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Contracts and Morals: Towards an Economic Analysis of Immoral Contracts in Ancient Rome

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Abstract

The way we nowadays think about “immoral” contracts is based on a number of assumptions. One of those assumptions concerns the relative isolation of law and extra-legal standards. This view, however, is not new or even modern: to a large extent, it can be traced back to Roman law that has been both praised and condemned for this relative separation.

In this paper we venture into the problematic of immoral transactions by combining historical, doctrinal and economic analysis. Focusing on cases and doctrines in ancient Roman law, our goal is to show how Roman lawyers found reasonable answers to issues which, in spite of obvious differences in economic and cultural context, can teach some lessons for modern contract law.

After a brief preliminary on methodological problems of the economic analysis of legal history, we reconstruct the dynamics of how and why the term immorality (*contra bonos mores*) became a general clause of Roman contract law in a relatively short time; discuss what kind of cases were solved with reference to this clause; and analyse how this clause shows the practical rationality of Roman lawyers. Finally we discuss some substantive and methodological insights this historical case can provide for the economic analysis of the interactions of law and morality.

Keywords: ancient law, contract regulation, social norms, Roman law

JEL classification: K00; K12; K40

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1. Introduction

Standard economic analysis is not concerned with the moral foundations of contract law, at least not in the way legal philosophy is – rather, it focuses on the consequences and evaluation of contract law in terms of preferences or welfare.¹ Only in a second round do economically minded legal scholars arrive to the problem how to explain (and evaluate) the still not infrequent references of modern secular legal systems to “morality”, “good morals” etc. as reasons for invalidating contracts.

The way we nowadays think about the role of morality in modern Western contract law is based on a number of premisses. First, law and morals are seen as two separate sets of rules. Second, irrespective of the factual effect of the contracting parties’ moral views (principles, attitudes, etc.) on their behaviour, as a general principle contract law should leave it to individuals to form contracts in the way they like. Third, if there are reasons for legal intervention, either in order to safeguard voluntariness or to regulate externalities, there should be corresponding *legal* rules which determine when a contract should be left unenforced or eventually one or both would-be contractors punished.² This perspective of relative “isolation”³ between law and extra-legal standards is not new or even modern. To a large extent, it can be traced back to Roman law. Arguably, ancient Rome was the first culture to systematically, albeit not completely, distinguish *ius*, *fas* and *mos* (law, religious precepts and moral custom). As we shall discuss below, Roman law has been both praised and condemned for this relative separation in subsequent centuries.⁴

In this paper we venture into the problematic of “contracts and morality” from a perspective which attempts to combine historical, legal (doctrinal), and economic analysis. As to the historical part, we discuss (1) why, how, and to what extent various transactions in ancient Rome were regulated with reference to *boni mores* (good morals), (2) reconstruct the process as the term *contra bonos mores* became a general clause of contract law in the hands of legal scholars in a relatively short time, and (3) discuss what types of cases were solved with reference to this clause, both in ancient Rome and in subsequent centuries. Our goal is to show how Roman lawyers found reasonable solutions to legal issues which, in spite of obvious differences in social and political context, bear a remarkable similarity to modern contract law problems. These findings can also teach more general lessons about the interplay between law and morality, a topic discussed in the law and economics literature of the last one or two decades, predominantly under the heading of “law and (social) norms”.⁵

¹ For an overview see Craswell 2000. Some commentators come to the orthodox answers in rather sophisticated ways. For instance, in response to some meta-theoretical critiques of economic analysis, Jody Kraus argued that the moralistic language in common law judgments is not a decisive argument against economic analysis because “*efficiency theories can account for the divergence between the non-consequentialist, moral nature of judicial opinions and the consequentialist nature of economic analysis by offering an evolutionary theory of how the terms of judicial opinions acquire their meaning.*” Kraus 2006: 14. For a more detailed argument see Kraus 2007.

² For a magisterial economic analysis of the limits of freedom of contract see Trebilcock 1993.

³ Zimmermann 1990: 707 n. 209.

⁴ Cf. text accompanying notes 10–11, below.

⁵ See e.g., Symposium 1996, McAdams 1997, Cooter 1997, 1998, Symposium 1998, Cooter 2000, Posner 2000, Ellickson 2001a, 2001b, Drobak 2006, McAdams and Rasmusen 2007 (an overview of the topic), Posner 2007 (a representative collection of articles).

2. Legal history as an object of economic analysis

As the economic analysis of ancient law can hardly be considered a well-established field of research,⁶ in this preliminary section we shall briefly discuss some methodological points and relate our research to the existing literature.

Our methodological position could be located between a purely historical and a presentist approach, closer to the former. As to the first, even if historians claim to be interested in nothing else but understanding the past, in doing so they rely unavoidably on a theoretical framework which is, in turn, linked to their current interests. With the increasing methodological self-consciousness and the loosening of interdisciplinary boundaries, we can witness now many interesting developments in the historiography of ancient Roman law. For instance, in the past decade or so historians, classicists and anthropologists have assessed various aspects of Roman legal, economic and social history with an innovative methodology, combining the reading of legal sources with the analytical tools of new institutional economics and law and economics.⁷

The main partly methodological and partly substantive controversy within this approach seems to be revolving around the compatibility of the legal scholar's focus on doctrinal details and the historian's interest in social and economic context. In particular, it is controversial to what extent Roman law reflects ("mirrors") social and economic conditions. Some argue that in order to understand their purpose and efficacy, legal rules should be examined in light of the society which produced them.⁸ Others claim that Roman law, once established, was further developed by jurists with little regard to social and economic needs.⁹ Although this paper does not directly address this controversy we consider the multidisciplinary historical approach a very promising way of scholarship. Ours is an attempt to pursue a similar line in the analysis of immoral contracts.

As to the other approach, the not fully uncritical term we suggest for it is *presentism*. Concerned with current problems of their own time and place, presentists attribute direct normative relevance to the historical object of their analysis, in our case ancient

⁶ Arguably, the economic analysis of ancient law has been in the process of establishing itself as a field of research though. A signal for this is that the publishing house Edward Elgar announced to include an anthology on the "Economic Analysis of Ancient Law" in its representative reprint series *Economic Approaches to Law*. The volume, edited by Geoffrey Miller, shall come out in December 2009, with papers by historians, economists and lawyers.

⁷ See e.g., Kehoe 1997, 2007.

⁸ As the subtitle of a collective volume tellingly formulates, researchers in this line analyse "*Roman Law as a Reflection of Social and Economic Life in Antiquity*" (Aubert – Sirks 2002). As the editors summarise on the cover: „Roman public and private law regulated many aspects of life in Late Antiquity. Legal sources, statutes, juristic opinions, textbooks, documents, and reports preserve a wealth of information shedding light on little-known areas of Roman society and its economy, but the use of this kind of evidence is often difficult, either technically or methodologically. Through a series of case studies [...], an interdisciplinary group of classicists, historians, and legal scholars propose various approaches to integrate Roman legal evidence with other kinds of sources in ancient social and economic history. [...] Close readings of juristic opinions and Republican or imperial legislation allow the contributors to find the rationale behind rules and decisions in order to explain practices and mentalities of the elite within a larger social context.”

⁹ For instance, the prominent legal historian Alan Watson argues that although Roman jurists were not unaware of social reality (almost all were socially prominent and some also top imperial bureaucrats with a well-defined perspective of the elite), they followed a style of interpretation that was inward-looking and not too much geared to social engineering. For a summary of this controversy see Cairns – du Plessis 2007.

Roman law. While some might blame purely historical analysis as esoteric antiquarianism, presentism clearly runs the danger of turning research into ideology. With regard to ancient Roman law, this can happen in at least two ways. The optimistic variant, not unlike Whig history, occurs when one is too easy and swift in drawing analogies between ancient Rome and the 21st century. The other version of presentism, cultural pessimism, refers to the idealization of remote times in contrast with the dull present. These two variants of presentism have much in common. Arguably, they can be even combined with each other. At any rate, we are attempting to avoid both kinds of presentism in this paper.

Presentism is ideological in the bad sense: simplified quasi-historical references are used as normative arguments in current debates, be it on the role of the state in economic regulation or on the role of non-legal standards (values, morality, etc.) in law. In particular, we do not think that problems of modern legal policy or scholarship can be solved *directly* in the way Roman lawyers solved theirs. Nor do we see Roman law as a “moral menace” or a negative model of how a legal system should *not* be designed. To note, while the first view is more popular among economically minded and market-oriented legal scholars,¹⁰ the second one has a more mixed group of adherents and a long and fascinating intellectual history.¹¹

As a matter of legal history, the relative separation between law and extra-legal standards has some roots in ancient Roman law. In our view, the proper way to discuss this issue is through analysis and explanation instead of praise or condemnation. In fact, the doctrine of *contra bonos mores* illustrates that the issue is rather complex. Even if we assume that the same evaluative standards apply to any legal system, it is extremely difficult to say whether and to what extent Roman law or any of its specific doctrines could be rationalized as efficient, welfare-maximizing or in other ways socially desirable. To answer *this* question, a number of other factors should be considered, including the difference between ancient Roman contract law “in books” and “in action”, the value-laden social and political context at any given point of time, and the

¹⁰ This seems to be the case with a recent article by Del Granado (2009) whose bold policy recommendation is that Latin American countries should design their legal systems after the model of ancient Roman law, as he understands it, i.e. as a radically private, quasi libertarian legal system.

¹¹ The cultural pessimist version of presentism holds that by encouraging commercialism and greed, Roman law and Western legal systems following the Roman model have been fostering an “unbrotherly” and “uncommunal” morality or excessive “rationalism”. *„In one version or another, this idea has been accepted by Europeans for centuries. Petrarch was already warning his readers in the Middle Ages that the practice of Roman law was a nursery of corrupt and mercenary values; and in the early-modern period many Europeans took the same view. Even in modern times, some of our greatest legal historians have put their authority behind the idea that Roman law was somehow morally menacing. The most famous scholarly version of the idea came from Heinrich Brunner, who, around the turn of the century, described the spread of Roman law through medieval and early-modern Europe as the spread of “destructive infections.” But Brunner was not the only major scholar to mount this sort of claim. Max Weber, to choose the most important example, also ascribed destructive impact to the spread of “rationalistic” Roman law, though his tone was of course more sober than Brunner’s; and the same idea left its mark on the writings of Karl Marx and Ferdinand Tönnies, among others. The idea has had a life in modern politics too. Through Marx, Engels, and Proudhon, it established itself in the general lexicon of socialist thought on the rise of capitalist society. Not least, it made its way into the ideological underworld of the German far right wing: Point 19 of the Nazi party program denounced Roman law as a vector of the “materialistic world-order” and demanded its elimination.”* Whitman 1996: 1841–42, footnotes omitted. Whitman 1996 also claims that as a matter of legal history, 16th century Dutch sources provide some evidence in support of the claim of “moral menace”. On the historiography of this claim see also Kaser 1939, Soma 2002, Monateri–Soma 2003, Whitman 2003.

significant changes in the Roman notions of law, morality, and freedom of contract throughout centuries.¹² Historical research has never been as simple as presentists hold. At the present state of empirical and theoretical knowledge, one should be especially careful and modest with normative conclusions. Realistically, research should focus on specific problems and well-defined relatively narrow contexts. If any lesson is to be drawn from ancient Roman law for the present, it can only be indirect.

3. The development and typical cases of *contra bonos mores* in Rome

While the *contra bonos mores* (immorality) clause itself raises difficult jurisprudential and philosophical questions about the relations of law and morality, the operation and the significance of the clause can only be understood in relation to the economic, social and political context surrounding its operation.

Before reconstructing the historical changes of the doctrine, a few general remarks on this context are in place. First, for modern eyes Roman law seems radically private: even a considerable part of criminal law was enforced privately.¹³ Second, although the contrast is probably not as sharp as scholars like Polányi viewed,¹⁴ one should bear in mind that the role of the individual in Roman society was significantly different from current conditions. In pre-industrial societies, moral and religious norms and customs played a key role in economic relationships via the social embeddedness of those relationships. Production, distribution, and consumption were directly facilitated by these non-economic links between exchange partners. In a market-oriented society of the modern times, economic exchange has become more disembedded from those social ties.¹⁵

In this section we provide an overview of the development of the notion *boni mores* (good morals) from the foundation of the City to the fall of the Empire, along with references to the socio-economic background and the systemic role of the clause within a larger set of social norms. With regard to the immorality clause we shall distinguish five periods in the history of Roman law.¹⁶

¹² As to the latter, the following remark by Allan Farnsworth (2006: 907) aptly summarises this dynamics: „The notion that a promise itself may give rise to an enforceable duty was an achievement of Roman law. But since the human mind is slow to generalize, it is not surprising that the history of contract law in Roman times is an account of the development of a number of discrete categories of promises that would be enforced, rather than the story of the creation of a general basis for enforcing promises.”

¹³ For the economic analysis of another historical example of private enforcement of criminal law see Friedman 1979.

¹⁴ Polányi 1944.

¹⁵ Regarding the sharpness of this contrast, Ellickson and Thorland distinguish “four general schools of opinion: rational-actor optimists, rational-actor pessimists, stage theorists, and cultural pluralists.” These schools of historiography differ in their views about “the extent to which human institutions vary from time to time and place to place.” (Ellickson – Thorland 1995: 324). Analysing certain institutions of land law in ancient Middle East, the two authors also make the more general methodological claim that the rational-actor model, despite its limitations, is “a fruitful prism *in all social contexts*” (ibid, at 325, emphasis added). Although we think that as an abstract methodological heuristic this claim is defensible (cf. Pettit 1995), the difference between their and our research subject warrants a different emphasis on moral attitudes, normative beliefs, cultural presuppositions and other contextual imponderabilia surrounding individual rational choice.

¹⁶ The following is the summary of an extensive discussion in Deli 2009a, chapter 4. See also Schmidt 1973, Kaser 1977, Plešcia 1987.

3.1

The first period extended from the foundation of Rome to the enactment of the Twelve Tables in the middle of the 5th century BC. In archaic Rome, the regulation of social (interpersonal) relations was in the hand of the *gens*¹⁷ and the head of the household, the *pater familias*. Powerful citizens were operating and regulating everyday life quite independently from public institutions and ‘jurisdictions’. In fact, the latter hardly existed or were less developed at the time. The settlement of disputes and the enforcement of norms were essentially private (communal) and patriarchal. In this early period, law was closely related both to morality and religious precepts.¹⁸ *Ius, fas* and *mos* constituted a close bundle of social norms.¹⁹ While the term *boni mores* was not used, the term *mos* or *mores* referred to something close to customary law. These *mores* regulated personal issues between family members,²⁰ domestic rituals and some matters of great economic import, such as succession or the marriage with marital power (*manus*).

During this archaic period, the rights of the *pater familias* were related to his status as an autonomous subject of private law (*ius privatum*). This status conferred to him a practically absolute power over his household. The few rather theoretical exceptions when public authorities intervened and restricted the quasi-sovereign power of the *pater familias* followed from the principle that the *ius privatum* was subordinate to the *ius publicum*: in case of conflict the *publica potestas* prevailed over the *patria potestas*.²¹

3.2

The second period lasted until the end of the 2nd century BC. This era was marked by the *ensor*’s activity. Originally, this magistrate could be held only by patricians, and it is said that its main function was to counterbalance the emerging political power of the lower social classes. This new central public office took on to foster social stability and peace in a very sensitive period of social turmoil. In specific, the *ensor* was instituted as the guardian of the “best civic virtues”. Obviously, the term referred to the virtues of the patricians.²²

The most important contrast to the previous period was that the *mores* began to be enforced by a separate, well-regulated central power. While the effectiveness of this censorial control is disputed among scholars, there is agreement that the behaviour of citizens, both private and public, came under the jurisdiction of the *ensor*. In private life the censors reprimanded cases of abuse of *patria potestas*, such as the cruel treatment or neglect of household members (children, the wife *in manu*, slaves and clients) or the failure to supervise their behaviour, cases of abuse of divorce, such as divorce for trivial reasons and, as we shall see, cases of ostentatious luxury. In public life the censors reprehended cases which were harmful to the community in general, such as abuse of office, public bribery, deception in public contracts, tax deception, military draft dodging, perjury or the mismanagement of guardianship.²³ The *ensor* not only controlled public matters like the proper conduct of *equites* (knights) in feeding

¹⁷ Dion. 2, 15, 2.

¹⁸ Plutarchos, Rom. 22. On this topic see Berman 1974: 49.

¹⁹ Orestano 1939: 195–196. Some even claim that “religion, law and morality were one and the same” Plescia 1987: 276.

²⁰ XII 5, 3; 6, 1.

²¹ Plescia 1987.

²² Gellius 4, 20, 10.

²³ Plescia 1987: 276–277.

their state-owned horses²⁴ but intruded into the citizens' bedrooms and private lives as well.²⁵

For instance, luxurious private expenses were limited. In a case reported by Velleius,²⁶ the Roman *ensor* realised the danger lying in such conduct and punished an *augur* (the holder of another public magistrate) who had rented a flat for the astonishing sum of six thousands sesterces. We may think today that renting a luxurious flat does not harm anybody and definitely should not be punished. In the Romans' view, however, what mattered was the effect such a luxury might have had on the morality of the whole society. When a citizen harmed the public morals with his extravagant expenditures he was punished accordingly for the sake of social stability.

The punishment generally consisted in *nota censoria* (note of censure) attached to the name of the delinquent in the census roll. The *nota censoria* could carry with it various disabilities, such as removal from the rural tribal membership, from the Knights' *rostrum*, or from the senate. This type of moral condemnation derived its deterrent effect from the fact that such disabilities temporarily cut off the person from his essential social networks in a setting when most social and economic transactions were linked to the membership in such status-based networks.²⁷

3.3

The analysis of legal sources helps us reconstruct the process as the term *contra bonos mores* became a general clause in the technical sense, starting with Papinian in the classical age and culminating in Paulus' sentences in the post-classical era. By the end of the second period, the censorial *regimen morum* and the importance of *mores* was largely diminished and practically replaced by the emerging *ius*. The major part of the former censorial supervision became a part of the praetorian jurisdiction.²⁸

As a matter of political and legal history, the emergence of the *contra bonos mores* clause is closely linked to the conflicts between the *ensor* and the *praetor* over power and regulatory competence. The *praetors*, another public authority, functioned as an independent magistracy for the administration of justice and the development of private law. Consequently, the praetorian legal judicature and the censorial moral supervision shared the task of regulating the citizens' conduct.²⁹

The appearance of the *contra bonos mores* clause as a *legal* term can be seen as a signal that private litigation supervised by the *praetor* was continuously taking over this kind of regulation from the *ensor*, at least to some extent. It was in the third period, the second and first centuries BC that this crucial change took place. These two centuries

²⁴ Or themselves, as in the case when some knights were found too fat for their horses (Gellius 6, 22).

²⁵ Dion. Hal. 20, 13, 3 and Plut. Cato maior 16.

²⁶ Velleius, *Historiae Romanae* 2, 10, 1: „Prosequamur nota severitatem censorum Cassii Longini Caepionisque, qui abhinc annos centum quinquaginta tris Lepidum Aemilium augurem, quod sex milibus HS. aedes conduxisset, adesse iusserunt.”

²⁷ Plescia 1987: 277. The *nota* was effective until the end of the five-year mandate of the *ensor*. When the new *ensor* was elected, he either reinstated or removed it. To note, besides this moral supervision, the censors also exercised important financial functions when assigning the citizens into *tribus* which then served as basis of taxation.

²⁸ Riccobono 1933–34: 302.

²⁹ The *regimen morum* was an integral part of the liability system in the republican period of Rome. For instance, the liability system as a mechanism of social control cannot be understood exclusively on the ground of private law institutions. The functioning of legislation, such as the Twelve Tables or the *Lex Aquilia* was closely linked to moral norms, social stigma, and personal shame and the latter were conveyed, in part, through the censorial *regimen morum*, see Deli 2009a.

witness to an expansion of *ius* (the praetor's jurisdiction) over *mos* (the censor's jurisdiction).

The long-lasting censorial experience could help the *praetor* to create a new legal terminus: *boni mores*.³⁰ It was called *mores* because of its origins in the former moral i.e. familiar regulations. The adjective was added to ensure a new and genuine praetorian interpretation of the notion and a purely legal understanding of some of the past values.

The term first emerged in legal sources in a delictual context. It concerned *iniuria* (civil wrong), i.e. personal harms or offenses against the head of the family or its family members. At the beginning, the use of the term *boni mores* was limited to three praetorian edicts³¹ on a casuistic basis.³² This step did not mean that the law fully absorbed the domain of morality but shows a clear expansion of the legal domain. The function of the new term was to ensure flexibility in the praetorian decision-making and case-selection process. In particular, it helped the praetor in distinguishing punishable and non-punishable forms of *iniuria*. Accordingly, the clause can be seen as a legal instrument playing a well-defined technical role in the field of private law.³³

The fact that the term *boni mores* was closely linked to the interpretation of *iniuria* suggests that in the Romans' view, immorality and illegality were also connected in a subtle way. Both set limits on personal freedom, i.e. the power of full-right citizens under private law. "As a general rule, the adult *sui iuris* person had absolute freedom of action over his person and his *familia* (i.e. dependents and property) under the *ius privatum* system, provided, however, that in the exercise of his rights no harm came and no offense was done to others (*iniuria*) and none of his acts was *contra bonos mores* of the community. The term *mores* referred to two things: local legal customs and usages (*consuetudo*) and local social-moral standards of a community (*regimen morum* or *boni mores huius civitatis*)."³⁴

3.4

In the fourth period, the 1st and 2nd centuries CE the *principes* made several attempts, mostly under the authority of *senatusconsulta*, to enforce certain moral standards in a society perceived to be in decline. For instance, Augustus intervened with laws concerning marriage, procreation, love affairs, and adultery, his goal being to stimulate an increase in the birth rate among Roman citizens. A clear early example of social engineering (largely unsuccessful), it was followed by several further regulatory efforts within this field of "moral policy".

Closer to our topic, following its role in the development of *iniuria*, i.e. in delictual matters the *boni mores* clause now came to play a role in the regulation of voluntary transactions of exchange and cooperation, i.e. in contractual relationships. This started with cases where *negotia contra bonos mores* (immoral transactions) were defined.

³⁰ Guarino 2001¹²: 371.

³¹ Ulp. D. 47, 10, 15, 2, cf. Lenel 1907: §§191ff., and Ulp. D. 47, 10, 15, 34.

³² Pugliese 1941: 5.

³³ For instance, in the 3rd century BC, praetorian edicts were issued on *convicium* and *pudicitia*, making it illegal to follow a respectable *materfamilias* in an indecent manner, i.e. *contra bonos mores*. The violations created delictual obligations (*iniuria*) which were actionable in a court of law with an *actio iniuriarum*.

³⁴ Plešcia 1987: 269. We can also observe that during this period the *publica potestas* began a slow process of replacing the *patria potestas*. In some respects the latter was abolished through the introduction of new institutions, in others only its use was discouraged.

For instance, it was *contra bonos mores* to sell poisonous drugs³⁵ or to exact or impose a penalty (*poena*) for breach of a promise to marry or for getting a divorce.³⁶ The *negotia contra bonos mores* were simply declared void: they did not create contractual obligations and they were not actionable in a court of law.³⁷ Public authorities not only explicitly forbade certain wrongdoings but also discouraged citizens from contracting for such acts by denying the enforceability of such agreements. This praetorian *moral* standard of the *legal* validity of transactions remained in force in the classical and postclassical periods too – illegal and immoral transactions continued to be void.

We can assume that this function of the clause first appeared in *bonae fidei* contracts, such as mandate to open the door for the same standard in *stricti iuris* obligations, e.g. stipulations later. As a quote from Ulpian states, a *societas* (partnership) could only be created for honest and licit purposes. If the parties' aim was *maleficent*, e.g. committing thefts their *societas* was null and void.³⁸ Relatedly, *turpitude* was a reason for invalidating agreements (*pacta*).³⁹ Besides sexual offenses, this category mainly included family offenses, such as the failure to support ascending and descending members of the family economically, socially and morally or prosecuting or testifying against ascending or descending members of the family.

In this period the *boni mores* clause became a highly technical legal instrument imposing limitations on the parties' contractual freedom⁴⁰ and free will.⁴¹ As mentioned above, the Romans considered it against good morals to impose a contractual penalty (*poena*) which would limit the freedom of marriage or divorce. This can be illustrated nicely with a case in family law.⁴²

As far as we can reconstruct, the background of the case is that a certain Titia had married Gaius Seius only to improve her son's chances for marriage with Gaius Seius' daughter. Most probably the daughter was a good party while Titia's son could have been a *spurius* (a child born outside of an official family). The threat of social disrepute and the prospect of financial well-being may have forced Titia to sacrifice her independence. In the agreement, the children's future marriage was not only a motive but a precondition of the parents' matrimony. Thus, Titia was bound to Gaius Seius by

³⁵ Gaius, D. 18, 1, 35, 2.

³⁶ Paulus D. 45, 1, 134.

³⁷ Plescia 1987. Common law has a similar doctrine: He who comes to the law has to come with clean hands, i.e. courts do not intervene between two parties who are both acting wrongfully.

³⁸ D. 17, 2, 57. „Nec praetermittendum esse pomponius ait ita demum hoc esse verum, si honestae et licitae rei societas coita sit: ceterum si maleficii societas coita sit, constat nullam esse societatem. generaliter enim traditur rerum inhonestarum nullam esse societatem.” To note, the text does not explicitly refer to *boni mores*. However, in the time of Ulpian *inhonestum* and *contra bonos mores* can be regarded as synonyms. The last sentence of this fragment might be a later addition because of its general character and shows the development of the clause concerning dishonest or immoral acts from the casuistic approach towards the more abstract formulation.

³⁹ Paulus D. 2, 14, 27, 4. “Pacta quae turpem causam continent non sunt observanda.”

⁴⁰ Gai. 3, 157.

⁴¹ Iul. D. 45, 1, 61.

⁴² D. 45, 1, 134pr.: “Titia, quae ex alio filium habebat, in matrimonium coit gaio seio habente familiam: et tempore matrimonii consenserunt, ut filia gatii seii filio titiae desponderetur, et interpositum est instrumentum et adiecta poena, si quis eorum nuptiis impedimento fuisset: postea gaius seius constante matrimonio diem suum obiit et filia eius noluit nubere: quaero, an gatii seii heredes teneantur ex stipulatione. respondit ex stipulatione, quae proponeretur, cum non secundum bonos mores interposita sit, agenti exceptionem doli mali obstaturam, quia inhonestum visum est vinculo poenae matrimonia obstringi sive futura sive iam contracta.”

their agreement about their children marriage, which in turn severely restricted the freedom of choice of the daughter and the son as well.

This case provides evidence that in personal matters like marriage the moral principle to safeguard the freedom of choice was taken seriously. But the case also illustrates how economic considerations (i.e. private material interests), the Roman “shame culture”,⁴³ and the principle of contractual freedom intertwined. We should also keep in mind that divorce was not stigmatized by later scruples of Christian origin at that time. The key to the proper understanding of the text lies in the second part of the last sentence: „*matrimonia ... sive futura sive iam contracta*”. Thus, a penalty was unenforceable with regard to both proposed and tied marriages.

3.5

Throughout the fourth period, the *contra bonos mores* clause was a subsidiary tool besides specific regulations of concrete legal norms. Nevertheless, its content was established in jurisprudence in a relatively narrow and specific manner. In the fifth and last period, starting from the 3rd century CE, the term *boni mores* gained a more abstract character and served as a tool in shaping doctrines of conditions and other general legal categories (e.g. *bonae fidei iudicia*). It did not only figure as a clause in certain specific norms but transformed into a more general concept and became part of the catalogue of sources of law, along with *leges* and *constitutiones*.⁴⁴

The notion *boni mores* started referring to a set of objective social values. It was objective in the sense that its reference was to the public order of the *civitas*, the city-state.⁴⁵ This development went hand in hand with the ever-growing multiculturalism of the Roman Empire which peaked in 212 CE when Roman citizenship was granted to almost every free person in the empire.

Because of its general character, it is hard to say how much the concept was influenced by emerging Christian thought and doctrines during Roman times. What seems certain is that in the postclassical period and under Justinian, the *regimen morum* became harsher, especially in family law. This trend undoubtedly reflects the Christian understanding of family and sexuality. For instance, the principle of no-fault divorce of the classical period was replaced by fault divorce. Marriage was soluble only with a just cause and the new rule was backed by severe penalties.⁴⁶

3.6

Looking at the legal sources, one can observe that most cases in which *contra bonos mores* figured as an argument for invalidating the transaction were related to inheritance, marriage and sexuality. The reason for this is linked to the social characteristics of these domains. Some of these characteristics are specific to Roman society, others are more general. Arguably, sexuality and death have always generated strong emotions and personal feelings. Conflicts in these domains have always brought to the surface moral sentiments and implicit value commitments of those involved.

More specific to ancient Rome, inheritance and marriage were transactions of great *economic* importance, at least for the upper classes. To simplify a bit, in this largely agrarian economy the transfer of wealth upon death or the union of families through

⁴³ On the concept of shame culture see Dodds 1970: 17-37, Wlosok 1990.

⁴⁴ Pap. D. 22, 1, 5, C. 2, 3, 6, and PS 1, 1, 4.

⁴⁵ Ulp. D. 47, 10, 15, 6.

⁴⁶ Plescia 1987.

marriage were one of the usual and significant ways of becoming rich (or poor). The relative importance of wealth transfers through testaments explains the large number of Roman legal cases dealing with disputes over inheritance. Arguably, this applies to modern (post-industrial) Western society to a much lesser extent.

A related long-lasting characteristic of Roman social morality was their disapproval for prodigality and luxury. As Max Kaser argued, this attitude was a relic of the peasant mentality of early Romans. It was also reflected in their hostility towards gratuitous promises and their efforts to maintain the stock of wealth (mainly, land) and transfer it from one generation to the other in an unchanged manner.⁴⁷

One fragment from around 300 CE nicely illustrates how this element of Roman social morality played a role in inheritance law.⁴⁸ A prodigy could only make a will or could be instituted as an heir if he had ceased his disesteemed way of living and his behaviour recurred to *boni mores* again. Considering the fact that in antique Rome succession was one of the most important possibilities of acquiring great fortune, this regulation was an effective regulatory instrument. Whatever its direct impact on the prodigy's behaviour itself, the rule effectively deterred possible creditors from lending money to him by making his future testamentary heritage uncertain.⁴⁹

Also, sexuality and family had a somewhat different (moral, legal, and economic) significance in Rome than in our current understanding.⁵⁰ For instance, one of the main considerations in the regulation of abortion was to protect the father's expectancy of a child as a part of his wealth. With regard to prostitution, "there arose the legal question as to whether the transaction of a prostitute or pimp constituted a *validum negotium*. According to Ulpian,⁵¹ no action was allowed for the recovery of money paid in consideration for sexual services, because the immorality did not rest on both parties but only on the payer of the money. The prostitute, though she committed an immoral act by fornicating, yet did not commit an immoral act by accepting money for it, since she was a prostitute. Under the law, therefore, there was no 'legal' obligation to pay the prostitute for the rendered services, because contracts for immoral acts were not legally enforceable; but once one paid for them, then he would be barred from recovering the money in a court of law by virtue of the 'natural' obligation for the services received. In other words, the *obligatio naturalis* barred the *condictio indebiti*."⁵²

To sum up, during the long span of Roman history, we observe an evolution "from family self-help and private justice to compulsory state justice; from a loose federation of family chiefs to a centralized government during which the power of the *paterfamilias* over the members of the family and property gradually declined as the

⁴⁷ Kaser 1939: 24.

⁴⁸ PS 3.4a.12: "Prodigus recepta vitae sanitate ad bonos mores reversus et testamentum facere potest et ad testamenti sollemnia adhiberi potest."

⁴⁹ Interestingly, we find analogies to this rule in more recent cases in legal history. The irresponsible spending habits and overindebtedness of young members of the social elite was regulated in a strikingly similar way in Rome and in (early) modern England, and the underlying motivations of the legislation might have been similar as well. The purpose of the invalidation of the transactions through which these "expecting heirs" would take over large debts was to discourage the land-owning elite from endangering their social status and, indirectly, the traditional social structure. The difference was mainly in doctrinal technique – the English used duress to invalidate such contracts by expecting heirs, see Dawson 1947.

⁵⁰ See e.g. McGill 1994, 1998.

⁵¹ D. 12, 5, 4 pr.; Ulpian D. 12, 5, 4, 3; Paulus, D. 12, 5, 8; C. 4, 7, 5.

⁵² Plešcia 1987: 305. It would be interesting to compare this regulation with the current German law (*Gesetz zur Regelung der Rechtsverhältnisse von Prostituierten*) which came into force in 2002. See Cserne 2008: 111.

power of the public authority grew.”⁵³ During these centuries the reference of the term *boni mores* also underwent a number of changes. In pre-classical Roman law *boni mores* originally meant the values of a distinct social class, the patricians. In the classical era it became a more general term both in the sense that its elitist tone slowly diminished and in the sense that its scope expanded.

But how could such a term have had a well-defined legal meaning in a multicultural empire like Rome? In this respect one should notice the inherent ambiguity in the Roman term *boni mores*. Their use of the term was not only descriptive, i.e. referring to what H. L. A. Hart called social morality but it had a normative flavour as well (something similar to the Hartian notion of critical morality).⁵⁴ In brief, “the ultimate test of *boni mores* was *utilitas publica*.”⁵⁵ The term referred to those values and norms which on one hand provided a general societal framework for various transactions within Roman society but on the other hand were critically selected and filtered through the ideas held by lawyers as a group of the morally conservative professional elite.

4. Invalidating transactions for moral reasons: learning from the Romans?

At this point we arrive to a question which is at least as elusive as it is interesting: is there any lesson to be learned from the history of the Roman doctrine of immorality? To keep the discussion focused, in this section we argue that potential lessons are twofold: substantive and methodological. As to the first kind of lessons, we shall briefly review later doctrinal developments in various national legal systems (4.1) as well as the normative discourse about legal moralism in philosophy and law and economics (4.2). With regard to substance, the question is to what extent contract regulation should rely on morality. As to the methodological lessons, we discuss whether current economic models can grasp the problem of immoral transactions satisfactorily, either in terms of explanation or in terms of justification (4.3).

4.1

In the various modern codes and restatements of law, “immorality” and “public policy” are generally seen as reasons for the non-enforcement of contracts. In reviewing modern national contract law regimes, we can observe a striking similarity across jurisdictions. In almost every Western legal system, a contract can be voided when a judge finds it violating certain fundamental norms of social morality, even if it does not violate any legal rule.⁵⁶ When rational contracting parties expect this to happen, they adapt their

⁵³ Plescia 1987: 266–267.

⁵⁴ Cf. Hart 1963.

⁵⁵ Plescia 1987: 280. He continues: “The paramount concern of the judge was the public interest over the individual interest: *salus reipublicae*. In other words, the judge was considered as the interpreter of the ruling class, i.e., of the informed segment of the community. [...] The jurists separated the *aequitas naturalis*, known to all men, from the *aequitas civilis* or better *ratio civilis*, known to few people who were versed in the science of government, namely the jurisprudential and *arcane imperii*.”

⁵⁶ “In addition to refusing enforcement in order to protect the interests of one of the parties, courts sometimes refuse enforcement in order to protect the interests of the public as a whole. In all legal systems, courts reserve this power to themselves. French law brings into play the concept of *cause* on the rationale that a contract cannot be based on a *cause illicite*. A court will examine not only the reason that led a party to engage in a transaction, for example, the expectation of acquiring land in return for a price, but also the party’s ulterior motive, such as operating a casino or a bordello, and determine whether this motive is offensive to law or morals.” Farnsworth 2006: 914. Cf. Schmidt 1973, Zimmermann 1990: 697–706, Kötz 1997: 154–170.

behaviour accordingly. To the extent the doctrine of immorality has this deterrent effect, it upholds and reinforces social morality.

While there are cases where either the nature of the transaction itself or the motivations behind it are deemed “against good morals” in an intuitively convincing way, on a closer look the justification of the general prohibition is not obvious. In fact, in various legal systems courts use this general clause for a wide range of purposes. Only a part of them are related to the Roman understanding of the term.

While Romans prohibited immoral contracts as a matter of *public policy*, in particular in order to deter the kinds of behaviour which they saw as violating community values and interests, later doctrinal and jurisprudential developments linked the morality of contractual relationships closer to justice and especially distributive justice. It is interesting to observe that whereas family life and sexual morality are two domains where modern legal systems look similar to Roman law in terms of *structure* (albeit less so in substance⁵⁷), in modern legal systems the domain covered by the immorality clause also includes cases where the balancing of *individual interests* of the contracting parties is at stake. Medieval contract theories already discussed inequality of performances (*lesio*), unequal bargaining power, and exploitation in moral terms, as matters of justice.⁵⁸ Modern contract law systems follow the same line. In current understanding, one widespread domain of application of the immorality doctrine refers to cases when the economic freedom of one contracting party is claimed to have been unduly restrained. This category typically includes long-term exclusive dealings, non-competition covenants⁵⁹ or burdensome suretyships undertaken by family members.⁶⁰

To sum up, one important difference between Roman and modern understandings of immoral contracts is that in the latter the clause has been increasingly used as an instrument for substantive judicial regulation of contracts, motivated by fairness or paternalism. The arguments for and against this kind of contract regulation (substantive, in contrast to formal; motivated by fairness or paternalism, in contrast to lack of voluntariness, externalities, or information imperfections) have been extensively discussed in the law and economics literature⁶¹ and shall not be revisited here. We only indicate that this later development in legal doctrine was unknown in ancient Roman law.

4.2

The *philosophical justification* of the immorality doctrine is controversial even in its traditional Roman domains. In the terminology of modern philosophical discourse, prohibiting a voluntary (trans)action based on its alleged “immorality” is called *legal*

⁵⁷ Cf. the paragraph accompanying notes 50 to 52, above.

⁵⁸ Cf. Gordley 1991.

⁵⁹ Kötz 1997: 156–161.

⁶⁰ In a 1993 decision (*BVerfG* 89, 214) the German Constitutional Court decided that if an inexperienced and resourceless individual takes on a disproportionate financial burden as surety for the loan of a family member, without personal interest, the transaction can be regarded as immoral (*sittenwidrig*) in sense of the §138 BGB. There are three conditions that should be met: some kind of pressure, subjectively disproportionate debts, absence of personal financial interest. In such cases German courts have the right to paternalistically revise suretyships by children, spouses, fiancés and partners through private law general clauses. Interestingly, when German courts use the immorality doctrine, the remedy they provide is paternalistic in substance. Historically, it can be seen as a reincarnation of the *metus reverentialis* doctrine, a weaker version of duress, see Deli 2009b.

⁶¹ See Cserne 2008 and the references cited there.

moralism. What moralism means and whether it can be justified is a matter of serious controversy. Without discussing the variety of standpoints on this matter,⁶² we merely indicate how legal moralism can be distinguished from and contrasted with other liberty-restricting reasons or principles.

Moralism vs. harm. In his magisterial discussion of liberty-restricting principles in criminal law, Joel Feinberg characterised moralism as the prohibition of “harmless wrongdoing.”⁶³ When a conduct is prohibited mainly or exclusively on the ground that it violates social morality, this implies that the conduct does not directly harm or offend anyone: it merely violates a norm of social morality. However, many supporters of legal moralism do not consider the wrongdoings labelled “immoral” to be harmless. They argue that the survival or flourishing of any particular society requires moral uniformity. Under this view, “immorality” does not simply violate an abstract moral principle or code: it causes harm to society by weakening its moral ties.⁶⁴ This argument brings legal moralism close to the harm principle or in economic terms to the regulation of negative externalities. In fact, some commentators, including *law and economics* scholars, tend to speak about “moral externalities” which would justify legal intervention.⁶⁵

Moralism vs. paternalism; exploitation vs. commodification. Whereas legal moralism justifies an intervention in individual conduct by appealing to abstract moral values, legal paternalism claims to promote the interests of individuals by imposing duties on them against their will. When specific instances of regulation are to be classified, the line of separation between moralistic and paternalistic reasons becomes somewhat blurred.⁶⁶ For instance, when “exploitative” contracts are prohibited in order to protect a vulnerable party, that party is considered “victim”, although not only he may have consented fully voluntarily *ex ante* but the contract even may have promoted his interests, compared to his *ex ante* position or with respect to his outside opportunities.⁶⁷ Thus, when the “victim” is granted relief *ex post* under such circumstances, arguably, the justification can not even be based on paternalism but only on abstract values imbued in social morality.⁶⁸

Looking at the substantive normative arguments in the *public discourse* of societies committed to some model of political and economic liberalism, the issue is often conceptualised as a debate on the role and the scope of markets. Traditional critics of the market paradigm are used to argue that markets are not “naturally given.” Rather, they are products of an historical development and their functioning depends on politically determined legal constructions.⁶⁹

⁶² For an overview see Greenawalt 1996.

⁶³ Feinberg 1988.

⁶⁴ Devlin 1965. For a thoughtful critique see Hart 1963, 1983.

⁶⁵ See section 4.3, below.

⁶⁶ On the difficulties of separating the two principles see Dworkin 2005.

⁶⁷ On exploitative contracts see Bigwood 2004, on exploitation in general see Wertheimer 2008.

⁶⁸ As we shall see below in section 4.3, the invalidation of immoral contracts and more specifically the legal restrictions on the transferability of rights or resources (inalienability) can be motivated by a related concern, fear from *commodification*. For economic analyses of inalienability see Calabresi – Melamed 1972: 1111–1115, Rose-Ackerman 1985.

⁶⁹ For the first see e.g. Polányi 1944, for the second, e.g. Hale 1952 and Atiyah 1979.

More specifically, the normative controversies about the role of the market focus on heavily discussed policy issues such as whether “permitting the sale of votes or public offices, the sale of blood or body organs, commercial surrogacy contracts, prostitution contracts or pornography undermine values of human self-fulfilment or human flourishing.”⁷⁰ Needless to say, such questions are not only raised by the enemies of markets. To mention just one example, the Nobel-laureate economist Kenneth Arrow once noted that “a private property—private exchange system depends, for its stability, on the system’s being non-universal.”⁷¹ What he meant by this is that if political, legal and bureaucratic offices were auctioned off, their holders freely bribed or votes freely bought and sold, the private sphere would be massively destabilized.

In sum, there seem to be reasonable arguments for limiting the scope of markets and, eventually, invalidating certain kind of transactions as “immoral” or against public policy. At this high level of generality, current public discourse is in accord with the views ancient Romans held about the role of contracts and contract law in society. To be sure, the closer we move to specific matters, the more conspicuous the differences become.⁷² When we move from substantive normative arguments to the methodology of economic modelling, there appear problems of yet another type.

4.3

In contrast to the mainstream philosophical discourse, the current *economic* discourse on the interactions of law and morality usually has a strong instrumentalist character. This instrumentalist perspective also has an impact on how economists conceptualize morality and on the way they develop theoretical *models* of it. This section serves to illustrate this connection with a few examples.⁷³

As mentioned above, some law and economics scholars justify the prohibition of “immoral” conduct, such as same-sex marriage with reference to so-called “moral externalities” of such conduct.⁷⁴ Aristides Hatzis, a law and economics scholar himself recently suggested a sophisticated and powerful critique of this “moral externality” argument. According to his conclusions, the economic theory of externalities cannot provide any clear-cut criterion for the regulation of immoral conduct.⁷⁵

Other related notions such as inalienability and commodification also seem to point to the limits of economic theory in understanding moral limitations to freedom of contract. As a recent overview of the economics of contract law admits, “*both popular morality and legal institutions commonly limit transactions dealing with matters thought to be fundamental to citizenship or personal identity; common examples include prohibitions on slavery, sexual prostitution, and the transfer of political rights such as suffrage or*

⁷⁰ Trebilcock 1993: 19.

⁷¹ Cited in Trebilcock 1993: 23. Cf. Arrow 1997.

⁷² Cf. section 3.6 above.

⁷³ For a critical overview of rational choice models of morality see Cserne 2004, ch. 4.

⁷⁴ “The externality argument [...] goes like this: A part of the cost of the voluntary but “immoral” activity spills over onto “moral” people, who are annoyed by the way of life of “immoral” people. Of course, every transaction is likely to impose a cost on a third party. This external cost is greater when this activity goes against conventional morality. Then, the way of life or the acts of some people can be said to offend the majority. Their acts or transactions have negative external effects of such magnitude that they can have detrimental effects to social order itself. Consequently, the argument goes, the state should intervene in order to protect the offended majority, by making the immoral people internalize the cost of their immorality, enhancing overall welfare.” Hatzis 2006: 58.

⁷⁵ Hatzis 2006.

*military service. The entitlements subject to such restriction are often described in political terms as inalienable, a concept not easily incorporated into economic accounts of exchange. [...] In some cases, restrictions on alienability can be justified in terms of market failure such as asymmetric information [...] or externality [...]. But many such restrictions are better explained by the idea that exchange of the relevant entitlement injures some fundamental interest of the restricted agent not captured by his utility function, or some social interest that cannot be translated into material or pecuniary terms.”*⁷⁶

The problems with the instrumentalist models of morality can be seen most explicitly in a recent article by Steven Shavell. Shavell compares law and morality as two mechanisms for the regulation of conduct and discusses “their theoretically optimal domains – [i.e.] where morality alone would appear to be best to control behaviour, [...] where morality and the law would likely be advantageous to employ jointly, and [...] where solely the law would seem to be desirable to utilize.”⁷⁷ In a related paper, co-authored with Louis Kaplow, they suggest a theory as to what kind of moral system would be economically efficient, i.e. how moral sanctions (guilt) and rewards (virtue) should “be employed to govern individuals’ behaviour if the objective were to maximize social welfare”.⁷⁸

More nuanced and less formal than Shavell, and focusing on an historical legal system, Karayiannis and Hatzis conceive law, social norms, and morality as three transaction-cost saving mechanisms that facilitate the functioning of the economy. They claim that “formal institutions cannot function without being internalized by the citizens [i.e. morality] and without being backed by social norms.”⁷⁹ They also discuss under what conditions social morality alone, i.e. without formal law, is able to regulate business effectively. By calling morality a “*transaction cost-saving device*” this approach also reveals an explicit instrumentalism. The main analytical differences between their and Shavell’s approach are twofold. First, they distinguish morality and social norms. Second, they model both of them as exogenously given. In other words, quite realistically, they do not consider morality and social norms as a matter of deliberate institutional design.⁸⁰

⁷⁶ Hermalin – Katz – Craswell 2007: 47. As they continue: “In economics, this idea finds historical roots in the classical Marxian idea of commodification, or the change in the social meaning of a good that occurs when it becomes the subject of economic exchange. The concept of commodification can be translated into neoclassical economic terms by interpreting it as sort of a cultural externality (e.g., when sexual prostitution is said to diminish the quality of other people’s relationships) or as a lexicographical preference ordering on the social welfare function.” For a reinterpretation of claims about commodification within law and economics see Trebilcock 1993: ch. 2 (p. 23–57). What makes the issue a deep moral problem, probably beyond the scope of economics, is that such cases are often formulated in terms of a conflict between autonomy and human dignity, see Cserne 2008: 125–126, 159–160.

⁷⁷ Shavell 2002: 227.

⁷⁸ Kaplow – Shavell 2001: 1. In particular, they analyse “how the optimal use of guilt and virtue is influenced by the nature of the behaviour under consideration, the costs of inculcating moral rules, constraints on the capacity to experience guilt and virtue, the fact that guilt and virtue often must be applied to groups of acts rather than be tailored to every conceivable type of act, and the direct effect of feelings of guilt and virtue on individuals’ utility.” Kübler suggests another instrumental model where social norms are regulated through “changing the meaning or the reputational value of following a norm.” (Kübler 2001: 449)

⁷⁹ Karayiannis – Hatzis 2007.

⁸⁰ Instrumentalist models of morality have been developed at the level of individual behaviour as well. In these models the question is how to account for rule-following, altruism, and cooperation within rational choice theory. One way is to explain co-operative behaviour in a repeated-game framework as a

As far as we can judge, standard economic *models* still cannot capture the complexity of interactions between law and morality. For instance, ancient Roman law clearly shows that the dichotomy employed in Shavell's model⁸¹ is rather simplistic. Morality was institutionalised in Rome both through the jurisdiction of the *censor* and through informal and semi-formal social networks based on reciprocity, status, honour, and *infamia* as a sanction. Other models take the distinction between individual moral beliefs and semi-formal social control into account but their arguments are not fully persuasive on other accounts.⁸² More generally, as a matter of conceptualization and analytical clarity, one would need more sophisticated models in order to capture the complexity of the relations between law and morals.

5. Conclusion

In this paper we have discussed the role of *boni mores* (good morals) in the regulation of transactions in ancient Roman law. Looking at the historical and doctrinal material with an economist's eye, many rules and institutional details can be understood as reasonable answers to regulatory challenges or social needs, as perceived by contemporary decision-makers. Economists can profit from this historical example when they join into normative discourses about the limits that a certain society should (and should not) set to voluntary transactions. To be sure, policy discourses are not historical and only partly academic.

We have also criticised various shortcomings of current economic models of law and morality. In this paper we have only taken a few preparatory steps towards a more satisfactory model. Our goal has been to collect some ingredients for this more challenging task. As to the direction of further research, we would like to stress the explanatory potential of evolutionary models in understanding long run historical changes such as the development of the *boni mores* doctrine. The interplay of law and morality has been a dynamic process across times and places, driven by human beliefs, desires and interactions, embedded within social, economic, and institutional constraints. When this historical dynamics is put under systematic social scientific scrutiny, one promising way to conceptualize these changes is through evolutionary models.

References

- Arrow, Kenneth J. 1997. 'Invaluable Goods' *Journal of Economic Literature* 35, 757–765
- Atiyah, Patrick S. 1979. *The Rise and Fall of Freedom of Contract*. Oxford: Clarendon Press

signalling mechanism (Posner 2000). In these models people comply with rules in order to sustain their reputation for trustworthiness. Alternatively, rule-guided behaviour can be included in a rational choice model through *ad hoc* modifications, such as the redefinition of preferences by attaching utility to norm-conformity itself (Rabin 1993). Finally, multiple-self models interpret moral conduct as the rule-guided behaviour of a lower-level self, directed by instrumental considerations of a higher-level self. For instance, Cooter (1998) analyses morality in this vein, as a technique of self-governance (self-control and self-improvement) by individuals. Cf also Cooter 2006.

⁸¹ Shavell 2002.

⁸² Karayiannis – Hatzis 2007.

- Aubert, Jean-Jacques and Boudewijn Sirks (eds.) 2002. *Speculum Iuris* Roman Law as a Reflection of Social and Economic Life in Antiquity. Ann Arbor: University of Michigan Press
- Berman, Harold J. 1974. *The Interaction of Law and Religion*. Nashville: Abingdon Press
- Bigwood, Rick 2004. *Exploitative Contracts*. Oxford – New York: Oxford University Press
- Cairns, J W and P J du Plessis 2007. ‘Introduction: Themes and Literature’ in *Beyond Dogmatics* Law and Society in the Roman World, ed. J W Cairns and P J du Plessis. Edinburgh: Edinburgh University Press, 3–8
- Calabresi, Guido – Douglas A. Melamed 1972. ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ *Harvard Law Review* 85, 1089–1128
- Cooter, Robert 1997. ‘The Normative Failure Theory of Law’ *Cornell Law Review* 82, 947–979
- Cooter, Robert 1998. ‘Model of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes’ *Boston University Law Review* 18, 903–930
- Cooter, Robert 2000. ‘Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms’ *Virginia Law Review* 86, 1577–1601
- Cooter, Robert 2006. ‘The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint’ *Fordham Law Review* 75, 1275–1285
- Craswell, Richard 2000. ‘Contract Law: General Theories’ *Encyclopaedia of Law and Economics Vol III. The Regulation of Contracts*, ed. Boudewijn Bouckaert – Gerrit de Geest. Cheltenham, UK: Edward Elgar, 1–24
- Cserne, Péter 2004. ‘The Normativity of Law in Law and Economics’ *German Working Papers in Law and Economics* Vol. 2004: Article 35
- Cserne, Péter 2008. *Freedom of Choice and Paternalism in Contract Law* Prospects and Limits of an Economic Approach. PhD thesis, Universität Hamburg, online: <http://www.sub.uni-hamburg.de/opus/volltexte/2008/3765/>
- Dawson, John P. 1947. ‘Economic Duress – an Essay in Perspective’ *Michigan Law Review* 45, 253–290
- Del Granado, Juan Javier 2009. ‘The genius of Roman law from a law and economics perspective’ *Berkeley Program in Law & Economics. Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers* Paper 09_0109-1, online: http://repositories.cdlib.org/bple/alacde/09_0109-1
- Deli, Gergely 2009a. *A generális klauzula dogmatikai, történeti és összehasonlító elemzése, különös tekintettel a jóerkölcsebe ütköző szerződések tilalmára* [A doctrinal, historical, and comparative analysis of general clauses, with special reference to the good morals] PhD thesis, Pázmány Péter Catholic University Faculty of Law and Political Sciences, online: http://www.jak.ppke.hu/tanszek/doktori/letolt/dg_dolg.pdf
- Deli, Gergely 2009b. ‘Metus Reventialis: Come-back of an Old Concept?’ in Dávid Radovan – Jan Neckár – David Sehnálek (eds.) *COFOLA 2009* The Conference Proceedings. Brno: Masaryk University, 131–136

- Devlin, Patrick 1965. *The Enforcement of Morals*. Oxford – London – New York: Oxford University Press
- Dodds, Eric Robertson 1970. *Die Griechen und das Irrationale*. Darmstadt: Wissenschaftliche Buchgesellschaft
- Drobak, John N. (ed.) 2006. *Norms and the Law*. Cambridge: Cambridge University Press
- Dworkin, Gerald 2005. 'Moral Paternalism' *Law and Philosophy* 24, 305–319
- Ellickson, Robert C. 2001a. 'The Market for Social Norms' *American Law and Economics Review* 3, 1–49
- Ellickson, Robert C. 2001b. 'The Evolution of Social Norms: A Perspective from the Legal Academy' in Michael Hechter and Karl-Dieter Opp (eds.) *Social Norms*. New York: Russell Sage Foundation, 35–75
- Ellickson, Robert C. and Charles DiA. Thorland 1995. 'Ancient Land Law: Mesopotamia, Egypt, Israel' *Chicago-Kent Law Review* 71, 321–411
- Farnsworth, E. Allan 2006. 'Comparative Contract Law' in *The Oxford Handbook for Comparative Law* ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press), 899–936
- Feinberg, Joel 1988. *Harmless Wrongdoing*. Oxford: Oxford University Press
- Friedman, David 1979. 'Private Creation and Enforcement of Law: A Historical Case' *Journal of Legal Studies* 7, 399–415
- Greenawalt, Kent 1996. 'Legal Enforcement of Morality' in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis M. Patterson. Malden, Mass. – Oxford: Blackwell, 475–487
- Gordley, James 1991. *The Philosophical Origins of Modern Contract Doctrine*. Oxford: Oxford University Press
- Guarino, Antonio 2001. *Diritto privato romano* 12th ed. Napoli: Jovene
- Hale, Robert L. 1952. *Freedom through Law*. New York: Columbia University Press
- Hart, Herbert L. A. 1963. *Law, Liberty, and Morality*. Stanford: Stanford University Press
- Hart, Herbert L. A. 1983. 'Social Solidarity and the Enforcement of Morality' in *Hart Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press, 248–262
- Hatzis, Aristides N. 2006b. 'The Negative Externalities of Immorality: The Case of Same-Sex Marriage' *Skepsis* 17, 52–65
- Hermalin, Benjamin E. – Avery W. Katz – Richard Craswell 2007. 'Contract Law' in *The Handbook of Law & Economics* Vol. I, ed. A. Mitchell Polinsky – Steven Shavell. Elsevier – North Holland, 3–136
- Kaplow, Louis and Shavell, Steven 2001. 'Moral Rules and the Moral Sentiments: Toward a Theory of an Optimal Moral System' *Harvard Law and Economics Discussion Paper* No. 342, available at: <http://ssrn.com/abstract=293906>

- Karayiannis Anastassios D. – Aristides N. Hatzis 2007. ‘Morality, Social Norms and Rule of Law as Transaction Cost-Saving Devices: The Case of Ancient Athens’, available at: <http://ssrn.com/abstract=1000749>
- Kaser, Max 1939. *Römisches Recht als Gemeinschaftsordnung*. Tübingen: Mohr Siebeck.
- Kaser, Max 1977. *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht*. Wien: Verlag der Österreichischen Akademie der Wissenschaften
- Kehoe, Dennis P. 1997. *Investment, Profit, and Tenancy The Jurists and the Roman Agrarian Economy*. Ann Arbor: University of Michigan Press
- Kehoe, Dennis P. 2007. *Law and the Rural Economy in the Roman Empire*. Ann Arbor: University of Michigan Press
- Kötz, Hein 1997. *European Contract Law Vol. 1: Formation, Validity, and Content of Contracts; Contract and Third Parties*. Oxford: Clarendon Press
- Kraus, Jody S. 2006. ‘A Philosophical Approach to the Economic Analysis of Contract Law’ [Scholarship Profile] *Virginia Journal* 9, 7–23
- Kraus, Jody S. 2007. ‘Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis’ *Virginia Law Review* 93, 287–359
- Kübler, Dorothea 2001. ‘On the regulation of social norms’ *Journal of Law, Economics and Organization* 17, 449–476
- Lenel, Otto 1907. *Das Edictum Perpetuum Ein Versuch zu seiner Wiederherstellung*. Leipzig: Bernhard Tauchnitz
- McAdams, Richard H. 1997. ‘The Origin, Development, and Regulation of Norms’ *Michigan Law Review* 96, 338–433
- McAdams, Richard H. and Eric B. Rasmusen 2007. ‘Norms in Law and Economics’ in *Handbook of Law and Economics* vol. 2., ed. A. Mitchell Polinsky and Steven Shavell Amsterdam – London: Elsevier, 1573–1618
- McGinn, Thomas A. J. 1994. *The Economy of Prostitution in the Roman World A Study of Social History and the Brothel*. Ann Arbor: University of Michigan Press
- McGinn, Thomas A. J. 1998. *Prostitution, Sexuality, and the Law in Ancient Rome* Oxford: Oxford University Press
- Monateri, Pier Giuseppe – Alessandro Soma 2003. ‘The Fascist Theory of Contract’ in *Darker Legacies of Law in Europe The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, ed. Christian Joerges and Navraj Singh Ghaleigh. Oxford – Portland: Hart Publishing 2003, 55–70
- Orestano, Riccardo 1939. ‘Dal ius al fas. Rapporto fra diritto divino e umano in Roma dall’età primitiva all’età classica’ *Bulletino dell’Istituto di Diritto Romano* 46, 194–273
- Pettit, Phillip 1995. ‘The Virtual Reality of Homo Oeconomicus’ *The Monist* 78, 308–329
- Plescia, Joseph 1987. ‘The Development of the Doctrine of *Boni Mores* in Roman Law’ *Revue Internationale des Droits de l’Antiquité* 34, 265–310

- Polányi, Karl 1944. *The Great Transformation The Political and Economic Origins of Our Time*. Boston: Beacon Press
- Posner, Eric A. 2000. *Law and Social Norms*. Cambridge: Harvard University Press
- Posner, Eric A. (ed.) 2007. *Social Norms, Nonlegal Sanctions, and the Law*. Cheltenham: Edward Elgar
- Pugliese, Giovanni 1941. *Studi sull' 'iniuria'* Milano: Giuffrè
- Rabin, Matthew 1993. 'Incorporating Fairness into Game Theory and Economics' *American Economic Review* 83, 1281–1302
- Riccobono, Salvatore 1933–34. *Corso di diritto romano. Formazione e sviluppo del diritto romano dalle XII tavole a Giustiniano, II*, Milano: Giuffrè
- Rose-Ackerman, Susan 1985. 'Inalienability and the Theory of Property Rights' *Columbia Law Review* 85, 931–969
- Schmidt, Helmut 1973. *Die Lehre von der Sittenwidrigkeit der Rechtsgeschäfte in historischer Sicht*. Berlin: Schweitzer
- Shavell, Steven 2002. 'Law versus Morality as Regulators of Conduct' *American Law and Economics Review* 4, 227–257
- Soma, Alessandro 2002. '»Roma madre delle leggi«. L'uso politico del diritto romano' *Materiali per una storia della cultura giuridica* 2002/1, 153–182
- Symposium 1996. 'Law, Economics, and Norms' *University of Pennsylvania Law Review* 144, 1643–2339
- Symposium 1998. 'Law, Social Norms, and Social Meaning' *Journal of Legal Studies* 27, 537–823
- Trebilcock, Michael J. 1993. *The Limits of Freedom of Contract*. Cambridge, Mass.: Harvard University Press
- Wertheimer, Alan 2008. 'Exploitation' in *Stanford Encyclopaedia of Philosophy*, online: <http://plato.stanford.edu/entries/exploitation>
- Whitman, James Q. 1996. 'The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence' *Yale Law Journal* 105, 1841–1890
- Whitman, James Q. 2003. 'Long Live the Hatred of Roman Law!' *Rechtsgeschichte* 2, 40–57
- Wlosok, Antonie 1990. 'Nihil nisi ruborem. Über die Rolle der Scham in der römischen Rechtskultur' in Antonie Wlosok *Res humanae – res divinae* Kleine Schriften, Heidelberg: Winter, 84–99
- Zimmermann, Reinhard 1990. *The Law of Obligations Roman Foundations of the Civilian Tradition*. Cape Town: Juta