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The Genius of Roman Law From a Law and Economics Perspective

JUAN JAVIER DEL GRANADO*

TABLE OF CONTENTS

I.	WHAT MAKES ROMAN LAW SO ADMIRABLE?.....	303
II.	ASYMMETRIC INFORMATION AND <i>NUMERUS CLAUSUS</i> IN ROMAN PRIVATE LAW	307
A.	<i>Roman Law of Property</i>	307
1.	<i>Clearly Defined Private Domains</i>	307
2.	<i>Clearly Publicized Ownership</i>	312
3.	<i>Private Management of Resources</i>	314
4.	<i>Institutional Mechanisms of Maintaining Typical Property Through Time</i>	317
B.	<i>Roman Law of Obligations</i>	321
1.	<i>Private Choices to Cooperate</i>	321
2.	<i>Private Choices to Cooperate Without Stipulating All Eventualities</i>	326
3.	<i>Private Cooperation Within Extra-contractual Relationships</i>	329
4.	<i>Private Cooperation Between Strangers</i>	332

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	C. Roman Law of Commerce and Finance	334
III.	SOCIAL NORMS COMPLETE PRIVATE ORDERING IN ROMAN PRIVATE LAW	342
IV.	PRIVATE SELF-HELP IN ROMAN LAW PROCEDURE.....	344
V.	ROMAN LEGAL SCHOLARSHIP IN THE RESTATEMENT OF CIVIL LAW ALONG THE LINES OF LAW AND ECONOMICS	346

Today, Latin American and Caribbean legal systems rely heavily on public law. Reliance on public law mechanisms is blind to the realities of information and incentive constraints. With government intervention in the economy, uninformed government officials make decisions from a centralized vantage point, and public actors take action without incentives.¹ Centralized legal systems do not mesh well with global economic pressures.² Decision-making and actions become decentralized in the private sector.³ Yet, the private sector cannot exist in a legal vacuum. Private law enables the private sector to be the main driver of the economy. Private law as a system of incentives and a means of communication allows people with information to make decisions and people with incentives to take action in the economy.⁴ Economics needs to be partnered with law and economics in Latin America and the Caribbean.

Arguing for a return to Roman law may prove to be the best way to introduce law and economics into the civil law tradition and to re-privatize the region's ailing legal system.⁵ As I suggest below, Latin American law throughout the twentieth century has come to rely overly on public law. As a paradigmatic private-law system, Roman law is amenable to a state-of-the-art fusion with law and economics. Civil law scholars look at codified private law as a systematic whole. However, during much of the twentieth century, modern legal systems have undergone a process of "decodification."⁶ The systematic nature of the legal system—a characteristic of civil law systems—has been lost.⁷ A re-codification of private law in the Latin America-Caribbean region along the lines of law

1. See Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2 J.L. ECON. & ORG. 181, 181–84 (1986).

2. See generally Thomas Marschak, *On the Comparison of Centralized and Decentralized Economies*, 59 AM. ECON. REV. 525 (1969).

3. See JUAN JAVIER DEL GRANADO, OECONOMIA IURIS 349 (2010).

4. *Id.*

5. See generally Juan Javier del Granado & M.C. Mirow, *The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes*, 83 CHI.-KENT L. REV. 293 (2008).

6. See generally NATALINO IRTI, LA EDAD DE LA DESCODIFICACION (Bosch ed., Luis Rojo Ajuria trans., 1992) (1979).

7. *Id.*

and economics and Roman law is an opportunity to bring new economic coherence to these legal systems. Codification projects are more than an academic enterprise, they directly cut across the interface between law and life.

The Article is organized as follows: The first part of this Article will introduce Roman private law, and sketch out the law and economics methodology to be applied to the Roman classical system. The second part of this Article will discuss the Roman private law of property, obligations, as well as commerce and finance. The third part will discuss the interaction of private law and private morality in the construction of Roman social order. The fourth part of this Article will discuss private procedural aspects of the Roman legal system. The fifth and final part of this Article will discuss how law and economics can help civil law scholars in Latin America reorganize their legal systems in restating private law for the twenty-first century.

I. WHAT MAKES ROMAN LAW SO ADMIRABLE?

Law and economics helps us understand why Roman law is still worthy of admiration and emulation, and illustrates what constitutes the “genius” of Roman law.⁸ This Article argues that one reason for the success of Rome was its highly efficient legal system and reliance on private law.⁹

Nothing can hide the manner in which Rome’s success resonates throughout the whole of human history. Rome is the world’s most successful civilization, bar none.¹⁰ Rome’s legacy remains ever present:

8. Between 1852 and 1865, Rudolf von Ihering published his influential work *DER GEIST DES RÖMISCHEN RECHTS*. In 1912, Frederick Pollack published his Carpentier lectures delivered at Columbia Law School as *THE GENIUS OF THE COMMON LAW*. Less than a century and a half after Ihering and almost a century after Pollack, we are able to achieve a much better grasp of the spirit of private law through the economic approach, which I explain in Section I.

9. Hans Julius Wolff explains that the “spirit or structure of the system as a whole” developed “primarily as private law.” See *ROMAN LAW: AN HISTORICAL INTRODUCTION* 49, 52–53 (1951). For the argument in law and economics literature that the real underlying cause of the efficiency of Roman law is its private-law character, see Juan Javier del Granado et al., *The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes*, 83 *CHI.-KENT L. REV.* 293, 304 (2008).

10. On the expression of Rome as the “eternal city,” see Kenneth J. Pratt, *Rome as Eternal*, 26 *J. HIST. IDEAS* 25 (1965). In contrast, the vast Han Chinese empire was based on the application of public-law principles and the Confucian vision of hierarchical

We still use the Roman alphabet and the Roman calendar, Roman architecture and engineering are still part and parcel of modern life. Yet, Rome's greatness is due as much to Roman law as it is to Roman aqueducts and Roman roads.

Roman private law is admirable because it functioned as an incentive-compatible communication mechanism, which allowed people to decentralize the management of resources.¹¹ Roman private law made possible a heterarchical social order and a decentralized marketplace without mediation by public law. Heterarchy exemplifies an altogether different form of social organization. Most social order in human life is based on various forms of hierarchy. People in a hierarchical social group do their duty according to their place in a "chain of being."¹² "Heterarchy" means "other order." In a heterarchy, social rank plays less of a part. Roman private law is fundamental to the realization of the basic human aspiration to a social order where hierarchical distinctions of class or caste become secondary.

Civil law scholars have long focused on the key distinction between private and public law. Civil law lawyers, compared to common law lawyers, are more aware that private law is something radically different from public law. My analysis of the Roman system from a law and economics perspective illustrates how private law is fundamentally different from public law. Through the economic approach I hope to throw a new light on the private legal order.

I argue that the admirable character of Roman law is its quality as a paradigmatic private law system, which makes a heterarchical society possible.¹³ Understanding how a system of private law works is relevant for economic liberalization.¹⁴ Private law must play a larger role as policymakers reduce government regulations and restrictions in a marketplace economy, where private-sector actors and decision-makers are front and center. My discussion of Roman law illustrates how private law aligns incentives for people to exert efforts and share information.

power structures. See LASZLO LADANY, *LAW AND LEGALITY IN CHINA, THE TESTAMENT OF A CHINA-WATCHER* 33 (1992).

11. For a robust development of this thesis, see GRANADO, *OECONOMIA IURIS*, *supra* note 3.

12. For a discussion of the Greek idea that inequality is the natural order of things, see the classic study by ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING; A STUDY OF THE HISTORY OF AN IDEA* (1936).

13. For a magisterial treatment in English, see REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1990) [hereinafter ZIMMERMANN, *THE LAW OF OBLIGATIONS*]. As a primer, David Johnston's *ROMAN LAW IN CONTEXT* (1999) is unsurpassed.

14. Unfortunately, the literature on economic liberalization focuses on public-law variables. See, e.g., Glen Biglaiser & David S. Brown, *The Determinants of Economic Liberalization in Latin America*, 58 *POL. RES. Q.* 671 (2005).

Roman private law also enables people who face resource, incentive, and information constraints to act in their own interest and, when efficient, to take precautions on behalf of others. Without the law of obligations as provided in Roman private law, people cannot reasonably be expected to act in the interest of others. Moreover, without the law of property as provided in Roman private law, people will expend little effort, even in furtherance of their own interest.¹⁵

In nations where the legal system betrays an overreliance on public law, such as Latin American countries, government officials lack the incentives to take action and the information to make decisions.¹⁶ At the risk of sounding redundant, in the Roman economy, Roman private law provided information to those who made decisions or delegated decision-making to those who possessed the information. Roman private law also provided incentives to those who took action or delegated action-taking to those who possessed the incentives.

For purposes of this Article, “Roman law” means the legal system of the Roman classical period, from about 300 B.C. to about 300 A.D.¹⁷ I will not attempt the job of being or trying to be a legal historian in this Article. In the manner of German pandect science, let us stipulate that I may choose certain parts of classical Roman law as being especially noteworthy to the design of an ideal private law system. This Article discusses legal scholarship from the *ius commune* or common law of Europe during the high Middle Ages. This Article will also discuss a

15. Communist dictatorships, which abolished private property in the twentieth century, decreed a legislative and constitutional duty to work. See David Ziskind, *Fingerprints on Labor Law: Capitalist and Communist*, 4 COMP. LAB. L. 99 (1981). For example, the Bolshevik revolutionaries turned the old catchphrase that “those who do not work should not eat,” originally meant for capitalists who lived off the labor of others, against Soviet workers. Leon Trotsky went so far as to suggest that the labor force be organized along the line of military-style hierarchies. See JAMES BUNYAN, *THE ORIGIN OF FORCED LABOR IN THE SOVIET STATE, 1917–1921* (1967).

16. For a discussion of the region’s failed law as the underlying narrative of law and development literature, see Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008).

17. My advice is to limit your reading in English on this inordinately complex subject to the scholarship of Alan Watson and the writing of Fritz Schulz. Schulz’s *CLASSICAL ROMAN LAW* (1951) is a readable and reliable guide which lays out the basic system. The series of monographs by ALAN WATSON, *CONTRACT OF MANDATE IN ROMAN LAW* (1961), *THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC* (1965), *THE LAW OF PERSONS IN THE LATER ROMAN REPUBLIC* (1967), *THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC* (1968), and *THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC* (1971), covers the material. Any student of Roman law may also always profit from reading an English translation of Justinian’s Institutes.

few Greek philosophical ideas which I believe are important in the Roman legal system.¹⁸

This Article revisits Roman private law from a law and economics perspective. However, I would be remiss to assume familiarity with the economic approach, on the part of scholars or students of Roman law. At least since the early 1960s in the United States, legal scholars have employed the methodology of mainstream economics, which includes cost-benefit analysis, statistics, price theory, the modern assumption of ordinal utility and revealed preference, and blackboard game theory.¹⁹ The new interdisciplinary field is variously known as the economic analysis of law or simply law and economics. Moreover, in the last twenty-five years, the field has undergone a paradigm shift.²⁰ With the Coase Theorem,²¹ transaction cost economics drew a dividing line in the sand between legal institutions, where transaction costs are high, and the marketplace, where transaction costs are low. Now, mechanism design theory posits the Myerson-Satterthwaite theorem,²² which brings to light the inextricable link between markets and legal institutions, and pays close attention to how institutional design affects the information and incentive costs that economic actors and decision-makers face.²³

Finally, the “ideal” system based on Roman law will be compared to modern French and German civil law. Contemporary German law is an extreme example of a system that distinguishes between public and private law. German civil law recognizes the private *Rechtsordnung* (legal order)²⁴ as a subsidiary source of legal authority,²⁵ yet German civil law scholars are unable to say precisely what this private legal order entails.²⁶ Law and economics scholarship, refashioned in civil law

18. Do note that the Greek ideas that I consider to have an important role in Roman law are quite different from those which philosopher John R. Kroger discusses. See *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004 WIS. L. REV. 905 (2004).

19. See Eric Talley’s encyclopedia entry, *Theory of Law and Economics*, in THE OXFORD COMPANION TO AMERICAN LAW 485 (2002).

20. See Robert Cooter, *The Cost of Coase*, 11 J. LEG. STUD. 1 (1982).

21. For an exposition of what came to be called the Coase Theorem, see Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

22. See R. Myerson & M. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265 (1983).

23. See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995).

24. See VOLKMAR GESSNER ET AL., EUROPEAN LEGAL CULTURES 65 (1996).

25. See ROGER BERKOWITZ, THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION (2005). German civil law recognizes the private *Rechtsordnung* or private legal order, as a source of legal authority that is subsidiary to public law.

26. On the developing relationship between private and public law in Germany, see Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006).

clothing, clarifies this vital concept in German law. The contrast made with such modern law will highlight the thorough-going and all-pervading private character of classical Roman law.

I hope this Article contributes to an intriguing new field of research—the economic analysis of Roman law.²⁷ The Roman legal system, which has been a source of inspiration to legal scholars over the centuries, may still be relevant to modern law and economics in the twenty-first century.²⁸

II. ASYMMETRIC INFORMATION AND *NUMERUS CLAUSUS* IN ROMAN PRIVATE LAW

In this next part of the Article, I will discuss how Roman private law makes reliance upon private effort, private cooperation, and private commercial and financial intermediation possible and credible.

A. Roman Law of Property

1. Clearly Defined Private Domains

Law and economics literature emphasizes the importance of clearly defined property rights,²⁹ yet the literature fails to discuss how the law of property defines these rights.³⁰ How property rights are defined is of central importance to the functioning of the economic system since the definition of rights makes public the private information that people have.³¹

27. The paper out of which this Article grew was a centerpiece of the 2009 Rome meeting of the European Association of Law and Economics, which focused on ancient law.

28. Note that Jorge L. Esquirol assigns continuing importance to Roman law in the curriculum of Latin American law schools, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 71 (2003).

29. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) (discussing law and economics literature on property law).

30. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). Thráinn Eggertsson summarizes much of the literature that Demsetz spawned in *ECONOMIC BEHAVIOR AND INSTITUTIONS* (1990). For more recent discussions, see the June 2002 symposium issue of the *JOURNAL OF LEGAL STUDIES* on the *Evolution of Property Rights*, 31 J. LEGAL STUD. S331–S672 (2002).

31. People observe the external world and interpret the facts of their external life. Because people privately observe their power over the external world of the things they possess in fact, these observations are private information and information asymmetries develop between what they know in private and what is publically known. Property

Roman law defines property using the principle of *numerus clausus*, which refers to the conception of property in a “closed number” of standardized forms.³² Roman civil law recognizes property *ex iure Quiritum* (according to the principles of civil law) and Roman Praetorian law recognizes property *in bonis habere* (among his goods). Ancient Roman law developed separately for citizens and for foreigners. Quiritary legal forms³³ applied to Roman citizens, while bonitary forms³⁴ applied to foreigners. However, these typical forms of property were unified for all practical purposes in 212 A.D. with the promulgation of the *Constitutio Antoniniana*. This imperial edict extended Roman citizenship to all the inhabitants of the empire, thus ending the segregated property law system and unifying the two forms into one. By the end of the classical period, the terms *mancipium* (taken by the hand),³⁵ *dominium* (ownership)³⁶ and *proprietas* (property³⁷) were used interchangeably to denote Roman typical property. Whatever the form, Roman property was conceived of in terms of a typical bundle of rights, which scholars have inferred from the Roman texts to have included the rights of the holder to use, enjoy and dispose of everything that lies within a domain.³⁸ Property holders enjoyed these rights exclusively, that is, they were able to exclude others from the use, enjoyment, and disposition of resources which fell within privately-held domains.³⁹

While Roman property consisted of a bundle of rights,⁴⁰ Roman lawyers also formulated unbundled property rights in a “closed number” of standardized forms. These *iura in re aliena* (rights over another’s property)⁴¹ were limited to *servitutes praediorum* (servitudes attached to

rights that make this private information public and remove the information asymmetries. See NARAYAN DIXIT, *ACADEMIC DICTIONARY OF ECONOMICS* 12 (2007) (defining asymmetric information).

32. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000) (explaining the *numerus clausus* principle).

33. Quiritary ownership was the standardized form of property that a Roman citizen acquired under the principles of civil law. See ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 442 (1953).

34. Bonitary ownership was the standardized form of property that the magistrates introduced, and which could be held by a non-Roman citizen. See BERGER, *supra* note 33, at 495.

35. BERGER, *supra* note 33, at 574.

36. *Id.* at 441.

37. *Id.* at 658.

38. See GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 153 (2003).

39. DIG. OF JUSTINIAN 47.10.13 (Ulpianus, Ad Edictum, 7).

40. Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 *VT. L. REV.* 247 (2007) (discussing property as a bundle of rights).

41. BERGER, *supra* note 33, at 530. These standardized forms of unbundled property rights entitled someone, other than the owner, to make a certain use of another’s property.

immovable property),⁴² *usus fructus* (right to use another's property and take fruits therefrom)⁴³ and *usus et habitatio* (right to use another's property without a right to the fruits, or right of dwelling in another's house).⁴⁴ I discuss typical security interests in another's property, also considered *iura in re aliena*, such as *fiducia cum creditore contracta* (trust concluded with a creditor), *datio pignoris* (giving a pledge) and *pignus conuentum* (an agreed upon pledge) in Section II.C.⁴⁵

In *seruitutes praediorum*, the rights of exclusion are partly unbundled from the property to which they refer. These rights are instead tied to the property of a neighbor who is entitled to exclude the property holder from interfering with his passage or conveyance of water through the property.⁴⁶ This interpretation echoes the modern insights of the law and economics movement into the exclusive nature of private property,⁴⁷ and it is consistent with the Roman conception that such a right-of-way gives no one any positive right to carry out an act.⁴⁸ Though common lawyers speak of positive appurtenant easements, Roman lawyers considered that any positive right to perform an act had to be clearly established as a personal right⁴⁹ under the law of obligations.⁵⁰ Accordingly, because they are not positive rights, *seruitutes praediorum* are not personal assets held by the usufructuary,⁵¹ but instead run with the dominant property to which these rights are tied. Moreover, Roman lawyers recognized that *seruitutes praediorum* might exist only to the extent that they prove useful to the dominant property.⁵²

Because unbundled property rights are a burden on bundled property rights, Roman lawyers were careful to limit the scope and duration of

42. BERGER, *supra* note 33, at 702.

43. *Id.* at 755.

44. *Id.* at 755, 484.

45. See FRITZ SCHULZ, CLASSICAL ROMAN LAW 401–27.

46. See ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 176–202.

47. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

48. J. INST. 8.1.15.

49. Such a conviction reflects the importance that Roman lawyers attached to the distinction between between *actiones in rem* (real actions) and *actiones in personam* (personal actions). See WILLIAM WARWICK BUCKLAND, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 89–90 (1952).

50. The civil law concept of obligations includes common-law areas such as contract and tort, and closely related matters. See *id.* at 193–96.

51. DIG. OF JUSTINIAN 33.2.1 (Paulus, Ad Sabinum 3).

52. See JOHNSTON, *supra* note 13, at 69–70.

iura in re aliena.⁵³ In *usus fructus* the rights of use and of enjoyment of fruits are partly unbundled from one's property, and given to another.⁵⁴ A limited case is *usus et habitatio*, in which one is given unbundled rights of use only—not rights to enjoy the fruits—of another's property.⁵⁵ However, Roman lawyers did not recognize one's right to enjoy the fruits of a domain if he was not entitled to use that domain, "*fructus quidem sine usu esse non potest*" ("the fruits certainly cannot exist without the use.")⁵⁶ After the right of use—and sometimes the use and enjoyment of fruits—were unbundled, the remaining property became almost, though not quite, an empty shell, *nuda proprietas* (mere property),⁵⁷ to which the property holder retained the rights of disposition.⁵⁸ The owner remained entitled to alienate or encumber his property as long as he did not affect the usufructuary. He also retained the right to monitor the use of his property by the usufructuary and could enjoy whatever fruits the usufructuary did not collect.⁵⁹ As Roman lawyers were careful to limit the scope and duration of *iura in re aliena*, Roman law limited the life of an *usus fructus* to the life of the usufructuary as well as to non-fungible things, and prevented the usufructuary from altering the economic character of the property.⁶⁰

The typical forms of property with unbundled rights discussed above are all inclusive. As I pointed out, Roman private law only allowed for a "closed number" of standardized forms of property bundles and of rights that could be unbundled.⁶¹ The principle of *numerus clausus* allowed everyone in society easily to understand what rights the legal system gave to a property holder. All property is legally alike. Accordingly, people rationally expect that their experience with the property rights for one piece of property will be the same for any other. The content of property rights is also typically the same for any and all property.

The principle of *numerus clausus* applies in contexts other than Roman property law, and an example may help clarify the concept: A dictionary discloses a "closed number" of standardized words. If

53. See RUDOLF SOHM, THE INSTITUTES OF ROMAN LAW 258 (James Crawford Ledlie, trans., 1892).

54. See ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 203–19.

55. *Id.* at 219–21.

56. DIG. OF JUSTINIAN 7.8.14 (Ulpianus, Ad Sabinum 17).

57. BERGER, *supra* note 33, at 601.

58. G A I INSTITUTIONES [INST.'S OF ROMAN LAW BY GAIUS] 2.31, 2.91 (F. de Zulueta ed., 1927).

59. See MAX KASER, ROMAN PRIVATE LAW 122 (Rolf Dannenbring trans., 1965).

60. See SCHULZ, *supra* note 45, at 388.

61. For a more in-depth discussion of the standardized forms of Roman bundled property rights and unbundled rights in the property of another, see DEL GRANADO, *supra* note 3, at 278–338.

standard English, Latin, or any language had an open system, or *numerus apertus* of nonstandard words, a speaker would be able to invent or create the words he used. As a result, others might be unable to understand him. In this way, Lewis Carroll's use of nonstandard words makes the meaning of his poem *Jabberwocky* difficult to understand.⁶² Roman private law, as a means of communication, is "jabberwocky-free."

Unlike the common law, Roman law avoids the piecemeal approach that would create distinct property regimes for, say, *res mobiles* (movable things)⁶³ and *res immobile* (immovable things).⁶⁴ While Roman law recognizes the differences between these two types of property, under the principle of *numerus clausus*, both types of property confer the same rights. Note that the distinction between movables and immovables acquires some importance after the promulgation of the *Constitutio Antoniniana* in 212 A.D.⁶⁵

In keeping with a clear, standardized system of property, each quiritary domain had boundaries that were clearly defined by the civil law.⁶⁶ The German scholar von Ihering offers a folk etymology for "quirités," explaining that the Sabine warriors used to carry lances to stake out property in a way that was highly visible to everyone.⁶⁷ Romans surveyors were masters at squaring off real property with *terminationes* as visible markers. The glossator Accursius formulated another boundary principle. In his gloss on a Roman text, Accursius states that the space above a property surface must be left unhindered. Further, the limits of property extend from the surface in a column down to the center of the earth and up to the heavens, "*cuius est solum eius est usque ad coelum et ad inferos*," ("whoever owns the ground it is theirs up to the sky and down to the depths").⁶⁸ His simple and straightforward explanation projected a clear mental image, which later legists were able to easily grasp.

62. See THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 94 (Random House 1946) (1871).

63. BERGER, *supra* note 33, at 679.

64. *Id.* at 679.

65. For a discussion of the consequences of the *Constitutio Antoniniana*, see ADRIAN NICHOLAS SHERWIN-WHITE, THE ROMAN CITIZENSHIP 215–27 (1973).

66. For a discussion of quiritary and bonitary ownership, see CHARLES PHINEAS SHERMAN, 2 ROMAN LAW IN THE MODERN WORLD 150 (1917).

67. I GEIST DES RÖMISCHEN RECHTS, AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG ch. 1 (1968).

68. ACCURSII GLOSSA IN DIGESTUM VETUS (1969) (concerning DIG. OF JUSTINIAN 18.2.1 (Paulus, Ad Sabinum 5)).

Just as land had clearly delineated bounds, Roman lawyers recognized that many movable things also had well-defined boundaries that were recognized by law.⁶⁹ Corporeal things have bodies that we can see, touch, and hold, “*quae tangi possunt*.”⁷⁰ Roman lawyers understood that many movable things are contained in themselves, “*quod continetur uno spiritu*” or composed of several things attached to one another, “*pluribus inter se coherentibus constat*,”⁷¹ and in some cases are indivisible, “*quae sine interitu diuidi non possunt*.”⁷² Examples of this last class include animals that would die or jewels that would lose their value if they were partitioned.⁷³

Through the use of a closed number of standardized forms and clearly defined boundaries, Roman private law reduces asymmetries of information between property holders and everyone else. The private legal system minimized the amount of information that people needed to search in order to recognize the property of others, and to understand their own property rights by publicizing the boundaries of private domains and what property owners may do with the resources that lie within private domains. But this is not the sole end of a good property law system. The legal system must also solve the problem of clearly defining which property belongs to what property holder. As I show in the next subsection, Roman law has a unique way of defining and making public what property belongs to which property holder.

2. Clearly Publicized Ownership

The Roman system used ceremonies, rather than a modern registration system, to publicize who held what private property.⁷⁴ Today, most legal systems in the world use a registration system for valuable property, but this is too costly to require for every type of property.⁷⁵ In Rome’s thriving agricultural economy, valuable types of property such as land, beasts of draught and burden, *seruitutes praediorum* for conveying water for irrigation purposes, and slaves, were valuable and needed a means to

69. For a brief discussion of Roman ownership see WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 421 (2d ed. 1848).

70. G. INST. 2.13, 2.14.

71. DIG. OF JUSTINIAN 41.3.30 (Pomponius, Ad Sabinum 30).

72. DIG. OF JUSTINIAN 6.1.35.3 (Paulus, Ad edictum 21).

73. See WILLIAM LIVESSEY BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 315 (1938).

74. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993) (discussing land ownership).

75. See Joseph Janczyk, *An Economic Analysis of the Land Titling Systems for Transferring Real Property*, 6 J. LEGAL STUD. 213 (1977).

ensure their ownership was publicly known.⁷⁶ To perform the functions now embedded in registration systems, Roman lawyers developed a solemn and elaborate ceremony involving bronze and scales to commemorate the conveyance of private property.⁷⁷ Ceremonies embed new information in the collective memory of a social group. People visibly took part in symbolic acts and wore various forms of outrageous clothing that naturally attracted the attention of onlookers. Thus, the memorable ceremony of *mancipatio* (take with the hand) created publicly available information about the change in the property's ownership.⁷⁸ Alternatively, Roman law allowed substitution of a public declaration (after a fictitious trial) with a confirmation before the *praetor*, *in iure cessio* (transfer before the magistrate).⁷⁹ Sometimes for certain types of property, Roman law relied on the collective memory of local communities to publicize the identity of the property holder. For non-valuable property, Roman law also presumed ownership from possession like modern legal systems.⁸⁰

Roman private law protects both property owners and possessors, though in different ways, as von Ihering explains.⁸¹ A property owner has a right to claim legal protection, whereas a possessor does not under Roman law. Common law lawyers may fail to appreciate civil law debates about the legal protection of possession because the common law, unlike Roman law, clearly recognizes rights incident to possession.⁸² In Roman law, *rei vindicatio* (vindication of the thing)⁸³ and *actiones ad exhibendum et negativa* (actions to exhibit or deny)⁸⁴ protect property right holders while *interdicta retinendae et recuperandae possessionis*

76. EPITOME ULPIANI 19.1 (F. Schulz ed., 1926).

77. On the ceremony involving bronze and scales, see ALAN WATSON, *ROMAN LAW & COMPARATIVE LAW* 45 (1991).

78. See GYÖRGY DIÓSDI, *OWNERSHIP IN ANCIENT AND PRECLASSICAL ROMAN LAW* 62 (1970).

79. BERGER, *supra* note 33, at 496.

80. Roman law presumed the possessor of property to be the owner, unless rebutted by the true owner. See THOMAS MACKENZIE, *STUDIES IN ROMAN LAW WITH COMPARATIVE VIEWS OF THE LAWS OF FRANCE, ENGLAND, AND SCOTLAND* 164 (1862).

81. RUDOLPH VON JHERING, *DER BESITZWILLE: ZUGLEICH EINE KRITIK DER HERRSCHENDEN JURISTISCHEN METHODE* (1968) (arguing that legal protection of possession protects the owner because the possessor was frequently the owner).

82. Adam Mossoff, *What Is Property? Putting The Pieces Back Together*, 45 *ARIZ. L. REV.* 371 (2003) (describing possessory rights as the core of property).

83. BERGER, *supra* note 33, at 627.

84. *Id.* at 343, 463.

(interdicts for the retention or resumption of possession)⁸⁵ protect possessors without property rights. Ultimately, the Roman legal system protects both property right holders and possessors in fact to align their interests with the development and maintenance of the resources under their domain or in their possession.⁸⁶

3. *Private Management of Resources*

Rather than stipulating how holders were to manage property, Roman private law created incentives and provided the example of the property owner, the *paterfamilias* (father of a family),⁸⁷ as the basis of the standard of diligent care to be used in the legal system.⁸⁸ The choice of what a property holder does with his property is left to the owner; Roman law does not stipulate how a holder may use his property. As the “bundle of rights” principle illustrates, “property” generally includes an ample range of faculties, uses, attributions, and possibilities. Ownership thereof enables the holder to exclude others from the use, enjoyment, and disposition of that property. In Roman law, property was not held by the individual, as it primarily is in modern law; rather, property was held by the family unit, or more correctly, on its behalf by the head of that family, called the *paterfamilias*, who personally manages the property. The *paterfamilias* will be further discussed below in Section II.C.

While Roman law left largely unstipulated what a holder could or could not do with his property, it stopped short of conferring absolute rights to property holders.⁸⁹ If the legal system conferred absolute rights without taking into account the effects that one’s use of property may have on another’s, property values may diminish.⁹⁰ Accordingly, Roman law established limits that controlled external effects created by the use of property. For example, a property holder in an apartment-block may not operate a *taberna casearia*, (cheese factory)⁹¹ that causes nauseating odors for the neighbors above unless he acquires a *seruitus*.⁹² He also may not flood the property of his neighbors below.⁹³ Within

85. *Id.* at 508.

86. See ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 91–109.

87. BERGER, *supra* note 33, at 377.

88. BRUCE W. FRIER & THOMAS A.J. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW 239 (2004).

89. UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 27–67 (1997).

90. RUDOLPH VON JHERING, *supra* note 81 (explaining that certain limits on property increase its value).

91. On Roman shops, see CHRISTOPHER FRANCESE, ANCIENT ROME IN SO MANY WORDS 155 (2007).

92. DIG. OF JUSTINIAN 8.5.8.5 (Paulus, Ad edictum 21).

93. *Id.*

limits set on a case-by-case basis in the Roman texts, the law leaves the choice of use of property to the arbitrium (judgment) of the property holder.⁹⁴ The Roman solution is superior at maximizing the value of property rights because Roman private law controlled external effects from within property law itself, whereas both common law and modern civil law use non-property doctrines, such as “nuisance” and “abuse of rights” to limit property rights.⁹⁵ These non-property doctrines fail to maximize the value of property rights because they are framed in general terms and apply to a wide range of external costs. The Roman solution is limited to specific factual situations. Therefore under Roman law, property limits are predictable and parties can thus anticipate the need to negotiate servitudes.

Roman law tied property together using a Gordian knot of wide-ranging typical rights, which could not be separated out of the bundle (except in the “closed number” of specific limited circumstances previously mentioned). Ideally, this standardized bundle of property rights was tied to a single property holder because Roman private law avoided situations of *communio* (common ownership)⁹⁶ reasoning that all rights in the bundle are largely complementary to one another and thus property loses its efficacy if these rights are scattered among several common property holders other than for a limited time and purpose.

In fact, Roman law’s system of “typical property” tied to one person solves a frequently cited problem with jointly held property—the tragedy of the commons.⁹⁷ In law and economics, the tragedy of the commons is a generalized form of a prisoner’s dilemma with many players.⁹⁸ In the tragedy of the commons, the dominant strategy of each player is not to cooperate. Many people who lack coordination and therefore do not cooperate fail to maintain a resource commonly owned. They thereby condemn the resource to overexploitation and disappearance.⁹⁹ Demsetz

94. BERGER, *supra* note 33, at 366.

95. Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687 (2010).

96. BERGER, *supra* note 33, at 400.

97. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

98. In this non-zero-sum game, two people face private incentives to be the first to reveal private information about a crime. If they both remained silent, they would both escape convictions. See Gordon Tullock, *Adam Smith and the Prisoner’s Dilemma*, 100 Q. J. ECON. 1073 (1985).

99. Shi-Ling Hsu, *What is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75 (2005).

brought this analysis into law and economics literature.¹⁰⁰ Heller discussed the flip side of this analysis in his literature.¹⁰¹ The tragedy of the anti-commons is also a generalized form of a prisoner's dilemma. However under this analysis, property holders, lacking coordination among themselves, raise the price of the resource excessively and thereby condemn the resource to *underuse*. By removing the need for coordination within a domain between multiple property owners, Roman law solves these joint-property problems.

The word "tragedy" here has the essence of the "inevitable" of Greek theater. Law and economics literature has recovered the analysis of the tragedy of the commons from Roman law. Harding's Malthusian article attributes the idea to an obscure nineteenth century mathematical amateur.¹⁰² The insight behind it goes back to Greek philosophy. Aristotle refutes Plato's community of property by explaining that, "ἧχιστα γὰρ ἐπιμελεῖ . . . ας τυγχάνει τό πλε . . . στων χοινόν," (what is common to everyone no one will take care of).¹⁰³ From this passage in Aristotle, the tragedy of the commons became a Roman law trope. Fernando Vázquez de Menchaca, a late scholastic from the school of Salamanca, fully develops the analysis of the tragedy of the commons in his sixteenth century treatise on the Roman law of property,¹⁰⁴ from which Hugo Grotius takes the analysis without supplying any additional insights.¹⁰⁵

The necessity of public law-implemented coordination of jointly held property is eliminated because private property provides owners the incentives to acquire information and invest in the development and upkeep of the resources that lie within private domains. Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world. The holder thus internalizes the external benefits and costs from the use, enjoyment, or disposition of the property. Incentives are aligned with the care and maintenance of that property because the holder is able to put a price on the resources involved.¹⁰⁶ Roman private law gives the right holders the incentives to invest in the maintenance and improvement

100. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

101. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

102. On the tragedy perspective, see Michael Goldman, "Customs in Common": *The Epistemic World of the Commons Scholars*, 26 THEORY & SOC'Y 1, 25; *id.* at 1–37 (1997).

103. ARISTOTLE, *POLITICS* bk. 2 (1988).

104. FERNANDO VÁZQUEZ DE MENCHACA, *CONTROUERSIARUM ILLUSTRUM ALIARUMQUE USU FREQUENTIUM LIBRI TRES* (1934).

105. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (1950).

106. DEL GRANADO, *supra* note 3, at 305.

of property because they are able to reap both the use, value, and the exchange value of those resources.¹⁰⁷ In short, the economic problems with common-held property are avoided in the Roman legal system because a single person, the *dominus proprietarius*, (owner)¹⁰⁸ is the residual claimant of the resources managed in the domain.

However, with unbundled property rights such as *usus fructus*, the *dominus usufructus*, (holder of an usufruct)¹⁰⁹ fails to be the residual claimant of the property. Since the incentives of the usufructuary are not perfectly aligned in the long-term with the management of the resources in the domain, Roman private law requires that the usufructuary post a bond, the *cautio usufructuaria*, to guarantee the diligent management of the property and its return according to the standard of care of a man of good judgment, “*et usurum se boni uiri arbitrato et, cum usus fructus ad eum pertinere desinet, restitutum quod inde exstabit,*” (“that will use the property as a good man should, and that when the usufruct ceases, he will restore what remains of it”).¹¹⁰ Roman private law requires the *dominus usus* (holder of an *usus*) to post a similar bond, the *cautio usuaria*, for the same reason.¹¹¹

4. Institutional Mechanisms of Maintaining Typical Property Through Time

To provide for proper management of resources, Roman law incorporates institutional mechanisms that maintain typical property through time.¹¹² The institutional mechanisms of *accessio*, (accession)¹¹³ *novam speciem facere*, (to make a new kind of thing)¹¹⁴ and *confusio uel commixtio*, (confusion and intermingling),¹¹⁵ as well as *successio*, (inheritance)¹¹⁶ *usucapio*, (acquire by use)¹¹⁷ and *longi temporis praescriptio*,

107. *Id.*

108. BERGER, *supra* note 33, at 422.

109. *Id.* at 385.

110. DIG. OF JUSTINIAN 7.9.1 (Ulpianus, Ad edictum 79).

111. See ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 218.

112. DEL GRANADO, *supra* note 3, at 316.

113. BERGER, *supra* note 33, at 340.

114. *Id.* at 712.

115. *Id.* at 399.

116. *Id.* at 722.

117. *Id.* at 752.

(prescription),¹¹⁸ are methods of maintaining typical Roman property as people, property, and attachments between these elements change throughout time. Each will be treated in the following paragraphs.¹¹⁹

In *accessio*, one's property becomes combined with, or incorporated into, another's property.¹²⁰ Instead of establishing *communio* between common property holders, Roman private law subjects the accessory property to the *dominium* of the property holder of the principal property. Thus, the dominant property holder acquires the accretion in the natural area along a river,¹²¹ the threads woven into a piece of cloth,¹²² the dyes used to process cotton fabric,¹²³ the wood panel containing an oil painting,¹²⁴ the writing on a goatskin parchment,¹²⁵ the buildings put up on¹²⁶ or the crops sown in the ground.¹²⁷ As is evident from the case law, Roman private law avoids a situation of *communio* between common property holders whenever possible.

In *novam speciem facere*, one applies one's labor to another's materials in order to create a thing of a new species.¹²⁸ Instead of establishing *communio* between these common property holders, Roman private law subjects the thing of the new species to the *dominium* of the laborer, *si ea species ad materiam reduci possit*,¹²⁹ (unless the materials can be returned to their primitive state). Thus, the person applying the labor acquires the wine made from grapes, the oil pressed from olives, and the flour ground from wheat kernels; but not the goblet cast in gold, nor the clothing made of wool, nor the boat assembled with planks of wood belonging to another.¹³⁰ The goblet can be melted down, the vestment can be ripped back into sheets of wool, the boat can be disassembled, and the planks stacked singly again and returned to their primitive states.

In *confusio uel commixtio*, one's property becomes confused or intermingled with another's property.¹³¹ Thus, if the boundary fence comes

118. *Id.* at 645.

119. Traditionally, civil lawyers referred to these legal institutions as modes of "acquiring" property rights. My law and economics analysis suggests they are, more precisely, modes of "maintaining" typical Roman property.

120. See R. A. BURGESS, *ACCESSIO AND RELATED SUBJECTS IN ROMAN LAW* (1972).

121. DIG. OF JUSTINIAN 41.1.7.1 (Gaius, *Rerum cottidianarum siue aureorum* 2).

122. J. INST. 2.1.26.

123. DIG. OF JUSTINIAN 41.1.26.2 (Paulus, *Ad Sabinum* 14).

124. G. INST. 2.72.

125. G. INST. 2.77.

126. DIG. OF JUSTINIAN 41.1.12 (Neratius, *Membranarum* 5).

127. J. INST. 2.1.32.

128. See SCHULZ, *supra* note 45, at 366.

129. J. INST. 2.1.12.

130. G. INST. 2.79.

131. See PAUL VAN WARMELO, *AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW* 89 (1976).

down between two neighboring fields, the flocks of sheep may become so intermingled that the farmers are unable to reckon who owns what animal. If the intermingling occurs by chance or the will of the property holders, Roman law will allow a situation of *communio* between common property holders. If not, and the component things cannot be separated, the property holders may ask the *iudex* (judge)¹³² to partition the property in proportion to the value that corresponds to each.¹³³

Through time people move, leave, or perish. In *successio*,¹³⁴ any one of the heirs, at any time, is able to ask the *iudex* to divide an *hereditas* (inheritance).¹³⁵ In this way, Roman law avoids a situation of *communio* among coheirs.

When property comes to be held by new possessors, Roman private law puts an end to the divorce between possession and property through *usucapio* and *longi temporis praescriptio*.¹³⁶ The possessor acquires *dominium* over another's property through usage over time.¹³⁷ That way, the legal system assures that every domain is managed by a single property holder who has an interest and control over the domain. Roman private law avoids situations of commonly-held ownership whenever possible.

The ability to price the resources held within privately held-domains, and the expectation of becoming property holders, give people incentives to invest in the conservation and development of the scarce resources that lie within their control.¹³⁸ Note that Roman law's various ways of giving property rights to a possessor aligns his incentives with the care and management of the resources in the domain and gives him the expectation of obtaining the residual interest over time. In addition to stability in his possession, the legal system gives the good faith possessor immediate property rights over the fruits or products of what he possesses, without having to wait for *usucapio* and *longi temporis praescriptio*.¹³⁹

132. BERGER, *supra* note 33, at 518.

133. DIG. OF JUSTINIAN 6.1.5.1 (Ulpianus, Ad edictum 16).

134. For a short discussion of the Roman law of succession, see JOHNSTON, *supra* note 13, at 44–52.

135. BERGER, *supra* note 33, at 485.

136. See ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 21–61.

137. DIG. OF JUSTINIAN 41.3.3 (Modestinus, Pandectarum 5); 44.3.3 (Modestinus, Differentiarum 6).

138. DEL GRANADO, *supra* note 3, at 305.

139. See JOHNSTON, *supra* note 13, at 59.

Roman law relies on typical forms of property bundles, unbundled property rights, clearly defined boundary markers for property, and publicized ownership to reduce informational asymmetries. Roman law also employs institutional mechanisms that maintain typical property through the vagaries of time to avoid situations of *communio* between common property holders. Where a situation of common ownership is unavoidable, as in *communio incidens*, I will show in Section II.B.3 of this Article that Roman private law turns *communio* into a quasi contract under the law of obligations. That way the legal system provides a legal mechanism for coordination of commonly-held ownership.

In law and economics, an Edgeworth box graphically represents how people can benefit from exchange.¹⁴⁰ Goods have both a use value and an exchange value. This analysis again goes back to Greek philosophy. People will not enter into exchanges if they hold like things. How, then, can people find an equivalence between unlike things to make an equal exchange? In a brilliant response to this paradox, Aristotle observes that a voluntary exchange is, “κατ’ ἀναλογίαν . . . ἀ μὴ κατ’ ἰσότητα,” (“equivalent even if it is not equal”).¹⁴¹ However, a voluntary exchange requires more than mere possession in fact; it requires property rights.¹⁴² Otherwise, the asymmetry of information between possessors may defeat attempts at barter. Even a barter economy requires property rights. Moreover, the law of property supports the market. As I explain above, rights of exclusion are logically prior to the pricing mechanism.

Hernando de Soto, a Peruvian economist, has strongly urged developing countries to create property titling programs.¹⁴³ During the last twenty-five years, many developing countries, including a large number in Latin America, have followed de Soto’s policy recommendations. The intended beneficiaries of these programs are the urban poor. Because the urban poor generally live and work in the informal economy, they traditionally do not hold recognized legal title to their assets. Therefore, they have been unable to post collateral for bank loans needed to improve their productivity. Nevertheless, these well-intended titling programs have failed to produce the expected, substantial economic growth. This Article provides an explanation for the failure of these titling programs. Because de Soto is a development economist rather than a law and economics scholar, his analysis is incomplete. Our short explanation of Roman law shows how an ideal private law system defines

140. See RICHARD A. IPPOLITO, *ECONOMICS FOR LAWYERS* 6–14 (2005).

141. ARISTOTLE, 5 *THE NICOMACHEAN ETHICS* (1998).

142. See DEL GRANADO, *supra* note 3, 296.

143. See *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989) (arguing that property titling programs can spark economic development).

property, even without land registration systems. Our law and economics perspective suggests that for the legal system to define and maintain property rights, more than a simple registration system is required.

B. Roman Law of Obligations

1. Private Choices to Cooperate

Law and economics literature is still under development with respect to contract law.¹⁴⁴ The economic approach, in the hands of common law lawyers, seems unable to posit an “economic theory” of contract law.¹⁴⁵ Law and economics models fail to explain contract doctrines as they exist under the common law. These models also fail to provide a conceptual framework for a critical reworking of the common law system.¹⁴⁶ The historical origins of common law doctrines of contract in Canon law, rather than in Roman law, give common law lawyers a substantially incomplete picture of contracts.¹⁴⁷ Roman law reveals the full range of possible mechanism designs in the law of obligations. Where common law lawyers seem to be spinning their wheels, Roman legal scholarship is able to uniquely contribute to our understanding of this area of the economic analysis of law. Canon lawyers put Roman contract law on its head. Since in Canon Law, contracts were usually accompanied by an oath, contractual breach amounted to the sin of perjury. Canon lawyers were concerned for the soul of promisors, and concluded that all promises should be kept, “*pacta sunt seruanda*.” The common law action of *assumpsit* follows the Canon law action of breach of faith, *fidei laesio*.¹⁴⁸

Roman private law encourages economic liberalization because it supports private choices to cooperate. Yet, cooperation requires credible commitments, which themselves require that the committed parties have

144. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003) (discussing the failure of law and economics literature to explain contracts law).

145. *Id.* at 830.

146. *Id.*

147. See Juan Javier del Granado, *The Path Dependence of the Common Law from a Romanist Perspective* (Aug. 3, 2011) (paper presented in Bogotá at the 15th annual meeting of the Latin American and Caribbean Law and Economics Association), http://escholarship.org/uc/bple_alacde.

148. See A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 5–6 (1975).

the incentives to comply in the future.¹⁴⁹ The Roman law of contractual obligations provides such incentives and therefore encourages expectations of cooperation between private parties. In law and economics, this is a beneficial outcome because trust between people has economic value.¹⁵⁰

The Roman law of obligations enables people to commit to future actions in a legally binding contract. The debtor who enters into a contract gives the creditor a legal claim against his person (*actiones in personam*), thus rendering his commitment to future action credible when made. Without such legal support for commitment, we would be forced to use more extreme measures as demonstrated by Hernan Cortes, the sixteenth century Spanish conquistador who burned his ships in the harbor of Veracruz to foreclose the option of retreat during the conquest of Mexico.¹⁵¹

Part of the credibility of obligations under Roman law is the distinction between *actiones in rem* (see *supra* Section II.A) and *actiones in personam*.¹⁵² Under the Roman law of obligations, if the debtor breaches, the creditor is able to force him, through an *actio in personam*, to pay an amount of money equal to, but not more than, the value of the performance.¹⁵³ Even where the obligation is *incertum* (uncertain),¹⁵⁴ the procedural formula stipulates that the *iudex* must assess, *tantum pecuniam* (an amount of money equal) to *quidquid Numerius Negidius Aulum Agerium dare facere oportet*, (whatever the defendant ought to give to, or do for, the plaintiff).¹⁵⁵ Accordingly, when performance becomes more costly to the debtor than the value of the performance to the creditor, the system of Roman private law allows the debtor to breach and pay monetary damages through the principle of *omnis condemnatio est pecuniaria* (all judgments are for monetary damages).¹⁵⁶ The contract restructures the future incentives of the debtor and makes his promises credible. Unlike modern civil and common law systems, the classical Roman *iudex* uniquely refused to issue decrees of specific performance.

149. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 562 (2003).

150. See Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717 (2006).

151. Letter from Hernan Cortes to Emperor Charles V (Oct. 30, 1520), in 1 CARTAS DE RELACIÓN DE LA CONQUISTA DE MÉJICO (1922). Without such legal support for commitment, we would be forced to use other more extreme measures as demonstrated by Hernan Cortes, the sixteenth century Spanish conquistador who burned his ships in the harbor of Veracruz to foreclose the option of retreat during the conquest of Mexico.

152. BERGER, *supra* note 33, at 346.

153. See ZIMMERMANN, *supra* note 13, at 771.

154. BERGER, *supra* note 33, at 387.

155. See ZIMMERMANN, *supra* note 13, at 771.

156. G. INST. 2.31.

The Roman contract system transforms the private expectations that people hold about the future actions of others into public information by utilizing an appropriate ceremony or standardized contract forms.¹⁵⁷ The legal system adopts the same institutional mechanisms, long-winded verbal statements in ceremonies and a “closed number” of standardized forms as those used in the Roman law of property (*see supra* Section II.A). As we saw earlier, modern civil law systems substitute the entry of public records in registration systems for the ceremonies of classical Roman law.¹⁵⁸ Through the use of standardized forms and clearly stipulated obligations, Roman private law reduces asymmetries of information between contractual parties.

Scholars today dispute whether Roman law, in archaic times, required contractual parties to participate in a ceremony involving bronze and scales in order to enter into an enforceable agreement.¹⁵⁹ If such a ceremony existed, its purpose was to subject parties to seizure if they failed to perform an obligation.¹⁶⁰ The ceremony openly established the parties as *nexus* (bound).¹⁶¹ However, under the legal system of the Roman classical period, the most important ceremonial means of forming binding legal commitments was the verbal question-and-answer sequence of *stipulatio*, (stipulation).¹⁶² In the immediate presence of each other and before witnesses, the *reus stipulandi* (stipulator)¹⁶³ asks the question, and the *reus promittendi* (promissor)¹⁶⁴ responds directly with a promise in terms that mirror the question. *Dari spondes? Spondeo. Dabis? Dabo. Promittis? Promitto. Fidepromittis? fidepromitto. Fideiubes? Fideiubeo. Facies? Faciam,*¹⁶⁵ (“Do you agree? I do agree. Do you promise? I do promise. Do you pledge your faith? I do pledge my faith. Do you bind yourself? I do bind myself. Will you give? I will give. Will you do so-

157. See DEL GRANADO, *supra* note 3, at 319.

158. On civil-law notary publics, see Armando J. Tirado, *Notarial and Other Registration Systems* 11 FLA. J. INT'L L. 171, 174 (1996).

159. On the controversial *nexum*, see Max Kaser, ROMAN PRIVATE LAW 167 (Rolf Dannenbring trans., 1965); de Zulueta, *The Recent Controversy Over Nexum*, 29 L. Q. REV. 137 (1913).

160. See ALAN WATSON, ROME OF THE XII TABLES: PERSONS AND PROPERTY 111–24 (1975).

161. BERGER, *supra* note 33, at 595–96.

162. *Id.* at 716.

163. *Id.* at 684.

164. *Id.*

165. J. INST. 3.15.

and-so? I will do so-and-so.”)¹⁶⁶ Accordingly, Roman law enables the parties to stipulate to a mutually understood unilateral obligation, which is legally enforceable as a contract. (See Section II.C below for a discussion of the literal contractual form).

Besides a ceremony, the other Roman method of publicizing private agreements was by use of standardized contract forms.¹⁶⁷ Parties during the classical period were able to form binding legal commitments by concluding any one of a “closed number” of standardized forms, eliminating the need for long drawn-out ceremonial verbal statements.¹⁶⁸ The typical contracts under Roman law were either *consensu* (consensual) or *re* (real).¹⁶⁹ The parties were able to form a consensual contract simply by manifesting their agreement.¹⁷⁰ The parties were able to form a real contract simply by handing over *res corporales* (a corporeal thing)¹⁷¹ while manifesting assent to such a standardized contract form with a name. Because Justinian was particularly fond of the number four, the system of *pandects* identifies four consensual contracts, *emptio uenditio* (purchase sale),¹⁷² *locatio conductio* (let hire),¹⁷³ *mandatum* (mandate)¹⁷⁴ and *societas* (partnership),¹⁷⁵ as well as four real contracts, *depositum* (deposit),¹⁷⁶ *mutuum* (gratuitous loan for consumption),¹⁷⁷ *commodatum* (gratuitous loan for use)¹⁷⁸ and *pignus* (pledge).¹⁷⁹

The typical contracts—referred to as the “nominate contracts” because they are named—are one of the greatest achievements of Roman private law.¹⁸⁰ By referring to a nominate contract, the parties knew that they had concluded an enforceable contract and easily understood what obligations they had assumed without having to stipulate them in detail.¹⁸¹ To illustrate, when the parties entered into an *emptio uenditio*,

166. Translation taken from S.P. SCOTT, 2 THE CIVIL LAW 111 (1932). Note that I retain the Latin terms throughout the article, because the translation of legal terms is invariably imprecise and possibly misleading.

167. See DEL GRANADO, *supra* note 3, at 319.

168. Interestingly, law and economics scholars have failed to see that the *numerus clausus* principle also operates in the law of obligations.

169. See ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 64–72 (1970).

170. See JOHNSTON, *supra* note 13, at 78.

171. BERGER, *supra* note 33, at 677.

172. *Id.* at 452.

173. *Id.* at 567.

174. *Id.* at 574.

175. *Id.* at 708.

176. *Id.* at 432.

177. *Id.* at 591.

178. *Id.* at 399.

179. *Id.* at 630.

180. See DEL GRANADO, *supra* note 3, at 319–20.

181. *Id.*

they only had to specifically stipulate the *pretium* (price)¹⁸² and the *res* (thing).¹⁸³ However, the obligation of the seller to respond for eviction, *euictionem praestare*, (guarantee against eviction) was created without being mentioned because it was part of the typical contract invoked by the name, *emptio uenditio*.¹⁸⁴ Thus, the parties took on all implied obligations of an *emptio uenditio* by giving their contract that name.

Modern law and economics teaches that when one party is better able to anticipate future contingencies and risks than the other, mutually beneficial transactions may fail to take place. Roman law encourages such mutually beneficial contracts by incentivizing revelation of privately-held information through default rules.¹⁸⁵ Roman law enables parties to stipulate out of implicit legal rules that are not essential to the standard contractual form.¹⁸⁶ For example, when the parties enter into an *emptio uenditio*, the parties may agree that the seller not respond for eviction by using something called a *pactum de non praestanda euictione* (proviso to exclude guarantee against eviction).¹⁸⁷ The seller who has private information about any circumstance which may affect the peaceful possession of a thing by the buyer responds for eviction as an implicit obligation. Accordingly, Roman private law provides parties an incentive to reveal private information to avoid the responsibility that the legal system imposes by default.

While the Roman legal system allows some modifications of the typical forms, it prevents formation of agreements that change the essential features of a standardized contractual form.¹⁸⁸ Thus, the parties are unable to agree to a *commodatum* in exchange for *merces* (rent),¹⁸⁹ which makes the transaction something other than a gratuitous loan.¹⁹⁰ The Roman lawyers indicated that such a transaction would have to be enforced by another legal action *ex locatione conductio* (for the lease of the thing).¹⁹¹

182. BERGER, *supra* note 33, at 649.

183. *Id.* at 677.

184. See ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC, *supra* note 17, 40–45, 70–86.

185. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing how parties reveal information when they contract around default provisions).

186. See DEL GRANADO, *supra* note 3, at 328.

187. See FRANCIS DE ZULUETA, THE ROMAN LAW OF SALE 46 (1945).

188. See DEL GRANADO, *supra* note 3, at 328.

189. BERGER, *supra* note 33, at 581.

190. See FERDINAND MACKELDEY, HANDBOOK OF THE ROMAN LAW 337 (Moses A. Dropsie trans. 1883).

191. DIG. OF JUSTINIAN 13.6.5 12 (Ulpianus, Ad Edictum 28).

In the Roman contractual system, any odd agreement, which lacks the long, drawn-out ceremonial verbal statements of *stipulatio* and fails to fit into one of the standardized forms, is unenforceable. Roman law refuses to provide a legal remedy to enforce it “*nuda pactio obligationem non parit*” (“a bare agreement does not produce an obligation”).¹⁹² Roman law refused to enforce naked pacts without a ceremony or a nominate—standardized contractual form to publicize the content of the obligations.

Discussed below, Latin American notary publics inconsistently insist on interpreting atypical contracts along the lines of typical molds. Notary publics must understand their primary responsibility is to give publicity to nonstandardized business deals.

2. Private Choices to Cooperate Without Stipulating All Eventualities

The Roman law of obligations establishes full freedom of contract.¹⁹³ However, the principle of freedom of contract is a necessary, but not sufficient, condition for realizing a decentralized market economy.¹⁹⁴ Law and economics literature emphasizes that writing a complete contract which stipulates all eventualities is often impossible or undesirable because parties to a contract are incapable of anticipating every future contingency.¹⁹⁵ Moreover, because negotiating and drafting clauses to resolve possible contingencies and risks is costly, parties may decide to leave remote contingencies unstipulated.¹⁹⁶ Rather than abridging full freedom of contract, Roman private law supplements, rather than substitutes for, incomplete contracts with: (1) standardized contractual forms; (2) the principle of *bona fides* (good faith)¹⁹⁷ of Roman Praetorian law; and (3) quasi-contractual obligations.¹⁹⁸ Roman law works because it supports private choices to cooperate without stipulating all eventualities. These supplemental institutional mechanisms enable people whose rationality is limited to cooperate despite their inability to completely know and provide for the future.

Roman standardized contractual forms approximate complete contracts.¹⁹⁹ Insofar as the near future will resemble the recent past, Roman private law

192. DIG. OF JUSTINIAN 2.14.7.4 (Ulpianus, Ad Edictum 4).

193. See RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 327 (1995).

194. See DEL GRANADO, *supra* note 3, at 326.

195. See Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 190 (2005) (explaining why contract are incomplete).

196. *Id.*

197. BERGER, *supra* note 33, at 374.

198. See DEL GRANADO, *supra* note 3, at 327–33.

199. *Id.* at 327.

supports personal autonomy by providing a default framework of implicit heteronomy. The nominate contracts in Roman law are based on long experience and incorporate supplemental provisions that provide for probable contingencies which may escape the attention and present awareness of contractual parties. As discussed earlier, each standardized or nominate contractual form in Roman law includes implied obligations covering unstipulated matters. The obligations implied in each typical form cover the unstipulated eventualities most likely to arise in the contract with that name.²⁰⁰

In the Roman legal system, the *ius honorarium* (law introduced by the magistrates)²⁰¹ developed, *adiuuandi uel supplendi uel corrigendi iuris ciuilis* (supporting, supplementing and correcting the civil law),²⁰² which is similar to the development of equity introduced by the chancery courts in common law systems.²⁰³ Both the *ius honorarium* and equity supplement and mitigate the rigors of strict law.²⁰⁴ In classical Rome, the *praetor* allowed a defendant to request the insertion of an *exceptio doli* (exception of bad faith) into the procedural formula.²⁰⁵ This addition instructed the *iudex* to consider the equity of the case, *si in ea re nihil dolo malo Aulio Agerii factum sit neque fiat*,²⁰⁶ (if no fraud has been committed by you as plaintiff).²⁰⁷ When enforcing any of the four consensual contracts, *emptio uenditio*, *locatio conductio*, *mandatus* and *societas*, or the real contract of *depositum*, the Praetorian formula contains an instruction to the *iudex* to consider more than whether both parties strictly performed their legal obligations *quidquid ob eam rem Numerium Negidium Aulio Agerio dare facere oportet ex fide bona*, (whatever the defendant ought to give to, do for, or is fitting for, the plaintiff according to the principles of good faith).²⁰⁸

200. *Id.*

201. BERGER, *supra* note 33, at 529.

202. DIG. OF JUSTINIAN 1.1.7 (Papinianus, Definitionum 2).

203. *See generally* W.W. BUCKLAND, EQUITY IN ROMAN LAW (1911) (describing the kinship between Roman and English lawyers) [hereinafter BUCKLAND, EQUITY IN ROMAN LAW].

204. *Id.* at 7.

205. BERGER, *supra* note 33, at 459.

206. DIG. OF JUSTINIAN 44.4.4 (Paulus, Ad Edictum 7).

207. Translation taken from S.P. SCOTT, 5 THE CIVIL LAW 60 (1932).

208. *See* 1 A. H. J. GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME 205–06 (1901).

Modern scholars have been unable to fully explain the Roman meaning of *bona fides*.²⁰⁹ However, law and economics suggests that *bona fides* allowed Roman law to supplement incomplete contracts.²¹⁰ When the parties are able to stipulate the entire content of a contract, the principle of *bene agere* (acting fairly and in good faith) requires that each party faithfully execute the obligations expressly stipulated, and nothing more.²¹¹ When the parties are unable to stipulate the entire content of a contract, Roman law does not require the parties to act altruistically, but rather requires parties to go beyond the mere express terms.²¹² Parties are required to act with *bona fides*; to respond to unstipulated eventualities without *dolus* (bad intent)²¹³ or *culpa* (negligence)²¹⁴ within the bounds of foreseeability, *non etiam improuisum casum praestandum esse*, (should not be responsible for the unforeseen event).²¹⁵

Modern scholars disagree about the exact standard of care that Roman lawyers applied because they miss the point of Praetorian *bona fides*.²¹⁶ The *iudex* evaluates on a case-by-case basis whether each party has acted as a *bonus uir* (upright man),²¹⁷ thus the standard of care varies. Whereas modern German civil law fits *bona fides* into groups of cases or *Fallgruppen*, Roman lawyers adopted a case-by-case approach to *iudicia bonae fidei* (controversies to be decided according to the principles of good faith) where every situation will be different. If *iudicia bonae fidei* could be reduced to typical situations, Roman lawyers would have adopted a solution based on the standardized contractual forms.²¹⁸ The Praetorian formula instructs the *iudex* to look at the unique circumstances of each case to figure out whether each party acted *ex fide bona* (according to the principles of good faith) precisely because the unstipulated eventualities fail to conform to typical patterns.²¹⁹

209. See generally Simon Whittaker & Reinhard Zimmermann, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in GOOD FAITH IN EUROPEAN CONTRACT LAW 16 (Reinhard Zimmermann & Simon Whittaker eds., 2000).

210. See DEL GRANADO, *supra* note 3, at 331.

211. See DIG. OF JUSTINIAN 19.2.21 (Javolenus, Epistularum 11).

212. See DIG. OF JUSTINIAN 19.2.22.3 (Paulus, Ad Edictum 34).

213. BERGER, *supra* note 33, at 440.

214. *Id.* at 419; DIG. OF JUSTINIAN 18.1.68 (Proculus, Epistularum 6).

215. COD. JUST. 4.35.13 (Diocletian & Maximian 290/293).

216. The concept gets rather short shrift in the literature. *E.g.*, GEORGE MOUSOURAKIS, THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW 34 (2003).

217. BERGER, *supra* note 33, at 767.

218. See DEL GRANADO, *supra* note 3, at 320.

219. See Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying*, 107 MICH. L. REV. 1461 (2009) (discussing why different standards of fault are proper in different contexts).

Incomplete contracting is particularly problematic and expensive when the *causa* (reason)²²⁰ of a contract is precisely that one party is better positioned than the other to acquire private information. Only in these situations of asymmetric information, does *bene agere* in Roman law demand that a party subordinate his interests entirely to the interests of others. Roman lawyers approach these situations by applying quasi-contractual obligations which are subsidiary to incomplete contracts.

3. *Private Cooperation Within Extra-contractual Relationships*

Another aspect of Roman law that encourages cooperation involves extra-contractual relationships. Whether the relationships arise through mistake, prior circumstances, or consensual acts, Roman private law recognizes and enforces certain extra-contractual obligations. In general, persons who are supposed to act for the benefit of others are considered to have special relationships with each other, despite the absence of any express agreement between them. Roman lawyers refer to certain obligations as *quasi ex contractu* (almost arising from a contract). The quasi-contractual obligations are similar, but not identical to obligations formed through a contract. Paralleling the closed system of typical contracts discussed in Section II.B.2, Roman lawyers conceived a “closed number” of standardized quasi-contractual forms: *negotiorum gestio* (management of another’s affairs without authorization),²²¹ *tutela uel curae gestio* (guardianship or wardship),²²² *communio incidens* (falling together into common ownership),²²³ and *indebitum solutum* (loosening a nonexistent debt).²²⁴

In *negotiorum gestio*, someone undertakes to take care of some business or affair for another.²²⁵ Roman law requires that the *negotiorum gestor* (person meddling in another’s affairs)²²⁶ act in the interest of this other.²²⁷ Once begun, the *negotiorum gestor* must attempt to complete his obligation,²²⁸ and after finishing, he must give a full accounting of his

220. See FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 149–50 (1876) (explaining that the doctrine of consideration in the common law descends from the Roman *causa*).

221. BERGER, *supra* note 33, at 593.

222. *Id.* at 747.

223. *Id.* at 400.

224. *Id.* at 498.

225. See WATSON, *supra* note 184, at 193–207.

226. BERGER, *supra* note 33, at 593–94.

227. DIG. OF JUSTINIAN 3.5.6.3 (Julianus, Digesto 3).

228. DIG. OF JUSTINIAN 3.5.3.10 (Ulpianus, Ad Edictum 10).

actions to the *dominus negotii* (owner of the business or affair)²²⁹ as well as return any fruits he may have acquired. Because of conflict of interest problems, a person is prevented from acquiring a private interest in the business he oversees. While the Roman law encourages cooperation, it also enforces realistic limits. It prevents what might look like cooperative arrangements but is actually one person interfering with another's property. Because one meddles in another's affairs without authorization, no contract is freely entered into between the parties to this extra-contractual relationship. To avoid officious interference with private interests, Roman law requires some underlying utility that necessitates meddling in the affairs of another: "*non autem utiliter negotia gerit, qui non necessariam uel quae oneratura est,*"²³⁰ ("but he does not attend to the matter [usefully], who adds something which was not necessary, or imposes a burden").²³¹ This limit is enforced by denying the *negotiorum gestor* a claim for reimbursement while still requiring the officious *negotiorum gestor* to be liable for *culpa levis* (slight negligence)²³² and *casus fortuitus* (unforeseeable accident).²³³

In *tutela uel curae gestio*, someone looks after the affairs of another who is a minor or of unsound mind.²³⁴ The tutor must look after the interests of his ward as if they were his own.²³⁵ Where the incentives of the tutor are not perfectly aligned with the interests of the ward, Roman private law requires the posting of a bond, the *cautio, rem pupilli saluam fore* (security for the protection of the ward's property),²³⁶ to guarantee the diligent management of the ward's affairs.²³⁷

Roman law also applies quasi-contractual obligations, in *communio incidens*, where several people unavoidably become joint property holders (see Section II.A) and in *indebitum solutum*, where someone unjustly enriches another.²³⁸

229. *Id.*

230. DIG. OF JUSTINIAN 3.5.9.1 (Ulpianus, Ad Edictum 10).

231. Translation taken from 2 S.P. SCOTT, *supra* note 166, at 39.

232. BERGER, *supra* note 33, at 420.

233. *Id.* at 476. DIG. OF JUSTINIAN 3.5.11 (Pomponius, Ad Quintus Mucius 21).

234. See R.H. Helmholz, *The Roman Law of Guardianship in England, 1300–1600*, 52 TUL. L. REV. 223 (1978).

235. DIG. OF JUSTINIAN 26.7.15 (Paulus, Sententiarum 2).

236. BERGER, *supra* note 33, at 385.

237. J. INST. 1.24.

238. See generally UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE (David Johnston & Reinhard Zimmerman eds., 2002). Emily Sherwin dates the law of restitution back to Roman law. See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001).

All quasi-contractual obligations are *iudicia bonae fidei*.²³⁹ The Praetorian formula instructs the *iudex* to review the circumstances of each case to decide whether a person has acted as a *bonus uir*.

Additionally, Roman lawyers refer to certain no-fault obligations as *quasi ex delicto*, (almost arising from a delict). In civil law, a delict is a civil wrong redressable by compensation.²⁴⁰ These obligations are similar to those imposed as a result of fault or carelessness. Roman lawyers conceive of a “closed number” of standardized quasi-delictual forms. Thus, Roman law subjects the *iudex* to objective responsibility (“strict liability” is the term used by the common law), *qui litem suam fecerit* (“he makes a trial his [own]”),²⁴¹ the sea carrier, innkeeper and stable keeper whose employees steal or damage the property of a customer, *furtum uel damnum in nauis aut caupone aut stabulo*, (theft or damage while under the care of ship owners, innkeepers, or stable keepers)²⁴² as well as anyone from whose dwelling something is *deiectum uel effusum*, (thrown or poured) onto the street,²⁴³ or from whose building something is *positum uel suspensum* (placed or suspended) which falls and obstructs traffic.²⁴⁴

As I show, Roman private law recognizes and enforces a “closed number” of both quasi-contractual and quasi-delictual obligations. However, modern civil law scholars disfavor the Justinianian labels of “quasi contract” and “quasi delict.”²⁴⁵ These scholars are unable to find any common thread linking all of these seemingly unrelated causes of action.²⁴⁶ Law and economics suggests that what links the motley collection of personal actions is some kind of pre-existing relationship between people. These standardized extra-contractual obligations—which lie between contracts and delicts—all involve relational obligations.

239. See DEL GRANADO, *supra* note 3, at 331.

240. Under the common law, the old Norman word “tort” describes civil wrongs. PETER HODGSON COLLIN, *DICTIONARY OF LAW* 241 (1999).

241. BERGER, *supra* note 33, at 519.

242. *Id.* at 592.

243. See KASER, *supra* note 59, at 216.

244. *Id.*

245. See DEL GRANADO, *supra* note 3, at 332–33.

246. Nor can the motley collection of situations be subsumed under the law of restitution for unjust enrichment. See e.g., James Gordley, *Restitution Without Enrichment? Change of Position and Wegfall der Bereicherung*, in *UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE* 227, 236–37 (Johnston & Zimmermann eds., 2002).

4. Private Cooperation Between Strangers

One of the central functions of any legal system is to promote responsible behavior. One way to describe such behavior is consideration for the interests of others—but expecting altruism would be requiring too much of a legal system. Roman law encourages cooperation between persons acting for the benefit of others, even when such persons have not formed any agreement or are even unknown to each other.

Modern law uses criminal prosecution by the state's bureaucracy to impose cooperation even among strangers. Bureaucratic inertia, however, where government officials lack both the private incentives and information, impairs the effectiveness of such prosecution. Roman law is more adept in encouraging cooperation because it enables individuals to bring legal actions against others for intentional harms, without state involvement.

Roman law protects property and persons through civil rather than criminal means. Roman law imposes responsibility for intentional harms (with *dolo malo*) through a “closed number” of standardized civil delicts.²⁴⁷ The standard Roman law delicts include several harms which modern law classifies as crimes against persons or property. A wide variety of behaviors involving the involuntary removal of property from the control of its rightful holder, *inuito domino* (without the owner's consent),²⁴⁸ constitute *furtum* (theft),²⁴⁹ and if done with force, *rapina* (robbery).²⁵⁰ As with modern law, the offense does not include removing property under the mistaken belief of ownership.²⁵¹ Roman law *iniuria* (done unlawfully)²⁵² includes many modern crimes against the person.²⁵³ However, as with modern law, the offense does not include injuring someone negligently during a sports competition.²⁵⁴ Roman private law prefigures the essential components of a modern legal system.

While Anglo-American common law retains its feudal system of intentional torts, modern Latin American civil law relies overly on criminal, as opposed to civil liability. The intentional delicts of Roman

247. See WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 220–33, 248–73.

248. BERGER, *supra* note 33, at 516.

249. *Id.* at 480.

250. *Id.* at 667.

251. DIG. 47.2.21.3 (Paulus, Ad Sabinum 40). A mental element of *contrectatio* (“laying hands on with an intent to misappropriating, meddling with or misusing another's property”) was a prerequisite. See BERGER, *supra* note 33, at 413.

252. BERGER, *supra* note 33, at 502.

253. See WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 248–55.

254. DIG. 47.10.3.3 (Ulpianus, Ad Edictum 56).

law were left out in the nineteenth century codifications of civil law. Law and economics literature teaches that private law imposes civil liability for reasons other than compensating people for their losses or redistributing wealth or risk in a society.²⁵⁵ Instead, a system of private law redistributes losses from those who are injured to those who caused the harms, creating incentives for people to prosecute those who fail to exercise due care for others.²⁵⁶

Moreover, Roman law imposes liability, even for unintentional harms (done with *culpa*). The Roman civil delict, *damnum iniuria datum* (damage done to property),²⁵⁷ evolved from a system which imposed objective responsibility to a system which declared subjective responsibility. Law and economics scholars may be puzzled by the change.²⁵⁸ A determination of objective responsibility (“strict liability” in common law) in a case seems more straightforward for a *iudex* than establishing the proper subjective standard of care. Presenting evidence about inadequate precautions adds to the cost of the litigation. Transaction cost economics overlooks the existence of asymmetric information. Because people privately observe the costs incurred in taking precautions and avoiding accidents, private information asymmetries develop. Thus a finding of civil responsibility for *damnum iniuria datum* under *culpa* (negligence) publicizes private information regarding cost effective precautions and fixes standards of care in different cases. For example, someone trimming and pruning a tree who risks dropping heavy branches onto a public walkway and fails to shout a warning is responsible for killing the slave passing by—“*si is in publicum decidat nec ille proclamavit*”²⁵⁹ (“where he threw down the object in a public place, and did not give warning”).²⁶⁰ A farmer who chooses a windy day to burn thorny trees and grass is responsible for the damage to his neighbor’s crops—“*si die uentoso id fecit, culpae*

255. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970).

256. See Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 13 (1996) (arguing that private actions in tort work better than state prosecution).

257. BERGER, *supra* note 33, at 548.

258. See EPSTEIN, *TORTS* 85, 89–107 (1999) (describing the choice between strict liability and negligence as a debate without conclusion in the literature).

259. DIG. 9.2.31 (Paulus, Ad Sabinum 10).

260. *Id.*, translated in 3 THE CIVIL LAW 338 (S.P. Scott ed. & trans., 1932).

reus est”²⁶¹ (“if he did this on a windy day, he is guilty of negligence”).²⁶² Asymmetric information explains why Roman lawyers moved away from objective responsibility and toward defining explicit subjective standards of care in specific cases. The later Roman juristic literature on *culpa*, thus, publicized the comparative costs of taking specific precautions, while the earlier no-fault system of responsibility neither inquired into, nor made public, this private information.²⁶³

C. Roman Law of Commerce and Finance

Roman private law works because it supports the marketplace. At the beginning of the twenty-first century, even conservative political pundits decried the excesses of unregulated capitalism (i.e., the “free market”).²⁶⁴ These commentators generally assumed that public law, in the guise of a regulatory regime which oversees market participants, must exist alongside market institutions.²⁶⁵ At the same time, mechanism design theory represents a powerful new paradigm.²⁶⁶ A very able—perhaps incipient—line of law and economics scholarship, at last, is poised to show exactly how private law, as opposed to public regulation, supports, supplements, and corrects markets. Accordingly, talking about the vicissitudes of savage capitalism is naïve. Markets never go unregulated. As the Roman system shows, private law, rather than public law, is able to vitally support, supplement, and correct market institutions.

The marketplace intermediates between supply and demand through the price mechanism.²⁶⁷ Rather than depending on the centralized control of a public authority, the price mechanism relies on the decentralized decisions made by countless private actors.²⁶⁸ Economists tend to assume

261. DIG. 9.2.30.3 (Paulus, Ad Edictum 22).

262. *Id.*, translated in 3 THE CIVIL LAW 338 (S.P. Scott ed. & trans., 1932).

263. The Roman jurists wrote commentaries on the edict and the civil law. See ALAN WATSON, THE SPIRIT OF THE ROMAN LAW 57–63 (1995).

264. Even Judge Richard Posner has entered the fray with two recent books. See, e.g., RICHARD POSNER, THE FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009); see also RICHARD POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010) (describing how insufficient public regulatory oversight led to the crisis).

265. *Id.* Judge Posner is mistaken. The solution to the global financial crisis of 2008, and the market problems we face in the twenty-first century, is to improve private legal institutions, rather than increased regulatory oversight.

266. See discussion of law and economics *supra* Section I.

267. JOHN BLACK, A DICTIONARY OF ECONOMICS 353 (Oxford 1997).

268. Market participants adjust prices or quantity up when faced with excess demand, and prices or quantity down as a response to excess supply. At equilibrium, the price mechanism produces a market-clearing price, at which the quantity demanded

that markets clear effortlessly.²⁶⁹ However, law and economics scholars know better.²⁷⁰ For markets to clear, intermediaries must make markets. Market makers are brokers who manage inventories of commercial and financial assets across space and time. They are able to buy where and when people want to sell, and sell where and when people want to buy.²⁷¹

Roman private law supports the making of markets through the laws of property and obligations. Moreover, Roman commercial and financial legal norms allow principals to reduce agency costs either by aligning their agents' interests with their own, or by monitoring their agents.²⁷² Principals accrue monitoring costs in order to keep agents from hiding their actions.²⁷³ When a creditor hands over money to a debtor, many of the actions of the debtor are unobservable by the creditor.²⁷⁴ As a result, creditors risk the potential loss of their money.²⁷⁵ In order to support financial intermediation, as briefly mentioned in Section II.A, the Roman law of property includes standardized forms of security interests in another's property such as *fiducia cum creditore contracta* (trust concluded with a creditor), *datio pignoris* (giving a pledge) and *pignus conuentum* (agreed upon pledge), discussed in Section II.C.²⁷⁶ Law and economics literature clarifies that the collateral pledged must be more valuable to the debtor than to a creditor in order to align their interests.²⁷⁷ However,

equals the quantity supplied. See DONALD RUTHERFORD, *ROUTLEDGE DICTIONARY OF ECONOMICS* 152 (1992). In this sense, the market clears.

269. See Kenneth J. Arrow & Gerard Debreu, *Existence of Equilibrium for a Competitive Economy*, 22 *ECONOMETRICA* 265 (1954) (formalizing the assumptions of general market equilibrium).

270. Instead, law and economics scholarship pays close attention to instances of market failure, see, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 44–47 (4th ed. 2004) (describing areas of market failure).

271. Market intermediaries buy and sell with a spread between the asking price and the bid price. The “bid/ask spread” is the market maker’s profit margin. See NARAVAN DIXIT, *ACADEMIC DICTIONARY OF ECONOMICS* 21–22 (Isha Books 2005).

272. The principal-agent problem arises because the agents, instead of acting and making decisions for the benefit of the principal, do so for their own benefit and contrary to the interests of the principal, where the principal is unable to observe the actions of the agents. See GRAHAM BANNOCK ET AL., *DICTIONARY OF ECONOMICS* 307 (4th ed., 2004).

273. *Id.*

274. RUTHERFORD, *supra* note 268, at 323 (defining lender’s risk).

275. *Id.*

276. See SCHULZ, *supra* note 45, at 401–27.

277. George G. Triantis, *Secured Debt Under Conditions of Imperfect Information*, 21 *J. LEGAL STUD.* 246 (1992) (explaining that secured lending allows the creditor to hold the debtor’s assets hostage); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 *AM. ECON. REV.* 519 (1983); ten years earlier, Thomas H. Jackson & Anthony T. Kronman were close to the answer, but failed to explain how

debtors are less able to give up possession of valuable collateral. The *pignus conuentum* is especially useful because a debtor pledges property without delivering possession of the collateral. Moreover, the Roman law of obligations enables people to enter into an arrangement of *fideiussio* (surety)²⁷⁸ through a *stipulatio* with the verbal form,²⁷⁹ “*Quod mihi debet, id fide tua esse iubes? Fideiubeo*”²⁸⁰ (“Do you guarantee the same? I guarantee”).²⁸¹ Law and economics literature clarifies that a surety commonly has an ongoing relationship with the principle debtor, or is better able to observe the actions of the debtor.²⁸² Accordingly, by stipulating to an obligation accessory to that of the debtor, the surety effectively lowers the creditor’s monitoring costs and the debtor’s capital costs.²⁸³

Moreover, as discussed earlier, the typical Roman consensual and real standard contractual forms greatly facilitate commerce and finance. *Depositum in sequestre* (deposit with one who stands aside) is particularly useful for usiness transactions or disputes.²⁸⁴ Pending the outcome of a controversy or the satisfaction of a condition, several parties deposit a thing with a *sequester* (“escrow agent” in the common law) for safekeeping.²⁸⁵ Once the controversy is resolved or the condition is met, the sequester must return whatever the parties deposited to the prevailing party or to the party stipulated.

The Romans also used the verbal contractual form of the *stipulatio* with a *pactum fiduciae* (agreement based on trust)²⁸⁶ to make a *donatio sub modo* (donation subject to a limitation).²⁸⁷ As part of a *donatio inter vivos* (donation between the living),²⁸⁸ the donor imposes an obligation on the donee to do something or to make a distribution of funds.²⁸⁹ The usefulness of a *donatio sub modo* is that the donor can stipulate almost anything he wants, and attach a *stipulatio poenae* (discussed below in Section IV) to guarantee that the donee will carry

collateral reduces the cost of monitoring the debtor, *see* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1150–61 (1979) (describing the economic basis for secured financing).

278. BERGER, *supra* note 33, at 350.

279. SCHULZ, *supra* note 45, at 499–502.

280. G. INST. 3.116.

281. *Id.*, translated in 1 THE CIVIL LAW 116 (S.P. Scott ed. & trans., 1932).

282. Avery Wiener Katz, *An Economic Analysis of the Guaranty Contract*, 66 U. CHI. L. REV. 47 (1999).

283. *Id.*

284. ZIMMERMANN, *supra* note 13, at 219–20.

285. DIG. 6.3.6 (Paulus, Ad Edictum 2); DIG. 16.3.17 (Florentinus, Institutionum 7).

286. BERGER, *supra* note 33, at 471.

287. *Id.* at 443.

288. *Id.*

289. COD. JUST. 8.55 (Philippus 249).

out the obligations. If the donee fails to carry out the charge, the *donatio* is revocable.²⁹⁰

A variant of the verbal contract form useful in commercial and financial transactions is the literal contract form. Roman lawyers recognized that some kinds of written records of business transactions created enforceable obligations. Mere annotations made in a *codex expensi et accepti* (cash-book)²⁹¹ fail to create obligations—“*nuda ratio non facit aliquem debitorem*”²⁹² (“a simple statement in an account does not render anyone a debtor”).²⁹³ For example, a *ratio mensae* (banking deposit),²⁹⁴ or a *pecunia faenerare* (banking loan)²⁹⁵ becomes binding only after money is handed over, as in the real contracts.

Further, Roman lawyers standardized various types of banking transactions. Banking transactions typically included interest without the need to enter into a *stipulatio*. Charging *anatocismus coniunctus* (compound interest)²⁹⁶ was standard practice, at least during the Roman classical period.²⁹⁷ Moreover, bankers or *argentarii*, held auctions for their clients, devising bidding systems that would attract the highest and best bidder—“*melior autem condicio adferri uidetur, si pretio sit additum*”²⁹⁸ (“better terms are held to be offered where an addition is made to the price”),²⁹⁹ as well as issuing *receptum* (promise to pay another’s debt)³⁰⁰ through a letter to guarantee payments for clients.³⁰¹

Other non-specialized private Roman legal institutions related to commerce and finance also supported the market. Modern scholars fail to recognize that a Roman law of commerce and finance existed.³⁰² The reason for this may be because it was not a separate body of law—it was embedded in the basic Roman civil law.³⁰³ Modern legal systems separate

290. KASER, *supra* note 59, at 56.

291. BERGER, *supra* note 33, at 391.

292. DIG. 39.5.26 (Pomponius, Ad Quintum Mucium 4).

293. *Id.*, translated in 5 THE CIVIL LAW 31 (S.P. Scott ed. & trans., 1932).

294. BERGER, *supra* note 33, at 667.

295. *Id.* at 625.

296. *Id.* at 361.

297. See ZIMMERMANN, *supra* note 13, at 169 & n.87 (clarifying that Justinian prohibits the charging of compound interest).

298. DIG. 18.2.4 (Ulpianus, Ad Sabinum 28).

299. *Id.*, translated in 5 THE CIVIL LAW 26 (S.P. Scott ed. & trans., 1932).

300. BERGER, *supra* note 33, at 668.

301. DIG. 13.5.26 (Scaevola, Responsorum 1).

302. See JOHNSTON, *supra* note 13, at ix (1999) (arguing that Roman commercial law has slipped through the consciousness of historians).

303. See DEL GRANADO, *supra* note 3, at 333.

the body of commercial and financial law as a *lex specialis* from the *lex generalis* of the body of civil law.³⁰⁴ Roman private law was more congruent because it lacked this separation. The modern *ius mercatorum* developed during the Middle Ages between 500 and 1500 A.D.³⁰⁵

Similarly, many modern commentators fail to recognize that slavery was an economic institution.³⁰⁶ The law of slavery was an important component of the Roman law of commerce and finance. Roman law improved the efficiency of ancient slavery by improving slaves' incentives. Slavery is a highly inefficient and oppressive legal institution.³⁰⁷ By giving slaves the option to manage a *peculium* (fund, land, or business)³⁰⁸ or to buy their *manumissio* (release from power),³⁰⁹ Roman private law simultaneously rendered slavery more efficient and less oppressive.³¹⁰

As noted above, according to Roman law, property was held by the *paterfamilias* (father of a family).³¹¹ However, conducting every transaction on behalf of his *filiifamilias* (children under power)³¹² and slaves was difficult and time-consuming. Accordingly, Roman law allowed both *filiifamilias* and slaves to manage a *peculium*.³¹³ The *peculium* is the property of the *paterfamilias*.³¹⁴ However, self interest and social norms reinforced a social convention in Roman society requiring the *paterfamilias* to respect the *peculia* of both his *filiifamilias* and slaves.³¹⁵ This limit on the *paterfamilias* was in his best interest—without it, a *filiusfamilias* would be strongly motivated to commit patricide. Similarly, this limit on the *paterfamilias* better aligned the interests of the *paterfamilias* with his slaves'. Without any expectation of manumission, a slave would also lack the incentive to exert effort for the benefit of the *paterfamilias* or to share information with him. The Roman poet Vergil, conveying a slave's despair at his inability to save his way to freedom, said: "*nec*

304. See generally Jürgen Basedow, *The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703 (2008) (explaining that mercantile law fails to be state-bound).

305. See R. C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 84–85 (D.E.L. Johnston trans., 1992).

306. See DEL GRANADO, *supra* note 3, at 333.

307. See Richard A. Posner, *Ethical and Political Basis of Efficiency*, 8 HOFSTRA L. REV. 487, 501–02 (1980).

308. BERGER, *supra* note 33, at 624.

309. *Id.* at 575.

310. See generally ALAN WATSON, ROMAN SLAVE LAW 95 (1987).

311. BERGER, *supra* note 33, at 620.

312. SCHULZ, *supra* note 45, at 154.

313. *Id.* at 154.

314. *Id.*

315. See JOHNSTON, ROMAN LAW IN CONTEXT, *supra* note 13, at 100.

*spes libertatis erat nec cura peculī*³¹⁶ (“no hope of freedom, no thrift of savings”).³¹⁷

Roman law does have at least one overall shortcoming: it lacks a sufficient system of agency.³¹⁸ The Roman law consensual contract of *mandatus* is a form of indirect agency, but this is not a sufficient substitute for agency-proper.³¹⁹ The *mandatarius* is only able to act on his own behalf, even when he transacts business in the interest of another.³²⁰ However, the Romans were not entirely without agency law. Both *filiifamilias* and slaves were able to act on behalf of the *paterfamilias*.³²¹ While this is not a well-regarded solution today, the Roman empowerment of the *paterfamilias* over both slaves and *filiifamilias* does lower what modern scholars recognize as a ubiquitous and endemic inefficiency in modern society: agency costs. By simultaneously allowing slaves and *filiifamilias* to act for the *paterfamilias*, and giving the *paterfamilias* enormous power—even ownership—over his agents, Roman law went a long way in reducing agency costs.³²²

Roman law created incentive-compatible mechanisms for information revelation, thus supporting commercial and financial intermediation. The *peculium* introduced limited liability to Roman law.³²³ Both *filiifamilias* and slaves were able to manage a *peculium* independently.³²⁴ Roman law limited the liability of the *patrimonium* (owner’s equity)³²⁵ for obligations incurred by *filiifamilias* and slaves to the amount of the *peculium*.³²⁶ If either a *filiifamilias* or slave incurred a delictual obligation, the *paterfamilias* had the option to hand over his *filiifamilias* or slave in lieu of payment.³²⁷ In either case, the legal system limited the liability of the *sui iuris* (in his own power) to the *peculium*. The institution of

316. VERGIL, *Ecloga I* in ECLOGUES 43, l. 32 at 44 (Robert Coleman ed., 1977).

317. *Eclogue I*, THE ECLOGUES AND GEORGICS OF VIRGIL 4 (Longmans, Green, & Co. ed., J.W. MacKail trans., 1915) (1889).

318. See generally WATSON, ROMAN SLAVE LAW, *supra* note 310, at 107–08.

319. *Id.*

320. WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC, *supra* note 17, at 149.

321. See generally AARON KIRSCHENBAUM, SONS, SLAVES, AND FREEDMEN IN ROMAN COMMERCE 32–33 (1987).

322. The power of the business owner over his managers aligned their interests. See *id.* at 32–34.

323. See JOHNSTON, *supra* note 13, at 101.

324. *Id.* at 101.

325. BERGER, *supra* note 33, at 622.

326. See DIG. 15.1.3.11 (Ulpianus, Ad Edictum 29).

327. See generally KIRSCHENBAUM, *supra* note 321, at 17.

limited liability enabled people to separate ownership and control in the economy.³²⁸ Roman private law of commerce and finance aligned the incentives of both *paterfamilias* and *filiifamilias* or slaves inasmuch as the *peculium* was the separate interest of the *filiusfamilias* or slave, less the payments to the *patrimonium* for the cost of capital.

Roman private law of commerce and finance offered a flexible structure for business organizations. The Roman family operated effectively as a default sole-proprietorship limited-liability entity. The *peculium* of a *filiusfamilias* or slave included any *res in patrimonio nostro* (everything included in private ownership).³²⁹ Under Roman law, even *serui uicarii* (slaves held by other slaves) were deposited in their *peculium*.³³⁰ Accordingly, a *paterfamilias* was able, under Roman law, to set up a *taberna* or *officina* and put the business into the *peculium* of either a *filiusfamilias* or slave.³³¹ The variety of *tabernae* in the Roman economy ran all the way from *tabernae argentariae* (banks) to *tabernae deuersoriae* (inns); from *naues instructae* or *societates exercitorum* (fleets of ships) to *societates publicanorum* (companies for purposes of tax collection or public works); from *tabernae caseariae* (cheese factories), to *officinae lateribus*, (brick factories). The Roman poet Horace, describing such a workshop as a fiery hell, said: “*dum grauis Cyclopum Uulcanus ardens uisit officinas*”³³² (“Vulcan kindles the awful forge, in which the Cyclops toils”).³³³

Limited liability was the norm in Roman businesses or *negotiationes* (commercial or financial businesses)³³⁴ held in *peculia*.³³⁵ However, Roman law also allowed individuals to choose nonstandard terms in their business organization, thus waiving limited liability. For example, a *paterfamilias* who wished to opt out of limited liability could establish his unlimited liability by posting a sign in a visible place in the establishment, indicating that he runs the business under his own management.³³⁶

328. See generally A.A. BERLE & G.C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 4–6 (1932).

329. BERGER, *supra* note 33, at 677.

330. WATSON, *THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC*, *supra* note 17, at 189.

331. DIG. 14.4.1 (Ulpianus, Ad Edictum 29).

332. HORACE, *Odes 1.4 in ODES AND EPODES I*. 8 at 32 (Niall Rudd, ed. & trans., 2004).

333. *THE ODES AND EPODES OF HORACE: A METRICAL TRANSLATION INTO ENGLISH* 56 (E.B.L. Lytton trans., 1870).

334. BERGER, *supra* note 33, at 593.

335. JOHNSTON, *supra* note 13, at 101.

336. DIG. 14.3.11.3 (Ulpianus, Ad Edictum 28).

As mentioned above, incentivizing an optimum level of savings and investment requires markets.³³⁷ People fail to know what the future will bring and never know when they will need to sell and when they will need to buy.³³⁸ Accordingly, people will only save and invest in commercial and financial assets if market brokers make markets liquid enough so that people are able to buy and sell as needed.³³⁹ Moreover, participants are similarly unwilling to transact or make investments unless commercial or financial assets are accurately priced by the market.³⁴⁰ Market prices reflect accurate valuations of the utility and scarcity of assets when all material private information is publicized. In addition to the information revealing aspects of the law of property and the law of obligations, Roman private law includes uniquely commercial or financial legal norms to support information revelation.

The *uenaliciarii* (slave-dealers)³⁴¹ who frequented the slave market in Rome brokered equity capital markets. Slavery, as discussed above, lowered agency costs.³⁴² Slaves also constituted a form of living tradable shares in businesses. The sale of a slave who held a *taberna* or *officina* in his *peculium* was equivalent to selling the business. *Serui communis* (commonly-owned slaves)³⁴³ were used in conjunction with the consensual contractual form of *societas* to bring rationally ignorant investors together, without forfeiting the protection of limited liability.

The Aedilician regulation of the slave market addresses problems of asymmetric information that go beyond supplying a much-needed skilled labor force.³⁴⁴ The *aedile* (magistrate in charge of public works) required a *uenaliciarius* (and anyone selling a slave in the secondary market) to *pronuntianto in uenditione* (reveal at the moment of sale) any material private information affecting the valuation of the

337. Tibor Scitovsky, *The Benefits of Asymmetric Markets*, 4 J. ECON. PERSP. 135, 136, 142 (1990) (describing benefits of real-world markets).

338. Sanford J. Grossman & Merton H. Miller, *Liquidity and Market Structure*, 43 J. FIN. 617, 619, 620 (1988) (describing market intermediaries as filling gaps arising from imperfect synchronization).

339. *Id.* at 618.

340. GRAHAM BANNOCK et al., THE PENGUIN DICTIONARY OF ECONOMICS 47 (6th ed. 1998).

341. BERGER, *supra* note 33, at 759.

342. See WATSON, ROMAN SLAVE LAW, *supra* note 310, at 107.

343. BERGER, *supra* note 33, at 705.

344. See, e.g., J. A. CROOK, LAW AND LIFE OF ROME 181 (1967). See also Scitovsky, *supra* note 337, at 138 (stating that the division of labor in society means that sellers have more information about their products than do buyers).

slave. Moreover, the *aedile* established objective responsibility (“strict liability” under the common law) for the failure to divulge information or for any contradiction with a *dictum promissum* (express warranty) given.³⁴⁵ However, *nudam laudem* (mere puffery or laudation) of a slave (or business) was excused.³⁴⁶ In addition, Roman law allowed the buyer of a slave (or business) to institute legal proceedings against the majority shareowner or *cuius maior pars aut nulla minor est*³⁴⁷ of a *serui communis*.³⁴⁸ Law and economics literature explains that information revelation gives better protection to market makers than a system which *ex post* imposes a penalty on persons for trading with private information.³⁴⁹

III. SOCIAL NORMS COMPLETE PRIVATE ORDERING IN ROMAN PRIVATE LAW

Inert legal positivism has made a great brouhaha over the possibility of combining law and morality.³⁵⁰ The law and economics movement, however, demonstrates the usefulness of including morality in the law. Law and economics scholarship has only begun to explore this interaction.³⁵¹ Roman legal scholarship may help law and economics scholars better understand how social and legal norms interact.

The Roman system creates a competitive environment of bounded private domains within which both central planning and social norms can operate. Roman law removes public regulation from private spaces and replaces it with private initiative.³⁵²

The Roman law of property defines a domain where the *dominus* may act as he chooses (with the limits discussed above in Section I.A.2) and protects the possessor who acquired his possession *nec vi, nec clam, nec precario* (not by force, nor stealth, nor license).³⁵³ Within the boundaries of

345. DIG. 21.1.1.1 (Ulpianus, Ad Edictum aedilium curulium 1).

346. DIG. 21.1.19 (Ulpianus, Ad Edictum aedilium curulium 1).

347. DIG. 21.1.44.1 (Paulus, Ad Edictum aedilium curulium 2).

348. DIG. 21.1.44 (Paulus, Ad Edictum aedilium curulium 2).

349. See generally HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 86–90 (1966).

350. See generally JOHN AUSTIN, 1 LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (Robert Campbell ed., 5th ed. 1875). See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

351. Early explanations of the interaction between law and morality fail. See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997) (discussing the interaction between social and legal norms).

352. Our succession of “oohs” and “aaahs” over Roman private law have been shared by other scholars in the past. On the German Pandectists’s embrace of private-law ideology, see PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 121–23 (1999).

353. RUDOLPH SOHM, THE INSTITUTES OF ROMAN LAW § 54 at 254 (James Crawford Ledlie trans., 1892).

a *dominium* or of legally protected possession, private property holders or possessors are able to manage resources without any interference from others. Where social norms are more effective in private ordering, a property owner might allow these informal norms to operate within the domain that he controls.³⁵⁴

The Roman law of obligations includes gratuitous typical contracts, such as the consensual contract of *mandatum* and the real contracts of *depositum* and *commodatum*.³⁵⁵ Roman gratuitous contracts may seem odd from a modern vantage point. However, through these contracts, social norms such as *fides* (trustworthiness),³⁵⁶ *pietas* (dutifulness toward God, parents and relatives),³⁵⁷ *munificentia* (liberality),³⁵⁸ *grauitas* (dignity)³⁵⁹ and *amicitia* (friendship),³⁶⁰ alongside complex networks of patronage, operated to complete private ordering.³⁶¹ Thus, *mutuum* was a gratuitous loan when done to maintain friendly relations between neighbors. Otherwise, the parties would include a *stipulatio* to cover the interest due.³⁶²

Moreover, in classical Roman law, violations of quasi contractual obligations were publicly frowned upon, carrying the type of stigma reserved for criminal convictions in modern society.³⁶³ In addition to legal liability, the legal system imposed a reputational punishment, *infamia* (infamy).³⁶⁴ Such extra-contractual relationships presupposed honest behavior, and a condemnatory judgment for a betrayal of confidence attracted social censure and subjected the person to legal and procedural disabilities. Thus, the private enforcement of social norms acted to reinforce the efficacy of formal legal sanctions.

As we have seen in Section II.C., Roman law conflates together the family and the firm. Social norms govern Roman family life. Thus,

354. O. F. ROBINSON, *THE SOURCES OF ROMAN LAW: PROBLEMS AND METHODS FOR ANCIENT HISTORIANS* 89 (1997).

355. ALAN WATSON, *THE STATE, LAW, AND RELIGION: PAGAN ROME* 41 (1992).

356. BERGER, *supra* note 33, at 471.

357. *Id.* at 630.

358. CHARLTON T. LEWIS, *AN ELEMENTARY LATIN DICTIONARY* 52 (1915).

359. BERGER, *supra* note 33, at 483.

360. CHARLTON T. LEWIS, *AN ELEMENTARY LATIN DICTIONARY* 53 (1915).

361. *See* MOUSOURAKIS, *supra* note 216, at 45–47.

362. *See* WATSON, *THE SPIRIT OF THE ROMAN LAW*, *supra* note 263, at 130.

363. *See generally* PETER GARNSEY, *SOCIAL STATUS AND LEGAL PRIVILEGE IN THE ROMAN EMPIRE* (1970).

364. BERGER, *supra* note 33, at 500. *See generally* A. H. J. GREENIDGE, *INFAMIA: ITS PLACE IN ROMAN PUBLIC AND PRIVATE LAW* 18–40, 154–70 (1894).

a social convention in Roman society required the *paterfamilias* to respect the *peculia* of both his *filiifamilias* and slaves. Much of the area that modern law closely regulates through labor legislation, Roman law largely leaves to social norms.³⁶⁵ Under the Roman law of obligations, employment contracts are largely indistinguishable from other consensual contracts for hire.³⁶⁶

Roman law explicitly removes legal regulation from countless areas where the private enforcement of social norms is more effective than formal legal sanctions, such as enforcing promises to marry.³⁶⁷ Roman private law left an *obligatio naturalis* (moral obligation) to the internal moral compass found within every Roman and to the private enforcement of social norms. Accordingly, Roman legal scholarship offers law and economics scholars a rare and unique opportunity to take an up-close look at the interaction of legal and social norms in private ordering.

IV. PRIVATE SELF-HELP IN ROMAN LAW PROCEDURE

In Roman law, litigation before an *iudex* is considered a private contract, *litis contestatio* (bearing witness to an action).³⁶⁸ In order to litigate their claim or offer a defense, the parties must stipulate before the magistrate that they will abide by the *sententia* (sentence)³⁶⁹ of the *iudex*.³⁷⁰ The new contract novates the earlier obligation that formed the basis for their claims, defenses, or counterclaims—no matter what their nature.³⁷¹ After the *litis constitutio*, the pre-existing obligations cease to exist.³⁷² Accordingly, the Roman system of procedure under the control of the *praetor* is a private system of binding arbitration.³⁷³

Moreover, in Roman law, private parties are able to use self-help measures by executing *sententiae*. Beyond constituting means for the execution of *res iudicata* (a matter already judged),³⁷⁴ private self-help

365. Jürgen Habermas is disingenuous when he denies the private character of Roman law and makes bold to compare local understandings of Roman social norms with public law limitations. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 76 (Thomas Burger trans., 1992).

366. Habermas concedes as much. *Id.*

367. CODE JUST. 5.1 (Diocletan & Maximus 293).

368. BERGER, *supra* note 33, at 566.

369. *Id.* at 700.

370. GREENIDGE, *supra* note 208, at 243–48.

371. *Id.* at 248.

372. *Id.*

373. A defendant rarely refused to confirm or rebut a plaintiff's claim because he would be *iudicatus* (condemned). GREENIDGE, *supra* note 208, at 255.

374. BERGER, *supra* note 33, at 678.

measures provide a means to effectively bring a legal action.³⁷⁵ Any creditor whose claim was untrue, yet laid their hands on the debtor *manus iniectio* (touching the debtor's shoulder)³⁷⁶ or took property of the debtor in pledge, or *pignoris capio*, risked liability *in duplum* (in twice the amount).³⁷⁷ However, debtors who faced claims knowing they were true made arrangements for payment, through a *confessio in iure* (acknowledgment of plaintiffs claim)³⁷⁸ rather than proceeded before the *iudex*, as von Ihering explains.³⁷⁹ Accordingly, *manus iniectio* and *pignoris capio* are private self-help means of collection, able to work without the intervention of the curule authorities.³⁸⁰

If the debtor breaches an obligation, the *iudex* must assess the value of the performance to the creditor. However, establishing *quanti ea res est*³⁸¹ (what is the value of the thing)³⁸² can be difficult where an obligation is uncertain. Accordingly, Roman law allowed the parties to agree privately on the amount of damages, by entering into a *stipulatio poenae* (stipulation to pay a penalty).³⁸³ The long-winded ceremonial statements of the verbal contractual form publicized an enforceable unilateral obligation to pay a specified amount of damages for a breach of contract. Moreover, *stipulationes poenarum* were also a means to enforce immaterial interests that could not be reduced to a pecuniary amount.³⁸⁴ What Anglo-American scholars overlook, and a *stipulatio poenae* may capture, is that damages from disappointed expectations are often much greater than the amount of the obligation.³⁸⁵

Lastly, rather than prosecute certain public claims against private persons, the Roman state privatized tax and debt collection. *Publicani*

375. MOUSOURAKIS, *supra* note 216, at 137–39.

376. BERGER, *supra* note 33, at 577.

377. *Id.* at 406.

378. *Id.*

379. *See generally* VON JHERING, *supra* note 81.

380. *See* H. F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 165–66 (3d ed. 1972) (describing legalized self-help).

381. Dig. 13, 3, 4 (Gaius, Ad Edictum Provinciale 9).

382. BERGER, *supra* note 33, at 664.

383. BERGER, *supra* note 33, at 718.

384. ZIMMERMANN, *supra* note 13, at 97.

385. *See* Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Penales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code*, 32 BROOK. J. INT'L L. 67, 117 (2006).

(farmers of public revenue)³⁸⁶ could purchase these claims and use the private self-help measures discussed above to satisfy them.³⁸⁷

V. ROMAN LEGAL SCHOLARSHIP IN THE RESTATEMENT OF CIVIL LAW ALONG THE LINES OF LAW AND ECONOMICS

The Latin America-Caribbean region must grasp the nettle of globalization. To survive, each Latin American and Caribbean country needs a competitive economy. Many countries in the region liberalized and privatized their economies in the 1990s, forgetting that their legal systems had been socialized and constitutionalized during much of the twentieth century under the influence of French legal sociology.³⁸⁸ Latin American and Caribbean leaders are no longer the naïve backers of an earlier state-centered, earlier economic age. However, the new crop of technocrats remains unaware of the extraordinary transformation of the legal system that must precede privatization of inefficient state enterprises.

The way that civil law scholars organize the texts of Roman law (or Pandects) is called the “system of Pandects.” The economic analysis of Roman law suggests a new *Pandektensystem* within the civil law tradition. Rather than classifying legal institutions along the lines of “persons,” “property,” and “actions,” a law and economics approach suggests a new arrangement of Roman law. Civil and commercial law must be brought together. The centuries-old civil law category of “modes of acquiring property” should be replaced with a new category of “modes of maintaining property.” Moreover, the “modes of maintaining property” should be moved to the book on “property.” New standardized forms of rights in the property of others, such as private mineral rights and industrial property rights, must be added to the book on “property.” New standardized contractual forms, such as “insurance” and “annuity” contracts, must be added to the book on “actions.” Law and economics suggests the expansion of the Roman system of subsidiary quasi-contractual or relational obligations, undergirded by the principle of *bona fides*.³⁸⁹ Law and economics suggests the “depenalization” (“decriminalization” in common law) of the legal system and the expansion of the Roman system of civil delicts, including the intentional delicts

386. BERGER, *supra* note 33, at 661.

387. See HILARY SWAIN & MARK EVERSON DAVIES, ASPECTS OF ROMAN HISTORY, 82 BC-AD 14: A SOURCE-BASED APPROACH 363 (2010).

388. See generally Martin A. Rogoff, *The Individual, the Community, the State, and Law: The Contemporary Relevance of the Legal Philosophy of Léon Duguit*, 7 COLUM. J. EUR. L. 477 (2001) (reviewing LÉON DUGUIT, L'ÉTAT: LE DROIT OBJECTIF ET LA LOI POSITIVE (1901)).

389. *Id.*

which have all but disappeared from civil law.³⁹⁰ Titles on “commercial and financial intermediation” must be added to complement the book on “actions.”

Most fundamentally, a book on the law of “civil procedure” must be brought back into the civil code. The nineteenth century codifications of civil law placed “civil procedure” in the hands of the state and professional judges. Thus, Napoleon, in an effort to excoriate the excesses of the French Revolution,³⁹¹ promulgated all matters relating to civil procedure as a separate code, the “Code of Civil Procedure.”³⁹² Bringing procedural law back into the realm of private civil law (privatizing legal procedure) is the most effective way to improve the legal systems of the Latin America-Caribbean region. Separate nineteenth century codes for civil procedure must be reintegrated into civil law. Modern Latin American and Caribbean legal systems could incorporate privatized procedural law through the reintroduction of Roman type arbitration proceedings.

Here are some other points to keep in mind: Roman law lacks labor law. Employment contracts are at will—they are treated like any other consensual contract for *locatio conductio* (let hire).³⁹³ Roman law lacks consumer protection law, other than incentive-compatible mechanisms for information revelation.³⁹⁴ When the emperors intruded into the legal system, private law created new forms to escape the public law’s most severe restrictions, such as in the shift from *fidepromissio* (pledging faith)³⁹⁵ to *fideiusso* (giving faith).³⁹⁶ Roman law lacks antitrust law. Antitrust law seeks to promote competition through state intervention. That is quite a paradox, considering that most limits on competition are created by state intervention. Roman law lacks regulatory law. Roman *iuris prudentes* favored letting markets self-regulate against the background of an effective system of private law. Because Roman private law

390. See generally ALEJANDRO GUZMAN BRITO, *LA CODIFICACION CIVIL EN IBEROAMERICA* (2000).

391. The French revolutionaries had sought for a brief, magically elusive moment, to move away from public adjudication toward private dispute resolution. See Alain Wijffels, *French Civil Procedure (1806–1975)*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 26 (C.H. van Rhee ed., 2005).

392. *Id.* at 25.

393. BERGER, *supra* note 33, at 567.

394. See Bruce W. Frier, *Tenant Remedies for Unsuitable Conditions Arising after Entry*, in *STUDIES IN ROMAN LAW: IN MEMORY OF A. ARTHUR SCHILLER* 64–79, 73 (Roger S. Bagnall & William V. Harris eds., 1986).

395. BERGER, *supra* note 33, at 350.

396. ZIMMERMANN, *supra* note 13, at 121.

enabled the private sector to decentralize the management of resources effectively, the Roman economy of the second century B.C. achieved levels of prosperity that remained unparalleled until the late eighteenth century A.D. with the beginning of the Industrial Revolution.

Roman law controlled external effects from within property law itself. In contrast, both common law and modern civil law uses non-property doctrines to limit property rights. In the early twentieth century, French legal scholars interpreted a newly discovered Roman text by the jurist Gaius about the mistreatment of slaves which suggested that a property holder may not use his rights with *dolus* or the intention to do harm to another—“*male enim nostro iure uti non debemus*”³⁹⁷ (“we should not make a bad use of our rights”).³⁹⁸ Civil law must avoid the use of non-property doctrines to avoid external effects that would destroy the value of property.

Moreover, in the early twentieth century, French legal sociology undermined the well-worn concept of the *ius commune* of private subjective rights.³⁹⁹ French and German legal authors attempted to objectify the concept of private rights as a “social function” of property—contracts or companies, provisionally given to private persons to manage, with a hesitation ready to blossom into outright distrust under the ever-watchful eye of the state. Private law must leave to owners all choices (allowed under the law) with respect to the use, enjoyment, and disposition of things within private domains. Private choices to cooperate within what the law allows must be left to the private contracting parties.

Contractual rigidity is another modern problem with a Roman solution. Standardized contractual forms are insufficient for the variety of private choices to cooperate. Therefore, social cooperation is hampered unless people are empowered to form nonstandard atypical contracts. Atypical contracts in Roman law take the verbal contractual form of *stipulatio* with ceremonial trappings. This alternative means of contracting has survived into modern civil law in the form of notarial instruments. However, modern civil law misses the atypical character of stipulated notarial instruments. Therefore, the civil law system has lost the flexibility that the Roman *stipulatio* gave to contractual parties. The legal scholarship from the *ius commune* makes atypical contracts enforceable through the doctrine of *consideration*. The commentator Bartolus misreads a text that mentions that a *stipulatio* has a reason or *causa* (consideration) to mean that atypical contracts with a *causa* are enforceable even without

397. G. INST. 1.53.

398. See generally LOUIS JOSSEAND, DE L'ABUS DES DROITS (1905).

399. See generally M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191 (2010).

the ceremonial trappings of the *stipulatio*.⁴⁰⁰ Although atypical contracts are enforceable in theory, in practice, modern notary publics often attempt to make atypical agreements fall into one of the typical standard contractual forms. All too often, notary publics rewrite contracts along typical standardized lines. A better alternative would be to follow the practice of Roman *tabelliones*. *Tabelliones* publicized the atypical obligations that contractual parties stipulated, without changing the terms of the agreements.⁴⁰¹ An example of where modern civil law has lost the flexibility of the *stipulatio* is the *pactum fiduciae* to make a *donatio sub modo*. In civil law jurisdictions today, trust-like relationships—where they exist—straitjacket contractual parties with standardized commercial contracts that are too rigid, if not utterly inflexible.

The civil law and the common law are fairly equal in their protection and enhancement of freedom of contract. However, the common law consists of a unique system of quasi-contractual or relational obligations. The development of the *ius honorarium*, under which the *praetor* formulated the principle of *bona fides*, parallels the historical development of equity in common law systems.⁴⁰² In equity, the chancery courts established quasi-contractual or relational obligations in the form of “fiduciary duties.” Latin American civil law needs to go further in this direction. One way to do this is by following the model of German civil law in its expansion of the principle of *bona fides*.⁴⁰³ This expanded *bona fides* accomplishes many of the same tasks that fiduciary duties carry out in the common law.⁴⁰⁴ Unfortunately, German civil law has expanded the meaning of *bona fides* to the point where it abridges the freedom to contract.⁴⁰⁵ The *Fallgruppen* (case-study groups) where the principle of *bona fides* applies are too broad.

400. BARTOLUS, DIGESTI NOVI PARTEM COMMENTARIA (1544), on DIG. 44.4.2.(a).3 (Ulpianus, Ad legem Iuliam et Papiam 19).

401. BERGER, *supra* note 33, at 727–28.

402. *See generally* BUCKLAND, *supra* note 203.

403. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBl. I] 42, 2909, *amended* by the statute of Sept. 28, 2009, BGBl. I at 3161, §§ 138, 157, 242, 826 (Ger.), *translated in German Civil Code, GESETZE IM INTERNET* (2010), http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000G1.

404. *See generally* FRANZ WIEACKER, ZUR RECHTSTHEORETISCHE PRÄZISIERUNG DES § 242 (1956).

405. Simon Whittaker & Reinhard Zimmermann, *Coming to Terms with Good Faith, in GOOD FAITH IN EUROPEAN CONTRACT LAW* 690 (Simon Whittaker & Reinhard Zimmermann eds., 2000).

By far, the greatest danger facing Latin American law today is the German tradition of constitutionalization of private law—the so-called doctrine of *mittelbare Drittwirkung* of fundamental rights in private law, made possible through the *Generalklauseln* that require the observance of *bona fides* in the German Civil Code.⁴⁰⁶ German law stretches the principle of *bona fides* by giving judges the counter-productive ability to interfere with private choices regarding the substance of contracts.⁴⁰⁷ In this regard, perhaps French civil law is a better model for Latin America because it has been less prone to deny freedom of contract.⁴⁰⁸

Addressing the problems of Latin America's legal systems is an exquisitely difficult balancing act, one legal scholars have shown to be ill-equipped to handle in the past. But handle it they must. In short, Roman law combined with law and economics are particularly reliable guideposts to the paradigmatic private legal system of the twenty-first century.

406. See generally HANS CARL NIPPERDEY *GRUNDRECHTE UND PRIVATRECHT* (1961).

407. *Id.*

408. *Id.*