

Cicero's equilibrium and the network of narratives in comparative law

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Abstract:

The question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains represents one of the most puzzling and extensively debated legal issues. This question has fascinated scholars in philosophy, law and history from ancient times and has produced an impressive amount of literature, decisions and comments. This paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particular the famous Cicero's decision on the famine at Rhodes. Moreover, this paper provides the comparative legal, economic, and behavioral analysis of pre-contractual disclosure duties in the ancient Roman law of contracts and compares them with its modern counterparts in the English, German and Belgium law of contracts. Furthermore, paper suggests that Cicero's moral judgement and its centuries long circulation via the extensive network of narratives spread widely and influenced the development of the modern legal regimes around the globe. Cicero's responsabilizing narrative is an instrument of mind and its circulation among lawyers and legal scholars helped to develop and sustain better social and legal norms. Finally, paper argues that comparative law might be seen as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsabilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do.

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1.Introduction

As Robert Shiller, Nobel prize winner, notes, “the “narratives” we spin for ourselves about the economy. Narratives not only reflect economic reality, they shape it, in a self-fulfilling manner — even if those narratives do not match macroeconomic models.”¹ Shiller as a pioneer of growing studies on the role of narratives in economics also suggests that we need to incorporate the contagion of narratives into economic and other behavioural theories.² Otherwise we may remain blind to a very important mechanism for economic and social change, as well as crucial element for economic forecasting.³ Namely, if we do not understand the epidemics of popular narratives, we do not fully understand how standards of fairness, morality and ethics are formed, changed, transmitted and how they influence social behaviour. Moreover, it seems that human kind is almost unable to get on without stories and without story telling.

In this respect, countless lawyers from ancient times have been wondering what is the moral thing to do and have produced numerous decisions and, as we will argue, ground-breaking narratives. The aim of this paper is of course not to answer that immemorial question, but instead to analyze what types of legal structures lead responsabilizing rationales to spread widely throughout legal systems. More particularly, we explore the classic narrative of the question on circumstances under which an individual has a moral duty to disclose valuable information unknown to the person with whom she bargains represents one of the most puzzling and extensively debated legal issues. Does the party have the right to remain silent and profit from her secret knowledge? These questions have fascinated scholars in philosophy, law and history from ancient times and has produced an impressive amount of literature, decisions and comments. Most recently, it has also gained extensive attention among prominent economics scholars investigating the legal and economic system of ancient Rome. For example, recent law and economics studies illustrate a fruitful potential of legal-economic theory for shedding light on the institutions of the ancient world, and in particular for enhancing our understanding of the legal and economic arrangements found in the Roman Empire.⁴ Moreover, Abatino and Dari-Mattiacci argue that non-disclosure remedies provided by Roman law were efficient in their sphere of application.⁵

Furthermore, extensive economic literature stresses the importance of narratives in sustaining better social norms.⁶ Namely, Bruner suggests that we organize our experience and our memory of human happenings mainly in the form of narrative – stories, excuses, myths,

¹ Shiller, Robert J, “Narrative economics,” 107 *American Economic Review* 42, 2017, pp. 967–1004.

² Shiller J. Robert, “Narrative Economics: How Stories Go Viral & Drive Major Economic Events,” Princeton University Press, 2019, at p. xvii.

³ *Ibid.*

⁴ Miller, Parsons Geoffrey, “Rome and the Economics of Ancient Law II,” in Giuseppe Dari-Mattiacci and Denis P. Kehoe (eds.), *Roman Law and Economics Volume II*, Oxford University Press, 2020, pp.1.

⁵ Abatino Barbara and Gisueppe Dari-Mattiacci, “The Dual Origin of the Duty to Disclose in Roman Law,” in Giuseppe Dari-Mattiacci and Denis P. Kehoe (eds.), *Roman Law and Economics Volume II*, Oxford University Press, 2020, pp. 401-427.

⁶ Shiller for example suggest that human brain have always been highly tuned towards narratives, whether factual or not, to justify ongoing actions, where those narratives motivate and connect activities to deeply felt values and needs; Shiller, J. Robert, “Narrative Economics,” Cowles Foundation Discussion paper No. 2069, 2017. See also Shiller J. Robert, “Narrative Economics: How Stories Go Viral & Drive Major Economic Events,” Princeton University Press, 2019.

reasons for doing and not doing.⁷ However, the concept of narratives was only cautiously taken into account by legal scholars who analyzed judgements⁸ and until today “the vast majority of the work on narratives in law is concerned with the analysis of legal decisions in domestic law.”⁹ Otten also suggests that “generally narratives are seen as part of the literature, as an art and as such cannot possibly have anything to do with law.”¹⁰ On the other hand, Delgado in his famous letter to the major US law reviews actually proposed a symposium on legal narratives, emphasized their crucial role for the understanding of the law and suggested an in-depth analysis of legal narratives and storytelling.¹¹ He also describes narratives as the cure to racial discrimination in law, since narratives have powers to change mind-sets.¹²

This paper joins this critical debate and explores the role of comparative law and its transmission of narratives on the formation of moral arguments providing reasons for what a person “should do.” More particularly, while focusing on the disclosure duties in the contract law of ancient Rome and famous Cicero decision on the famine at Rhodes case the paper overcomes an old legal and moral crux and critically examines the legal obligations (and related narrative) of parties to disclose private information to their counterparties in contract for sale of ancient Roman law. Furthermore, paper suggests that Cicero’s moral judgement and its centuries long circulation via the extensive network of narratives spread widely and influenced the development of the modern legal regimes around the globe. Cicero’s responsabilizing narrative is an instrument of mind and its circulation among lawyers and legal scholars helped to develop and sustain better social and legal norms. Finally, paper argues that comparative law might be seen as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsabilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do. Namely, we have been intrigued by narratives because they might be instrumental for the understanding of how

⁷ Bruner suggests that narrative is a “conventional form, transmitted culturally and constrained by each individual’s level of mastery and by his conglomerate of prosthetic devices, colleagues and mentors. Narratives, then, are a version of reality whose acceptability is governed by convention and narrative necessity rather than by empirical verification and logical requiredness;” Bruner Jerome, “The Narrative Construction of Reality,” *Critical Inquiry* 18, 1991.

⁸ See e. g. Schepple, Kim L., “Foreword: Telling Stories,” 87 *Mich. L. Rev.* 2073 (1989).

⁹ Otten Julia, “Narratives in International Law,” *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, 2016, Vol. 99, No. 3 (2016), pp. 187-216 ; at p. 188. See also Clapham Andrew, “Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups,” 6 *Journal of International Criminal Justice* 5, pp. 899-926, 2008, at p. 900; and Grabher M. Gudrun and Anna Gamper (eds.), “Legal Narratives: European Perspectives on U.S. Law in Cultural Context,” Wien-New York, Springer, 2009.

¹⁰ Otten, *supra* note 5, at p. 188. For example Weisberg states that law, proud law, dressed in a little brief authority, stubbornly resists full recognition of its basically narrative nature; Weisberg H. Richard, “Three Lessons from Law and Literature,” 27 *Loyola of Los Angeles Law Review* 1, 1993, 285 (285), pp. 285-304.

¹¹ “We believe that stories, parables, chronicles, and narratives are potent devices for analyzing mindset and ideology - the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place. . . . [T]he main cause of Black and brown subordination is not so much poorly crafted or enforced laws or judicial decisions. Rather, it is the prevailing mindset through which members of the majority race justify the world as it is, that is with whites on top and Blacks at the bottom. Ideology makes current social arrangements seem natural and fair;” Delgado Richard, “Letter from Richard Delgado to Kevin Kennedy,” (June 1, 1988), at p 2. See also Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 *Mich. L. Rev.* 2128 (1989); and Brooks Peter, “Narrativity of the Law,” 14 *Law and Literature* 1(2), 2002.

¹² *Ibid.*

comparative law works nowadays.

This paper complements our earlier work on the “disclosure duties” in five noteworthy respects.¹³ First, this paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particular the famous Cicero decision on the famine at Rhodes. Second, this paper explores whether the same outcome as in the famine at Rhodes case could still be envisaged today while applying law & economics concepts and whether his decision actually corresponds with the economically inspired optimal rule. Third, this paper resonates on the ancient Cicero decision and provides its modern applications, reflections for the comparative law and economics scholarship of pre-contractual disclosure duties in English law of contracts (i.e. caveat emptor doctrine), German (aufklärungspflichten) and Belgian law of contracts. Fourth, paper suggests in comparative law, a plurality of narratives exists and they can have a strong influence on the understanding and the development of comparative law. Namely, we employ Cicero’s moral judgement and its centuries long circulation via the extensive network of narratives to show how comparative legal scholarship played a significant role in its spread and how it might influenced the development of the modern legal regimes around the globe. Fifth, Cicero’s brilliant decision in the famine at Rhodes case is an ancient social equilibrium of fairness and efficiency.

In this article, the analysis is as positive as it is normative. The analytical approach employs an inter-disciplinary dynamic¹⁴ investigation and enriches it with the concepts used in the economic analysis of law.¹⁵ Moreover, the employed law and economics methodology follows the classical comparative law and economics approach.¹⁶ This classical comparative law and economics approach serves as a bridge between facts and normative conclusions, between economic theory and policy proposals for an improved legal system.¹⁷ Due to the limited scope of this paper we merely employ economic methodology which seeks to complement other legal disciplines by uncovering the underlying economic logic and their social effects of assessed legal institutions.¹⁸ In looking for transparency in the law the employed approach connects to what “the best traditional legal scholarship aims to do: clarifying the underlying order of law as it is; offering tools for fashioning law to cope with

¹³ De Geest, Gerrit, and Kovac, Mitja ‘Formation of Contracts in the Draft Common Frame of Reference,’ 17 *European Review of Private Law* 113, 2009; Kovac, Mitja “Comparative Contract Law and Economics,” Edward Elgar 2011; and Callewaert Margot and Kovac, Mitja, “Does Cicero’s Decision Stand the Test of Time? Famine at Rhodes and Comparative Law and Economics Approach,” *Comparative Law Review*, forthcoming, 2022.

¹⁴ The dynamic part of analysis employs recent behavioural insights that offer a novel assessment of how parties will react in their daily behaviour upon different set of rules and norms.

¹⁵ For a synthesis of law and economics scholarship, see Gerrit De Geest, *Contract Law and Economics – Encyclopaedia of Law and Economics*, Volume 6, 2nd ed. (Edward Elgar, Cheltenham 2011). Also see Richard A Posner, *Economic Analysis of Law*, 8th ed. (Wolters Kluwer Law Publishers, New York 2011).

¹⁶ Roger Bergh Van den, *The Roundabouts of European Law and Economics* (Eleven International Publishing, Den Hague 2018) 21-28.

¹⁷ *Ibid.*

¹⁸ Employed methodology complements traditional legal disciplines by bringing to light a logic which decision-makers follow without necessarily expressing it in their reasons for judgement, yet which constraints the results they can arrive at. It also seeks to make this logic transparent to outside observers; Anthony Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Hart Publishing, London 2006), 11-16. See also Guido Calabresi, *The Future of Law & Economics* (Yale University Press, New Haven 2016); and Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, Cambridge 2016).

novel situations.”¹⁹

However, several caveats should be stated. Namely, the aim of the paper is not to impose a final word on the matter, but to undertake an exploratory analysis of the relationship between the development of contract law and its economic effects. Moreover, there are further factors and issues that might drive the observed results (and that call for further investigation) as for example issues of (i) political biases of courts, (ii) political neutrality of economic approaches, (iii) underlying sociological and psychological phenomena, and (iv) fairness qualities.

This paper is structured as follows. The first part offers conceptual framework and literature review for the categorization of narratives. It provides a conceptual approach to narratives, to what they are and how they function. The second part examines the duty to disclose in Roman law, introduces an ancient “famine at Rhodes” case and presents Cicero’s reasoning and his reflections on the concepts of justice and fairness. The fourth part localizes an example of narratives in comparative law – a moral duty to disclose information and provides a comparative treatment of Cicero’s narrative and its viral transmission. Finally, some brief conclusions are presented.

2. Conceptual framework and literature review

The study of mind, has as Bruner notes, centered principally on how man achieves a true knowledge of the world.²⁰ Jones suggests that we do not achieve our mastery of social reality by “growing up as little scientists, little logicians, or little mathematicians.”²¹ Instead, as Bruner argues, we “organize our experience and our memory of human happenings mainly in the form of narrative – stories, excuses, myths, reasons for doing and not doing and so on.”²² Narratives are “stories people tell themselves, and each other, to make sense of human experience – that is, to organize, explain, justify, predict and sometimes influence its course; they are instruments of mind in the construction of reality.”²³ Moreover, narratives are employed by variety of fields to advance knowledge as are viewed as central features of all societies.²⁴ Namely, narrative

¹⁹ Ejan MacKaay, *Law and Economics for Civil Law Systems* (Edward Elgar, Cheltenham 2013) 6.

²⁰ Where classic rational and empiricists traditions have dominated our conception of how mind grows and how it gets its grasp on the real world; Bruner, *supra* note 7, at p 1. See also Gardner Howard, “Frames of Mind: The Theory of Multiple Intelligence,” 3rd ed., Basic Books, 2011; and Bruner Jerome, “Acts of Meaning,” Cambridge University Press 1990.

²¹ Jones E. Edward, “Interpersonal Perception,” Freeman, New York, 1990.

²² Bruner, *supra* note 7, at p. 4. See also Bruner Jerome, “Life as Narrative,” 54 *Social Research* 1, Reflections on the Self, 1987, pp. 11-32; and Monteagudo Jose Gonzalez, “Jerome Bruner and the Challenges of the Narrative Turn: Then and Now,” 21 *Narrative Inquiry* 2, 2011, p. 295 – 302.

²³ Narratives are version of reality whose acceptability is governed by convention and narrative necessity rather than by empirical verification and logical requiredness; Bruner, *supra* note 7, at p. 6. See also Bruner Jerome, “Actual Minds, Possible Worlds,” Cambridge University Press, 1986; Sarbin R. Theodore, “Narrative Psychology: The Storied Nature of Human Conduct,” New York: Praeger, 1986; Bruner Jerome, and Kalmar, D. A., “Narrative and metanarrative in the construction of Self,” in M. D. Ferrari & R. J. Sternberg (Eds.), “Self-awareness: Its nature and development”(pp. 308–331). Guilford Press, 1998; and Charon Rita and Martha Montello, “Stories Matter The Role of Narrative in Medical Ethics,” New York, Routledge, 2002.

²⁴ For example narratives are used in anthropology, psychology, sociology, history, epidemiology, marketing, psychoanalysis, literary studies, neuroscience and neurolinguistics. For a synthesis see Shiller, *supra* note 2, pp. 14-17. See also Juille Tom and Dorian Jullien, “Narrativity from the Perspectives of Economics and Philosophy: Davis, Ross, Multipleselves Models... and Behavioral Economics,” GREDEG Working Papers 2016-19, Groupe

analysis uses stories to describe human experience and action, since people give meaning to their lives through the stories they tell.²⁵ Narratives we hear and that we tell shape the meaning and the quality of our lives and they connect us with others and with our own histories, through time, place and crossroad and advice on how we might live our lives.²⁶ Narratives create images, myths and metaphors that carry moral resonance and contribute to our knowing and being known.²⁷ Narratives offer a journey into the world of practical ethics and join the worlds of thought and feeling.²⁸ Oliver suggest that narrative analysis is a “research methodology that offers insights into how people construct the meaning of their experience.”²⁹ This chapter summarizes narrative literature from various fields and provides a conceptual framework on which we seek to build a narrative-based approach to comparative law.

2.1 Conceptual framework and literature review

In our paper we focus on narratives as rationales or justifications of certain behaviour or decision-making and which shape standards in economic decisions.³⁰ These narratives of one should do or should not do is also the focus of our paper. Namely, as Benabou, Falk and Tirole suggest the most important narratives pertain to actions with moral or social implications and which involve externalities/internalities and reputational concerns.³¹ Moreover, we also employ their definition of “narrative as any news, story, life experience or heuristic that has the potential to alter person’s beliefs about the tradeoff between private benefits and social costs (or the reverse) faced by decision maker, who could be herself, someone she observes, or someone she seeks to influence.”³² Benabou, Falk and Tirole show that positive narratives or responsibilities increase the pressure to do the moral thing and that narratives involve a critical-contagion aspect where such narratives spread moral arguments through a population inducing

de REcherche en Droit, Economie, Gestion (GREDEG CNRS), Université Côte d'Azur, France, 2016; MacMullen Ramsay, “Feelings in History: Ancient and Modern, Regina Books, 2003; North C. Douglas, “Understanding the Process of Economic Change,” Princeton University Press, 2010; Morson Gary Saul and Morton Schapiro, “Cents and Sensibility: What Economics Can Learn from the Humanities,” Princeton University Press, 2017; and Vartanian, Oshin, Bristol, A. S., and Kaufman, J. C. (Eds.), “Neuroscience of Creativity,” Boston Review, 2013.

²⁵ Polkinghorne, D. E., “Narrative Configuration in Qualitative Analysis,” In J. A. Hatch and R. Wisniewski (eds.), *Life History and Narrative*, Washington: Falmer Press, 1995, pp. 5-24.

²⁶ Witherell, C., and N. Noddings (eds.), *Stories Lives Tell: Narrative and Dialogue in Education*, New York: Teachers College Press, 1991; and Connelly, F. M., and D. J. Clandinin, “Stories of Experience and Narrative Inquiry,” *19 Educational Researcher* 5, 1990, pp. 2-14.

²⁷ Coles, R., “The Call of Stories: Teaching and the Moral Imagination,” Boston: Houghton Mifflin, 1989.

²⁸ Ibid.

²⁹ Oliver, L. Kimberly, “A Journey into Narrative Analysis: A methodology for Discovering Meanings,” *17 Journal of Teaching in Physical Education*, 1998, pp. 244-250.

³⁰ The other type is narratives as sense making employed by people when they seek to give meaning to disparate or random events – evolutionary programmes for pattern seeking, planning and anxiety-reduction purposes. See for example Karlsson Niklas, George Loewenstein and Jane McCafferty, “The Economics of Meaning,” *30 Nordic Journal of Political Economy* 1, 2004, pp. 61-75; and Chater Nick and George Loewenstein, “The Under-appreciated Drive for Sense-making,” *126 Journal of Economic Behavior & Organization* B, 2015, pp. 137–154.

³¹ Benabou Roland, Armin Falk and Jean Tirole, “Narratives, Imperatives, and Moral Reasoning” " CRC TR 224 Discussion Paper Series crctr224_2019_070, University of Bonn and University of Mannheim, Germany, 2019.

³² It may be received fortuitously, searched for and thought of by the individual himself, or strategically communicated by someone else, *ibid*, at p. 2.

a cascade of pro-social behaviour.³³

Moreover, extensive literature shows that moral-identity and social-reputation concerns are the driving forces behind prosocial behaviour.³⁴ Moreover, Hagenbach and Koessler show that show that agents who are more central in terms of preference tend to communicate more and to have a greater impact on decisions,³⁵ whereas Galeotti et al argue that the influential players in a community are those who diffuse information to many others who, in contrast, are poorly connected.³⁶

Furthermore, narrative analysis originates from what Bruner calls one of two modes of cognitive functioning, or ways of knowing, which provide ways of understanding people's stories.³⁷ It is shown that narratives convince person of truth by means of lifelike-ness, or verisimilitude.³⁸ As Alverman et al. suggest an effective narrative results in a compelling message for the reader, a message that may cause the reader to "nod in agreement, pause in reflection, or take an action."³⁹ Narrative reasoning functions by attending to the diversity of people's behaviour.⁴⁰

Related stream of literature investigates the cultural transmission (via narratives) of values, beliefs and ideas. For example, Bisin and Verdier show that cultural transmission mechanisms have very different implications than evolutionary selection mechanisms with respect to the dynamics of the distribution of the traits in the population.⁴¹ They argue, that "if the direct socialization of children inside the family and their cultural adaptation and imitation from society at large operate as substitutes in the whole cultural transmission mechanism, then there

³³ Ibid, at p.3.

³⁴ Bénabou Roland and Jean Tirole, "Incentives and Prosocial Behavior," 96 *The American Economic Review* 5, 2006, pp. 1652-1678. See also Ellingsen Tore and Magnus Johannesson, "Pride and Prejudice: The Human Side of Incentive Theory," 98 *The American Economic Review* 3, 2008, pp. 990-1008; Ariely, D., Bracha, A., and S, Meier, "Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially," 99 *American Economic Review* 1, 2009, pp. 544-555; Della Vigna, S., List, J., and U. Malmendier, "Testing for Altruism and Social Pressure in Charitable Giving," 127 *Quarterly Journal of Economics* 1, 2012, pp. 1-56; Exley, C. L., "Excusing Selfishness in Charitable Giving: The Role of Risk," 83 *Review of Economic Studies* 2, 2016, pp. 587-628; and Grossman, Z., and J. van der Weele, "Self-image and Willful Ignorance in Social Decisions," 15 *Journal of the European Economic Association* 1, 2017, pp. 173-217.

³⁵ Hagenbach Jeanne, and Frederic Koessler, "Strategic Communication Networks," 77 *The Review of Economic Studies* 3, 2010, pp. 1072-1099. Extensive literature also studies the interactions between morality, prices and markets. See for example Brekke, K., Kverndokk, S., and K. nyborg, "An Economic Model of Moral Motivation," 87 *Journal of Public Economics* 9-10, 2003, pp. 1967-1983; Roemer, J., "Kantian Equilibrium," 112 *Scandinavian Journal of Economics* 1, 2010, pp. 1-24; Ambuehl, S., An Offer you Can't Refuse? Incentives Change What We Believe," University of Toronto, mimeo, 2016; and Elias, J., Lacetera N., and M. Macis, "Efficiency-Morality Trade-offs in repugnant Transactions: A Choice Experiment, NBER W.P. 22632, 2016.

³⁶ Galeotti, Andrea, Ghiglino, Christian, and Francesco Squintani, "Strategic Information Transmission in Networks," 148 *Journal of Economic Theory* 5, 2013, pp. 1751-1769. See also Ambrus A., Azevedo, E., and Y. Kamada, "Hierarchical Cheap Talk," 8 *Theoretical Economics*, 2013, pp. 233-261.

³⁷ Bruner Jerome, "Actual Minds, Possible Worlds," Cambridge University Press, 1986

³⁸ Ibid.

³⁹ Alvermann, D. E., D. G. O'Brien and D. R. Dillon, "On Writing Qualitative Research," 31 *Reading Research Quarterly*, 114-120, 1996, p. 117.

⁴⁰ Oliver, supra note 26, at p. 248.

⁴¹ Bisin Alberto and Thierry Verdier, "The Economics of Cultural Transmission and the Dynamics of Preferences," 97 *Journal of Economic Theory* 1, 2001, pp. 298-319. See also Benabou Roland and Jean Tirole, Belief in a Just World and Redistributive Politics," 121 *Quarterly Journal of Economics* 2, 2006, pp. 699-746; Tabellini G., "The Scope of Cooperation: Values and Incentives," 123 *Quarterly Journal of Economics* 3, 2008, pp. 905-950; and Dohmen T., A. Falk, D. Huffman and U. Sunde, "The Intergenerational Transmission of Risk and Trust Attitudes," 79 *Review of Economic Studies* 2, 2012, pp. 645-677.

exists an heterogeneous distribution of preferences in the population, which is globally stable.”⁴² Whereas Foerster and van der Weele show that image concerns work against person’s hypocrisy.⁴³ Moreover, epidemiology have pursued mathematical models of the spread of disease epidemics which might be also applied to spread and transmission of narratives.⁴⁴ Berger for example suggests that human behaviour might be influenced by an old idea not talked about much but still remembered, or behavioural residue.⁴⁵ Yet, the spread of narrative may be also induced by the so called information cascade which occurs when individuals, having observed the actions and possibly payoffs of those ahead of them, take the same action regardless of their own information signals.⁴⁶

Also, anthropologists such as Douglas Holmes have long studied how central bank language and rituals influence the economy and shows how central bankers have been engaging in communicative experiments that predate the financial crisis and continue to be refined amid its unfolding turmoil.⁴⁷ Andre et al. in their empirical investigation document that households’ narratives are strongly heterogeneous and coarser than experts’ narratives, focus more on the supply side than on the demand side, and often feature politically loaded explanations.⁴⁸ They also show that households’ narratives strongly shape their inflation expectations and that today the media is an important source of narratives.⁴⁹ Recently, Hong et al. employed machine learning tools to analyse inflation narratives in 880,000 Wall Street Journal articles confirm the important role of economic narratives in inflation forecasting and documented that “narrative-based forecasts perform better in the long-run forecasting” than numerical models, seemingly

⁴² On the other hand, “When family and society are substitutes in the transmission mechanism, in fact, families will socialize children more intensely whenever the set of cultural traits they wish to transmit is common only to a minority of the population; and, on the contrary, families which belong to a cultural majority will not spend much resources directly socializing their children, since their children will adopt or imitate with high probability the cultural trait most predominant in society at large, which is the one their parents desire for them;” Bisin and Verdier, *supra* note 38, at p. 299.

⁴³ Foerster Manuel and Joël J. van der Weele, “Denial and Alarmism in Collective Action Problems,” TI 2018-019/I Tinbergen Institute Discussion Paper, 2018.

⁴⁴ Legrand J., R. F. Grais, P. Y. Boelle, A.J. Valleron, and A. Flahault, “Understanding the Dynamics of Ebola Epidemics,” 135 *Epidemiology and Infection*, 2007, pp. 610-21; Breda, D., O. Dieckmann, W F. de Graaf, A. Pugliese, and R. Vermiglio, “On the Formulation of Epidemic Models,” 6 *Journal of Biological Dynamics* 2, 2012, pp. 103-17; Nsoesie O. Elaine, Richard J. Beckman, Sara Shashaani, Kayani S. Nagaraj, Madhaw V. Marathe, “A Simulation Optimization Approach to Epidemic Forecasting,” 8 *PLoS ONE* 6, e67164, 2013; and Goel Sharad, Ashton Anderson, Jake Hofman and Duncan J. Wats, “The Structural Virality of Online Diffusion,” 62 *Management Science* 1, 2016, pp. 1-17.

⁴⁵ Berger Jonah, “Contagious: Why Things Catch On,” New York: Simon and Schuster, 2013.

⁴⁶ An information cascade is a situation in which an individual makes a decision based on observation of others without regard to his own private information. See e.g. Banerjee Abhijit, “A Simpler Model of Heard Behaviour,” 107 *Quarterly Journal of Economics* 3, 1992, pp. 797-817; Banerjee Abhijit and Drew Fudenberg, “Word-of-Mouth Learning,” 46 *Games and Economic Behaviour* 1, 2004, pp. 1-22; and Bikhchandani Sushil, Hirschleifer David and Ivo Welch, “Information Cascades,” in Steven N. Durlauf and Lawrence E. Blume (eds.), “The New Palgrave Dictionary of Economics,” Second Edition, Palgrave Macmillan, 2008.

⁴⁷ Holmes also shows how officials at central banks have created a new monetary regime that relies on collaboration with the public to achieve the ends of monetary policy; Holmes R. Douglas, “Economy of Words: Communicative Imperatives in Central Banks,” Chicago University Press, 2013.

⁴⁸ Andre Peter, Ingar Haaland, Christopher Roth, and Johannes Wohlfar, “Narratives about the Macroeconomy,” CEPR Discussion Paper No. DP17305, 2022.

⁴⁹ *Ibid.*

because the latter miss subtle economic signals and shifts.⁵⁰

On the other hand, Spiegler raises the intriguing possibility that narratives with a particular structure may affect people's actions by influencing the subjective beliefs they form from the data they observe.⁵¹ Whereas Charles and Kendall while conducting extensive psychological experiments into how humans create explanatory frameworks to frame economic data argue that people almost always seek to fit new information into pre-existing narratives.⁵² Moreover, they show that "causal narratives"⁵³ causally link an action variable to an outcome variable of interest by weaving in additional variables and that exogenously generated causal narratives manipulate the beliefs and actions of subjects.⁵⁴ Furthermore, they show that the shape of our storytelling matters, since "narratives with a particular structure may affect people's actions by influencing the subjective beliefs they form from the data they observe".⁵⁵ More specifically, the experiments suggest that "lever" narratives, which present linear causality frames (A leads to B leads to C, and so on) have the strongest grip on people's minds.⁵⁶ So-called threat narratives, which describe how offsetting forces both avoid and cause particular outcomes, are less potent.⁵⁷ Their experiments also show that people love "to share their homegrown narratives with other subjects, who are then persuaded by them."⁵⁸

Finally, the importance of informal stories and narratives in the formation of person's beliefs and moral standards has been emphasized by Nobel prize laureate Shiller.⁵⁹ Whereas similar literature explores the roles played by narratives, mems, and folklore.⁶⁰

2.2 Constructing features of narratives

Bruner suggest that narrative is a mental model and operates as an instrument of mind in the construction of reality and offers ten features of powerful narrative.⁶¹ First, a narrative is an account, a unique pattern of events occurring over time (narrative diachronicity) and may be

⁵⁰ Hong, Yongmiao and Jiang, Fuwei and Meng, Lingchao and Xue, Bowen, Forecasting Inflation with Economic Narratives and Machine Learning (July 29, 2022). Available at SSRN: <https://ssrn.com/abstract=4175749> or <http://dx.doi.org/10.2139/ssrn.4175749>

⁵¹ Spiegler, Rani, "Bayesian Networks and Boundedly Rational Expectations," 131 Quarterly Journal of Economics 3, 2016, pp. 1243-1290. See also Stone, Deborah A. 1989. "Causal Stories and the Formation of Policy Agendas", 104 Political Science Quarterly 2, 1989, pp. 281-300; and Eliaz, Kfir and Rani Spiegler., "A Model of Competing Narratives," 110 American Economic Review 12, 2020, pp. 3786-3816.

⁵² Charles Constantin and Chad W. Kendall, "Casual Narratives," NBER Working Paper 30346, 2022.

⁵³ This narrative implies a causal chain from an action (parental ban on social media use), to an auxiliary variable (social media use), to an outcome (depression); *ibid* at p. 3.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*, at p. 4.

⁵⁶ *Ibid*. See also Eliaz and Spiegler, *supra* note 45.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ Shiller, *supra* note 1.

⁶⁰ For example, Mukand and Rodrik show that political entrepreneurs use narratives to catalyse political (and policy) change; Mukand Sharun and Dani Rodrik, "The Political Economy of Ideas: On Ideas Versus Interest in Policymaking," NBER Working Paper 24467, 2018. See also Barrera, Oscar, Sergei Guriev, Eemric Henry, and Ekaterina Zhuravskaya, "Facts, Alternative Facts and Fact Checking in Times of Post-Truth Politics," 182 Journal of Public Economics 1, 2020; and Michalopoulos Stelios, and Melanie Meng Xue, "Folklore," NBER Working Paper 254302018, 2021.

⁶¹ Bruner, *supra* note 7, at p. 6.

characterized as quintessential pattern of events occurring over time.⁶² Second, narratives are particular and take as their ostensive reference particular happenings that serve as their vehicle rather than their destination.⁶³ Third, narratives are intentional state entailments and are about people acting in a setting, and the happenings that befall them must be relevant to their intentional states, to their beliefs, desires, theories and values.⁶⁴ Fourth, they have hermeneutic property and composability, whereas automatized interpretations of narratives function as a default settings that deal with knowledge (a form of mindlessness).⁶⁵ Fifth, they are canonical and contain a breach of certain canonical script.⁶⁶ Namely, in order to be worth telling, narrative, while involving precipitating event, must be about how an implicit canonical script has been breached, violated, or deviated from in a manner to do violence to the legitimacy of the canonical script.⁶⁷ Sixth, narrative has to be referential and its truth is judged by its verisimilitude rather than its verifiability.⁶⁸ In other words, narrative may de facto create or constitute a reality. Seventh, it has to belong to a genre (e.g. farce, tragedy, romance, saga), since genres, once we narrate to ourselves or the ones that we hear or read, seem to provide us with commodious and conventional model for limiting the hermeneutic task of making sense of human happenings.⁶⁹ Eighth, narrative has to be normative, because tellability as a form of discourse rests on a breach of conventional expectation, narrative is necessarily normative (i.e. normativeness). Ninth, narrative has to be context sensitive and negotiable. Namely, Bruner suggests that context sensitivity makes narrative discourse in everyday life such a viable instrument for cultural negotiation.⁷⁰ Finally, narrative have to accrue (narrative accrual) and eventually create a culture, history or a tradition.⁷¹ For example, Bruner suggests that principles of jurisprudence, like *stare decisis*, may be viewed as a system of narrative accruals, since they “guarantee a tradition by assuring that once a case has been interpreted in one way, future cases

⁶² Ibid, at p. 6. Goodman suggests that “narrative comprises an ensemble of ways of constructing and representing the sequential, diachronic order of human events, of which the sequencing of clauses in spoken or written stories is only a device; Goodman Nelson, “Twisted Tales; or Story, Study, and Symphony,” 7 *Critical Inquiry* 1, 1980, 103-119, at p. 99.

⁶³ Those stories are in some sense generic and the suggestiveness of a story lies in the emblematic nature of its particulars; *ibid*, at pp. 6-7.

⁶⁴ Narrative accounts also cannot provide causal explanations, yet they supply the basis for interpreting why a character acted as he or she did. This interpretation is concerned with reasons for things happening, rather than strictly with their causes; *ibid* at p. 7.

⁶⁵ The events themselves have to be constructed and constituted in the light of overall narrative. Moreover, the telling of a story and its comprehension as a story depend on the human capacity to process knowledge. This narrative comprehension is also among the earliest powers of mind to appear in the child and among the most widely employed forms of organizing human experience; *ibid*, at pp. 8-9. See also Propp Vladimir, “Morphology of the Folktale,” 2nd ed., University of Texas Press, Austin, 1968; and Nelson Katherine, “Narratives from the Crib,” Cambridge University Press, 1989.

⁶⁶ *Ibid*, at p. 11.

⁶⁷ *Ibid* at p. 11. See also White Hayden, “The Value of Narrativity in the Interpretation of Reality,” 7 *Critical Inquiry* 1, 1980, pp. 5-27; and Herrnstein Smith Barbara, “On the Margins of Discourse: The Relation of Literature to Language,” Chicago University Press, 1978.

⁶⁸ *Ibid*, at p. 13.

⁶⁹ *Ibid*, at p. 14. See also Fowler Alastair, “Kinds of Literature: An Introduction of the Theory of Genres and Modes,” revised edition, Oxford University Press, 2002.

⁷⁰ Bruner, *supra* note 7, at p. 17. See also Dunn Judy, “The Beginnings of Social Understanding,” Cambridge: Wiley-Blackwell, 1991.

⁷¹ “Institutions for example invent traditions out of previously ordinary happenings and then endow them with privileged status; Bruner, *supra* note 7, at p. 18. See also Hobsbawm Eric and Terence Ranger, “The Invention of Tradition,” Cambridge University Press, 2014.

that are similar shall be interpreted and decided equivalently.”⁷² He also argues that “what creates a culture must be a “local” capacity for accruing stories of happenings of the past into some sort of diachronic structure that permits a continuity into the present.”⁷³ Hence, the perpetual construction and reconstruction of the past “provide precisely the forms of canonicity that permit us to recognize when a breach has occurred and how it might be interpreted.”⁷⁴ Bruner concludes that “it is this sense of belonging to the canonical past that permits us to form our own narratives of deviation while maintaining complicity with the canon.”⁷⁵

2.3 Law and narratives

In law, the possibility that there could be a story behind interpretation or behind law-making process is oftentimes rejected.⁷⁶ The concept of narrative was only cautiously taken into consideration by scholars which analyzed judgements, and until today the vast majority of the work on narratives in law is concerned with the analysis of legal decisions in domestic law.⁷⁷ Commonly, narratives are seen as a part of literature,⁷⁸ as an art and as such cannot possibly have anything to do with law.⁷⁹ However, Schepple suggest that narrative is a way of organizing, coping with, even acting on the world.⁸⁰ Namely, she suggests that stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world.⁸¹ Some legal scholars have even explored the implicit norms inherent in legal testimony, which is principally narrative in form.⁸² Delgado argues that traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. He suggests that this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie

⁷² “Insofar as the law insists on such accrual of cases as precedents and insofar as cases are narratives, the legal system imposes an orderly process of narrative accrual,” Bruner, *supra* note 7, at p. 18.

⁷³ Narrative and its accrual as an instrument assuring historical continuity and legitimacy is needed to construct a history, a tradition and a legal system; Bruner *supra* note 7, at p. 20.

⁷⁴ Bruner also suggests that one of the principal ways in which we work mentally in common is by the process of joint narrative accrual; *Ibid.* See also Bruner, Jerome, “Acts of Meaning: Four Lectures on Mind and Culture,” Harvard University Press, 1990.

⁷⁵ *Ibid.*, at p. 20.

⁷⁶ Otten, *supra* note 9, at p. 188.

⁷⁷ Otten also claims that in international law, there are only few instances in which scholars hint at the existence of stories or even set out to analyse them; Otten, *supra* note 9, at p. 188.

⁷⁸ Narrative studies in law generally connected with the law and literature studies. See e.g. Cardozo N. Benjamin, “Law and Literature: And Other Essays and Addresses,” New York: Fred B Rothman & Co, 1986; Fludernik Monika and Greta Olson, “Introduction: Law and Literature Versus Law as Literature: Dissenting Opinions,” in Monika Fludernik and Greta Olson (eds.), *In The Grip of the Law: trials, Prisons, and the Space Between*, Peter Lang D, 2004; and Schenk Mary Jane, “Reading Law as Literature, Reading Literature as Law: A Pragmatist’s Approach,” 25 *Journal of Medieval and Humanistic Studies*, 2013, pp. 9-29.

⁷⁹ *Ibid.*

⁸⁰ Schepple, L. Kim, “Foreword: Telling Stories,” 87 *Mich. L. Rev.* 2073 (1989).

⁸¹ Stories re-present experience, and can introduce imagination and new points of view; *ibid.* at. 2073.

⁸² See e.g. Massaro M. Toni, “Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?,” 87 *Michigan Law Review* 2099, 1989; Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *Mich. L. Rev.* 2225 (1989); and Joseph W. Singer, “Persuasion,” 87 *Mich. L. Rev.* 2442 (1989).

behind their quasi-scientific string of deductions.⁸³ The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.⁸⁴

Moreover, it has also been suggested that narrative is pre-conceptual, influencing both the way facts are perceived and factual substance itself, particularly in the criminal justice system.⁸⁵ Whereas Cover emphasizes that law itself is truly derived from the sacred narratives of our world.⁸⁶

Furthermore, critical legal studies emphasize the narrative qualities of the law and challenge law's autonomy as a rational system and shifts their scholarly attention towards law's narrativity.⁸⁷ Said claims that legal story telling uses narratives to address various issues and even elaborates invented stories that could be real, with the aim to present situations in which certain conditions are perpetuated.⁸⁸

Otten argues that powerful legal narratives follow a strategy of concealing their fictitious and imagined components in order to convince the audience that they are telling the real story.⁸⁹ She also suggests that legal interpretation can provide tools to construct narratives and thus international law can be essentially understood as a rhetorical system.⁹⁰ Moreover, Fish suggest that the role of narratives in interpretation has been captured by for example the "parol evidence rule: in the first stage its presence on the interpretive scene works to constrain the path interpreters must take on their way to telling persuasive story...then, the rule is invoked to protect meanings from the flow of the story."⁹¹ She also shows that international law might have also a narrative nature and also argues that narratives could be seen as the bigger mental maps on which laws are located.⁹² Hence, the methodological component of legal theory, "read

⁸³ Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989), at p. 2441.

⁸⁴ *Ibid.* See also Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 Mich. L. Rev. 2459 (1989).

⁸⁵ Kern Griffin L., "Narrative, Truth, and Trial," 101 *Georgetown Law Journal* 281, 2013, at pp. 287-288.

⁸⁶ Cover, R. M., "The Folktales of Justice: Tales of Jurisdiction," 14 *Capital University Law Review* 179, 1985, at p. 180.

⁸⁷ Olson suggests "legal narratives are moreover the subject of law; in common, civil, and mixed legal systems, the re-construction of what happened to whom or to what is central to a given sequence of events' being adjudged in juristic terms. Applying an abstract legal norm to a particular case in the civil law tradition requires that an interpretive process is undertaken that involves recourse to methods of narrative analysis such as differentiating between the frame of the telling, the telling, and the told, naming functions of narrative structures, and identifying types of tellers; Olson Greta, "Narration and Narrative in Legal Discourse," in Peter Hühn, Jan Christoph Meister, John Pier and Wolf Schmid (eds), *Handbook of Narratology*, 2nd ed., Berlin, München, Boston: De Gruyter, 2014, pp. 371-383. For a synthesis on critical legal studies see Mattei Ugo, "Comparative Law and Critical Legal Studies," in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford University Press, 2019, pp. 815-836.

⁸⁸ Said E., "Culture and Imperialism," New York: Knopf, 1993.

⁸⁹ Otten, *supra* note 9, at p. 192.

⁹⁰ *Ibid.*, at p. 194. Her suggestion is based upon White's argument that the law is a "culture of argument and interpretation through operations of which the rules acquire their life and ultimate meaning; White B. James, *Law as a Language: Reading Law and Reading Literature*," 60 *Texas Law Review* 1981, at p. 436.

⁹¹ Fish Stanley, "The Law wishes to have a Formal Existence," in Stanley Fish (ed.), *There's no such thing as Free Speech, And it's a good thing, too*, Oxford University Press, 1994, at p. 153.

⁹² Otten, *supra* note 9, at p. 199.

as narrative, reveals a moral choice that a purely analytical reading will often obscure.”⁹³

3. The Duty to disclose in Roman Law

We start our exploration of narratives in comparative law with analysis of a famous ancient narrative, launched by Cicero, on the famine at Rhodes and ethics (or what is moral thing to do). In this part we localize an example of narrative in comparative law of contracts and trace how and why it was created and examine the authority it establishes over time.

Consensual contracts in Roman law break into two groups, sale, hire and *societas* which are perfectly bilateral and have in each case a *quid pro quo*, consideration contracts, and mandate which is only imperfectly bilateral and is gratuitous. Contracts for sale of goods gave rise to *bona fidei*, *iudicia*, *actio empti* for the buyer, *venditi* for the vendor.⁹⁴ The binding force of Roman contracts can hardly be overstated, and the formation of contracts rested on consent.⁹⁵ However, consent being necessary the circumstances of fraud (*dolus*), violence or threats (*metus*) and mistake might make consent unreal.⁹⁶

In cases of *dolus* a consent obtained by such fraud was none the less consent and the transaction was *prima facie* valid.⁹⁷ Yet in *stricti iuris* transactions, if there was a serious fraud, and this point was expressly invoked in the action (*exceptio doli*) the action was lost.⁹⁸ Buckland suggest that in *bona fidei* transactions to order payment only of what was due *ex fide bona*, the point of *dolus* could always be raised by the defence without any express *exceptio*, and the condemnation reduced, or the action dismissed, as the case might require.⁹⁹ If the exchange has been completed, then in the absence of any other remedy, the *actio doli* could be invoked to recover the loss caused by the fraud.¹⁰⁰

In instances of mistakes Roman law regarded such contracts void. In *bona fidei* exchanges (sales) the rule was that fundamental mistake avoided contract.¹⁰¹ On the other hand, error in *substantia* must have been such that contract would certainly not have been made in knowledge of the facts.¹⁰²

Moreover, there have been two different sets of officials, the *aediles curules* (having jurisdiction over regulated cattle and slave markets) and the *praetor* (having general civilian jurisdiction over contracts) that actually developed remedies for mistakes, fraud, error and

⁹³ Otten also suggests that even empirical data cannot escape narratives, since they are presented as objective, with an interpretive narrative attached to them by which they are giving meaning; Ibid. See also West L. Robin, “Narrative, Authority and Law,” University of Michigan Press, 2001, at p. 358.

⁹⁴ Buckland, W. William, “A Manual of Roman Private Law,” Cambridge University Press, 1953, at p. 278.

⁹⁵ Within most cases also on some other formal requirement; *ibid* at p. 251.

⁹⁶ *Ibid.* at p. 252.

⁹⁷ *Ibid.*

⁹⁸ G. 4.117.

⁹⁹ Buckland, *supra* note 66, at p. 252.

¹⁰⁰ However, if the aggrieved party transferred property then there was generally an action (*condictio*) for the recovery of what had been handed over or its value; *ibid* at p. 252.

¹⁰¹ Yet, Roman law does not offer any definition on what is fundamental; *ibid*, at p. 253.

¹⁰² Yet, as Buckland suggests Roman texts do not lend themselves to any clear-cut-rule and sometimes even laid down the rule that misdescription in an important point avoided the agreement, while if it was a minor point, there was a claim for compensation; *ibid*, at p. 254.

other nonconformity in sales contracts.¹⁰³ The praetor had the power of *iurisdictio* to resolve disputes between litigants and of *ius edicendi* to issue an edict listing the remedies available to litigants.¹⁰⁴ This paper focuses on praetor's jurisprudence which provided a single on-the-contract remedy (*actio ex empto*), affirming the contract but allowing the buyer to claim damages¹⁰⁵ Those damages has to be calculated according to the buyer's negative interest and were meant to make the buyer whole with the respect to his position prior to the contract.¹⁰⁶

However, in the Augustan period, a convergence of different remedies could be detected and the praetor also introduced an off-the-contract remedy (*actio ex empto ad redhibendum*) which also included the possibility of obtaining restitution.¹⁰⁷ With such action the buyer returned the good and asked for the restitution of the price paid.¹⁰⁸ In addition, Donadio suggest that a buyer in a market sale could undertake an action either with aediles and choose between restitution (*actio redhibitoria*) and price reduction (*actio quanti minoris*) or could resort to general jurisdiction of praetor initiating an action employing *actio ex empto*.¹⁰⁹

3.1 Famine at Rhodes narrative

Cicero's *De Officiis* (On Duties) contains a discussion (narrative) on honest business dealings. He states that people want to be honest but that it might not always be obvious what an honest person should do in certain business situations.¹¹⁰ It is not always clear what we should do when we are confronted with an opportunity where we can personally gain by refraining from saying or doing something.¹¹¹

To this end, Cicero introduces a case that was first developed in the second century B.C. by the Stoic philosopher Diogenes of Babylon, and his pupil Antipater of Tarsus.¹¹² Cicero analyses this case from an ethical point of view. What should we do when what is right and what is profitable conflict with each other? He states that personal advantage gained at the expense of others affords us no real advantage.¹¹³ As we live in a social environment requiring mutual cooperation, actions undermining our society harm us in the long run, even though we might think that we are gaining in the short run.¹¹⁴

¹⁰³ Abatino and Dari-Mattiacci, supra note 2, at p. 401. See also Arangio-Ruiz, Vincenzo, "La compravendita in diritto romano," Jovene, 1956, pp. 237-239; and Talamanca, Mario, "Istituzioni di diritto romano," Giuffrè, 1990, pp. 657-8.

¹⁰⁴ See e.g. de Ligt, Luuk, "Fairs and Markets in the Roman Empire: Economic and Social Aspects of Periodic Trade in Pre-Industrial Society," Gieben, 1993; and Buckland, supra note 65.

¹⁰⁵ Abatino and Dari-Mattiacci suggest that these kinds of damages (*damnum emergens*) could be regarded as very similar to the modern reliance damages; Abatino and Dari-Mattiacci, supra note 2, at p. 401.

¹⁰⁶ Abatino and Dari-Mattiacci, supra note 2, at p. 408. See also Talamanca, supra note 74 at p. 591.

¹⁰⁷ See e.g. Watson, Alan, "Seller's liability for defects: aedilician edict and praetorian law," 37 Iura, 1987, 167-175; and Donadio, Nunzia, "La tutela del compratore tra actiones aediliciae e action empty, Giuffrè, 2004, 37-38.

¹⁰⁸ D. 21.1.23.7; D. 21.1.60.

¹⁰⁹ Donadio, supra note 78, at p. 34. See also Donadio, Nunzia, *Promissio Auctionatoris*, 39 Index, 2011, 524-57..

¹¹⁰ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹¹⁴ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

In the case, there is food-shortage and famine at Rhodes, resulting in an extremely high price of corn there.¹¹⁵ An honest merchant has brought a large stock of corn all the way from Alexandria to the island Rhodes. On his way to Rhodes, he noticed that other merchants were also on their way with grain for the Rhodians.¹¹⁶ Should this merchant share this information with the Rhodians? Or should he keep it to himself in order to sell his corn at a higher price? If the Rhodians know there will be an increase in supply soon, this will likely drive down the price of the grain that the merchant can get.¹¹⁷ Cicero asks if it is honest of the merchant to benefit from withholding this knowledge from his customers.¹¹⁸

3.2 Cicero's Ethical Reasoning

In setting up the narrative, Cicero explains both Diogenes's and Antipater's reasoning. On the one hand, Antipater argues that the seller should disclose everything to the purchaser as the purchaser must be as informed as the seller about the good.¹¹⁹ This refers to the conditions for a free market exchange, where both seller and buyer are equally, fully and completely knowledgeable about what they are buying and selling.¹²⁰ In this case, the invisible hand enforces a fair price in the market (Smith, 1976; De Geest & Kovač, 2009). Antipater states that it is one's duty to take the interests of others into account as well as to serve society.¹²¹ However, Cicero also mentions Diogenes's counterargument, stating that as long as the seller is not breaking the law by not declaring the specific defects that he is obliged to declare, and by not committing misrepresentation, he is not obliged to reveal the information.¹²² Diogenes continues that the merchant may try to sell his goods at the best possible price by withholding the information to his advantage as he has no duty to tell the Rhodians everything that might be in their interest to know.¹²³

Moreover, Diogenes attacks Antipater's standpoint by arguing that private property does not really exist if people always have to consider everyone else's and society's interests in this way.¹²⁴ He continues that nothing should be sold in this case, but everything should be given away for free instead.¹²⁵ Both arguments are acknowledging that the action of keeping the

¹¹⁵ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹¹⁶ Ibid.

¹¹⁷ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹¹⁸ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹¹⁹ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913; Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹²⁰ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹²¹ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹²² Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913; Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹²³ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹²⁴ Ibid.

¹²⁵ Ibid.

information to himself is to the merchant's advantage.¹²⁶ However, Antipater labels this as wrong, whereas Diogenes does not.

Cicero concludes that the merchant should tell the Rhodians that other ships are on their way without making clear why he should do so.¹²⁷ He refers to the father of Cato who established the principle of good faith, entailing that any defect known to the seller should be notified to the buyer as well.¹²⁸ Cicero emphasizes the extensive scope of good faith, and then continues that if the decision of Cato's father was right, the merchant should have shared the information with the Rhodians.¹²⁹

However, the grain itself was not defective in any way.¹³⁰ In any case, Cicero seems to agree with Antipater's argument that the purchaser should not be uninformed about any detail, hence, he or she should be as informed as the seller.¹³¹ Hereby, Cicero states that honesty requires the seller to be morally obliged to tell the buyer everything, as not revealing information could be considered concealment.¹³² Furthermore, by stating that concealment entails "...trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it"¹³³, Cicero implies that if the buyer would find the information useful in making the decision whether or not to buy the good, then an honest seller is required to share that information.¹³⁴

3.3 General Law and Economics Reflections on Cicero's narrative

Contract law and economics scholarship has some general reflections on Cicero's reasoning. First of all, the difference between lying and concealing information does not matter, as telling nothing is always telling something.¹³⁵ According to economics theory, when people do not get any information on the quality of a good, they will always make a presumption.¹³⁶ In addition, both lying and not revealing information are intrinsically costly.¹³⁷ After all, one party invests in misleading through words in case of lying, or that party invests in non-detection in

¹²⁶ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹²⁷ Ibid.

¹²⁸ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913; Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹²⁹ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹³⁰ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹³¹ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913; Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹³² Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹³³ Cicero, Marcus Tullius, 'De Officiis. With an English Translation', (Miller, Walter tr) Harvard University Press, 1913.

¹³⁴ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹³⁵ De Geest, Gerrit, and Kovač, Mitja 'Formation of Contracts in the Draft Common Frame of Reference,' 17 European Review of Private Law 113, 2009.

¹³⁶ Akerlof, George Arthur, 'The Market for Lemons: Qualitative Uncertainty and the Market Mechanism', Quarterly Journal of Economics, Vol. 84, 488-500, 1970; De Geest, Gerrit, and Kovač, Mitja 'Formation of Contracts in the Draft Common Frame of Reference,' 17 European Review of Private Law 113, 2009

¹³⁷ De Geest, Gerrit, and Kovač, Mitja 'Formation of Contracts in the Draft Common Frame of Reference,' 17 European Review of Private Law 113, 2009.

case of concealing.¹³⁸ In addition, the other party invests in detection in both cases.¹³⁹ Hence, either lie costs or concealment costs, and verification costs are involved. Furthermore, both lying and not revealing information are wasteful as they lead to inefficient allocations due to the extra costs involved.¹⁴⁰ However, the social welfare consequences relating to acquiring information depend not only on whether the information is socially valuable but also on whether it is the buyer or the seller that acquires the information as well as whether it is based on inferences made from silence or not.¹⁴¹

A second reflection relates to a duty to reveal everything. Contract law and economics follows the ‘less is more’ principle.¹⁴² The unimportant information should not be shared, but should instead be filtered away, as behavioral law and economics has shown that people will otherwise suffer from information overload.¹⁴³ People can have difficulty understanding contractual terms and can be unable to make effective decisions based on the contract when they are confronted with too many contractual terms or when these terms are too complex.¹⁴⁴ Moreover, the condition that the party would not have entered into the contract without the information is not necessary.¹⁴⁵ The underlying economic reasoning is the following: in a perfectly competitive market, any small difference will lead to another decision.¹⁴⁶ In addition, if there is less than perfect competition, there will always be some consumers at the margin that will change their decision based on the small difference.¹⁴⁷ Furthermore, even in a bilateral monopoly where the product will be bought in any case, the division of the surplus between the buyer and the seller is still unclear, hence, any small difference in knowledge might marginally change the negotiated price.¹⁴⁸ As parties always have more information available after concluding the contract than before, and on top of that they also suffer from hindsight bias, a lack of perfect information should not be a reason to avoid the contract.¹⁴⁹ Otherwise,

¹³⁸ De Geest, Gerrit, and Kovač, Mitja ‘Formation of Contracts in the Draft Common Frame of Reference,’ 17 *European Review of Private Law* 113, 2009; Posner, Richard A., ‘Economics Analysis of Law’, Aspen, 1998.

¹³⁹ Shavell, Steven, ‘Foundations of Economic Analysis of Law’, The Belknap Press of Harvard University Press, 2004.

¹⁴⁰ De Geest, Gerrit, and Kovač, Mitja ‘Formation of Contracts in the Draft Common Frame of Reference,’ 17 *European Review of Private Law* 113, 2009.

¹⁴¹ Fishman, Michael J., and Hagerty, Kathleen M., ‘The Optimal Amount of Discretion to Allow in Disclosure’, *The Quarterly Journal of Economics*, Vol. 105(2), 427-444, 1990; Grossman, Sanford J., ‘The Informational Role of Warranties and Private Disclosure about Product Quality’, *The Journal of Law & Economics*, Vol. 24(3), 461-483, 1981; Shavell, Steven, ‘Acquisition and Disclosure of Information Prior to Sale’, *The RAND Journal of Economics*, 20-36, 1994; Spier, Kathryn E., ‘Incomplete Contracts and Signalling’, *The RAND Journal of Economics*, Vol. 23(3), 432-443, 1992.

¹⁴² De Geest, Gerrit, and Kovač, Mitja ‘Formation of Contracts in the Draft Common Frame of Reference,’ 17 *European Review of Private Law* 113, 2009

¹⁴³ Simon, Herbert A., ‘Theories and Decision-making in Economics and Behavioral Science’, *American Economic Review*, Vol. 49, 253-283, 1959; Tversky, Amos, and Kahneman, Daniel, ‘Prospect Theory: An Analysis of Decision under Risk’, *Econometrica* 47, 263-291, 1979.

¹⁴⁴ Tversky, Amos, and Kahneman, Daniel, ‘Prospect Theory: An Analysis of Decision under Risk’, *Econometrica* 47, 263-291, 1979.

¹⁴⁵ De Geest, Gerrit, and Kovač, Mitja ‘Formation of Contracts in the Draft Common Frame of Reference,’ 17 *European Review of Private Law* 113, 2009.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ De Geest, Gerrit, and Kovač, Mitja ‘Formation of Contracts in the Draft Common Frame of Reference,’ 17 *European Review of Private Law* 113, 2009; Fischhoff, Baruch, ‘Hindsight is not equal to foresight: The effect of outcome knowledge on judgement uncertainty’, *Journal of Experimental Psychology: Human Perception and*

contracts would never be binding.¹⁵⁰

In addition, Abatino and Dari-Mattiacci show that generally remedies applied by the praetor have had two positive effects: a) sellers had incentives to reveal more information than under the aedilician remedies; and b) sellers were not liable for innocent misrepresentation.¹⁵¹ This praetors remedies were designed to induce information exchange (which boost allocative efficiency) along the scope and subjective knowledge.¹⁵² In cases of non-disclosure praetorian remedy was the so-called *actio ex empto* which allowed the buyer to receive damages equal to the difference between the price paid and the value of the good to him.¹⁵³ This remedy could be used for any undisclosed information and about any characteristic of the good. Of course, one has to note that the introduction of *actio empti ad redhibendum* also enabled aggrieved buyer to claim the restitution of the good.

3.4 Cicero and the debate on economics versus ethics

Kaldor-Hicks efficiency is, according to White, not a valid tool in assessing whether and how regulation should be implemented relating to consumer contracts, as it rather rapidly leads to focusing on wealth maximization and utilitarianism which are lacking as ethical norms.¹⁵⁴ This seems to be the case for Bentham's monistic utilitarianism, which is a kind of reductionism with normative implications.¹⁵⁵ It considers legal rules as irrational and bad law that need to be overcome when they do not pass the utilitarian test.¹⁵⁶ However, there are other forms of utilitarianism, such as Mill's liberal utilitarianism, that include other values than utility alone.¹⁵⁷ When a legal rule fails the utilitarian test in this case, it can still be justified as enhancing other values, such as fairness.¹⁵⁸ This brings us to the broader debate of "economics versus ethics".

Conform Posner's efficiency hypothesis of law, most legal arguments and legal rules can be seen as ways of getting people to avoid waste or getting them to act efficiently.¹⁵⁹ Ethics looks at what we should do, which principles should guide our everyday behavior.¹⁶⁰ In Cicero's case, what we should do when what is right and what is advantageous or profitable

Performance, Vol. 1(3), 288-299, 1975; Slovic, Paul, and Fischhoff, Baruch, 'On the psychology of experimental surprises', Journal of Experimental Psychology: Human Perception and Performance, Vol. 3(4), 544-551, 1977.

¹⁵⁰ De Geest, Gerrit, and Kovač, Mitja 'Formation of Contracts in the Draft Common Frame of Reference,' 17 European Review of Private Law 113, 2009.

¹⁵¹ Abatino and Dari-Mattiacci, supra note 2, at p. 404.

¹⁵² Such information exchange induced a more efficient matching between goods and buyers; Ibid., at p. 416.

¹⁵³ Ibid.

¹⁵⁴ White, Alan M., 'Behavior and Contract', Minnesota Journal of Law & Inequality, Vol. 27(1), 135-179, 2009.

¹⁵⁵ Tuzet, Giovanni, 'Calabresi and Mill – Bilateralism, Moral Externalities and Value Pluralism', Global Jurist, 1-10, 2019.

¹⁵⁶ Bentham, Jeremy, 'An introduction to the Principles of Morals and Legislation', Hafner, 1789.

¹⁵⁷ Tuzet, Giovanni, 'Calabresi and Mill – Bilateralism, Moral Externalities and Value Pluralism', Global Jurist, 1-10, 2019.

¹⁵⁸ Mill, John Stuart, 'Utilitarianism' in Lindsay, Alexander Dunlop, 'Utilitarianism. Liberty. Representative Government.', Dent & Sons, 1-60, 1962.

¹⁵⁹ Posner, Richard A., 'Economics Analysis of Law', Aspen, 1998.

¹⁶⁰ Hare, Richard Mervyn, 'Moral Thinking: Its Levels, Method and Point', Oxford University Press, 1981.

conflict with each other.¹⁶¹ Therefore, both the ethical, and the law and economics perspective are useful to conduct a normative analysis of the law, to analyze how the law should be.

These two lenses to analyze the famine at Rhodes case, followed different reasonings, but they both resulted in the same outcome, i.e., they both concluded that the merchant should have informed the Rhodians that more ships with grain were on their way to the island.

Therefore, this case can be seen as an example of De Geest's argument that a normative analysis based on Kaldor-Hicks efficiency and a normative analysis based on fairness maxims are not necessarily the polar opposites they are often portrayed to be.¹⁶²

According to De Geest, fairness maxims look at only one side of the problem as they emphasize how frustrating an outcome is for one of the parties, but do not take the conflicting (dis)advantage for the other party into account.¹⁶³ When applying this to the famine at Rhodes, it is frustrating for the Rhodians that the price they paid for grain would be a lot higher if the merchant did not share the information that other ships were on their way as well. Therefore, it is only fair that the merchant shares the information. Not sharing information can then always be seen as a bad thing. However, reasoning based on fairness maxims does not look at the other side of the problem.¹⁶⁴ The merchant, on the other side, might have incurred a lot of extra costs by investing in a speedy ship and a strong crew on board. In addition, the merchant has taken a longer, perhaps more perilous journey to Rhodes than if he had just sold his grain in Alexandria, resulting in higher opportunity costs. He probably did this all with the intention of selling his grain at a higher price in Rhodes than in Alexandria. He might incur huge losses, potentially even resulting in bankruptcy, bringing financial problems to his family if he is not able to get a higher price for his grain. This is then frustrating for the merchant.

To solve problems with conflicting (dis)advantages to the other side, De Geest outlines four fundamental options.¹⁶⁵ He states that you can ignore the other disadvantages by, for instance, always only caring about the buyer and not the seller, or you can acknowledge both sides, but decide on a fixed ranking order, for example, stating that the interest of the buyer is always more important than the interest of the seller.¹⁶⁶ Additionally, you can acknowledge both sides, but instead of choosing a fixed ranking order, you can decide based on "gut-feeling".¹⁶⁷ However, the relevant option here is acknowledging both sides, and then balancing them using a certain measure.¹⁶⁸ This measure can constitute of monetary losses, happiness losses, or utility losses, for example.¹⁶⁹ This is what Kaldor-Hicks efficiency does as it considers a change to be an improvement if those who benefit could theoretically compensate those who are worse off, and then still improve, meaning that compensation does not actually need to take place.¹⁷⁰

¹⁶¹ Richards, Randy, 'Cicero and the Ethics of Honest Business Dealings', Online Journal of Ethics, 1995-1997.

¹⁶² De Geest, Gerrit, 'Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms', in Hatzis, Aristides N., and Mercuro, Nicholas, 'Law & Economics: Philosophical Issues and Fundamental Questions', Routledge, 183-202, 2015.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Coleman, Jules L., 'Efficiency, Utility and Wealth Maximization', Hofstra Law Review, Vol. 8(3), 509-551, 1980; De Geest, Gerrit, 'Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates

Thus, the discussion is misleadingly framed as “ethics versus economics” or “fairness versus welfare” as economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it.¹⁷¹

Kaplow & Shavell also state that satisfying fairness is partially reconcilable with the social welfare concept, as preferences for a legal rule based on fairness should be taken into account when determining social welfare, just like any preference or taste should. Introducing fairness concerns into economic welfare concepts this way, boils down to empirical questions about individual’s tastes and preferences.¹⁷² This goes against Milton Friedman and the Chicago school claiming that economics is a value-free zone. After all, they stated that economics is a positive science simply describing what is.¹⁷³ However, economic models are not neutral as everyone views the world through a mental picture frame.¹⁷⁴ Economics is actually about choosing or developing an economic rational that best fits our purpose, meaning that it is reflecting our context, values and aims.¹⁷⁵ This also fits together with Calabresi’s concept of ‘moral externalities’.¹⁷⁶ When a certain act or behavior morally offends society at large, legal rules will be put in place to prohibit this act or behavior, or at least render it more difficult to perform.¹⁷⁷ These are ‘inalienability rules’ which do not permit a transfer between a willing buyer and a willing seller.¹⁷⁸ The magnitude of these moral costs to third parties determines if they should be given normative weight, i.e., whether it is appropriate, both economically and legally, to protect people from such externalities.¹⁷⁹ These moral costs should be given normative weight if they are larger than the costs experienced by those suffering from the legal rule prohibiting the act or making it more difficult.¹⁸⁰ Hence, in case of consumer contracts,

Scholarly Transparency Norms’, in Hatzis, Aristides N., and Mercuro, Nicholas, ‘Law & Economics: Philosophical Issues and Fundamental Questions’, Routledge, 183-202, 2015.

¹⁷¹ De Geest, Gerrit, ‘Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms’, in Hatzis, Aristides N., and Mercuro, Nicholas, ‘Law & Economics: Philosophical Issues and Fundamental Questions’, Routledge, 183-202, 2015.

¹⁷² Kaplow, Louis, and Shavell, Steven, ‘Economic Analysis of Law’, in Auerbach, Alan, and Feldstein, Martin, ‘Handbook of Public Economics’, 1-96, 1999; Posner, Richard A., and Shavell, Steven, ‘A Review of Steven Shavell’s “Foundations of Economic Analysis of Law”’, Journal of Economic Literature, Vol. 44(2), 405-414, 2006.

¹⁷³ Raworth, Kate, ‘Doughnut Economics – Seven Ways to Think Like a 21st-Century Economist’, Random House Business Books, 2017.

¹⁷⁴ Goffmann, Erving, ‘Frame Analysis: An Essay on the Organization of Experience’, Harper & Row, 1974; Raworth, Kate, ‘Doughnut Economics – Seven Ways to Think Like a 21st-Century Economist’, Random House Business Books, 2017.

¹⁷⁵ Raworth, Kate, ‘Doughnut Economics – Seven Ways to Think Like a 21st-Century Economist’, Random House Business Books, 2017.

¹⁷⁶ Calabresi, Guido, ‘The Future of Law and Economics. Essays in Reform and Recollection.’, Yale University Press, 2016; Calabresi, Guido, and Melamed, Douglas A., ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’, Harvard Law Review, Vol. 85, 1089-1128, 1972.

¹⁷⁷ Calabresi, Guido, ‘The Future of Law and Economics. Essays in Reform and Recollection.’, Yale University Press, 2016.

¹⁷⁸ Calabresi, Guido, and Melamed, Douglas A., ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’, Harvard Law Review, Vol. 85, 1089-1128, 1972.

¹⁷⁹ Calabresi, Guido, ‘The Future of Law and Economics. Essays in Reform and Recollection.’, Yale University Press, 2016; Tuzet, Giovanni, ‘Calabresi and Mill – Bilateralism, Moral Externalities and Value Pluralism’, Global Jurist, 1-10, 2019.

¹⁸⁰ Calabresi, Guido, ‘The Future of Law and Economics. Essays in Reform and Recollection.’, Yale University Press, 2016.

when consumer manipulation and exploitation by sellers through harmful non-salient terms, for instance, offends society more than legal rules excluding these terms cost sellers, such rules should be implemented.

Finally, merchant's non-disclosure of information and resulted allocation of fortunes in the famine at Rhodes case is not, as one might argue, a mere economic re-distribution issue but an instance of deliberately caused information asymmetry which by definition results in market failures and inefficient allocation of scarce resources. Such market failures and inefficient allocation of scarce resources should be in order to boost economic growth and social wealth, addressed and deterred by legal rules and related duties to inform. Outstandingly, ancient Roman law and Cicero's decision in famine at Rhodes case provided exactly such a remedy.

Thus, Cicero has managed to strike a perfect balance between curing market failures and allocative efficiency on the one hand and moral standards of behavior on the other hand – the Cicero's equilibrium. His equilibrium also shows that the discussion is misleadingly framed as "ethics versus economics" or "fairness versus welfare" as economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it. As shown Cicero's equilibrium simultaneously achieves pareto efficiency and induces ethical, fair and moral behaviour.

5. The role of narratives and comparative contract law

Comparative law's intellectual endeavor is a privileged place of contemplation, methodological excellence and scholarly exploration. Comparatists also know that each of the compared legal systems, acts, decisions or jurisprudence is necessarily expressed through either written or oral language.¹⁸¹ Mattila actually suggest that law is necessarily bound to human language and that the language of law is as old as law itself and has drawn people's attention from different viewpoints since ancient times.¹⁸²

However, we comparativists are also very often confronted with the question of the exact aim of our comparative endeavor.¹⁸³ Jansen for example suggests that comparatists are commonly engaged in contracting different legal systems rather than genuinely comparing them and that both "traditional mainstream comparative lawyers and modern interpretative approaches to comparative legal studies normally treat comparison pragmatically, without any solid theoretical basis."¹⁸⁴ However, Zweigert and Kötz argue that the primary aim of

¹⁸¹ See e.g. White J. B., "Legal Knowledge," 115 Harvard Law Review 1396, 2001-2002.

¹⁸² Mattila H. E. S., "Comparative Linguistics: A Discipline in Statu Nascendi," in B. Pozzo and V. Jacometti (eds.), "Multilingualism and the Harmonisation of European Law," Kluwer Law International, 2006, at p. 21. See also Mattila H. E. S., "Legal Language: History," in K. Brown (ed.), "Elsevier Encyclopedia of Language and Linguistics, Oxford: Elsevier, 2006.

¹⁸³ Sacco Rodolfo, "Legal Formants: A Dynamic Approach to Comparative Law," 39 American Journal of Comparative Law 1, 1991. For a synthesis of comparative methodology and its aims see Mathias Reimann and Reinhard Zimmermann (eds.), "The Oxford Handbook of Comparative Law," 2nd ed., Oxford University Press, 2019.

¹⁸⁴ Jansen Nils, "Comparative Law and Comparative Knowledge," in Mathias Reiman and Reinhard Zimmermann (eds.), "The Oxford Handbook of Comparative Law," Oxford University Press, 2008, at p. 307. See also Dannemann Gerhard, "Comparative Law: Study of Similarities or Differences?" in Mathias Reiman

comparative law is the knowledge itself, the same as in all cases of scientific methods.¹⁸⁵ In their view comparative law is an “*ecole de verite*” which extends and enriches the “supply of solutions” and offers the scholar of critical capacity the opportunity of finding the “better solution” for her time and place.¹⁸⁶ In addition, they suggest that the aim of comparative law is also a) to serve as an aid to the legislator; b) to serve as a tool of construction; c) to serve as a component of the curriculum of the universities; d) to contribute to the development of a methodology and to serve as a contribution to the systematic unification of the law; and e) to contribute to the development of a private law common to the whole Europe.¹⁸⁷ This last part seeks to add another potential aim to this previous list and attempts to localize an example of narrative in comparative contract law, to trace its creation and to offer one reading of the Cicero’s story.

4.1 Comparative law as a network of narratives

Many distinguished comparative lawyers have insisted on the virtues of comparative law as a means of expanding knowledge generally and as means of better understanding law.¹⁸⁸ As a distinct academic discipline comparative law has, as we argue, also another potential objective. Namely, comparative law might be seen as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsabilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do.

How do legal narratives go viral? Contagion occurs from jurist to jurist through comparative education, reading the cases from different legal systems and via talk and discussion, whether in person or through telephone, conference or printed materials (articles, textbooks, commentaries, books). There is also contagion facilitated by comparative law from one legal system to another, as jurists watch and read one another’s stories/cases (narratives). Shiller actually suggest that the basis principle of contagion is the same as with the causes of epidemic.¹⁸⁹ Also legal narratives might follow the same pattern as the spread of disease. In this constellation comparative law functions as a spreader of narrative and is infecting jurists around the globe (preventing that contagion rate would decrease and cause the narrative to be forgotten).¹⁹⁰

and Reinhard Zimmermann (eds.), “The Oxford Handbook of Comparative Law,” Oxford University Press, 2008, pp. 383-419.

¹⁸⁵ They brilliantly observe that “if one accepts that legal science includes not only the techniques of interpreting the text, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a life time by even the most imaginative jurist who was corralled in his own system;” Zweigert Konrad and Hein Kötz, “An Introduction to Comparative Law,” 3rd ed., Oxford University Press, 1998, at p. 15.

¹⁸⁶ Ibid, at p. 15.

¹⁸⁷ Ibid, at p. 16. See also Hendry J., “Legal Comparison and the (Im)possibility of Legal Translation,” in S. Glanert (ed.), “Comparative Law: Engaging Translation,” London: Routledge, 2014, at p. 87.

¹⁸⁸ For a synthesis see Glenn H. Patrick, “The Aims of Comparative Law,” in Jan M. Smits, “Elgar Encyclopedia of Comparative Law,” 2nd ed., Edward Elgar, 2014, pp. 65-74.

¹⁸⁹ Shiller, *supra* note 2, at p. 21.

¹⁹⁰ See for example, Aiden Erez and Jean-Baptiste Michel, “Uncarted: Big Data as a Lens on Human Culture,” Riverhead Books, 2013.

Legal narratives are at first unobserved but then (with the comparative law's transmission mechanisms) start to grow. This long lag between the publication of one legal narrative and its eventual epidemic status represents a time interval over which the legal narrative evolves from something regarded as peculiar and thought provoking into something that is clearly correct and great. During this interval other legal scholars start to increasingly appreciate the legal narrative (i.e. and corresponding legal solution/rule) and the legal epidemic spreads through comparative law, academic rituals, such as paper presentations at seminar and major conferences, such as remarkable Society of Legal Scholars conferences.¹⁹¹ Eventually, legal narratives (and corresponding solutions) make their way into textbooks and start to infect generation after generation of law students across different legal families and systems.

One may also argue that narratives are inherent in comparative law. Comparative law and comparative lawyers also form the so-called interpretive community which actually creates knowledge and spreads narratives through society. Namely, literature suggests that interpretive communities (by sharing common experience or common interpretative strategy) actually create and transmit narratives, since these narratives (in our discussion Cicero's narrative in particular) reproduce the common belief of legal community (and across different communities and legal systems) about the meaning or ultimate nature of reality, shared by the average member of legal community¹⁹²

Moreover, legal education (the determination of which texts are read and which courses are taught) is then influenced and shaped by such interpretative community.¹⁹³ Hence, comparative legal education features as super-important place of narrative transmission and transaction. Furthermore, as shown comparative law might be seen as a network of narratives that acts as powerful tool to establish or reinforce interpretative authority and are hence inherently part of comparative legal discourse. Hence, narratives might effectively function as mental tools that shape, influence and form the understanding of comparative law.

4.2 Cicero's famine at Rhodes and his super-spreader narrative

Already in ancient Greece, the philosopher Plato appreciated the importance of narratives, he wrote his philosophy in the form of fictional dialogues featuring the celebrity Socrates. As Shiller argues, the narrative force helps to explain what makes his work still popular today.¹⁹⁴ Insightfully, Cicero in his book *De Oratore* (On the Orator, 55 BCE), which is actually a book on narratives, states: "Nature form and produces men to be facetious mimics or story-tellers; their look, and voice, and mode of expression assisting their conceptions."¹⁹⁵

Cicero's narrative on the famine at Rhodes does not just provide a structure for interpretation of similar contingencies where a judge or a legislator will face with similar moral dilemmas but has through centuries actually become also our common mental model (shared

¹⁹¹ See for example Vinck Patrick, Phuong N. Pham, Kenedy K. Bindu, Juliet Bedford, and Eric J. Nilles, "Institutional Trust and Misinformation in the Response to the 2018-19 Ebola Outbreak in North Kivu, DR Congo: A Population-Based Survey," 19 *Lancet Infectious Diseases* 30063, 2019.

¹⁹² See Bruner, *supra* note 9, at p. 20.

¹⁹³ Otten, *supra* note 9, at p. 205.

¹⁹⁴ Shiller, *supra* note 2, at p. 34.

¹⁹⁵ Cicero, Marcus Tullius, 1860 (55 BCE), *On Oratory and Orators*. New York: Harper and Brothers, 1860, p. 145.

by lawyers around the globe) for controlling knowledge, since it actually operates as an instrument of mind in the construction of today's reality. Cicero's ancient narrative has an impact on how and when current legal interpretation of moral dilemmas (to disclose or not to disclose the valuable information) takes place in the legal discourse in many modern legal systems. As Jackson stated, "lawyers internalize a set of narrative frameworks regarding the legal recognition of typical behavioural patterns – the narrative form of legal rules...(laden) with those forms of approval and disapproval which legal institutions use in order too confer recognition."¹⁹⁶ As shown, Cicero's superspreading super-narrative – mental map - has been from generation to generation via scholarly articles, first year textbooks on Roman law, courts' interpretations, and scholarly commentaries passed on in teaching to law students and consequently internalized through centuries by almost endless generations of lawyers across Europe (and across the world).¹⁹⁷

Namely, Cicero's narrative became a mental tool and when narrative operates as a mental tool, this means that his story become real and received unquestioned acceptance from legal audiences around the globe. Moreover, Cicero's narrative fits into the description of a very powerful narrative, since it makes sense of a moral/ethical problem, it locates troubles by incorporating them into its storyline, and it engages for centuries with us readers and convince us of the story he presents. His powerful narrative actually developed a moral code which storied memories and insights of earlier contexts from ancient lawyers that have been via this narrative imbedded in us today. One may even argue that Cicero has deliberately created it in order to persuade legal communities with particular reading of contract law. As White suggests, such narrative becomes then a collective sign and the icon of a series of events and a code for understating reality.¹⁹⁸

In other words, Cicero's narrative is essentially a cognitive instrument that organizes experienced knowledge in the form of a story. His narrative has become so natural, convincing and self-evident that is internalized in our legal education, in our mental problem solving mechanisms and into our moral standards of behavior.

One may also argue that narratives are inherent in comparative law. Comparative law and comparative lawyers also form the so-called interpretive community which actually creates knowledge and spreads narratives through society. Namely, literature suggests that interpretive communities (by sharing common experience or common interpretative strategy) actually create and transmit narratives, since these narratives (in our discussion Cicero's narrative in particular) reproduce the common belief of legal community (and across different communities and legal systems) about the meaning or ultimate nature of reality, shared by the average member of legal community¹⁹⁹

Moreover, legal education (the determination of which texts are read and which courses are taught) is then influenced and shaped by such interpretative community.²⁰⁰ Hence, comparative

¹⁹⁶ Jackson B. Stuart, "Law, Facts and Narrative Coherence," London: Deborah Charles Publications, 1988, at p. 171.

¹⁹⁷ Transmission took place via various mechanisms and routes from judgements, scholarly lectures, legal opinions, textbooks, articles and commentaries. As Otten suggest, narrative transmits its messages in codes and in evaluations of problems and dilemmas it has encountered; Otten *supra* note 7, at p. 213.

¹⁹⁸ White, *supra* note at p. 30.

¹⁹⁹ See Bruner, *supra* note 9, at p. 20.

²⁰⁰ Otten, *supra* note 9, at p. 205.

legal education features as super-important place of narrative transmission and transaction. Furthermore, as shown comparative law might be seen as a network of narratives that acts as powerful tool to establish or reinforce interpretative authority and are hence inherently part of comparative legal discourse.

Furthermore, Cicero's narrative also fulfills Bruner's criteria for an effective narrative. Namely, First, Cicero's narrative is a unique pattern of events occurring over time (narrative diachronicity) and is characterized as quintessential pattern of events occurring over time. Second, Cicero's narrative is very particular and take as its ostensive reference particular happening that serves as its vehicle rather than its destination. Third, Cicero's narrative is intentional state entailment and is about people acting in a setting, and the happenings that befall them are relevant to their intentional states, to their beliefs, desires, theories and values. Fourth, his narrative has hermeneutic property and composability, whereas automatized interpretations of narrative function as a default settings that deals with knowledge. Fifth, it is canonical and contains a breach of certain canonical script. Namely, as stated in order to be worth telling, narrative, while involving precipitating event, must be about how an implicit canonical script has been breached, violated, or deviated from in a manner to do violence to the legitimacy of the canonical script. Sixth, Cicero's narrative is also referential and its truth is judged by its verisimilitude rather than its verifiability. In other words, analyzed narrative *de facto* creates a reality. Seventh, it indeed belongs to a genre (human tragedy), since genres, once we narrate to ourselves or the ones that we hear or read, seem to provide us with commodious and conventional model for limiting the hermeneutic task of making sense of human happenings. Eight, his narrative is normative, because tellability as a form of discourse rests on a breach of conventional expectation, narrative is necessarily normative (i.e. normativeness). Ninth, Cicero's narrative is context sensitive and negotiable. Finally, this ancient narrative is accrual and creates a culture, history and a tradition. For example, as Bruner suggests Cicero's narrative may be viewed as a system of narrative accruals, since it "guarantees a tradition by assuring that once a case has been interpreted in one way, future cases that are similar shall be interpreted and decided equivalently." Moreover, Cicero's narrative has a "local" capacity for accruing stories of happenings of the past into some sort of diachronic structure that permits a continuity into the present. Hence, the perpetual construction and reconstruction of the past "provide precisely the forms of canonicity that permit us to recognize when a breach has occurred and how it might be interpreted."²⁰¹ Cicero's narrative also creates in us a sense of belonging to the canonical past that permits us to form our own narratives of deviation while maintaining complicity with the ancient canon.

In addition, Vitz suggests that narratives are also a central factor in a person's moral development.²⁰² Based on extensive psychological contributions he argues that narrative material is an essential component of effective moral education.²⁰³ Hence, Cicero's narrative for instruction in virtue has been via the comparative law's transmission mechanism

²⁰¹ See Bruner, *supra* note 7.

²⁰² Vitz C. Paul, "The Use of Stories in Moral Development: New Psychological Reasons for an Old Education Method," 45 *American Psychologist* 6, 1990, pp. 709-720.

²⁰³ Narrative and narrative thinking are especially involved in how cognitive processes lead to moral development and hence narratives should be employed as a powerful mechanism of moral education; *ibid*, at p. 709.

internalized in our legal education, in our mental problem-solving mechanisms and into our moral standards of behavior. The narrative force and comparative law transmission mechanism helps to explain what makes Cicero's work after more than 2000 years still popular today.

4.3 Examples of narratives in the German, English and Belgium law of contracts: the narrative of the duty to disclose valuable information

-----Note to the editor – to be completed! -----

5. Conclusion

From ancient times, legal scholars have been puzzled by the question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains. Even the great Marcus Tullius Cicero, as one of the most prominent ancient lawyers and remarkable thinkers, has dealt with this complicated puzzle and explored whether or not it is honest of the merchant to profit by withholding the information that more ships with grain will arrive at Rhodes soon, hence not sharing this with the Rhodians. In his classic, eternal writings he weighs Diogenes's and Antipater's reasoning against each other, concluding that the merchant should tell the Rhodians that more ships are on their way to be considered honest.

This more than two thousand years old case, while brilliantly addressing the ever-present issues of morality and ethical behavior, could be from the law and economics perspective regarded as the first, in human history, recorded example of an asymmetric information problem.

While employing the main findings of the law and economics literature on the duty to disclose information, several similarities as well as differences with Cicero's ethical arguments might be noticed. First, in this paper we have shown how the praetorian and in particular Cicero's decision in the Rhodes famine case efficiently addresses the problems created by asymmetric information problem. Second, our investigation shows that lawmaking in ancient Rome produced remarkable legal solutions to omnipresent legal problems. Third, Cicero's decision in the Rhodes famine case stands the test of time and corresponds with the law and economics suggestions on how to address the asymmetric information problem in circumstances under which an individual has a valuable information unknown to the person with whom he transacts.

Namely, also law and economics analysis of Rhodes famine case suggest that the merchant should disclose the information to the Rhodians. After all, the merchant is the least cost information gatherer, the information is valuable to the Rhodians justifying the information and communication costs, it is unlikely that the Rhodians possess the information already, the information is not entrepreneurial as the merchant acquired it casually, and the other ships being on their way to Rhodes is not just an opinion or a non-falsifiable statement. Hence, all

five cumulative conditions relating to this optimal doctrine to disclose information are fulfilled.

Although the ethical and economical perspectives on this case contain different reasonings, they both come to the same conclusion, i.e., the merchant should also from the law and economics perspective disclose to the Rhodians that more ships with grain are on their way. This posits the question whether fairness maxims (ethics) and efficiency (economics) are really as opposing as they are often portrayed to be. Economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it. By applying the optimal doctrine of disclosure of information, one may argue that in this case, not revealing the information to the Rhodians is not only considered unfair but also inefficient. In other words, Cicero's decision spurs wealth maximization, since it induces an optimal disclosure of information, discourages opportunism and moral hazard, induces efficient reliance and allocates risk on the superior risk bearer.

Finally, paper suggests that Cicero's moral judgement and its centuries long circulation via the extensive network of narratives spread widely and influenced the development of the modern legal regimes around the globe. Cicero's responsabilizing narrative is an instrument of mind and its circulation among lawyers and legal scholars helped to develop and sustain better social and legal norms. In addition, comparative law might be seen as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsabilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do.