VIA VTRIVSQVE IVRIS ŒCONOMICE CONSPECTA
Mechanism Design, Path Dependence and Law

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This monograph is dedicated to the memory of our cherished colleague and friend Héctor Fix-Fierro

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FOREWORD

This rich and provocative book describes how Roman law in the classical period (circa 300 B.C.E. to 300 C.E.) and the common law during what future generations may view as its classical period (circa 1800 C.E. to 2000 C.E.) provide the legal infrastructure —legal forms and procedures for resolving disputes— that enables people to engage in mutual activities, and to create, amass, protect, and transfer wealth. As the authors explain, this legal infrastructure helps people solve problems of asymmetric information and mis-aligned incentives across a broad range of activities and resources. The authors present these bodies of law as offering today's law and economics scholars practical lessons in mechanism design. That said, and strikingly, they observe the basic architecture of Roman law and the common law was not a product of conscious design. Both systems began with procedural rules that allowed private parties to bring some types of disputes to public tribunals for resolution. The basic architecture of private law in Roman law and the common law was created to make sense of a large body of result-oriented caselaw that was loosely organized around these procedural rules.

The perspective of mechanism design directs us to look at private law as rules of engagement that may be more or less successful in enabling people to overcome problems of asymmetric information and mis-aligned incentives in mutual activities, disputes over resources, and actions that affect others. One premise of the book is that Roman law and the common law are fairly successful in enabling people to solve these problems. The longevity of these legal systems and their track record makes this a plausible premise. When Roman law and the common law converge on a solution, then perhaps we might generally assume this is a good mechanism for facilitating private ordering. When they diverge, then perhaps we might profitably interrogate and analyze the differences with an eye to determining whether one approach is superior to the other as a matter of mechanism design.

This perspective and the richness of Roman law and the common law yield many provocative observations. I will briefly sketch one of these observations to give you an idea of what you will find in this book.

The observation concerns contract law. Roman law provided people with a set of well-developed form contracts that covered different types of commonplace transactions. People could make a contract outside of these forms but this required a fair bit of effort on their part, including in modern civilian jurisdictions involving a notary to whom people would explain their novel contract. Apparently, one function of the notary is to ensure both parties understood the novel contract. Under the common law, in principle every contract is a novel contract and the parties have the power to define the terms. In practice, form contracts dominate in common law systems. But these often are private forms. When one party supplies a form, then the other party is expected to read and understand the form, and fails to do so at her own peril. This arrangement has led to no end of mischief. The authors persuasively argue that Roman law is superior to the common law in this respect.

You will find many equally provocative arguments in this book. For example, the authors argue Roman law of property is superior to the common law because the common law of real property (land law) is rooted in feudal concepts of tenure. The authors argue this had several unfortunate consequences in common law systems, including land law being unnecessarily complicated, the law of personal property (chattel law) being under-developed, legal rights with respect to ideas and expression (i.e., intangible resources) being mistakenly characterized as matters of property law, and making it easy to cloak with a veil of legality the theft of land and resources belonging to indigenous peoples.

The perspective of mechanism design enables the authors to pack an enormous amount of information about Roman law and the common law in the book. I cannot evaluate the accuracy of their description of Roman law. Thus, it was news to me that Roman law used the institution of slavery to perform tasks that we associate with the law of business organizations. I can attest their account of the common law is impressively complete and accurate given the amount of material covered in a short space. Indeed, the authors understand better than many Anglo-American legal scholars the centrality of equity to the common law of contract and property.

A book as rich and provocative as this invariably raises many questions that must be left unexplored. One such question is whether private law, as the authors conceive of it, is scalable as population and wealth grows. The authors conceive of private law as a system of rules that facilitates private ordering by helping people solve problems of asymmetric information and mis-aligned incentives, and that is developed by public tribunals

gradually over time as people bring disputes to public tribunals to resolve. Such a system existed when ancient Rome flourished, and when Great Britain became a world empire and English-speaking peoples colonized much of the modern world. But the world today is vastly wealthier, and vastly more crowded, than it was when these systems flourished. Time will tell whether private law will adapt. The authors make a persuasive case that the success or failure of private law should be evaluated through the perspective of mechanism design, and that this is a fruitful perspective for understanding the history of private law.

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INTRODUCTION: MECHANISM DESIGN, PATH DEPENDENCE AND LAW

Twenty years into the dawn of a new millennium, time seems to slide by evermore quickly and we find that our intellectual paradigms shift accordingly. In the field of law and economics, scholars have yet to recognize one such major shift: the passing of the discipline from transaction-cost economics to mechanism design theory. That we have not recognized this major change in paradigm within our field[1] is due in part to the multitude of theoretic developments currently underway within the economic approach to law. Scholars are, accordingly, confused about the direction in which the field is moving.

I. Insurgency of Mechanism Design

William H. J. Hubbard believes that behavioral economics is a major paradigm shift in law and economics.[2] He offers up an extended metaphor. He claims that the move from neoclassical economics to behavioral economics is comparable to the shift from Newtonian physics to quantum mechanics.[3] Rather than debate his claims, we wish to put forward an alternative view of the future of the field of law and economics. Mechanism design theory has been called the "engineering side of economics."[4] If called on to put into a few

[1] Thomas Samuel Kuhn first introduced the concept of 'paradigm shift' so central to contemporary discourse in the early 1960s in his book *The Structure of Scientific Revolutions* (1962).

[2] "Quantum Economics, Newtonian Economics, and Law," 2017 *Michigan State Law Review* 425 (2017).

[3] His comparison fails to acknowledge that the development of quantum mechanics in physics is closely allied, in terms of intellectual history, to the development of game theory in economics. As we explain *infra*, John von Neumann set about to update the mathematics used in neoclassical economics along the lines of quantum mechanics.

[4] Eric S. Maskin, lecture delivered at IX World Knowledge Forum in Seoul, South Korea, on October 16, 2008; Leonid Hurwicz claims, in *Designing Economic Mechanisms* 1 (2006), to have first developed mechanism design theory as a useful benchmark and common

words what is mechanism design theory, we could say it as an attempt to generalize (partially) game-theoretical approaches through reverse mathematics.[5] Matthew Jackson notes: "The theory of mechanism design takes a systematic look at the design of institutions and how these affect the outcomes of interactions. The main focus of mechanism design is on the design of institutions that satisfy certain objectives, assuming that the individuals interacting through the institution will act strategically and may hold private information that is relevant to the decision at hand."[6] Today, law and economics scholars are wont to speak of 'asymmetric information'[7] and 'incentive compatibility'[8] rather than of the hackneyed 'transaction costs' of yesteryear. Today, the Myerson-Satterthwaite Theorem in mechanism design theory[9] provides an intriguing counterpoint to the Coase Theorem in transaction-cost economics.[10] Further, many who use game-theoretic models to better understand the law would note the informational concerns of such settings in practice.[11] In the

language for comparing alternative economic systems against the backdrop of the socialist calculation debate of the 1950s.

[5] 'Reverse mathematics' was developed by philosophers who wished to grasp the connection between mathematics and logic. So, they went backwards. Instead of deducing theorems from given axioms —as mathematicians had been doing since Euclid in the fourth century B.C.—, they asked which axioms were needed to prove specified theorems, rather than the other way around. See John Stillwell, *Reverse Mathematics: Proofs from the Inside Out* (2018).

[6] *Mechanism Theory* (2003).

[7] See George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," 84 *Quarterly Journal of Economics* 488 (1970).

[8] See Hurwicz, "On informationally decentralized systems," in Charles Bartlett McGuire and Roy Radner (editors), *Decision and Organisation: A Volume in Honor of Jacob Marschak* (1972).

[9] Roger B. Myerson and Mark A. Satterthwaite, "Efficient Mechanisms for Bilateral Trading," 29 *Journal of Economic Theory* 265 (1983).

[10] Ronald H. Coase, "The Problem of Social Cost," 3 *The Journal of Law and Economics* 1 (1960); reprinted in *The Firm, the Market and the Law* 95-156 (1988). Coase himself sharply criticized George J. Stigler's formulation of the Coase Theorem —which had done so much to make Coase famous—, *The Theory of Price* 113 (Third edition, 1966). Stigler had not simplified Coase's analysis; it was simple. See Robert D. Cooter, "The Cost of Coase," 11 *The Journal of Legal Studies* 1 (1982).

[11] See, *exempli gratia*, Joel Watson's game theory text. In *Strategy: An Introduction to Game Theory* (2013), he notes the unrealisticall strong assumptions and acknowledges value in the idea, saying: "Still, however, Coase's point sets a useful benchmark for a discussion about optimal legal structure and policy." He then states: "I would argue that the message should be less about property rights and more about information, the freedom to contract, and the existence of a reliable and inexpensive external enforcement system." See pages 238-240 for a fuller development of Watson's take on this point.

context of a court deciding a nuisance dispute case, Judge Posner highlights the informational concerns.[12]

Perhaps we have not recognized this major change in paradigm, because it has occurred almost imperceptibly. Already, at the end of the 1980s, when Robert D. Cooter and Thomas S. Ulen brought out their second-generation law and economics manual,[13] they were not only "more eclectic in accepting philosophical and humanistic traditions of legal thought"[14] —as they claimed at the time—, but they also began to apply the insights of game theory to the field.[15] At the beginning of the 1990s, a new set of analytical tools became available to law and economics scholars. These tools were related to the expansion in economics of the analysis of strategic interaction. The approach had been developed in the 1940s and 50s, when John von Neumann[16] —and John Forbes Nash Jr. after him—[17] looked at the practitioners of mainstream economics with intellectual contempt for employing, slide rule in hand, in the middle of the twentieth century, the mathematical methods belonging to the Newtonian mechanics of the seventeenth century. Facing the blackboard with a piece of chalk, they attempted to update the mathematics employed in economics with the probabilistic methods of quantum mechanics.[18]

From its beginnings, the new perspective that opened up shattered the lofty scientific aspirations of mainstream economists and, in particular, of the members of the Chicago school.[19] For this reason, Milton Friedman put up a fierce (and stubborn) resistance to the introduction of the approach in mainstream economics —something that is not widely known—. He appreciated that game theory runs counter to the basic methodological postulates of the 'Ordinalist Revolution' that had defined the field in the

12 Richard A. Posner, *Economic Analysis of Law* (Fifth edition, 1997). See also Iljoong Kim and Jaehong Kim, "Efficiency of Posner's Nuisance Rule: A Reconsideration," 160 *Journal of Institutional and Theoretical Economics* 327 (2004).

13 *Law and Economics* (1988).

14 Gary Minda, "The Jurisprudential Movements of the 1980s," 50 *Ohio State Law Journal* 599, 607 (1989).

15 Douglas G. Baird *et alii* continued the task in *Game Theory and the Law* (1994).

16 Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* 6, 45, 147 (1944).

17 Nash, "Equilibrium points in n-person games," 36 *Proceedings of the National Academy of Sciences* 48-49 (1950); "Non-Cooperative Games," 54 *The Annals of Mathematics* 286 (1951).

18 See Philip Mirowski, "What Were von Neumann and Morgenstern Trying to Accomplish?" in Eliot Roy Weintraub (editor), *Toward a History of Game Theory* (1992).

19 In the interest of full disclosure, one of us is a Chicago-trained lawyer and economist.

1930s and 40s.[20] Game theory reduces the strategic and contingent decisions of rational actors —which occur in time— to the atemporal realm of mathematics. This reduction proves to be overly complex for economists from an analytical point of view.[21] To further the analysis of strategic interaction —of far-reaching importance in our day—, economists work at the edge of what can be modeled mathematically. The application of game theory, seen in this light, is a complex and uncertain matter.[22] As it is, empirical work drawn from experimental economics shows that the models of game theory routinely yield inaccurate (if not erroneous) predictions.[23] Nonetheless and in spite of these difficulties, game theory is in marked expansion.

This is how we arrive at the second paradigm of the economic analysis of law, constituted by the analytical approach commonly called 'mechanism design theory'[24] —for which Myerson, together with Hurwicz and Maskin, early in this century, were awarded the 2007 prize in economics in memory of Alfred Nobel—.[25] This offshoot of game theory attempts to generalize it and, thus, represents a further step in the analysis of strategic interaction. The traditional methodology of game theorists is to describe a given game —a description of the strategic situation with the players, the order of play, the strategies and the payoffs defined—, and then proceed to cal-

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20 Von Neumann himself saw this development with mounting worry when he reintroduced cardinal utility and, even, the interpersonal comparison of utilities, in order to come up with a general solution to bilateral zero-sum games. He admits this much in a letter to Morgenstern (October 16, 1942), cited by Mirowski, "What Were von Neumann and Morgenstern Trying to Accomplish?," at 142.

21 To appreciate the complexity involved in game theory, recall the remark attributed to physicist Murray Gell-Mann, "Imagine how hard physics would be if electrons could think," cited by Scott Page, "Computational models from A to Z," 5 *Complexity* 36 (1999).

22 For an account of the difficulties to be come across in applying game theory, see David Kreps, *Game Theory and Economic Modelling* 91-132 (1990).

23 In particular, decision-making under conditions of risk and uncertainty contradicts the predictions of expected utility theory. Maurice Allais, "Le comportement de l'homme rationnel devant le risque: critique des postulats et axiomes de l'école Américaine," 21 *Econometrica* 503 (1953); "The Foundations of a Positive Theory of Choice Involving Risk and a Criticism of the Postulates and Axioms of the American School," in Allais and Guy Hagen (editors), *Expected Utility Hypotheses and the Allais Paradox* 27 (1979).

24 For a general description, see Myerson, "Mechanism design," in John Eatwell *et alii* (editors), *The New Palgrave: Allocation, Information, and Markets* 191-206 (1989). For an introduction, see Tilman Börgers, *An Introduction to the Theory of Mechanism Design* (2015).

25 Later, Lloyd S. Shapley and Alvin E. Roth were awarded the 2012 prize for their related work in market design. See Roth, "What have we learned from market design?" 118 *Economic Journal* 285 (2008).

culate the optimal set of strategy profiles from which the players should choose in order to predict behavior in the game.[26] Mechanism design theorists proceed inversely, as in reverse mathematics. They begin by settling on a socially desirable outcome, and then proceed to design the rules of the game to give the players the incentives to reach it. Typically, the practical problems studied involve situations in which a party (or parties) has private information so the socially desireable outcome depends on information that the mechanism designer does not directly observe. Instead, the outcome specified by the mechanism depends on the statements or actions of the parties. Since payoffs or preferences over outcomes may depend on the players' private information or types, the mechanism is said to specify a 'game form.'

Traditionally, in mechanism design models, players make statements, called messages, about their private information. While often modeled as being cheap statements, in the sense that players are unconstrained in what they say, there have been studies of settings where the statements a player can make are constrained in a way that depends on her private information.[27] More recently there has been work incorporating hard evidence into mechanism design type models.[28] We take a fairly broad view of mechanisms. The usual analysis involves the mechanism designer or external enforcer committing to a decision rule that maps messages to public actions taken by the enforcer.[29]

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[26] Game theorists commonly employ any number of techniques to find solutions. Among these are the iterated elimination of strictly dominated strategies, rationalizability, Nash equilibrium, and subgame perfect Nash equilibrium, Bayes Nash equilibrium, and perfect Bayesian equilibrium.

[27] In their seminal paper, "Partially Verifiable Information and Mechanism Design," 53 *Review of Economic Studies* 447 (1986), Jerry Green and Jean-Jacques Laffont studied state-dependent message spaces and showed when the revelation principle holds in that setting.

[28] Bull and Watson, "Hard Evidence and Mechanism Design," 58 *Games and Economic Behavior* 75 (2007), studied a setting with both cheap messages and hard evidence, which exists in some contingencies and not in others. Their analysis showed that when the condition of evidentiary normality does not hold dynamic mechanisms are needed. When it holds, static mechanisms are sufficient, and an abstract-declaration model where players name their type as in Green and Laffont's model is sufficient. Jesse Bull, "Mechanism Design with Moderate Evidence Cost," 8 *B.E. Journal of Theoretical Economics* 1 (2008), considers a setting with costly evidence disclosure.

[29] *Exempli gratia*, in situations where a jury updates, on the basis of evidence disclosed, its belief that a defendant is guilty, there is no precommitment to a decision rule by the jury. However, in this setting there are similar issues for the institutional design to attain a socially desireable outcome. In such a setting, Bull and Watson provide a rationale for a judge to exclude relevant evidence as is provided under Rule 403 of the Federal Rules of Evidence,

As is typical for a new paradigm in the economic analysis of law, mechanism design theory is still going through a process of acceptance which has not been fully consolidated. Today, law and economics scholars remain wedded to outdated conceptual or mental models. They remain invested in the methodology of transaction-cost economics, as if nothing new had occurred in the field since the 1990s.[30] Others such as Hubbard are exploring the implications of behavioral economics for law and economics.[31] Yet their behavioral analyses depart from rational choice theory. As Fred Sanderson McChesney reminds us, "Behavioral economics puts its procedural emphasis on laboratory experiments, whose purpose seems principally to test the reality of [mainstream] assumptions, but not their predicted outcomes."[32] Economists should not pretend that their models register the imprint of any given reality. The reality is always more complicated. Economists should avoid the intellectual trap of confusing their conceptual or mental schemes or models —the theories and hypotheses they hold up— with reality. The core of this methodological stance, clearly discernible in Friedman's essay on economic methodology,[33] led him to consider that economic models are nothing more than abstractions or heuristic devices which serve to make predictions. The success of a theory is based on the accuracy with which it can predict outcomes.

In the field of mechanism design theory, the revelation principle was an important development.[34] Economists were able to greatly simplify

"Statistical Evidence and the Problem of Robust Litigation," 50 *RAND Journal of Economics* 974 (2019). We consider such analysis to be in the spirit of mechanism design.

30 Guido Calabresi's recent book abides by the methodology of transaction-cost economics, without even mentioning game theory, *The Future of Law and Economics: Essays in Reform and Recollection* (2016).

31 Christine Jolls *et alii*, "A Behavioral Approach to Law and Economics," 50 *Stanford Law Review* 1471 (1998); Cass R. Sunstein (editor), *Behavioral Law and Economics* (2000); Richard H. Thaler and Sunstein, "Libertarian Paternalism Is Not an Oxymoron," 70 *University of Chicago Law Review* 1159 (2003); "Libertarian Paternalism," 93 *American Economic Review* 175 (2003); *Nudge: Improving Decisions About Health, Wealth, and Happiness* 4-6 (2008); Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* 19-138 (2018).

32 "Behavioral Economics: Old Wine in Irrelevant New Bottles?" 21 *Supreme Court Economic Review* 50 (2013).

33 "The Methodology of Positive Economics," in Friedman (editor), *Essays in Positive Economics* 3-43 (1953).

34 See Myerson, "Incentive compatibility and the bargaining problem," 47 *Econometrica* 61 (1979); "Optimal coordination mechanisms in generalized principal-agent problems," 11 *Journal of Mathematical Economics* 67 (1982); "Multistage games with communication," 54 *Econometrica* 323 (1986); *Game theory: analysis of conflict* 257-58 (1991).

the search for optimal mechanisms which had to be taken up to implement a socially desirable outcome. They could, without loss of generality, restrict their attention to a small subset of game forms, called 'direct mechanisms.' Once a direct mechanism was found, economists could translate it back to indirect mechanisms with its properties. Also important for mechanism design was the parallel development of implementation theory.[35] Economists were able to escape from the problem of multiple suboptimal equilibra in designing mechanisms.

In a setting of multiple equilibria, we find that history is inescapable in considering the design of legal institutions. The models of rational choice theory must, in any case, be corrected, amended, or supplemented, with the analyses of area studies. This is so because, in a Bayesian game setting where agents have cuasilinear preferences with transferable utility —we allow, out of intellectual honesty—, economists cannot know out-of-hand the set of incentive-compatible or truthful mechanisms, which are computationally tractable, individually rational, and budget balanced, as well as being strictly Pareto efficient or maximizing social welfare, apart from those disclosed through the comparative method in the field of legal history.

A watershed moment for the new paradigm of mechanism design theory in law and economics was the publication in 2018 of E. Glen Weyl and Eric A. Posner's *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*. Yet even in that work both authors have no alternative but to fall back in order to consider legal institutions taken from history. At the beginning of the twenty-first century, they propose nothing short of overhauling the content of property and replacing it with "partial common ownership" based on the mechanism of the *ἀντίδοσις* (exchange) of property of Athenian tax law.[36] In the fifth century B.C., this mechanism allowed wealthy Athenian citizens to allocate a *λειτουργία* (undertaking for the people) between themselves.[37] Under the procedure, the citizen called on to pay for anything —from equipping a trireme for a year to underwriting dramatic productions— could challenge an allegedly wealthier citizen to choose between the undertaking or exchanging his property with the challenger.[38]

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35 See Maskin, "Nash equilibrium and welfare optimality," 66 *Review of Economic Studies* 23 (1999).

36 *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, at 55.

37 Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* 65 (2006); Brooks Kaiser, "The Athenian Trierarchy: Mechanism Design for the Private Provision of Public Goods," 67 *Journal of Economic History* 445 (2007).

38 See Demosthenes, *Against Phaenippus* (359 B.C.)

The mechanism gave everyone an incentive to be truthful despite the burdens of the tax being levied.[39]

The intellectually-honest law and economics scholar can no longer afford to think in a strictly linear and discursive fashion. Her thought must become circular and recursive. Faced with the failure of past efforts to formulate a unidimensional methodology in the social sciences, she is more likely to use a mix of eclectic strategies. That new, more open attitude is evident in the work of the historian of the common law —and critic of the Coasian method— Alfred William Brian Simpson, who recommends that we combine the lateral glance of Archilochus' proverbial fox, who knows many shallow, trifling things, with the frontal view of the hedgehog, who contemplates a single vast, marvelous panorama spread out to the horizon.[40]

Accordingly, in this book, we combine the abstract and rarefied models of rational choice theory with the more concrete and localized analyses of area studies. We attempt to promote an understanding of economic theory in nontechnical terms, and broaden the approach we take in order to stretch a collaborative bridge between academic domains. Like Weyl and Posner's book, our approach is not an exercise in the narrow mechanism design theory found in the technical economics literature. Rather we employ a broader approach which integrates reverse game-theoretic analyses, and adapts them to the interdisciplinary field of law and economics to which we aim to contribute.[41]

II. Path Dependence and Legal History

Now, if history matters, legal history matters even more.[42] Legal institutions are both context-dependent and contingent, that is to say, they are path-

[39] In the middle of the twentieth century, Arnold C. Harberger would propose the same mechanism as a measure to thwart tax avoidance, see "Issues of Tax Reform for Latin America," in *Fiscal Policy for Economic Growth in Latin America: Papers and Proceedings of a Conference Held in Santiago, Chile, December, 1962* (1965).

[40] See "'Coase v. Pigou' Reexamined," 25 *The Journal of Legal Studies* 53 (1996); "An Addendum: [A Response to Law and Economics and A. W. Brian Simpson by R. H. Coase]," 25 *The Journal of Legal Studies* 99 (1996); *Reflections on 'The Concept of Law'* 125 (2011).

[41] As noted above, we consider Bull and Watson, "Statistical Evidence and the Problem of Robust Litigation," an example of this type of broader mechanism design approach.

[42] The legal profession is "in thrall to history," as Richard A. Posner reminds us, see "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship," 67 *University of Chicago Law Review* 573, 583 (2000).

dependent. Legal institutions cannot be understood without appreciating their particular history. John Bell explains: "Path dependence focuses attention on the way in which legal rules are embedded not only in a network of concepts but also in a network of practices and organizations that together make up the institutions of law in a particular legal system."[43] In economics 'path dependence' refers to how history is able to —and does— shape economic structures.[44] This idea applies the conventional wisdom that once you move down a certain path, it is hard to change course.[45] Where conventional history offers the law student or legal scholar little more than a "never-ending series of social contexts,"[46] we integrate legal history into a wider narrative arc through law and economics which offers a (mostly) comprehensive exposition of the interface between law and life and touches on matters of importance to the legal system.

In this book, we explore the links between the common law in the United States of America and the private law of the formally-dead Roman Empire, which tends to be associated with civil law. Law and economics is our bridge between what seem like two fundamentally different legal traditions. Understanding how a system of private law works is relevant for economic liberalization.[47] Private law must play a larger role as policymakers reduce government regulations and restrictions in the marketplace, where private-sector actors and decision-makers are front and center.

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43 "Path Dependence and Legal Development," 87 *Tulane Law Review* 787, 809 (2013).

44 *Exempli gratia*, consider the market dominance of the ubiquitous 'QWERTY' keyboard (named for the first six letters on the second row of keys in the mechanical typewriter.) Paul David, "Clio and the Economics of QWERTY," 75 *American Economic Review* 332 (1985); Stan Liebowitz and Stephen E. Margolis, "Path dependence, lock-in, and history," 11 *Journal of Law, Economics, and Organization* 205 (1995). Christopher Latham Sholes had rearranged the original alphabetical order back in the 1870s to reduce the bars' jamming when typists struck the keys at "even moderate speed." Darren Wershler-Henry, *The Iron Whim: A Fragmented History of Typewriting* 156 (2007). Today, jamming is not a mechanical problem with electronic keyboards, but his rearrangement of keys remains standard. *Idem*, at 153.

45 For a review of the technical economics literature, see Joseph Farrell and Paul Klemperer, "Coordination and Lock-in: Competition with Switching Costs and Network Effects," in Mark Armstrong and Robert H. Porter (editors), 3 *Handbook of Industrial Organization* 1967, 1971-72 (2007).

46 Justin Desautels-Stein, "Structuralist legal histories," 78 *Law and Contemporary Problems* 37, 42 (2015); "A context for legal history, or, this is not your father's contextualism," 56 *American Journal of Legal History* 29 (2016).

47 Unfortunately, the literature on economic liberalization focuses on public-law variables. See, *exempli gratia*, Glen Biglaiser and David S. Brown, "The Determinants of Economic Liberalization in Latin America," 58 *Political Research Quarterly* 671 (2005).

In Chapter One, we argue that the admirable character of Roman law is its quality as a paradigmatic private-law system, which makes a decentralized society and market economy possible. Our discussion of classical Roman law illustrates how private law aligns incentives for people to exert efforts and share information. Roman private law also enables people who face not only resource constraints, but also incentive and information constraints, to act in their own self-interest and, when efficient, to act on behalf of others.

In Chapter Two, we update the old question, debated in law and economics literature, of whether the common law is efficient. Instead, we propose a new question: Is the common law exceptional?[48] That the common law is efficient is a given because it is a system of private law, though we must allow that this answer has only been recently proposed in the literature.[49] Whether the common law is exceptional is a separate question connected with this matter. Might we not be able to design another system of private law, within the tradition of Anglo-American common law and equity, which would be even more efficient? Instead of comparing, as modern business scholars have done,[50] the efficiency of the common law with the present-day civil law, with its own inefficiencies, we seek to outline through mechanism design theory what exactly are the origins and development of the present-day common law system in the United States, whether it is exceptional, and how we might further modernize it. The tradition of civil law only enters the discussion insofar as some aspects of classical Roman law offer up alternate possibilities in the design of private-law institutions.

Next, in Chapter Three, we turn to what mechanism design theory might have to say about the design of public-law institutions 'writ large.'[51] Under the general assumptions of democratic theory, legislatures have posi-

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48 Francis H. Buckley discusses the rubric of 'exceptionalism' in the United States, see "An Exceptional Nation?" in Buckley (editor), *The American Illness: Essays on the Rule of Law* 43 (2013).

49 See Juan Javier del Granado and Matthew C. Mirow, "The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes," 83 *Chicago-Kent Law Review* 293, 304 (2008).

50 See Florencio López de Silanes *et alii*, "The Economic Consequences of Legal Origins," 46 *Journal of Economic Literature* 285 (2008); "Investor Protection and Corporate Valuation," 57 *Journal of Finance* 1147 (2002); "The Quality of Government," 15 *Journal of Law, Economics & Organization* 222 (1999); "Law and Finance," 106 *The Journal of Political Economy* 1113 (1998); "Legal Determinants of External Finance," 52 *Journal of Finance* 1131 (1997).

51 For an exploration of the mechanisms of democracy 'writ small,' see Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (2007).

tive legitimacy to make law because of the power of the people who elected them. Throughout the world, however, unelected judges also make law through the exercise of judicial review, an institution that has often involved the reification of individual rights in spite of majority preferences. What, if anything, gives such judges positive legitimacy to make law? The answer we provide may be surprising. We demonstrate that judges' positive legitimacy is based on the power of people. Courts' legitimacy has the same basis as legislatures'. Since the French Revolution, the ultimate arbiter in the social fight is the strongest faction, the majority. A group of people communicates its type to society at the ballot box. Based on the ballot count, society makes concessions to the terms dictated by the majority. Under what circumstances would an individual ever be able to dictate terms to society? We demonstrate that the court system allows a single individual to act collectively with other similarly situated individuals spread out through time. This group can communicate its type to society through legal reasoning. Courts are insulated from the political process because unelected judges are supposed to be beholden to a temporally-disconnected group, rather than to contemporaneous constituencies. Relevantly, we give a fresh answer to the age-old question of what is embodied in the phrase 'The rule of law, not of men.'

CHAPTER ONE:
THE GENIUS OF THE ROMAN LAW[52]

As a paradigmatic private-law system, Roman law is amenable to a state-of-the-art fusion with law and economics. Arguing for a return to Roman law may prove to be the best way to introduce law and economics into the civil law tradition.[53] 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.'[54] The systematic nature of the legal system —a characteristic of civil law systems— has been lost.[55]

A recodification of private law along the lines of law and economics and Roman law is an opportunity to bring new economic coherence to civilian legal systems.[56] Codification projects in civilian quarters are more than an academic enterprise; they directly cut across the interface between law and life.

I. What Makes the Roman Law Admirable?

Law and economics helps us understand why Roman law is still worthy of admiration and emulation,[57] and illustrates what constitutes the genius of Ro-

[52] This Chapter is an extended version of a paper delivered at the XXVI Annual Conference of the European Association of Law and Economics held at Rome, Italy in September, 2009.

[53] See generally Juan Javier del Granado and Matthew C. Mirow, "The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes," 83 *Chicago-Kent Law Review* 293 (2008).

[54] See generally Natalino Irti, *L'età della decodificazione* (1978).

[55] *Ibidem.*

[56] One of us brought out a newly-minted civil code from a law and economics perspective. This model code is a project ten years in the making, but several decades overdue in civilian quarters. See del Granado, *De iure ciuili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI* (2018).

[57] For a magisterial treatment of Roman law in English, see Reinhard Zimmermann,

man law.[58] This Chapter argues that one reason for the success of Rome was its highly efficient legal system and reliance on private law.[59]

Rome is the world's most successful civilization, bar none.[60] Nothing can hide the way Rome's success resonates throughout history. Rome's legacy remains ever present. We still use the Roman alphabet and the Roman calendar. Roman architecture and engineering are still part of modern life. Yet, Rome's greatness, we argue, is due as much to Roman law as it is to Roman aqueducts or Roman roads. Roman private law is admirable because it implemented information and incentive mechanisms, which allowed people to decentralize the management of resources.[61] An enormous and evolving body of private law at Rome made possible a decentralized social order and laid the foundations for a market economy without mediation by public law.

Most social order in human life is based on various forms of hierarchy. People in a hierarchical social order do their duty according to their place in a 'chain of command'[62] with mediation by public law. Societies characterized by hierarchical distinctions of class or caste implement centralized, command and control mechanisms to coordinate collective action between people. Heterarchy exemplifies an altogether different form of social organization. Heterarchy refers to an 'other order' which spontaneously emerges

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The Law of Obligations: Roman Foundations of the Civilian Tradition (1990). As a primer, David Johnston's *Roman Law in Context* (1999) is unsurpassed.

58 Between 1852 and 1865, Rudolf von Jhering published his influential work *Der Geist des römischen Rechts*. In 1912, Sir Frederick Pollock 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 Pollock, we are able to achieve a much better grasp of the spirit of private law through the economic approach, which we explain in Section I.

59 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 "The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes," at 304.

60 On the expression of Rome as the 'eternal city,' see Kenneth J. Pratt, "Rome as Eternal," 26 *Journal of the History of Ideas* 25 (1965). In contrast, the vast Chinese Empire under the Han dynasty was based on the application of public-law mechanism designs and the Confucian vision of hierarchical power structures. See Grant Hardy and Anne Behnke Kinney, *The Establishment of the Han Empire and Imperial China* 5 (2005).

61 For a robust development of this thesis, see del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI* (2010).

62 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).

from the self-coordinated actions of private individuals.[63] As a result, in a heterarchy, social rank plays less of a part. Accordingly, 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, a distinction that law and economics would later recognize but fail to develop adequately. Civil lawyers, compared to common lawyers, are more aware that private law is something entirely different from public law. Our analysis of the classical Roman system from a law and economics perspective illustrates how private law is fundamentally different from public law. Through the economic approach, we hope to throw a new light on the private legal order. Without the law of obligations, as provided for in Roman private law, people cannot reasonably be expected to take precautions in the interest of others. Moreover, without the law of property, as provided for in Roman private law, people will expend little effort, even in furtherance of their own interest.[64]

In nations where the legal system betrays an overreliance on public law despite its demonstrated limitations, government officials lack the incentives to take many actions and the information to make many decisions.[65] 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.

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63 The 'spontaneous order' that Friedrich von Hayek conceived; see *The Constitution of Liberty* 230 (1960).

64 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 *Comparative Labor Law & Policy Journal* 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).

65 Friedrich Hayek, 1 *Law, Legislation, and Liberty: Rules and Order* (1972). 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 *American Journal of Comparative Law* 75 (2008).

For purposes of this Chapter, 'Roman law' means the legal system of the Roman classical period, from about 300 B.C. to about 300 A.D.[66] Tracing the thousand-year legal history of the Roman Republic and the Roman Empire is too exacting a task. In the manner of German Pandect science, let us stipulate that we may choose certain parts of classical Roman law as being especially noteworthy to the design of an ideal private law system. This Chapter discusses legal scholarship from the *ius commune* or 'common law' of Europe during the high Middle Ages. This Chapter will also discuss a few Greek philosophical ideas which we believe are important in the classical Roman legal system.[67]

This Chapter revisits Roman private law from a law and economics perspective. Law and economics introduced a register of methods —both quantitative and qualitative—, with which to assess legal institutions. Roman law did not have the benefit of this register, but the institutions of Roman law provide some of the most compelling examples of ideas that would not be formalized until the late twentieth century. So the Chapter not only helps to understand the economic logic of Roman law, it also sheds light on both the virtues and limitations of law and economics by providing an ancient case study of law in the service of private interests.

We 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.[68] The new interdisciplinary field is variously known as the 'economic analysis of law' or simply 'law and eco-

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66 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 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*.

67 Do note that the Greek ideas that we 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 *Wisconsin Law Review* 905 (2004).

68 See Eric Talley's encyclopedia entry, "Theory of Law and Economics," in *The Oxford Companion to American Law* 485 (2002).

nomics.' Moreover, in the last twenty-five years, the field has undergone a paradigm shift.[69] With the Coase Theorem,[70] 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, the mechanism design literature posits the Myerson-Satterthwaite Theorem,[71] which brings to light the inextricable linkage 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.[72]

Finally, the 'ideal' system based on Roman law will be compared to present-day French and German civil law, two systems derived from Roman 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)[73] as a subsidiary source of legal authority,[74] yet German civil law scholars are unable to say precisely what this private legal order entails.[75] Law and economics scholarship, refashioned along civilian lines, 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.

This Chapter corrects a long overdue omission in economic research and contributes to an intriguing new field of inquiry: the economic analysis of Roman law.[76] The Roman legal system has long been a source of inspi-

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69 See Robert D. Cooter, "The Cost of Coase," 11 *The Journal of Legal Studies* 1 (1982).

70 For an exposition of what came to be called the Coase Theorem, see Ronald H. Coase, "The Problem of Social Cost," 3 *The Journal of Law and Economics* 1 (1960); reprinted in *The Firm, the Market and the Law* 95-156 (1988).

71 See Roger B. Myerson and Mark A. Satterthwaite, "Efficient Mechanisms for Bilateral Trading," 29 *Journal of Economic Theory* 265 (1983).

72 See Ian Ayres and Eric Talley, "Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade," 104 *Yale Law Journal* 1027 (1995).

73 See Volkmar Gessner *et alii*, *European Legal Cultures* 65 (1996).

74 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.

75 On the developing relationship between private and public law in Germany, see Ralf Michaels and Nils Jansen, "Private Law Beyond the State? Europeanization, Globalization, Privatization," 54 *American Journal of Comparative Law* 843 (2006).

76 See the pair of volumes recently edited by Giuseppe Dari-Mattiacci and Dennis P. Kehoe, *Roman Law and Economics: Institutions and Organizations* (2020), and *Roman Law and Economics: Exchange, Ownership, and Disputes* (2020), coming out ten years after our own work in the field.

ration to legal scholars over the centuries. Less obvious is the enormous contribution that the study of Roman law can make to modern law and economics in the twenty-first century.[77]

II. Incentive and Information Mechanisms in Roman Private Law

In this next part of the Chapter, we will discuss how Roman private law made possible and credible reliance upon private effort, private cooperation, and private commercial, financial and investment intermediation by implementing incentive and information mechanisms.

1. *Roman Law of Property*

A. *Clearly Defined Private Domains*

Law and economics literature emphasizes the importance of clearly-defined property rights,[78] yet the literature fails to discuss how the law of property defines these rights.[79] How property rights are defined is of central importance to the functioning of the economic system since the definition of rights *in rem* makes public —'common knowledge' in game-theoretical terminology—[80] the private information that people have over things they possess in fact.[81]

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77 Note that Esquirol assigns continuing importance to Roman law in the curriculum of Latin American law schools, "Continuing Fictions of Latin American Law," 55 *Florida Law Review* 41, 71 (2003).

78 Thomas W. Merrill and Henry E. Smith discuss the law and economics literature on property law, "What Happened to Property in Law and Economics?" 111 *Yale Law Journal* 357 (2001).

79 See Harold Demsetz, "Toward a Theory of Property Rights," 57 *American Economic Review* 347 (1967). Thrainn 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 on the Evolution of Property Rights, 31 *The Journal of Legal Studies* S331-S672 (2002).

80 See Robert J. Aumann, "Agreeing to Disagree," 4 *Annals of Statistics* 1236 (1976); Cédric Paternotte, "The Fragility of Common Knowledge," 82 *Erkenntnis* 451 (2017).

81 Because people privately observe their power over the external world of the things they possess in fact, these observations are private information, and asymmetric information

Roman law defines property using the mechanism design of *numerus clausus*, which refers to the conception of property in a 'closed number' or a closed system of standardized forms.[82] Roman civil law recognizes property *ex iure Quiritum* and Roman Prætorian law recognizes property *in bonis habere*. Ancient Roman law developed separately for citizens and for foreigners. Quiritary legal forms[83] applied to Roman citizens, while bonitary forms[84] 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*,[85] *dominium*[86] and *proprietas*[87] were used interchangeably to denote Roman typical property. Whatever the form, later medieval scholars conceived Roman property in terms of a standardized 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.[88] Roman property arose out of the Roman *actiones* (which like the English writs gave people the capacity to sue.) In the twelfth and thirteenth centuries, Canon lawyers explained "*ius* as a faculty or power" and developed the idea of subjective individual rights.[89] Though anachronistic for classical Roman law, we prefer the canonistic rights vocabulary, in which "*[l]ibertas*, *potestas*, *facultas*, *immunitas*, *dominuim*, *iustitia*, *interesse*

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develops between what they know in private and what is publically known. Property rights make this private information public and remove the asymmetric information. Narayan Dixit defines asymmetric information, *Academic Dictionary of Economics* 12 (2007).

82 Merrill and Smith explain the *numerous clausus* principle. See "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle," 110 *Yale Law Journal* 1 (2000).

83 Quiritary ownership was the standardized form of property that a Roman citizen acquired under the principles of civil law. See Adolf Berger, *Encyclopedic Dictionary of Roman Law* 442 (1953).

84 Bonitary ownership was the standardized form of property that the magistrates introduced, and which could be held by an alien. See Berger, *Encyclopedic Dictionary of Roman Law*, at 495.

85 Berger, *Encyclopedic Dictionary of Roman Law*, at 574.

86 *Idem*, at 441.

87 *Idem*, at 658.

88 See Geoffrey Samuel, *Epistemology and Method In Law* 153 (2003).

89 Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625* (1997).

and *actio* can all in the appropriate circumstances, be translated as 'right.'"[90] Property holders enjoyed these rights exclusively, that is, they could 'exclude' others from the use, enjoyment, and disposition of resources which fell within privately-held domains.[91]

While Roman property consisted of a bundle of rights,[92] Roman lawyers also formulated unbundled property rights in a 'closed number' or a closed system of standardized forms. These *iura in re aliena*[93] were limited to *seruitutes prædiorum*,[94] *usus fructus*[95] and *usus et habitatio*.[96] (We discuss typical security interests in another's property, also considered *iura in re aliena*, such as *fiducia cum creditore contracta*, *datio pignoris* and *pignus conuentum* in Section II.3.)[97]

In *seruitutes prædiorum*, the rights of exclusion are partly unbundled from the property to which they refer. These rights are instead tied to the dominant property of a neighbor, whom the property holder is now unable to exclude from passing himself or his animals, or conveying water through the servient property.[98] This interpretation echoes the modern insights of the law and economics movement into the exclusive nature of private property,[99] 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.[100] Though common lawyers speak of appurtenant easements or easements in gross as positive nonpossessory rights, Roman lawyers considered that any positive right to perform an act had to be clearly established as an *in personam* right[101] under the law

90 *Idem*, at 262. For the sake of clarity in this Chapter, we utilize a legal language closer to our own time.

91 Digest of Justinian 47.10.13 (Ulpianus, *Ad edictum*, 7).

92 Denise R. Johnson, "Reflections on the Bundle of Rights," 32 *Vermont Law Review* 247 (2007).

93 Berger, *Encyclopedic Dictionary of Roman Law*, at 530. These standardized forms of unbundled property rights entitled someone, other than the owner, to make a certain use of another's property.

94 *Idem*, at 702.

95 *Idem, at* 755.

96 *Idem, at* 755, 484.

97 See Schulz, *Classical Roman Law*, at 401-27.

98 See Watson, *The Law of Property in the Later Roman Republic*, at 176-202.

99 See Thomas W. Merrill, "Property and the Right to Exclude," 77 *Nebraska Law Review* 730 (1998).

100 Institutes of Justinian 8.1.15.

101 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) as a mechanism design of private-law systems. See William Warwick Buckland, *Roman Law and*

of obligations.[102] Accordingly, because they are not positive rights, *seruitutes prædiorum* are not personal assets held by the property holder,[103] but instead run with the dominant property to which these rights are tied. Moreover, Roman lawyers recognized that *seruitutes prædiorum* might exist only to the extent that they prove useful to the dominant property and increased its value.[104]

Because unbundled property rights are a burden on bundled property rights, Roman lawyers were careful to limit the scope and duration of *iura in re aliena*.[105] In *usus fructus* the rights of use and of enjoyment of fruits are partly unbundled from one's property and given to another.[106] 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.[107] 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.)[108] 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*,[109] to which the property holder retained the rights of disposition.[110] The owner remained entitled to alienate or encumber his property if 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.[111] Yet, the property holder was unable to prevent the usufructuary from using, and enjoying the fruits of, the property. 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 usu-

Common Law: A Comparison in Outline 89-90 (1952). This distinction coincides with the property/liability rule distinction in law and economics literature—.

102 The civil law term 'obligations' refers to common law areas such as contract and tort, and closely related matters—everything in between contracts and torts. See *idem*, at 193-96.

103 Digest of Justinian 33.2.1 (Paulus, *Ad Sabinum* 3).

104 See Johnston, *Roman Law in Context*, at 69-70.

105 See Rudolf Sohm, *The Institutes of Roman Law* 258 (James Crawford Ledlie, translator, 1892).

106 See Watson, *The Law of Property in the Later Roman Republic*, at 203-19.

107 *Idem, at* 219-21.

108 Digest of Justinian 7.8.14 (Ulpianus, *Ad Sabinum* 17).

109 Berger, *Encyclopedic Dictionary of Roman Law*, at 601.

110 Institutes of Gaius 2.31, 2.91.

111 See Max Kaser, *Roman Private Law* 122 (Rolf Dannenbring translator, 1965).

fructuary as well as to nonfungible things, and prevented the usufructuary from altering the economic character of the property.[112]

The typical forms of property or unbundled rights discussed above are all inclusive. As we pointed out, Roman private law only allowed for a 'closed number' or a closed system of standardized forms of property bundles and of rights that could be unbundled.[113] The mechanism design 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 mechanism design of *numerus clausus* applies in contexts other than Roman property law. An example may help clarify the concept: A dictionary discloses a 'closed number' or a closed system of standardized words. If standard English, Latin, or any language, had an open system, or a *numerus apertus* of nonstandard words, a speaker would be able to invent or create the words he used.[114] As an unwanted 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.[115] 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)[116] and *res immobile* (immovable things.)[117] While Roman law recognizes the differences between these two types of property, under the mechanism design of *numerus clausus*, both types of property confer the same rights. Note that the distinction between movables and immovables acquires additional importance after the promulgation of the Constitutio Antoniniana in 212 A.D.[118]

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112 See Schulz, *Classical Roman Law*, at 388.

113 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, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 278-338.

114 See Steve Johnston's compilation of invented words for use when standardized vocabulary lists fall short, *Words for the 90s* (1995).

115 See *Through the Looking-Glass and What Alice Found There* 21-22, 23, 126 (1872).

116 Berger, *Encyclopedic Dictionary of Roman Law*, at 679.

117 *Idem, at* 679.

118 For a discussion of the consequences of the Constitutio Antoniniana, see Adrian Nicholas Sherwin-White, *The Roman Citizenship* 215-27 (1973).

In keeping with a clear, standardized system of property, each quiritary domain had boundaries that were clearly defined by the civil law.[119] The German scholar von Jhering offers a folk etymology for 'quirites,' explaining that the Sabine warriors used to carry lances to stake out property in a way that was highly visible to everyone.[120] Roman surveyors were masters at squaring off real property with *terminationes* as visible markers.[121] The glossator Accursius formulated another boundary principle. In his gloss on a Roman text, Accursius states that the space above, and below, 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*."[122] His simple and straightforward explanation projected a clear mental image, which later legists could easily grasp—dare we say, see.

Just as land had clearly delineated bounds, Roman lawyers recognized that many movable things also had well-defined boundaries that were recognized by law.[123] Corporeal things have bodies that we can see, touch, and hold, "*quæ tangi possunt*."[124] 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*,"[125] and in some cases, are indivisible, "*quæ sine interitu diuidi non possunt*."[126] Examples of this last class include animals that would die or jewels that would lose their value if they were partitioned.[127]

Using a closed system of standardized forms and clearly-defined boundaries, Roman private law reduces the asymmetry of information be-

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119 For a discussion of quiritary and bonitary ownership, see Charles Phineas Sherman, 2 *Roman Law in the Modern World* 150 (1917).

120 1 *Geist des römischen Rechts, auf den verschiedenen Stufen seiner Entwicklung* chapter 1.

121 For a discussion of the Roman rectangular system of land demarcation known as 'centuriation', see Gary D. Libecap and Dean Lueck, "Land Demarcation in Ancient Rome," in Giuseppe Dari-Mattiacci and Dennis P. Kehoe (editors), *Roman Law and Economics: Exchange, Ownership, and Disputes* 211 (2020).

122 *Accursii Glossa in Digestum vetus* (1488), concerning Digest of Justinian 18.2.1 (Paulus, *Ad Sabinum* 5).

123 For a brief discussion of Roman ownership, see William Smith, *A Dictionary of Greek and Roman Antiquities* 421 (Second edition, 1848).

124 Institutes of Gaius 2.13, 2.14.

125 Digest of Justinian 41.3.30 (Pomponius, *Ad Sabinum* 30).

126 Digest of Justinian 6.1.35.3 (Paulus, *Ad edictum* 21).

127 See William Livesey Burdick, *The Principles of Roman Law and Their Relation to Modern Law* 315 (1938).

tween property holders and everyone else. The private legal system minimized the amount of information that people needed to search 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 we show in the next subsection, Roman law has a unique way of defining and making public what property belongs to which property holder.

B. *Clearly Publicized Ownership*

The Roman system used ceremonies, rather than a modern registration system, to publicize who held what private property.[128] 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.[129] In Rome's thriving agricultural economy, valuable types of property such as land, beasts of draught and burden, *seruitutes prædiorum* for passage or conveying water for irrigation purposes, and slaves, were valuable and needed a means to ensure their ownership was publicly known.[130] 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.[131] (In similar fashion, English common law developed another special ceremony—referred to as 'livery of seisin' in Law French.[132]) 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* created publicly available information —'common knowledge' in game-theoretical terminology— about the change in the property's ownership.[133] Alternatively, Roman

[128] Robert C. Ellickson discusses land ownership, "Property in Land," 102 *Yale Law Journal* 1315 (1993).

[129] See Joseph Janczyk, "An Economic Analysis of the Land Titling Systems for Transferring Real Property," 6 *The Journal of Legal Studies* 213 (1977).

[130] *Epitome Ulpiani* 19.1 (edited by Fritz Schulz, 1926).

[131] On the ceremony involving bronze and scales, see Watson, *Roman Law and Comparative Law* 45 (1991).

[132] See John Rastell, *Les termes de la ley* 281 (1812).

[133] See Gyorgy Diosdi, *Ownership in Ancient and Preclassical Roman Law* 62 (1970).

law allowed substitution of a public declaration (after a fictitious trial) with a confirmation before the *prætor*, *in iure cessio*.[134] Sometimes for certain types of property, Roman law relied on the collective memory of local communities to publicize the identity of the property holder. An example may help to clarify the concept: While a dictionary amounts to a registration system for words, the collective memory of local communities also admits a 'closed number' or a closed system of standardized words as a means of communication. For nonvaluable property, Roman law also presumed ownership from possession like modern legal systems.[135]

Roman private law protects both property owners and possessors, though in different ways, as von Jhering explains.[136] 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.[137] In Roman law, *rei uindicatio*[138] and *actiones ad exhibendum et negativa*[139] protect property right holders while *interdicta retinendæ et recuperandæ possessionis*[140] 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.[141]

C. *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

134 Berger, *Encyclopedic Dictionary of Roman Law*, at 496.

135 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).

136 Von Jhering argues that legal protection of possession protects the owner because the possessor was frequently the owner, *Der Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode* (1889).

137 Adam Mossoff describes possessory rights as the core of property, "What is Property? Putting the Pieces Back Together," 45 *Arizona Law Review* 371 (2003).

138 Berger, *Encyclopedic Dictionary of Roman Law*, at 627.

139 *Idem, at* 343, 463.

140 *Idem, at* 508.

141 See Watson, *The Law of Property in the Later Roman Republic*, at 91-109.

owner, the *pater familias*,[142] as the basis of the standard of diligent care to be used in the legal system.[143] 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' metaphor 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 *pater familias*, who personally manages the property. (The *pater familias* will be further discussed *infra* in Section II.3.)

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.[144] If the legal system conferred absolute rights without considering the effects that one's use of property may have on another's, property values may diminish.[145] Accordingly, Roman law established limits that controlled external effects created using property. For example, a property holder in an apartment-block may not operate a *taberna casearia* (cheese factory,)[146] which causes nauseating odors for the neighbors above unless he acquires a *seruitus prædii urbani*.[147] He also may not flood the property of his neighbors below.[148] Within limits set on a case-by-case basis in the Roman texts, the law leaves the choice of use of property to the *arbitrium* of the property holder.[149] 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 present-day civil law use nonproperty doctrines, such as nuisance and abuse of rights to limit property rights.[150] These nonproperty doctrines fail to maximize the value of property rights because they are framed in general terms

142 Berger, *Encyclopedic Dictionary of Roman Law*, at 377.

143 Bruce W. Frier and Thomas A.J. McGinn, *A Casebook on Roman Family Law* 239 (2004).

144 Ugo Mattei, *Comparative Law and Economics* 27-67 (1997).

145 Von Jhering explains that certain limits on property increase its value, *Der Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode*.

146 On Roman shops, see Christopher Francese, *Ancient Rome in so Many Words* 155 (2007).

147 Digest of Justinian 8.5.8.5 (Paulus, *Ad edictum* 21).

148 *Ibidem.*

149 Berger, *Encyclopedic Dictionary of Roman Law*, at 366.

150 Anna di Robilant, "Abuse of Rights: The Continental Drug and the Common Law," 61 *Hastings Law Journal* 687 (2010).

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 standardized rights, which could not be separated out of the bundle (except in the 'closed number' or the closed system 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*[151] 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.[152] In law and economics, the tragedy of the commons is a generalized form of a prisoner's dilemma with many players.[153] 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.[154] Demsetz brought this analysis into law and economics literature.[155] Heller discussed the flip side of this analysis in the literature.[156] 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.

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151 Berger, *Encyclopedic Dictionary of Roman Law*, at 400.

152 See Garrett Hardin, "The Tragedy of the Commons," 162 *Science* 1243 (1968).

153 In this nonzero-sum game, two people face private incentives to be the first to reveal private information about a crime. See Gordon Tullock, "Adam Smith and the Prisoner's Dilemma," 100 *Quarterly Journal of Economics* 1073 (1985).

154 Shi-Ling Hsu, "What is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem," 69 *Alabama Law Review* 75 (2005).

155 See Demsetz, "Toward a Theory of Property Rights."

156 Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," 111 *Harvard Law Review* 621 (1998).

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. Hardin's Malthusian chapter attributes the idea to an obscure nineteenth century mathematical amateur.[157] The insight behind it goes back to Greek philosophy. Aristotle refutes Plato's community of property by explaining that, "*ἥκιστα γὰρ ἐπιμελείας τυγχάνει τὸ πλείστων κοινόν*."[158] From this passage in Aristotle, the tragedy of the commons became a Roman law trope. Fernando Vazquez 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,[159] from which Hugo Grotius takes the analysis without supplying any additional insights.[160]

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.[161] Roman private law gives the right holders the incentives to invest in the maintenance and improvement of property because they are able to reap both the use value and the exchange value of those resources.[162] In short, the economic problems with common-held property are avoided in the Roman legal system because a single person, the *dominus proprietarius*,[163] is the residual claimant of the resources managed in the domain.

However, with unbundled property rights such as *usus fructus*, the *dominus usufructus*[164] fails to be the residual claimant of the property. Since the incen-

157 On the tragedy perspective, see Michael Goldman, "'Customs in Common': The Epistemic World of the Commons Scholars," 26 *Theory and Society* 1, 25 (1997).

158 Aristotle, *Politics* book 2 (350 B.C.)

159 Fernando Vazquez de Menchaca, *Controuersiarum illustrium aliarumque usu frequentium libri tres* (1564).

160 Hugo Grotius, *De jure belli ac pacis libri tres* (1625).

161 Del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 305.

162 *Ibidem.*

163 Berger, *Encyclopedic Dictionary of Roman Law*, at 422.

164 *Idem, at* 385.

tives 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 arbitratu et, cum usus fructus ad eum pertinere desinet, restituturum quod inde exstabit.*"[165] Roman private law requires the *dominus usus* to post a similar bond, the *cautio usuaria*, for the same reason.[166]

As we discuss in Section I.2.B *infra*, incomplete contracts are an abiding theme in the literature. However, few law and economics scholars have investigated the related theme of incomplete property. Defining "full ownership" would be requiring too much of a legal system "for there is an infinity of potential rights [...] that can be owned [...]. It is impossible to describe the complete set of rights that are potentially ownable."[167] The legal system is unable to "stipulate every tiniest use of each property."[168] Rather than stipulating how holders are to manage property, Roman private law supplements, rather than substitutes for, incomplete property with: standardized bundles of property rights tied to a single property holder, and standardized temporarily unbundled rights in the property of others; limits to the *arbitrium* of the property holder set on a case-by-case basis in the Roman texts, and quasi-contractual obligations.

D. *Institutional Mechanisms for Maintaining Typical Property Through Time*

To provide for proper management of resources, Roman law incorporates institutional mechanisms that maintain standardized property through time.[169] The institutional mechanisms of *accessio*,[170] *nouam speciem facere*,[171]

165 Digest of Justinian 7.9.1 (Ulpianus, *Ad edictum* 79).

166 See Watson, *The Law of Property in the Later Roman Republic*, at 218.

167 Demsetz, "A Framework for the Study of Ownership," in Demsetz (editor), 1 *The Organization of Economic Activity: Ownership, Control and the Firm* 12, 19 (1988).

168 Yun-chien Chang and Henry E. Smith, "An Economic Analysis of Civil versus Common Law Property," 88 *Notre Dame Law Review* 1, 31 (2012).

169 Del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 316.

170 Berger, *Encyclopedic Dictionary of Roman Law*, at 340.

171 *Idem*, at 712.

and *confusio uel commixtio*,[172] as well as *successio*,[173] *usucapio*,[174] and *longi temporis præscriptio*,[175] are methods of maintaining typical Roman property as people, property, and attachments between these elements change throughout time. Each will be treated in turn in the following paragraphs.[176]

In *accessio*, one's property becomes combined with, or incorporated into, another's property.[177] 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,[178] the threads woven into a piece of cloth,[179] the dyes used to process cotton fabric,[180] the wood panel containing an oil painting,[181] the writing on a goatskin parchment,[182] the buildings put up on[183] or the crops sown in the ground.[184] As is evident from the case law, Roman private law avoids a situation of *communio* between common property holders whenever possible as a mechanism design.

In *nouam speciem facere*, one applies one's labor to another's materials to create a thing of a new species.[185] 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*"[186] (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

172 *Idem*, at 399.

173 *Idem*, at 722.

174 *Idem*, at 752.

175 *Idem*, at 645.

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

177 See R. A. Burgess, *Accessio and related subjects in Roman Law* (1972).

178 Digest of Justinian 41.1.7.1 (Gaius, *Libri rerum cottidianarum siue aureorum* 2).

179 Institutes of Justinian 2.1.26.

180 Digest of Justinian 41.1.26.2 (Paulus, *Ad Sabinum* 14).

181 Institutes of Gaius 2.72.

182 Institutes of Gaius 2.77.

183 Digest of Justinian 41.1.12 (Neratius, *Membranarum* 5).

184 Institutes of Justinian 2.1.32.

185 See Schulz, *Classical Roman Law*, at 366.

186 Institutes of Justinian 2.1.12.

assembled with planks of wood belonging to another.[187] The goblet can be melted down, the vestment can be ripped back into sheets of wool, the boat can be dissembled, 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.[188] Thus, if the boundary fence comes 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*[189] to partition the property in proportion to the value that corresponds to each.[190]

Through time people move, leave, or perish. In *successio*,[191] any one of the heirs, at any time, is able to ask the *iudex* to divide an *hereditas*.[192] In this way, Roman law avoids a situation of *communio* among coheirs. Or a *pater familias* may executive a *testamentum* and leave the family property to a single heir.[193]

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 præscriptio*.[194] The possessor acquires dominium over another's property through usage over time.[195] 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

187 Institutes of Gaius 2.79.

188 See Paul Van Warmelo, *An Introduction to the Principles of Roman Civil Law* 89 (1976).

189 Berger, *Encyclopedic Dictionary of Roman Law*, at 518.

190 Digest of Justinian 6.1.5.1 (Ulpianus, *Ad edictum* 16).

191 For a short discussion of the Roman law of succession, see Johnston, *Roman Law in Context*, at 44-52.

192 Berger, *Encyclopedic Dictionary of Roman Law*, at 485.

193 See Thomas Rüfner, "Testamentary Formalities in Roman Law," in Zimmermann *et alii* (editors), 1 *Comparative Succession Law: Testamentary Formalities* 1 (2011).

194 See Watson, *The Law of Property in the Later Roman Republic*, at 21-61.

195 Digest of Justinian 41.3.3 (Modestinus, *Pandectarum* 5); 44.3.3 (Modestinus, *Differentiarum* 6).

lie within their control.[196] 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* or *longi temporis præscriptio*.[197]

Roman law relies on standardized forms of property bundles, temporarily unbundled property rights, clearly defined boundary markers for property, and publicized ownership to reduce asymmetric information. Roman law also employs institutional mechanisms that maintain typical property through the vagaries of time to avoid situations of *communio* whenever possible between common property holders. Where a situation of common ownership is unavoidable, as in *communio incidens*, we will show in Section II.2.C 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.[198] Goods have both a use value and an exchange value. This analysis again goes back to Greek philosophy. People will not enter 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 equivalent even if it is not equal, "*καὶ ἀναλογίαν καὶ μὴ καὶ ἰσότητα*."[199] However, a voluntary exchange requires more than mere possession in fact; it requires property rights.[200] 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 marketplace. As we explain above, rights of exclusion are logically prior to the pricing mechanism.

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196 Del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 305.

197 See Johnston, *Roman Law in Context*, at 59.

198 See Richard A. Ippolito, *Economics for Lawyers* 6-14 (2005).

199 Aristotle, 5 *The Nicomachean Ethics* (340 B.C.)

200 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* 296.

Hernando de Soto, a Peruvian economist, has strongly urged developing countries to create property titling programs.[201] 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 Chapter 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 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.

2. *Roman Law of Obligations*

A. *Private Choices to Cooperate*

Law and economics literature is still under development with respect to contract law.[202] The economic approach, in the hands of common law lawyers, seems unable to posit a "economic theory" of contract law.[203] Law and economics models fail to describe 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.[204] The historical origins of common law doctrines of contract in Canon law, rather than in Roman law, give common law lawyers a substantially incomplete

201 De Soto *et alii* argue that property titling programs can spark economic development, *El otro sendero: La revolución informal* (1986).

202 Eric A. Posner discusses the failure of law and economics literature to explain contracts law, "Economic Analysis of Contract Law After Three Decades: Success or Failure?" 112 *Yale Law Journal* 829 (2003).

203 *Idem*, at 830.

204 *Ibidem.*

picture of contracts.[205] Roman law reveals the full range of possible mechanism designs in the law of obligations.

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 the incentives to comply in the future.[206] 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' —in its nontechnical sense— between people has economic value.[207]

The Roman law of obligations enables people to commit to future actions in a legally binding contract. The debtor who enters 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 Hernán Cortés, 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.[208]

Part of the credibility of obligations under Roman law is the distinction between *actiones in rem* (see *supra* Section II.1) and *actiones in personam* as a mechanism design[209] —known as the property/liability rule distinction in law and economics literature—.[210] 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.[211] Even where the obligation is *incertum*,[212] the pro-

205 See Juan Javier del Granado, "The Path Dependence of the Common Law from a Romanist Perspective," paper delivered on August 3, 2011 at Bogota, Colombia at the XV Annual Conference of the Latin American and Caribbean Law and Economics Association.

206 See Alan Schwartz and Robert E. Scott, "Contract Theory and the Limits of Contract Law," 113 *Yale Law Journal* 541, 562 (2003).

207 See Claire A. Hill and Erin Ann O'Hara, "A Cognitive Theory of Trust," 84 *Washington University Law Review* 1717 (2006).

208 Letter to Emperor Charles V (Oct. 30, 1520), in 1 *Cartas de Relacion de La Conquista de Mejico* (1519). Without such legal support for commitment, we would be forced to use other more extreme measures as demonstrated by Cortés.

209 Berger, *Encyclopedic Dictionary of Roman Law*, at 346.

210 See Calabresi and A. Douglas Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972).

211 See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 771.

212 Berger, *Encyclopedic Dictionary of Roman Law*, at 387.

cedural formula stipulates that the *iudex* must assess, *tantum pecuniam* —an amount of money equal— *quidquid Numerius Negidius Aulo Agerio dare facere oportet* or whatever the defendant ought to give to, or do for, the plaintiff.[213] Accordingly, when performance becomes costlier 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 mechanism design of *omnis condemnatio est pecunaria*, that is, all judgments are for monetary damages.[214] The contract restructures the future incentives of the debtor and makes his promises credible. Unlike modern civil and common law systems, the classical Roman *prætor* uniquely refused to provide authoritative instructions for decrees of specific performance.

The Roman contract system transforms the private expectations that people hold about the future actions of others into public information —'common knowledge' in game-theoretical terminology— by utilizing an appropriate ceremony or standardized contract forms.[215] The legal system adopts the same institutional mechanisms, long-winded verbal statements in ceremonies and a 'closed number' or a closed system of standardized forms as those used in the Roman law of property (see *supra* Section II.1.) As we saw earlier, modern civil law systems substitute the entry of public records in registration systems for the ceremonies of classical Roman law.[216] Using the mechanism designs of standardized forms and clearly stipulated obligations, Roman private law reduces asymmetric 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 to enter an enforceable agreement.[217] If such a ceremony existed, its purpose was to subject parties to seizure if they failed to perform an obligation.[218] The ceremony openly established the parties as *nexus* or bound.[219] However, under the legal system of the Roman classical period, the most important ceremonial means of forming binding legal commitments was the verbal

213 Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 771.

214 Institutes of Gaius 2.31.

215 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 319.

216 On civil law notary publics, see Armando J. Tirado, "Notarial and Other Registration Systems," 11 *Florida Journal of International Law* 171, 174 (1996).

217 On the controversial *nexum*, see Kaser, *Roman Private Law*, at 167; de Zulueta, "The Recent Controversy Over Nexum," 29 *Law Quarterly Review* 137 (1913).

218 See Watson, *Rome of the XII Tables: Persons and Property* 111-24 (1975).

219 Berger, *Encyclopedic Dictionary of Roman Law*, at 595-96.

question-and-answer sequence of *stipulatio*.[220] In the immediate presence of each other and before witnesses, the *reus stipulandi*[221] asks the question, and the *reus promittendi*[222] responds directly with a promise in terms that mirror the question. *Dari spondes? Spondeo. Dabis? Dabo. Promittis? Promitto. Fidepromittis? fidepromitto. Fideiubes? Fideiubeo. Facies? Faciam*,[223] Accordingly, Roman law enables the parties to stipulate to a mutually understood unilateral obligation, which is legally enforceable as a contract. (See Section II.3 *infra* for a discussion of the literal contractual form.)

Besides a ceremony, the other Roman method of publicizing private agreements was by use of standardized contracts.[224] Parties during the classical period could form binding legal commitments by concluding any one of a 'closed number' or a closed system of standardized forms, eliminating the need for long drawn-out ceremonial verbal statements.[225] The typical contracts under Roman law were either *consensu* or *re*.[226] The parties could form a consensual contract simply by manifesting their agreement.[227] The parties could form a real contract simply by handing over *res corporales*[228] 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*,[229] *locatio conductio*,[230] *mandatum*[231] and *societas*,[232] as well as four real contracts, *depositum*,[233] *mutuum*,[234] *commodatum*[235] and *pignus conuentum*.[236]

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220 *Idem*, at 716.

221 *Idem*, at 684.

222 *Ibidem.*

223 Institutes of Justinian 3.15. Note that we retain the Latin terms throughout the Chapter, because the translation of legal terms is invariably imprecise and possibly misleading.

224 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 319.

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

226 See Watson, *The Law of the Ancient Romans* 64-72 (1970).

227 See Johnston, *Roman Law in Context*, at 78.

228 Berger, *Encyclopedic Dictionary of Roman Law*, at 677.

229 *Idem*, at 452.

230 *Idem*, at 567.

231 *Idem*, at 574.

232 *Idem*, at 708.

233 *Idem*, at 432.

234 *Idem*, at 591.

235 *Idem*, at 399.

236 Idem, at 630.

The typical contracts —referred to as the 'nominate contracts' by civilians because they are named— are one of the greatest achievements of Roman private law.[237] 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.[238] To illustrate, when the parties entered into an *emptio uenditio*, they only had to specifically stipulate the *pretium* (price)[239] and the *res* (thing.)[240] However, the obligation of the seller to respond for eviction, *euictionem præstare*, was created without being mentioned because it was part of the typical contract invoked by the name, '*emptio uenditio*'.[241] 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.[242] Roman law enables parties to stipulate out of implicit legal rules that are not essential to the standard contractual form.[243] For example, when the parties enter an *emptio uenditio*, the parties may agree that the seller does not respond for eviction by entering into a *pactum de non præstanda euictione*.[244] 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

237 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 319-20.

238 *Ibidem.*

239 Berger, *Encyclopedic Dictionary of Roman Law*, at 649.

240 *Idem*, at 677.

241 See Watson, *The Law of Obligations in the Later Roman Republic*, 40-45, 70-86.

242 Ayres and Robert Gertnert discuss how parties reveal information when they contract around default provisions, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 *Yale Law Journal* 87 (1989).

243 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 328.

244 See de Zulueta, *The Roman Law of Sale* 46 (1945).

mechanism design of a standardized contractual form.[245] Thus, the parties are unable to agree to a *commodatum* in exchange for *merces* (rent),[246] which makes the transaction something other than a gratuitous loan.[247] The Roman lawyers indicated that such a transaction would have to be enforced by another legal action, *ex locatione conductio*.[248] 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*.[249] Roman law refused to enforce naked pacts without a ceremony or a standardized contractual form with a name to publicize the content of the obligations.

As explained *infra* in Section V, 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 unstandardized business deals.

B. *Private Choices to Cooperate Without Stipulating All Eventualities*

The Roman law of obligations establishes full freedom of contract, including the ability to enter into and enforce incomplete contracts, an abiding theme in law and economics.[250] However, the mechanism design of freedom of contract is a necessary, but not sufficient, condition for realizing a decentralized marketplace economy.[251] 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.[252] Moreover, because negotiating and drafting clauses to resolve possible contingencies and risks is costly,

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245 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 328.

246 Berger, *Encyclopedic Dictionary of Roman Law*, at 581.

247 See Ferdinand Mackeldey, *Handbook of the Roman Law* 337 (Moses A. Dropsie translator, 1883).

248 Digest of Justinian 13.6.5 12 (Ulpianus, *Ad edictum* 28).

249 Digest of Justinian 2.14.7.4 (Ulpianus, *Ad edictum* 4).

250 See Richard A. Epstein, *Simple Rules for a Complex World* 327 (1995).

251 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 326.

252 See Robert E. Scott and George G. Triantis, "Incomplete Contracts and the Theory of Contract Design," 56 *Case Western Reserve Law Review* 187, 190 (2005); Maskin and Jean

parties may decide to leave remote contingencies unstipulated.[253] Rather than abridging full freedom of contract, Roman private law supplements, rather than substitutes for, incomplete contracts with: standardized contractual forms; the concept of good faith[254] of Roman Prætorian law, and quasi-contractual obligations.[255] Roman law works because it supports private choices to cooperate without stipulating all eventualities. These supplemental mechanism designs 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.[256] Insofar as the near future will resemble the recent past, Roman private law supports personal autonomy by providing a default framework of implicit legal 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 standardized nominate form cover the unstipulated eventualities most likely to arise in the contract with that name.[257]

In the Roman legal system, the *ius honorarium*[258] developed, *adiuuandi uel supplendi uel corrigendi iuris ciuilis*,[259] which is like the development of equity introduced by the chancery courts in common law systems.[260] Both the *ius honorarium* and equity supplement and mitigate the rigors of strict law.[261] In classical Rome, the *prætor* allowed a defendant to request the insertion of an *exceptio doli* into the procedural formula.[262] This addition instructed the *iudex* to consider the equity of the case, *si in ea re nihil dolo malo Auli Agerii*

Tirole, "Unforeseen contingencies and incomplete contracts," 66 *Review of Economic Studies* 84 (1999).

253 *Ibidem.*

254 Berger, *Encyclopedic Dictionary of Roman Law*, at 374.

255 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 327-33.

256 *Idem*, at 327.

257 *Ibidem.*

258 Berger, *Encyclopedic Dictionary of Roman Law*, at 529.

259 Digest of Justinian 1.1.7 (Papinianus, *Definitionum* 2).

260 Buckland describes the kinship between Roman and English lawyers, *Equity in Roman Law* (1911).

261 *Idem*, at 7.

262 Berger, *Encyclopedic Dictionary of Roman Law*, at 459.

factum sit neque fiat,[263] if no fraud has been committed by you as plaintiff.[264] When enforcing any of the four consensual contracts, *emptio uenditio*, *locatio conductio*, *mandatum* and *societas*, or the real contract of *depositum*, the Prætorian formula contains an authoritative 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 concept of good faith.[265]

Modern scholars have been unable to fully explain the meaning of good faith.[266] However, law and economics suggests that *bona fides* allowed Roman law to supplement incomplete contracts.[267] When the parties are able to stipulate the entire content of a contract, the mechanism design of *bene agere* or acting fairly requires that each party faithfully execute the obligations expressly stipulated, and nothing more.[268] 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.[269] Parties are required to act with *bona fides*; to respond to unstipulated eventualities without *dolus*[270] or *culpa*[271] within the bounds of foreseeability, *non etiam improuisum casum præstandum esse*.[272]

Modern scholars disagree about the exact standard of care that Roman lawyers applied because they miss the point of Prætorian *bona fides*.[273] The *iudex* evaluates on a case-by-case basis whether each party has acted as a *bonus uir*,[274] thus the standard of care varies. Whereas modern German civil law fits good faith and fair dealing, or *Treu und Glauben*, into groups

263 Digest of Justinian 44.4.4 (Paulus, Ad Edictum 7).

264 Translation taken from Samuel Parsons Scott, 5 The Civil Law 60 (1932).

265 See Abel Hendy Jones Greenidge, 1 *The Legal Procedure of Cicero's Time* 205-06 (1901).

266 See generally Simon Whittaker and Zimmermann, "Good Faith in European Contract Law: Surveying the Legal Landscape," in Zimmermann and Whittaker (editors), *Good Faith in European Contract Law* 16 (2000).

267 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 331.

268 See Digest of Justinian 19.2.21 (Javolenus, *Epistularum* 11).

269 See Digest of Justinian 19.2.22.3 (Paulus, *Ad edictum* 34).

270 Berger, *Encyclopedic Dictionary of Roman Law*, at 440.

271 *Idem*, at 419; Digest of Justinian 18.1.68 (Proculus, *Espistularum* 6).

272 Code of Justinian 4.35.13 (Diocletian and Maximian 290/293).

273 The concept gets rather short shrift in the literature. *Exempli gratia*, George Mousourakis, *The Historical and Institutional Context of Roman Law* 34 (2003).

274 Berger, *Encyclopedic Dictionary of Roman Law*, at 767.

of cases or *Fallgruppen*, Roman lawyers adopted a case-by-case approach to *iudicia bonæ fidei* where every situation will be different. If *iudicia bonæ fidei* could be reduced to typical situations, Roman lawyers would have adopted a solution based on the standardized contractual forms.[275] The Prætorian 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.[276]

Incomplete contracting is particularly problematic and expensive when the *causa* or reason[277] 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.

C. *Private Cooperation Within Extracontractual Relationships*

Another aspect of Roman law that encourages cooperation involves extracontractual relationships. Whether the relationships arise through mistake, prior circumstances, or consensual acts, Roman private law recognizes and enforces certain 'extracontractual obligations,' as they are referred to by civilians. In general, persons who are supposed to act for the benefit of others are considered to have special relationships with each other which demand 'trust' —in its nontechnical sense—, despite the absence of any express agreement between them. Roman lawyers refer to certain obligations as *quasi ex contractu* or 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.2.B, Roman lawyers conceived a 'closed number' or a

275 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI,* at 320.

276 Epstein discusses why different standards of fault are proper in different contexts, "The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying," 107 *Michigan Law Review* 1461 (2009).

277 Pollock explains that the doctrine of consideration in the common law descends from the civil law *causa*, *Principles of Contract* 149-50 (1876).

closed system of standardized quasi-contractual forms: *negotiorum gestio*,[278] *tutela uel curæ gestio*,[279] *communio incidens*,[280] and *indebitum solutum*.[281]

In *negotiorum gestio*, someone undertakes to take care of some business or affair for another.[282] Roman law requires that the *negotii gestor* or person meddling in another's affairs[283] act in the interest of this other.[284] Once begun, the *negotii gestor* must attempt to complete his obligation,[285] and after finishing, he must give a full accounting of his actions to the *dominus negotii* —owner of the business or affair[286]— 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 between the parties to this extracontractual 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 quæ oneratura est*."[287]This limit is enforced by denying the *negotii gestor* a claim for reimbursement while still requiring the officious *negotii gestor* to be liable for *culpa levis*[288] and *casus fortuitus*.[289]

In *tutela uel curæ gestio*, someone looks after the affairs of another who is a minor or of unsound mind.[290] The tutor must look after the interests of his ward as if they were his own.[291] Where the incentives of the tutor are not perfectly aligned with the interests of the ward, Roman private law requires

278 Berger, *Encyclopedic Dictionary of Roman Law*, at 593.
279 *Idem*, at 747.
280 *Idem*, at 400.
281 *Idem*, at 498.
282 See Watson, *The Law of Obligations in the Later Roman Republic*, at 193-207.
283 Berger, *Encyclopedic Dictionary of Roman Law*, at 593-94.
284 Digest of Justinian 3.5.6.3 (Julianus, *Digestum* 3).
285 Digest of Justinian 3.5.3.10 (Ulpianus, *Ad edictum* 10).
286 *Ibidem.*
287 Digest of Justinian 3.5.9.1 (Ulpianus, *Ad edictum* 10).
288 Berger, *Encyclopedic Dictionary of Roman Law*, at 420.
289 *Idem*, at 476. Digest of Justinian 3.5.11 (Pomponius, *Ad Quintus Mucius* 21).
290 See Richard H. Helmholz, "The Roman Law of Guardianship in England, 1300-1600," 52 *Tulane Law Review* 223 (1978).
291 Digest of Justinian 26.7.15 (Paulus, *Sententiarum* 2).

the posting of a bond, the *cautio*, *cauere rem pupilli saluam fore*,[292] to guarantee the diligent management of the ward's affairs.[293]

Roman law also applies quasi-contractual obligations, in *communio incidens*, where several people unavoidably become joint property holders (see Section II.1) and in *indebitum solutum*, where someone unjustly enriches another.[294]

All quasi-contractual obligations are *iudicia bonæ fidei*.[295] The Prætorian 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* or almost arising from a delict. In civil law, a delict is a private wrong redressable by compensation. These obligations are similar to those imposed as a result of fault or carelessness. Roman lawyers conceive of a 'closed number' or a closed system of standardized quasi-delictual forms. Thus, Roman law subjects the *iudex*, to objective responsibility —'strict liability' is the term used by the common lawyer—, *qui litem suam fecerit*, who makes a trial his own;[296] the sea carrier, innkeeper and stable keeper whose employees steal or damage the property of a customer, *furtum uel damnum in naui aut caupone aut stabulo*;[297] as well as anyone from whose dwelling something is *deiectum uel effusum* (thrown or poured) onto the street,[298] or from whose building something is *positum uel suspensum* (placed or suspended) which falls and obstructs traffic.[299]

As we show, Roman private law recognizes and enforces a 'closed number' or a closed system of both quasi-contractual and quasi-delictual obligations as mechanism designs. However, modern civil law scholars disfavor the Justinianian labels of 'quasi contract' and 'quasi delict."[300] These schol-

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292 Berger, *Encyclopedic Dictionary of Roman Law*, at 385.

293 Institutes of Justinian 1.24.

294 Emily Sherwin dates the law of restitution back to Roman law, see "Restitution and Equity: An Analysis of the Principle of Unjust Enrichment," 79 *Texas Law Review* 2083 (2001).

295 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 331.

296 Berger, *Encyclopedic Dictionary of Roman Law*, at 519.

297 *Idem*, at 592.

298 See Kaser, *Roman Private Law*, at 216.

299 *Ibidem.*

300 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 332-33.

ars are unable to find any common thread linking these seemingly unrelated causes of action.[301] Law and economics suggests that what links the motley collection of personal actions is some kind of pre-existing or just-created relationship between people. These standardized extracontractual obligations —which lie between contracts and delicts— all involve what we will call 'relational obligations.'

D. *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' or a closed system of standardized civil delicts.[302] The standard Roman law delicts include several harms which modern law classifies as crimes against persons or property.[303] A wide variety of behaviors involving the involuntary removal of property from the control

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301 Nor can the motley collection of situations be subsumed under the law of restitution for unjust enrichment. See, *exempli gratia*, James Gordley, "Restitution Without Enrichment? Change of Position and Wegfall der Bereicherung," in Johnston and Zimmermann (editors), *Unjustified Enrichment: Key Issues in Comparative Perspective* 227, 236-37 (2002).

302 See Watson, *The Law of Obligations in the Later Roman Republic*, at 220-33, 248-73.

303 See David D. Friedman, "Private Prosecution and Enforcement in Roman Law," in Dari-Mattiacci and Kehoe (editors), *Roman Law and Economics: Exchange, Ownership, and Disputes*, at 327. Friedman's thesis is based on a mistaken chronology of private and public wrongs. For archaic examples of state enforcement and sanctions, look to the Law Stele of Hammurabi, Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor* (1995); "Mesopotamian Legal Traditions and the Laws of Hammurabi," 71 *Chicago-Kent Law Review* 13 (1995).

of its rightful holder, *inuito domino*,[304] constitute *furtum*,[305] and if done with force, *rapina*.[306] As with modern law, the offense does not include removing property under the mistaken belief of ownership.[307] Roman law *iniuria*[308] includes many modern crimes against the person.[309] However, as with modern law, the offense does not include injuring someone negligently during a sports competition.[310] Roman private law prefigures the essential components of a modern legal system.

While Anglo-American common law retains its closed system of intentional torts, modern Latin American civil law relies overly on criminal, as opposed to civil liability. The intentional delicts of Roman 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.[311] 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.[312]

Moreover, Roman law imposes liability, even for unintentional harms done with culpa or negligence. The Roman civil delict *damnum iniuria datum*[313] 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.[314] A determination of objective responsibility —'strict liability' at 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 asymmet-

304 Berger, *Encyclopedic Dictionary of Roman Law*, at 516.

305 *Idem*, at 480.

306 *Idem*, at 667.

307 Digest of Justinian 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, *Encyclopedic Dictionary of Roman Law*, at 413.

308 *Idem*, at 502.

309 See Watson, *The Law of Obligations in the Later Roman Republic*, at 248-55.

310 Digest of Justinian 47.10.3.3 (Ulpianus, *Ad edictum* 56).

311 See Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 26 (1970).

312 Epstein argues that private actions in tort work better than state prosecution, "The Tort/Crime Distinction: A Generation Later," 76 *Boston University Law Review* 1, 13 (1996).

313 Berger, *Encyclopedic Dictionary of Roman Law*, at 548.

314 Epstein describes the choice between strict liability and negligence as a debate without conclusion in the literature, *Torts* 85, 89-107 (1999).

ric information. Because people privately observe the costs incurred in taking precautions and avoiding accidents, asymmetric information develops. Thus, a finding of civil responsibility for *damnum iniuria datum* under *culpa* makes public —'common knowledge' in game-theoretical terminology— 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*."[315]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, culpæ reus est*."[316] 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* —'negligence' at common law—, 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.[317]

3. *Roman Law of Commerce, Finance and Investment*

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'.)[318] These commentators generally assumed that public law, in the guise of a regulatory regime which oversees market participants, must exist alongside market institutions.[319] At the same time, mechanism design theory represents a powerful new paradigm.[320] A very able —perhaps incipient— line of law and economics scholarship, at last, is poised to show exactly how private

315 Digest of Justinian 9.2.31 (Paulus, *Ad Sabinum* 10).

316 Digest of Justinian 9.2.30.3 (Paulus, *Ad edictum* 22).

317 The Roman jurists wrote commentaries on the edict and the civil law. See Watson, *The Spirit of the Roman Law* 57-63 (1995).

318 Even Judge Posner has entered the fray with two recent books, which describe how insufficient public regulatory oversight led to the crisis. See *The Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (2009); *The Crisis of Capitalist Democracy* (2010).

319 *Ibidem*, 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 to ratchet up regulatory oversight.

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

litigation, as opposed to public regulation, supports, supplements, and corrects markets. Accordingly, talking about the vicissitudes of savage capitalism is naive. Marketplaces never go unregulated. As the Roman system shows, private law, rather than public law, can vitally support, supplement, and correct market institutions.

The marketplace intermediates between supply and demand through the price mechanism.[321] Rather than depending on the centralized control of a public authority, the price mechanism relies on the decentralized decisions made by countless private actors.[322] Economists tend to assume that markets clear effortlessly.[323] However, law and economics scholars know better.[324] For markets to clear, intermediaries must make markets. Market makers are brokers who manage inventories of commercial, financial and investment assets across space and time. They can buy where and when people want to sell, and sell where and when people want to buy.[325]

Roman private law supports the making of markets through the laws of property and obligations. Moreover, Roman commercial, financial and investment legal norms allow principals to reduce agency costs either by aligning their agents' interests with their own, or by monitoring their agents.[326] Principals accrue monitoring costs to keep agents from hiding their actions.[327] When a creditor hands over money to a debtor, many of the

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321 John Black, *A Dictionary of Economics* 353 (1997).

322 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 equals the quantity supplied. See Donald Rutherford, *Routledge Dictionary of Economics* 152 (1992). In this sense, the market clears.

323 Kenneth J. Arrow and Gerard Debreu formalize the assumptions of general market equilibrium, "Existence of Equilibrium for a Competitive Economy," 22 *Econometrica* 265 (1954).

324 Instead, law and economics scholarship pays close attention to instances of market failure, see, *exempli gratia*, Cooter and Thomas S. Ulen, *Law and Economics* 44-47 (Fourth edition, 2004.

325 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 (2005).

326 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 alii*, *Dictionary of Economics* 307 (Fourth edition, 2004).

327 *Ibidem.*

actions of the debtor are unobservable by the creditor.[328] Thus, creditors risk the potential loss of their money.[329] To support financial intermediation, as briefly mentioned in Section II.1, the Roman law of property includes standardized forms of security interests in another's property such as *fiducia cum creditore contracta*, *datio pignoris* and *pignus conuentum*, discussed in Section II.3.[330] Law and economics literature clarifies that the collateral pledged must be more valuable to the debtor than to a creditor to align their interests.[331] However, 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 an arrangement of *fideiussio*[332] or personal guarantee through a *stipulatio* with the verbal form,[333] *Quod mihi debet, id fide tua esse iubes? Fideiubeo*.[334] 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.[335] 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.[336]

Moreover, as discussed earlier, the typical Roman consensual and real standard contractual forms greatly facilitate commerce, finance and investment. *Depositum in sequestre* is particularly useful for business transactions or disputes.[337] Pending the outcome of a controversy or the satisfaction of a

328 *Idem*, at 323 (defining lender's risk).

329 *Ibidem.*

330 See Schulz, *Classical Roman Law*, at 401-27.

331 George G. Triantis explains that secured lending allows the creditor to hold the debtor's assets hostage, "Secured Debt Under Conditions of Imperfect Information," 21 *The Journal of Legal Studies* 246 (1992); Oliver E. Williamson, "Credible Commitments: Using Hostages to Support Exchange," 73 *American Economic Review* 519 (1983); ten years earlier, Thomas H. Jackson and Anthony T. Kronman were close to the answer, but failed to explain how collateral reduces the cost of monitoring the debtor, see "Secured Financing and Priorities Among Creditors," 88 *Yale Law Journal* 1143, 1150-61 (1979).

332 Berger, *Encyclopedic Dictionary of Roman Law*, at 350.

333 Schulz, *Classical Roman Law*, at 499-502.

334 Institutes of Gaius 3.116.

335 Avery Wiener Katz, "An Economic Analysis of the Guaranty Contract," 66 *University of Chicago Law Review* 47 (1999).

336 *Ibidem.*

337 Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 219-20.

condition, several parties deposit a thing with a *sequester* —'escrow agent' in the common law— for safekeeping.[338] 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 fiduciæ*[339] to make a *donatio sub modo*.[340] As part of a *donatio inter vivos*,[341] the donor imposes an obligation on the donee to do something or to make a distribution of funds.[342] The usefulness of a *donatio sub modo* is that the donor can stipulate almost anything he wants, and attach a *stipulatio poenæ* (discussed *infra* in Section IV) to guarantee that the donee will carry out the obligations. If the donee fails to carry out the charge, the donation is revocable.[343]

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*[344] fail to create obligations, "*nuda ratio non facit aliquem debitorem*."[345] For example, a *ratio mensæ*,[346] or a *pecunia fænerare*[347] 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 a *stipulatio*. Charging *anatocismus coniunctus* or compound interest[348] was standard practice, at least during the Roman classical period.[349] Moreover, bankers or *argentarii*, held auctions for their clients, devising bidding systems that would attract the highest and best bidder, "*melior autem condicio*

338 Digest of Justinian 6.3.6 (Paulus, *Ad edictum* 2); Digest of Justinian 16.3.17 (Florentinus, *Institutionum* 7).

339 Berger, *Encyclopedic Dictionary of Roman Law*, at 471.

340 *Idem*, at 443.

341 *Ibidem.*

342 Code of Justinian 8.55 (Philippus 249).

343 Kaser, *Roman Private Law*, at 56.

344 Berger, *Encyclopedic Dictionary of Roman Law*, at 391.

345 Digest of Justinian 39.5.26 (Pomponius, *Ad Quintum Mucium* 4).

346 Berger, *Encyclopedic Dictionary of Roman Law*, at 667.

347 *Idem*, at 625.

348 *Idem*, at 361.

349 See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 169 and note 87 (clarifying that Justinian prohibits the charging of compound interest).

adferri uidetur, si pretio sit additum."[350] as well as issuing *receptum*[351] through a letter to guarantee payments for clients.[352]

Other nonspecialized private Roman legal institutions related to commerce, finance and investment also supported the market. Modern scholars fail to recognize that a Roman law of commerce, finance and investment existed.[353] The reason for this may be because it was not a separate body of law, but was embedded in the basic Roman civil law.[354] Modern legal systems separate the body of commercial, financial and investment law as a *lex specialis* from the *lex generalis* of the body of civil law.[355] Classical 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.[356]

Similarly, many modern commentators fail to recognize that slavery was an economic institution.[357] The law of slavery was an important component of the Roman law of commerce, finance and investment. Roman law improved the efficiency of ancient slavery by improving slaves' incentives. Slavery is a highly inefficient and oppressive legal institution.[358] By giving slaves the option to manage a *peculium* which could include a fund, land, or business[359] and to buy their *manumissio*,[360] Roman private law simultaneously rendered slavery more efficient and less oppressive.[361]

As noted above, under classical Roman law, property was held by the *pater familias*.[362] However, conducting every transaction on behalf of his *filii*

350 Digest of Justinian 18.2.4 (UIpianus, *Ad Sabinum* 28).

351 Berger, *Encyclopedic Dictionary of Roman Law*, at 668.

352 Digest of Justinian 13.5.26 (Scævola, *Responsorum* 1).

353 Johnston argues that Roman commercial law has slipped through the consciousness of historians, *Roman Law in Context*, at ix (1999).

354 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 333.

355 Jurgen Basedow explains that mercantile law fails to be state-bound, "The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making," 56 *American Journal of Comparative Law* 703 (2008).

356 See Raoul Charles van Caenegem, *An Historical Introduction to Private Law* 84-85 (D.E.L. Johnston translator, 1992).

357 See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 333.

358 See Richard A. Posner, "Ethical and Political Basis of Efficiency," 8 *Hofstra Law Review* 487, 501-02 (1980).

359 Berger, *Encyclopedic Dictionary of Roman Law*, at 624.

360 *Idem*, at 575.

361 See generally Watson, *Roman Slave Law* 95 (1987).

362 Berger, *Encyclopedic Dictionary of Roman Law*, at 620.

familias[363] and slaves was difficult and time-consuming. Accordingly, Roman law allowed both *filii familias* and *slaves* to manage a *peculium*.[364] The *peculium* is the property of the *pater familias*.[365] However, self-interest and social norms reinforced a social convention in Roman society requiring the *pater familias* to respect the *peculia* of both his *filii familias* and slaves.[366] This limit on the *pater familias* was in his best interest—without it, a *filius familias* would be strongly motivated to commit patricide. Similarly, this limit on the *pater familias* better aligned the interests of the *pater familias* with his slaves'. Without any expectation of manumission, a slave would also lack the incentive to exert effort for the benefit of the *pater familias* 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 spes libertatis erat nec cura peculi*."[367]

Classical Roman private law does have at least one overall shortcoming: it lacks a sufficient system of agency.[368] The Roman law consensual contract of *mandatum* is a form of indirect agency,[369] but this is not a sufficient substitute for agency-proper.[370] The *mandatarius* is only able to act on his own behalf, even when he transacts business in the interest of another.[371] However, the Romans were not entirely without agency law. Both *filii familias* and slaves could act on behalf of the *pater familias*.[372] While this is not a well-regarded solution today, the Roman empowerment of the *pater familias* over both slaves and *filii familias* does lower what modern scholars recognize as a ubiquitous and endemic inefficiency in modern society: agency costs.[373] By simultaneously allowing the slave and *filius familias* to act for the

363 Schulz, *Classical Roman Law*, at 154.

364 *Idem*, at 154.

365 *Ibidem.*

366 See Johnston, *Roman Law in Context*, at 100.

367 Vergil, Ecloga I (42 B.C.)

368 See generally Watson, *Roman Slave Law*, at 107-08.

369 See Kehoe, "Mandate and the Management of Business in the Roman Empire," in Dari-Mattiacci and Kehoe (editors), *Roman Law and Economics: Institutions and Organizations* 307 (2020).

370 *Ibidem.*

371 Watson, *The Law of Obligations in the Later Roman Republic*, at 149.

372 See generally Aaron Kirschenbaum, *Sons, Slaves, and Freedmen in Roman Commerce* 32-33 (1987).

373 For an alternative account of agency costs in Roman business organizations, see Barbara Abatino and Dari-Mattiacci, "Agency Problems and Organizational Costs in Slave-Run Businesses," in Dari-Mattiacci and Kehoe (editors), *Roman Law and Economics: Institutions and Organizations*, at 273.

pater familias, and giving the *pater familias* enormous power —even ownership and the power of life and death— over his agents, Roman law went a long way in reducing agency costs.[374]

Roman law created incentive-compatible mechanisms for information revelation, thus supporting commercial, financial and investment intermediation. The *peculium* introduced limited liability to Roman law.[375] Both *filii familias* and slaves could manage a *peculium* independently.[376] Roman law limited the liability of the *patrimonium*[377] for obligations incurred by *filii familias* and slaves to the amount of the *peculium*.[378] If either a *filius familias* or slave incurred a delictual obligation, the *pater familias* had the option to hand over his *filius familias* or slave in lieu of payment.[379] In either case, the legal system limited the liability of the *sui iuris* to the *peculium*. The institution of limited liability enabled people to separate ownership and control in the economy.[380] Roman private law of commerce, finance and investment aligned the incentives of both *pater familias* and *filii familias* or slaves because the *peculium* was the separate interest of the filius familias or slave, less the payments to the *patrimonium* for the cost of capital.

Roman private law of commerce, finance and investment offered a flexible structure for business organizations. The Roman family operated effectively as a default sole-proprietorship limited-liability entity.[381] The *peculium* of a *filius familias* or slave included any *res in patrimonio nostro*.[382] Under Roman law, even *serui uicarii* or other slaves were deposited in their *peculium*.[383] Accordingly, a *pater familias* was able, under Roman law, to set up a *taberna* or *officina* and put the business into the *peculium* of either a *filius familias* or slave.[384] The variety of *tabernæ* in the Roman economy ran all the way from *tabernæ argentariæ* or banks to *tabernæ deuersoriæ* or inns; from *naues instructæ*

374 The power of the business owner over his managers aligned their interests. See Kirschenbaum, *Sons, Slaves, and Freedmen in Roman Commerce*, at 32-34.

375 See Johnston, *Roman Law in Context*, at 101.

376 *Idem*, at 101.

377 Berger, *Encyclopedic Dictionary of Roman Law*, at 622.

378 See Digest of Justinian 15.1.3.11 (Ulpianus, *Ad edictum* 29).

379 See generally Kirschenbaum, *Sons, Slaves, and Freedmen in Roman Commerce*, at 17.

380 See generally Adolf Augustus Berle Jr. and Gardiner Coit Means, *The Modern Corporation and Private Property* 4-6 (1932).

381 See Dari-Mattiacci *et alii*, "Depersonalization of Business in Ancient Rome," 31 *Oxford Journal of Legal Studies* 1 (2009).

382 Berger, *Encyclopedic Dictionary of Roman Law*, at 677.

383 Watson, *The Law of Obligations in the Later Roman Republic*, at 189.

384 Digest of Justinian 14.4.1 (Ulpianus, *Ad edictum* 29).

or *societates exercitorum* with fleets of ships to *societates publicanorum* or public companies for purposes of tax collection or public works; from *tabernæ casearіæ* or cheese factories, to *officinæ lateribus* or brick factories. The Roman poet Horace, describing such a workshop as a fiery hell, said: "*dum grauis Cyclopum Uulcanus ardens uisit officinas.*"[385]

Limited liability was the norm in Roman businesses or *negotiationes*[386] held in *peculia*.[387] However, Roman law also allowed individuals to choose nonstandard terms in their business organization, thus waiving limited liability.[388] For example, a *pater familias* 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.[389]

As mentioned above, incentivizing an optimum level of savings and investment requires markets.[390] 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.[391] Accordingly, people will only save and invest in commercial and financial assets if market brokers make markets liquid enough so that people can buy and sell as needed.[392] Moreover, participants are similarly unwilling to transact or make investments unless commercial or financial assets are accurately priced by the market.[393] 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, financial or investment legal norms to support information revelation.[394]

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385 Horace, Odes 1.4 (23 B.C.)

386 Berger, *Encyclopedic Dictionary of Roman Law*, at 593.

387 Johnston, *Roman Law in Context*, at 101.

388 For an alternative account of asset partitioning in Roman business organizations, see Henry Hansmann *et alii*, "Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce," in Dari-Mattiacci and Kehoe (editors), *Roman Law and Economics: Institutions and Organizations*, at 199.

389 Digest of Justinian 14.3.11.3 (Ulpianus, *Ad edictum* 28).

390 Tibor Scitovsky describes benefits of real-world markets, "The Benefits of Asymmetric Markets," 4 *Journal of Economic Perspectives* 135, 136, 142 (1990).

391 Sanford J. Grossman and Merton H. Miller describe market intermediaries as filling gaps arising from imperfect synchronization, "Liquidity and Market Structure," 43 *Journal of Finance* 617, 619, 620 (1988).

392 *Idem*, at 618.

393 Graham Bannock *et alii*, *The Penguin Dictionary of Economics* 47 (Sixth edition, 1998).

394 For a discussion of the Roman norms that induce the revelation of information, see

The *uenaliciarii* or slave dealers[395] who frequented the slave market in Rome brokered equity capital markets. Slavery, as discussed above, lowered agency costs.[396] 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* or commonly-owned slaves[397] 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 Ædilitian regulation of the slave market addresses problems of asymmetric information that go beyond supplying a much-needed skilled labor force.[398] The *ædile* —magistrate in charge of public works— required a *uenaliciarius* to *pronuntianto in uenditione* (reveal at the moment of sale) any material private information affecting the valuation of the slave (or business.) Moreover, the *ædile* established objective responsibility for the failure to divulge information or for any contradiction with a *dictum promissumue* or express warranty given.[399] However, *nudam laudem* or mere puffery or laudation of a slave (or business) was excused.[400] 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*[401] of a *serui communis*.[402] 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.[403]

The Roman law of business organizations was not a separate body of law; it was embedded in the basic Roman civil law. Nor did *societates publicanorum* have a clear corporate personality or *partes* —nonliving tradable shares—, which are mechanism designs of the modern joint-stock compa-

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Abatino and Dari-Mattiacci, "The Dual Origin of the Duty to Disclose in Roman Law," in Dari-Mattiacci and Kehoe (editors), *Roman Law and Economics: Exchange, Ownership, and Disputes*, at 401.

395 Berger, *Encyclopedic Dictionary of Roman Law*, at 759.

396 See Watson, *Roman Slave Law*, at 107.

397 Berger, *Encyclopedic Dictionary of Roman Law*, at 705.

398 *Exempli gratia*, J. A. Crook states that the division of labor in society means that sellers have more information about their products than do buyers, *Law and Life of Rome* 181 (1967). See also Scitovsky, "The Benefits of Asymmetric Markets," at 138.

399 Digest of Justinian 21.1.1.1 (Ulpianus, *Ad edictum aedilium curulium* 1).

400 Digest of Justinian 21.1.19 (Ulpianus, *Ad edictum aedilium curulium* 1).

401 Digest of Justinian 21.1.44.1 (Paulus, *Ad edictum aedilium curulium* 2).

402 Digest of Justinian 21.1.44 (Paulus, *Ad edictum aedilium curulium* 2).

403 See generally Henry G. Manne, *Insider Trading and the Stock Market* 86-90 (1966).

ny.[404] Instead, the forms that Roman business organizations took were more flexible and less well-defined than modern legal[405] or business scholars[406] realize.

III. Social Norms Complete Private Ordering in Roman Private Law

Inert legal positivism has discussed the possibility of combining law and morality.[407] The law and economics movement, however, demonstrates the usefulness of including morality within the law. Law and economics scholarship has only begun to explore this interaction.[408] 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.[409]

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404 Geoffrey Poitras and Manuela Geranio rebut the claim of significant trading in *partes* or 'nonliving shares' of the *societates publicanorum*, "Trading of shares in the Societates Publicanorum?," 61 *Explorations in Economic History* 95 (2016); Poitras and Frederick Willeboordse rebut the claim of corporate personality of the *societates publicanorum*, "The *societas publicanorum* and corporate personality in Roman private law," 2019 *Business History* 1 (2019).

405 For an alternative account of Roman business organizations, see Andreas Martin Fleckner, "Roman Business Associations," in Dari-Mattiacci and Kehoe (editors), *Roman Law and Economics: Institutions and Organizations*, at 233.

406 Ulrike Malmendier, "Law and Finance at the Origin" 47 *Journal of Economic Literature* 1076 (2009); "Societas," in R. Bagnall, K. Brodersen, C. Champion, A. Erskine, and S. Hübner (eds), *Encyclopedia of Ancient History* (2012); "Publicani," *idem*; "Roman Law and the Law-and-Finance Debate," in I. Reichard and M. Schermaier (editors), *Festschrift für Rolf Knütel* (2010); "Roman Shares," in W. Goetzmann and G. Rouwenhorst (editors), *The Origins of Value: The Financial Innovations that Created Modern Capital Markets* 31-42, 361-365 (2005); *Societas publicanorum* (2002).

407 See generally John Austin, 1 *Lectures on Jurisprudence or the Philosophy of Positive Law* (Fifth edition, 1875). See generally Herbert Lionel Adolphus Hart, *The Concept of Law* (Second edition, 1994).

408 Early explanations of the interaction between law and morality fail, see Cooter, "Normative Failure Theory of Law," 82 *Cornell Law Review* 947 (1997).

409 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).

The Roman law of property defines a domain where the *dominus* may act as he chooses (with the limits discussed above in Section I.1.B) and protects the possessor who acquired his possession *nec vi, nec clam, nec precario*, that is, not by force, nor stealth, nor license.[410] Within the boundaries of a *dominium* or of a 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.[411]

The Roman law of obligations includes gratuitous typical contracts, such as the consensual contract of *mandatum* and the real contracts of *depositum* and *commodatum*.[412] Roman gratuitous contracts may seem odd from a modern vantage point. However, through these contracts, social norms such as *fides*,[413] *pietas*,[414] *officium*,[415] *humanitas*,[416] *munificentia*,[417] *grauitas*[418] and *amicitia*,[419] alongside complex networks of patronage, operated to complete private ordering.[420] 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.[421]

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.[422] In addition to legal liability, the legal system imposed a reputational punishment, *infamia*.[423] Such extra-contractual relationships presupposed honest behavior, and a condemnatory judgment for a betrayal of confidence attracted social censure and sub-

410 Rudolph Sohm, *The Institutes of Roman Law* section 54 at 254 (James Crawford Ledlie translator, 1892).

411 O. F. Robinson, *The Sources of Roman law: Problems and Methods for Ancient Historians* 89 (1997).

412 Watson, *The State, Law, and Religion: Pagan Rome* 41 (1992).

413 Berger, *Encyclopedic Dictionary of Roman Law*, at 471.

414 *Idem*, at 630.

415 *Idem*, at 607.

416 *Idem*, at 489.

417 Charlton T. Lewis, *An Elementary Latin Dictionary* 52 (1915).

418 Berger, *Encyclopedic Dictionary of Roman Law*, at 483.

419 Lewis, *An Elementary Latin Dictionary*, at 53.

420 See Mousourakis, *The Historical and Institutional Context of Roman Law*, at 45-47.

421 See Watson, *The Spirit of the Roman Law*, at 130.

422 See generally Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (1970).

423 Berger, *Encyclopedic Dictionary of Roman Law*, at 500. See generally Greenidge, *Infamia: Its Place in Roman Public and Private Law* 18-40, 154-70 (1894).

jected 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.3, Roman law conflates together the family and the firm. Social norms govern Roman family life. Thus, a social convention in Roman society required the *pater familias* to respect the *peculia* of both his *filii familias* and slaves. Much of the area that modern law closely regulates through labor legislation, Roman law largely leaves to social norms.[424] Under the Roman law of obligations, employment contracts are largely indistinguishable from other consensual contracts for hire —'at will' contracts in the common law—.[425]

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.[426] Roman private law left an *obligatio naturalis* 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*.[427] To litigate their claim or offer a defense, the parties must stipulate before the magistrate that they will abide by the *sententia*[428] of the *iudex*.[429] The new contract novates the earlier obligation that formed the basis for their claims, defenses, or counterclaims—no matter what their nature.[430] After

424 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, see *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* 76 (Thomas Burger translator, 1992).

425 Habermas concedes as much, *ibidem.*

426 Code of Justinian 5.1 (Diocletan and Maximus 293).

427 Berger, *Encyclopedic Dictionary of Roman Law*, at 566.

428 *Idem*, at 700.

429 Greenidge, *Infamia: Its Place in Roman Public and Private Law*, at 243-48.

430 *Idem*, at 248.

the *litis contestatio*, the pre-existing obligations cease to exist.[431] Accordingly, the Roman system of procedure under the control of the *prætor* is a private system of legally-binding arbitration without appeal.[432]

Moreover, in Roman law, private parties can use self-help measures by executing *sententiæ*. Beyond constituting means for the execution of *res iudicata*,[433] private self-help measures provide a means to effectively bring a legal action.[434] Any creditor whose claim was untrue, yet laid their hands on the debtor or *manus iniectio*[435] or took property of the debtor in pledge or *pignoris capio*, risked liability in *duplum*.[436] However, debtors who faced claims knowing they were true made arrangements for payment, through a *confessio in iure*[437] rather than proceeded before the iudex, as von Jhering explains.[438] Accordingly, *manus iniectio* and *pignoris capio* are private self-help means of collection, able to work without the intervention of the curule authorities.[439]

If the debtor breaches an obligation, the *iudex* must assess the value of the performance to the creditor. However, establishing *quanti ea res est*[440] can be difficult where an obligation is uncertain. Accordingly, Roman law allowed the parties to agree privately on the amount of damages, by entering a *stipulatio poenæ*.[441] 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.[442] What Anglo-American scholars overlook, and a *stipulatio poenæ* may capture, is that damages from disappointed expectations

431 *Ibidem*.

432 A defendant rarely refused to confirm or rebut a plaintiff's claim because he would be *iudicatus*, that is, condemned. Greenidge, *Infamia: Its Place in Roman Public and Private Law*, at 255.

433 Berger, *Encyclopedic Dictionary of Roman Law*, at 678.

434 Mousourakis, *The Historical and Institutional Context of Roman Law*, at 137-39.

435 Berger, *Encyclopedic Dictionary of Roman Law*, at 577.

436 *Idem*, at 406.

437 *Ibidem.*

438 See generally von Jhering, *Der Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode*.

439 H. F. Jolowicz and Barry Nicholas describe legalized self-help, *Historical Introduction to the Study of Roman Law* 165-66 (Third edition, 1972).

440 Digest of Justinian 13, 3, 4 (Gaius, *Ad Edictum Provinciale* 9).

441 Berger, *Encyclopedic Dictionary of Roman Law*, at 718.

442 Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 97.

are often much greater than the amount of the obligation.[443] Nonetheless, the parties had to enter into *stipulationes poenarum* in good faith in estimating the value of the performance to the creditor.

Lastly, rather than prosecute certain public claims against private persons, the Roman state privatized tax and debt collection. *Societates publicanorum*[444] could purchase these claims and use the private self-help measures discussed above to satisfy them.[445]

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.[446] Latin American and Caribbean leaders are no longer the naive backers of an earlier state-centered, 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.[447] Rather than classifying legal institutions along the lines of Quintus Mucius Scævo-

443 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 *Brooklyn Journal of International Law* 67, 117 (2006).

444 *Publicani* are discussed *supra* in Section II.3.

445 See Hilary Swain and Mark Everson Davies, *Aspects of Roman History, 82 BC-AD 14: A Source-Based Approach* 363 (2010).

446 See generally Martin A. Rogoff, "The Individual, the Community, the State, and Law: The Contemporary Relevance of the Legal Philosophy of Leon Duguit," 7 *Columbia Journal of European Law* 477 (2001), reviewing Leon Duguit, *L'Etat: Le Droit Objectif et la Loi Positive* (1901).

447 See del Granado, *De iure ciuili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI* (2018).

la's classification of 'persons,' 'things,' and 'actions,'[448] a law and economics approach suggests a new arrangement of civil 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 over time.' 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 or industrial rights in the property of others, 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 'obligations.' Law and economics suggests the expansion of the Roman system of subsidiary quasi-contractual or relational obligations, undergirded by the concept of good faith.[449] Law and economics suggests the depenalization —'decriminalization' at common law— of the legal system and the expansion of the Roman system of civil delicts, including the intentional delicts which have all but disappeared from civil law.[450] Titles 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 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, to excoriate the excesses of the French Revolution,[451] promulgated all matters relating to civil procedure as a separate code, the Code de procédure civile of 1806.[452] Bringing procedural law back into the realm of private civil law (in essence, privatizing legal procedure) is the most effective way to improve civil legal systems. Separate nineteenth century codes for civil procedure must be reintegrated into basic civil law. Modern 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 consen-

448 Alejandro Guzmán Brito, "El carácter dialéctico del sistema de las Institutiones de Gayo," in *Estudios de derecho romano en homenaje al Prof. Dr. D. Francisco Samper* 427-457 (2007).

449 *Ibidem.*

450 See generally Guzman Brito, *La codificacion civil en Iberoamerica* (2000).

451 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 Cornelis Hendrik van Rhee (editor), *European Traditions in Civil Procedure* 26 (2005).

452 *Idem*, at 25.

sual contract for *locatio conductio*.[453] Roman law lacks consumer protection law, other than incentive-compatible mechanisms for information revelation.[454] 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*[455] to *fideiussio*.[456] 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 themselves 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 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 present-day common law and civil law uses nonproperty 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*."[457] Civil law must avoid the use of nonproperty 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.[458] French 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

453 Berger, *Encyclopedic Dictionary of Roman Law*, at 567.

454 See Bruce W. Frier, "Tenant Remedies for Unsuitable Conditions Arising after Entry," in Roger S. Bagnall and William V. Harris (editors), *Studies in Roman Law: In Memory of A. Arthur Schiller* 64-79, 73 (1986).

455 Berger, *Encyclopedic Dictionary of Roman Law*, at 350.

456 Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 121.

457 Institutes of Gaius 1.53.

458 See generally M.C. Mirow, "The Social-Obligation Norm of Property: Duguit, Hayem, and Others," 22 *Florida Journal of International Law* 191 (2010).

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 unstandardized 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 *causa* or consideration.[459] 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 the ceremonial trappings of the *stipulatio*.[460] 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.[461] An example of where modern civil law has lost the flexibility of the *stipulatio* is the *pactum fiduciæ* 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 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 *prætor* formulated the concept of good faith, parallels the historical development of equity in common

459 See Gordley, *The Philosophical Origins of Modern Contract Doctrine* 49 (1991).

460 Bartolus, *Digesti noui partem commentaria* (1544), on Digest of Justinian 44.4.2.(a).3 (Ulpianus, *Ad legem Iuliam et Papiam* 19).

461 Berger, *Encyclopedic Dictionary of Roman Law*, at 727-28.

law systems.[462] At 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 *bona fides*.[463] This expanded *bona fides* accomplishes many of the same tasks that fiduciary duties carry out in the common law.[464] Unfortunately, German civil law has expanded the meaning of *bona fides* to the point where it abridges the freedom to contract.[465] The *Fallgruppen* where *bona fides* applies are too broad.

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 *Treu und Glauben* in the German Civil Code.[466] German law stretches the mechanism design of *bona fides* by giving judges the counter-productive ability to interfere with private choices regarding the substance of contracts.[467] 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.[468]

Addressing the problems of civilian 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.

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462 See generally Buckland, *Equity in Roman Law*.

463 Burgerliches Gesetzbuch sections 138, 157, 242, 826.

464 See generally Franz Wieacker, *Zur rechtstheoretische Prazisierung des § 242* (1956).

465 Whittaker and Zimmermann, "Coming to Terms with Good Faith," in Whittaker and Zimmermann (editors), *Good Faith In European Contract Law* 690 (2000).

466 See generally Hans Carl Nipperdey, *Grundrechte und Privatrecht* (1961).

467 *Ibidem.*

468 *Ibidem.*

CHAPTER TWO:
THE EXCEPTIONALISM OF THE COMMON LAW[469]

In contrast to the scope and formalism of Roman law, the legal institutions of the United States illustrate another highly distinctive system of private law, combining age-old elements which need to be clearly distinguished and defined. Law and economics scholars have failed to specify exactly what is the system of Anglo-American common law and equity, apart from surveying the processes of the common law courts and setting forth a few early normative claims about property rights and torts.[470]

I. What Makes the Common Law Efficient?

Economic efficiency involves a comparison between different states of the world.[471] Law and economics scholars have spilled much ink in comparing the welfare effects that stem from the processes of the common law courts to those produced by legislative lawmaking.[472] How common law doctrines

469 This Chapter is an extended version of a paper delivered at the II Annual Dual Meet between the University of California, Berkeley, School of Law and the Universidad Nacional Autómona de México, Instituto de Investigaciones Jurídicas held at Berkeley, California in September, 2019.

470 The transaction-cost literature explained early on that property rights internalize external costs, Harold Demsetz, "Toward a Theory of Property Rights," 57 *American Economic Review* 347, 350-52 (1967), and that torts assign liability to cheapest-cost avoiders, Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970). See Epstein, "The Social Consequences of Common Law Rules," 95 *Harvard Law Review* 1720 (1982).

471 Russell Hardin, "Magic on the Frontier: The Norm of Efficiency," 144 *University of Pennsylvania Law Review* 1987 (1996).

472 Paul H. Rubin, "Why Is the Common Law Efficient?," 6 *The Journal of Legal Studies* 51 (1977); George L. Priest, "The common law process and the selection of efficient rules," 6 *The Journal of Legal Studies* 65 (1977); John Goodman, "An Economic Theory of the Evolution of Common Law," 7 *The Journal of Legal Studies* 393 (1978); Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," 8 *The Journal of Legal Studies* 103 (1979); Robert D. Cooter and Lewis Kornhauser, "Can Litigation Improve the Law without the Help of Judges?,"

fair in terms of economic efficiency when compared to statutory schemes enacted by the legislature is a positive question.

Perhaps the central positive claim made in the existing literature, even now, is that the common law is efficient.[473] Well, is it, if we allow normative claims to enter the literature? When back in the 1970s, the economic approach to law developed initially, the positive or descriptive claims about the legal system dominated the normative claims. What can normative claims add to this debate? Taking a more normative perspective, in this Chapter, we evaluate some of the legal rules and doctrines implemented through the common law courts using lessons from mechanism design theory to suggest alternate possibilities in the design of private-law institutions.

In a remarkable book, Richard A. Epstein draws on liberal political theory to extract the principles that he believes lie beneath the system of Anglo-American common law and equity.[474] He settles on personal autonomy, first possession, voluntary exchange, protection against aggression, and limited privilege for cases of necessity.[475] From these principles, he derives the relative simplicity of the common law when compared to state regulation.[476]

As a common lawyer, Epstein offers up the idea of a system of private law, as if it were a novel approach. Yet these trite figures were first developed by the Natural lawyers in the eighteenth century and in civilian quarters have shaped legal developments from the nineteenth century onward.[477]

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9 *The Journal of Legal Studies* 139 (1980); Rubin, "Common Law and Statute Law," 11 *The Journal of Legal Studies* 205 (1982); Cooter and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution," 27 *Journal of Economic Literature* 1092 (1989); Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms," 86 *Virginia Law Review* 1577 (2000); Todd J. Zywicki, "The rise and fall of efficiency in the common law: A supply-side analysis," 97 *Northwestern University Law Review* 1551 (2003); Rubin, "Micro and Macro Legal Efficiency: Supply and Demand," 13 *Supreme Court Economic Review* 19 (2005); Nicola Gennaioli and Andrei Shleifer, "The Evolution of Common Law," 115 *Journal of Political Economy* 46 (2007); Thomas J. Miceli, "Legal Change: Selective Litigation, Judicial Bias, and Precedent," 38 *The Journal of Legal Studies* 157 (2009); Nuno Garoupa and Carlos Gómez Ligüerre, "The Syndrome of the Efficiency of the Common Law," 29 *Boston University International Law Journal* 287 (2011).

473 See Posner, *The economic analysis of law* 613-615 (Sixth edition, 2003).

474 See *Simple Rules for a Complex World* (1995).

475 *Idem*, at 53-63, 71-80, 91-92, 113-16.

476 Like the Natural lawyers, he reasons deductively from first principles.

477 As a law and economics scholar, Epstein asks why the Natural lawyers hit upon efficient private legal institutions without engaging in economic analysis. See "The Utilitarian Foundations of Natural Law," 12 *Harvard Journal of Law and Public Policy* 713 (1989). Yet,

Like the Natural lawyers, Epstein idealizes the state of nature.[478] He contends that "[t]he most simple social organization [is] lawlessness,"[479] which he suggests is preferable to state regulation. Yet public-law systems work a Pareto improvement in the welfare of society, and lawlessness is no social order at all. That was precisely Thomas Hobbes' argument, when he famously asserted that the life of man in the state of nature is "solitary, poore [sic], nasty, brutish, and short."[480]

Law and economics still has a long way to go in comparing private-law systems with public-law systems, and in parsing out their differences.[481] Perhaps a substantial paradigm shift was needed to make sense of private law. The Coase Theorem separates legal institutions —where transaction costs are high— from the market economy —where transaction costs are low— .[482] The Myerson-Satterthwaite Theorem points directly to the inextricable linkage that exists between legal institutions and the market economy.[483] Law and economics is now prepared to transcend the outdated perspective of the Natural lawyers on private legal institutions.

Common lawyers have yet to discover what civilians have always known, that private law is something entirely different from public law. Law and economics scholars have followed in this error by failing to adequately inves-

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rather than bringing economic analysis into Natural law, he transposes the method of the Natural lawyers over into law and economics.

478 Treading periously close to social Darwinism, he signals that the first principles may be drawn from natural selection. "[Charles] Darwin's choice of the word 'natural,'" far from bring a "verbal happenstance" in language, "hint[s] at some tight connection between natural selection and [N]atural law," *idem*, at 720 (1989). To be fair, Epstein is no social Darwinist. For him, the principle of 'survival of the fittest' operates at the level of a society, not the individual.

479 *Simple Rules for a Complex World*, at 33.

480 Thomas Hobbes, *Leviathan* 185-86 (1651).

481 Epstein follows the analytic philosophy of Herbert Lionel Adolphus Hart, who departed from legal positivism after his famous debate with Lon Fuller. See Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593 (1958); Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart," 71 *Harvard Law Review* 630 (1958). In theorizing a 'minimum content of [N]atural law,' Hart asked what legal rules might be necessary to a society for the "minimum purpose of survival," *The Concept of Law* 189 (1961). As a law and economics scholar, Epstein asks that private legal institutions be designed for the "maximum flourishing of all individuals instead of their minimum survival," "The Not So Minimum Content of Natural Law," 25 *Oxford Journal of Legal Studies* 219, 228 (2005)

482 See Ronald H. Coase, "The Problem of Social Cost," 3 *The Journal of Law and Economics* 1 (1960); reprinted in *The Firm, the Market and the Law* 95-156 (1988).

483 See Roger B. Myerson and Mark A. Satterthwaite, "Efficient Mechanisms for Bilateral Trading," 29 *Journal of Economic Theory* 265 (1983).

tigate what is private law, and why it is different from public law. Public-law systems fail to consider problems of asymmetric information and incentive compatibility that private legal institutions are designed to solve. Public-law systems centralize aspects of the social order, by implementing top-to-bottom command and control mechanisms in such a way that officials without information will make decisions, and bureaucrats without incentives will take actions, within the administrative apparatus of the state. Private legal institutions decentralize the social order, by implementing information and incentive mechanisms in such a way that people with information will make decisions, and people with incentives will take actions, within the market economy. Anglo-American common law and equity is a system of private law—that is why it is efficient when compared to public-law systems.[484]

Our intellectual intuition of what is the nature of law, holds out that it is a command backed by a sanction[485]—an outdated perspective to which legal positivists continue to tenaciously cling in the twenty-first century. This perspective belongs to public law. In rejecting the legal fiction that the state had a psychological will, the public lawyer Hans Kelsen 'depsychologized' the command theory,[486] but preserved its coldest, hardest forms: the coercive order that comes from a hierarchy of validating norms for centralized planning and control. The 'spontaneous order' that Friedrich von Hayek conceived[487] —which we call heterarchy—, on the other hand, is built out of private law. An unplanned market economy depends on private litigation rather than public regulation. Given that people in a decentralized social order must overcome problems of asymmetric information and incentive compatibility, private law is uniquely suited to form the backbone of the private sector.

Nevertheless, the way United States courts implement information and incentive mechanisms is subject to second-best solutions and path-dependent legal institutions. To begin with, law and economics scholars may be surprised to hear that the English and Anglo-American legal tra-

484 This answer has only been recently proposed in the literature. See Juan Javier del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI* (2010), and "The genius of the Roman Law from a law and economics perspective," 13 *San Diego International Law Journal* 301-349 (2011).

485 John Austin identified positive law with legislative will, *Lectures on Jurisprudence, or The Philosophy of Positive Law* (1874).

486 "The Pure Theory of Law and Analytical Jurisprudence," 55 *Harvard Law Review* 44, 55 (1941).

487 *The Constitution of Liberty* 230 (1960).

dition consists of not one, but of two distinct private-law systems, historically strewn together: common law and equity. Whether common law and equitable jurisdictions have come to be concurrent through a unified court system, as in California or in New York, or separate through distinct courts of law and chanceries, as in Delaware, United States judges reason as if writs at common law or bills in equity still defined their powers.[488] Today, both federal and state courts "continue to make sharp distinctions" between legal and equitable remedies and common lawyers "continue to look for guidance" to Anglo-American treatises on equity.[489] Accordingly, legal reasoning remains bifurcated in this legal system. The New York lawyer and law reformer David Dudley Field was wrong: He believed that the differences between common law and equity would "disappear the moment the two courts and the two modes of procedure [we]re blended."[490] Today, we know better.[491]

Surprisingly little has been written to explain the system of Anglo-American common law and equity. In the United States, neither legal educators nor historians, much less law and economics scholars, have satisfactorily mapped their system of private law.[492] This conceptual muddiness starts with the first-year legal curriculum, that is divided into the core common law subjects of property, torts and contracts. Only an elective second-year remedies class covers (perfunctorily) the remaining equitable institutions.[493] When historians of the common law attempt to explain their system of private law, they inevitably fall back on an outdated civilian mapping because the civilian approach is the only comprehensive classification of legal institutions. Granted, grafting the civilian world view on the common law means making some adjustments. Taken up is the new miscellaneous category of 'unjust enrichment' to cover the equitable institutions that remain, what

488 Kellen Funk, "The Union of Law and Equity: The United States, 1800–1938," in Henry E. Smith *et alii* (editors), *Equity and Law: Fusion and Fission* 46, 47 (2019).

489 Samuel L. Bray, "Equity: Notes on the American Reception," in Smith *et alii* (editors), *Equity and Law: Fusion and Fission* 31, 38 (2019).

490 "Law and Equity," in A. P. Sprague (editor), *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* 579 (1884).

491 Indeed, the federal constitution's distinction between law and equity remains relevant in adjudication. The United States Constitution article III, section 2 explicitly recognizes this distinction. See Charles T. McCormick, "The Fusion of Law and Equity in United States Courts," 6 *North Carolina Law Review* 283, 284 (1928).

492 For a primer on the attempts, see Michael Lobban, "Mapping the Common Law: Some Lessons from History," 2014 *New Zealand Law Review* 21 (2014).

493 *Idem,* at 43.

is left out of 'property,' 'contracts' and the catch-all misnomer —in civilian terminology— of 'extracontractual obligations.'[494] Or the law of restitution is enlisted to fill this gap, as can be seen in a recent monograph.[495]

Sir Thomas Erskine Holland famously described the common law as a "chaos with a full index."[496] Our impression is that the common law tradition does not even have a workable index despite Sir Frederick Pollock's yearnings to the contrary.[497] Much less does it offer a detailed mapping of the system of English and Anglo-American common law and equity. As Alan Watson makes plain, deducing a logical structure from "decided cases"[498] is difficult. "[W]hen law is based on cases it has no obvious system or structure."[499] Each case deals "with a particular point […] apparently unrelated to, and independent of, other cases dealing with a different point."[500] No less of a Natural lawyer than William Blackstone reckoned that the laws of England had two principal objects: rights and wrongs.[501] He then divided rights into 'rights of persons' and 'rights of things', and wrongs into 'private wrongs' and 'public wrongs.'[502] Taking a more normative perspective through mechanism design theory, in this Chapter, we claim that the English and Anglo-American system of private law is made up of 'rights held in things,' 'duties owed to persons' and 'institutions that support the marketplace.'

II. Rights Held in Things Under English and Anglo-American Common Law and Equity

Rights held in things are generally called 'property rights' in the law and economics literature, but 'property' in a technical sense is absent from An-

494 See James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2006).

495 Cooter and Ariel Porat's book draws our attention to incentives, but overlooks the aspect of asymmetric information, *Getting Incentives Right: Improving Torts, Contracts, and Restitution* (2014).

496 *Essays on the Form of Law* 171 (1870).

497 "The Science of Case-Law," in *Essays in Jurisprudence and Ethics* 237-260 (Second edition, 1882).

498 "The Structure of Blackstone's Commentaries," 97 *Yale Law Journal* 795, 796 (1988).

499 *Ibidem.*

500 *Ibidem.*

501 1 *Commentaries on the Laws of England* 122 (1775).

502 *Ibidem.*

glo-American common law and equity. In the legal literature, another term brought in to gloss over the ambiguity is 'ownership.' Yet the correct term is 'feudal tenure.' To speak of ownership is notoriously imprecise because no one can own a fee, but only hold it of someone else.

Surely, English lawyers have significantly modernized their land law since the Middle Ages. The fee simple absolute (held in socage) became fully alienable and heritable by the thirteenth century.[503] The enclosure movement got rid of nonspatial rights to common lands, so that the fee holder came to control exclusively the resources within certain bounded limits.[504] In the United States, enclosure further closed off Native American rights, and the federal government undertook to massively redistribute public lands to private homesteaders.[505] Today the fee simple absolute grants its owner the rights to a "chunk of the world" —law and economics scholars claim— in much the same way as a Roman *dominium*.[506]

These scholars point out that private-law institutions employ a mix of governance and exclusion strategies to decentralize the social order.[507] Property rights decentralize the social order by spatially delimiting private domains. Within those domains, assets fall under private governance because their owners can exclude others from these resources.[508] Nevertheless, in the United States, we claim rights held in things are subject to second-best solutions and path-dependent legal institutions. As we will see, feudal practices still define the nature of property rights at Anglo-American common law and equity. Moreover, what law and economics scholars call 'property rights,' in the United States is subject to two different legal systems, one for 'real property,' another for 'personal property.'

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503 Alfred William Brian Simpson, *An Introduction to the History of the Land Law* 53 (1961). Claire Priest suggests that tenancy in socage became the dominant form of land ownership in Anglo-America. This form of feudal landholding, she claims, was less onerous because the obligations "were fixed with certainty." *Credit Nation: Property Laws and Legal Institutions in Early America* 28 (2021).

504 Stuart Banner, "Transitions Between Property Regimes," 31 *Journal of Legal Studies* 359 (2002)

505 Douglas W. Allen, "Homesteading and Property Rights; Or, How the West Was Really Won," 34 *Journal of Law and Economics* 1 (1991).

506 See Yun-chien Chang and Henry E. Smith, "An Economic Analysis of Civil versus Common Law Property," 88 *Notre Dame Law Review* 1, 3 (2012).

507 Smith, "Exclusion Versus Governance: Two Strategies for Delineating Property Rights," 31 *Journal Legal Studies* 453 (2002).

508 Smith, "Property and Property Rules," 79 *New York University Law Review* 1719, 1753-56 (2004).

1. *Real Property Taken From Feudal Law*

The legal system that governs real property in the United States is based on European feudal law. 'Feudal law' is a misnomer. Scholars steeped in Roman learning in the fourteenth and fifteenth centuries used Roman legal terminology to describe these practices retrospectively and, as a result, came to write about an inexistent feudal law.[509] Rather than feudal law, legal historians should refer to 'feudal practices.'

Feudal practices failed to be uniform across the European continent. Nonetheless, some generalities can be drawn. Unlike a Roman *dominium* which had one *pater familias*, feudal tenure was shared by a lord with his vassal.[510] The vassal was endowed with possession of the land and the right to use, enjoy and dispose of it, called *dominium* '*utile*'.[511] The lord had the superior right to the land, but lacked possession, called *dominium* '*directum*' or '*eminens*.'[512] Land was held in fief, or *feodum*,[513] by vassals as a result of the grant by their lord in exchange for military services, oaths of fealty and acts of homage. Vassals who possessed fiefs, or *feoda*, could in turn subdivide their tenancies and become lords to vassals of their own through subinfeudation.[514] This process often continued through multiple layers of 'mesne lords' who simultaneously acted as liege vassals to their superiors (whom they were bound to obey) and liege lords to their inferiors (whom they were bound to protect.) Accordingly, European feudal practices confused rights held in things and duties owed to persons.

Civilian legal scholars may be surprised to hear that the most feudal country in Europe was England. As John Greville Agard Pocock observes, "In Norman England we find a fully matured form of the *fe[o]dum*."[515]

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509 See Ernesti Theophili Majeri, *Syntagma juris feudalis: theoretico-practicum, sive commentarius ad jus feudale commune* (1716).

510 Sir John Dalrymple, *An essay towards a general history of feudal property in Great Britain* 192 (1759).

511 See Alexander Mansfield Burrill, 1 *A law dictionary and glossary: containing full definitions of the principal terms of the common and civil law* 512 (1850).

512 *Ibidem.*

513 See Frederic Jesup Stimson, *A concise law dictionary of words, phrases, and maxims* 190 (1911).

514 In a unique contribution to the literature, David D. Haddock and Lynne Kiesling address feudal tenure from a law and economics perspective, see "The Black Death and Property Rights," 31 *Journal of Legal Studies* 545 (2002).

515 *The Ancient Constitution and the Feudal Law* 85-86 (1957).

The Norman invasion of the English coastline in 1066 accelerated the conversion to feudal tenure of Anglo Saxon *böcland*[516] and allodial property which remained held under vulgar Roman law.[517] An allod is a Germanic legal term.[518] Allodial[519] property refers to what was left of Roman ownership after the fall of the Roman Empire to Germanic invaders. Common law scholars are unaware of the feudal character of their own legal system. Pocock points out that even the greatest of the common lawyers, Sir Edward Coke, has "no conception" that "he [i]s dealing with the law of a society organized upon feudal principles."[520]

The technical term for feudal tenure in Law French —used at common law, which equity borrowed— is 'seisin.'[521] Pollock and Frederic William Maitland declare: "In the history of our law there is no idea more cardinal than that of seisin." They conclude that all of English land law is really "about seisin and its consequences."[522] Seisin is possession with a legal right.[523] Seisin —known as *gewere* or *saisine* in civilian quarters— may be an outgrowth of the confusion of ownership and possession which arose under vulgar Roman law after the retreat of the Roman legions from Britannia.[524] Later scholars would reintroduce a concept of possession as distinct from ownership into English and Anglo-American common law and equity, taking it from the civil law.[525]

A. *Standardized Bundles of Property Rights*

Law and economics scholars have borrowed civilian legal terminology again to claim that property rights are clearly defined at English and An-

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516 See Francis Palgrave, 2 *The rise and progress of the English commonwealth, Anglo-Saxon period, Containing the Anglo-Saxon policy, and the institutions arising out of laws and usuages which prevailed before the conquest* ccclvii (part 2 1832).

517 John Hudson, *The formation of the English common law: law and society in England from King Alfred to Magna Carta* 100 (2017).

518 Marc Bloch, 1 *La Société Féodale* 204 (1939).

519 Stimson, *A concise law dictionary of words, phrases, and maxims*, at 73.

520 *The Ancient Constitution and the Feudal Law, at* 45.

521 John Rastell, *Les termes de la ley* 354 (1812).

522 2 *The History of English Law Before the Time of Edward I* 29 (Second edition, 1898).

523 Frédéric Joüon des Longrais, *La conception anglaise de la saisine du XIIe au XIVe siècle* 165 (1925).

524 Ernst Levy, *West Roman Vulgar Law* 31 (1951).

525 Oliver Wendell Holmes Jr., *The Common Law* 210–11 (1881); Pollock, *A First Book of Jurisprudence for Students of the Common Law* 172, 178 (Sixth edition, 1929).

glo-American common law and equity through an unarticulated *numerus clausus* principle.[526] Such a doctrine is far from being a "hoary common law doctrine"[527] and has never been articulated in this legal tradition.[528] The mechanism design of *numerus clausus* defines property in terms of a 'closed number' or a closed system of standardized bundles of rights.

Henry E. Smith is opposed to the bundle-of-rights metaphor in property law taken from civil law.[529] Instead, he asserts owners exercise a "sole and despotic dominion" over resources that fall within well-defined boundaries.[530] In this assertion, he echoes Blackstone. Blackstone's well-known definition of ownership is framed in Natural law terms. He considers that allodial owners "hath [sic] *absolutum et directum dominium*, and therefore [are] said to be seised thereof absolutely."[531] Classical Roman law, while giving owners *rei uindicatio*[532] and possessors *interdicta retinendæ et recuperandæ possessionis*[533] to defend their interests, never entertains the absolute conception of property of the Natural law. The Medieval triptych of *ius utendi*, *ius fruendi uel ius abutendi* —the legal power of owners to exclusively use, enjoy and dispose of the resources that lie within private domains— is closer to a conception of a limited "bundle of property rights" than to Smith's conception of unlimited rights within a "chunk of the world."[534]

Jane B. Baron traces the bundle-of-rights metaphor in the United States to the Anglo-American legal realists. They found in Wesley Newcomb Hohfeld's concept of jural relations the flexibility to reconceptualize property rights as subordinate to the state.[535] She identifies Morris R. Cohen in particular as the source of the idea. He held that "a property right is a relation not between an owner and a thing, but between the owner and other

526 Thomas W. Merrill and Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle," 110 *Yale Law Journal* 1-70 (2000).

527 Roderick M. Hills Jr. and David Schleicher, "Planning an Affordable City," 101 *Iowa Law Review* 91, 134-35 (2015).

528 Merrill and Smith claim otherwise, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle," at 69.

529 "On the Economy of Concepts in Property," 160 *University of Pennsylvania Law Review* 2097 (2012).

530 See Merrill, "Property as Modularity" 125 *Harvard Law Review* 151 (2012).

531 2 *Commentaries on the Laws of England* 104 (1766).

532 Berger, *Encyclopedic Dictionary of Roman Law*, at 627.

533 *Idem, at* 508.

534 Smith, "Property as the Law of Things," 125 *Harvard Law Review* 1691, 1702 (2012).

535 "Rescuing the Bundle-of-Rights Metaphor in Property Law," 82 *University of Cincinnati Law Review* 57, 63 (2013).

individuals in reference to things."[536] Unlike Smith, she attaches importance to the fluid conception of property that the bundle-of-rights metaphor makes possible. Yet to borrow her own expression, the private-law system does not bundle property rights "willy-nilly."[537] As we claim, the system of real property is path-dependent and subject to second-best solutions.

The tradition of English and Anglo-American common law and equity never entertains the absolute conception of property of the Natural lawyers. In feudal England, no mesne lord, tenant, or villein would have thought of his real interests as ownership, let alone as absolute property. Only the Crown exercised suzerainty over the lands of the realm. Everyone else —beginning with the tenants in chief— held of the Crown. As Francis Bacon explains, "No man is so absolute an owner of his possessions, but that the wisdom of the law doth [sic] reserve certain titles to others."[538] Further, Bacon deems that "the law supposeth [sic] the land did originally come of" the Crown.[539] That much Blackstone conceded: "This allodial property no subject in England has; it being a received, and now undeniable principle in the law, that all the lands in England are holden [sic] mediately or immediately of the king."[540]

In this Chapter, we argue that feudal tenure, at English and Anglo-American common law and equity, fails to contain an adequately standardized form of bundled property rights. Merrill and Smith are amiss in believing that the closed system of property rights "strikes a rough balance," as they put it, "between the extremes of complete regimentation and complete freedom of customization."[541] Instead, in the United States, real property is one of the most bewildering and confusing subjects for students of the first-year law curriculum.

The distinctions that the Roman lawyers made in describing feudal practices[542] have their own terminology in the common law. A complicated

536 "Property and Sovereignty," 13 *Cornell Law Quarterly* 8 (1927).

537 "Rescuing the Bundle-of-Rights Metaphor in Property Law," at 70.

538 *Reading upon the Statute of uses* 36 (1785).

539 *Idem,* at 37.

540 2 *Commentaries on the Laws of England*, at 105.

541 "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle," at 40. Smith and Chang have recently tempered this view. They allow that the common-law system "probably errs on the side of too many forms," "The *Numerus Clausus* Principle, Property Customs, and the Emergence of New Property Forms," 100 *Iowa Law Review* 2275 (2015).

542 Franz Wieacker, *Privatrechtsgeschichte der Neuzeit, unter besonderer Berücksichtigung der deutschen Entwicklung* 84 (1967).

system of present-possessory 'estates in land' (*dominium utile*) exists alongside an even more complicated system of nonpossessory 'future interests' (*dominium directum*.) Moreover, the legal doctrines governing property rights represent a "hypertechnical, abstruse set of rules."[543] Property rights, as law and economics scholars conceptualize them, ought to be clearly defined—an early normative claim in the literature. Yet teaching law students the different fees at common law and equity is like taking your children to the zoo to admire the seemingly endless variety of animals.[544]

The system of estates in land is paired with an equally endless array of future interests.[545] Future interests fail to confer the rights to present possession to their holder. At most they confer an expectation of future seisin. Nonetheless, at common law, both reversioners and remaindermen and women alike are given real actions and presently hold real interests. As no possession is presently conferred, though, remainders are contingent or vest, and executory interests will shift or spring.[546]

What makes the system of estates in land and future interests complicated is that, as we discussed *supra* in Section II.1, feudal practices confuse rights held in things and duties owed to persons.[547] Civil-trained law-

[543] Joseph William Singer, "Property as the Law of Democracy," 63 *Duke Law Journal* 1287, 1290 (2014).

[544] Casebook editors and various versions of the restatement of property have simplified the system for purposes of legal education, yet law students must, nonetheless, master an extensive array of estates in land, which include the fee simple absolute, the fee tail, both male and female, the life estate, the fee determinable, the fee subject to a condition subsequent, the fee subject to an executory limitation, among the freehold estates, and various types of leaseholds, among the nonfreehold estates.

[545] The future interests include the reversion, the possibility of reverter, the right of entry, among the reversionary ones, contingent and vested remainders, and shifting and springing executory interests, among the nonreversionary ones. Again, the system has been simplified for purposes of legal education. In their daily practice, property lawyers must contend with the even more complicated common law of each state of the union.

[546] Fortunately, law students are spared having to master the intricacies of the rule of perpetuities. As Epstein points out, lawyers in the United States can avoid this rule through clever draftsmanship, by including a savings clause in every deed or will, *Simple Rules for a Complex World*, at 26.

[547] The distinction between *actio in rem* and *actio in personam* is a mechanism design of classical Roman law. Guido Calabresi and A. Douglas Melamed reformulated it in law and economics literature, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972). Common law scholars had rejected it. In the case of *Tyler v. Court of Registration*, Judge Holmes submitted that "all proceedings like all rights are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected." 175 *Massachusetts Reports* 71, 76 (1900).

yers understand that parties can stipulate conditions and pacts to modify the contractual obligations they assume. However, they would be surprised to discover that, at English and Anglo-American common law and equity, grantors can place conditions and pacts on the ownership of things. Accordingly, law students must come to grips with the defeasible fees that result from conditional or durational grants.[548] Furthermore, restrictive covenants and equitable servitudes run with the land.

Both civil and common law jurisdictions have implemented similar land registration systems. Because of the high degree of complexity of the open system of feudal tenure in the United States, buyers commonly will secure title insurance policies whenever they invest in land.[549] The title insurance industry is unheard of in civilian jurisdictions, just as the civil notary public plays no role in the common law in avoiding the clouding of titles. No additional professional oversight, we claim, will provide legal certainty unless we end feudal tenure and remove the complex layers of property ownership currently in place in the United States.

In law and economics quarters, Lee Anne Fennell has already raised her voice to caution us that "the architecture of the fee simple most plainly gets in the way" of maximizing land values in the United States.[550] However, the obsolescence of real property law involves more than simply the outdated fee simple absolute. She would create a "callable fee" within the tradition of Anglo-American common law and equity.[551] Yet her proposal is ill-advised. Such standardized property rights would clearly misalign the incentives of investors, as would the more radical proposal put forward by E. Glen Weyl and Eric A. Posner.[552] They propose nothing less than to extend some form of Fennell's "callable fee" to all property in the United States, by disinterring the institution of *ἀντίδοσις* (exchange) of property for *λειτουργία* (undertaking for the people) from Ancient Athenian public tax law.[553]

Both their proposals would make it difficult for Anglo Americans to invest in land. Owners make investments to maintain and improve their land because property rights incentivize them (as potentially willing sellers)

548 Simpson, *An Introduction to the History of the Land Law*, at 81.

549 Harry Mack Johnson, "The Nature of Title Insurance," 33 *Journal of Risk and Insurance* 393 (1966).

550 "Fee Simple Obsolete," 91 New York University Law Review 1457, 1464 (2016).

551 *Idem*, at 1482-89. Fennell's proposal for a "floating fee" is set forth along the same lines and for the same purposes. *Idem*, at 1490-94.

552 *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (2018).

553 *Idem*, at 52.

through privately set prices. Whoever fails to pay a price set by the owner finds herself excluded from the use, enjoyment or disposition of the resources held within privately-held domains. A callable fee —especially one extended to include all property in the United States— would price all assets (including those held by unwilling sellers) and convert all prices into public information. The government would use this information for public tax purposes on some form of an accretion basis.[554] The government would share in any increases in the land values that result.[555] Consequently, the ability of owners as willing sellers to set prices on resources within their domain no longer would provide them the full exchange value that they could realize in the private marketplace. Asset-based taxes are widely understood in the economics literature to disincentivize investment.[556]

Despite Fennel's thoroughness as a scholar, she fails to consider that the leasehold (held in villeinage) in agglomerated neighborhoods might solve the aggregation or assembly problems[557] she examines,[558] as did leases in Ancient Rome. Civilian legal scholars may be surprised to hear that, in the United States, leaseholds constitute another type of feudal tenure.[559]

Common lawyers consider leaseholds to be chattels real, a nonfreehold estate in land. Law and economics scholars are at a loss in grappling with chattels real. Smith and Merrill admit to having "difficulty telling the differ-

554 See David J. Shakow, "Taxation Without Realization: A Proposal for Accrual Taxation," 134 *University of Pennsylvania Law Review* 1111 (1986).

555 Shakow advocates for a wealth tax, "A Comprehensive Wealth Tax," 53 *Tax Law Review* 499 (2000); "A Wealth Tax: Taxing the Estates of the Living," 57 *Boston College Law Review* 947 (2016).

556 Since annual wealth measurements are currently unavailable, this literature considers taxation of annual capital income. See Christophe Chamley, "Optimal Taxation of Capital Income in General Equilibrium with Infinite Lives," 54 *Econometrica* 607 (1986); "Capital Income Taxation, Wealth Distribution and Borrowing Constraints," 79 *Journal of Public Economics* 55 (2001); Kenneth L. Judd, "Redistributive Taxation in a Simple Perfect Foresight Model," 28 *Journal of Public Economics* 59 (1985); "Optimal taxation and spending in general competitive growth models," 71 *Journal of Public Economics* 1 (1999).

557 See generally Scott Duke Kominers and Weyl, "Holdout in the Assembly of Complements: A Problem for Market Design," 102 *American Economic Review* 360 (2012).

558 "Fee Simple Obsolete"; see also "Property Beyond Exclusion," 61 *William and Mary Law Review* 521 (2019).

559 See generally Mary Ann Glendon, "The Transformation of American Landlord-Tenant Law," 23 *Boston College Law Review* 503 (1982); Robert H. Kelley, "Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated," 41 *Wayne Law Review* 1563 (1995); Stephen Siegel, "Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry," 52 *Journal of Urban Law* 649 (1975).

ence between a kind of junior ownership for a term, on the one hand, and a license agreement, on the other."[560] They are not alone. That consummate expositor of the common law, Blackstone, reverts to Natural law to define leases as a "contract for the possession of lands and tenements, for some determinate period."[561] Simpson speculates that "the idea of a person becoming a vassal for a term of years hardly fitted into the feudal structure of things."[562]

Radically for law and economics scholars, Weyl and Posner suggest nothing less than that landowners are monopolists: "Like a monopolist, the landowner can earn higher returns on the sale of her land by holding out for a generous offer (effectively withholding supply from the market) rather than selling to the first person who offers a fair price. In the meantime, the land is unused or underused."[563] Yet, they fail to consider that when people hold on to land in a locality, they are making a market in real property. All market makers manage inventories of assets across both space and time in order to bring together buyers and sellers.[564] Indeed, Weyl and Posner's proposal abstracts out market-making activity completely from the economy. They suggest that future technology through the internet can effortlessly put buyers in touch with sellers (without any type of asymmetric information.) While the efficient-market hypothesis[565] is a valid generalization for the economy as a heuristic,[566] mechanism design theory elucidates that markets arise by dint of considerable, sustained efforts.[567]

The residue of feudalism in real property law has other insidious consequences (see our discussion in Section II.4 *infra*.) Not all the incidents

560 "The Property/Contract Interface," 101 *Columbia Law Review* 773, 831 (2001).

561 2 *Commentaries on the Laws of England*, at 140.

562 *An Introduction to the History of the Land Law*, at 70.

563 *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, at 38.

564 Without this market-making activity, the problems Fennel examines would only intensify.

565 Eugene F. Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work," 25 *Journal of Finance* 383 (1970); Michael Jensen, "Some Anomalous Evidence Regarding Market Efficiency," 6 *Journal of Financial Economics* 95, 95 (1978).

566 Kenneth J. Arrow and Gerard Debreu, "Existence of an Equilibrium for a Competitive Economy," 22 *Econometrica* 265, 265 (1954); Edward C. Prescott and Robert M. Townsend, "Pareto optimal and competitive equilibria with adverse selection and moral hazard," 52 *Econometrica* 21 (1984).

567 See Ronald J. Gilson and Reinier H. Kraakman, "The Mechanisms of Market Efficiency," 70 *Virginia Law Review* 549 (1984); Market Efficiency After the Financial Crisis: It's Still a Matter of Information Costs, 100 *Virginia Law Review* 313 (2014).

of feudal tenure have been eliminated from Anglo-American common law and equity. Bruce L. Benson highlights the mischief caused presently by feudal forfeiture in the United States, which diminishes legal security for vulnerable populations of wide swaths of immigrant foreigners, unable to defend their property rights.[568] Moreover, as part of the war on drugs announced by Ronald Reagan back in 1984, the United States has set itself on an aggressive course of exporting this Anglo-American feudal institution to its unsuspecting Latin American neighbors, despite its incongruity with the civil law system.

B. *Standardized Unbundled Property Rights*

The mechanism design of any system of real property should aim to maximize land values. Law and economics scholars recognize that a standardized form of bundled property rights is more valuable to owners when the legal system allows some of these property rights to become temporarily unbundled. *Iura in re aliena* are temporarily unbundled property rights in Roman law. Roman lawyers consider these unbundled rights in the property of others to be negative rights.[569] Insofar as some of the property rights become unbundled, the owners lose the power to prevent interferences with their property. Thus, when an *usus fructus* or *usus et habitatio* becomes unbundled from a *dominium*, the naked owners can no longer exclude the usufructuary or usuary from the use, enjoyment or disposition of their property. When a *seruitus prædii* becomes unbundled from a *dominium*, the owner of the servient land can no longer exclude the owner of the dominant land from passing over his property or transporting water or animals over it.

Temporarily unbundled property rights increase land values. Roman law admits only a closed system of *iura in re aliena*[570] and, notably, limits their duration in time. No *usus fructus* or *usus et habitatio* can outlast the life of the usufructuary or usuary. The moment any *seruitus prædii* ceases to confer value on the dominant land, it becomes extinguished. The temporal limitation

568 "The War on Drugs: A Public Bad," *Searle Center on Law, Regulation, and Economic Growth Working Paper* (2008).

569 Note that we take our terminology from Roman legal scholarship. Common lawyers refer to 'negative' easements (or covenants) as land use restrictions, which prevent property owners from using land in the manners specified —not as the loss of the unbundled rights to exclude others—.

570 See Alan Watson, *The Law of Property in the Later Roman Republic* 176 (1968).

of *iura in re aliena* is a mechanism design of Roman law because unbundled property rights encumber the property of others.[571]

Incongruently, common lawyers speak of profits and easements —both appurtenant and in gross— as positive nonpossessory rights. While Roman lawyers believe that the law cannot segregate possession from the use of land, common lawyers have always considered profits and easements to be nonpossessory, and to exist as positive rights, independently of the land with which they run. As a result, at Anglo-American common law and equity, the open system of present-possessory estates and nonpossessory future interests in land is additionally burdened with a vast assortment of independently existing profits and easements.

Profits and easements in gross are a particularly taxing problem at English and Anglo-American common law. Already in the thirteenth century, Henry of Bracton despaired over what to make of them.[572] Rather than being held with regard to appurtenant tenements, in the United States people can hold profits and easements in gross as to remote and cut-off servient tenements, which lie considerable distances away.

With negative unbundled rights in the property of others under Roman law, owners temporarily are unable to avoid interferences with their property. In contrast, positive nonpossessory rights add to the *numerus apertus*-quality of real property in the United States because they can burden present-possessory estates in perpetuity. Furthermore, (as noted *supra* in Section II.1.A,) restrictive covenants and equitable servitudes run with the land. As a result, standardized estates in land no longer remain legally like others of their type. Each estate is distinct from the others depending with which profits or easements, and restrictive covenants or equitable servitudes, it is burdened.[573]

Antony Dnes and Dean Lueck are amiss in believing that United States law regarding easements and profits provides an "illustration of the efficient

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571 See *supra* our discussion of *iura in re aliena* in Section II.1.A of Chapter One.

572 Sir Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property with Original Authorities* 205 (Fifth edition, 1897).

573 Law and economics scholars ought to recognize that, for a system of private law to decentralize the social order, rights held in things must remain standardized across people in the long run. That way people can apply their own experience with their tenure of things, to an understanding of the tenure that others can hold. In this manner, private legal institutions solve the problems posed by asymmetrici nformation between people in the marketplace.

evolution of [real] property."[574] They set forth that the fragmentation of real property rights at common law may be efficient because of the "gain[s realized] from specialization in the ownership."[575] They seem to believe that modern land recording or registration is capable of solving the problems posed by asymmetric information and offsets the need for standardization of real property rights in the legal system. Applying the comparative method, they point to a "stronger [land] titl[ing] system" in Anglo America compared with that in England.[576] At English land law, titles were ancient and easements and profits could be created by prescription. The English had delayed until 1925 in introducing the registration system for land. Accordingly, they note that English law evolved to limit the easements and profits that could be created more strictly than United States law. [577]

Inconsistently, Dnes and Lueck argue that "[r]egistration gives ownership finality" because the recording system for land defines the "first-to-file registrant as the owner."[578] They fail to consider that, in many state jurisdictions, the doctrines of constructive, actual and inquiry notice at Anglo-American equity control in establishing the owner. Moreover, title insurance is in place in the United States not solely to "cover for mistakes" in land registration —as they claim—, but to pool and manage the risks created by the open system of feudal tenure.

The residue of feudalism in real property law means that land contests determine who has the better title rather than who is the single property owner. Moreover, since property law is state rather than federal, registration systems for land vary across state jurisdictions. Benito Arrunada and Nuno Garoupa distinguish between title recording and registration.[579] With a Torrens-type registration system, a registrar conducts an *ex ante* investigation of third-party rights and proceeds to record title only when title conflicts are undetected. With simple title recordation, title conflicts are solved *ex post*,

574 "Asymmetric Information and the Law of Servitudes Governing Land," 38 *The Journal of Legal Studies* 89, 90 (2009).

575 *Idem*, at 91. They offer the example of mineral rights (which we discuss in Section II.1.C *infra*) severed from surface estates: "[A]llowing an oil company to own and manage underground hydrocarbons while a farmer manages the soil [above] increases the total value of the land." *Ibidem*.

576 *Idem*, at 117.

577 English law allows negative easements "only for air, building support, light, and riparian water." *Idem*, at 105.

578 *Idem*, at 106.

579 "The Choice of Titling System in Land," 48 *The Journal of Law and Economics* 709, 710-11 (2005).

depending on which party was first-to-file. In either model, we claim finality as to ownership proves elusive at English and Anglo-American common law and equity.

C. *Private Ownership of Mineral Rights*

In the United States, the long-standing practice has been private ownership of oil, gas, and other minerals.[580] Mineral estates are held mostly in fee simple, but the 'mineral lease' —rather than constitute a nonfreehold estate— is held as a fee simple determinable estate qualified by durational language. Mineral estates include easements implied at law to the surface and to fresh water for drilling or mining operations.[581]

The open system of feudal tenure means that holders are able to sever mineral rights from surface estates and to partition mineral estates both horizontally and vertically, in whichever way they deem fit.[582] The ease with which fragmented mineral estates can be created multiplies the number of subsurface property interests to which mineral deposits are subjected. As a result, the extraction of oil and gas becomes inefficient without government intervention in setting 'spacing units' to the drainage area of single wells—a second-best solution.[583] Moreover, the open system of real property entangles holders of mineral estates and drilling and mining operator-lessees in a web of legal uncertainty. Identifying the private owner of a mineral estate located in the United States is a difficult and time-consuming process.

Courts apply the rule of capture (discussed in Section II.3 *infra*) to subsurface oil and gas deposits by drawing an analogy with animals *feræ naturæ*:

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580 Texas broke with the laws of Spain and Mexico, which regarded subsurface property interests as the exclusive domain of the sovereign, and privatized mineral rights through various constitutional amendments in 1866, 1869 and 1876. Texas Constitution of 1866 article VII, section 39; Texas Constitution of 1869, article X, section 9; Texas Constitution of 1876 article XIV, section 7.

581 See John S. Lowe, "The Easement of the Mineral Estate for Surface Use: An Analysis of Its Rationale, Status, and Prospects," 39 *Rocky Mountain Mineral Law Institute* 4-3 section 4.02 (1993).

582 Louisiana is the exception as a civilian jurisdiction, where mineral rights cannot be held separately in perpetuity. George W. Hardy III, "Public Policy and Terminability of Mineral Rights in Louisiana," 26 *Louisiana Law Review* 731 (1996).

583 Hannah J. Wiseman, "Coordinating the Oil and Gas Commons," 2014 *Brigham Young University Law Review* 1543, 1560 (2014).

both are capable of escape and migration.[584] The rule of capture is not incentive-compatible because abutting mineral operators rush to drain oil and gas fields, which leads to the depletion of nonrenewable natural resources and to the all-too-familiar sight of vast tracks of land, from Texas to Kansas, studded with oil derricks and drilling rigs.[585]

2. *Personal Property Taken From Natural Law*

To this day, personal property law in the United States is underdeveloped, and chattels are understood at English and Anglo-American common law and equity to be a lesser form of property. The legal system that governs personal property is based on the eighteenth-century Natural law tradition. Natural lawyers abstracted a notion of property from the classical Roman law.[586] Hence Morton Horwitz's distinction between the "abstraction of the legal idea of property" and the "physicalist" conception of property "derived from land."[587]

English private legal institutions were carried over across the Atlantic Ocean to the shores of Anglo America, not in the form of a well-stocked legal library with multiple sets of case reporters, but as a single four-tome hornbook, Blackstone's Natural law treatise. As early as 1766, Blackstone looked with contempt at personal property —'chattels' in Law French,[588] although he uses the nontechnical term 'things personal'—. "[A]ll sorts of things moveable" are, in his low estimation, "of a perishable quality," and thus are, "not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immoveable."[589] He maintains that in "feodal [sic] ages" people were quite ignorant "of [the] luxurious refinements" which modern life has to of-

584 In *Westmoreland and Cambria Natural Gas Co. v. De Witt*, the Supreme Court of Pennsylvania speaks of "minerals *ferae naturae*," 18 *Atlantic Reporter* 724, 725 (Pennsylvania 1889).

585 Rance L. Craft, "Of Reservoir Hogs and Pelt Fiction: Defending the Ferae Naturae Analogy Between Petroleum and Wildlife," 44 *Emory Law Journal* 697 (1995).

586 Paolo Grossi, *Le situazioni reali nell'esperanza giuridica medievale* (1968).

587 See *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 145 (1992). David J. Seipp submits that "goods and animals, not land" came closest to what Blackstone called "that sole and despotic dominion…, in total exclusion of the rights of any other individual in the universe," a Natural law definition. "The Concept of Property in the Early Common Law," 12 *Law and History Review* 29, 87 (1994).

588 Rastell, *Les termes de la ley*, at 71-72.

589 2 *Commentaries on the Laws of England*, at 384-85.

fer, but he concedes that in his time "the introduction and extension of trade and commerce" have made personal property at least not a completely "trifling" matter and something not entirely irrelevant to the law.

Blackstone concedes, further, that, at English common law and equity, personal property law is underdeveloped. He writes: "Our antient [sic] lawbooks […] do not […] often condescend to regulate [personal] property […]. There is not a chapter in Britton or the [M]irroir [sic] [of Justices] […] and the little that is to be found in Glanvil[l], Bracton, and Fleta, seems principally borrowed from the civilians."[590]

Yet Blackstone is wrong about the reason for the characteristic underdevelopment of the law of personal property. With the Industrial Revolution underway, chattels had become valuable. During the early republican period in the United States, James Kent shows solicitude for the subject in his hornbook. When he treats chattels in 1827, he considers: "[T]he law of chattels, once so unimportant, has grown into a system, which, by its magnitude, overshadows, in a very considerable degree, the learning of real estates."[591] Despite the fresh urgency of the subject, Anglo-American courts proved incapable of developing the law of personal property. At common law and equity, property rights to chattels have always been defended through the writs of trespass *de bonis asportatis* —Latin for goods carried away—,[592] detinue,[593] replevin,[594] trover[595] or conversion,[596] rather than through the writ of right.[597] In a tort action, the focus of the court is always on the malfeasance of the wrongdoer, rather than on the property rights of the owner.[598] As a result, judges failed to develop the law with respect to moveable things in this legal tradition.[599]

To this day, in the Anglo-American legal tradition, the law of personal property is underappreciated and remains poorly developed. When Grant Gilmore sought to modernize the law regarding security interests in chattels, he was forced to insert a mini-treatise on personal property —at

590 *Idem*, at 385.
591 2 *Commentaries on American Law* 278 (1827).
592 See Stimson, *A concise law dictionary of words, phrases, and maxims*, at 150.
593 *Idem*, at 162.
594 *Idem*, at 303.
595 *Idem*, at 329.
596 *Idem*, at 126.
597 *Idem*, at 306.
598 See David Ibbetson, *A Historical Introduction to the Law of Obligations* 110-11 (1999).
599 *Ibidem*.

the "kindergarden level"— as part of Article 9 of the Uniform Commercial Code.[600] In the United States, to this day, law teachers instruct their students, without appreciating why, in Gilmore's classificatory categories into which all personalty is made to fall. Civilian lawyers who are familiar with codes —as their own private law is codified— may be surprised when they read Article 9. Julian B. McDonnell complains that Gilmore is "obsessed with defining" its terms.[601] McDonnell admits feeling nonplussed with "its elaborate division of personal property collateral into different categories." With knowing wit, he confesses that his students of secured transactions "go batty." He questions why Gilmore is "unwilling to rely on unspecified usages of the general language community or of the legal profession," and instead is "compelled to manufacture a vocabulary of [his] own."

The pre-code law regarding security interests in chattels had developed haphazardly in the United States.[602] During the late nineteenth and early twentieth centuries, state legislators had developed new security devices for different forms of personal property, such as equipment, inventory and accounts receivable. The common law pledge, as a bailment of personal property to a creditor, was unsuitable for equipment in the wake of the Industrial Revolution.[603] The chattel mortgage[604] and the conditional sale[605] were unsuitable for inventory in the burgeoning national market of the nineteenth century.[606] The trust receipt[607] was unsuitable for businesses with regularly revolving accounts receivable in the postwar, pre-depression era of the twentieth century.[608] As soon as nonpossessory security devices were created, state legislators set up filing systems to provide "information

600 "Security Law, Formalism, and Article 9," 47 *Nebraska Law Review* 659, 674 (1968).

601 "Definition and Dialogue in Commercial Law," 89 *Northwestern University Law Review* 623 (1989).

602 See Gilmore, 1 *Security Interests in Personal Property* 3–293 (1965).

603 The debtor lost possession of equipment that manufacturers needed to run their business.

604 *Idem*, at 24-61.

605 *Idem*, at 62-85.

606 Retailers could not resell inventory if they had conveyed title to the creditor. Nor could they procure inventory from wholesalers who retained title.

607 *Idem*, at 86-127.

608 Unlike factors of bygone days who sold the merchandise of their clients, in factoring the assignees were financing agents who exclusively provided capital and collected the proceeds of the accounts receivable.

about secured creditors to other secured creditors."[609] McDonnell untangles the historical process: "It is very doubtful that the participants in this process recognized that they were creating the new field of personal property security law."[610] In his hornbook, he elaborates: "Instead, they focused on each security device as an independent legal entity […]. The cases and the commentators speak not of the law of secured transactions, but instead of the law of chattel mortgages, the law of conditional sale, the law of trust receipts and so forth."[611]

Homer Kripke believes that the "legal structure of secured credit developed to make possible mass production and the distribution of goods."[612] Yet to weld together the assortment of pre-code security devices, Gilmore was called on to develop the law of personal property. He did so through his categories. That he was successful is beyond question. Robert E. Scott remarks that the pre-code law regarding the law of chattel mortgages, the law of conditional sale, the law of trust receipts, and the rest, had "served second-class markets as the poor man's means of obtaining credit."[613] The post-code law of secured transactions has —in his estimation— "become the linchpin of private financing."[614]

A. *Bailments Can Be Many Things*

As we keep in mind the characteristic underdevelopment of the law of personal property, a few other peculiarities of English and Anglo-American common law and equity make sense. One is the state of confusion and incoherence that surrounds the law of bailments in common law jurisdictions. Whatever definition is given, bailments entail accepting possession without legal title over tangible personal property and the duty to hand back that possession at a later time. The term 'bailment,' is derived from the Law French verb '*bailler*,' which means 'to hand over.'[615] Whatever

609 Baird, "Notice Filing and the Problem of Ostensible Ownership," 12 *The Journal of Legal Studies* 53, 55, 62 (1983).

610 1 *Secured Transactions Under the Uniform Commercial Code* section 3B.02 (1997)

611 *Ibidem*.

612 "Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact," 133 *University of Pennsylvania Law Review* 929, 931 note 14 (1985).

613 "The Politics of Article 9," 80 *Virginia Law Review* 1783 (1994).

614 *Idem*, at 1783-84.

615 See Blackstone, 2 *Commentaries on the Laws of England*, at 451.

scope is assigned, bailments generally do not extend to either real or intangible property.

Civilian lawyers may be hard-pressed to understand this one-figure-fits-all common law concept. That is because the civil law uses any number of interrelated figures to refer to bailments, which the common law lumps together. Among the real contracts are *depositum*, the gratuitous handing over of a thing to another for safekeeping, entered into for the benefit of the depositor;[616] *commodatum*, the gratuitous handing over of a thing as a loan for use, celebrated for the benefit of the borrower,[617] and *pignus conuentum*, the handing over of a thing as security for a debt.[618] Among the consensual contracts are *locatio conductio operis*, the handing over of a thing to another for that person to carry out a particular piece of work on it,[619] and *mandatum*, the gratuitous handing over of a thing to another for that person to take care of some affair, celebrated for the benefit of the mandator.[620] And a quasi delict, the special regime of objective responsibility —'strict liability' at common law— for losses to a customer who hands over a thing to the sea carrier, innkeeper or stable keeper that provides carriage or accommodations.

Usefully at common law the liability of the bailee follows classical Roman law, with a heightened standard of care where one existed in that legal system.[621] Where under Roman law borrowers who benefit from gratuitous *commodata* respond for *culpa levissima*, at common law borrowers on loans made "gratuitously for the[ir] sole benefit" are liable "not merely for slight, but for the slightest neglect."[622] Where under Roman law sea carriers, innkeepers or stable keepers respond quasi-delictually for the losses that occur to their customers irrespective of their *dolus* or *culpa*, at common law innkeepers and common carriers are "answerable for the smallest negligence" in themselves or their servants or even "without the least shadow of fault or neglect."[623]

616 Joseph Story, *Commentaries on the Law of Bailments* 3 (1832).

617 *Ibidem.*

618 *Idem,* at 4.

619 *Idem,* at 3-4.

620 *Idem,* at 3-4.

621 See generally Kent, "Lecture XL Of Bailment," in 2 *Commentaries on American Law*, at 559-611.

622 *Idem*, at 575.

623 *Idem*, at 602-03.

B. *'Intellectual Property' Is Not Property*

Common law thinking has brought another distortion into the modern-day world. Doggedly legal systems everywhere treat copyrights, patents and trademarks as 'intellectual property.' The economic and political hegemony of Great Britain, and later of the United States, imposed this legal thinking on the rest of the world. Today, law and economics scholars disagree about whether intellectual property is property.[624] In our view, intellectual property is an unsound doctrine.

That this unsound doctrine arose in the United States is laden with irony.[625] At the beginning of the Anglo-American republic, the hardheaded plantation owner who drafted the Declaration of Independence, Thomas Jefferson, famously wrote: "He who receives an idea from me receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."[626] Economists explain that patents are nonrivalrous and nonexcludable. The Roman law scholar Giuseppe Dari-Mattiacci proposes to move patents to the law of restitution[627] —we gather, undoubtedly, through the "unmistakably Roman" *condictiones*—.[628] However, the legal system treats patents as 'intellectual property'. Consequently, Dari-Mattiacci laments that "the resulting litigation is framed not as restitution for the production of a benefit but rather as a violation of a property right."[629]

Much confusion exists, also, in the law and economics literature regarding copyright. William M. Landes and Richard A. Posner argue, since common law copyright protection was perpetual, that copyrights be made in-

624 Frank H. Easterbrook, "Intellectual Property Is Still Property," 13 *Harvard Journal of Law & Public Policy* 108 (1990); Epstein, "Liberty Versus Property? Cracks in the Foundations of Copyright Law," 42 *San Diego Law Review* 1 (2005); Smith, "Intellectual Property as Property: Delineating Entitlements in Information," 116 *Yale Law Journal* 1742, 1750 (2007); Epstein, "The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary," 62 *Stanford Law Review* 455 (2010).

625 William W. Fisher III, "Geistiges Eigentum—ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten," in *Eigentum im internationalen Vergleich* 265-92 (1999).

626 Letter to Isaac McPherson (August 13, 1813), in Albert Ellery Bergh (editor), *The Writings of Thomas Jefferson* 326, 333-34 (1907).

627 "Negative Liability," 38 *Journal of Legal Studies* 21 (2009).

628 See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 835-57, 857.

629 "Negative Liability," at 53-54.

definitely renewable under federal law as well.[630] Lawrence Lessig responds to this nonsequitur with irony. He proposes that federal law demand a $1 fee after fifty years to continue copyright protection.[631] Mark Lemley considers the current extension of copyright protection in the European Union[632] and the United States[633] —which has grown inordinately in the modern-day world through the Berne Convention—[634] to be no less than "a wholesale attack on the public domain."[635]

The reason that copyrights, patents and trademarks must be limited in their duration is simple —and one that Landes, Posner, Lessig and Lemley fail to consider—. Unbundled intellectual rights encumber the property of others.[636] Like Dari-Mattiacci, we propose a Roman solution. Classify copyrights, patents and trademarks as 'intellectual rights in the property of others'.[637] Along with the *iura in re aliena* (discussed *supra* in Section II.A.2,) copyrights, patents and trademarks would be considered negative rights and limited in their duration. In common law quarters, Molly Shaffer Van Houweling makes the connection between intellectual property and 'servitudes' —civilian legal terminology for easements, restrictive covenants, and equitable servitudes—.[638] Yet the common law fails to have a general concept of unbundled rights in the property of others and lacks the underlying mechanism design that limits their duration in time.

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630 "Indefinitely Renewable Copyright," 70 *University of Chicago Law Review* 471 (2003).

631 Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 248-49 (2004).

632 Council Directive 93/98/European Economic Community of 29 October 1993, *Official Journal of the European Communities* No. L 290/9 (1993).

633 Sonny Bono Copyright Term Extension Act, Public Law No. 105-298, 17 *United States Code* section 302(a) (1998).

634 Berne Convention for the Protection of Literary and Artistic Works of 1886.

635 "Romantic Authorship and the Rhetoric of Property," review of James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996), in 75 *Texas Law Review* 902 (1997).

636 For a system of private law to decentralize the social order, rights held in things must remain standardized across people in the long run.

637 "Título III, De los derechos intelectuales e industriales en la propiedad de otro," in del Granado, *De iure ciuili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI*, at 92-96.

638 See generally "The New Servitudes," 96 *Georgetown Law Journal* 885 (2008); "Touching and Concerning Copyright, *Real Property Reasoning in MDY Industries, Inc. v. Blizzard Entertainment, Inc.*," 51 *Santa Clara Law Review* 1063 (2011); "Technology and Tracing Costs: Lessons from Real Property," in Shyamkrishna Balganesh (editor), *Intellectual Property and the Common Law* 385 (2013).

The common law runs up against the problems of treating intellectual property as property without heading to the root of what is wrong. The common law offers only second-best solutions and proceeds through the indirect means of statutory interpretation in the field of intellectual property. Fair use was an early development at English common law beginning with the Statute of Anne of 1709.[639] At the turn of the nineteenth century, Lord Ellenborough understood that unlimited copyright would "put manacles upon science."[640] 'Fair use,' determined on a case-by-case basis, limits copyright holders' exclusive rights and permits infringing uses if made for teaching, scholarship, or commentary, essential to the free flow of ideas, thoughts, and debate.[641] In addition to fair use, under the 'first sale' doctrine, as Shaffer Van Houweling explains,[642] a lawful purchaser of a copyrighted, patented or trademarked product may generally use or resell the product without fear of infringement claims or litigation.[643] The holders of intellectual property rights are said to 'exhaust' their rights to the product with the first sale.

Another problem in the field of intellectual property has a Roman solution. Apply the law of *nouam speciem facere* in the field of intellectual property whenever patents become commingled.[644] Patent thickets and patent trolls currently impede innovation in the United States.[645] When innovators develop new processes and techniques, they unavoidably incorporate pre-

639 See generally Matthew Sag, "The Prehistory of Fair Use," 76 *Brooklyn Law Review* 1371 (2011).

640 *Cary v. Kearsley* (1803), in Isaac Espinasse (editor) 4 *Reports of cases argued and ruled at Nisi Prius, in the courts of King's Bench and Common Pleas, 1793-1807* 168, 170 (1804).

641 Melville Nimmer and David Nimmer, "The Defense of Fair Use," 4 *Nimmer on Copyright* section 13.05 (2020).

642 See generally "Exhaustion and the of Limits Remote-Control Property," 93 *Denver Law Review* 951 (2016); "Exhaustion and Personal Property Servitudes," in Irene Calboli and Edward Lee (editors), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (2016); "Disciplining the Dead Hand of Copyright: Durational Limits on Remote Control Property," 30 *Harvard Journal of Law & Technology* 53 (2017).

643 *Bobbs-Merrill v. Straus*, 210 *United States Reports* 339 (1908); *Motion Picture Patents Co. v. Universal Film Co.*, 243 *United States Reports* 502 (1917); *Prestonettes, Inc. v. Coty*, 264 *United States Reports* 359 (1924).

644 "Título IV, De los modos en que se mantiene la propiedad," in *De iure ciuili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI*, at 99.

645 Carl Shapiro, "Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting," in 1 *National Bureau of Economic Research Innovation Policy and the Economy* 119 (2001); Clark D. Asay, "Software's Copyright Anticommons," 66 *Emory Law Journal* 265 (2017). The literature makes an about-face from Demsetz' early thesis, which provided what

ceding patents. As these patents are already owned, innovators must negotiate through a 'thicket' of licensors, who have the incentives for hold up. Moreover, speculators have the incentives to 'troll' for patents with the sole purpose of extracting rents from innovators. These problems are especially vexing in the United States where the Patent and Trademark Office overgrants patents.[646] Patents should only be approved if they are 'nonobvious' —involve an 'inventive step' in civil law terminology— in light of all prior art.[647] As John H. Barton concludes, patents must only be available for "an exceptional innovation" —which leaps, not simply steps, beyond existing technology—.[648]

3. *Institutional Mechanisms for Maintaining Property Rights Over Time*

As explained *supra* in Section I, common lawyers have largely taken over their mapping of private-law institutions from civilian scholars. One outdated classification contrived by the Natural lawyers consists in the 'ways of acquiring property'. Property law casebooks in the United States begin their discussion by confusing the category of personal property with the different ways of acquiring it. Thus, law students become acquainted with the rule of capture[649] at the same time as they become familiar with such ungainly creatures as quasi property.[650] Law and economics scholars can update the map of English and Anglo-American common law and equity by introducing a new category: the 'ways of maintaining property' (a new classification arrived at entirely through the economic approach to law.)

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is now the prevailing justification for patents. See "The Private Production of Public Goods," 13 *Journal of Law and Economics* 293, 295-300 (1970).

646 For empirical evidence that it overgrants patents, see Michael D. Frakes and Melissa F. Wasserman, "Does the U.S. Patent and Trademark Office Grant Too Many Bad Patents? Evidence from a Quasi-Experiment," 67 *Stanford Law Review* 613 (2015).

647 See Adam B. Jaffe and Josh Lerner, *Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to do About It* 32-35, 75, 119-23, 145-49 (2004).

648 "Non-Obviousness," 43 *Idea: The Intellectual Property Law Review* 475, 508 (2003).

649 *Pierson v. Post*, 3 *Caines' Reports* 175 (1805); Dhammika Dharmapala, "An Economic Analysis of Riding to Hounds: *Pierson v. Post* Revisited," 18 *The Journal of Law, Economics, & Organization* 39 (2002).

650 *International News Service v. Associated Press*, 248 *United States Reports* 215 (1918); Shyamkrishna Balganesh, "Quasi-Property: Like, but not quite Property," 160 *University of Pennsylvania Law Review* 1889 (2012).

Law and economics scholars should recognize that private-law institutions must constantly re-bundle property rights because of the inexorable changes wrought by the passage of time.[651] When owners die, the laws of inheritance[652] or trusts[653] operate to reassign property rights to heirs, legatees or *cestuis que trustent*. When things become confused, the common law doctrines of accession or intermingling[654] operate to reassign property rights either to one or another of the property holders, but not to both. When new people occupy things, the law of adverse possession[655] operates to reassign property rights to possessors after the requisite time.

Law and economics scholars should also recognize that private-law institutions must constantly place re-bundled property rights under the control of a single property holder, who acts as the residual claimant.[656] Classical Roman law avoids situations of *communio* between various property owners whenever possible as a mechanism design.[657] As a result, every *dominium* is generally subjected to the stewardship of a single *pater familias*, which avoids the need for coordination among various co-owners. When the co-ownership becomes unavoidable —because it is voluntary, accidental or incidental—, the Roman law of obligations steps in to coordinate the governance of resources jointly held through the quasi contract of *communio incidens*. At Anglo-American equity, tenants in common[658] are, likewise, considered to owe fiduciary duties to each other (see our discussion of fiduciary duties *infra* in section IV.2.) In *Van Horne v. Fonda*, Chancellor Kent explains: "Community of interest, produces a community of duty […] to deal candidly and benevolently with each other."[659]

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651 Michael A. Heller, "The Boundaries of Private Property," 108 *Yale Law Journal* 1163 (1999). With regard to fragmentation of property interests, see also Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," 111 *Harvard Law Review* 621 (1998); *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (2008)

652 Stimson, *A concise law dictionary of words, phrases, and maxims*, at 220.

653 *Idem*, at 329.

654 *Idem*, at 58.

655 *Idem*, at 66.

656 Armen A. Alchian and Demsetz, "Production, Information Costs, and Economic Organization," 62 *American Economics Review* 777, 782 (1972).

657 See *supra* our discussion of how Roman law avoids situations of *communio* in Section II.1.D of Chapter One.

658 Stimson, *A concise law dictionary of words, phrases, and maxims*, at 117.

659 5 *Reports of cases adjudged in the Court of Chancery of New York by William Johnson* 388, 407-08 (1821).

Yet the parallels of Anglo-American equitable institutions with classical Roman law run deeper when legal institutions address the vagaries of ownership in incentive-compatible ways. Under both legal systems, the risk of loss shifts to the buyer when a sale is perfected.[660] In the period between a sale and the actual conveyance, sellers' incentives remain misaligned with the care and maintenance of the land. To address this problem, the Roman law of obligations steps in to coordinate the governance of resources through the quasi contract of *negotiorum gestio*. Sellers as *negotiorum gestores* are required to look after the land for buyers as *domini negotiorum*. At Anglo-American equity, during the same period, sellers are, likewise, required to look after the land for buyers, who become its equitable owners under the property law doctrine of equitable conversion.[661] With equitable ownership in the land —rather than a mere contractual right—, buyers are provided access to a wider range of remedies against sellers and third parties.[662]

4. *Mischief Wrought by the Common Law*

It may be difficult for some Anglo Americans to accept the uses to which the common law has been put at different times. United States scholars need to take stock of the past of their legal system in order to assess its relative merits and shortcomings for the future.

A. *Use of Feudal Tenure to Strip Native Americans of Their Property*

To this day, feudal tenure continues to define property rights in the United States. The first real property case that first-year law students read in class is *Johnson v. M'Intosh*.[663] There, the Supreme Court of the United States comes out against the interest of an unwitting purchaser of Native American lands. At the founding of the Anglo-American republic, the federal government took over from the British Crown the *dominium eminens*

660 See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 281-92.

661 See the 1801 English case of *Paine v. Meller*, in James Barr Ames (editor), 1 *A selection of cases in equity jurisprudence with notes and citations* 227 (1904).

662 See Story, 2 *Commentaries on Equity Jurisprudence: as administered in England and America* 459 (1839).

663 21 *United States Reports* 543 (1823).

of feudal tenure. Yet, John Marshall denies to Native Americans the *dominium utile* over their lands. Through "backed-handed, ironic half tongue-in-cheek prose,"[664] Justice Marshall uses feudal tenure to grant ownership to the federal government, while exploiting the feudal confusion of seisin with possession to deny ownership to Native Americans. Far from allowing that the Illinois and Piankashaw tribes owned the lands at issue, the court rules that they were only in possession of them. Justice Marshall asserts: "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned."[665] In contrast, the Roman lawyer Francisco de Vitoria never doubted that, when Europeans arrived, Native Americans exercised *dominium* over their things.[666]

Feudal tenure has enabled the federal government in the United States to historically strip Native Americans of their lands.[667] Justice Marshall's term for their real interest is 'occupancy' —the common law term for possession—.[668] Ever since 1823, the exact meaning of Native Americans' right of occupancy of their lands has been a matter of debate by Anglo-American legal scholars. Philip P. Frickey speculates that Native Americans are tenants at sufferance.[669] They certainly are neither disseisors nor trespassers. Yet at Anglo-American common law, tenants at sufferance are subject to immediate ejectment,[670] and are denied the retrieval of 'emblements' —Law French for crops sown with grain, that is, *fructus industriales*—.[671] Native Americans' occupancy includes tribal fishing and hunting rights in the land and gives them protection against dispossession. Justice Marshall compares their right of occupancy to a tenancy for years: "[T]he Indian title of occupancy […] is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment."[672]

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664 Epstein, "Property Rights Claims of Indigenous Populations: The View from the Common Law," 31 *University of Toledo Law Review* 1, 7 (1999).

665 *Johnson v. M'Intosh*, at 603.

666 See generally *De indis et de iure belli relectiones* (1557).

667 The unjust treatment of Native Americans is especially concerning to us. Bull is an enrolled member of the Delaware Tribe of Indians. Del Granado belongs to creole and indigenous elites of Inkan descent.

668 Stimson, *A concise law dictionary of words, phrases, and maxims*, at 264.

669 Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," 107 *Harvard Law Review* 381, 386 (1993).

670 Stimson, *A concise law dictionary of words, phrases, and maxims*, at 173.

671 Rastell, *Les termes de la ley*, at 191.

672 *Johnson v. M'Intosh*, at 592.

Notably, the Supreme Court lays down the exclusive prerogative of the federal government to purchase these occupied tribal lands. Justice Marshall insists: "The claim of government extends to the complete ultimate title, charged with this right of possession [belonging to Native Americans,] and to the exclusive power of acquiring that right."[673] No one else may purchase from Native Americans their lands. Their title of occupancy is effectively inalienable, except to the United States. Eric A. Kades argues that the "competition-stifling rule" of *Johnson v. M'Intosh* created a monopsony in the federal government which enabled Anglo Americans to dispossess Native Americans from their lands at least cost.[674] The holding —according to Kades— "ensured that Europeans did not bid against each other to acquire Indian lands, thus keeping prices low."[675] To further lower the cost, European settlers spread smallpox among Native Americans who had no natural resistance to the disease and exterminated big-game animals on which they depended for food and clothing.[676] Kades' term for the pillage of Native Americans' lands in the United States is "efficient expropriation."[677]

Yet the pillage of Native Americans' heritage goes beyond tribal lands in the United States. Mexicans and Peruvians are either of European, African and Native American mixed blood—or full blooded detribalized and Hispanicized Native Americans. Accordingly, they consider pre-Columbian artifacts and pre-European history an intrinsic part of their cultural heritage.

Inconsistently, United States courts ignore feudal tenure when their country's museums expropriate pre-Columbian artifacts from Mexico and Peru. Despite these countries' repeated legislative declarations of ownership over pre-Columbian artifacts as part of their national cultural patrimony, federal judges have come to deny the property rights of Mexicans and Peruvians. Moreover, the underdevelopment of the law of personal property at Anglo-American common law and equity has complicated judicial debates about cultural property.

673 *Idem*, at 603.

674 "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands," 148 *University of Pennsylvania Law Review* 1065, 1071-73 (2000); see also "History and Interpretation of the Great Case of *Johnson v. M'Intosh*," 19 *Law and History Review* 67 (2001).

675 "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands," at 1172-73.

676 *Idem, at* 1105.

677 *Ibidem.*

In *United States v. McClain*,[678] the defendants had been convicted under the National Stolen Property Act[679] of conspiring to transport and receiving through interstate commerce pre-Columbian artifacts, knowing these artifacts to have been stolen from Mexico. Mexico's Law on Archæological Monuments of May 11, 1897 declared archeological monuments to be "the property of the nation."[680] Included among archeological monuments were Mexican antiquities, codices, idols, amulets and other chattels "of interest to the study of the civilization and history of the aboriginals and ancient settlers of America and especially of Mexico."[681]

In its analysis, the United States Court of Appeals for the Fifth Circuit "recognizes the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archæological, or historic national treasures," —and affirms with categorical language— "or of whatever is within its jurisdiction."[682] Notwithstanding its language of respect for Mexican sovereignty, this court holds that "[n]othing in this article [Article 1 of the 1879 law] constitutes a declaration of ownership." In 1930, 1934 and 1970, the Mexican government made further legislative declarations to the same effect. Judge John Minor Wisdom refuses to recognize, under these laws as well, the property rights of Mexico to pre-Columbian artifacts taken from within its borders.

In addition to considering pre-Columbian artifacts the property of the nation, these laws recognized the right to private property over them and placed restrictions on their sale and export. Since private ownership is recognized, Judge Wisdom unwisely reasons that the legislative declarations of state ownership over pre-Columbian artifacts prior to 1972 are nothing more than exercises of Mexican state's police powers. States have broad police powers within their jurisdictions to regulate the use or disposition of private property to promote the public health and safety. Through another back-handed ploy, he analogizes pre-Columbian artifacts to firearms. A state may restrict the sale of firearms to convicted felons. Similarly, the Mexican state may restrict the export of pre-Columbian artifacts through the exercise of its police powers. Accordingly, he reasons that the restrictions fail to amount to ownership.

678 545 *Federal Reporter, Second Series* 988 (1977).

679 18 *United States Code* section 2315.

680 14 *Anuario de Legislacion y Jurisprudencia* 323 (1897), at article 1.

681 *Idem*, at article 6.

682 *Idem*, at 992.

With a sense of discomfort —like the unease felt by Marshall at expropriating Native Americans—, Wisdom backtracks. "To be sure" —more categorical language—, "the pre-Columbian artifacts regulated by Mexico seem to be in a different position from firearms […]. Because the artifacts cannot lawfully be taken from the country without an export license, they appear more owned than the other types of property."[683] He suggests that "[t]his appearance reflects the confusion of ownership with possession."[684] The court ignores that under feudal tenure, real rights can be nonpossessory. Judge Wisdom reasons that the "state comes to own property only when it acquires such property in the general manner by which private persons come to own property" —meaning with possession—, and again contradicts himself, "or when it declares itself the owner." In his confusion, Judge Wisdom gets the ownership and possession backwards: "Separating a piece of property from a country is analogous to depriving that country of possession over the property, because it deprives the country of jurisdiction over the property." He claims that Mexico never had actual possession over these artifacts.

Yet the court doubles down in its reasoning. "[R]estrictions on exportation are just like any other police power restrictions," he insists.[685] The court concludes that the pre-Columbian artifacts that the defendants —San Antonio dealer Patty McClain and four other persons—[686] conspired to transport, and received through interstate commerce, were not stolen simply because Mexico claimed to own them. The court ignores that through its legislative declarations of ownership in 1879, 1930, 1934, 1970 and 1972, the Mexican government exercised the *dominium eminens* of feudal tenure over these pre-Columbian artifacts. Feudal conceptions survive to this day in public law and public international law as part of the notion of state sovereignty[687] in civil law jurisdictions. Accordingly, the Mexican government acted consistently in permitting, as a matter of public law, the same pre-Columbian artifacts to be privately owned. The private owners held the *dominium utile* or possession over these artifacts.

683 *United States v. McClain*, at 1002.

684 *Ibidem.*

685 *Ibidem.*

686 The defendants had attempted to sell the artifacts to the Mexican Cultural Institute in San Antonio, Texas, which unbeknown to them was an arm of the Mexican government.

687 That feudal conceptions made their way into early-modern political thought is unsurprising. The modern concept of 'the state' developed in Europe from the extension of the suzerainty of a feudal overlord. See Jean Bodin, 1 *Les Six livres de la République* (1576).

Like Mexico, Peru has long and repeatedly asserted state ownership over pre-Columbian artifacts as part of its national cultural wealth. Like Mexico, Peru allows possession of the artifacts to remain in private hands. In *Government of Peru v. Johnson*,[688] a lower federal court applies the holding in *United States v. McClain* to a tort action for conversion of pre-Columbian artifacts filed by the Peruvian government. In its analysis, the district court recognizes that "priceless and beautiful Pre-Columbian artifacts excavated from historical monuments in that country have been and are being smuggled abroad and sold to museums and other collectors of art. Such conduct is destructive of a major segment of the cultural heritage of Peru," —and affirms with categorical language— "the plaintiff is entitled to the support of the courts of the United States in its determination to prevent further looting of its patrimony." Notwithstanding its language of support for Peruvian cultural property, this court denies Peru its ownership over the pre-Columbian artifacts seized by the United States Customs Service from an Anglo-American private collector.

For United States courts to recognize the *dominium eminens* of feudal tenure over cultural property, the foreign government must assert exclusive ownership and ban outright any private property or possession of the artifacts. That is, quite inconsistently with feudal tenure —with which common lawyers are all too familiar—, the government must simultaneously exercise the *dominium utile* over these artifacts. Egypt does just that. The Law on the Protection of Antiquities declares all antiquities found within its borders after 1983 to be public property and criminalizes private ownership or possession of those antiquities. In *United States v. Schultz*,[689] the United States Court of Appeals for the Second Circuit applies the holding in *United States v. McClain*. The court upholds the conviction under the National Stolen Property Act of an art dealer who had conspired to smuggle stolen antiquities out of Egypt.

Gordley calls for a change in the judicial mind-set of his compatriots regarding cultural property. He proposes that United States courts come to recognize that "two rights of ownership or entitlement may exist simultaneously" in artifacts which form part of a nation's cultural heritage— "that of a private party to possess the object but to treat it with the re-

688 720 *Federal Supplement* 810 (1989).

689 333 *Federal Reporter, Third Series* 393 (2003).

spect that it deserves" and "that of the state to preserve it."[690] In support of his proposal, he cites with approval an Italian case, in which a lower court recognizes the *dominio eminente* (*dominium eminens* in Italian) of the government of Ecuador to certain pre-Columbian artifacts.[691] He is careful to distinguish this doctrine from the Anglo-American concept of eminent domain.[692] He insists it be translated as "paramount ownership" or "paramount authority," in which he is correct. Despite Gordley's thoroughness as a legal historian, he fails to apprehend that *dominium eminens* is rooted in feudal tenure and integral to Anglo-American common law and equity. Instead, he attributes the inability of United States courts to recognize the real rights of Mexicans and Peruvians in cultural property to nineteenth-century will theorists Christopher Columbus Langdell and Pollock, who defined property as unlimited.[693] Gordley overlooks that the underdevelopment of the law of personal property at Anglo-American common law and equity may reach back further than the nineteenth century.

As we explain *supra* in Section II.2, the law of personal property remains poorly developed in the English and Anglo-American legal tradition. Accordingly, state courts apply feudal conceptions to personal property. A seminal personal property case on the law of gifts that first-year law students read in class is *Gruen v. Gruen*.[694] There, the Court of Appeals of New York —New York state's highest court— upholds a present gift of a remainder in a valuable painting by an architect to his son, while the father retains the life estate in the chattel. This case is far from precedent-setting. Older cases uphold limitations to create lesser estates over investment securities and funds.[695] During the early republican period in the United States,

690 "The Enforcement of Foreign Law: Reclaiming One Nation's Cultural Heritage in Another Nation's Courts," in Francesco Francioni and Gordley (editors), *Enforcing International Cultural Heritage Law* 110 (2013), at 123-24.

691 Tribunale of Torino, 25 March 1982, in 123 *Giurisprudenza Italiana* 625 (1982).

692 Gordley neglects to trace eminent domain in United States public law, through the Natural lawyers, to feudal conceptions. The unacknowledged source of Hugo Grotius' discussion of 'expropriation' —in civilian terminology— is the Roman lawyer Fernando Vásquez de Menchaca. See del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 195.

693 Langdell, "Classification of Rights and Wrongs Part 1," 13 *Harvard Law Review* 537–56 (1900), at 537–8; Pollock, *A First Book of Jurisprudence for Students of the Common Law* (1896), at 160.

694 68 *New York Reports, Second Series* 48 (1986).

695 See *In re Estate of Brandreth*, 169 *New York Reports* 437, 441-42 (1902).

Chancellor Kent went further than Blackstone[696] in asserting that chattels admit present-possessory estates and future interests. Kent is categorical in his hornbook in setting forth that the "limitation over in remainder is good as to every species of chattels."[697] In the 1848 edition he adds a qualification—"of a durable nature."[698] Excepted are things such as "corn, hay, and fruits, of which the use consists in the consumption."

Common lawyers are used to feudal land holding. Real property at Anglo-American common law and equity is built on the separation between *dominium eminens* and *dominium utile*, although common lawyers use other terms of art. Perhaps today few United States lawyers realize that grantors can create future interests and present-possessory estates in personal property both through wills *mortis causa* and through deeds *inter vivos*. Merrill and Smith explain that today "virtually anyone who wants to create complicated future interests in personal property, including of course stocks, bonds, and shares in mutual funds —the largest source of wealth in today's society— does so through a trust."[699] United States lawyers have lost sight of their own legal roots and practices and unwittingly turn a blind eye to the looting of Mexicans and Peruvians' pre-European heritage. United States courts must do more to ensure the protection of Mexico and Peru's cultural property. That judges ignore their own legal past when their museums expropriate pre-Columbian artifacts which are vital to the life and identity of these Latin American countries is inexcusable.

B. *Public-Law Nature of Slavery and Indentured Servitude*

Anglo-American slavery was an inhumane and highly inefficient legal institution because of its public-law nature. Alongside the involuntary enslavement of Africans, English colonizers in America also reduced their fellow countrymen to a voluntary form of chattel bondage known as 'indentured servitude.'

In the early 1970s —in what a reviewer considered "perilously close to being simply a hymn to slavery"—,[700] Robert W. Fogel and Stanley L.

696 2 *Commentaries on the Laws of England* 398.

697 2 *Commentaries on American Law*, at 286.

698 Sixth edition, at 352.

699 "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle," at 18.

700 E. K. Hunt, "The New Economics of Slavery: A Review of Time on the Cross," 33 *Review of Social Economy 166, 168 (1975).*

Engerman argued that it was more humane than previously believed[701] and an efficient, even thriving, socio-economic system.[702] That slaves were better clothed and received better medical care than free laborers, in the Southern states of the union at the time, hardly establishes the humanity of the institution. In their detailed economic analysis, Fogel and Engerman suggest that what made pre-Civil War Southern agriculture in the United States efficient —and incentive-compatible— was the gang system of production. They claim that the system "forced men to work at the pace of an assembly line (called the gang) that made slave laborers more efficient than free laborers."[703] They explain that "[t]he gang played a role comparable to the factory system or, at a later date, the assembly line, in regulating the pace of labor."[704] The gang system increased the intensity of work per hour of slave labor. Their explanation falls apart when we realize that free labor could have also been organized to work in gangs, as it later was through the assembly line method of production employed in the meatpacking and automobile industries of the North.

The reason the tobacco and cotton agricultural economies of the South used slave labor was set forth clearly back in the middle of the eighteenth century by the Anglo-American polymath Benjamin Franklin. He explains that "slaves may be kept as long as a [master] pleases, or has occasion for their labour [sic]; while hired men are continually leaving their master (often in the midst of his business,) and setting up for themselves."[705] Despite the continual influx of European settlers, the open abundance of land in the American continent made free labor expensive to hire and difficult to retain and manage. Writing a few years after Franklin, Adam Smith sheds light on the inefficiency —and lack of incentive compatibility— of slave labor. Slaves who "can acquire nothing but [their] maintenance" consult their "own ease by making the land produce as little as possible over and above that maintenance."[706] Whatever work slaves may do "can be squeezed out of [them] by violence only, and not by any interest of [their] own."[707]

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701 1 *Time on the Cross: The Economics of American Negro Slavery* 107-126 (1974).

702 *Idem*, at 192, 210.

703 "Explaining the Relative Efficiency of Slave Agriculture in the Antebellum South," 67 *The American Economic Review* 275, 294 (1977).

704 "Explaining the Relative Efficiency of Slave Agriculture in the Antebellum South: Reply," 70 *The American Economic Review* 672 (1980).

705 *Observations concerning the increase of mankind, peopling of countries* 5-6 (Second edition, 1918).

706 1 *An Inquiry into the Nature and Causes of the Wealth of Nations* 473 (1776).

707 *Idem*, at 471.

In subsequent work, Engerman and David Eltis concede forced labor as occupying a "continuum of dependency" between the poles of freedom and slavery.[708] Somewhere between these poles lie indentured servitude, convict labor, debt peonage, *encomienda* —the short-lived system of commending Native American communities to Spanish landowners for religious instruction—, and feudal villeinage. However, we might note that even slave law falls along the various points of a continuum.

At the most compassionate end is the Castilian slave law that was carried over across the Atlantic Ocean to Spanish America.[709] In the middle of twentieth century, the scholar of Mexican history Frank Tannenbaum shocked Anglo Americans by showing that the institution of slavery was developed in a different "moral and legal setting" in Spanish America.[710] At the time, Harry A. Overstreet exclaimed: "It comes as a shock."[711] He confessed that "most [Anglo] Americans tend to lump all slavery together as of one and the same kind," and that Tannenbaum's book was "not one to make us proud of ourselves."[712] The thesis has provided fodder for seemingly endless scholarly debate and given rise to innumerable controversies over a seventy-year period. Nonetheless, Alejandro de la Fuente reports that a "growing body of scholarship" at the turn of the millennium and during the early decades of this century "vindicates one key element of Tannenbaum's approach: the centrality of the law [of slavery]."[713] Legal scholar Michelle A. McKinley explains that Tannenbaum was "intrigued by what he rightly perceived as a different legal treatment of slaves as compared with the Anglophone experience."[714] Spanish America took its slave law from Roman law and incorporated its private-law provisions. That these provisions protected slaves in myriad ways is undeniable.[715] What made Roman

708 "Dependence, Servility, and Coerced Labor in Time and Space," in 3 *The Cambridge World History of Slavery, 1420-1804* 1, 3 (2011).

709 See Ivette Perez-Vega, "An Account on Slavery in Puerto Rico: Historic Slave Legislation, 16th to 19th Centuries," 10 *Quaestio Iuris* 1828 (2017).

710 *Slave and Citizen: The Negro in the Americas* 42 (1946).

711 "Slave and Citizen: The Negro in the Americas, by Frank Tannenbaum," 1 *Industrial and Labor Relations Review* 520 (1948).

712 *Ibidem*.

713 "From Slaves to Citizens? Tannenbaum and the Debates on Slavery, Emancipation, and Race Relations in Latin America," 77 *International Labor and Working-Class History* 154, 163 (2010).

714 "Fractional Freedoms: Slavery, Legal Activism, and Ecclesiastical Courts in Colonial Lima, 1593-1689," 28 *Law and History Review* 749, 755 (2010).

715 See Watson, *Roman Slave Law* (1987).

slave law more incentive-compatible was the ability of slaves to manage a *peculium* and to use it to purchase their freedom.[716] Watson explains that slaves "were frequently given a fund called the *peculium*, which technically belonged to their owner but which they could use as their own within the limits laid down by the master."[717] Moreover, he indicates that "it was common, though not legally required, for masters to allow slaves to buy their freedom with the *peculium*, at whatever price the master fixed."[718] The slave law of Spanish America went further than Roman law. Castilian private law allowed slaves to "legally enforce the agreement" with their masters to manumit them and to haul their masters into court to "have a price fixed that was not exorbitant."[719] In Spanish America, slaves could purchase their freedom "by installments."[720] McKinley's careful archival work documents that slaves engaged in "forum shopping" where the interests of "legal dependents aligned with the goals of multiple social superiors who competed with each other to advance their respective jurisdictions."[721]

At the most brutal end of the continuum is the Anglo-American law of slavery that developed in the English colonies. Feudal England had villeins but no slaves (at least during the early modern period.) At the end of the eighteenth century, Blackstone asserts that the law of England "will not endure" the existence of slavery,[722] an assertion that at the beginning of the nineteenth century Chancellor Kent repeats in his hornbook.[723] Lord Mansfield holds that English positive law fails to recognize slavery in *Somerset v. Stewart*.[724] There, a slave had accompanied his Virginia master on a voyage to London, where he attempted to quit his master's service and was bound in chains by the captain of the vessel on the Thames river. George W. Van Cleve claims that this case "altered not just the English, but also

716 See *supra* our discussion of Roman practices of manumission in Section II.3 of Chapter One.

717 *Slave Law in the Americas* 24 (1989).

718 *Ibidem*.

719 *Idem*, at 54.

720 Tannenbaum, "The Destiny of the Negro in the Western Hemisphere," 61 *Political Science Quarterly* 1, 19 (1946).

721 *Fractional Freedoms: Slavery, Intimacy, and Legal Mobilization in Colonial Lima, 1600–1700* 243 (2016).

722 1 *Commentaries on the Laws of England*, at 424.

723 2 *Commentaries on American Law*, at 201-02.

724 98 *The English Reports* 488, 510 (1772).

ultimately the [Anglo-]American, framework for the law of slavery."[725] Because no positive English law recognized slavery, Watson explains that slave law had to be developed in the English colonies "from scratch."[726] During the course of the eighteenth century, colonial legislatures developed it "bit by bit" through numerous statutes.[727] As a result, he observes that the Anglo-American law of slavery "possesses a public[-law] dimension in a way that is in sharp contrast with Roman law."[728] In the United States' southern interior during the pre-Civil War period, he claims that "one might almost say that a slave belonged to every citizen."[729] He notes that "[c]itizens were organized by law in patrols to recapture runaways" and that "a slave off a plantation could be stopped by any white and questioned on his activities."[730] Chancellor Kent observes that "a slave found alone, could be beaten with impunity by any freeman, without cause" and that provisions were made with public funds in every town to "appoint a common whipper."[731] Citizens had public-law duties to capture and return runaway slaves and masters were forced under criminal sanctions to punish runaways. The Southern states of the union intervened by prohibiting masters from "teaching [slaves] to read or write" or from allowing them to engage in small-scale economic activities, such as hiring out their time, or keeping their own "horses, cattle, and pigs."[732]

Tannenbaum underscores that the pivotal difference in the slave laws of the Americas lay in the ease and frequency of manumission. While "the favoring of manumission is perhaps the most characteristic and significant [mechanism design] feature" of the institution of slavery in Spanish America, in the United States "opposition to manumission and denial of opportunities for it are the primary aspect of slavery."[733] He claims that in Anglo America, "legal obstacles were placed in the way of manumission, and it was discouraged in every other manner."[734] Southern states went so far as to

725 "Somerset's Case and Its Antecedents in Imperial Perspective," 24 *Law and History Review* 601 (2006).

726 *Slave Law in the Americas*, at 63.

727 *Idem*, at 65.

728 *Idem*, at 66.

729 *Ibidem*.

730 *Ibidem*.

731 2 *Commentaries on American Law*, at 205-06.

732 *Slave Law in the Americas*, at 66.

733 *Slave and Citizen: The Negro in the Americas*, at 69.

734 *Idem*, at 65.

impose a host of legal restrictions on manumission, all designed to deter masters from setting their slaves free.[735]

Virginia was a typical slave state and its legal system was uncongenial to manumission. Where Virginia slaves were fortunate enough to be manumitted, they were forced to leave the state. In order to become free, they had to make the "wrenching decision to leave their children and other family members behind."[736] In addition to suffering the indignities of slavery, manumitted slaves were forcibly ostracized —in the Ancient Greek meaning of the term—. In what is a familiar pattern in the United States, Anglo Americans used and abused slaves, and then deported them[737] (we hasten to add that this pattern continues with federal immigration laws in the United States.) Moreover, the Virginia legislature sanctioned the resale of manumitted slaves to satisfy any outstanding debts incurred by their former masters. Their freedom was left "perpetually contingent upon the financial solvency" of their former masters.[738] Virginia courts[739] refused to enforce manumission contracts between slaves and their masters even where the contracts were "fully complied with on the part of the slave"[740] and refused to free children along with their manumitted parents "uninfluenced by considerations of humanity."[741]

Where slave law in the Americas not only sanctioned manumission but encouraged it, Tannenbaum claims that the social "taint of slavery was neither very deep nor indelible." Slavery and race have become en-

735 See Jenny Bourne Wahl, "Legal Constraints on Slave Masters: The Problem of Social Cost," 41 *American Journal of Legal History* 1, 13-16 (1997).

736 A. Leon Higginbotham Jr. and F. Michael Higginbotham, "Yearning to Breathe Free: Legal Barriers against and Options in favor of Liberty in Antebellum Virginia," 68 *New York University Law Review* 1213, 1266 (1993).

737 When after *Somerset v. Stewart*, the Northern states abolished slavery within their borders, they did so prospectively with "enough time to give their citizens convenient opportunity for selling the slaves to [S]outhern planters." In effect, the slave populations in the North were deported en mass to the South, where they continued to be enslaved for generations. *Speech of the Hon. J. P. Benjamin, of La., delivered in Senate of United States on Thursday, March 11, 1858* 13 (1858).

738 *Idem*, at 1255-56.

739 See Loren Schweninger, *Appealing for Liberty: Freedom Suits in the South* (2018).

740 William H. Cabell in *Stevenson v. Singleton*, 28 *Cases decided in the Supreme Court of Appeals of Virginia* 72, 73 (1829).

741 Spencer Green in *Maria v. Surbaugh*, 23 *Cases decided in the Supreme Court of Appeals of Virginia* 228, 229 (1824).

twined in the imagination of Anglo Americans[742]—less so among Spanish Americans.[743] Manumission made the institution of slavery in Spanish America more like indentured servitude in Anglo America, insofar as it was not a permanent, but only a temporary and transitional state of personal bondage.

Blackstone understands the institution of slavery in Natural law terms as an "absolute and unlimited power […] given to the master over the life and fortune of the slave."[744] The master and servant relation —the technical term for the employment relation at common law— involves the "same state of subjugation."[745] Civilian legal scholars may be surprised to hear that, at English common law, masters were understood to hold property rights —Blackstone outright calls it "property"—[746] over the service of their hired dependents to whom they pay wages. In the same way that leaseholds are another form of feudal tenure, the lease of services transforms dependents into domestics who become part of their masters' estate and household. As heads of the estate and household, masters could inflict corporal punishment to discipline and correct their servants "for negligence and other misbehavior," though Blackstone recommends it be done "with moderation."[747] Lea VanderVelde notes that "we tend to believe that whipping was the *sine qua non* of slavery."[748] Rather, she clarifies that "striking workers was not restricted to slavery. "[749]

As Robert Steinfeld has shown, few newcomers to the English colonies enjoyed free labor.[750] While we used to think that slavery replaced the prac-

742 To this day, Anglo Americans feel understandably conflicted about the questions raised by Mark Twain's *Adventures of Huckleberry Finn* (1884). See Sharon E. Rush, "Emotional Segregation: Huckleberry Finn in the Modern Classroom," 36 University of Michigan Journal of Law Reform 305 (2003).

743 Off the coast of the Spanish peninsula, white European Christians faced enslavement in North Africa. The Spanish author Miguel de Cervantes —creator of *El ingenioso hidalgo don Quijote de la Mancha* (1605)— was himself sold into slavery in Algiers. His captivity lasted five years. See Donald McCrory, *No Ordinary Man: The Life and Times of Miguel de Cervantes* 69 (2002).

744 1 *Commentaries on the Laws of England*, at 423.

745 *Idem*, at 425.

746 *Idem*, at 429.

747 *Idem*, at 428.

748 "The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace," 39 *Seattle University Law Review* 727, 731 (2016)

749 *Ibidem*.

750 See *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870*, 40, 60-62 (2002).

tice of indentured servitude, David W. Galenson shows that the numbers of skilled indentured servants brought over were proportional to the numbers of unskilled slaves imported.[751] At English common law, apprentices and other servants could be hired for specified terms through indentures —sealed writings— (explained in Section III.1 *infra*.) He describes that in exchange for "paid ocean passage and usually other consideration such as food and clothing, immigrants promised to work for a fixed term, generally four to seven years."[752]

Like the Anglo-American law of slavery, the law of indentured servitude is a colonial development and discloses a public-law dimension. Again to take Virginia as typical of the other English colonies, indentured servants were imported from the first settlements at the beginning of the seventeenth century. As the master and servant relation in indentured servitude was unknown to English common law, the practice in Virginia depended "entirely for its sanction on special local statutes, or on the action of tribunals which had no precedents before them."[753] Virginia courts extended the English understanding of servants as chattels and "part of the personal estate of [their] master[s]" to recognize the right assumed by the masters to assign their servants' contracts "whether [the servants] gave [their] consent or not."[754] Moreover, the Virginia legislature provided for the enforcement of indentures and offered rewards for the pursuit and recapture of runaway servants. Criminal sanctions ranging from whipping, to additions of time (from one to seven years,) to branding, to irons, all applied to servants who failed to comply with their indentures. In Virginia the authorities provided for the "erection of a whipping-post in every county"[755] and the law "finally made no distinction between runaway servants and slaves."[756] As a result, the public-law nature of slavery and indentured servitude made both institutions particularly brutal for Anglo Americans.

751 *White Servitude in Colonial America: An Economic Analysis* 174 (1984).

752 "The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis," 44 *Journal of Economic History* 1, 3 (1984).

753 James Curtis Ballagh, *White Servitude in the Colony of Virginia: A Study of the System of Indentured Labor in the American Colonies* 46 (1895).

754 *Idem*, at 43-44.

755 *Idem*, at 59.

756 *Idem*, at 52.

III. Duties Owed to Persons Under English and Anglo-American Common Law and Equity

Blackstone's map of the common law system into rights and wrongs found no place for contracts.[757] Even today, the category of contracts has yet to find a secure footing in Anglo-American common law and equity. During the latter half of twentieth century, Dean Gilmore famously asserted that "contract [wa]s being reabsorbed into the mainstream of tort […] the residual category of civil liability."[758] He expressed his alarm at the increasing application of the doctrines of unjust enrichment and promissory estoppel.[759] Indeed, many doctrines at equity lie between torts and contracts. The Roman lawyer Gaius was the first to distinguish the categories of *delictus* and *contractus*. [760] Later Roman lawyers expanded Gaius' classification. In the *corpus iuris ciuilis*, we find two more categories between delicts and contracts: quasi delicts and quasi contracts.[761]

Duties owed to persons not only stem from torts and contracts, but also from the relationships that arise among people who must 'trust' one another —in its nontechnical sense— in the decentralized social order. Borrowing civilian legal terminology, we call these 'relational' obligations, as opposed to 'contractual' and 'delictual' obligations. These duties, which law and economics scholars have been slow to recognize,[762] are instrumental to the market economy. In practice, incentives in many productive relationships are shaped by both a formal contract and relational aspects.[763] In mapping English and Anglo-American common law and equity, we will classify rela-

757 1 *Commentaries on the Laws of England*, at 122.

758 *The Death of Contract* 87 (1974).

759 *Idem*, at 55-85; see Darryn Jenson, "Critique and Comment: The Problem of Classification in Private Law," 31 *Melbourne University Law Review* 516, 534 (2007).

760 Institutes of Gaius 3.88.

761 Institutes of Justinian 3.13.2.

762 Joel Watson, "Theoretical Foundations of Relational Incentive Contracts," 13 *Annual Review of Economics* (2021), provides a survey of the technical economics literature on relational enforcement. Much of this enforcement is termed 'relational contracting' although there is typically not a formal externally enforced contract.

763 Joel Watson, David Miller, and Trond Olsen study such a setting in a formal model, "Relational Contracting, Negotiation, and External Enforcement," 110 *American Economic Review* 2153 (2020).

tional obligations as 'institutions which support markets' (and discuss them in Section IV *infra*.)[764] Here in Section III we discuss torts and contracts.

While law and economics scholars have made headway in their analyses of torts, the progress made in contracts is not up to scratch according to Eric A. Posner. A few years back, while surveying the field of contracts, he held forth that "economic analysis has failed to produce an economic theory of contract law, and does not seem likely to be able to do so."[765] The double failure to which he draws attention involves both the dearth of a positive theory and the lack of a normative one.[766] We have always been puzzled by Posner's opinion.[767] Between the revival of the efficient-breach hypothesis and the idea of incomplete contracting, the economic approach to contracts has indeed advanced legal scholarship.[768] If anything, we submit, rather, that the headway made in the economic analysis of torts is not up to scratch. A few years back, when surveying the field of torts, Stephen G. Gilles could only point toward the criteria of optimal care and the idea of a cheapest cost-avoider as contributions.[769] Surely any United States torts instructor takes pleasure in the mathematics to be found in Judge Learned Hand's formula "B >> P x L in *United States v. Carroll Towing Co.*"[770] The civilian lawyer might be disappointed to learn that a 'reasonable person' simply makes the same economic calculation as a property owner —*pater familias*

764 As we will see, the duties that arise from relationships are broader than what legal scholars refer to as unjust enrichment or restitution.

765 "Economic Analysis of Contract Law After Three Decades: Success or Failure?" 112 *Yale Law Journal* 829, 830 (2003).

766 His hornbook on contracts fails to add any additional insights. See *Contract Law & Theory* (2011). Nor does Douglas G. Baird's *Reconstructing Contracts* (2013).

767 The focus of a hornbook is on 'core subjects' typically taught in the first year of law school. This focus leads Posner to overlook many contributions of the economics approach. *Exempli gratia*, he discusses freedom of contract, but fails to address the idea that renegotiation can be bad for incentives to perform in the original contract; while he discusses investment, unconscionability and consumer protection, he comes short in addressing hold up.

768 The economic approach has yielded insights about verifiability, hold up, and renegotiation. On the latter, the legal view has typically suggested that freedom of contract is always good, even in a renegotiation setting. However, when *ex ante* incentives to perform the original contract are considered, an intermediate cost of renegotiating is desireable. See Alan Schwartz and Joel Watson, "The Law and Economics of Costly Contracting," 20 *Journal of Law, Economics, and Organization* 2 (2004).

769 "Negligence, Strict Liability and the Cheapest Cost-Avoider," 78 Virginia Law Review 1291 (1992).

770 159 *Federal Reporter, 2nd Series* 169, 173 (Second Circuit, 1947); Richard A. Posner, "A Theory of Negligence," 1 *The Journal of Legal Studies* 29, 32 (1972).

(forget the *bonus*)— with his own affairs. Today, a new type of economic approach to law looms ever closer, made possible by mechanism design theory. At long last, we will be able to see exactly what is involved in negligence, or strict liability, how they are similar to one another, and how they are different. Moreover, a more complete picture of standardized contracts and unstandardized contracting is on the horizon.

Blackstone famously compares the English private-law system to "a regular Edifice: where the Apartments [a]re properly disposed, leading one into another without Confusion; where every part [i]s subservient to the whole, all uniting in one beautiful Symmetry: and every Room ha[s] its distinct Office allotted to it."[771] He draws quite an impressive image. At the end of his *Commentaries*, he abandons the mental image of the orderly edifice, but still calls on those who will follow him "to sustain, to repair, to beautify this noble pile."[772] Between the nineteenth and the twentieth centuries, Anglo-American common law and equity have been extensively modernized. Too often, we lose sight of the extent of the modernization. United States legal scholars write as if the common law is exceptional and unchanging.[773] They have in mind a fully-formed and immutable 'common law' (they forget entirely about 'equity') to adorn that shining "Citty [sic] upon a Hill."[774] Obsessively self-absorbed —as "the eies [sic] of all people"[775] are upon them—,[776] they idealize the common law in an empty-headed way. They forget that English law has changed even more than English spelling since the seventeenth century. Surely, Holmes was correct to denounce legal rules that persist "from blind imitation of the past" and "for no better reason [...] than [they were] laid down in the time of Henry IV," when the "grounds upon which [they were] laid down have vanished long since."[777] Progress has been made and will continue to be made in the English and Anglo-American legal tra-

771 Letter to Seymour Richmond (January 28, 1745), in "Note," 32 *Harvard Law Review* 975–76 (1919).

772 4 *Commentaries on the Laws of England* 443 (1769).

773 Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Second edition, 2003).

774 John Winthrop, "A Modell of Christian Charity" [1630], in 7 *Collections of the Massachusetts Historical Society* 31–48 (Third Series, 1838).

775 *Ibidem.*

776 Francis H. Buckley discusses the fear that "in time [the United States] might become a country like the others," see "An Exceptional Nation?" in Buckley (editor), *The American Illness: Essays on the Rule of Law* 43 (2013).

777 "The Path of the Law," 10 *Harvard Law Review* 457, 469 (1897).

dition. During the twentieth century, the two most influential common lawyers in the United States have been Karl Llewellyn and William Prosser. In Sections III.1 and III.2 *infra*, we come to the unflappable conclusion that no one has done more good for private legal institutions than Llewellyn —through artful deception—, and no one has done more harm than Prosser —through mistaken views, which he honestly held—.

1. *Contracts Taken From Canon Law*

The English legal tradition in contractual matters takes after classical Canon law. No area of the law —except perhaps real property— is more path dependent than that of contracts. Private legal institutions are a product of their history.

At the end of the fifteenth century, the common law courts at Westminster —which included Common Pleas, Exchequer and King's Bench— were thrust into inter-institutional Tiebout-type competition[778] with England's ecclesiastical courts. "[T]the secular courts were put on their mettle, so to speak, by the competition of the spiritual forum," as Pollock and Maitland put it.[779] Before the fifteenth century in England, parties preferred to celebrate their contracts under classical Canon law, the legal system of the Roman Catholic Church. Under the *corpus iuris canonici*, the ecclesiastical courts could exercise personal jurisdiction over contractual parties if they would simply add an oath to their agreement.[780] Pollock and Maitland hint that the "sacred texts teach that the Christian's Yea or Nay should be enough."[781] Richard H. Helmholz clarifies that saying "by my faith" was enough.[782] Since an oath had been given, a breach of this faith amounted to the sin of perjury.[783] Accordingly, the ecclesiastical courts enforced contractual promises on parties as part of their care for souls. Beginning in the sixteenth century, the common lawyers at King's Bench extended the tort action of trespass on case to situations where an assumpsit —from

778 Charles M. Tiebout, "A Pure Theory of Local Expenditures," 64 *Journal of Political Economy* 416-424 (1956).

779 2 *The History of English Law before the Time of Edward I*, at 195.

780 *Liber Sextus* 3.2.2.

781 2 *The History of English Law before the Time of Edward I*, at 195.

782 *Roman canon law in Reformation England* 25, note 78 (1990).

783 Thomas Aquinas considers *periuria* one of the "daughters of greed," a cardinal sin. *Summa Theologiæ* 2-2.118.8 (1642).

the Latin verb 'to promise'—[784] had been made. If a defendant attempted to remove the cause to the ecclesiastical courts, they applied the fourteenth century Statute of Præmunire,[785] meant to prevent causes from being appealed to the Roman Rota.[786] As the common lawyers were bent on taking jurisdiction in contractual matters away from the ecclesiastical courts, they modeled the new *ostensurus*[787] *quare*[788] writ of assumpsit on the Canon law action of *læsio fidei* that they sought to displace.[789]

Lest we forget, Canon law turns the Roman system of contracts on its head. The Medieval Roman lawyers distinguish between *pacta nuda* and *pacta vestita*.[790] The Roman system of contracts incorporates the mechanism design of *nuda pactio obligationem non parit* —Latin for a naked pact does not give rise to an obligation—.[791] Under classical Roman law, an agreement is enforceable if it is dressed in a verbal ceremony or fits into one of the standardized forms. Contracting under Canon law incorporates the diametrically opposite mechanism design of *pacta quantumcunque nuda, seruanda sunt* —Latin for pacts however naked, are to be kept—.[792] Under classical Canon law, all agreements accompanied by oaths are enforceable.[793] To this day, at United States common law, all contracting is unstandardized as a result.

Law and economics scholars have attempted to apply the mechanism design of *numerus clausus* taken from civil law scholarship to rights held in things (discussed supra in Section II.1.A.) However, these scholars seem to be unaware that this same mechanism design also applies in civil law to duties owed to persons.[794] In the tradition of classical Roman law, contracts,

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784 The third-person present indicative of *assumo, assumis, assumpsi, assumptum, assumere*. See also Rastell, *Les termes de la ley*, at 42.

785 *Acts of the Parliament of England during the reign of Richard II* chapter 5 (1392).

786 Ralph Houlbrooke, "The Decline of Ecclesiastical Jurisdiction under the Tudors," in Rosemary O'Day and Felicity Heal (editors), *Continuity and Change: Personnel and Administration of the Church of England 1500-1642* 239 (1976)

787 The future participle of *ostendo, ostendere, ostendi, ostensum* —Latin for 'to show'—. See also Walter A. Shumaker, *The cyclopedic law dictionary* 730 (1922).

788 Latin for 'why' or 'for what reason,' or 'by what means.' *Idem*, at 834.

789 Helmholz, Assumpsit and Fidei Laesio, 91 *Law Quarterly Review* 427 (1975).

790 Zimmermann, "Roman-Dutch Jurisprudence and Its Contribution to European Private Law," 66 *Tulane Law Review* 1685, 1690 (1992).

791 Digest of Justinian 2.14.7.4.

792 Decretals of Gregory IX 1.35.1.

793 Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 539.

794 As we note in Section III.1.B *infra*, Smith is so blithe that he merges the categories of contract and property: "Contractual boilerplate is a little like property," "Modularity in

quasi contracts, quasi delicts and delicts all fall into a closed system of standardized forms, which come with names to identify them.[795]

Because all contracting is unstandardized at Anglo-American common law, the contract that the parties celebrate is whatever is said or written down. In the English legal tradition, however, where a written document is clear, evidence of what the parties said when they negotiated the contract does not matter. The content of the duties that they assume is construed within the 'four corners' of the written document. United States courts apply the parole —Law French for words—[796] evidence rule in interpreting contracts. John Henry Wigmore traces its origins to the evidentiary device of the covenant under seal during the high Middle Ages. He explains that "in Anglo-Norman times people [we]re still, on the whole, unfamiliar with writing."[797] He goes on: "The rise of the seal br[ought] a new era for written documents, not merely by furnishing them with a means of authenticating genuineness, but also by rendering them indisputable as to the terms of the transaction and thus dispensing with the summoning of witnesses."[798]

As we explain in Section III.2 *infra*, common lawyers considered covenants under seal —or indentures— a complete embodiment of an unstandardized enforceable promise. Certainly no "bare avernment"[799] of words could stand against a covenant under seal. The *endenture* in Law French was an evidentiary device where a promise would be written out twice on a piece of parchment, which was subsequently ripped apart so that the two versions of the writing would fit together at the jagged edges.[800] Later Medieval practice was to seal the writings with wax. By analogy, common lawyers came to value unsealed writings above mere words as evidence when interpreting contracts. In 1604 Coke famously comments in the Countess of Rutland's case on the inconvenience to the common law that writings

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Contracts: Boilerplate and Information Flow," 104 *Michigan Law Review* 1175 (2006).

795 See *supra* our discussion of typical nominate contracts, quasi contracts, delicts and quasi delicts under Roman law in Section II.2 of Chapter One.

796 See John Bouvier, 2 *A law dictionary, adapted to the Constitution and laws of the United States of America, and of the several States of the American Union* 216 (1839).

797 "A Brief History of the Parol Evidence Rule," 4 *Columbia Law Review* 338, 343 (1904).

798 4 *A Treatise on the System of Evidence in Trials at Common Law* 3411 (1905).

799 5 *The reports of Sir Edward Coke* 26 (1721).

800 Bouvier, 1 *A law dictionary, adapted to the Constitution and laws of the United States of America, and of the several States of the American Union*, at 492.

"made by advice and on consideration" be proved by the "uncertain testimony of slippery memory."[801]

Under the parole evidence rule, whenever the contract that the parties celebrate is written down, its written terms cannot be contradicted at trial by evidence of the mere words they exchanged or their prior dealings or any other understandings they had apart from the writing. Accordingly, contractual parties in the United States must be careful what they write down. Nothing must be left out of the writing. When United States lawyers draft contractual documents, they commonly consult form books.[802] These form books contain extensive collections of preprinted clauses with explanatory notes and checklists of all the clauses that should be written down in the contracts that they draft for their clients. When contractual parties in the United States enter into unstandardized agreements without lawyers, they purchase commercially available preprinted contractual forms. Commercially available preprinted contractual forms are unheard of in civilian jurisdictions. The tradition of Continental law took over from classical Roman law its standardized contracts —or as they are called in civilian legal terminology, the 'typical nominate contracts'—, and expanded the list.

Accordingly, the best way of explaining the system of contracts at Anglo-American common law and equity to a civilian lawyer is to say that all contracting is 'atypical' in this legal tradition. That is to say, all contracting is unstandardized. Law and economics scholars seem to be unaware of the limited possibilities for mechanism designs that their own legal tradition affords to contractual parties. Accordingly, the economists Bengt Holmström and Oliver D. Hart have developed much of contract theory with a substantially incomplete picture of contract law.[803] Through mechanism design theory, law and economics scholars will recognize that standardized contracts with names enable parties to coordinate future actions in the decentralized social order with less communication. Everyone in the community is able to understand the duties they assume from the nature of the standardized contracts they celebrate and can quickly identify each

801 *Idem*, at 26-27.

802 Michael H. Hoeflich, "Law Blanks & Form Books: A Chapter in the Early History of Document Production," 11 *Green Bag, Second Series* 189 (2008).

803 "Moral Hazard and Observability," 10 *Bell Journal of Economics* 74 (1979); "Moral Hazard in Teams," 13 *Bell Journal of Economics* 324 (1982); "The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration," 94 *Journal of Political Economy* 691 (1986); "Property Rights and the Nature of the Firm," 98 *Journal of Political Economy* 1119 (1990).

of these by a name. That way people can apply their own experience with each contract, to an understanding of the duties others assume when they celebrate the same named contract. In this manner, private legal institutions solve the problems posed by the asymmetric information which arises between people in the decentralized marketplace where anyone can conduct private transactions. Indeed, the development of the typical nominate contracts was a significant commercial advance for Ancient Rome. Parties found them easy to celebrate and the added legal intercourse promoted the market economy.

Classical Roman law incorporates both a closed system of standardized contracts, and an open system though a verbal ceremony which allows parties to enter into enforceable unstandardized agreements. At early English common law, under the sway of vulgar Roman law, a vestige of the Roman system of standardized contracts with names had survived. Glanvill lists a loan for consumption, or sale, or loan for use, or letting, or deposit.[804] These contracts were enforceable through the writ of debt.[805] Moreover, during the Middle Ages, the covenant under seal allowed parties in England to enter into unstandardized agreements and was enforceable through the writ of covenant.[806] Like with the verbal ceremony it replaced under vulgar Roman law,[807] only the promisor who affixed a wax impression —or seal— to the writing assumed a duty on the covenant.[808] Unfortunately, both the writs of debt and of covenant disappeared early on from English common law. By the sixteenth century, the writ of assumpsit had displaced them. As a result, to this day, we note that in contractual matters Anglo-American common law follows classical Canon law, not classical Roman law.

A. *Standardized Contracts Transplanted Into Commercial Law*

Llewellyn deceived the entire legal establishment in the United States. He sold his project of legal reform to lawyers, judges, legislators and law professors across the land as an attempt to unify commercial law among

804 *Tractatus de legibus et consuetudinibus regni Anglie* X.3 (1554).

805 Sir William Searle Holdsworth, "Debt, Assumpsit, and Consideration," 11 *Michigan Law Review* 347, 348 (1913).

806 Lon Fuller, "Consideration and Form," 41 *Columbia Law Review* 799, 800–01 (1941).

807 See Paul Vinogradoff, *Roman law in mediaeval Europe* 103 (1909); Stroud Francis Charles Milsom, *Historical Foundations of the Common Law* 214 (1969).

808 Ibbetson, *A Historical Introduction to the Law of Obligations*, at 73.

the states of the union.[809] However, the Uniform Commercial Code is nothing less than a blatant and intentional transplant of major parts of the German civil code into the heart of Anglo-American law.

That is not to say that Anglo Americans literally transposed the provisions of the German civil code into the Uniform Commercial Code, as was done with the French civil code by Latin Americans, who adopted literal translations of its provisions. Llewellyn —like Prosser— was a qualified and competent common lawyer who had a firm grasp of Anglo-American common law and equity. He was able to employ his specialist knowledge to recreate from within his own legal tradition the mechanism designs of German civil law. Llewellyn's German template was completely overlooked by an octogenarian Samuel Williston —author of the Uniform Sales Act of 1906—. He complained that Llewellyn's May, 1949 draft "proposes many rules which have never existed anywhere"[810] when he lamented that the "advantage of similarity to the English law should be so lightly cast aside."[811]

Foremost on Llewellyn's agenda was to meet the need that was felt in the United States, during the postwar expansion of the economy, for a workable system of standardized contracts. The various articles of the Uniform Commercial Code establish —in Llewellyn's words— an "official standardized contract on each matter […] subject to alteration by the parties."[812] Articles 2, 2A and 9 standardize sales, leases and security instruments. Articles 3, 4, 5, 7 and 8 standardize notes, drafts, bank deposits, bailments and investment securities.

Llewellyn explains standardized contracts in plain, understandable language, which is reminiscent of other Anglo-American realists: "Standardized contracts in and of themselves partake of the general nature of machine production. They materially ease and cheapen selling and distribution. They are easy to make, file, check and fill. To a regime of fungible goods is added one of fungible transactions—fungible not merely by virtue of simplicity (the sale of a loaf of bread over the counter) but despite complexity. Dealings with fungible transactions are easier, cheaper."[813]

809 "Why a Commercial Code?" 22 *Tennessee Law Review* 779 (1953).

810 "The Law of Sales in the Proposed Uniform Commercial Code," 63 *Harvard Law Review* 561, 564 (1950).

811 *Idem*, at 565.

812 "Contract: Institutional Aspects," 4 *Encyclopedia of the Social Sciences* 329, 334 (1931).

813 *Ibidem.*

That the Uniform Commercial Code has been adopted in nearly every jurisdiction in the United States except Louisiana is telling. As a mixed jurisdiction, Louisiana already had standardized contracts through its civil code. Accordingly, Louisiana lawyers felt no overriding need to transplant these from the German civil code.

Transplanted legal institutions encounter a lot of difficulties when they take root in far-off lands and are inefficient. The term 'legal transplant' was coined in the twentieth century by Watson.[814] Apart from the local resistance to legal borrowings that concerns Kenneth W. Dam,[815] legal recipients are unable to apprehend the full meaning of the foreign institutions that they adopt, even when these embody what law and development scholars refer to as 'best practices.' United States law professors who teach the Uniform Commercial Code, to this day, find it difficult to make sense of its structure and provisions. Its content seems alien and removed from the tradition of Anglo-American common law and equity in which they were schooled.

Like the German civil code, the Uniform Commercial Code has an *Allgemeiner Teil*. According to Article 1, the code governs commercial matters —with civilian exactitude— as a *lex specialis*. The principles of "[common] law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy"[816] supplement its provisions as a *lex generalis*.

United States law professors are at a loss to explain the civilian legal institutions which Uniform Commercial Code transplanted through its provisions. One mystery is why the common law doctrine of consideration[817] is omitted altogether from the code and even loosened when parties modify contracts[818] or merchants make irrevocable offers.[819] Civilian lawyers understand that a typical nominate contract is 'its own cause' —'its own consideration' in common law terminology—. A similar doctrine existed at early English common law. The seal on a covenant was considered to import consideration.[820] Even before consideration made its way into the common law from equity, in 1321 Sir William Herle famously answers back

814 *Legal transplants: an approach to comparative law* (1974).

815 *The Law-Growth Nexus: The Rule of Law and Economic Development* 24 (2006).

816 Uniform Commercial Code section 1-103.

817 See Gordley, *The Philosophical Origins of Modern Contract Doctrine* 171 (1991).

818 Uniform Commercial Code section 2-209(1).

819 Uniform Commercial Code section 2-205.

820 David Thomas Konig, "Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication," in *The many legalities of early America* 97-118 (2001).

to the sergeant at law in the Watham Hay case: "We shall not undo the law for a cartload of hay." He goes on: "Covenant is none other than the assent of parties that lies in specialty." [821] That specialty or '*aliquid speciale*' —Latin for something special— at common law was the seal on the covenant. Similarly, standardized contracts with names under the Uniform Commercial Code import their own consideration. Another mystery is why, in sales agreements between merchants, the common law mirror image rule between offers and acceptance is loosened.[822] Under classical Roman law, the rule that the promisor answer with words that mirror the question posed by the stipulator, as part of the verbal ceremony of *stipulatio*, solely applies to unstandardized agreements.[823]

Rather than being determined by political and economic forces, Watson claims that legal change is driven by lawyers.[824] Lawyers either borrow laws from other nations or develop them from existing laws within their own legal tradition. Sometimes lawyers with a "transplant bias" forget to ask whether these laws are badly chosen for legal recipients.[825]

In the case of the Uniform Commercial Code, Llewelyn could not have done more to improve the United States legal system. Llewelyn was certainly more intent on modernizing Anglo-American law than making it uniform. Larry E. Ribstein and Bruce H. Kobayashi explain that the National Conference of Commissioners on Uniform State Laws "confused the need for *new* law with the need for more *uniform* law."[826] Llewelyn's artful deception went a long way in successfully modernizing the legal system that governs contracts in the United States.

In contract matters, Llewellyn left little standing. The provisions of the code displaced Anglo-American common law in every contractual area except real estate sales and mortgages, service agreements and suretyship. Even with the Uniform Commercial Code having displaced, by the middle

821 Translated from Law French by Helen M. Cam, 26 *The Year Books of Edward II* 286 (1969).

822 Uniform Commercial Code section 2-207. See Douglas G. Baird and Robert Weisberg, "Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207," 68 *Virginia Law Review* 1217 (1982).

823 See *supra* our discussion of the ceremony of *stipulatio* under Roman law in Section II.2.B of Chapter One.

824 "Legal Change: Sources of Law and Legal Change," 131 University of Pennsylvania Law Review 1121, 1146-47 (1983).

825 *Ibidem*.

826 "An Economic Analysis of Uniform State Laws," 25 *The Journal of Legal Studies* 131, 136 (1996).

of the twentieth century, much of the common law —note that Llewelyn left equitable doctrines standing—, United States commercial law recognizes only a few standardized contracts with names. As technology and the economy advance ever more quickly in the twenty-first century, more standardized contracts will be needed. An up-to-date system of standardized contracts is essential for economic growth everywhere.

B. *Unstandardized Contracting at Common Law*

Civilian lawyers may be hard-pressed to understand the system of contracts at Anglo-American common law, unless someone explains that all contracting is 'atypical' in this legal tradition. That is to say, all contracting is unstandardized. As a result, in the United States, contractual writings tend to be longer,[827] incorporate a greater number of qualifications and definitions, and make a more extensive use of boilerplate.

Modern-day boilerplate, —along with the common law conviction that intellectual property is property (discussed *supra* in Section II.2.B)—, constitutes a distortion which threatens day-to-day life across the world. Civilians refer to nonnegotiated one-sided agreements as 'contracts of adhesion,' where boilerplate terms are offered on a take-it-or-leave-it basis. Yet boilerplate is even more prevalent in common law jurisdictions.

This distortion in legal doctrine only has grown more acute, as Margaret Jane Radin asserts, with electronic commerce in the twenty-first century.[828] Our perspective on boilerplate differs from hers. She draws on liberal political theory grounded in Kantian deontology to object to boilerplate because it contradicts the value of 'personal autonomy.'[829] As scholars devoted to the study of comparative lawyering, legal traditions and institutions from an economic frame of mind, we view legal rights as having only an in-

827 Neither legal historians, nor law and economics scholars, realize that the prolix contractual writings used in United States law stem from its path dependence (discussed *supra* in Section III.1.) See John H. Langbein, "Comparative Civil Procedure and the Style of Complex Contracts," 35 *American Journal of Comparative Law* 381 (1987); Claire A. Hill and Christopher King, "How Do German Contracts Do as Much With Fewer Words?," 79 *Chicago-Kent Law Review* 889 (2004).

828 "Humans, Computers, and Binding Commitment," 75 *Indiana Law Journal* 1125 (2000); "Online Standardization and the Integration of Text and Machine," 70 *Fordham Law Review* 1125 (2002).

829 See generally *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013).

strumental value. The perspective of law and economics scholars on boilerplate, as Brian H. Bix observes, is consequentialist rather than principled.[830]

The problem with unstandardized contracting is that parties may have unequal bargaining power. Many, perhaps even most, contracts today are made between parties with unequal bargaining power. Where parties have unequal bargaining power, they can abuse their power to extract economic rents in the form of contractual concessions. Contractual parties with unequal bargaining power negotiate one-sided agreements. One-sided agreements incorporate boilerplate which imposes greater expected costs and benefits on one party than costs and benefits on the opposite party. Llewellyn himself introduced the distinction between nonnegotiated "boiler-plate [sic] clauses" and "dickered terms," that is, contractual terms that are negotiated between parties of equal bargaining power."[831]

Lucian A. Bebchuk and Richard A. Posner suggest that consumers can behave as opportunistically as businesses when they negotiate one-sided agreements.[832] These two law and economics scholars point out that while businesses might be deterred by losses in reputation from inserting unequal boilerplate terms into their contracts, consumers have "no reputation to lose."[833] The twosome speculates that businesses standardize their agreements with boilerplate language in order to balance out the terms. Businesses will "stand on the contract as written"[834] and consumers will adhere to its terms or withdraw from the negotiation. That way sophisticated businesses are protected from opportunistic consumers. Of course, Bebchuk and Posner's argument turns the concern with one-sided nonnegotiated agreements on its head. Consumer protection law is premised on the concern with the unequal bargaining power of unsophisticated consumers who must contend with opportunistic businesses.

Law and economics literature has long held that boilerplate is welfare-enhancing, despite the asymmetric information that persists between contractual parties with unequal bargaining power. This literature is misguid-

830 *Contract Law: Rules, Theory, and Context* 140 (2012).

831 *The Common Law Tradition* 370 (1960). In his hornbook, E. Allan Farnsworth describes boilerplate as "standard clauses lifted from other agreements on file or in form books," *Contracts* 426 (Third edition, 1999).

832 "Boilerplate in Consumer Contract: One-Sided Contracts in Competitive Consumer Markets," 104 *Michigan Law Review* 827 (2006).

833 *Idem*, at 827.

834 *Idem*, at 828.

ed.[835] A few years back when surveying the literature, Michael I. Meyerson conceded that "using a contract with plain language and without fine print is not sufficient."[836] He considers the doctrine of unconscionability at Anglo-American equity as a second-best solution:[837] "It may still be necessary […] to resort to unconscionability" in the interpretation and enforcement of contracts "where there is truly no alternative for the consumer."[838] Anglo-American common law courts also interpret boilerplate against the party that drafts it.[839] Yet the Anglo-American legal realist Friedrich Kessler was put out with the "round about method" of interpreting boilerplate *contra proferentem*[840] despite the "remarkable skill" of United States judges in "construing ambiguous clauses against their author even in cases where there was no ambiguity."[841] Neither the doctrine of unconscionability at common law nor interpreting boilerplate clauses against their author, we claim, is effectively capable of overcoming asymmetric information between contractual parties with unequal bargaining power.

Kessler is ready to adhere to freedom of contract between parties which stand on "a footing of social and approximate economic equality." Yet in the face of "enterprises with strong bargaining power" he rejects the suggestion that consumers can "shop around for better terms" because the businesses either "ha[ve] a monopoly (natural or artificial)" or because "all [their] competitors use the same clauses."[842] Through mechanism design theory, we reproduce the analysis of unequal bargaining power among contracting parties that the twentieth-century legal realists propounded in the

835 See R. Ted Cruz and Jeffrey J. Hinck, "Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information," 47 *Hastings Law Journal* 635 (1996).

836 "The Efficient Consumer Form Contract: Law and Economics Meets the Real World," 24 *Georgia Law Review* 583, 612-13 (1990).

837 Eric A. Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract," 24 *Journal of Legal Studies* 283, 304 (1995).

838 "The Efficient Consumer Form Contract: Law and Economics Meets the Real World," note 202 at 622.

839 *The Restatement (Second) of the Law of Contracts* section 206.

840 Michelle E. Boardman examines the application of this doctrine in the insurance context that so concerned Kessler in "*Contra Proferentem*: The Allure of Ambiguous Boilerplate," 104 *Michigan Law Review* 1105, 1107 (2006).

841 "Contracts of Adhesion—Some Thoughts About Freedom to Contract," 43 *Columbia Law Review* 629, 633 (1943).

842 *Idem*, at 632.

first half of the twentieth century. Their concern was that the inequality of bargaining power through one-sided agreements led to the exploitation of underprivileged, unsophisticated, uneducated, illiterate contractual parties.

Like Bebchuk and Posner, Henry E. Smith confuses boilerplate with the standardized contracts with names that Llewellyn transplanted into commercial law (discussed *supra* in Section III.1.A.) Smith touches on the same theme as Bebchuk and Posner. From an information-cost perspective, businesses use boilerplate to standardize one-sided contractual forms. As Kessler explains, "once its contents have been formulated by a business firm, [boilerplate] is used in every bargain dealing with the same product or service." [843] That both contracts and property can use a closed system of standardized boilerplate, as an information mechanism which the common law implements, however, leads Smith to confuse the categories of contracts and property. With arguments reminiscent of Gilmore, Smith claims that "boilerplate is the first way station on the road from contract to property."[844]

Bebchuk and Posner argue that contractual forms which businesses can standardize through boilerplate are Kaldor-Hicks superior —wealth maximizing, to use Judge Posner's umbrella term— when compared to unstandardized contracting into which individuals can enter. However, these businesses standardize boilerplate terms in one-sided ways. We counter that the closed system of standardized contracts with names recognized at commercial law under the Uniform Commercial Code is Kaldor-Hicks superior to boilerplate.

Accordingly, we propose that modern-day boilerplate has yet another Roman solution. Expand the list of standardized contracts with names —the 'typical nominate contracts' in civilian legal terminology— recognized under United States commercial law and design these to reflect the reasonable expectations of parties in commercial dealings, especially for electronic commerce. We agree with Kessler: Courts must abandon "the pious myth that the law of contracts is of one cloth."[845] Where United States judges identify repeated commercial dealings, like the Roman *prætores*, they could design off-the-rack contracts for the parties instead of interpreting their tailor-made agreements. Rather than adopting a doctrine of reasonable expectations for interpreting contracts as Meyerson proposes —inspired by in-

843 *Idem*, at 631.

844 "Modularity in Contracts: Boilerplate and Information Flow," at 1175-76.

845 "Contracts of Adhesion—Some Thoughts About Freedom to Contract," at 631.

surance law—,[846] courts could develop an equitable doctrine of reasonable expectations for designing new standardized contracts with names. These standardized contracts with names would approximate, as Meyerson puts it, "the ideal of the [balanced] agreement that is voluntarily entered into by parties with perfect information."[847]

Even where the contractual parties are privileged, sophisticated, educated and literate—and equally so, unstandardized contracting raises a further problem, with which law and economics scholars must come to grips. Asymmetric information persists between contractual parties in the decentralized marketplace because people lack experience with the nonstandard terms.[848] Accordingly, the contractual parties need to engage in more communication to coordinate their future actions. Otherwise, they may fail to fully understand the duties that they assume.

As explained *supra* in Section III.1.A, under classical Roman law parties enter into enforceable unstandardized agreements by participating in an exacting verbal ceremony. This verbal ceremony consists of a solemn question-and-answer sequence performed in front of witnesses. The stipulator formulates in his own words a question, and the promisor answers in like words. For the unstandardized agreement to be enforceable, the answer must mirror the question.[849] People can put into their own language —express in their own words— only what they clearly understand. By forcing the parties to describe in their own language the duty that the promisor assumes, Roman law effectively resolves any asymmetric information between them and with affected third parties regarding the contractual terms.

Common law jurisdictions do poorly by comparison. Legal historians are uncertain when the ceremony of *stipulatio* fell into desuetude in Ancient

846 "The Efficient Consumer Form Contract: Law and Economics Meets the Real World," at 612.

847 *Ibidem*.

848 Note that Islamic lawyers reject unstandardized contracting to this day, in the same way Canon lawyers historically rejected usury. Both usury and unstandardized contracting can be one-sided and subject to abuse. Arab merchants for centuries had conducted business with the standardized contracts found in Roman vulgar law, see Ignaz Goldziher, 2 *Muhammedanische Studien* 75-76 (1890); Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* 239-70 (2009). However, the modern-day economy needs both unstandardized contracting and standardized contracts. Islamic lawyers today resort to legal fictions to enable their clients to enter into agreements with nonstandard terms, see Frank Vogel, "Contract Law of Islam and the Arab Middle East," in 7 *International Encyclopedia of Comparative Law* 3–76 (2006).

849 Watson, *The Law of Obligations in the Later Roman Republic* 1 (1965).

Rome.[850] German Pandect scholars continued, through the end of the nineteenth century, to discuss it as part of the *gemeines Recht*.[851] During ancient Roman times, as an evidentiary device, a scribe would etch the words of the contractual parties with a stylus on wax tablets. The *tabellio* has become the notary public in modern-day civilian jurisdictions.[852] The notary public, as a highly-trained legal professional, is unknown in common law jurisdictions.[853] Common lawyers are unaware that civilian notary publics are modern specialists in unstandardized contracting. In fact, in civilian jurisdictions, notary publics themselves have lost sight of the crucial function that they serve. The notary public is a qualified lawyer who, on behalf of the public faith, should explain nonstandard terms to the parties and enter the atypical contracts in his public records. For an unstandardized agreement to be enforceable, the notary public must both clearly explain the duties that the parties assume and publish its contents. By advising the parties and filing their atypical contract as a public document, the notary public effectively resolves any asymmetric information which persists. Common law jurisdictions have no corresponding legal professionals to assist parties with unstandardized contracting.

Back in the fifth century B.C., Ancient Athenian private law already developed unstandardized contractual writings—as is modern common law practice.[854] Yet Roman lawyers rejected private written instruments as a means to publicize the duties that contractual parties assume when they celebrate unstandardized contracts. Reserved 'closed' testaments, and the codicils that modified them, were written out on wax tablets,[855] but unstandardized contracting was verbal in the Roman world. Roman lawyers recognized that writings etched on wax tablets stored in dark places, and composed in hard-to-read legalese, not plain Latin, hide their meaning rather than bring it out into the open.

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850 Perhaps the only survival of it today is under Canon law. Modern-day spouses repeat their wedding vows through a solemn question-and-answer sequence in front of a cleric.

851 See Friedrich Carl von Savigny, *Das Obligationenrecht als Teil des heutigen römischen Rechts* 249-54 (1853).

852 See Levy, *Weströmisches Vulgarrecht—Das Obligationenrecht* 37 (1956).

853 See Armando J. Tirado, "Notarial and Other Registration Systems," 11 *Florida Journal of International Law* 171 (1996).

854 See Douglas M. MacDowell, *The Law in Classical Athens* 233 (1978).

855 See Thomas Rüfner, "Testamentary Formalities in Roman Law," in Zimmermann *et alii* (editors), 1 *Comparative Succession Law: Testamentary Formalities* 1 (2011).

The asymmetric information that persists with unstandardized contracting may also have another Roman solution in the modern world. With state-of-the-art technology, publish online video and sound recordings of contractual parties when they celebrate unstandardized agreements —articulating to each other with the advice of counsel the duties they assume— in order to make these enforceable.[856] As well, expand the mirror image rule to cover the language of the parties in these recordings. If this technology for tailored unstandardized contracting becomes too costly or cumbersome for the parties, use off-the-rack standardized contracts with names recognized under commercial law.

C. *Efficient Breach*

In the seventeenth century, Coke complains against the court of Chancery for granting a decree of specific performance on a promise to make a lease. In *Bromage v. Gennings*, a common law writ of trespass on case had been before the court of King's Bench. There, the plaintiff had failed to produce a covenant under seal.[857] Coke protests that the Chancery decree "subvert[s] the intention of the covenantor" who "intends it to be at his election either to lose the damages or to make the lease."[858] Sir William Searle Holdsworth explains that Coke deemed the decree at equity of specific performance to be unjust. It deprived the defendant of his choice "either to pay damages, or to fulfil his promise."[859]

As the common law writ of assumpsit developed out of the writ of trespass on case, the common law remedy for breach of contract was *solely* for monetary damages. In the nineteenth century, Holmes explains the similarity in remedies at torts and contracts: "If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference."[860] Because monetary damages are the sole remedy for breach of contract, English and Anglo-American common law paral-

856 "Título I, De las obligaciones contractuales que se contraen por consentimiento," in *De iure ciuili in artem redigendo: Nuevo proyecto de recodificación del derecho privado para el siglo XXI*, at 113-20.

857 1 *Rolle* 354 (King's Bench 1616).

858 *Idem, at 368.*

859 1 *A History of English Law* 243 (1903).

860 "The Path of the Law," at 462.

lels the development of Roman classical law, where the mechanism design of *omnis condemnatio est pecunaria* —Latin for all judgments are for monetary damages— holds.[861] In developing the writ of assumpsit, the common lawyers took the Canon law action of *læsio fidei* as their model (as we explain *supra* in Section III.1.) However, they kept the tort remedy of monetary damages. Because common law pleading was centralized at Westminster in the courts of Common Pleas and King's Bench and fact-finding was delegated to *nisi prius* judges on the assize circuits (discussed in Section IV.1 *infra*,) the English common law courts had limited powers to compel performance or grant other forms of specific relief.[862] Instead the court of Chancery adopted the Canon law remedy of specific performance. Justice Story explains that "if a contract is broken," courts at equity may "compel the party specifically to perform the contract," while courts at common law "can only give [money] damages for the breach of it."[863] Following Coke, Holmes considers that where the "law compel[s] men to perform their contracts," it is in effect subjugating the will of one to that of another, which amounts to a form of "limited slavery" or "servitude *ad hoc*."[864] Rather he makes clear that the "duty to keep a contract at common law means a prediction that you must pay [money] damages if you do not keep it—and nothing else."[865] Following Holmes, Judge Posner would develop the efficient-breach hypothesis in the economic analysis of contract law.[866] Where performing a contract —when the circumstances have changed— costs the debtor more than the creditor stands to gain, the option of breaching the contract and paying damages may be a Pareto improvement. The contracting parties obtain a net social gain, and no one is left worse off. The debtor is made better off by the breach despite paying damages. The creditor is made as well off by the payment of damages as if the contract had been fully performed.

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861 See *supra* our discussion of the exclusivity of monetary damages under Roman law in Section II.2.A of Chapter One.

862 See Clinton W. Francis, "The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England," 83 *Columbia Law Review* 35 (1983).

863 *Commentaries on Equity Jurisprudence: as administered in England and America* 30 (1836).

864 *The Common Law*, at 300.

865 "The Path of the Law," at 462.

866 See *Economic Analysis of Law* 55-60 (1973); Charles J. Goetz and Robert E. Scott, "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach," 77 *Columbia Law Review* 554 (1977).

D. *Contracts Rightly Understood*

While Eric A. Posner was surveying the field of the economic analysis of contract law and finding it not up to scratch —for lacking both a positive theory, which would explain what contract law 'is,' and a normative one, which would explain what contract law 'should be'—,[867] Alan Schwartz and Robert E. Scott attempted to make progress.[868] Economists had provided the starting points for such theoretical developments. "[T]he building blocks for such a theory are only now becoming available," they claim.[869] Yet rather than reduce contract law down to its key aspects, Schwartz and Scott amplify the subject matter of contracts. Their categorization of the "universe of bargaining transactions" encompasses broad swaths of United States law, such as family law, real property law, consumer protection law, securities law and laws governing the employment relation.[870] From this universe of transactions, they consider transactions between firms which are "sophisticated economic actors" to alone comprise what is "commonly called contract law." Accordingly, their line of analysis is both over- and under-inclusive.

In order to make the analysis more tractable, we make a simplifying assumption. The purpose of contracts may be reduced to the making of credible promises and nothing else. The making of credible promises allows people to coordinate future actions in a decentralized social order. Promises are present statements which people make to one another regarding their future actions. Promises are credible —in the present— when the promisees believe that the promisors will have the incentives —in the future— to perform these actions. Through mechanism design theory, law and economics scholars should recognize that all that is needed for people to coordinate their future actions in the decentralized marketplace is that they pay monetary damages when they are in breach of contract. The prospect of paying monetary damages changes debtors' future incentives and makes their promises to perform credible to creditors.

The amount of monetary damages necessary to change the debtors' future incentives equals the value that the creditors expect to receive from

867 "Economic Analysis of Contract Law After Three Decades: Success or Failure?" at 830.

868 "Contract Theory and the Limits of Contract Law," 113 *Yale Law Journal* 541 (2003).

869 *Idem*, at 548.

870 *Idem*, at 544.

the performance. Accordingly, common law courts award judgements for 'expectation damages.'[871] The debtors are left free to choose, as Coke and Holmes indicate, between paying the judgement for monetary damages or performing the contract as promised. Contract law is designed to do nothing more than support the coordination of future actions in the decentralized marketplace through the making of credible promises.

Holmes concedes that the "common law meaning of promise"[872] where monetary damages are the *sole* remedy for breach of contract "stinks in the nostrils" of scholars who "think it advantageous to get as much ethics into the law as they can."[873] That attitude confuses contract law, as Judge Posner spells out in following Holmes, with the language of duties and entitlements that it borrows from moral discourse.[874] That circumstances always change explains why contract law fails to be about decreeing specific performance out of moral duties.[875] Even the Canon lawyers, whose ministry was to care for souls, understood that promissory morality[876] only holds under the mechanism design of *rebus sic stantibus* —Latin for circumstances standing as they are,[877] that is, circumstances remaining unchanged—.[878] When circumstances change, instead of excusing debtors from their legal duties through a misunderstood doctrine of 'commercial impracticability,'[879] Anglo-American common law at least gives them a choice, either to perform or to pay creditors' expectation damages.

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871 See John H. Barton, "The Economic Basis of Damages for Breach of Contract," 1 *The Journal of Legal Studies* 277, 278-79 (1972).

872 *The Common Law*, at 300.

873 "The Path of the Law," at 462. Inconsistently, Charles Fried attempts to find sanctity in contracts and considers Holmes' analysis to be "too simple." See *Contract as Promise: A Theory of Contractual Obligation* 117 (1981).

874 "Let Us Never Blame a Contract Breaker," 107 *Michigan Law Review* 1349, 1357 (2009).

875 See Steven Shavell, "Is Breach of Contract Immoral?" 56 *Emory Law Journal* 439, 441 (2006).

876 See Gordley, "Impossibility and Changed and Unforeseen Circumstances," 52 *American Journal of Comparative Law* 513, 525 (2004).

877 On the sin of perjury in changing circumstances, see Decretum of Gratian part 2 cause 22 question 2 canon 14.

878 "*[S]i res in eodem statu manserit*" (if the circumstance will have remained in the same state,) gloss by John Zimeke to '*furens*' (the madman,) *Decretum Gratiani cum glossis* folio 427 *recto* (1542).

879 Uniform Commercial Code section 2-615(a)

2. *Torts Mirror the Roman Law*

'Torts' —Law French for twisted or crooked conduct—[880] are wrongs visited by one person on another, which give rise to private actions, what the Roman lawyers call 'delicts.'[881] Blackstone prefers the Anglicized term 'private wrongs,' which he distinguishes from 'public wrongs' or crimes, which give rise to public actions. The private-law system that governs torts in the United States parallels what developed under classical Roman law. Like the Roman 'typical nominate delicts,' the common law has a system of standardized torts with names. Some legal historians have argued that common lawyers developed this area of the law by borrowing civilian learning.[882] However, no other area of the common law —except perhaps real property— is more homegrown.[883] To use some Latin, the common law of torts grew out of a *contra pacem*[884] writ in England, alleging *vi et armis*[885] and using the *ostensurus quare* formula—the writ of trespass.[886] The writs were standardized royal commands written out in Latin on a piece of parchment directed to local sheriffs.[887]

Beginning in the thirteenth century, the royal courts —mainly the courts of Common Pleas and King's Bench— took jurisdiction over cases where the king's peace was breached allegedly 'with force and arms.' The king's peace was the "most potent of the ideas" in Maitland's view, by which the royal courts extended their jurisdiction.[888] "Gradually this peace (which at one time was conceived as existing only at certain times, in certain places, and in favour [sic] of certain privileged persons, covering the king's coronation days, the king's highways, the king's servants and to those whom

880 Burn and Burn, *A new law dictionary*, at 689.

881 See 3 *Commentaries on the Laws of England* 1 (1768).

882 See Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, at 163.

883 Pollock points to deep parallels in the development of English torts and Roman delicts. "[T]he Roman theory was built up on a foundation of archaic materials by no means un like [sic] our own," he observes. *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* 13 (1892).

884 Latin for 'against the peace.' See also Walter A. Shumaker, *The cyclopedic law dictionary* 222 (1922).

885 Latin for 'with force and arms.' *Idem*, at 1058.

886 Rastell, *Les termes de la ley*, at 374.

887 See Simon Theloall, 10 *Le Digest des briefs Originals et des Choses concernants eux* 114 (1579).

888 *The Forms of Action at Common Law* 10 (1936).

he had granted it by his hand or his seal) was extended to cover all times, the whole realm, all men."[889] The alleged wrongdoers were hauled into court and called on 'to explain why' they had acted so.

During the fourteenth century, the writ of case developed from the writ of trespass. In practice, the allegations of force and arms often masked an array of wrongs wider than merely injuries linked to *affrays* —Law French for public acts of violence—.[890] Along these lines, Charles Donahue Jr. reports numerous cases in the late 1340s of people accused of murdering horses.[891] He observes: "That seems odd, until we look at the names of the defendants: They are Ferrer in French, or Faber in Latin, or Smith in English. The words all mean the same thing. These are blacksmiths who were shoeing horses and botched the job."[892] The Black Death had at that time triggered a demographic decline in England's workforce.[893] The scarcity of competent occupational workers led to a surge in the "negligent activity" of carriers, builders, shepherds, doctors, clothworkers, smiths, innkeepers and jailers.[894] To have their cases heard by the royal courts, complainants alleged that the perpetrators acted with violence —a legal fiction—, when what really had happened was ordinary carelessness.

By the fifteenth century, the common law courts dispensed with the legal fiction. Litigants were permitted to plead 'on the case' —*en son case* in Law French—.[895] In setting out the background of their complaint through a whereas —*cum* in Latin— clause, Donahue makes clear that complainants could allege the flouting of a "more specific [legal] duty than the general one not to commit breaches of the peace."[896] The writ of trespass *vi et armis* was still available where the injuries could be attributed directly to the use of force and arms.[897] Yet where plaintiffs pointed to injuries which were

889 *Ibidem.*

890 Burn and Burn, *A new law dictionary*, at 25.

891 "The Modern Laws of Both Beginnings? Tort and Contract: Fourteenth Century," 40 *Manitoba Law Journal* 9 (2017).

892 *Idem*, at 16.

893 See Robert C. Palmer, *English Law in the Age of the Black Death: 1348-1381* 139-293 (1993).

894 *Idem*, at 140.

895 See Cecil Herbert Stuart Fifoot, *History and Sources of the Common Law: Tort and Contract* 75 (1949).

896 "The Modern Laws of Both Beginnings? Tort and Contract: Fourteenth Century," at 21.

897 See James Whishaw, *A new law dictionary: containing a concise exposition of the mere terms of art and such obsolete words as occur in old legal, historical and antiquarian writers* 327 (1829).

the indirect result or incidental consequence of an act or omission, trespass on the case was the preferred writ.

Towards the end of the eighteenth century, Blackstone notes what had become a "settled distinction" at common law.[898] He sets down: "[W]here an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission: or where the act is not immediately injurious, but only by consequence and collaterally; there no action *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act."[899]

The common law of torts which emerges in England, on that account, was organized around a closed system of standardized writs —"each with its uncouth name"[900]— which mirror the 'typical nominate delicts' under the Roman law. Common lawyers had come to think of wrongs in terms of remedies, in such a way that, in Maitland's expression, "where there is no remedy, there is no wrong."[901] In an inversion of this thought, revealing the shifting attitudes in the late 1850s, the first hornbook on torts composed on either side of the Atlantic Ocean complained that "remedies have been substituted for wrongs."[902] Even so, common lawyers lacked an understanding of torts as an area of the common law.[903] Common lawyers studied the writs of 'trespass,' 'trespass on the case,' 'trover,' 'replevin,' 'detinue' and 'waste.' "Each procedural pigeon-hole [sic] contains its own substantive law," Maitland observes.[904]

Gordley argues that common lawyers developed the area of torts by reading civilian concepts such as intent, fault and strict liability into the writs.[905] However, as Donahue affirms, these concepts are already to be found in the texts of the common law case reports. This much Gordley allows: "Sometimes, in describing the situation, the plaintiff did allege that the defendant acted negligently."[906] Even so, Gordley argues that "it isn't clear what the al-

898 3 *Commentaries on the Laws of England*, at 123.

899 *Ibidem*.

900 Maitland, *The Forms of Action at Common Law*, at 1.

901 *Idem*, at 4.

902 Francis Hilliard, *1 The Law of Torts or Private Wrongs* vi (1859)

903 In much the same way, today we lump equitable doctrines into the second-year remedies class. Yet we lack an understanding of relational duties as an area of equity.

904 *The Forms of Action at Common Law*, at 3.

905 *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, at 163.

906 *Idem*, at 166.

legation meant." To illustrate, Donahue cites the case of *Berden v. Burton*.[907] At issue is whether trespass or trespass on the case lies. There, a *clausum fregit* —breaking of the close in Latin—[908] and entry had occurred, and the manor burned down from a lit hearth left unattended. Donahue suggests that "every possible standard of liability is mentioned" in the report. He concludes that these justices and counsel "clearly saw what the possibilities were." A close reading shows counsel for the defendant pleading that "the burning […] done was by reason of the negligence of the servants inside, who should have watched the fire," and counsel for the plaintiff responding that "a great assembly and multitude of armed men […] threatened the servants, with the result that the servants were in fear of death and let the fire lie unattended." Judge John Belnap responds for the court: "[Y]ou ought to have brought your special writ upon your case, since it was not their intention to burn them, but the burning happened by accident." [909] The allegations of these fourteenth-century judges and counsel are clear. Gordley is correct that eighteenth-century civilian lawyers such as Robert Joseph Pothier had worked out the concepts of intent, fault and strict liability.[910] What is unclear is why common lawyers would borrow these concepts from civilian learning when they could read them in the case reports as Donahue observes.

A. *Tripartite Structure of Intentional Torts, Negligence, and Strict Liability*

Towards the end of the nineteenth century, the law student in the United States could find cases to read, but torts lacked conceptual cohesion or clarity. Torts as a legal category looked so unruly in 1871 to Holmes that, in reviewing an abridged version for the Harvard Law School of Charles Greenstreet Addison's English hornbook on the subject, he comments: "[u]nder this title we expect to find some or all of the wrongs remedied by the actions of trespass, trespass on the case, and trover."[911] Then he quips: "Torts is not a proper subject for a law book."

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907 6 *Year Books of Richard II* 19-23 (1382).

908 See Herbert Newman Mozley and George Crispe Whiteley, *A concise law dictionary* 68 (1876).

909 *Ibidem.*

910 See *Traité des obligations* sections 116, 118, in André Marie Jean Jacques Dupin (editor), 1 *Oeuvres de Pothier* 1 (1821).

911 5 *American Law Review* 341 (1871).

Two years later, in an influential 1873 law review article,[912] Holmes sets himself to the task of giving conceptual cohesion and clarity to torts. His mapping of the area of torts is authoritative. Today it has been adopted in the United States. Holmes writes: "At one end […] in a treatise on torts, we should find a class of cases […] determined by certain overt acts or events alone, irrespective of culpability"—the tort of strict liability. "At the other extreme from above are found […] frauds, or malicious or willful injuries"—the intentional torts. "Half-way between the two groups […] lie the great mass of cases in which negligence has become an essential averment"—the tort of negligence.

Holmes' understanding of tort law is clear-eyed. He sees torts as reflecting societal choices rooted in "intuitions of public policy, avowed or unconscious" rather than moral beliefs, despite the use of "moral phraseology" by the law.[913] He eschews the misunderstanding of believing that tortfeasors should compensate victims out of a sense of moral duty or from a theory of corrective justice.[914] Despite his classic statement about the relative roles of logic and experience in the life of the law,[915] he applies unrelenting logic in his attempt to map this area of the common law and find a common basis "at the bottom of all liability in tort."[916] The general framework for tort liability that he hits upon is the foresight of consequences by the average man. "If a consequence cannot be foreseen, it cannot be avoided," he explains.[917] Within this general framework, he can fit not only intent and fault, but also strict liability. While intent involves this foresight of consequences,[918] and fault involves the lack of it regarding harmful acts,[919] with strict liabil-

912 "The Theory of Torts," 7 *American Law Review* 652, 653 (1873).

913 *The Common Law*, at 1, 79.

914 Inconsistently, Ernest J. Weinrib attempts to fit Holmes' argument within a Kantian framework; see *The Idea of Private Law* 127, 180-82 (Second edition, 2012).

915 Holmes paraphrases the Roman lawyer Rudolph von Jhering, whom he had read in a French translation by O.L.M.G. de Meulenaere, 4 *L'Esprit du Droit Romain* 311 (Third edition, 1888).

916 *The Common Law*, at 77.

917 *The Common Law*, at 56.

918 The intentional torts involve injurious acts with foresight that the consequences will follow or with a disregard that the average member of the community would foresee that they will follow.

919 The tort of negligence involves injurious acts without foresight that the consequences will follow when the average member of the community would have foreseen that they could follow.

ity the foresight regards the consequences of extrahazardous activities.[920] Accordingly, Holmes maps the area of torts in the United States and lays the foundation for today's tripartite structure of intentional torts, negligence and strict liability.

Unfortunately, when in 1880 Holmes develops the subject in his III and IV lectures at the Lowell Institute in Boston,[921] he sidetracks. Loosely devoting lecture III to the tort of negligence[922] and lecture IV to the intentional torts,[923] he fails to comprehensively discuss the tort of strict liability. That same year, he publishes a law review article devoted predominantly to the rise of the tort of negligence from trespass *vi et armis*.[924] He thus scatters his discussion of *Rylands v. Fletcher*, nuisance, defamation, trespassing cattle, domesticated but vicious and wild animals, and the liability of common carriers and innkeepers at common law, through his III and IV lectures and in his 1880 article.

In his 1873 article, he throws light on 'liability without fault' —his term for strict liability— in discussing the English case of *Rylands v. Fletcher*.[925] There, the owners of a steam-powered textile mill had built a reservoir of water which burst into an abandoned mining shaft, flooding their neighbor's colliery. In building the reservoir, the mill owners employed a "competent engineer and competent contractors" to independently conduct the works, and were personally without fault.[926] On appeal to the Exchequer Chamber, Judge Colin Blackburn rules that whoever keeps on his land "anything likely to do mischief" acts "at his peril."[927] Holmes explains strict liability "on the principle that it is politic to make those who go into extrahazardous employments take the risk on their own shoulders."[928]

Today Holmes' foresight-based theory of strict liability has been largely adopted in the United States. In *Madsen v. East Jordan Irrigation Company*, the Supreme Court of Utah denies the plaintiff recovery. The murder of kit-

920 The tort of strict liability involves extrahazardous activities with foresight that the consequences will follow or with a disregard that the average member of the community would foresee that they could follow.

921 He published these lectures in 1881 as *The Common Law*.

922 *The Common Law*, at 77-129.

923 *Idem*, at 130-63.

924 "Trespass and Negligence," 14 *American Law Review* 1 (1880).

925 1 *The Law Reports, Court of the Exchequer* 265 (1866).

926 *Idem*, at 268-69.

927 *Idem*, at 279.

928 "The Theory of Torts," at 653.

tens in a mink farm by their mothers who were frightened by defendant's nonnegligent blasting operations "was not within the realm of matters to be anticipated."[929] Accordingly, Judge Eugene C. Pratt rules that defendant's extrahazardous use of explosives in its irrigation canal fails to be the proximate cause of the loss of the mink litter.

Holmes's exposition of strict liability is coherent and clear. Nonetheless, at the beginning of the twentieth century, many United States legal scholars find strict liability difficult to ferret out. Without adequate understanding, Pollock refers to a "dogma of no liability without fault" which it would seem is "more or less prevalent in certain [Anglo-]American law schools."[930] In debunking the negligence-dogma theory, David Rosenberg suggests that Holmes was prepared to expand strict liability to industrial injuries.[931] "These were not academic musings; [Holmes] was fully prepared to put his theory into action," Rosenberg affirms.[932] As a Massachusetts judge, Holmes certainly extends the holding in *Rylands v. Fletcher* from a nonnatural reservoir to the natural accumulation of ice on a sidewalk from a drainage pipe.[933] At the end of the nineteenth century, with the advent of the second Industrial Revolution, he acknowledges that the "incidents of certain well known businesses" such as "railroads, factories, and the like"[934] are keeping the courts busy. In granting that compensation paid for "injuries to person or property" by these enterprises "sooner or later goes into the price paid by the public,"[935] he anticipates the rise of enterprise liability in the twentieth century.

Be that as it may, in his III and IV lectures and in his 1880 article, Holmes does appear to reject strict liability by endorsing[936] Lemuel Shaw's opinion in *Brown v. Kendall*.[937] There, the defendant had attempted to separate two fighting dogs with a stick. In taking a step backwards and lifting his arm with the stick, he directly struck the eye of the plaintiff, who brought an action of trespass. Shaw observes that to recover the plaintiff must "show

929 101 *Utah Reports* 552, 555 (1942).

930 Pollock, "A Plea for Historical Interpretation," 39 *Law Quarterly Review* 162, 167 (1923).

931 *The Hidden Holmes: His Theory of Torts in History* (1995).

932 *Idem*, at 135.

933 *Davis v. Rich*, 180 *Massachusetts Reports* 235 (1902).

934 "The Path of the Law," at 467.

935 *Ibidem.*

936 *The Common Law*, at 89; "Trespass and Negligence," at 8.

937 60 *Massachusetts Reports* 292 (1850).

either that the intention was unlawful, or that the defendant was in fault."[938] Holmes endorses Shaw's reading of fault-based liability into the writ of trespass *vi et armis*, rather than his omission of a discussion strict liability. Yet how could the Supreme Court of Massachusetts in 1850 discuss strict liability when the English case of *Rylands v. Fletcher* would not be handed down for another fifteen years?

Throughout his writings, Holmes grounds liability without fault in personal choice: "[I]t may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken."[939] He argues that strict responsibility —his term, again— lies at the "boundary line between rules based on policy irrespective of fault, and requirements intended to formulate the conduct of a prudent man."[940] Nevertheless, Holmes' failure to comprehensively discuss strict liability, his confused endorsement of Shaw, and the close association in Anglo-American common lawyers' minds between fault and the standard of the 'reasonable person' —as Holmes' average-man test is called in the United States— led judges and legal scholars during the first half of the twentieth century to draw attention to the intentional torts and the tort of negligence.

B. *Torts Rightly Understood*

During the second half of the twentieth century, United States common lawyers call attention to the tort of strict liability. Yet the path they take is ill-conceived. With Prosser leading the way, they incorporate basic misunderstandings about the role of enterprise liability in the marketplace, undercut the doctrine of *res ipsa loquitur*, and abandon the defenses of contributory negligence as well as the last clear chance rule.

Prosser proves far more influential than Holmes in the development of tort law in the United States. His pervasive influence proceeds from his strategy of spotting trends in the evolving case law of the states of the union which he then announces to Anglo-American common lawyers. Rather than argue for a change in the law, he spots that change already underway in the case law. By analyzing patterns evidenced in the case law, he retains a tone of reasoned neutrality and, at the same time, can argue

938 *Idem*, at 296.
939 *The Common Law*, at 117.
940 *Ibidem*.

that the new developments purportedly reflect an emerging consensus despite underlying ideological disagreements across the legal community.

Like Holmes —a master of English prose—, Prosser had an exceptional talent for writing, analysis and exposition. His hornbook[941] maps the area of torts in the United States more thoroughly than Holmes ever did. He follows Holmes' tripartite classification of intentional torts,[942] negligence[943] and strict liability[944] —without acknowledging Holmes' contribution in this area—, and adds chapters on nuisance,[945] misrepresentation,[946] owners and occupiers of land[947] and suppliers of chattels,[948] which he claims "cannot be assigned to any one ground of intent, negligence, or strict liability," but where "recovery may rest upon any of the three."[949] Prosser parses lines of decisions, draws hypotheticals, charts favorable and contrary holdings, and maps the boundaries between the reported cases. That the 15,000 cases that he cites[950] were mostly brought under the procedural pigeonholes of the common law writs has fallen out of view.[951] Despite his protestations to "adhere to the terminology and the concepts which are in use in the courts,"[952] he reads doctrines and formulas into the common law cases that he canvasses.

Where Holmes is clear-eyed —even prescient, we could say—, Prosser holds mistaken views about torts with damaging consequences for the development of Anglo-American common law. Unlike Holmes, he believes that torts are "directed towards the compensation of individuals"[953] for losses and that, albeit in a loose way, the law of torts "reflects current ideas of morality."[954] When "such ideas have changed," he declares that "the

941 *Handbook on the Law of Torts* (1941).
942 *Idem*, chapters 2-4.
943 *Idem*, chapters 5-9.
944 *Idem*, chapter 10.
945 *Idem*, chapter 13.
946 *Idem*, chapter 16.
947 *Idem*, chapter 14.
948 *Idem*, chapter 15.
949 *Idem*, at 35.
950 *Idem*, at vii.
951 The forms of action were abolished, but old patterns of thought had persisted in the United States.
952 *Handbook on the Law of Torts*, at 35.
953 *Idem*, at 8.
954 *Idem*, at 9.

law has kept pace with them."[955] Unlike Holmes, he believes that the different torts "have little in common and appear […] to be entirely unrelated to one another," and that it is "not easy to discover any general principle upon which they may all be based, unless it is the obvious one that injuries are to be compensated."[956] "In so broad a field," he reiterates that it is "not easy to find a single guiding principle which determines when such compensation is to be paid."[957] As a result, Prosser loses sight of a basic principle of tort law, which both Roman law and common law share and which keeps liability within manageable bounds. Although the *numerus clausus* principle has never been applied in this area, Anglo-American torts fall into a 'closed number' or a closed system of standardized forms of action, and come with names to identify them. As far as we are aware, law and economics scholars have yet to recognize that the mechanism design of *numerus clausus* (discussed *supra* in Section II.1.A) applies —in addition to property rights and standardized contracts— to the area of torts.

Civilian lawyers have a closed system of standardized contracts with names —the 'typical nominate contracts'— which common lawyers lack. Common lawyers, in turn, have a closed system of standardized torts with names —we could call them 'typical nominate delicts,' using civilian legal terminology— which modern civilian lawyers lack. (In this same way, the court of Chancery, steeped as it was in civilian learning, used to refer to the common law writs as *actiones nominatæ*.)

With a lack of understanding of the subject, Prosser declares in his hornbook that "[t]here is no necessity whatever that a tort must have a name."[958] He believes that torts at Anglo-American common law are open-ended and can be stretched to accommodate the needs of an evolving industrial society in whichever way plaintiffs' attorneys deem fit. He highhandedly tells his readers that a complex civilization gives rise to inevitable losses —"[n]ew and nameless torture," a pun on new and nameless torts— which demand that compensation be paid out to an ever widening assortment of victims.[959] The courts respond to "cases of first impression" by proceeding "boldly to create […] new cause[s] of action, were none had been rec-

955 *Idem*, at 14.
956 *Idem*, at 4.
957 *Idem*, at 8.
958 *Idem*, at 4-5.
959 *Idem*, at 5.

ognized before." He holds out that "the mere fact that the claim is novel will not of itself operate as a bar to the remedy" in tort.[960]

Only recently have Anglo-American common lawyers come to recognize that "[t]orts have names for a reason," as Kenneth S. Abraham and G. Edward White allow.[961] Through their names, torts "[auto]describe [them] sel[ves]" as standardized forms of action whose elements are "discrete, contained, and limited" and which point to a "core set of routine facts" to which they "can be easily applied."[962] The closed system of standardized torts with names makes tort law effective at common law and should not be abandoned. Where modern French and German civilian lawyers espouse a 'general theory of tort liability,'[963] tort law is ineffective. Abraham and White predict that an open-ended, nameless tort would "be unappealing to the courts because of the difficulties they anticipate it would later pose for them." The courts would be ineffectually "called upon in each case to define the scope of and fashion limits on liability."[964] Lest we forget, the French and German civilian courts have been slower to construct this area of law.

Prosser also fails to understand another underlying mechanism design of tort law. Injured people must remain uncompensated for unintentional acts and be made to bear their own losses. Holmes was clearheaded enough to appreciate that "loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune."[965] Through mechanism design theory, law and economics scholars must recognize that people generally have the best incentives and information to take their own precautions and to depend on their own care and prudence. This is not an "expression of the highly individualistic attitude of the common law" as Prosser urges,[966] but a matter of simple asymmetric information and incentive compatibility. Only exceptionally does an injury fit into one of the standardized forms of tort action with a name recognized at Anglo-American common law. Through the mecha-

960 *Ibidem*.

961 "Torts Without Names, New Torts, and the Future of Liability for Intangible Harm," 68 *American University Law Review* 2089 (2019).

962 *Idem*, at 2089, 2100 and 2124.

963 See article 1382 of the Code civil des Français of 1804 and section 823 of the Burgerliches Gesetzbuch of 1900.

964 *Idem*, at 2100.

965 *The Common Law*, at 94.

966 *Handbook on the Law of Torts*, at 394.

nism design of *numerus clausus*, tort law determines when compensation is to be paid for discrete, contained, and limited injuries.

Today in the United States, George L. Priest complains that the "diffuse and indiscriminate expansion of substantive tort liability has led to the unraveling of insurance markets."[967] He traces this expansion of liability to two earlier scholars: Kessler and Fleming James Jr. Kessler (whom we discuss *supra* in Section III.1.A) is responsible for "thoroughly delegitimat[ing] 200 years of contract law tradition in the defective products field."[968] Priest exaggerates, insofar as Kessler was correct to criticize modern-day boilerplate. James is responsible for pursuing the idea of tort damage awards "as a form of social insurance."[969] Priest exaggerates, insofar as the idea was already thoroughly developed by Chancellor Kent, though Holmes rejected it.[970] Holmes had edited Kent's hornbook on Anglo-American law.[971] There, Kent had discussed innkeepers and common carriers —who are strictly liable at common law— as "insurer[s]" of the chattels of their guests and passengers.[972] Instead, we suggest that the 'wedge' for change —a metaphor which Priest borrows directly from Prosser— was Prosser himself. Priest admits that Prosser did exercise an "extraordinary influence over the direction of the law."[973] Following Prosser's lead, the courts of the states of the union handed down major, landmark expansions of tort liability in the 1960s and early 1970s. Not only did lawyers and judges follow him in inordinately expanding tort liability, the area of torts in the United States became distorted as a result of his influence.

Prosser's skewed vision of strict liability meant that the enterprise liability that developed in the United States failed to be limited to extrahazardous activities. His scholarship is directed to expanding strict liability, yet he misunderstands —to use Holmes' term— 'liability without fault.' Unlike Holmes, Prosser misreads the holding of the English case of *Rylands v. Fletcher*. In an effort to demonstrate that the "case itself, or a statement of prin-

967 "The Current Insurance Crisis and Modern Tort Law," 96 *Yale Law Journal* 1521, 1589 (1987).

968 Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," 14 *The Journal of Legal Studies* 461, 492 (1985).

969 *Idem*, at 470.

970 *The Common Law*, at 96.

971 2 *Commentaries on American law* (Twelfth edition, 1884).

972 *Idem*, at 849, 855, 864 and 871.

973 "The Invention of Enterprise Liability," at 465.

ciple clearly derived from it," is accepted in the United States,[974] he confuses strict liability for extrahazardous activities with strict liability for nuisances. Prosser should have known better. He concedes that "[t]he [Anglo-]American courts have shown a deplorable tendency to call everything a nuisance, and let it go at that."[975]

On Rylands and Horrocks' appeal of the case to the House of Lords, Lord Cairns claims that the reservoir was a "nonnatural use" of the land.[976] With an analysis borrowed from the nuisance cases, Prosser argues that a nonnatural use of land means a use "inappropriate to the place where it is maintained, in light of the character of that place and its surroundings."[977] He quotes Justice George Sutherland in the zoning decision of *Village of Euclid v. Ambler Realty Company*.[978] "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."[979] In line with Sutherland's reasoning, Prosser explains *Rylands v. Fletcher*. England is a "pluvial country."[980] There, "constant streams and abundant rains make the storage of water unnecessary."[981] In England, a reservoir is a nonnatural use of land—rather than an extrahazardous activity.

In this case, the House of Lords affirms the Exchequer Chamber's holding of 'liability without fault.' Prosser is opposed to Holmes' term. He claims that the term has "clung to the doctrine of *Rylands v. Fletcher*, enshrouded it in darkness and tended to some considerable extent to cast it into discredit."[982] Nonetheless, Holmes' term accurately describes the Exchequer Chamber's holding of strict liability for "anything likely to do mischief."[983] Lord Cranworth's concurrence clarifies the opinion of the House of Lords: "[T]he rule of law was correctly stated by Mr. Justice Blackburn."[984] The defendants are found liable "whatever precautions [they] may have taken to prevent

974 "The Principle of *Rylands v. Fletcher*," in *Selected Topics on the Law of Torts* 152 (1953).

975 *Handbook on the Law of Torts*, at 451.

976 3 *The Law Reports, English and Irish Appeal Cases and Claims of Peerage before the House of Lords* 330, 339 (1868).

977 "The Principle of *Rylands v. Fletcher*," at 147.

978 *Idem*, at 147.

979 272 *United States Reports* 365, 388 (1926).

980 "The Principle of *Rylands v. Fletcher*," at 187-88.

981 *Ibidem*.

982 "The Principle of *Rylands v. Fletcher*," at 179.

983 1 *The Law Reports, Court of the Exchequer* 279.

984 3 *The Law Reports, English and Irish Appeal Cases and Claims of Peerage before the House of Lords* 330, at 340.

the damage."[985] Faced with a nonnatural reservoir bursting into the shafts of a neighboring colliery, the House of Lords agrees with the Exchequer Chamber. Rylands and Horrocks acted at their peril.

By the end of the nineteenth century, judicial attitudes toward strict liability had changed in England and the United States, as people's perceptions of the potential scope and range of nonnatural disasters adjusted to new realities. A contemporary Anglo-American law review notes: "[W]ater can do a great deal of mischief and pile up a great deal of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not, in a few minutes."[986] Simpson puts the decision of *Rylands v. Fletcher* in the context of the second Industrial Revolution, against the historical backdrop of the Dale dike and Bilberry embankment disasters of 1864 and 1852.[987] Holmes would have been directly familiar with these English disasters, the legal and historical context of strict liability which Prosser was unable to glean from the case reports. In the United States, a few pivotal jurisdictions had, at an early date, rejected strict liability.[988] However, New York, New Jersey and Pennsylvania "reversed their stance" following the South Fork dam disaster of 1889.[989]

As a result of Prosser's misreadings, when enterprise liability develops in the United States in the 1960s and early 1970s, the courts of the states of the union fail to limit recovery under the tort to the discrete, contained, and limited injuries caused by extrahazardous activities. Prosser adopts a tone of reasoned neutrality in his hornbook to argue that the tort of strict liability should be expanded to defective products. He spots a trend in the evolving case law and announces that a "growing minority of jurisdictions have held the manufacturer libel to the ultimate consumer, even in the absence of contract."[990] He believes that "it seems far better to discard the troublesome sales doctrine of warranty, and impose strict liability outright in tort, as a pure matter of social policy."[991] He insists that "the action

985 *Ibidem*.

986 "The Law of Bursting Reservoirs," 23 *American Law Review* 643 (1889).

987 "Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher," 13 *The Journal of Legal Studies* 209, 244 (1984).

988 "The Principle of *Rylands v. Fletcher*," at 152.

989 See Jed Handelsman Shugerman, "The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of *Fletcher v. Rylands* in the Gilded Age," 110 *Yale Law Journal* 333, 337 (2000).

990 *Handbook on the Law of Torts*, at 468-69.

991 *Idem*, at 692.

for breach of a warranty was originally a tort action,"[992] in which he is correct. Then, in two landmark law review articles where his language is anything but neutral —he uses the language of siege warfare—,[993] he recommends to Anglo-American common lawyers that the requirement of privity of contract be dropped altogether to allow consumers to sue manufacturers in tort for injuries caused by defective products.

Prosser's language of siege warfare is taken from an earlier negligence case. In *Ultramares Corporation v. Touche*,[994] Benjamin Cardozo was concerned with limiting the liability of accountants to nonclient third parties. There, the requirement of privity of contract had barred a nonclient factor from recovering funds from an accounting firm. The factor loaned funds in reliance on an accounts receivable audit which the accountants had negligently prepared. Judge Cardozo's ruling represented an attempt to curb the threat that liability "in an indeterminate amount for an indeterminate time to an indeterminate class"[995] poses to the accounting profession. With an altogether different objective in mind, ironically Prosser quotes him to propose that the requirement of privity of contract, a check against extensive liability in tort, should be dropped. "The assault upon the citadel of privity is proceeding in these days apace,"[996] he insists.

Prosser fails to recommend to Anglo-American common lawyers that strict liability be solely extended to defective products which are extrahazardous. Rather than restrict the tort to products "such as firearms and dynamite" which are "inherently dangerous," he calls for its extension to a wider range of "standardized products." Through uniformity of production, he argues that a "high degree of safety already has been achieved."[997] Thus, consumers "are entitled to receive, an assurance of such safety" from manufacturers.[998] Prosser should have known better. He concedes that at the time consumers are able "in every jurisdiction" to bring the tort of negligence for defective products "aided by the [common law] doctrine of *res*

992 *Idem*, at 690.

993 "The Assault upon the Citadel (Strict Liability to the Consumer)," 69 *Yale Law Journal* 1099 (1960); "The Fall of the Citadel (Strict Liability to the Consumer)," 50 *Minnesota Law Review* 791 (1966).

994 255 *New York Reports* 170 (1931).

995 *Idem*, at 179.

996 *Idem*, at 180.

997 "The Assault upon the Citadel," at 1140.

998 *Ibidem*.

ipsa loquitur, or by its practical equivalent."[999] This doctrine shifts the burden of proof to the manufacturer, which makes the extension of the tort of strict liability to defective products redundant for consumers in the United States.

Through the presumption of negligence, the doctrine of *res ipsa loquitur* shifts the burden of proof to manufacturers which have better information regarding their conduct than do consumers.[1000] The phrase *'res ipsa loquitur'* —Latin for the thing speaks for itself—[1001] first entered the common law in the English case of *Byrne v. Boadle*.[1002] There, a barrel had rolled out of the window of a second-story flour shop striking a person on foot. The barrel, and jigger by which it was being hoisted into the storeroom, were under the control of the defendant, who could solely explain how it fell. Faced with a plaintiff unable to produce evidence of the mishap —because of asymmetric information between both litigants—, Sir Jonathan Frederick Pollock throws in the crack that "there are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them."[1003]

With a darker display of humor, Prosser suggests that "[i]t was perhaps inevitable" that Baron Pollack's Latin phrase would "become involved in passenger cases," and there "cross-breed with the [common] carrier's burden of proof and produce a monster child."[1004] At common law, common carriers (Chancellor Kent uses the nineteenth-century example of the proprietors of stagecoaches) were held strictly liable for the damaged or nondelivered freight entrusted to them,[1005] but only responded for the safety of passengers for their "want of due care."[1006] Rather than additionally impose strict liability on common carriers for the safety of passengers, the law barons of the Exchequer court adopted a presumption of negligence. Where the plaintiff establishes the *prima facie* —Latin for on the face of it—[1007] case of his injury, the burden of proof is made to shift to the

999 *Idem*, at 1114.

1000 See our discussion of the shift in the burden of proof at equity with self-dealing in Section IV.2 *infra*.

1001 Shumaker, *The cyclopedic law dictionary*, at 883.

1002 159 *The English Reports* 299 (1863).

1003 *Idem*, at 300.

1004 "*Res Ipsa Loquitur* in California," in *Selected Topics on the Law of Torts* 306.

1005 See our discussion of bailment *supra* in Section II.2.A.

1006 2 *Commentaries on American Law*, at 466.

1007 Shumaker, *The cyclopedic law dictionary*, at 799.

defendant.[1008] The mechanism design of *res ipsa loquitur* represents one of the great evidentiary innovations of the common law tradition.[1009]

Prosser is opposed to this presumption of negligence —which lies between fault-based and strict liability— already available at common law. He views *res ipsa loquitur* as a misleading stopgap to the weighing and considering of circumstantial evidence at trial. He believes that the doctrine operates as a makeshift measure to replace adjudication, or worse a "catchword easy to repeat as a substitute for consideration of the evidence."[1010] Rather than recommend its use to Anglo-American common lawyers, he undercuts it.

A weaker version of this doctrine is that, instead of shifting the burden of proof from the plaintiff to the defendant, it permits the jury to infer negligence from the occurrence of the injury itself, and then combine this inference with the other circumstantial evidence presented at trial. Prosser seems to have been persuaded by Edmond H. Bennet's 1871 law review article.[1011] Judge Bennet asks whether mere proof of a loss or injury creates a presumption of negligence in the defendant or makes out a *prima facie* case for the plaintiff. Bennet's answer is well-known: "The distinction between the burden of proof and *prima facie* evidence is the same in cases of negligence as in any other. The one is a fixed legal principle, the other a mere question of the weight of evidence. They differ as much as the words *onus* [Latin for burden[1012]] and *pondus* [Latin for weight[1013]] differ."[1014] In line with Bennet's reasoning, Prosser spots a trend in the evolving case law and announces that a "majority of decisions are heavily in favor" of the interpretation of *res ipsa loquitur* that it creates a weak "permissible inference only."[1015]

The doctrine of *res ipsa loquitur* —unlike strict liability—, while it protects consumers effectively, opens to manufacturers the possibility of presenting evidence which will rebut the presumption of negligence. Manufacturers must be made to take precautions and to exercise care and prudence

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1008 See Hilliard, 1 *The Law of Torts or Private Wrongs*, at 128.

1009 See Holmes, "Common Carriers and the Common Law," 13 *American Law Review* 611 (1879).:

1010 "*Res Ipsa Loquitur* in California," at 309.

1011 "The Burden of Proof in Cases of Negligence," 5 *American Law Review* 205.

1012 As in *onus probandi*, the burden of proof. See Shumaker, *The cyclopedic law dictionary*, at 723.

1013 *Idem*, at 780.

1014 *Idem*, at 355.

1015 *Idem*, at 355.

to protect consumer safety, rather than provide them social insurance where consumers could also take their own precautions.

When both manufacturers and consumers can take precautions, the tort of strict liability fails to be incentive-compatible as John Prather Brown demonstrated back in the early 1970s.[1016] Only when injured people cannot take precautions because the activities or products are extrahazardous will the tort of strict liability ensure that enterprises, which act at their peril, take into account the foreseeable injuries that they may cause —Prosser's inevitable losses—.

In addition to undercutting the doctrine of *res ipsa loquitur*, Prosser recommends to United States common lawyers the abandonment of effective defenses available against enterprise liability, where consumers could take their own precautions. Prosser should know better. He concedes that "[f]ew, if any products, of course, are absolutely safe. Any knife will cut, any hammer wielded unskillfully will mash a thumb, any food can cause indigestion."[1017] Consumers must also be made to take their own precautions and to depend on their own care and prudence.

At common law the defense of 'contributory negligence' bars recovery in tort where plaintiffs contribute —even in the slightest manner— to the injuries they suffer as a result of the negligence of defendants. This defense was established in the English case of *Butterfield v. Forrester*.[1018] There, a homeowner partially had obstructed the road by the side of his house setting down a pole to do repair work and a rider on horseback came at breakneck speed at half-light and road against it. Lord Ellenborough set forth that "[o]ne person being in fault will not dispense with another's using ordinary care for himself."[1019]

Prosser is opposed to the all-or-nothing result brought about by this defense because of its absolute bar to recovery. He believes that the hardship occasioned is "readily apparent."[1020] The doctrine "visits the entire loss caused by the fault of two parties on one of them alone."[1021] He condemns this doctrine that "[n]o one ever has succeeded in justifying […] as a policy,

1016 "Toward an Economic Theory of Liability," 2 *The Journal of Legal Studies* 324 (1973).
1017 "The Fall of the Citadel," at 807.
1018 103 *The English Reports* 926 (1809).
1019 *Idem*, at 927.
1020 *Handbook on the Law of Torts*, at 403.
1021 "Comparative Negligence," in *Selected Topics on the Law of Torts*, at 7.

and no one ever will."[1022] Rather than create incentives for plaintiffs to be "responsible for [their] own safety," he believes the defense "encourages negligence" by permitting defendants to escape the consequences of their actions.[1023] Prosser spots another trend, this time in legislative enactments, and announces to Anglo-American common lawyers that a "conservative prophet would have no difficulty" in envisaging the replacement of contributory negligence through the "adoption of damage apportionment acts" in the remaining states of the union "within the next few years."[1024]

Prosser is, likewise, opposed to the 'last clear chance rule' at common law, in spite of its mitigating the hardship of the all-or-nothing defense of contributory negligence that he deplores. This doctrine originated in the English case of *Davies v. Mann*.[1025] There, a plaintiff owner had left his ass helpless on the highway with a pair of its legs tied up. The defendant wagon driver, seeing the animal clearly, came at brisk pace and ran into it. Because of its origin, Prosser mocks it as the "jackass doctrine."[1026] Under this doctrine, contributorily negligent plaintiffs can recover damages if negligent defendants observe the peril and have a fresh opportunity to avoid the injuries. He believes that "it is no better policy to relieve the [contributorily] negligent plaintiff of all responsibility for his injury than it is to relieve the negligent defendant."[1027] Despite the apparent simplicity of the last clear chance rule, he criticizes it for being difficult to apply. He claims that it presents the courts with—"one of the worst tangles known to the law."[1028] Prosser exaggerates. Any determination of negligence involves knotty factual inquiries; the application of strict liability is straightforward by comparison. He dismisses the last clear chance rule that is "more a matter of dissatisfaction with the defense of contributory negligence than anything else."[1029] He suggests that this doctrine is nothing more than a "way station on the road to apportionment of damages."[1030]

Prosser recommends apportionment of damages to Anglo-American common lawyers. He believes they should abandon the long-established

1022 *Ibidem*.
1023 *Handbook on the Law of Torts*, at 403.
1024 "Comparative Negligence," at 2.
1025 152 *The English Reports* 588 (1842).
1026 "Comparative Negligence," at 11.
1027 *Idem*, at 15.
1028 *Idem*, at 13.
1029 *Handbook on the Law of Torts*, at 410.
1030 *Idem*, at 410.

common law defense of contributory negligence subject to the last clear chance rule. The adoption of damage apportionment in negligence cases —or 'comparative negligence' as it has come to be called in the United States, using the term at admiralty law—, originated in collision cases on the high seas. In *The Schooner Catharine v. Dickinson*,[1031] a vessel coming up leeward without a look-out had collided into the hull of a cargo ship sailing down windward, causing her to sink off the coast of New York. Justice Samuel Nelson adopted the well-settled rule at English admiralty of dividing the loss equally between colliding vessels, which he considered, "the most just and equitable, and as best tending to induce care and vigilance on both sides."[1032] Prosser agrees with Justice Nelson that the "simplest possible method of apportionment" is dividing the damages equally between mutually concurring negligent litigants. "Crude as it is," Prosser claims that it is a "closer approximation of substantial justice than a denial of all recovery" through contributory negligence.[1033]

Prosser discusses the practical difficulties encountered in apportioning damages according to fault. He acknowledges the doubts of the common law courts in order to quiet underlying ideological disagreements across the legal community over the "lack of any definite basis for it" and the "bias and general unreliability of juries."[1034] However, he maintains that the time is past "in the light of the long history, the many statutes, and the multitude of cases, to contend" that it "cannot be done at all."[1035]

The apportionment of damages that Prosser recommends runs counter to long-established values embedded in the common law tradition. Under comparative negligence today, juries are slap-dash in their approach to determining the respective fault of the parties. Few Anglo-American jurisdictions are left in which the plaintiff's contributory negligence acts as an absolute bar to the defendant's liability for negligence. The abandonment of effective defenses available against enterprise liability that Prosser recommends in hindsight could not have been more damaging for tort law in the United States.

In understanding the area of torts, law and economics scholars had in the past focused solely on the incentives people face and how these incen-

1031 58 *United States Reports* 170 (1855).
1032 *Idem*, at 177.
1033 "Comparative Negligence," at 17-18.
1034 *Handbook on the Law of Torts*, at 405.
1035 "Comparative Negligence," at 67.

tives shape their choices. They asked how torts create incentives for people to take precautions.[1036] However, people are already incentivized to act with care and prudence in their interaction with others out of social norms.[1037] Far from adopting the immoral or amoral attitude of Holmes's 'bad man',[1038] we believe humanity is made up of largely loving, responsible, contributing, and socially well-adjusted people. Yet even good, well-intentioned people cannot, as a matter of course, be expected to undertake cost-justified precautions on behalf of others when the comparative costs of taking precautions is private information. Where good, well-intentioned people engage in other-regarding conduct, they still have the problems of asymmetric information inherent in knowing what precautions to take on behalf of their fellow human beings in concrete cases.

In understanding the area of torts, law and economics scholars must in the future analyze questions of asymmetric information and incentive compatibility within a more unified framework. Through mechanism design theory, we will be able to recognize where negligence is to be preferred over strict liability.[1039] The tort of negligence is designed to overcome asymmetric information regarding the comparative costs of taking precautions between strangers in the decentralized social order. Findings of negligence in tort cases publicize what precautions are cost-justified in concrete cases. What mechanism design theory makes possible in the twentieth-first century is a more noble 'good man' view of negligence, in which —while avoiding the confusion of social norms with legal norms— we allow that subjective morality exists alongside objective legal standards of care which apply to concrete cases.

While a determination of negligence may involve protracted fact-finding at trial, the judicial application of strict liability is straightforward. From the standpoint of the incentive effects, strict liability should be preferred to fault-based liability. The tort of strict liability, after all, produces compa-

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1036 See Haddock and Christopher Curran, "An Economic Theory of Comparative Negligence," 14 *The Journal of Legal Studies* 49 (1985); Cooter and Ulen, "An Economic Case for Comparative Negligence," 61 *New York University Law Review* 1067 (1986).

1037 Where people engage in anti-social conduct that results in injuries to others in foreseeable ways, the intentional torts are designed to provide the incentives that will deter potential offenders.

1038 "The Path of the Law," at 459 and 461.

1039 Epstein describes the choice between strict liability and negligence as a debate without conclusion in the literature, see *Torts* 85, 89-107 (1999).

rable incentives with lower administrative costs.[1040] The tort of negligence with a defense of contributory negligence subject to the last clear chance rule requires three costly and difficult findings of fault. What justifies the social investment in protracted fact-finding is that the private information about cost-justified precautions is made public —'common knowledge' in game-theoretical terminology—[1041] through the fixing of legal standards of care applicable to concrete cases. The tort of negligence is not about compensating injured people for their losses, nor does it instantiate any form of corrective justice as some legal scholars still mistakenly believe.[1042] The all-or-nothing result which obtains under findings of contributory negligence or the last clear chance rule creates rents to incentivize litigants to invest in social welfare-enhancing fact-finding.

Prosser's mistaken views about the closed system of standardized torts with names, strict liability for extrahazardous activities, the rebuttable presumption of negligence under the doctrine of *res ipsa loquitur*, and the defense of contributory negligence subject to the last clear chance rule —though honestly held—, have led to the abandonment of indispensable checks to the expansion of tort liability in the United States. Today Anglo-American common lawyers see no bounds, as Priest makes clear, to the ever-increasing expansion of enterprise liability under tort.

IV. Institutions Which Support the Marketplace in the United States

Finally, we turn to the private-law institutions that make the marketplace possible. The truism that a market economy can, by and large, exist only within a framework of laws relating to property, contract and tort, in an institutional setting of law and order and the rule of law,[1043] misses a large swath of legal institutions. The functioning of the economic system requires that market participants overcome problems of information asymmetry and incentive compatibility. To this end, in addition to the common law of property, contracts and torts, law and economics scholars have yet to examine in detail

1040 See Epstein, *Torts*, at 95-96.

1041 See Robert J. Aumann, "Agreeing to Disagree," 4 *Annals of Statistics* 1236 (1976); Cédric Paternotte, "The Fragility of Common Knowledge," 82 *Erkenntnis* 451 (2017).

1042 *Per contra*, see generally Weinrib, *The Idea of Private Law*.

1043 Paul G. Mahoney, "The Common Law and Economic Growth: Hayek Might Be Right," 30 *The Journal of Legal Studies* 503, 504-05 (2001).

the dynamics of how —at equity— the duties owed to persons that arise from relationships (we call them 'relational obligations' in this book) prop up the market economy.

1. *Implied and Constructive Warranties Under Commercial Law*

Law and economics literature explains how implied and constructive warranties, which impose liability by default on market participants with private information, create incentives for them to reveal it when they contract around the default rules.[1044] Implied and constructive warranties support the marketplace where anyone can conduct private transactions, by overcoming asymmetric information between market participants with different (and imperfect) information.

While express warranties for undertakings as to the quality of goods sold stretch back to the fifteenth century in England,[1045] Jenny Bourne Wahl reveals that antebellum Southern chanceries in Anglo-American slave sales transactions rejected —in a homegrown development, we might add, that mirrored the *ius honorarium* of classical Roman law— the strict application of the doctrine of *caveat emptor* at English common law, and upheld implied and constructive warranties of merchantability and title and duties to disclose latent defects in merchandise under commercial law.[1046] "Slave law, in many ways, helped blaze the path of [Anglo-]American law generally," she insists.[1047] Wahl explains that "compared to other antebellum commodity markets, slave markets involved larger information gaps between buyers and sellers."[1048] As a result, "[a]ny slave sold at full price was presumed sound. If the buyer could not observe (and was not told of) a defect, but had

1044 Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 *Yale Law Journal* 87, 127 (1989).

1045 Milsom, "Sale of Goods in the Fifteenth Century," 77 *The Law Quarterly Review* 257, 278-82 (1961).

1046 *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* 29 (1998). See generally Andrew Fede, "Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor," 31 *The American Journal of Legal History* 322 (1987).

1047 "American Slavery and the Path of the Law," 20 *Social Science History* 281 (1996).

1048 "The Jurisprudence of American Slave Sales," 56 *Journal of Economic History* 143, 144 (1996).

paid the price of a sound slave and could prove the defect had existed at the time of the sale, the buyer was entitled to damages."[1049]

Northerners largely looked past the 'sound price doctrine' that had developed in Anglo-American slave law. Then-Justice of the New York Supreme Court Kent, for one, subscribes to the widespread notion during the first half of the nineteenth century that *caveat emptor* —Latin for 'let the buyer beware'— had been strictly applied at common law.[1050] In *Seixas v. Woods*, he claims: "If upon a sale there be neither a[n express] warranty nor deceit, the purchaser purchases at his peril. This seems to have been the ancient and the uniform language of the English law."[1051] In his hornbook he dismisses the doctrine that a "sound price warrants a sound commodity," which he claims to "be in a state of vibration"[1052] in the South. In later editions of his hornbook, he becomes more adamant: "On a general sale of merchandise for a sound price, there is no implied warranty that the article is fit for merchantable or manufacturing purposes."[1053] He goes on: "A warranty is not raised by a sound price alone, except under peculiar circumstances, as where there is a written description as to kind or quality, or goods of a certain description are contracted for, or perhaps in some other peculiar cases."[1054]

Nevertheless, by the turn of the twentieth century, Williston incorporated implied and constructive warranties as part of the law of sales through his authoritative interpretation of the Uniform Sales Act of 1906. Unlike other Northerners, he accepts that a "bargain to sell goods for the price of sound goods implies a representation that they are sound"[1055] and that implied and constructive warranties were "in force from an early date" in the South.[1056] Quoting the leading hornbook on the English law of sales by the

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1049 Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*, at 35.

1050 Walton Hale Hamilton reveals that, until the nineteenth century, the English courts had applied *caveat emptor* unevenly, see "The Ancient Maxim Caveat Emptor," 40 *Yale Law Journal* 1133, 1176-82 (1931).

1051 2 *Caines' Reports* 48, 54 (New York, 1804).

1052 2 *Commentaries on American law* 375 (1830).

1053 2 *Commentaries on American law* 477-78 note a (Fifth edition, 1844).

1054 *Ibidem*.

1055 *The law governing sales of goods at common law and under the Uniform Sales Act* 334-35 (1909).

1056 *Idem*, at 335.

Southern lawyer and Confederate statesman Judah Philip Benjamin,[1057] he argues that a particular purpose is some purpose "not necessarily distinct from a general purpose."[1058] Williston's interpretation effectively incorporates the implied warranty of merchantability within the scope of the implied warranty of fitness for a particular purpose recognized by the act.[1059] Furthermore, his interpretation of the act extends the applicability of these implied and constructive warranties from manufacturers to dealers "in goods of that description."[1060] Subsequently at the middle of the twentieth century, Llewellyn codified them in Articles 2 and 2A of the Uniform Commercial Code.[1061]

United States legal scholars are at a loss to explain the exact legal nature of the implied and constructive warranties that developed on their side of the Atlantic Ocean. During the first half of the twentieth century, Llewellyn uses the metaphor of the "bastard" —born of both contract and tort— to describe them.[1062] He even suggests that understanding implied and constructive warranties along the lines of contract principles may amount to "over-domination by an illegitimate father."[1063] During the second half of the twentieth century, Prosser continues to use this metaphor. Implied and constructive warranties are, in his words, a "freak hybrid born of the illicit intercourse of tort and contract."[1064] At least at the beginning of the twentieth century, Williston grounded his belief that implied and constructive warranties "sound in tort as well as in contract" by recalling their origin in the English tort of trespass on the case, while allowing that "to-day most persons instinctively think of a warranty as a contract or promise."[1065] United States legal scholars fail to consider that implied and constructive warranties —which lie between contracts and torts— arise from the relation-

1057 *A treatise on the law of sale of personal property: with references to the American decisions and to the French code and civil law* cliii (Fifth edition, 1906).

1058 *The law governing sales of goods at common law and under the Uniform Sales Act*, at 336.

1059 Uniform Sales Act of 1906 section 15(1).

1060 *The law governing sales of goods at common law and under the Uniform Sales Act*, at 269.

1061 In sales, the provisions on warranties in the Uniform Commercial Code are Sections 2-312 through 2-315, and on exclusion or modification of warranties, Section 2-316; in leases, Sections 2A-311 through 2A-313, and 2A-314.

1062 "On Warranty of Quality, and Society, II," 37 *Columbia Law Review* 341, 354 (1937).

1063 *Ibidem*.

1064 "The Fall of the Citadel (Strict Liability to the Consumer)," 50 *Minnesota Law Review* 791, 800 (1966).

1065 *The law governing sales of goods at common law and under the Uniform Sales Act*, at 246.

ships that form between market participants —much as do fiduciary duties, both of which we call relational obligations in this book—.

Our term 'relational obligations' is close to the unrelated expression 'relational contracts' to which legal sociologists refer in the law and society literature.[1066] Accordingly, a brief terminological clarification is in order at this juncture to avoid any confusion. By relational obligations we do not mean contracts, which since ancient Roman times have been understood to arise from the consent of the contractual parties.[1067] Instead, we refer to the extra-contractual obligations that arise from pre-existing or just-created relationships between people embedded in the marketplace, irrespective of whether the parties consent or not. These relationships can be voluntarily entered into, but they can also be incidental or accidental, that is, nonconsensual.

Nor should we allow our analysis to be confused with Sir Henry Sumner Maine's 'status'-speak. He famously observed that the progress of law from premodern to modern societies had been a "movement from status to contract."[1068] As Katharina Isabel Schmidt indicates, modern scholars have been tempted to speak of a "reverse movement from contract to status."[1069] Thus, revisionist law and economics scholars might be inclined to interpret the Uniform Commercial Code's definitions of 'consumers'[1070] and 'merchants'[1071] as a return to status in commercial law. However, as she makes clear,[1072] Maine referred to 'status' in a context of static social distinctions more fitted to premodern life, rather than the fluid associative relevancies of modern life, where people assemble, disperse, and come to-

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1066 See generally Ian R. Macneil, "The Many Futures of Contracts," 47 *Southern California Law Review* 691 (1974); *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980).

1067 Randy E. Barnett, "Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract," 78 *Virginia Law Review* 1175 (1992).

1068 *Ancient law, its connection with the early history of society and its relation to modern ideas* 99 (1917).

1069 "Henry Maine's Modern Law: From Status to Contract and Back?" 65 *American Journal of Comparative Law* 145, 151 (2017).

1070 Uniform Commercial Code section 1-201(b)(11) defines a 'consumer' as an "individual who enters into a transaction primarily for personal, family, or household purposes."

1071 Uniform Commercial Code section 2-104(1) defines a merchant as a "person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

1072 "Henry Maine's Modern Law: From Status to Contract and Back?" at 147.

gether again, through economic interactions in the marketplace. Instead, we analyze how duties owed to persons arise from pre-existing or just-created relationships between market participants. Through this analysis, we are able to explain why section 2-314(1) of the Uniform Commercial Code lays down the implied warranty of merchantability between a merchant and a consumer.[1073]

2. *Fiduciary Duties at Equity*

To this day, United States legal scholars are at a loss as well to describe the exact legal nature of 'fiduciary duties.' Given that these duties represent such a basic component of the Anglo-American system of private law, this level of incomprehension at the beginning of the twenty-first century is as inexplicable, as it is inexcusable. As one commentator puts it, fiduciary obligation is "one of the most elusive concepts in Anglo-American law."[1074] To borrow a civilian way of speaking, fiduciary duties represent a 'general theory of quasi-contractual liability.'[1075] Fiduciary duties arise not from the consent of the parties, as in a contract,[1076] but from the pre-existing or just-created relationships[1077] that form between people who must 'trust' —in its nontechnical sense— one another in the marketplace. In contrast, Roman law implements a closed system of 'typical nominate quasi contracts.' Like fiduciary duties, *negotiorum gestio*, *tutela uel curæ gestio*, *communio incidens*, and *indebitum solutum* arise from the relationships that emerge between

[1073] Michelsen Hillinger rejects public policy grounds as the explanation for section 2-314(1) of the Uniform Commercial Code because "imposition of responsibility on all sellers would not undermine any of the policies." See "The Merchant of Section 2-314: Who Needs Him?" 34 *Hastings Law Journal* 747, 800 (1983).

[1074] Deborah A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation," 1988 *Duke Law Journal* 879 (1988).

[1075] For sake of comparison, as we discuss *supra* in Section III.2.B modern civil law has developed a 'general theory of tort liability' from abstract statements of the obligation to repair harm caused to others.

[1076] Easterbrook and Daniel R. Fischel mistakenly consider fiduciary duties as implied contract terms, "Contract and Fiduciary Duty," 36:1 *Journal of Law and Economics* 25, 427 (1993). To the contrary, Tamar Frankel adverts that the core of fiduciary rights is extracontractual, "Fiduciary Duties as Default Rules," 74 *Oregon Law Review* 1209, 1211 (1995).

[1077] Again, these relationships are to be distinguished from 'relational contracts', which arise from the consent of the parties. See Schwartz, "Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies," 21 *The Journal of Legal Studies* 271 (1992).

people embedded in a decentralized social order.[1078] Whatever form these quasi-contractual (or relational) obligations —which lie between contracts and delicts— may take, the mechanism design is the same.

To explain the need for 'trust' within these relationships —in its non-technical sense—, D. Gordon Smith emphasizes the exercise by fiduciaries of "discretion over a critical resource belonging to another."[1079] Without adding anything to Smith's insights, Paul B. Miller prefers the language of "discretionary power over the significant practical interests of another."[1080] Smith and Jordan C. Lee add that this exercise must occur "in the face of incomplete contracts."[1081] Almost thirty years ago, Hart reminded law and economics scholars that "[i]t is only possible to make sense of fiduciary duty in a world where the initial contract is incomplete for some reason."[1082] Indeed, fiduciary duties are the homegrown solution that English and Anglo-American equity came up with to the problem of completing incomplete contracts —much as classical Roman law developed the concept of good faith—. However, fiduciary duties go beyond the obligation to act with good faith and fair dealing transplanted into United States law, in the twin strictures imposed on a fiduciary to refrain from competing with the beneficiary *and* to act in the sole interests of the beneficiary.[1083]

The standardized duties owed to persons that arise from these relationships generally include —at equity— both a duty of loyalty and a duty of care, though courts have occasionally fashioned others. As DeMott asserts, the duty of care is "not distinctively fiduciary."[1084] It is the same duty, when it arises, that one has at common law under tort to act as a reasonable person. It imposes the same standard of care that the civilian lawyer expects a *bon père de famille* —property owner in civilian legal terminology— to bring to the management of his own affairs (discussed *supra* in Section III.)

1078 See *supra* our discussion of Roman quasi-contractual obligations in Section II.2.C of Chapter One.

1079 "The Critical Resource Theory of Fiduciary Duty," 55 *Vanderbilt Law Review* 1399, 1402 (2002).

1080 "A Theory of Fiduciary Liability," 56 *McGill Law Journal* 235, 262 (2011).

1081 "Fiduciary Discretion," 75 *Ohio State Law Journal* 609, 616 (2014).

1082 "An Economist's View of Fiduciary Duty," 43 *University of Toronto Law Journal* 299, 301 (1993).

1083 See Mariana Pargendler, "Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered," 82 *Tulane Law Review* 1315, 1324 (2008).

1084 "Beyond Metaphor: An Analysis of Fiduciary Obligation," at 915.

What makes fiduciary duties unique in private law, if not exceptional, is how United States courts exercise their equitable powers when they adjudicate a breach of the duty of loyalty. The duty of loyalty, which is distinctively fiduciary, prohibits self-dealing. In fiduciary relationships "thought of self [i]s to be renounced, however hard the abnegation," as Judge Cardozo asserts.[1085] Where plaintiffs provide evidence of self-dealing in court, the burden of proof shifts to the fiduciary to establish the fairness of the transaction.[1086] This shift in the burden of proof at equity provides effective protection to the beneficiary (see our discussion *supra* in Section III.2.B of a similar shift in the burden of proof in common law torts through the mechanism design of *res ipsa loquitur*.) Otherwise, the only remedy of the beneficiary would be for the breach of a contract, to which she is a non-party. Instead, the *onus* is placed squarely on the defendant, who must prove she acted beyond reproach as a fiduciary. She must establish that she acted not only honestly, but with a "punctilio of an honor the most sensitive" in Judge Cardozo's well-known formulation.[1087] As Melanie B. Leslie points up, fiduciary duties become more effective at equity "when they function both as legal rules and moral norms"[1088] in the United States.

Anglo-American equity recognizes fiduciary duties in a *numerus clausus* or a closed system of standardized relationships, which include those between an executor/heir, guardian/ward, agent/principal, trustee/beneficiary, director/shareholder, corporate officer/shareholder, general partner/general partner, general partner/limited partner, attorney/client, doctor/patient, psychiatrist/patient, psychotherapist/patient, mental health counselor/patient, cleric/parishioner, investment advisor/client, tenant in common/tenant in common, mortgagee/mortgagor, where 'trust' is imposed —in its nontechnical sense— on one person for the benefit of another. Conversely, those between a friend/friend, employee/employer and broker-dealer/client do not seem to fit into the 'closed number' of relationships on which United States courts or legislatures have been willing to impose fiduciary duties.

Additionally, United States courts have found fiduciary duties to arise between a majority shareholder/minority shareholder in corporations.

1085 *Meinhard v. Salmon*, 164 *North Eastern Reporter* 545, 548 (N.Y. 1928).

1086 See Cooter and Bradley J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences," 66 *The New York University Law Review* 1045, 1048 (1991).

1087 *Meinhard v. Salmon*, at 546.

1088 "Trusting Trustees: Fiduciary Duties and the Limits of Default Rules," 94 *Georgetown Law Journal* 67, 70 (2005).

Here the flexibility of Anglo-American equity offers a decided advantage over civilian private law in protecting minority stakeholders in business organizations. This advantage explains the differences in efficiency uncovered between private legal institutions that trace their origins to the English common law tradition against those that originate from civil law.[1089] Relational obligations, in addition to contractual ones, underlie agency and partnership,[1090] and undergird the corporation, in the United States.[1091] A firm is more than a *nexus* of contracts, as Michael C. Jensen and William H. Meckling famously asserted.[1092] It comprises a *nexus* of contracts and standardized relationships and the duties owed to persons that arise from both of these.

3. *Equitable Estoppel*

Another equitable institution that supports the decentralized marketplace is estoppel.[1093] The equitable doctrine of estoppel closely follows the *exceptio doli* of classical Roman law. This procedural exception was available in that legal tradition when the opposite party in a litigation had acted with *dolus malus*.[1094] The Roman *prætores* introduced it, under the *ius honorarium*, so that no one could profit from his own fraud by means of the civil law against the premises of natural equity, "*ne cui dolus suus per occasionem iuris*

1089 See Florencio López de Silanes *et alii*, "The Economic Consequences of Legal Origins," 46 *Journal of Economic Literature* 285 (2008); "The Quality of Government," 15 *The Journal of Law, Economics & Organization* 222 (1999); "Law and Finance," 106 *The Journal of Political Economy* 1113 (1998).

1090 Apparent agency and partnership by estoppel exist regardless of the agreement of parties.

1091 The 1990s saw the rise in the United States of a hybrid between the partnership and the corporation—the limited liability company. Larry E. Ribstein, "The Emergence of the Limited Liability Company," 51 *The Business Lawyer* 1 (1995). The limited liability company is a transplant of the Latin American *sociedad de responsabilidad limitada* into the United States law of business organizations. See generally Susan Pace Hamill, "The Origins Behind the Limited Liability Company," 59 *Ohio State Law Journal* 1459 (1998).

1092 "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," 3 *Journal of Financial Economics* 305, 310 (1976).

1093 Rastell, *Les termes de la ley*, at 206-07.

1094 The *dolus malus* could be less egregious than trickery and deceit. It was enough that the other party behave in an un-Roman-like manner which departed from the ethical premises and precepts of the *mores maiorum*. See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, at 668-69.

ciuilis contra naturalem æquitatem prosit."[1095] At English and Anglo-American equity, likewise, courts may estop a wrongdoer from alleging or denying a fact, or asserting a common law right or defense, which contradicts a former position the party has taken in a pleading, testimony, or *in pais* —Law French for in the country,[1096] that is, in an out-of-court statement—. This equitable affirmative defense follows from the mechanism design that no one will be permitted to profit from his own wrongdoing in a court of justice.[1097] Estoppel is an effective remedy to support the marketplace because of the wide discretion that courts are given to implement it under their equitable powers. Courts make fact-specific determinations whether to estop a wrongdoer based on the equities of the parties. In other words, the *exceptio doli* has survived as an equitable institution in England and the United States where civilian jurisdictions have in legal practice lost this effective procedural safeguard.

4. *Equitable Trusts*

The civilian lawyer is hard-pressed to understand the English and Anglo-American trust.[1098] Unlike what has been transplanted to countless civilian jurisdictions,[1099] English and Anglo-American trusts are more than mere contracts, but comprise "estates vested in persons upon particular trusts and confidences."[1100] When a trustee receives the legal ownership of an estate from the settlor, she certainly enters into a contract to use the property according to the instructions given to her at common law. However, at equity fiduciary relationships are created with *cestuis que trustent*, who additionally become equitable owners of the estate. Accordingly, the English and Anglo-American trust is a more variegated institution than first appearances might suggest. It is endowed with many features, born of contract, segregated legal and equitable ownership and fiduciary duties, all working as one.

1095 See Digest of Justinian 44.4.1.1 (Paulus, Ad edictum, 71).

1096 See Stimson, *A concise law dictionary of words, phrases, and maxims*, at 175.

1097 *Riggs v. Palmer*, 115 *New York Reports* 506, 511 (1889).

1098 Henri Batiffol, "The Trust Problem as Seen by a French Lawyer," 33 *Journal of Comparative Legislation and International Law* 18, 19 (1951).

1099 Beginning in Panama, with Law No. 9 of January 6, 1925; see Ricardo Joaquín Alfaro, *El fideicomiso: estudio sobre la necesidad y conveniencia de introducir en la legislación de los pueblos latinos una institución civil nueva, semejante al trust del derecho inglés* 8 (1920).

1100 Story, 1 *Commentaries on Equity Jurisprudence: as administered in England and America* 28 (1836).

Yet the confusion of trusts with mere contracts fails to be exclusively a civilian corruption. Maitland believed that, had the law of contract taken its modern form back in the fourteenth century, the trust would already be assimilated into this area of law. Confronted with the trust, the common law courts would have been "compelled to say, 'Yes, here is an agreement; therefore it is a legally enforceable contract.'"[1101] John H. Langbein spells out Maitland's reasoning with these words: "The common law of contract was too primitive [back in the fourteenth century] to do the job."[1102]

Despite Langbein's insistence to the contrary, the three-cornered relation of settlor, trustee and *cestui que trust* can only with difficulty be explained in modern terms as a contract at common law for the benefit of a third party. The English and Anglo-American trust is more than a "type of standardized contract"[1103] as Maitland or Langbein believe. To balance out this view, Henry Hansmann and Ugo Mattei reclaim the "property-like" aspects of the trust, which they argue serves to partition off assets to be pledged separately among creditors as security.[1104] As Smith and Merrill discern, the law of trusts combines the *in rem* benefits of the law of property with the *in personam* flexibility of the law of contract.[1105] To this characterization, we would add the 'trust'-enhancing mechanism design of fiduciary duties (discussed *supra* in Section IV.2.) The decentralized marketplace where anyone can conduct private transactions requires more than the due regard for property rights and the due performance of contracts under the rule of law. A *numerus clausus* of relational obligations must also be respected.

5. *Equity in Delaware*

Delaware is the Anglo-American union's second smallest state, and has its seventh smallest population. By William Lucius Cary's reckoning, it is a "pygmy among the 50 states."[1106] Yet a disproportionate number of United

1101 *Equity: A Course of Lectures* 28 (1909).

1102 "The Contractarian Basis of the Law of Trusts," 105 *Yale Law Journal* 625, 634 (1995).

1103 *Idem*, at 660.

1104 "The Functions of Trust Law: A Comparative Legal and Economic Analysis," 73 *The New York University Law Review* 434, 469-72 (1998).

1105 "The Property/Contract Interface," at 843-49.

1106 "Federalism and Corporate Law: Reflections upon Delaware," 83 *Yale Law Journal* 663, 701 (1974).

States companies incorporate/reincorporate there. By the English choice-of-law 'internal affairs' rule, the law of the incorporating jurisdiction (Delaware corporate law) applies to the governance of countless United States companies, wherever their corporate headquarters or operations might be located.[1107] As a result, Delaware corporate law exercises an outsize influence on the Anglo-American law of business organizations.

The dominance of Delaware corporate law in the United States is a matter of endless theoretical debate. The debate pits race-to-the-bottom theorists, who believe that state legislatures pander to the interests of managers responsible for incorporation/reincorporation decisions,[1108] against race-to-the-top theorists, who believe that state legislatures seek to adopt rules for corporate governance which maximize the value of companies to shareholders.[1109] Other commentators are more skeptical about the Tiebout-type competition that these theorists allege occurs between state jurisdictions for corporate charters and the revenues derived from them through corporate franchise taxes.[1110]

In this theoretical debate, the empirical claims stand out. At the beginning of the new century, Robert M. Daines found that incorporation in Delaware added approximately five percent to the value of United States companies.[1111] In a later empirical study, Guhan Subramanian adjusted Daines' figures to three percent in 1991-93, and two percent in 1994-96, with the "Delaware effect" disappearing after those periods.[1112]

On an opposite note, Carney and George B. Shepherd believe Delaware retains its dominance despite its corporate law being inferior.[1113] Their

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1107 William J. Carney, "The Political Economy of Competition for Corporate Charters," 26 *The Journal of Legal Studies* 303, 312-18 (1997).

1108 "Federalism and Corporate Law: Reflections upon Delaware," at 666.

1109 Ralph K. Winter Jr., "State Law, Shareholder Protection, and the Theory of the Corporation," 6 *The Journal of Legal Studies* 251 (1977); *Government and the Corporation* (1978); "Private Goals and Competition Among State Legal Systems," 6 *Harvard Journal of Law and Public Policy* 127, 128-29 (1982).

1110 Lucian Bebchuk *et alii*, "Does the Evidence Favor State Competition in Corporate Law?," 90 *California Law Review* 1775, 1778 (2002); Marcel Kahan and Ehud Kamar, "The Myth of State Competition in Corporate Law," 55 *Stanford Law Review* 679, 684-85 (2002).

1111 "Does Delaware Law Improve Firm Value?" 62 *Journal of Financial Economics* 525, 529 (2001).

1112 "The Disappearing Delaware Effect," 20 *The Journal of Law, Economics, & Organization* 32, 41-43 (2004).

1113 "Mystery of Delaware Law's Continuing Success," 2009 *University of Illinois Law Review* 1 (2009).

qualitative (not quantitative) assessment of what constitutes superior corporate law from a transaction-cost perspective falls back on the conventional truism of well-specified property rules.[1114] They make short shrift of the goals of protecting minority shareholders[1115] or overcoming agency costs.[1116] They argue that "all modern [Anglo-]American corporate laws" achieve these goals "through judicial scrutiny of directors' conflicting interest transactions, seizures of business opportunities, and appraisal rights for freeze-out mergers."[1117] In their estimation, Delaware corporate law is outclassed by other modern Anglo-American jurisdictions.

Among modern Anglo-American jurisdictions, most scholars agree that Delaware corporate law is in a class by itself. Why? The "leading edge of corporate and finance capitalism—futures trading in Illinois, general incorporation in New Jersey" originated in the nineteenth century precisely in those states that "maintained separate courts of chancery and left common law procedures relatively unaltered until the mid-twentieth century."[1118] At the beginning of the twenty-first century, Delaware persists in maintaining "equity's distinct operation, with separate institutions, personnel and principles, all self-consciously extraordinary."[1119] What explains the dominance of Delaware corporate law in the United States turns out to be the distinctiveness of its equitable institutions.

The claim that Delaware's equitable institutions are distinct is not to suggest that Delaware chancellors get everything right. Delaware chancellors are as prone to error as everyone else in the United States legal establishment. As we argue in this book, at the beginning of the twenty-first century legal professionals generally gloss over the exact contours of Anglo-American legal institutions. Their imprecision and shortsightedness is readily evident in the Delaware supreme court's adoption, between 1993 and 2006, of a duty of good faith, alongside the duty of loyalty and the

1114 *Idem*, at 6, 8-9. They believe that clearly-set out default rules are needed in relational contracts rather than in corporations, and nod to Larry E. Ribstein, "The Uncorporate Solution to the Corporate Mystery," 2009 *University of Illinois Law Review* 131 (2009).

1115 See López de Silanes *et alii*, "Investor Protection and Corporate Valuation," 57 *Journal of Finance* 1147 (2002); "Legal Determinants of External Finance," 52 *Journal of Finance* 1131 (1997).

1116 See Henry Hansmann and Reinier H. Kraakman, "The End of History for Corporate Law," 89 *Georgetown Law Journal* 439, 443-49 (2001); Berle and Means, *The Modern Corporation and Private Property* (1932).

1117 "Mystery of Delaware Law's Continuing Success," at 5 note 20.

1118 Funk, "The Union of Law and Equity: The United States, 1800–1938," at 68-69.

1119 Bray, "Equity: Notes on the American Reception," at 33.

duty of care, in order to form a new triad of fiduciary duties.[1120] This break with the past lumps together the Roman lawyers' intrinsically classical solution to the age-old problem of completing incomplete contracts, with the English and Anglo-American chancellors' traditional answer to the self-same problem: the bifurcated understanding of the law of fiduciary duties. The duty of good faith and fair dealing —a transplanted legal concept alien to English and Anglo-American legal tradition— comes already subsumed under the indigenous concept of the duty of loyalty. If a director acts with bad faith towards the corporation, that she acted disloyally is a no-brainer. By 2003, the Delaware court of Chancery adverted: "It does no service to our law's clarity to continue to separate the duty of loyalty from its own essence; nor does the recognition that good faith is essential to loyalty demean or subordinate that essential requirement."[1121]

V. Civil Procedure Under English and Anglo-American Common Law and Equity

The common law jury trial has carried into the modern world the ancient procedures of private-law adjudication that existed under the formally-dead Roman Empire.[1122] Despite the best efforts of English and Anglo-American legal historians to argue that the jury trial is homegrown, civilian lawyers will clearly recognize its contours if they are at all familiar with classical Roman law.

1. *Jury Trial Taken From Roman Law*

The procedures that govern the common law jury trial are based on private-law adjudication as it existed under classical Roman law.[1123] If we ever

[1120] *Cede & Co. v. Technicolor, Inc.*, 634 *Atlantic Reporter, Second Series* 345, 361 (Delaware, 1993); *Stone v. Ritter*, 911 *Atlantic Reporter, Second Series* 362, 370 (Del. 2006).

[1121] *Guttman v. Jen-Hsun Huang*, 823 *Atlantic Reporter, Second Series* 492, 506 note 34 (Del. Ch. 2003).

[1122] The close connection between the common law jury trial and the Roman classical procedure has been obscured because a modern jury contains multiple lay members while the ancient *iudex* acts as a sole lay juror.

[1123] The *iudex* was, from the first, a sole individual charged to act as trier of fact because the formulary system arose in Rome's dynamic second-century B.C. commercial society, where the parties themselves produced their own evidence.

want to understand the common law jury trial,[1124] it is high time we rehabilitate the perspective of English legal historian William Francis Finlason. He had advanced the uncontroversial thesis that the origins of English — and later Anglo-American— law can be traced to the application of vulgar Roman law in Britannia after the withdrawal of the Roman legions.[1125]

Unfortunately, at the end of the nineteenth century, Pollock and Maitland took it upon themselves to deride this thesis and personally attack Finlason (without mentioning his name.) "It has been maintained" they say ("with great ingenuity," they add, as part of their thinly veiled attack on him,) "that Roman institutions persisted after Britain was abandoned by the Roman power, and survived the Teutonic invasions in such force as to contribute in material quantity to the formation of our laws."[1126] The image of Roman private-law institutions surviving the onslaught of the Germanic invaders was meant to elicit the derision of the reader. Finlason had engaged in "a mere enumeration of coincidences" according to them, as there was "no real evidence" to support his claims. Moreover, they belittled his uncontroversial sources. Finlason had quoted from the *Mirror of Justices*, a late thirteenth century textbook in Law French and Latin, which criticizes judges and the legal system.[1127] They declared this textbook to be the "deliberate" fable of "later apocryphal" authors. In a tone reminiscent of today's complaints about the spread of 'alternate truths,' they sustained that this textbook amounted to "not even false history."[1128] They countered that English laws "ha[d] been formed in the main from a stock of Teutonic customs."[1129] In the earliest Anglo-Saxon documents, there was "no trace of the laws and jurisprudence of imperial Rome, as distinct from the pre-

1124 The common law jury is a collective body because of the path dependence of its origins in England's static twelfth- and thirteenth-century agricultural society, where neighbors with access to local knowledge were, at least initially, called on to act as suppliers of fact, rather like witnesses. On the transformation of the jury "from supplier of fact to trier of fact," see Chris William Sanchirico, "Games, Information, and Evidence Production: With Application to English Legal History," 2 *American Law and Economics Review* 342, 358-374 (2000).

1125 "An introductory Dissertation on the influence of the Roman law in the formation of our own," in *Reeves' History of the English law: from the time of the Romans, to the end of the reign of Elizabeth* i-cxxviii (1869).

1126 *The history of English law before the time of Edward I*, at xli.

1127 Andrew Horn, *Mirroir des iustices uel Speculum Iusticiariorum* (1642).

1128 *The history of English law before the time of Edward I*, at 32.

1129 *Idem*, at xl.

cepts and traditions of the Roman Church." They added that "[w]hatever is Roman in them is ecclesiastical."

Later legal historians got the message. In the twentieth century, Theodore Frank Thomas Plucknett expresses: "The old legend that a complete system of Roman law continued after the fall of the empire, survived the Anglo-Saxon invasions, and finally became the actual basis of the common law may be dismissed. It was never supported by evidence of any sort and is no longer held by any competent historian. Indeed, the search for Romanism in Anglo-Saxon sources has produced little beyond those obvious dispositions which the church secured for her protection"[1130] (at least Plucknett cites Finlason by name.)[1131]

Finlason's thesis is far from controversial. Nor is it un-English. Saying that English law began with vulgar Roman law applied in the Roman province of Britannia only states the obvious.[1132] For good measure, Finlason had argued at length that the English jury trial followed the procedure of classical Roman civil trial "with which, in all essential respects, it was identical."[1133] Apparently, saying that the English jury trial was a Roman development offended Pollock and Maitland's English sensibilities. As a result, their chauvinism distorted our view of English legal history.

In the middle of twentieth century, the German scholar Fritz Pringsheim advanced a similar thesis. He was a technically proficient scholar —more so than Finlason—, and politically savvy enough to avoid offending the English sensibilities of the 'Eminent Victorians.' Pringsheim only proposes that classical Roman law has "an inner relationship" with English common law because the "national attributes which enabled [the] English and Romans to govern the world are the same."[1134] At the time this obsequiousness may actually have been necessary.[1135]

1130 "The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey," 3 *The University of Toronto Law Journal* 1, 26 (1939).

1131 *Idem*, at note 5.

1132 That *seisin* is an outgrowth of the confusion of property and possession under vulgar Roman law —Levy's thesis alluded in Section II.1— becomes clear in light of Finlason's thesis. See *West Roman Vulgar Law*, at 31.

1133 "An introductory Dissertation on the influence of the Roman law in the formation of our own," at xx.

1134 "The Inner Relationship between English and Roman Law," 5 *The Cambridge Law Journal* 347 (1935).

1135 On a geopolitical level, Patrick Karl O'Brien begs to differ. The United States, not the British Empire, represents "the sole example of geopolitical hegemony since the fall of Rome." See "The Pax Britannica and American Hegemony: Precedent, Antecedent or Just

We propose, like Finlason, that what brings both legal systems together is the jury trial[1136] and single-issue pleading.[1137] Both trial systems segregate responsibility for decision-making between questions of law and questions of fact. At Anglo-American common law, the judge serves as the trier of law, the jury is the trier of fact.[1138] Under classical Roman procedure, the *prætor* serves as the trier of law, the *iudex* is the trier of fact.

The timing of the trials may be different. While judge and jury sit together in a present-day common law trial, classical Roman trial procedure was divided between an *in iure* stage before the magistrate and an *apud iudicem* stage before the *iudex*.[1139] Still, the mechanism design at work is the same. Historically, common law trails were divided into two stages as well. By the Statute of Westminster II,[1140] the initial pleadings were held before the judges at Westminster and, pursuant to a writ of *nisi prius*,[1141] the jury trial took place in the county of origin of a dispute.

Moreover, under both trial systems, single-issue pleading simplifies the process of fact-finding for lay juries, composed of common citizens who are untrained in the law. The *iudex* is a lay juror, not a judge or magistrate.[1142] Common law jury instructions take the same form, and perform the same function, as Roman *formulæ*. As the trier of law, the presiding judge or *prætor* assisted by clerks with legal training gives an instruction to the jury or *iudex* explaining each issue that they will be required to decide, as the trier of fact.

Another History?," in O'Brien and Armand Clesse (editors), *Two Hegemonies: Britain 1846-1914 and the United States 1941-2001* 27 (2002).

1136 In the United States the jury trial is constitutionally mandated. United States Constitution amendment VI; United States Constitution amendment VII.

1137 During the mid-nineteenth and early twentieth centuries, common law pleading was summarily abandoned in the United States. See Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 *University of Pennsylvania Law Review* 909 (1987).

1138 In the English courts of Chancery and Admiralty, chancellors and judges are the sole triers of law and fact, like judges in modern civil law courts, which take after Canon law procedure.

1139 See Ernest Metzger, *Litigation in Roman Law* 125 (2005).

1140 *Acts of the Parliament of England during the reign of Edward I* chapter 30 (1285).

1141 Stimson, *A concise law dictionary of words, phrases, and maxims*, at 258.

1142 We might add that both the jury at Anglo-American common law and the *iudex* under classical Roman procedure only award monetary damages, which simplifies the process of fact-finding.

In assessing the distinctive features of single-issue pleading, Epstein points to the distinction between questions of law and questions of fact.[1143] He claims that a conclusion of law "is impermissible in a system of presumptions."[1144] Epstein's thesis is that in practical reasoning "there is always room to doubt whether the conclusion follows from the premise."[1145] In single-issue pleading, as it developed in the English courts between the thirteenth and sixteenth centuries, the parties would plead back and forth until one side either 'traversed' —that is, one side denied the facts alleged by the other—, resulting in a factual issue, or 'demurred' —one side accepted the factual allegations of the other, but challenged the legal sufficiency of the claim—, resulting in a legal issue.[1146] At the stage of 'joinder of issue,' common law pleading left a single issue to be resolved at trial.

As Epstein points out in later work, single-issue pleading had developed among the Romans.[1147] Roman *prætores* "allowed the parties' back and forth to continue so long as either party wanted to add some new matter to the case that incorporated all allegations from the proceeding stages of the complaint."[1148] Though Epstein does not go into the procedural details, we might add that *intentiones*,[1149] *exceptiones*,[1150] *replicationes*,[1151] *duplicationes*,[1152] *triplicationes*,[1153] and so on,[1154] found their way into Roman *formulæ*. The "system of indefinite pleas"[1155] likewise ended at the stage of '*litis contestatio*' before the magistrate.

1143 See "Pleadings and Presumptions," 40 *University of Chicago Law Review* 556, 564 (1972).

1144 *Idem*, at 565.

1145 *Idem*, at 558.

1146 Or the party facing a claim could 'confess and avoid' —one side accepted the facts and arguments advanced so far, but introduced new factual allegations or new legal arguments of its own—, and the staged pleading continued as the parties narrowed their dispute to single factual or legal issues.

1147 See generally "One Step at a Time in Roman Law: How Roman Pleading Rules Shape the Substantive Structure of Private Law," in Giuseppe Dari-Mattiacci and Dennis P. Kehoe (editors), *Roman Law and Economics: Exchange, Ownership, and Disputes* 301 (2020).

1148 *Idem*, at 304.

1149 Institutes of Gaius 4.41.

1150 Institutes of Gaius 4.116-125.

1151 Institutes of Gaius 4.126, 4.126a.

1152 Institutes of Gaius 4.127.

1153 Institutes of Gaius 4.128.

1154 Institutes of Gaius 4.129.

1155 Epstein, "Pleadings and Presumptions," at 568.

2. *Bifurcated Structure of Common Law and Equity*

In England, two separate systems of courts evolved. The common law courts sat at Westminster Hall and included the courts of Common Pleas, Exchequer and King's Bench. The centralized jurisdiction of these permanent tribunals was supplemented by the *nisi prius* circuit system, which consisted in assizes of itinerant judges sent throughout the realm twice a year.[1156] The court of Chancery also sat at Westminster Hall, but exercised a separate jurisdiction. As the chancellor represented the king's conscience, he was duty-bound to mitigate the severity of the sentences that the common law courts passed down.[1157] As a result, common law and equity developed in England as two distinct bodies of law.

What English legal historians seem to underappreciate (almost ignore) is that this bifurcated jurisdiction was, again, taken from classical Roman law. In Ancient Rome, the *prætores* had exercised two separate jurisdictions. They brought to bear on private litigation a quiritary jurisdiction around the preordained *actiones directæ* published every year in the edict, by which they strictly applied the civil law. As this body of law was rigid and ill-adapted to fit new situations which may arise, the *prætores* exercised a more flexible bonitary jurisdiction, with *actiones utiles* based on ideas of fairness and justice, which likewise mitigated the harsher aspects of the civil law. As a result, both *ius ciuile* and *ius honorarium* developed in Ancient Rome as two distinct bodies of law, despite the *prætores* having failed, as Willem Zwalve and Egbert Koops point out, "under normal, Republican, circumstances [to] have a court of [their] own."[1158]

Both the English and Roman legal systems combined the exercise of two distinct jurisdictions.[1159] Referring to the growth of the separate jurisdiction of the chancellor in England, Justice Story reflects on its similarity to the Roman experience: "[I]t can not escape observation, how naturally it grew

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1156 The judges were drawn from the courts of King's Bench and Common Pleas, supplemented by Common Pleas' serjeants-at-law and the Chief Baron of the Exchequer.

1157 Concern for the monarch's conscience was a mainstay of European legal thought. On the interrelated theological concepts of conscience and synderesis and their relation to law, see del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI*, at 107.

1158 "The Equity Phenomenon," in Egbert Koops and Willem Zwalve (editors), *Law & Equity: Approaches in Roman Law and Common Law* 3, 5 (2013).

1159 See Buckland, "Praetor and Chancellor," 13 *Tulane Law Review* 163 (1939).

up, in the same manner, and under the same circumstances, as the equitable jurisdiction of the [*p*]*rætor* at Rome."[1160]

A. *Equity Follows the Law*

Seen from the vantage point of the civilian-trained lawyer, equity is a clear and commonplace, even ordinary, legal concept. Hence, equitable jurisdiction is far easier to understand and to explain to a civil lawyer than most common lawyers recognize or acknowledge. Far from equity being mysterious, the concept of a corrective to general laws attending to the specific circumstances of the case has been part of western legal thought at least since Aristotle.[1161] What is more, the Aristotelian understanding of *ἐπιείκεια* prevailed early on at the English court of Chancery. In 1615, Chancellor Ellesmere observed: "The [c]ause why there is a Chancery is, for that [m]ens [a]ctions are so divers and infinite. That it is impossible to make any general [l]aw which may aptly meet with every particular [a]ct, and not fail in some [c]ircumstances."[1162]

That a bifurcated form of legal reasoning arose in both legal systems clarifies why English chancellors and Roman *prætores* could escape the excessive rigors of general legal doctrines and adjust private law to fit specific cases in order to support market-making activity. Equity purports to follow common law rules in its issuance of new and distinct remedies —such as injunctive relief, constructive trusts and specific performance—. Moreover, equity purports to withhold relief altogether if an adequate remedy could be had at common law. Rather than contend that equity follows the common law as is commonly said, we might suggest that equitable discretion presides over the common law process. Equitable remedies are left to the discretion of English and Anglo-American courts in the exercise of their equitable powers. Courts make fact-specific determinations whether to grant new and distinct remedies based on the equities of the parties. From the beginning, in view of that, the court of Chancery dispensed justice by royal prerogative in England when relief was deemed to be inadequate or inequitable in the courts of the common law.

1160 *Commentaries on Equity Jurisprudence: as administered in England and America*, at 36.

1161 See *Nicomachean Ethics*, V.x sec. 1137a–1138a (340 B.C.)

1162 The Earl of Oxford's Case, 21 English Reports 485, 486 (Chancery 1615).

B. *Law Secreted at the Interstices of Procedure*

If substantive law is "gradually secreted in the interstices of procedure," as Maine suggested,[1163] then we should keep in mind a further similarity. Both systems of private law were extruded through a closed system of standardized forms of action with names such that the "substantive legal framework emerge[d] through the gradual application of the procedural system."[1164] Epstein's thesis is that the thrusting and parrying of factual and legal allegations through indefinite pleas both at Westminster Hall and the *Forum Romanum*[1165] permitted the parties to narrow their disputes to single factual or legal issues, which could be fitted into discrete causes of action.[1166] Accordingly, both Anglo-American common law and equity and Roman *ius ciuile* and *ius honorarium* grew out of a piecemeal accretion of case law, as we will see in Chapter Three *infra*.

VI. One Last Word About English and Anglo-American Common Law and Equity

Seen against the background of its underappreciated sources, the system of English and Anglo-American common law and equity is, in a word, common and unexceptional—a system of private law not alien to the other European legal families. That is not to disparage it, but, instead, to point out its ability to synthesize the elements of private law from European sources into a framework relevant to the construction of a new nation. United States legal scholars underappreciate that their legal tradition, far from being one-of-a-kind, is simply a different mixture of the same elements that are intrinsic to European law, whether in England or on the Continent.

As we have seen, the legal procedure of this legal tradition mirrors classical Roman law more closely than even modern-day civil law, which is supposed to be derived from it. Though single-issue pleading disappeared with

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1163 *Dissertations on Early Law and Custom* 389 (1886).

1164 Epstein, "One Step at a Time in Roman Law: How Roman Pleading Rules Shape the Substantive Structure of Private Law," at 303.

1165 For the exact locations, see Leanna Bablitz, "The location of legal activities in the city of Rome," in *Actors and Audience in the Roman Courtroom* 13 (2007).

1166 Under classical Roman law the *prætor* set forth *actiones*. At early common law the chancellor issued writs. Hans Peter, *Actio und Writ: Eine vergleichende Darstellung römischer und englischer Rechtsbehelfe* (1957).

the blending of modes of procedure at common law and equity at the end of the nineteenth century both in England and the United States, the jury trial had already extruded the substantive norms of this legal tradition.

The legal system that governs real property developed from European feudal practices. Though its precise origins remain uncertain, 'seisin' —the defining element of the English system of estates in land— reaches even farther back to the confusion of ownership and possession that existed under the vulgar Roman law that remained in place after the withdrawal of the Roman legions from Britannia, where feudal practices developed.

The legal system that governs personal property was cobbled together later out of elements which the eighteenth-century Natural lawyers borrowed from classical Roman law, which is not to say that these borrowings brought conceptual order. The ongoing disorder, if not incoherence, of the law of bailments in common law jurisdictions emerged when common lawyers lumped together a number of interrelated civil law figures into a one-figure-fits-all common law concept. Notably, to this day, in the United States the liability of the bailee follows classical Roman law, with a heightened standard of care where one existed in that legal system.

The legal system that governs contracts takes after classical Canon law, as was practiced in England's ecclesiastical courts. In developing the writ of assumpsit, the common lawyers looked to the Canon law action of *læsio fidei* as their model. As a result, to this day, in the United States all common law contracting is unstandardized, despite twentieth-century efforts made through the Uniform Commercial Code to promote standardized contracts.

While some legal historians argue that common lawyers developed torts by borrowing civilian learning, we have shown that no other area of the common law is more homegrown. Nonetheless, the legal system that governs torts in the United States developed along the lines of the standardized civil law delicts that existed under classical Roman law.

Law and economics scholars have yet to examine how —at equity— the duties owed to persons that arise from relationships support the market economy, a particularly fruitful area for research about the sources of this legal tradition. In a homegrown development that mirrored the *ius honorarium* of classical Roman law, Anglo-American chancellors upheld implied and constructive warranties of merchantability and title and duties to disclose latent defects in merchandise. The development of the equitable doctrine of estoppel also closely followed the *exceptio doli* of classical Roman law. To this day, United States legal scholars are at a loss as well to describe the exact legal nature of fiduciary duties at equity. We have shown that

fiduciary duties arise not from the consent of the parties, as in contracts, but from the pre-existing or just-created relationships that form between people who must 'trust' —in its nontechnical sense— one another in the marketplace. The English and Anglo-American trust is a more variegated institution than common law scholars recognize, with fiduciary duties operating alongside a lattice of contract and legal and equitable ownership. Fiduciary duties also support the common law of agency and partnership, which arise from both contracts and relationships. As a result, corporate governance developed along different lines in England and the United States.

As we have seen, this legal tradition interweaves the strands of classical Roman law, vulgar Roman law, Germanic law, Anglo-Norman feudal practices, Canon law, the European *ius commune*, the writings of the Natural lawyers, German Pandect science, French legal sociology, and finally, homegrown Anglo-American law and economics. None of these elements will strike the civilian lawyer as one-off or alien. Indeed, what is exceptional is how little common lawyers appreciate about the common sources of the system of English and Anglo-American common law and equity.

CHAPTER THREE:
THE PROVINCE OF THE RULE OF LAW[1167]

Twenty years into the dawn of a new millennium, the progress we have made in certain fields is fast and inexorable, and artificial intelligence, quantum computers and genetic engineering are all on the horizon. Yet, our understanding of the political and legal fabric that knits us together into national societies and a global economy has been slow and unsteady. Today, political theory is incapable of understanding even the rudiments of democratic legitimacy under the rule of law.

I. The Rule of Law, Not of Men

Well into the twenty-first century, the state of the world hangs together by weft threads which were spun together by eighteenth-century political philosophers. Per the general assumptions of democratic theory, law-making supremacy belongs in elected parliaments or legislatures, rather than in unelected courts. Yet in practice, throughout the world —in the common law as well as in the civil law— an undeniable amount of law-making power is wielded by unelected courts. Why is so much law-making power put in the hands of democratically unaccountable judges? Could it be that the majority's power, which legitimizes statutory law, also legitimizes case law?

We must bring much-needed clarity to the subject if we are to avoid illegitimate acts of legislative or judicial overreaching and ensure democratic accountability under the rule of law. Moreover, supranational courts are needed to organize an ever-more interconnected world. Thus, can legal scholars in this new century continue to pretend that legislative gov-

[1167] This Chapter is an extended version of a paper delivered at the I Annual Dual Meet between the University of California, Berkeley, School of Law and the Universidad Nacional Autómona de México, Instituto de Investigaciones Jurídicas held at Mexico City, Mexico in September, 2018.

ernance is legitimate while judicial governance is not?[1168] Can they continue to delegitimize the courts' vital role in protecting basic individual rights as counter-majoritarian and antidemocratic exercises of power?[1169] Can people and politicians continue to believe that referendums outweigh other representational mechanisms of democratic politics? A system of constitutional —supermajoritarianly enacted— checks and balances in most nation-states vests, in the unelected courts, the authority to stand up for individual rights against the elected legislature, and vests, in the elected legislature, the authority to decide policy matters against the unelected courts. Yet, from the commonly accepted outlook of legal positivism, we face an almost absolute lack of doctrinal clarity when we seek to understand the current political and legal state of the world.

In this Chapter, we demonstrate, through two superficially simple game-theoretic models, that the majority's power legitimizes both statutory law *and* case law. It turns out "the law" is nothing more than politics over time. In the might-makes-right social order assumed by legal positivists,[1170] this Chapter asks the question of where is ultimate power to be found, considering that political coalitions of people are notoriously unstable. May the "rule of law" turn out to be nothing other than synchronic processes of ballot-counting rectified by diachronic processes of legal reasoning by analogy? Let's see.

Such a significant part of the whole sweep of the legal order is judge-made law. As an argument, this point is unassailable, despite a plethora of legislation in the twentieth century,[1171] despite the drive toward codification since the nineteenth century and judges hiding their powerful and creative role in developing the law,[1172] somewhere behind the smoke and mirrors of the interstices of legislation, or in the shadowings or penumbras emanating from constitutional provisions. As an argument, this point is unassailable, no matter how much Montesquieu denied it, when he asserted famously that judges are merely "mouthpieces of the letter of the law; passive

[1168] David Marquand, *Parliament for Europe* (1979); Giandomenico Majone, "Europe's Democratic Deficit: The Question of Standards," 4 *European Law Journal* 5, 15 (1998).

[1169] See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

[1170] Richard A. Posner, *The Problems of Jurisprudence* 9 (1990).

[1171] Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

[1172] Edward A. Tomlinson, "Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law," 59 *Louisianna Law Review* 101 (1997).

beings, incapable of moderating either its force or rigor." [1173] How can we go on without a model to explain the legitimacy of case law, when case law is ubiquitous throughout legal history and continues to be a source of legal creativity in the common law system as well as in the civil law tradition?[1174] Despite the endless outpouring of ostensible scholarship on both sides of the Atlantic, this poverty of thought distorts legal doctrine, is unwise at best and dangerous at worst.

The normative account of what legitimizes the law-making powers of majority rule seems a clear and well-settled doctrine. Its greatest exponent, Jean-Jacques Rousseau, bravely stated, "the law is the expression of the general will."[1175] Today's scholars use more up-to-date terms like 'collective preferences'; yet to speak about 'the will of the people' (popular will,) or for that matter about 'the preferences of the majority' (majoritarian preferences,) is incoherent and pointless because collective preferences do not even exist at all. Coalitions of people are made up of different, and sometimes even contradictory groups, which temporarily come together to engage in collective action.[1176] At least since the 1950s, after Kenneth Joseph Arrow published his impossibility theorem,[1177] scholars have known that it is impossible to devise a transitive and nondictatorial mechanism that would effectively aggregate the divergent preferences of individuals into an ordinal ranking of social preferences. This result irreparably dooms any hope that a collective or discursive rationality could lend a normative sense of legitimacy to law.[1178] (Moreover, not all voters reveal their true preferences, which, in any case, cannot be aggregated.)[1179]

1173 *De l'esprit des lois*, book 11 (1748).

1174 Of course, the truism that judges make law begs the question: How do they make law?

1175 *Du contract social, ou, Principes du droit politique*, book 11 (1762).

1176 See generally Robert A. Dahl, *A Preface to Democratic Theory* (1956).

1177 *Choice and Individual Values* (1951).

1178 Note that Eric A. Posner, and E. Glen Weyl's proposed quadratic voting system departs from Arrow's assumption of ordinal preferences, "Voting Squared: Quadratic Voting in Democratic Politics," 68 *Vanderbilt Law Review* 441, 443 note 3 (2015); *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 80-126 (2018). This Chapter points up an alternative correction to rule by tyranny of the majority which steers clear of ballot counting.

1179 Allan Gibbard. "Manipulation of Voting Schemes: A General Result," 41 *Econometrica* 587 (1973); Mark A. Satterthwaite, "Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions," 10 *Journal of Economic Theory* 187 (1975).

What is left is the positive account: what James Madison called the "superior force of an interested and overbearing majority."[1180] Surely this cannot be the case. It seems odd and contradictory that the legitimacy of the law —the obligation to obey the law— could be anything but normative. Even purely positive law doctrines give the impression of reintroducing Natural law by the back door, when they explain the legitimacy of law through a rule of recognition[1181] or *Grundnorm*[1182] to escape from the trap of circularity? Are we ever, then, to eliminate Natural law from legal discourse? Almost 80 years ago, Lon Fuller led the call for a revival of Natural law.[1183] It has now been 60 years since Fuller's famous debate with Herbert Lionel Adolphus Hart.[1184] The problem with Natural law is: How can a legitimate, legal regime be conceived, in normative terms, when reasonable people differ about what is self-evident? Whose reason is reasonable? If the obligation to obey the law can be divorced from normative concerns, what is entailed in a purely positive account of the legitimacy of statutory law and of case law? Can the (perhaps supranational) institution building that will follow in the twenty-first century continue to rely primarily on the republican blueprints that were laid back at the end of the eighteenth century?

Positive law and economics and positive political theory converge in a monograph by Robert D. Cooter.[1185] He employs economic methodology to address the strategic problems that institutional, especially constitutional, design must solve. Yet he ignores the constitutional dimension of individual rights, as they are defined by the case law of higher courts. Rather, he treats individual rights as matters of public policy for a constitutional convention to decide. In response, Eric A. Posner explains about public choice theories of constitutional rights: "There are no such theories, not in Cooter's book and not elsewhere in the literature… It may be that public choice, and rational choice in general, have nothing distinctive to say about constitutional rights."[1186]

1180 *The Federalist, on the new Constitution*, No. 10 (1810).

1181 See Hart, *The Concept of Law* (1961).

1182 See Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934).

1183 Lon Fuller, *The Law in Quest of Itself* 116 (1940).

1184 Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593 (1958); Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harvard Law Review* 630 (1958).

1185 *The Strategic Constitution* (2000).

1186 "Strategies of Constitutional Scholarship," 26 *Law & Social Inquiry* 529 (2001).

Over the last 40 years, a cottage industry of public choice scholarship has sprouted up. From an interest-group perspective, this literature seems to delegitimize society's chief law-making institutions. The focus of much of this scholarship is on the agency problems endemic in core legislative institutions comprised of elected representatives,[1187] and in core judicial institutions comprised of unelected judges.[1188] Rather than repeat this literature, we will skirt agency problems altogether. Society's chief law-making institutions can be modeled without elected representatives or unelected judges.[1189] By removing the agents of power, we will reveal that substratum of power relations that lies beneath society.

This Chapter attempts to model the majority's power to legitimize both statutory law *and* case law. The legitimacy of case law, it turns out, is related —but not identical— to the legitimacy of statutory law. Accordingly, we first develop a game-theoretic model of the purely positive legitimacy of statutory law. This part of the Chapter will only make explicit the suppositions that underlie much well-settled positive political theory regarding democracy. We acknowledge the obvious. There is nothing new in this part of the Chapter —no philosophy, theory, insight, perception, or pronouncement— that hasn't been, in some shape or form, expressed by someone else before, and, for that matter, just as surely will be again. Only after this model is made explicit as the Che Guevara signaling game (discussed *infra* in Section II) and graphically represented in the extensive form, do we attempt, to model the purely positive legitimacy of case law, which we advance as the Saint Thomas More signaling game (discussed *infra* in Section III.)

Let's get one thing straight: Every lawyer knows that judges make law. Yet, what is case law and how does it differ from statutory law? Close to 70 years ago Edward Hirsch Levi, who served as dean of the University of Chicago Law School, published his highly influential booklet on legal reasoning.[1190] Yet no Chicago professor, other than Cass Sunstein about 20 years ago, has picked up the intellectual gauntlet thrown down. At the outset, we make clear that while judge-made law is ubiquitous throughout the world, it is also minimalist and casuistic. As Sunstein notes distinct-

1187 For a valuable though somewhat outdated survey, see Daniel A. Farber and Philip P. Rickey, *Law and Public Choice: A Critical Introduction* (1991).

1188 See Maxwell L. Stearns, 1995. "Standing Back from the Forest: Justiciability and Social Choice," 83 *California Law Review* 1309 (1995).

1189 Recall a Swiss popular assembly or an Athenian popular court.

1190 *An introduction to legal reasoning* (1949).

ly, case law proceeds in small, incremental steps.[1191] Moreover, it construes rights narrowly, through case-by-case decisions, unlike statutory law which defines policy matters broadly. Certainly, legislatures can make durable statutory law because the courts enforce those statutory standards.[1192] Here courts are asked to apply a legislatively-created right to facts undoubtedly contemplated by the legislature as a standard. Courts may further narrow such standards into rules, "a legal direction which requires for its application nothing more than a determination of the happening or nonhappening of physical or mental events—that is, [a determination] of facts."[1193] Yet courts also —all the time— incrementally extend or stretch statutory law, that is, create and apply judicially-created rights, to fit new factual situations that no legislature has contemplated.

Case law is narrowly fact-specific. When judges decide cases, their decision cannot be abstracted from the facts of the case. Nor can a reason or principle necessarily be induced through legal reasoning. Let us, once and for all, break free of the distinctively rationalist vocabulary of legal process that has beguiled generations of civil-trained lawyers and even prominent common law judges such as Benjamin Cardozo.[1194] More recent analyses of legal reasoning also miss their mark, when they consider that the holding of a case is anything more than the narrow decision of a fact-specific case. Melvin Aron Eisenberg submits: "Courts often announce rules to govern issues that are at best tangential to a resolution of the dispute before them."[1195] And Frederick Schauer agrees: "Because a reason is necessarily broader than the outcome that it is a reason for, giving a reason is saying something broader than necessary to decide the particular

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1191 See "On Analogical Reasoning," 106 *Harvard Law Review* 517 (1993); "Incompletely Theorized Agreements," 108 *Harvard Law Review* 1733 (1995); "Problems with Rules," 83 *California Law Review* 953 (1995); *Legal Reasoning and Political Conflict* (1996); "The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided," 104 *Harvard Law Review* 4 (1996); *One Case at a Time: Judicial Minimalism on the Supreme Court* (2001); "Minimalism at War," 2004 *Supreme Court Review* 47(2004); "Burkean Minimalism," 105 *Michigan Law Review* 353 (2006); "Second-Order Perfectionism," 75 *Fordham Law Review* 2867 (2007).

1192 See Richard A. Posner and William M. Landes, "The Independent Judiciary in an Interest-Group Perspective," 18 *Journal of Law and Economics* 875 (1975); William F. Shughart II and Robert D. Tollison, "Interest Groups and Courts," 6 *George Mason Law Review* 953 (1998).

1193 Henry M. Hart Jr. and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 139-40 (1994).

1194 *The Nature of the Judicial Process* (1922).

1195 *The Nature of Common Law* 3 (1988).

case."[1196] Such reasons are —let us be clear— *obiter dicta* and not case law. Case law is not about extracting any coherent *ratio decidendi* from a case. Nor do judges solemnly set out the *ratio decidendi* of cases. The Latin terminology mucks things up. Rather, the holding of a case is inseparable from its report of the facts, with the decision. Oliver Wendell Holmes Jr., echoing the words of Rudolf von Jhering, famously put it, when he said that "experience is the life of the law, not logic."[1197]

Also at the outset, we must make clear what is our methodology. Rational choice assumptions do not present a problem in this Chapter when we model rational, calculating, optimizing behavior across the temporal dimension. Criticisms in terms of the underlying assumptions of human knowledge and cognitive capacity are at least as old as the model of rational choice itself. In the fifth century, Augustine, who articulated the doctrine of free choice and autonomy as the self who is a law unto himself, also articulated the doctrine of heteronomy, as the self's need for systems of external authority —religion and law— to impose direction upon life.[1198] Augustine was aware of the insights of a neo-Platonist philosopher, Plotinus, who worked out human choice as a complex union of autonomous and heteronomous elements. Edmund Burke would turn the same doctrine in the eighteenth century into an argument on the necessity to respect the continuity of the traditions, institutions and cultural practices of a people— the inheritance of dead generations, due to generations as yet unborn.[1199] Burke's contribution is an argument from a perspective of bounded rationality against the abstract programs of the French Revolution to use 'Reason,' with a capital letter, to uproot traditional values and institutions.

In both of our game-theoretic models, the players are assumed to be rational decision-makers maximizing their payoffs and endowed with cognitive capacity to understand the rules of the games as well as the other players. This Chapter assumes that homo sapiens are intelligent, resilient, adaptable, organized animals which exhibit both allelomimetic and agonistic behavior. Even though incommensurate alternatives cannot be sorted out by reason when disputes over rivalrous goods break out, this Chapter argues that communication is still possible even as the outbreak of vio-

1196 *Thinking like a lawyer: a new introduction to legal reasoning* 56 (2009).

1197 *The Common Law 1* (1881). For an excellent general discussion of case law, see Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005).

1198 Bernhard Dombart (editor), *Sancti Aurelii Augustini de Ciuitate Dei libri XXII* (1929).

1199 *Reflections on the Revolution in France* (1790).

lence seems imminent and inevitable. Homo sapiens communicate without resorting to hooting, strutting, ground-thumping, or chest-beating. Law is the outward manifestation of the signaling system of credible threats of violence in human populations.

Let's be quite clear and upfront about what we propose. Legal reasoning by analogy, as carried out by courts, is not an exercise in divination, but an empirical judgment that an imminent, nonabstract, concrete, ripe, injury may be repeated across the temporal dimension. Our point is that if oracles were possible, legislatures and not judges should consult them. In this sense, our Chapter departs radically from the literature that attempts to take account of the preferences of future generations.[1200]

Judges look to the facts of a present situation and make a probabilistic inference by analogy that an empirical judgment from past similar-fact cases may apply in probabilistic terms and have a bearing to future similar-fact cases. The perspective is present-centred because judges use only information available in current-state knowledge, and their decisions are primarily controlled by the immediate situation before them. Nonetheless, judges are radically past- and future- as well as present-oriented. They do not ignore or deny things in the immediate situation. However, they also combine their present-centred perspective with a kind of long-term, future-oriented approach to legal reasoning, as well as making a veritable dogma of the past. Judges rule in the present, revere the past and, at the same time, think about the future. They are not seers because their vision of the future reflects past or present experience rather than developing a vision of life different from the past or present. Judges' own experience in handling multiple cases with similar facts gives them a sense of the recurrence, or continuity, of human experiences. In the judicial mind, the cyclical view of time prevails. How-

[1200] See Anthony D'Amato, "What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility," 84 *American Journal of International Law* 190 (1990); R. George Wright, "The Interests of Posterity in the Constitutional Scheme," 59 *University of Cincinnati Law Review* 113 (1990); G. F. Maggio, "Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources," 4 *Buffalo Environmental Law Journal* 161 (1997); Lisa Heinzerling, "Environmental Law and the Present Future," 87 *Georgetown Law Journal* 2025 (1999); Aaron-Andrew P. Bruhl, "Justice Unconceived: How Posterity Has Rights," 14 *Yale Journal Law & Humanities* 393 (2002); John Edward Davidson, 2003. "Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing Upon Future Generations," 28 *Columbia Journal of Environmental Law* 185 (2003). Richard A. Epstein injects a different perspective into this debate, "Justice Across the Generations," 67 *Texas Law Review* 1465 (1989).

ever, in the actual labyrinth of life, judges also learn that recurrence cannot be trusted, as every case may be different. Reasoning by analogy is an innate human ability with a lengthy history in law.[1201] Well, yes, in both game-theoretic models in this Chapter, the players are assumed to have the cognitive capacity to recognize in probabilistic, not deterministic, terms the considerable potential for similar, or worse, situations —which are presently before them, and which may have occurred in the past— to recur in the future.

The point of the debate over the legitimacy of both statutory law and case law, as a purely-positive matter, is to distinguish those signals that are credible threats of violence from instances of strategic deception. Society must decide whether to heed the signal or to ignore it and attack. The point of signaling is to get information across[1202] which will avoid unnecessary violence, as we will see, even without engaging others in any type of 'rational dialogue.'

In this Chapter, we argue that politics and law are attempts, from within liberal theory, to make a place for different and incommensurable ways of life. How does a liberal regime allow its citizens to pursue their diverse aims? How can we find freedom in an intrusive, dominating, relentlessly coercive society? We show how incommensurate pluralism in society is possible despite the legitimate overbearing coercive order under the rule of law.

A strong incommensurability thesis embodies the idea that there is a sharp, unbridgeable gap between different rational discourses about, and views of, the world and the good. When we say that conceptual schemes and values are incommensurable, we mean that they are incomparable by any rational measure. There exists no purely rational framework for making social choices about which ways of life are preferable. Society is pluralistic. A strong incommensurability thesis abandons our comfortable illusions that the various monisms that imprison the varieties of human experience and human thought in a single ideology or creed, may make social coherence possible. The existence of incommensurable concepts of the good, and the consequent need to make choices between them, undermines the Enlightenment faith in a rational morality. Values are in conflict. A divided, pluralistic society is a tumultuous scene of competing views of order,

[1201] See Stein on Marcus Antistius Labeo's use of analogy in Roman law, "The Relations Between Grammar and Law in the Early Principate: The Beginnings of Analogy," in *Atti Del II Congresso Internazionale della Societa Italiana di Storia del Diritto* 757 (1971).

[1202] See Michael Spence, "Job Market Signaling," 87 *The Quarterly Journal of Economics* 355 (1973); John C. Harsanyi, "Games with Incomplete Information Played by 'Bayesian' Players," 14 *Management Science* 159-182, 320-334, 486-502 (1968).

of vastly different if not outright contradictory modes of comprehension, of different moral and religious traditions, of differing standpoints or conceptual schemes, of overlapping and contradictory objectives and interests.

II. Che Guevara Signaling Game

To model the legitimacy of statutory law, we present a game-theoretic approach. Consider the following interaction, which we will refer to as the Che Guevara signaling game, played between faction (F) and everyone else (E). F's type is private information and is not observed by E. Faction's type is either a synchronic majority, which is realized (selected by Nature) with probability p, or a synchronic minority, which is realized with probability $1 - p$. More formally, we say that the set of players is denoted by $N = \{F, E\}$, and F's type space is denoted by $\Theta_F = \{\text{majority, minority}\}$.

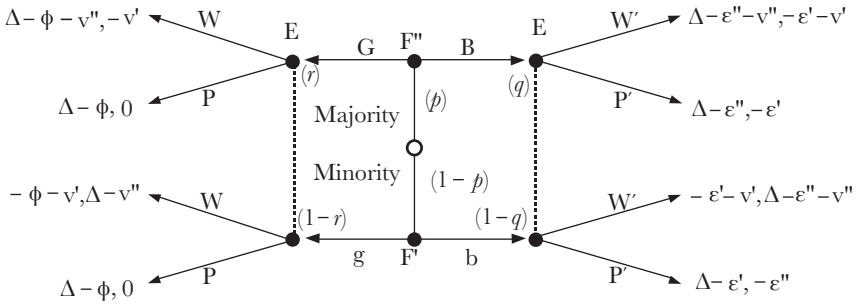
The relative strength of F and E depend on whether F is a synchronic majority or minority. As F observes its type, it knows its own relative fighting ability, which implies it knows that of E. However, as E is uninformed of F's type, E does not know its own relative fighting ability or that of F. We use F' to denote the minority F and F'' to denote the majority F. After observing its type, F chooses between two costly actions that potentially convey information to E. F can choose either a ballot count or a guerrilla foco. The ballot count is denoted by B for the majority F and b for the minority F, and entails a cost of campaigning for the election. We assume that this cost is higher for the minority than it is for the majority, and denote these costs by ε' and ε'', respectively, and assume $\varepsilon' > \varepsilon''$. The guerrilla foco is denoted by G for the majority F and g for the minority F, and entails the same cost for either type, which is denoted by ϕ. We assume that $\varepsilon' > \phi > \varepsilon''$.

Following this choice by F, E can choose either war or peace. As noted above, E does not observe F's type, but does observe F's choice of ballot count or guerrilla foco. Following the guerrilla foco, E's choice of war is denoted by W and E's choice of peace is denoted by P. Similarly, following the choice of ballot count, E's choice of war is denoted by W' and E's choice of peace is denoted by P'.

It is costly to wage war, and we assume that this cost to the majority is less than it is to the minority. This is treated symmetrically so whichever player is the majority bears a cost of v'' to wage war, and the minority bears a cost of v' to wage war, where $v' > v'' > 0$. We denote by Δ the present value of the rival resource for which E and F are competing. We assume that $\Delta >$

ϕ, ε', ε'', v''. Following either choice of action by F, waging of war by E leads to whichever player is the majority (if F is a majority then E is a minority) receiving Δ. However, if E chooses peace, for either action choice of F, F receives Δ. The motivation for this when F has selected the guerrilla foco is that an unchallenged guerrilla foco takes over. In the case of the ballot count, it is assumed that F can rig the election, which fits with the assumption that $\varepsilon' > \varepsilon''$.

The extensive-form representation of this game is given below. We use r to denote E's updated belief that F is a majority following the selection of a guerrilla foco, and we use q to denote E's updated belief that F is a majority following the selection of a ballot count.



We now consider perfect Bayesian equilibria of this game. There are two possible separating equilibria, which provide a signaling interpretation to F's choice of action. These are described in the following two results.

Proposition 1: When $-\phi - v' > \Delta - \varepsilon'$, there is a perfect Bayesian equilibrium of this game has F playing Bg, which results in belief $r = 0$ and $q = 1$ for E, and E plays WP′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to r and q. Note, for r = 0, W is E's optimal action since $\Delta - v'' > 0$ by assumption. Also, for q = 1, P′is optimal for E since $v' > 0$. F″strictly prefers to play B because deviating to G will yield $\Delta - \phi - v''$, which, since $\phi > \varepsilon''$and $v'' > 0$, is less than the value from playing B of $\Delta - \varepsilon''$. Similarly, F′strictly prefers to play g because deviating to b will yield $\Delta - \varepsilon'$, which, by assumption, is less than the value from playing g of $-\phi - v'$. *Q.E.D.*

Proposition 2: When $\phi < \varepsilon'' + v''$ and $\Delta - \phi < -\varepsilon' - v'$, there is a perfect Bayesian equilibrium of this game has F playing Gb, which results in belief $r = 1$ and $q = 0$ for E, and E plays PW′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to r and q. Note, for $r = 1$, P is E's optimal action since $v' > 0$ by assumption. Also, for $q = 0$, W′ is optimal for E since $\Delta - v'' > 0$. F″ strictly prefers to play G because deviating to B will yield $\Delta - \varepsilon'' - v''$, which, since $\phi < \varepsilon'' + v''$, is less than the value from playing G of $\Delta - \phi$. Similarly, F′ strictly prefers to play b because deviating to g will yield $\Delta - \phi$, which, by assumption, is less than the value from playing g of $-\varepsilon' - v'$. *Q.E.D.*

We suggest that the assumptions and result of Proposition 1 fit with the behaviour of Che in Bolivia. There, although he was in the minority, he chose to stage a guerrilla foco. Jon Lee Anderson goes into some detail about the relish with which, upon gaining power in Cuba in the first months of 1959, the "real life" Ernesto 'Che' Guevara oversaw an estimated 550 executions of those considered enemies of the Cuban Revolution.[1203] Several books about the foco ascribe its failure in large part to the complete absence of popular support.[1204]

A ballot count may sometimes be viewed as objective and unambiguous, unlike a nucleus of determined fighters who take to the mountains and jungles and claim to speak on behalf of a majority of the people. However, we suggest, as our assumption indicates, that elections can be manipulated. To deny that a faction may cheat in an election is naïve. A faction strongly desiring to perpetuate an electoral fraud has many workable options, depending on the polling method in use. For example, the faction may cast votes in the names of dead persons not yet purged from a register, forage voting registers, list ineligible persons as eligible, use substitutes with forged identity documents to vote in place of registered voters. In some systems, a voter may vote more than once—either by going more than once to a polling place or by depositing more than one voting record during a single visit to a polling place. Additionally, a faction might print or distribute unofficial ballot slips already marked with choices and, somehow, smuggle these slips into the pile of votes already cast. The faction may be able to manipulate the counting process, or influence members of the electorate, for example,

[1203] Jon Lee Anderson, *Che Guevara: A Revolutionary Life* (1997).

[1204] See Matt D. Childs, "An Historical Critique of the Emergence and Evolution of Ernesto 'Che' Guevara's Foco Theory," 27 *Journal of Latin American Studies* 593 (1995).

harassing, threatening, bribing, or intimidating, voters. Voters may be prevented from voting by violence or disorder near polling places.

Yet perpetuating a wholesale electoral fraud may be an expensive undertaking for a faction. Moreover, the irregularities and cheating during voting may destroy public acceptance of the announced results; the cost for the faction may arise, not only from the cost of perpetrating the fraud, but from the public's reaction.

The mechanism design for elections to be meaningful is that manipulation of an election by a minority faction must be sufficiently costly to discourage the manipulation. In well-functioning democracies, this is the case. While some may prefer to view elections in such countries as being impervious to manipulation, it is just that elections can be manipulated at a very large cost. In our discussion of the Saint Thomas More signaling game, we apply a similar view to legal proceedings. This line of thought follows the view of the scope for forgery of a piece of evidence found in Jesse Bull.[1205] (In this literature on costly evidence production, it is assumed that forgery or evidence tampering is possible but producing a forged piece of evidence is costlier than producing the same document when it exists. For example, consider a receipt, which shows that payment has been made by a buyer. When payment was made, it is quite inexpensive for the buyer to present the receipt. However, when the buyer did not pay, producing a receipt will be much more expensive because it must be forged.) Under the assumption of Proposition 1, it is prohibitively costly for the minority faction to choose the ballot count, and the manipulation of the vote that it knows ahead of time that it will do, should it choose the ballot count. So instead, the minority faction chooses the guerrilla foco. So, when E sees that the faction has selected the ballot count, E knows that the faction is a majority and chooses peace. Similarly, when E observes that the faction has selected the guerrilla foco, E knows that the faction is a minority and wages war against the faction. It is important to note that the minority faction does not find it advantageous to try to act like it is the majority and choose the ballot count. This is because the cost of manipulating the ballot count is prohibitively high. This is reflected in the assumption that $-\phi - v' > \Delta - \varepsilon'$, which implies that $\varepsilon' > \phi + v' + \Delta$. We suggest that an important function

[1205] "Mechanism Design with Moderate Evidence Cost," 8 *Contributions in Theoretical Economics* number 1, article 15 (2008). See also Chris William Sanchirico and George Triantis, "Evidentiary Arbitrage: The Fabrication of Evidence and the Verifiability of Contract Performance," 24 *Journal of Law, Economics, and Organization* 72 (2008).

of government is to ensure that manipulating an election is a very costly endeavor.

Legal legitimacy is a concept that can be given purely positive content. Questions about coercion, and free will, arise about what people can avoid. To make an analogy with Natural law, we reconcile ourselves to something undesirable but unavoidable and subordinate or yield our will or reason to a higher power, such as God. Moreover, this submission and surrender of our will to the higher authority of the all-powerful majority is more like a stoic posture towards fate than a variation of the Hostage Identification Syndrome,[1206] whereby people accept the domination of their erstwhile oppressors, because becoming a hostage is strategic and temporary, rather than unavoidable and permanent.

The legitimacy of law does not involve, nor does it require, a normative justification. Nor does it require a normative, communicative, rational discourse to form part of the democratic decision-making process. Jürgen Habermas spent much of his life arguing the opposite.[1207] Furthermore, history does not have powers of reason, despite the importuning of Georg Wilhelm Friedrich Hegel.[1208] Rather than stay committed to the centrality of dialogue and debate in democracy and the rule of law, let us recognize politics and law for what they are: attempts to reconcile our discordant, incommensurable values and interests.

The perfect Bayesian separating equilibrium of Proposition 1 is not tyrannical, although it is dictatorial—as we will also demonstrate in the Saint Thomas More signaling game (see *infra* in Section III.) The rule of tyranny is the opposite of the rule of law; it is rule by illegitimate dictatorial commands. In the next section, we complete our examination of performance signaling of legitimate, dictatorial legal regimes in human populations. The purely positive legitimacy of statutory law, it turns out, is related (but not identical) to the purely positive legitimacy of case law.

Again, and again, in everyday parlance, we thrust forward the phrase 'the rule of law, not of men' as a kind of rhetorical flourish. Was Grant Gilmore right to hold 40 years ago that rule-of-law ideals are more rhetori-

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[1206] Georges Gachnochi and Norbert Skurnik, "The paradoxical effects of hostage-taking," 44 *International Social Science Journal* 235 (1992).

[1207] *Legitimationsprobleme im Spätkapitalismus* (1973); *Theorie des kommunikativen Handelns* (1981); Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen (1992).

[1208] Georg Wilhelm Friedrich Hegel, *System der Wissenschaft: erster Theil, Die Phänomenologie des Geistes (1807)*.

cal than real?[1209] The economic analysis of legal reasoning brings an unexpected benefit: an entirely new approach to that fundamental and highly visible phrase 'the rule of law, not of men'—a concept that is notoriously hard to define. The rule of law captures for us the legitimacy of "the law," as opposed to nonlaw. We can define the concept of the rule of law in positive, not normative, terms using economic methodology, with greater precision than ever before. Otherwise, the "rule of law, not of men" rings hollow as a thin and well-worn platitude.

III. Saint Thomas More Signaling Game

Despite the rapid expansion of statutory law in the twentieth century,[1210] legislatures did not create most of the rules of private law; judges did—Roman law and English common law are judge-made, as *infra* we discussed in Chapters One and Two. A great deal of public law is also judge-made: *Exempli gratia*, the federal and constitutional doctrine of the United States of America in the nineteenth and twentieth centuries; the large body of public law developed by courts in the administrative system of the crown of Castile in the Americas and the Philippines (The laws of the Indies) in the sixteenth and seventeenth centuries.[1211] For that matter, much of the public law being created in the European Union in the last 70 years is also judge-made law.

We must model the purely-positive legitimacy of law and lawmaking in a way that accurately reflects what everyone knows about the legal system: Both legislators and judges do make law and always have. Case law carries the same force of law as statutory law; it is "the law" for us, not "no law" as Jeremy Bentham would have us believe.[1212] Moreover, to function well, core legislative institutions comprised of elected representatives must be supplemented by other, nonelected bodies—like courts. Again, we remove the agents of power altogether.[1213] We attempt a pure agonistic, ludic distillation of the human struggles that lie beneath case law.

1209 *The Ages of American Law* 105-06 (1997).

1210 Calabresi, *A Common Law for the Age of Statutes*.

1211 See Juan Javier del Granado, *Œconomia iuris: Un libro de derecho del siglo XVI, refundido para el siglo XXI* 261-77 (2010).

1212 David Lieberman, *The Province of Legislation Determined* 239-40 (2002).

1213 Our analysis does not require kings or queens, ministers, magistrates, or judges of any kind.

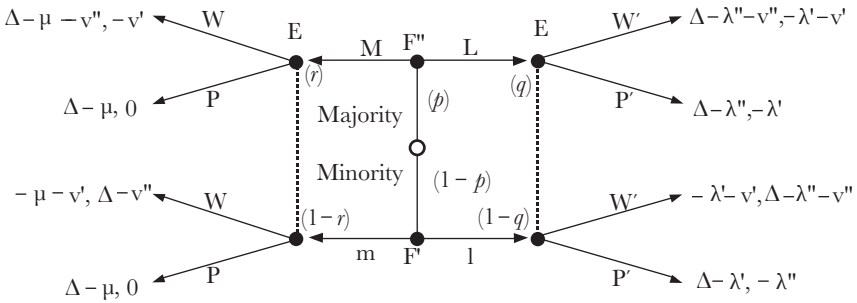
To model the legitimacy of case law, we present a game-theoretic approach. Consider the following interaction, which we will refer to as the Saint Thomas More signaling game, played between faction (F) and everyone else (E). F's type is private information and is not observed by E. Faction's type is either a diachronic majority, which is realized (selected by Nature) with probability p, or a discrete and insular minority, which is realized with probability $1 - p$. More formally, we say that the set of players is denoted by $N = \{F, E\}$, and F's type space is denoted by $\Theta_F = \{\text{majority, minority}\}$.

The relative strength of F and E depend on whether F is a diachronic majority or insular minority. As F observes its type, it knows its own relative fighting ability, which implies it knows that of E. However, as E is uninformed of F's type, E does not know its own relative fighting ability or that of F. We use F′ to denote the minority F and F″ to denote the majority F. After observing its type to E. F can choose either a legal argument or martyrdom. The legal argument is denoted by L for the majority F and l for the minority F, and entails a cost of mounting a legal offensive or defense. We assume that this cost is higher for the minority than it is for the majority, and denote these costs by λ' and λ'', respectively, and assume $\lambda' > \lambda''$. Martyrdom is denoted by M for the majority F and m for the minority F, and entails the same cost for either type, which is denoted by μ. We assume that $\lambda' > \mu > \lambda''$.

Following this choice by F, E can choose either war or peace. As noted above, E does not observe F's type, but does observe F's choice of legal argument or martyrdom. Following martyrdom, E's choice of war is denoted by W and E's choice of peace is denoted by P. Similarly, following the choice of legal argument, E's choice of war is denoted by W′ and E's choice of peace is denoted by P′.

It is costly to wage war, and we assume that this cost to the majority is less than it is to the minority. This is treated symmetrically so whichever player is the majority bears a cost of v'' to wage war, and the minority bears a cost of v' to wage war, where $v' > v'' > 0$. We denote by Δ the present value of the rival resource for which E and F are competing. We assume that $\Delta > \mu, \lambda', \lambda'', v''$. Following either choice of action by F, waging of war by E leads to whichever player is the majority (if F is a majority then E is a minority) receiving Δ. However, if E chooses peace, for either action choice of F, F receives Δ. The motivation for this when F has selected the martyrdom is that if unchallenged martyrdom leads to the faction winning. In the case of the legal argument, it is assumed that F will be convincing regardless of its type, which fits with the assumption that $\lambda' > \lambda''$.

The extensive-form representation of this game is given below. We use *r* to denote E's updated belief that F is a majority following the selection of martyrdom, and we use *q* to denote E's updated belief that F is a majority following the selection of the legal argument.



Proposition 3: When − μ − v′ > Δ − λ′, there is a perfect Bayesian equilibrium of this game has F playing Lm, which results in belief r = 0 and q = 1 for E, and E plays WP′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to *r* and *q*. For r = 0, E's optimal action is W since Δ − v″ > 0, and, for q =1, E's optimal action is P′since − λ′ > − λ′− v′. F″strictly prefers to play L because deviating to M will yield Δ − μ − v″, which, since μ > λ″and v″ > 0, is less than the value from playing L of Δ − λ″. Similarly, F′strictly prefers to play m because deviating to b will yield Δ − λ′, which, by assumption, is less than the value from playing m of − μ − v′. *Q.E.D.*

Proposition 4: When μ < λ″+ v″and Δ − μ < − λ′− v′, there is a perfect Bayesian equilibrium of this game has F playing Ml, which results in belief r = 1 and q = 0 for E, and E plays PW′.

Proof: To show this specifies an equilibrium, we just need to show consistency of F's strategy with E's best response to *r* and *q*. For r = 1, E's optimal action is P since v′ > 0, and, for q =0, E's optimal action is W′since Δ − v″ > 0. F″strictly prefers to play M because deviating to L will yield Δ − λ″ − v″, which, since μ < λ″+ v″, is less than the value from playing M of Δ − μ. Similarly, F′ strictly prefers to play l because deviating to m will yield Δ − μ, which, by assumption, is less than the value from playing m of − λ′− v′. *Q.E.D.*

Hence, in the assumption of Proposition 3, a minority Saint Thomas More embraces martyrdom. It is instructive to remember five centuries

ago Sir Thomas More, lord chancellor in one of England's most dangerous periods, amid the initial split between Catholics and Anglicans, or English Protestants, and the onset of the religious wars, embraced martyrdom rather than swear a false oath to King Henry VIII's Act Respecting the Oath to the Succession. To those assembled at the scaffold, he said that he died "the [k]ing's good servant, but God's servant first."[1214]

In a similar manner to Proposition 1 pertaining to the Che Guevara signaling game, we have assumed that the minority faction is able to, at a very large cost, manipulate the legal proceedings in a way that allows it to win. Here again, we suggest there is scope for manipulation, but in well-functioning societies the cost of doing so is quite high. This is in line with the influence-cost literature.[1215] As noted above, this also fits very well with the literature on costly evidence that allows for forgery. Here, the minority faction's cost of manipulating the legal hearing being prohibitively costly takes the form of $-\mu - v' > \Delta - \lambda'$, which implies $\lambda' > \mu + v' + \Delta$. We suggest that it is critically important to have a legal system that makes it very costly for an insular minority to make a convincing legal argument.

Unlike an ideologue bent on martyrdom, to bring a legal action, a litigant must show a concrete injury-in-fact. The justiciability doctrines —standing, ripeness, mootness, and the political question— must be strictly applied for case law to be legitimate. The doctrines of justiciability of standing in the common law system or *actio* in the civil law tradition must not conflate injury-in-fact with an injury to a zone of interests protected by statutory law. An injury can be both to a zone of interests defined as a matter of public policy and an actual injury sufficiently personal and concrete that a litigant could analogize from it. Courts make case law, which may shape new rights, or may extend legislatively-created rights to facts not previously considered by the legislature. The injury-in-fact requirement as a mechanism design enables legal reasoning to draw analogies from a concrete injury liable to be repeated over time. An ideological litigant —a discrete and insular minority— is unable to point to this type of particularized injury. At most, an ideological litigant may press home policy arguments.

1214 David Halpin, "Utopianism and Education: The Legacy of Thomas More," *British Journal of Educational Studies* 49 299 (2001).

1215 See, for example, Cooter and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes," 23 *Journal of Economic Literature* 1067 (1989) and Gordon Tullock, *Trials on Trial* (1980).

Legal argument is a performance signal because the litigant can demonstrate an actual or imminent injury-in-fact, and through reasoning by analogy unfolds a parable of horribles, alluding to other particularized instances of harm which preceded it or are likely to follow it. It should be noted that what makes a legal argument by analogy from long-standing precedents or particularized showings of future harm unduly expensive for ideological litigants is that their harm is more conjectural and speculative. Ideological litigants' legal arguments seem hardly real and not credible when made in the abstract, with unsubstantiated and potentially misleading allegations of fact, precisely because of the difficulty of looking around the temporal corner. Again, the nonmimicry constraints are both internal, and imposed from the outside by the receivers' reactions.

The role of courts in the legal process is not to extend a mantle of protection over discrete and insular minorities, however much John Hart Ely insists that this function lies at the core of judicial responsibilities.[1216] As a positive matter, it is socially realistic to suppose that quite the opposite happens. Courts dispense with discrete and insular minorities—the term used by Justice Harlan Fiske Stone in "the Footnote" in *United States v. Carolene Products Co.*[1217] Judicial review is not "a counter-majoritarian force"; much less is it a "deviant institution" in democracy. There would be no positive justification for a counter-majoritarian institution in the political process. Would such an institution not instigate a revolution against it? Why have the Anglo-American people not plunged into an incarnate revolution against the United States Supreme Court, and against all courts and lawyers? Was not the French Revolution provoked by the actions of the Parliament of Paris? Bickel's approach has led several generations of common law scholars astray, and misses the very point of legal reasoning across time, which works by analogy.[1218]

While the vigilant and courageous nonelected courts are required as an occasional counterpoise to the elected legislature, it is to promote durable statutory law[1219] and to define and protect, by accretion of case law, the interests of a diachronic majority (the proposal we make.) In game-theoretical terms, the signal given by a diachronic majority is similar (but not identical)

1216 *Democracy and Distrust: A Theory of Judicial Review* (1980).

1217 304 U.S. 144, 152 note 4 (1938).

1218 See generally *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.*

1219 Posner and Landes' 1975 thesis, "The Independent Judiciary in an Interest-Group Perspective."

to the signal sent out by a synchronic majority. The legitimacy of statutory law, it turns out, is related (but not identical) to the legitimacy of case law. An enactment passed by the overwhelming majority of the people becomes a legitimate legal command because the outcome of the social struggle on that issue is predictable. Society simply submits to the inevitable domination of the majority to avert pointless bloodshed. In contrast, the sentence handed down after a court proceeding becomes an unqualifiedly legitimate legal command not because the result of the social struggle, but because the diachronic majority will put up a struggle even in the face of a possible crushing defeat or complete annihilation.

Let us explain why. If a discrete and insular minority were to attempt to dictate its preferences on the rest of society, the majority would simply crush it, that is, wipe it out of existence. The majority might decimate the faction, or even obliterate it and its lineage, that is, annihilate it from time.

Yet a diachronic majority is different. A diachronic majority is composed of people, who while sharing concrete interests, exist at different times in the past, present, and in the future (though future identities remain indeterminate.) Due to the technological barriers of existing communications (upstream) as well as time paradoxes,[1220] this group is unable to meet or assemble into coalitions. However, if each person puts up a present struggle (however unequal this struggle may be,) and in turn is annihilated, society is unavoidably faced with recurrent crises of violence over time. Unrelated injured parties reappear, willing to engage society to assert analogous interests. Strategically speaking, it is not individually unrealistic to expect that the injured parties find it rational to put up a fight where defeat would be otherwise certain, secure in the knowledge that a numerous group of people spread out through time, in turn, fight on a same issue. The diachronic majority dares to face off against everyone else because it is self-aware through the very same process of legal reasoning. This struggle takes place within reconstituted, present and imaginary time. One moment a diachronic faction seems to have self-immolated. The next it is reborn, like the Phoenix bird, literally rising out of its ashes. Accordingly, through legal reasoning by analogy, diachronic majorities can signal threats that are credible because of the recurrent violence that is expected over time. Through the jurisdictional activity of courts, society makes the necessary concessions to these analogous interests, to pre-empt these recurrent, violent disruptions and outbursts from breaking out.

[1220] See Derek Parfit's thought experiments, *Reasons and Persons* (1984).

It is precisely empty cores,[1221] the relentless pattern of cycling in the world of politics, which prevent a discrete and insular minority —or a majority or even supermajority for that matter— from maintaining itself over time. The byzantine politics of fluid allegiances between people, a Sisyphean hell of endless negotiation and re-negotiation, has a logic all its own. Today, ideological interest groups are part of the faction. Tomorrow, they ask themselves if a new faction will be unified enough to hold the political line.

We do not discount the costs of the recurrent violence expected from a diachronic majority over time. The value of the threat shortly decreases after society is swept over by violence. Yet to assume that recurrent violence regenerates this threat is not entirely socially unrealistic. Accordingly, we assume that the costs of recurrent violence to everyone else add up over time. We observe that recurrent violence only brings poverty and deprivation for everyone else.

The legal scholar may feel uncomfortable with the reductive assumptions of the model. We lump together the decision to bring a legal action and adjudication of the dispute *inter partes*. We make short shrift of the adversarial/inquisitorial distinction in legal process. We put aside the tripartite structure of dispute resolution. Our focus is rather on private/public law litigation *erga omnes*. In case lawmaking, the party structure is not bipolar, but rather multipolar, with plaintiff classes defined by a common individuated injury-in-fact standing against everyone else, or against a public defendant replacing private defendants. In case lawmaking, everyone has a stake in the case or controversy. Accordingly, a decision will have an effect beyond the parties directly involved. A legal norm created by a court is valid *erga omnes* (with prospective general effects.) In addition to the immediate effect *inter partes*, a given decision has a prospective effect because of the case's effect on other cases. We assume deference to precedent —though not necessarily excessive adherence to precedent or the doctrine of *stare decisis* (to stand by decisions and not disturb settled matters)— as part of the legal system. Without precedent, past/present pronouncements do not bind the present/future. We strip the legal process down to its bare agonistic essentials, and demonstrate that in social conflict over a rivalrous good, communication still happens between the parties. Moreover, legal argument, stripped down to its superficially simple agonistic essentials, is a legitimate dictatorial, nonrational

[1221] See Lester G. Telser, "The Usefulness of Core Theory in Economics," 8 *Journal of Economic Perspectives* 151 (1994); *Economic Theory and the Core* (1978).

command in that the receiver, who responds to the variable signal, consents to the terms the signaler dictates in exchange for peace.

Since the sacrifice involved in martyrdom, or engaging in any other strategic brinkmanship, such as a hunger strike, is quite high, even suicidal, a legal resolution handed down after a court proceeding has more threat value than dozens of hunger strikes. All in all, a clear and unambiguous legal argument is a performance signal of the diachronic majority backing for the judicial decision that is held to be law. Case law is legitimate in so far as the barely submerged threat of unavoidable recurrent violence is brought credibly to bear in the arena of social conflict. Society surrenders to the inevitable ascendancy of the diachronic majority, rather than live with recurrent violent disruptions and outbursts.

The primary requirement for a litigant to gain access to the courts, an injury-in-facte, is the rule of representation in the legal process, in the same manner that the ballot count obtained in an election is the rule of representation in the political process. The counter-majoritarian fallacy may lead some scholars into the sophomoric blunder of believing that society suffers from a democratic deficit, when the rule of law is the foundation of democracy. However, scholars who see through the counter-majoritarian fallacy should resist the siren calls of legal process jurisprudence.[1222] We can have no illusion that the ruthless exercise of power can be trammeled by the highest principles and procedural safeguards. Nor that reason and procedure are the essence of law. The only possible constraint on power is power. Where there is countervailing power, there is constraint.

Nor should we think that limited government depends entirely on a constitution's delegation of limited powers to it. Power remains with the people as a matter of social fact. Constitutions ought to clarify the limited role of government and the expansive scope of individual action, but it is not that legal process or constitutional principles define the role of legislatures or of courts. Constitutions are also very open-ended. It is the power itself that is self-defining. One person's power ends where another person's power begins. Coalitions of people in time are highly unstable. Today's majority is not the same coalition as tomorrow's. Certain temporally disconnected individuals who share actual, concrete, discrete, particularized interests wield

[1222] See, for example, the return to legal process jurisprudence in Ilya Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory," 89 *Iowa Law Review* 1287 (2004).

power. Rather than parliamentary or judicial supremacy, there is a delicate balance of powers under the rule of law.

We should not confuse democracy with elections or constitutions —second-order laws enacted by supermajorities—. The latter may be necessary conditions for a democracy, but they are insufficient in themselves. Raising up a democracy requires politically independent institutions. Unelected courts correct a collective action problem—that people disconnected through time are unable to act together. Core judicial institutions comprised of unelected judges, unlike core legislative institutions comprised of elected representatives, are insulated from the political process because unelected judges are supposed to be beholden to a diachronic majority, rather than to synchronic constituencies. In sum, a line of judicial decisions in concrete cases, not any constitutional convention, is the source of our individual rights as people. Why, therefore, shall we continue to be treated in public law to the ludicrous, yet disturbing sight, of constitutional conventions, which give ideological discontents of every stripe a perfect forum to haggle over abstract rights as matters of policy? Or worse, to the constitutions drafted by committees that Adrian Vermeule and Adriaan Lanni aptly call a "monstrosity."[1223]

Moreover, as is evident from our model, judges may create new case law as well as prospectively overrule earlier case law. *Stare decisis* (a policy of observing precedent if the facts of the cases are similar) is not an inexorable command even in the common law system. Certainly, Oona A. Hathaway is correct to claim that the "doctrine of *stare decisis*… creates the [common] law's path-dependent character."[1224] However, if a court believes a past ruling is unworkable, it will be overturned. In the civil law tradition, a line of decisions establishes case law; yet judges are freer to depart from prior holdings. There appears to be no conceptual difficulty for the legal positivist here. The declaratory theory of adjudication —steeped in the Natural law tradition— implies that judges retroactively overrule earlier case law. With a change in current-state knowledge, a synchronic majority may legislatively reconsider statutory law. With a change in current-state knowledge, a diachronic majority may reconsider case law. Legal reasoning

[1223] "Constitutional Design in the Ancient World," 64 *Stanford Law Review* 907, 920 (2012).

[1224] "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System," 86 *Iowa Law Review* 601, 605 (2001).

is forgotten and resurrected, assessed and reassessed, interpreted and reinterpreted, in the hands of the living generation.

IV. A New, Better-Defined Formalism

Up to this point, public choice theory has lacked an adequate purely-positive explanation of the mechanisms 'writ large' that generate legal rules narrowly defined: statutes and case law. Our entirely novel approach to statutory law and case law keeps within the parameters of legal positivism. There will always be public disagreement about what constitutes basic individual rights and liberties and shared community values. That is why we have politics and law in a democracy under the rule of law.

However, if agency problems are kept out of consideration, there is no need for political or legal morality. Law and morality should not be confused. Legal obligation and moral duty are two different things. "The law" is a law unto itself. Its purely positive legitimacy lies outside the realm of morality. Though all of us are adept moralizers—law is a very different matter. Cooter has successfully modeled morality as a punishment-induced equilibrium dependent on a signaling equilibrium, which he calls "consensus."[1225] The problem with a consensus is that Cooter is right, a consensus is nonmajoritarian. If a consensus is nonmajoritarian, it must be kept within the bounds of informal enforcement.[1226]

The only justification for coercive law must be grounded in the majority's purely positive power to legitimize. Insofar as democracy and the rule of law are built on the economics of violence, our sole justifications for these institutions remains purely positive.

The 'the rule of law, not of men' itself is, at the heart of our Constitution, a delicate balance of synchronic and diachronic powers. Martin Shapiro shows how courts avoid a head-on collision with the legislature or parliament through a preoccupation with concrete cases and the seamless web of incremental decision-making.[1227] Courts act where legislatures are inactive. Per Justice Ruth Bader Ginsburg, courts open a (rational?) dialogue with the legislature or parliament when they make deliberate, carefully measured

[1225] "Normative Failure Theory of Law," 82 *Cornell Law Review* 947 (1997).

[1226] See generally Eric A. Posner, "Social Norms, Social Meaning, and the Economic Analysis of Law," 27 *The Journal of Legal Studies* 765 (1998); *Law and Social Norms* (2000).

[1227] "The European Court of Justice: of Institutions and Democracy," 32 *Israel Law Review* 448 (1998).

movements and slow advances with adherence to procedures.[1228] Certainly, courts keep from engaging legislatures head-on by applying the political question doctrine, and the group of doctrines that lead courts to avoid constitutional issues whenever possible. This Chapter focuses on the other justiciability doctrines: standing, ripeness and mootness.

The astonishing result of this Chapter is that private individuals have the power to legislate. An oversimplified two-type, two-action game-theoretic model shows us how this legislation is possible. Individuals, under certain conditions, can dictate terms to the rest of society. Not only is legislation by private individuals possible, it is ubiquitous. Independent courts solve the collective action problem caused by the inability of parties spread across time to form coalitions to defend their efficient interests because of temporal paradoxes.

We offer a new modest formalism, which respects legal reasoning by analogy and democratic results as a branch of practical reasoning. True, rational choice is an optimistic assumption when applied to individuals who act for their own interest. Yet, as David D. Friedman wisely points out, it becomes a pessimistic assumption when applied to people who must act in someone else's interest.[1229] We have taken agency relationships and agency costs out of the equation in this Chapter, through a slight of hand. With agency costs, public choice perspectives teach us to be cautious. Perhaps, understanding the logic of the problem widens the scope for the economic analyst, and concedes less to the rule-of-law formalist (believer in legal reasoning and democracy.)

1228 "Speaking in a Judicial Voice," 67 *New York University Law Review* 1185 (1992).

1229 *Law's Order: What Economics Has to Do with Law and Why It Matters* 13 (2000).

CUMULATIVE INDEX

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This short law and economics work offers a sustained focus on two disparate foundations for Western European legal arrangements: one grounded in Roman law and the other based on the common law.

Instead of comparing, as modern business scholars have done, the efficiency of the common law with the present-day civil law, with its own inefficiencies, the authors seek to outline through mechanism design theory what exactly are the origins and development of the present-day common law system in the United States, whether it is exceptional, and how they could further modernize it. The tradition of civil law enters the discussion insofar as some aspects of classical Roman law, as a paradigmatic private-law system, offer up alternate possibilities in the design of private-law institutions.

Next, the authors turn to what mechanism design theory might have to say about the design of public-law institutions. Under the general assumptions of democratic theory, legislatures have positive legitimacy to make law because of the power of the people who elected them. Throughout the world, however, unelected judges also make law through the exercise of judicial review. What, if anything, gives such judges positive legitimacy to make law?

The answer the authors provide may be surprising. They demonstrate that judges' positive legitimacy is based on the power of people. The court system allows a single individual to act collectively with other similarly situated individuals spread out through time. Courts are insulated from the political process because unelected judges are beholden to a temporally-disconnected group, rather than to contemporaneous constituencies.

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