

THE GENIUS OF ROMAN LAW FROM A LAW AND ECONOMICS PERSPECTIVE

By

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1. What makes Roman law so admirable?

Law and economics aids us in understanding why Roman law is still worthy of admiration and emulation, what constitutes the “genius” of Roman law.

For purposes of this paper, “Roman law” means the legal system of the Roman classical period, from about 300 B.C. to about 300 A.D. I will not attempt the tiresome job of being or trying to be a legal historian in this paper. In the manner of German pandect science, let us stipulate that I may arbitrarily choose certain parts of Roman law as being especially noteworthy to the design of an ideal private law system. This paper discusses legal scholarship from the *ius commune*. It will also discuss a few Greek philosophical ideas which I believe are important in the Roman legal system. Finally, the “ideal” system based on Roman law will be compared to modern French and German civil law.

I argue that the admirable character of Roman law is its quality as an (almost) paradigmatic private law system. Understanding how a system of private law works is relevant for economic liberalization. My discussion of Roman law illustrates how private law aligns incentives for people to (1) exert efforts and (2) share information. Roman private law also enables people, who face resource constraints and incentive constraints, to act (1) in their own interest and, when efficient, to act (2) in the interest of others. Without the law of obligations, people cannot credibly be expected to act in the interest of others.

Moreover, this paper argues that without the law of property people will even fail to act in their own interest.

This paper demonstrates that what is admirable about Roman private law is its quality as a mechanism of communication that allows people to decentralize the management of resources. Roman private law makes possible a decentralized social order and the market, without mediation by public law. German civil law recognizes the private *Rechtsordnung* as a subsidiary source of legal authority (Berkowitz 2005.) Yet civil law scholars are unable to say precisely what is the private legal order. Law and economics may provide the answers.

The paper is organized as follows: The second part of this paper discusses the Roman private law of property, of obligations and of commerce and finance. The third part of this paper discusses private procedural aspects of the Roman legal system. The fourth and final part of this paper suggests how law and economics can help civilian legal scholars in Latin America reorganize the system of pandects in restating civil law for the 21st century.

2. Asymmetric information and *numerus clausus* in Roman private law

In this part of paper I discuss how Roman private law makes private effort, private cooperation and private commercial and financial intermediation possible and credible.

2.1 Roman law of property

2.1.1 Clearly defined private domains

Law and economics literature emphasizes the importance of clearly defined property rights. Yet the literature fails to discuss how the law of property defines these rights. People have private information about their control over things they possess in fact. Property rights make this information public.

Roman law uses the principle of *numerus clausus* to define property rights. Roman lawyers conceive of property in a “closed number” of typical forms. Roman civil law recognizes property *ex iure Quiritum* and Roman Praetorian law recognizes property *in bonis habere*. With the promulgation of the Constitutio Antoniniana in 212 A.D., which extended Roman citizenship to all of the inhabitants of the Empire, these typical forms of property became unified. By the end of the classical period, the terms *mancipium*, *dominium* and *proprietas* were used interchangeably to denote Roman typical property.

While Roman typical property consists of bundle of rights, Roman lawyers also conceive of unbundled property rights in a “closed number” of typical forms. These *iura in re aliena* are limited to *seruitutes praediorum*, *usus fructus* and *usus et habitatio*. I discuss security interests in another’s property such as *fiducia cum creditore contracta*, *datio pignoris* and *pignus conuentum* in section 2.3.

In *seruitutes praediorum* the rights of exclusion are partly unbundled from the property; to which they refer; instead they are 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. This interpretation echoes the modern insights of the law and economics movement, but it is consistent with the Roman conception that such a right-of-way gives no one any positive right to perform an act, which would have clearly had to be established as a personal right under the law of obligations (Inst. 8.1.15); simply a negative right to avoid interference with an act. Accordingly, *seruitutes praediorum* are not personal assets (Dig. 33.2.1.,) but instead run with the dominant property to which these rights become tied. Moreover, Roman lawyers recognize that *seruitutes praediorum* might exist only to the extent that they prove useful to the dominant property.

In *usus fructus* the rights of use and of enjoyment of fruits are partly unbundled from another’s property, and given to one. A limited case is *usus et habitatio*, in which one is given unbundled rights of use over another’s property. Roman lawyers did not recognize the inverse case. They accepted that no one was able to enjoy the fruits of a domain if he was not entitled to use that domain, “*fructus quidem sine usu esse non potest*” (Dig. 7.8.14.) After the rights of use and of enjoyment of fruits are unbundled, the remaining property becomes an empty shell, *nuda proprietas*. The property holder retains the rights of disposition. He remains entitled to alienate or encumber his property as long as he does not affect the usufructuary, and he is entitled to enjoy the fruits not collected by the usufructuary and retains the right to monitor the use of his property by the usufructuary. As a result, Roman law limits the life of an *usus fructus* to the life of the usufructuary as well as to non-fungible things, and prevents the usufructuary from altering the economic destination of the thing.

The forms discussed above are all-inclusive. Roman private law only accepts a “closed number” of typical forms of property bundles or of unbundled property rights. The principle of *numerus clausus* in the Roman law of property allows everyone in society easily to understand what rights the legal system gives to any property holder. Legally speaking, one property is like another property, is like any other property. Accordingly, people rationally expect that their experience with the property rights the legal system defines for one thing, will hold for another thing, will hold for any other thing.

Roman law avoids the piecemeal approach that would create distinctive and separate property regimes for, say, *res mobiles* and *res immobiles*. Roman law recognizes the differences between these kinds of things. This distinction becomes especially important after the difference between *res Mancipii* and *res nec Mancipii* loses relevance with the promulgation of the *Constitutio Antoniniana*. However, under the principle of *numerus clausus*, Roman law approaches all property in the same way.

Moreover, each piece of real property has boundaries that are clearly defined by the legal system. The German scholar von Ihering (1968b, bk. 1 ch. 1.) offers a folk etymology for ‘Quirites,’ relating the term to the Sabine warriors who carried lances with which property was staked out in a way that everyone could see. Roman surveyors were masters at squaring off property with *terminationes* as visible markers. The glossator Accursius formulated another boundary principle by providing an easily-grasped image. In his explication of a Roman text discussing that the space above a property surface must be left unhindered, he wrote (1969, on Dig. 18.2.1.) that 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.*”

Moreover, Roman lawyers recognized that many movable things have their own boundaries. Corporeal things have bodies that we can see, touch and hold, “*quae tangi possunt*” (Gai. Inst. 2.13.; 2.14.) Roman lawyers understood that many things are contained in themselves, “*quod continetur uno spiritu*” or composed of several things attached to one another, “*pluribus inter se coherentibus constat*” (Dig. 41.3.30.) and in some cases are indivisible, “*quae sine interitu diuidi non possunt*” (Dig. 6.1.35.3.) such as animals that would die or jewels that would lose their value if they were partitioned.

Through the use of typical forms and clearly defined boundaries, Roman private law reduces asymmetries of information between property holders and everyone else. The private legal system minimizes the amount of information that people need to know in order to recognize the property of others and to understand their own property. The legal system still has to solve the problem of clearly defining which property belongs to what property holder. A system of private law must also make this information public. Roman law has a unique solution for this problem as well.

The modern registration systems which record which property belongs to what property holder make this information public. Most legal systems in the world use a registration system for valuable property. A registration system, however, is too costly to require for every type of property. Given the agricultural base of Rome’s thriving economy, *res Mancipii* such as land, beasts

of draught and burden, *seruitutes praediorum* for conveying water for irrigation purposes, and slaves (Ep. Ulp. 19.1.) were valuable property. To perform the functions now embedded in registration systems, Roman lawyers developed a solemn and elaborate ceremony involving bronze and scales (Gai. Inst. 1.119.) for the private conveyance of *res mancipi*; the memorable ceremony of *mancipatio* created publicly available information about the change in the property's ownership. Alternatively, Roman law allowed substitution of a public declaration and confirmation before the praetor, *in iure cessio*. For other property, Roman law relied on collective memory and, ultimately, possession to publicize the identity of the property holder.

Since rights in possessory property were difficult to prove, Roman private law protects both property and possession, as von Ihering (1968a) famously explains. A property owner has a right on the basis of which he may claim the protection of the legal system. A possessor in fact has no such right on which to base his claim. Nonetheless, in Roman law, *rei vindicatio* and *actiones ad exhibendum et negativa* protect property right holders and *interdicta retinendae et recuperandae possessionis* protect possessors. The Roman legal system protects both property right holders and possessors in fact in order to align their interests with the development and maintenance of the resources under their domain or in their possession.

2.1.2 Private management of resources

The social norms movement makes a great brouhaha over the possibility of combining law and morality (see Cooter 1997.) The law and economics movement, however, demonstrated its usefulness. No speculation is required to recognize that private law creates bounded domains within which both central planning (Coase 1937) and social norms can operate within a competitive environment. The Roman law of property, by defining a domain where the *dominus* may act as he chooses (with the limits discussed below,) and protecting the possessor, whom acquired his possession not by force, nor stealth, nor licence, *nec vi, nec clam, nec precario*, removes public regulation from private spaces and replaces it with private initiative. Within the boundaries of a *dominium* or legally protected possession, the property holder or the possessor is able to manage resources without any interference from others.

Roman law does not stipulate what a holder may do or not do with his property. That choice is left to the *arbitrium* of the property holder. Property generally includes an ample range of faculties, uses, attributions and possibilities, such as the rights of use, rights of enjoyment of fruits, rights of disposition, and rights of exclusion. The property holder chooses what to do with his property. In Roman law, property is not held by the individual as in

modern law. Property is held by the family unit, or more correctly speaking, by the head of that family. The *paterfamilias* is discussed later in section 2.3.

Roman law cunningly and wisely leaves unstipulated what a holder may do or not do with his property, but stops short of conferring absolute rights to property holders (see Mattei 1997, pp. 27-67.) If the legal system conferred absolute rights, without taking account of external effects, the use that others give to their property might destroy the value that property has for one. As a result, property rights would lose their value, as von Ihering (1968a) notably explains. Accordingly, Roman law establishes limits that control external effects derived from the use of property. For example, a property holder in an apartment-block may not operate a cheese factory, *taberna casearia*, that causes nauseating odors for the neighbors above unless he acquires a *servitus*, or he may not flood the property of the neighbors below (Dig. 8.5.8.5.) Within these limits, Roman law leaves the choice of use of property to the property holder.

Roman law ties property together by using a Gordian knot of wide-ranging typical rights which cannot be separated out of the bundle. Ideally, this bundle of property rights is tied to a single property holder. Roman private law abhors situations of *communio*. Property consists of a typical bundle of rights over a domain given to a single property holder. Roman lawyers understood that all of these rights are largely complementary to one another. Property loses its efficacy if these rights are unbundled, or if they are scattered among several joint property holders.

The tragedy of the commons is a generalized form of a prisoners' dilemma with many players, where the dominant strategy of each player is not to cooperate (here many people, who lack any coordination between themselves, fail to take care for the maintenance of the resource) by which an open access resource is condemned to overexploitation and disappearance. Demsetz (1967) brought this analysis into law and economics literature. The flip side of this analysis is brought up in the literature by Heller (1998.) The tragedy of the anti-commons is a generalized form of a prisoners' dilemma with many players, where the dominant strategy of each player again is not to cooperate (here many property holders, who lack any coordination between themselves, raise the price of the resource excessively) by which a jointly-held resource is condemned to underuse.

The word "tragedy" here has the sense 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 (1968) Malthusian article attributes the idea to an obscure 19th-century mathematical amateur. The insight behind it goes back to Greek philosophy. Aristotle refutes Plato's community of property by explaining (1988, bk. 2) that what is common to everyone no one will take

care of, “ἥχιστα γὰρ ἐπιμελείας τυγχάνει τό πλείστων κοινόν.” From this passage in Aristotle, the tragedy of the commons became a Roman law trope. Fernando Vázquez de Menchaca (1934) fully develops the analysis of the tragedy of the commons in his 16th-century treatise on the Roman law of property, from which Hugo Grotius (1950) takes the analysis without supplying any additional insights.

Roman typical property solves both prisoners’ dilemmas by removing the need for coordination within a domain. Roman law gives a single property holder a bundle of rights with respect to a thing, opposable to the whole world. The property holder is entitled to use, enjoy and dispose of the thing owned, at his choice; as well as to exclude others from the use, enjoyment or disposition of the thing owned. The property holder internalizes the external benefits and costs from the use, enjoyment or disposition of the thing owned (and his incentives are aligned with the care and maintenance of the resource) because he is able to put a price on the rights involved; his ability to price is the result of his power to exclude others from using, enjoying or disposing of the thing owned.

The *dominus proprietarius* is the residual claimant of the resources managed in the domain. With unbundled property rights such as *usus fructus*, on the other hand, the *dominus usus fructus* fails to be the residual claimant of the property. Since the incentives of the usufructuary are not perfectly aligned, in the indefinite long-term, with the management of the resources in the domain, Roman private law requires the posting of a bond, the *cautio usufructuaria*, in guarantee of 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*” (Dig. 7.17.19.1.) Roman private law requires the *dominus usus* to post the *cautio usuaria* for the same reason.

An Edgeworth box graphically represents how people can benefit from exchange. Goods have both a use value and an exchange value. Yet the analysis again goes back to Greek philosophy. People will not enter into exchanges if they have like things. How, then, can people find an equivalence between unlike things to make an equal exchange? Aristotle (1998 bk. 5) observes that a voluntary exchange is equivalent even if it is not equal, “κατ’ ἀναλογία μὴ κατ’ ἰσότητα.” However, a voluntary exchange requires more than mere possession in fact; it requires property rights. 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.

To provide for proper management of resources, Roman law incorporates institutional mechanisms that maintain typical property through time, as a well-defined bundle of rights over a domain tied to a single holder. These methods of maintaining property are *accessio*, *novam speciem facere* and *confusio uel commixtio* as well as *usucapio* and *longi temporis praescriptio*.

Legal doctrine in civil law jurisdictions generally refers to these Roman legal institutions as methods of acquiring property. (Note that law and economics has suggested an improvement in the system of pandects. The legal institutions of *accessio*, *novam speciem facere* and *confusio uel commixtio* as well as *usucapio* and *longi temporis praescriptio*, more properly speaking, are methods of maintaining Roman typical property.)

Through time, both people and things undergo changes. Through time, the attachments between things change. Roman private law avoids a situation of *communio* between joint property holders whenever possible. In *accessio*, one's thing becomes combined with, or incorporated into, another's thing. Instead of establishing *communio* between joint property holders, Roman private law subjects the accessory thing to the *dominium* of the property holder of the principal thing. Thus, he acquires the accretion in the natural area along a river (Dig. 41.1.7.1.), the threads woven into a piece of cloth (Inst. 2.1.26.), the dyes used to process cotton fabric (Dig. 41.1.26.2.), the wood panel containing an oil painting (Gai. Inst. 2.72.), the writing on a goatskin parchment (Gai. Inst. 2.77.), the buildings put up on land (Dig. 41.1.12.) or the crops sown in the ground (Inst. 2.1.32.)

In *novam speciem facere*, one creates a thing of a new species, through the application of labor to another's materials. Instead of establishing *communio* between joint property holders, Roman private law subjects the thing of the new species to the *dominium* of the laborer, unless the materials can be returned to their primitive state, "*si ea species ad materiam reduci possit*" (Inst. 2.1.12.) Thus, he 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 vestment confectioned with wool nor the boat assembled with planks of wood (Gai. Inst. 2.79.) belonging to another.

In *confusio uel commixtio*, one's thing becomes intermingled with another's thing. If the intermingling occurs by chance or the will of the property holders, Roman law will allow a situation of *communio* here between joint property holders. If not, and the component things cannot be separated, the property holders may ask the iudex to partition the thing in proportion to the value that corresponds to each (Dig. 6.1.5.1.)

Through time, people move and leave, or perish. Property becomes vacant, and occupied by new possessors. Roman private law puts an end to the divorce between possession and property through *usucapio* and *longi temporis praescriptio*. The possessor acquires *dominium* over another's property through usage over time (Dig. 41.3.3.; 44.3.3.) 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. Furthermore, the grant of property rights to the possessor aligns his incentives with the care and management of the resources in the domain. Roman law gives him the expectation of obtaining the residual interest with time.

Roman law relies on typical forms of property bundles, typical forms of unbundled property rights, and clearly defined boundary markers for property to reduce informational asymmetries, and employs institutional mechanisms that maintain typical property through the vagaries of time and avoid situations of *communio* between joint property holders. Where a situation of joint property is unavoidable, as in *communio incidens*, I will show in section 2.2.3 of this paper that Roman private law turns *communio* into a quasi contract. That way the legal system provides a legal mechanism for coordination of a situation of joint ownership.

2.2 Roman law of obligations

2.2.1 Private choices to co-operate

Roman law works because it supports private choices to co-operate. Co-operation requires credible commitments. A commitment is credible only if one expects another will have the incentives to comply in the future. The Roman law of obligations provides such incentives. Therefore, Roman law encourages expectations of co-operation between private parties. This is a beneficial outcome, because trust between people has an economic value.

The Roman law of obligations enables people to commit to future actions. By entering into a contractual obligation, a person undertakes a legally binding commitment. The debtor who enters into a contract gives the creditor a legal claim against his person, thus rendering his commitment to future action credible when made. Without such legal support for commitment, we would be forced to use other more extreme measures as demonstrated by Hernan Cortes. Cortes, of course, is the 16th-century Spanish conquistador who burned his ships in the harbor of Veracruz to foreclose the option of retreat during the conquest of Mexico.

Part of the credibility of obligations under Roman law is the distinction between *actiones in rem* (see my discussion above in section 2.1) and *actiones*

in personam (see Merrill and Smith 2001.) 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 (not more than) the value of the performance. Even where the obligation is *incerta*, the procedural formula stipulates that the iudex must assess an amount of money equal, *tantam pecuniam*, to whatever the defendant ought to give to, or do for, the plaintiff, *quidquid Numerius Negidius Aulum Agerium dare facere oportet*. 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 damages, through the principle of *omnis condemnatio pecuniaria* (see Zimmermann 1996, p. 772.) The contract restructures the future incentives of the debtor, and makes his promises credible.

The Roman contractual system transforms the private expectations that people hold about the future actions of others into public information. Roman law enables people to know clearly when their promises are to be enforceable as contracts. Under the Roman law of obligations, people know that they have entered into a contract either because they have conducted (1) an appropriate ceremony or because they have concluded (2) a typical contract. The legal system adopts the same institutional mechanisms, ponderous ceremonies or typical forms, as those used in the Roman law of property (which I surveyed in section 2.1.) Through the use of typical forms and clearly stipulated obligations, Roman private law reduces asymmetries of information between contractual parties.

Today scholars dispute as to 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; if such a ceremony existed, its purpose was to subject their persons to seizure if they failed to perform an obligation. The ceremony openly established the parties as bound, *nexus* (see de Zulueta 1913.) 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*. In the immediate presence of each other (and before witnesses,) the *reus stipulandi* asks a question, and the *reus promittendi* responds directly with a promise, in terms that mirror the question. *Dare spondes? Spondeo. Dabis? Dabo. Promittis? Promitto. Fidepromittis? fidepromitto. Fideiubes? fideiubeo. Facies? faciam.* (Inst. 3.15.) Accordingly, Roman law enables the parties to stipulate a mutually-understood unilateral obligation, which is legally enforceable as a contract (see section 2.3 below for a discussion of the literal contractual form.)

Under the legal system of the Roman classical period, the parties are also able to form binding legal commitments by concluding any one of a “closed number” of typical contracts, without need for ponderous ceremonial trappings.

Roman typical forms facilitate contracting. (Note that law and economics scholars have failed to see that the *numerus clausus* principle also operates in the law of obligations, Merrill and Smith 2000.) The parties are able to form a consensual contract simply by manifesting their agreement. The parties are able to form a real contract simply by handing over a thing with an intention to form such a contract. Since Justinian was particularly fond of the number four, the system of pandects identifies four consensual contracts, *emptio uenditio*, *locatio conductio*, *mandatus* and *societas*, as well as four real contracts, *depositum*, *mutuum*, *commodatum* and *pignus*.

The typical contracts are one of the greatest achievements of Roman private law. The typical contracts have names, which is why they are also referred to as the nominate contracts. Merely by referring to a nominate contract, the parties know that they have concluded an enforceable contract. Moreover, they are able easily to understand what implied obligations they have assumed without need for detailed stipulations. To illustrate, when the parties enter into an *emptio uenditio*, they must stipulate the price and the thing. However, the obligation of the seller to respond for eviction, *euictionem praestare*, is created without being mentioned because it is part of the typical contract invoked by the name, *emptio uenditio*. The parties take 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 (Ayres and Gertner 1992.) Roman law encourages such contracts by incentivizing revelation of privately-held information through default rules (Ayres and Gertner 1989.) Roman law enables parties to stipulate out of legal rules that are not essential to the typical contractual form. For example, when the parties enter into an *emptio uenditio*, the parties may agree that the seller not respond for eviction, through a *pactum de non praestanda euictione*. The seller who has private information that may affect the peaceful possession of a thing by the buyer, responds by the default rule for eviction. Accordingly, Roman private law gives him an incentive to reveal that private information if he wants 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 which change the essential features of a contractual form. Thus, the parties are unable to agree to a *commodatum* in exchange for *merces*, which makes the transaction something other than a gratuitous loan. The Roman lawyers indicated that such a transaction would have to be enforced by another legal action, for the lease of the thing, *ex locatione conductione* (see Dig. 13.6.5 12.) In the Roman contractual system, any odd contract, which lacks the ceremonial trappings of *stipulatio* and fails to

fit into one of the typical forms, is unenforceable. Roman law refuses to provide a legal remedy to enforce it, “*nuda pactio obligationem non parit*” (Dig. 2.14.7.4.)

2.2.2 Private choices to co-operate without stipulating all eventualities

The Roman law of obligations establishes full freedom of contract. However, the principle of freedom of contract is a necessary, but not sufficient, condition for realizing a decentralized market economy. Law and economics literature emphasizes that writing a complete contract which stipulates all eventualities is often impossible or undesirable. People (including those who choose to form a contract) are incapable of anticipating every contingency. The future is unpredictable. Moreover, negotiating and drafting clauses to resolve possible future contingencies and risks is costly. Rational contracting parties may decide that leaving remote contingencies unstipulated is preferable. Rather than abridging full freedom of contract, Roman private law supplements, not substitutes for, incomplete contracts with the (1) typical contractual forms, the (2) principle of *bona fides* of Roman Praetorian law and (3) quasi contractual obligations. Roman law works because it supports private choices to co-operate without stipulating all eventualities.

Roman typical contractual forms approximate complete contracts. As I discussed earlier, each nominate (or typical) 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.

The *ius honorarium* develops, “*adiuuandi uel supplendi uel corrigendi iuris ciuilibus*” (Dig. 1.1.7.); its formation is similar to equity in common law systems. Both supplement and mitigate the rigors of strict law. In classical Rome, the praetor allowed a defendant to request the insertion of an *exceptio doli* into the procedural formula; this addition instructed the iudex to consider the equity of the case, *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*. The inverse of *dolus* is *bona fides* (Dig. 18.1.68.) 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*.

Modern scholars have been unable to fully explicate the Roman meaning of *bona fides*. Law and economics suggests that *bona fides* allowed Roman law to supplement incomplete contracts. When the parties are able to stipulate the

entire content of a contract, *bene agere* requires that each party faithfully execute the obligations expressly stipulated, not more. When the parties are unable to stipulate the entire content of a contract, Roman law does not require the parties to act altruistically (see Dig. 19.2.22.3.) However, the parties are required to go beyond the mere express terms. They are required to act *bona fide*, that is, to respond to unstipulated eventualities without *dolus* or *culpa* within the bounds of foreseeability, “*non etiam improuisum casum praestandum esse*” (Cod. 4.35.13.)

Modern scholars disagree about the exact standard of care that Roman lawyers applied. Modern scholars miss the point of *bona fides*. The *iudex* evaluates whether each party has acted as a *bonus uir* on a case-by-case basis. The circumstances of each case are so variable that ultimately Roman law adopts a case-by-case approach to *iudicia bonae fidei*, unlike German civil law which fits *bona fides* into typical *Fallgruppen*. If *iudicia bonae fidei* could be reduced to typical groups of cases, Roman lawyers would have adopted a solution based on the typical contractual forms. 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* precisely because the unstipulated eventualities fail to conform to typical patterns.

Incomplete contracting is particularly problematic and expensive (because of information rents,) when the reason (or *causa*) 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 insist that a party subordinate his interests to the interests of others. Roman lawyers approach these situations by applying quasi contractual obligations which are subsidiary to the incomplete contracts.

2.2.3 Private co-operation within extra-contractual relationships

Another aspect of Roman law which encourages co-operation involves extra-contractual relationships. 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 almost arising from a contract, *quasi ex contractu*. Paralleling the closed system of typical contracts (which has been discussed in section 2.2.2 of this paper,) Roman lawyers conceive of a “closed number” of typical quasi contractual forms, *negotiorum gestio*, *tutela uel curae gestio*, *communio incidens* and *indebitum solutum*.

In *negotiorum gestio*, someone undertakes to take care of some business or interest for another. Roman law requires that the *negotiorum gestor* act in the interest of this other (Dig. 3.5.6.3.) Once begun, the *negotiorum gestor* must

attempt to complete what he sets out to do (Dig. 3.5.3.10.); after finishing his stewardship he must give a full accounting of his actions to the *dominus negotii* as well as return any fruits he may have acquired as a result. Because of conflict of interest problems (which modern law also recognizes,) a person is prevented from acquiring a private interest in the business he undertakes for the *dominus negotii*. The bias of Roman law toward encouraging co-operation also enforces realistic limits; it prevents what might look like co-operative arrangements but are actually one person interfering with another's property. 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, cui non necessaria uel quae oneratura est*" (Dig. 3.5.9.1.) 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* and *casus fortuitus* (Dig. 3.5.11.)

In *tutela uel curae gestio*, someone looks after the affairs of another who is a minor or of unsound mind. The tutor must look after the interests of his ward as if they were his own (Dig. 26.7.15.) 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*, in guarantee of the diligent management of the affairs of the ward (Inst. 1.24.)

Roman law also applies quasi contractual obligations, in *communio incidens*, where several people become, unavoidably, the joint property holders of a common thing (see section 2.1,) and, in *indebitum solutum*, where someone unjustly enriches another.

All quasi contractual obligations are *iudicia bonae fidei*. The Praetorian formula instructs the iudex to review the circumstances of each case to decide whether a person has acted as a *bonus uir*. Moreover, in classical Roman law, violations of quasi contractual obligations carry the type of stigma currently reserved for criminal convictions (see Peter Garnsey 1970.) In addition to legal liability, the legal system imposes a reputational punishment, *infamia*.

Additionally, Roman lawyers refer to certain obligations as almost arising from a delict, *quasi ex delicto*. Roman lawyers conceive of a "closed number" of typical quasi delictual forms. Roman law subjects to objective responsibility ('strict liability' is the term used by the common law) the iudex who makes a case his own, *qui litem suam fecerit*, the sea carrier, innkeeper and stable keeper whose employees steal or damage the property of a customer, *furtum uel damnum in nauis aut caupona aut stabulo*, as well as anyone from whose dwelling something is thrown or poured, *deiectum uel effusum*, onto the street, or from whose building something is placed or suspended, *positum uel suspensum*, which falls and obstructs traffic.

2.2.4 Private co-operation between strangers

One of the central functions of any legal system is to promote responsible behavior. One way of describing such behavior is consideration towards the interests of others, though expecting altruism would be requiring too much of a mere 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 unknown to each other.

Modern law uses criminal prosecution by the state's bureaucracy to impose co-operation among strangers. Bureaucratic inertia, however, impairs the effectiveness of such prosecution. Roman law is more adept in encouraging co-operation because it enables individuals to bring legal actions against others for harms, without needing state prosecution.

Roman law protects property and persons through civil rather than criminal means. Roman law imposes responsibility for the harms that are done intentionally (with *dolo malo*) through civil delicts. The Roman law delicts include many harms which modern law classifies as crimes (against person or property.) A wide variety of behaviors involving the involuntary removal of property from the control of its rightful holder, *inuito domino*, constitute *furtum*; if done with force, *rapina*. As with modern law, the offense does not include removing property under the mistaken belief that it belongs to you (Dig. 47.2.21.3.) Roman law *iniuria* includes many modern crimes against the person. As with modern law, the offense does not include injuring someone negligently during a sports competition (Dig. 47.10.3.3.)

Roman law imposes responsibility for the harms that are done even unintentionally (with *culpa*) through civil delicts. The Roman delict *damnum iniuria datum* (for damage to property) evolved from a system of objective responsibility to a system of *culpa*. Law and economics scholars may be puzzled by the change. A determination of objective responsibility ('strict liability' is the term used by the common law) in a case seems more straightforward for a iudex than establishing the proper standard of care. Presenting evidence about inadequate precautions adds to the cost of the litigation. However, law and economics scholars overlook asymmetric information. A finding of civil responsibility for *damnum iniuria datum* under *culpa* publicizes private information about cost effective standards of care in different cases. Someone cutting off the branches of a tree, who fails to shout a warning over the public thoroughway, is responsible for killing the slave passing by, "*si is in publicum decidat nec ille proclamavit*" (Dig. 9.2.31.) A farmer, who chooses a windy day to burn thorn trees and grass, is responsible for the damage to his neighbor's crops, "*si die uentoso id fecit, culpa reus est*" (Dig. 9.2.30.3.) Asymmetric

information explains why Roman lawyers moved away from objective responsibility and toward defining explicit standards of care in specific cases.

2.3 Roman law of commerce and finance

Roman law works because it supports the market. The market intermediates between supply and demand through the price mechanism. Economists tend to assume that markets clear effortlessly. However, law and economics scholars know better. For markets to clear, intermediaries must make markets. Market makers are brokers who manage inventories of commercial and financial assets across space and time. Market makers are able to buy where and when people want to sell. Market makers are able to sell where and when people want to buy. Market makers buy and sell with a spread between the ask price and the bid price.

Roman law supports the making of markets through the law of property and the law of obligations. Principals are able to reduce agency costs either by aligning their agents' interests with their interests own, or through monitoring of their agents. Principals run up monitoring costs in order to keep agents from hiding their actions. In order to facilitate financial intermediation, the Roman law of property includes typical forms of security interests in another's property such as *fiducia cum creditore contracta*, *datio pignoris* and *pignus conuentum*. Law and economics literature clarifies that the collateral must be more valuable to the debtor, than to a creditor, in order to align their interests. Debtors are less able to give up possession of valuable collateral. The *pignus conuentum* is especially useful, since a debtor pledges property without delivering possession of the collateral. Moreover, the Roman law of obligations enables people to enter into an arrangement of *fideiusso* through a *stipulatio* with the verbal form, "*Quod mihi debet, id fide tua esse iubes? Fideiubeo.*" Law and economics literature clarifies that a surety, better able to monitor a debtor, by stipulating an obligation accessory to that of the debtor, is able to lower the creditor's monitoring costs (Katz 1999.)

Moreover, as discussed earlier, the Roman typical consensual and real contractual forms greatly facilitate commerce and finance. Particularly useful for business transactions is a *depositum apud sequestrem*. Pending the outcome of a controversy or condition, several parties hand over a thing to a *sequester* ('escrow agent' is the term used by the common law) for him to hold for safekeeping, (Dig. 16.3.17.) Once the controversy is resolved or the condition is met, he must return whatever they deposit with him to the prevailing party or to the party stipulated.

The Romans also used the verbal contractual form of the *stipulatio* with a *pactum fiduciae* to make a *donatio sub modo*. As part of a *donatio inter vivos*, the donor imposes an obligation on the donee to do something or to make a distribution of funds (Cod. 8.55.) The usefulness of a *donatio sub modo* ('trust' is the term used by the common law) is that the donor can stipulate just about anything he wants, and even attach a *stipulatio poenae* (discussed below in section 3) to guarantee that the donee carry out his wishes. If the donee fails to carry out the charge, the *donatio* is revocable.

A variant of the verbal contractual form useful in business transactions is the literal contractual form. Mere annotations made in a *codex expensi et accepti* fail to create obligations, "*nuda ratio non facit aliquem debitorem*" (Dig. 39.5.26.) A banking deposit, *ratio mensae*, or banking loan, *pecunia foenerare*, becomes binding only after money is handed over, as in the real contracts. Banking transactions typically include interest without the need to enter into a *stipulatio*; charging compound interest, *annatocismus coniunctus*, is standard practice, at least during the Roman classical period. Moreover, bankers or *argentarii* held auctions for their clients, devising bidding systems which would attract the highest and best bidder, "*melior autem condicio adferri uidetur, si pretio sit additum*" (Dig. 18.2.5.,) as well as issued letters of credit, *receptum*, to guarantee payments for clients (Dig. 13.5.26.)

Furthermore, other specialized private Roman legal institutions related to commerce and finance also support the market. Modern scholars debate whether a distinctly Roman law of commerce and finance ever existed. Some scholars argue that the *ius mercatorium* developed during the Middle Ages, that is between 500 and 1500 A.D. Modern scholars fail to recognize that a Roman law of commerce and finance existed, but it was not a separate body of law; it was embedded in the basic Roman civil law. Modern legal systems separate the body of commercial (and financial) law as a *lex specialis* from the *lex generalis* of the body of civil law. Roman private law was more congruent because it lacked this divorce.

Similarly, many modern commentators fail to recognize that slavery was an economic institution; 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. By giving slaves the possibility to manage a *peculium* and buy their manumission, Roman private law simultaneously rendered slavery more efficient and less oppressive.

According to Roman law, property is held by the *paterfamilias*. However, having the *paterfamilias* conduct every transaction on behalf of his *filiifamilias* and slaves is burdensome and time-consuming. Accordingly, Roman law allows

both *filiifamilias* and slaves to manage a *peculium*. The *peculium* is the property of the *paterfamilias*. However, self interest and social norms reinforce a social convention in Roman society requiring the *paterfamilias* to respect the *peculia* of both his *filiifamilias* and slaves. This limit on the *paterfamilias* is in his own best interest. Without this limit on his power, a *filiusfamilias* would be strongly motivated to commit patricide. Similarly, this limit on the *paterfamilias* better aligns the interests of the *paterfamilias* and his slaves. Lacking 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. As Vergil put it, “*nec spes libertatis erat nec cura peculi*” (1977, pm. 1, l. 32)

Roman law does have at least one major shortcoming; it lacks a sufficient system of agency. Of course, the Roman law consensual contract of *mandatus* is a form of indirect agency, but this is not a sufficient substitute for agency-proper. The *mandatarius* is only able to act on his own behalf, even when he transacts business in the interest of another. However, the Romans were not entirely without agency law. Both *filiifamilias* and slaves are able to act on behalf of the *paterfamilias*. While this is not a solution well-regarded today, the Roman empowerment of the *paterfamilias* over both slaves and *filiusfamilias* does lower what moderns recognize as a major inefficiency in society, agency costs. By simultaneously allowing slaves and *filiusfamilias* to act for the *paterfamilias*, and giving the *paterfamilias* enormous power (even ownership) over his agents, Roman law reduces agency costs.

Roman private law from the classical period contains sophisticated legal institutions related to commerce and finance. Roman law institutes limited liability; it also creates incentive-compatible mechanisms for information revelation, thus supporting commercial and financial intermediation.

The *peculium* introduces limited liability to Roman law. Both *filiifamilias* and slaves are able to manage a *peculium* independently. Roman law limits the liability of the *patrimonium* for obligations incurred by *filiifamilias* and slaves to the amount of the *peculium* (see Dig. 15.1.) If either a *filiusfamilias* or slave incurs a delictual obligation, the *paterfamilias* has the option to hand over his *filiusfamilias* or slave in lieu of payment. In either case, the legal system limits the liability of the *sui iuris* to the *peculium*.

The *peculium* of a *filiusfamilias* or slave may include any *res in patrimonio*. Under Roman law, even slaves may hold other slaves, *serui uicarii*, in their *peculium*. Accordingly, a *paterfamilias* is able under Roman law to set up a *taberna* or *officina* and put the business into the *peculium* of either a *filiusfamilias* or slave (Dig. 14.4.) As Horace put it, “*Vulcanus ardens uisit officinas*” (2004, pm. 1.4., l. 8.) The institution of limited liability enables people to separate management from investment in the economy. Roman private

law of commerce and finance aligns the incentives of both *paterfamilias* and *filiifamilias* or slaves inasmuch as the *peculium* is the separate interest of the *filiusfamilias* or slave, less the payments to the *patrimonium* for the cost of capital. The variety of *tabernae* in the Roman economy runs all the way from banks, *tabernae argentariae*, to inns, *tabernae deuersoriae*; from fleets of ships, *naues instructae* or *societates exercitorum*, to companies for purposes of tax collection or public works, *societates publicanorum*; from cheese factories, *tabernae caseariae*, to brick factories, *officinae lateribus*.

Limited liability is the norm in Roman businesses or *negotiationes* held in *peculia*. However, Roman law also allows individuals to choose non-standard terms in their business organization. For example, a *paterfamilias* who wishes to opt out of the background rule of limited liability may establish his unlimited liability by indicating that he runs the business under his management by the simple expedient of posting a sign in the establishment in a visible place (Dig. 14.3.11.3.)

Incentivizing investment requires markets. People never know when they will need to sell and when they will need to buy. Accordingly, people will only invest in commercial and financial assets if market brokers make markets liquid enough so that people are able to buy when they need and sell when they need. Moreover, participants are similarly unwilling to transact or make investments unless commercial or financial assets are accurately priced by the market. 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 discussed earlier, Roman law presents uniquely commercial or financial legal institutions to support information revelation.

Slavery, as discussed above, lowers agency costs. Slaves also constitute a form of living tradable shares in businesses. The sale of a slave who holds a *taberna* or *officina* in his *peculium* is equivalent to selling the business. *Serui communes* were used in conjunction with the consensual contractual form of *societas* to bring rationally ignorant investors together, without forfeiting the protection of limited liability.

Accordingly, the Aedilitian regulation of the slave market addresses problems of asymmetric information that go beyond access to a skilled labor force. The aedile required a *uenaliciarius* (and anyone selling a slave in the secondary market) to reveal, *pronuntiatio*, at the moment of sale, *in uenditione*, any material private information affecting the valuation of the slave; moreover, the aedile established objective responsibility ('strict liability' is the term used by the common law) for the failure to divulge information or for any contradiction with an express warranty, *dictum promissumue*, given (Dig.

21.1.1.1.) However, mere puffery or laudation, *nudam laudem*, of a slave (or business) was excused (Dig. 21.1.19.) In addition, Roman law allowed the buyer of a slave (or business) to institute legal proceedings against the majority shareowner, *cuius maior pars aut nulla minor est*, of a *seruus communis* (Dig. 21.44.1.) 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 (Manne 1966.)

3. Private self-help in Roman law procedure

In Roman law, litigation before an iudex is conceived of as a private contract, *litis constitutio*. The parties stipulate before the praetor that they will abide by the *sententia* of the iudex. In order to litigate their claim or offer a defense, the parties must enter into this *stipulatio* before the praetor. The new contract, *litis constitutio*, novates the earlier obligation that forms the basis for their claims or defenses or counterclaims, no matter what their nature. After the *litis constitutio*, the pre-existing obligations cease to exist. Accordingly, the Roman system of procedure under the control of the praetor is a private system of binding arbitration.

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*, private self-help measures are means of effectively bringing a legal action. Any creditor whose claim was invalid, yet who laid their hands on the debtor, *manus iniectio*, or took property of the debtor in pledge, *pignoris capio*, risked liability in twice the amount, *in duplum*. However, debtors who faced valid claims made arrangements for payment, rather than the go before the praetor, as von Ihering (1968b, bk. 1, ch. 1) distinctively explains. Accordingly, *manus iniectio* and *pignoris capio* are private self-help means of collection, able to work without the intervention of the curule authorities.

If the debtor breaches an obligation, the iudex must assess the value of the performance to the creditor. However, establishing “*quanti ea res est*” (Dig. 13, 3, 4.; the expression belongs to Bulgarus 2007 on Cod. Cod. 2.6.6.) can be difficult where an obligation is *incerta*. Accordingly, Roman law allows the parties themselves to agree privately on the amount of damages, by entering into a *stipulatio poenae*. The ponderous ceremonial trappings of the verbal contractual form put people on notice that they assuming an enforceable unilateral obligation. Moreover, *stipulationes poenarum* are also means to enforce immaterial interests that could not be reduced to a pecuniary amount (Zimmermann 1996, p. 97.) What modern scholars overlook, and a *stipulatio poenae* may capture, is that damages from disappointed expectations are often much greater than the amount of the obligation.

Lastly, rather than prosecute public claims against private persons, the Roman state even privatized tax and debt collection. *Societas publicanorum* may purchase these claims and use the private self-help measures discussed above.

4. Roman legal scholarship in the restatement of civil law along the lines of law and economics

Latin America must grasp the nettle of globalization; to survive, each Latin American country needs a competitive economy. Unfortunately, Latin American countries liberalized and privatized their economies in the 1990s, forgetting that their legal systems had been socialized and constitutionalized during much of the 20th century under the influence of French legal sociology (see Duguit 1901.) Such systems do not mesh well with global economic pressures. Economics needs to be partnered with law and economics.

Arguing for a return to Roman law is the best way to introduce law and economics into the civil law tradition and to reprivatize Latin America's ailing legal system. The private sector cannot exist in a vacuum. Private law enables the private sector to be the main driver of the economy.

The economic analysis of Roman law suggests a new system of pandects within the civil law tradition. Rather than classifying legal institutions along the line of persons, things and methods of acquiring property, law and economics suggests a new arrangement of Roman law. The entire body of private law must be unified. Civil and commercial law must be brought together. The methods of maintaining property must be moved to the book on things. For reasons unrelated to classical Roman law, property in civil law jurisdictions is resistant to horizontal partitions. New typical forms of property, such as private mineral rights and industrial property rights, must be added to the book on things. New typical contractual forms, such as insurance and annuity contracts, must be added to the book on obligations. Law and economics suggests the expansion of the Roman system of subsidiary quasi contractual obligations, undergirded by the principle of *bona fides*. Law and economics suggests the depenalization of the legal system and expansion of the Roman system of typical delictual forms. A book on commercial and financial intermediation must be added to complement the book on obligations. Most fundamentally, a book on the law of civil procedure must be brought into the civil code. Bringing procedural law back into the realm of private law (privatizing legal procedure) is the most effective way to improve the Latin American legal system.

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 hire, *locatio conductio*. Roman law lacks consumer protection law. When the emperors intrude into the legal system, private law creates new forms

to escape the public law's most severe restrictions, such as in the shift from *fidepromissio* to *fideiusso* (see Zimmermann 1996, p. 121.) 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* favoured letting markets self-regulate.

The German and French civil law doctrine of abuse of right contradicts Roman legal limitations to property. Scholars in the 19th century interpreted a passage against the mistreatment of slaves, "*male enim nostro iure uti non debemus*" (Gai Inst. 1.53.) to suggest that a property holder may not use his rights with *dolus* or the intention to do harm to another (BGB §226.) French legal sociology unwittingly extended this doctrine when legal authors attempted to formulate a 'social function of property' (see Duguit 1901.) Civil law must limit the use of property to avoid external effects that would destroy the value of property; other legal limits on property are destructive. Let me be clear: property serves a private function, not a social function. Private law must leave to the property holder all choices regarding the use of his property. Similarly, the supposed 'social function of contracts' is destructive. Contracts serve a private function, not a social function. Private choices to cooperate must be left to the contracting parties.

Contractual rigidity is another modern problem with a Roman solution. Typical contracts are insufficient for the variety of private choices to co-operate. Therefore, social co-operation is hampered unless people are empowered to form 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 contracts. 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 *causa*. The commentator Bartolus (1544, on Dig. 44.4.2.3.) misreads a text that mentions that a *stipulatio* has a reason or *causa* ('consideration' is the term used by the common law) to mean that atypical contracts with a *causa* are enforceable even without the ceremonial trappings of the *stipulatio*. Although atypical contracts are enforceable in theory, in practice modern notary publics often attempt to make atypical agreements fall into one of the typical contractual forms. All too often, notary publics rewrite contracts along typical lines. A better alternative would follow the practice of Roman *tabelliones*; they publicized the atypical obligations that contractual parties stipulated, without changing the terms of the agreements. An example where modern civil law has lost the flexibility of the *stipulatio* is the *pactum fiduciae* to make a *donatio sub modo*. Unfortunately, in civil law jurisdictions today, trust-

like relationships, where they do exist, straitjacket contractual parties with typical commercial forms 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. The distinctive difference of the common law consists of its unique system of quasi contractual 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. (In equity, the chancery courts formulated those quasi contractual obligations called ‘fiduciary duties.’) However, Latin American civil law needs to go further in this direction, for example by following the model of German civil law in its expansion of the principle of *bona fides* (through BGB §242, §138, §157, §826.) This expanded *bona fides* accomplishes many of the same tasks that fiduciary duties carry out in the common law (see Wieacker 1956.)

Unfortunately, German civil law has expanded the meaning of *bona fides* to the point where it abridges freedom of contract. The *Fallgruppen* where the principle of *bona fides* is found to apply are too broad. By far the greatest danger facing Latin American law today is the German tradition of constitutionalization of private law, that is, the so-called doctrine of *mittelbare Drittwirkung* of fundamental rights in private law, made possible through *Generalklauseln* requiring the observance of *bona fides* in the German Civil Code. 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. In this detail, perhaps French civil law is a better model for Latin America, because it has been less prone to deny freedom of contract.

Addressing the problems of Latin America’s legal systems is an exquisitely difficult balancing act, one legal scholars have shown themselves ill-equipped to handle in the past. But handle it they must. In short, Roman law combined with law and economics are the best guides to the paradigmatic private legal system of the 21st century.

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