rather the threat of social disintegration that is implicit in the pacta maxim. What the pacta maxim does is transform into a legal imperative what appears to be the only bulwark against the onslaught of war and devastation, namely an existentially hypercharged moral obligation to keep one's word.

Here the pacta maxim operates an almost imperceptible sleight of hand. It charges all contractual obligations with moral value, even those that may not have such value in conventional morality. In some cultures, the absolute commitment to perform a promise is encountered only when the promise is made to God-Jephthah's tragic promise may serve as an example. (Judges 11:30-40.) Pufendorf arrived at his position partially because his project involved binding the ruler to the rulership contract otherwise than through divine mandate. To provide more force to his result, Pufendorf argued that all contractual relations are governed by the same rules, whether private law agreements, treaties among states, or the social contract.

By contrast, some theories of contract have attempted to delimit separate realms for law and morality. American law has been shaped by one of the most powerful of these theories, namely the one advanced by Holmes. The American law of contract, for example, starts from the proposition that it is the role of the law - and not of morality - to decide which promises should be legally enforceable. There is no general rule in the common law, either in the form of the pacta maxim or in any other form, that all promises or all agreements are binding. In the American vision, a contract is simply a promise that the law, for whatever reason, has decided to enforce: "A contract is a promise or a set of promises for the breach of
which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” (Restatement (Second) of Contracts § 1 (1981).) As a result, the imposition of a contractual duty does not predetermine the question of moral obligation: “The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves [the promisor] free . . . to break [the] contract if [it] chooses.” (Oliver Wendell Holmes, The Common Law 236 (M. Howe ed., 1963) (1881).) Furthermore, the extent of damages does not depend on the moral culpability of the breach: “Willful breaches have not been distinguished from other breaches . . . .” (Restatement (Second) of Contracts, introductory note to ch. 16 (Remedies), at 100.) In other words, a breach of contract, in American law, is not a tort. (Clark Fitzpatrick, Inc. v. Long Island R.R. Co., 521 N.Y.S.2d 653, 656-57 (N.Y. 1987).)

This may be the fundamental difference between the civilian and the common law visions of contract: “The contrast between the two approaches can be put in two statements: pacta sunt servanda for French law, which accordingly insists an exact performance of a contractual undertaking; and for the common law, Holmes’[s] celebrated statement . . . .” (“Conclusions,” in Contract Law Today: Anglo-French Comparisons 379, 386 (D. Harris & D. Tallon eds., 1989).)

But the question remains: Why did the pacta maxim arise and triumph in the civil law while remaining foreign to the common law tradition? One explanation is self-evident: pacta sunt servanda is formulated in Latin. American law rarely has recourse to Latin maxims, especially at the level of general principle. The success of the maxim may be due to the peculiarly intimate relationship between continental European culture and the Latin language. If this is the case, then there are, in this context, yet further grounds for reflection. Latin was a living language during much of European history but has since passed away. Outside of relatively restricted circles within the Church, Latin is no longer either spoken or written. This is an extraordinary fact, and one that calls for much more commentary than it usually receives. One might wonder, for example, whether any language ever expires before all the potential it contains has been developed. What might be the potential of the Latin language?

The history of Rome may provide some indication. Rome was not Athens. It was not about philosophy and literature and art. The Roman achievement can be summed up, with very little omission, in terms of two ideas. The first is conquest: “The Romans, considering themselves to be destined for war and believing war to be the only art, devoted their entire spirit and all of their thoughts to perfecting it.” (Montesquieu, Considérations sur les causes de la grandeur des romains et de leur décadence ch. 2, at 15 (Amsterdam 1734).) The other is the law: “The Romans lacked the versatility, manysidedness and imaginative power of the Greeks; their eminent qualities are sober and acute thought, and firmness and perseverance of will. Their intellect was directed to the practical, and sometimes degenerated into egoism and cunning, just as their perseverance often turned into obstinancy and pedantry. In the domain of state and law these qualities accomplished great and enduring results, while they were decidedly unfavorable to art and literature.” (1 Wilhelm Teuffel, History of Roman Literature 1 (C. Schwabe ed., 5th ed. 1967).) The intimate relationship between delenda and pacta suggests that conquest and law may also have been the two essential poles of the Latin language.

Though spoken in Rome and on the Latium plain since at least the 7th century B.C., Latin is not thought to have become a literary language until 240 B.C., the year in which Livius Andronicus first produced a Latin play on the Greek model to amuse the soldiers returning from the victory over Carthage at the end of the First Punic War. Some years later, Gnaeus Naevius composed his Bellum Punicum, the first Roman epic poem, and one whose influence reached to Virgil.

The first Roman to become a distinguished writer of prose was Marcus Cato. Cato was a Roman's Roman, and his writings were the first great prose monument of the Latin language. Curiously, almost nothing is left of them. For example, Cicero knew over 150 of Cato's orations, but today only fragments survive. Similarly, only a few passages remain from Cato's Origines, the first history of Rome to be written in Latin. His treatise an agriculture, which still exists, was probably revised, or at least largely rearranged, by a later hand.

What survives most prominently of Cato's words is the phrase calling for the destruction of Carthage. No one who has read Plutarch's biography can doubt that the phrase was Cato's and that he did, in fact, repeat it incessantly. Cato was well known for the almost inaccessible brevitas of his speeches (Cicero, Brutus 66), and, as Plutarch suggested, he seems to have cultivated this reputation. (See Plutarch, Marcus Cato 12,.5.) Plutarch's biography culminates with the
story of Cato and the fig, and every part of the tale is devoted to explaining how Cato, singlehandedly, could have brought about the destruction of Carthage. Even for the *delenda* phrase, however, there is curiously little authority in Latin. There is no trace of it in Cato's contemporaries nor, more surprisingly, in Cicero. The summaries left of Livy merely allude to the locution but do not quote it. (Livy, *Ab urbe condita* bk. 49.) It was not until the Silver Age, generations after Cato's death, that Latin writers

finally understood the profoundly Roman truth of the phrase and recorded it in its lapidary beauty. (Charles E. Little, "The Authenticity and Form of Cato's Saying 'Carthago Delenda Est,'" 29 *Classical J.* 429, 434-35 (1934).) Pliny included the phrase and the anecdote at the point in his natural history at which he discussed figs. The phrase is also found in the *Epitome* of Florus (1.31.4), written two, or perhaps even three, centuries after the fact, as well as in the 4th century biography of Cato earlier attributed to Aurelius Victor. (Aurelius Victor, *De viris illustribus* 47.8.) In Germany the phrase continued to evolve, finally being fixed in a slightly different form in the middle of the 19th century. (Silvia Thürlemann-Rapperswil, "'Ceterum censeo Carthaginem esse delendam,'" 81 *Gymnasium* 465, 474-75 (1974).)

In truth, *where delenda* has survived is in the minds of everyone who has ever learned Latin, as the perfect emblem of a culture dedicated at all costs to the preservation of its state, as well as of the hideous consequences that such a single-minded vision oft entails. *Delenda* seems to provoke the question that the Latin language sought during the course of two millennia to answer, namely what restraints are needed to hold in check such an exclusive focus on one's own interest. In other words, a phrase with the power of this one clearly required a counterpart. The creation of that counterpart occupied the long history of Roman law. The Roman legal discussion continually returned to questions of tying down, restraining, and binding (*ob-ligare*), whether it was by contract, marriage, or treaty. Tribonian codified the preliminary results, but the work was complete only after the systematization of the classical texts in Bologna, the moralizing influence of the canonists, and the absolutist conceptions of the natural law theorists. What all of that effort produced was the maxim *pacta sunt servanda*.

Shortly after Pufendorf, Latin succumbed to the vernacular and expired as a vehicle for legal culture. Two of the most memorable products of that language were these two phrases, connected by grammatical construction, by history, and by a gorgeously active symmetry of gender, number, word order, and inflection. *Delenda* is the call-the verb preceding the noun in the whisper of a question, the uneasy equation of the "-a" and the "-o*. *Pacta* is the response-the dissonance resolved in the neuter plural, the noun restored to its place. After all, as the *Digest* tells us, *pactum* has the same root as *pax*. (Digest 2.14.1.) At this point, I stare out the window and speculate: Is it possible that the mission of the Latin language was simply to produce these two phrases? Might the

*Corpus iuris*, the canon law, and the school of Latin natural lawyers have served only as the means by which the Latin language explored its potential? Does the sudden decline of Latin after Pufendorf suggest that the force of the language was spent? To these questions, of course, there are no answers. In fact, it may not make sense to ask such questions at all.

Whatever it means in the end, the civilians are imbued with this Latin learning. Even today, they understand the civil law as the synthesis and development of the Roman, canon, and natural law traditions. Until the close of the 17th century, Latin was of course a living language in England as well. Yet even before Milton's century ended, Latin was being left behind there. With the years, Latin has all but disappeared from Anglo-American legal thought. Virtually never in the course of an American legal education does a professor suggest that Justinian, the canonists, or Latin natural law might be of any assistance in understanding the American legal system. Civil lawyers continue to lead a life of Latinity. We in the common law do not.

In the end, what separates us, when we converse about the law, is only a language. But what a

*Associate Professor, Rutgers (Camden) Law School. I owe a deep debt of gratitude to Susan Bender and Ted McAdams, without whose enthusiasm and hospitality this essay could not have been written. I would also like to thank the editors of this journal for permitting me to publish in a somewhat unconventional format. Thanks as well are due to Jim Morgan for his superb research assistance. This paper was originally presented at the III Seminario de Historia del Derecho Privado, held in Sitges, Spain, in May 1992. I am especially grateful to Carlos Petit and Antonio Serrano for their kind invitation, as well as to the participants in the Seminario for their suggestions and encouragement. Translations of the classical authors are drawn from the Loeb Classical Library, published by the Harvard University Press, though, as with all the translations, I have taken the liberty of altering them where appropriate. The English version of the Digest of*
Justinian, cited in this Article as “Digest,” is from the four-volume translation edited by Alan Watson. Unless otherwise noted, I am responsible for the remaining translations. To the questions I posed about how best to translate some of the Latin quotations, Hans Baade, Father John Lynch, Aldon Smith, and Alan Watson responded with extraordinary generosity and insight. However, since I did not ask all the necessary questions, the inevitable errors are my own.

Referring Principles:

I.1.1 - Good faith and fair dealing in international trade