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Rescuing Comparative Law and Economics?
Exploring Successes and Failures of an Interdisciplinary Experiment

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DOES CICERO'S DECISION STAND THE TEST OF TIME? FAMINE AT RHODES AND COMPARATIVE LAW AND ECONOMICS APPROACH

Margot Callewaert and Mitja Kovac[1]

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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. 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 have produced an impressive amount of literature, decisions and comments. Most recently, it has also gained extensive attention in many prominent laws and among economics scholars. In addition, the pre-contractual duty to disclose information is, among many comparative legal scholars, widely used as an illustration of the current deep, sharp common/civil law division. This paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particularly the famous Cicero decision on the famine at Rhodes.

I. INTRODUCTION

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. 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[2]. Moreover, Abatino and Dari-Mattiacci argue that non-disclosure remedies

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[2] G. Parsons Miller, *Rome and the Economics of Ancient Law II*, in G. Dari-Mattiacci, D.P. Kehoe (eds.), *Roman Law and Economics*, Vol. II (Oxford: Oxford University Press, 2020), 1.

provided by Roman law were efficient in their sphere of application[3]. In addition, the pre-contractual duty to disclose information is, among many comparative legal scholars, widely used as an illustration of the current deep, sharp common/civil law division, which origins could be traced back to ancient Roman law.

This paper joints this critical debate and employs law and economics theory and methodology to explore the disclosure duties in the contract law of ancient Rome. More particularly, while focusing on the famous Cicero decision on the famine at Rhodes case, the paper overcomes an old legal and moral crux and critically examines the legal obligations of parties to disclose private information to their counterparties in contract for sale of ancient Roman law. Moreover, this paper resonates on this ancient Cicero decision and provides its modern applications, reflections for the comparative law and economics scholarship of pre-contractual disclosure duties.

This paper complements our earlier work on the "disclosure duties" in four noteworthy respects[4]. First, this paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particularly 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 provides the comparative law and economics analysis of pre-contractual disclosure duties in the ancient Roman, English, US and Belgian law of contracts. Fourth, this paper critically evaluates the impact of the Roman law and Cicero's law-making on the development and economic logic of contemporary legal systems.

In this article, the analysis is as positive as it is normative. The analytical approach employs an inter-disciplinary dynamic[5] investigation and enriches it with the concepts used in the economic analysis of law[6]. Moreover, the employed law and economics methodology follows the classical comparative law and economics approach[7]. This classical comparative law and economics approach serves as a bridge between facts and normative conclusions, between

[3] B. Abatino, G. Dari-Mattiaci, *The Dual Origin of the Duty to Disclose in Roman Law*, in Dari-Mattiacci, Kehoe, *supra* note 1, 401-427.

[4] G. de Geest, M. Kovač, *Formation of Contracts in the Draft Common Frame of Reference*, in 17 Eur. Rev. Private L. 113-132 (2009); M. Kovač, *Comparative Contract Law and Economics* (Cheltenham: Elgar Publishing, 2011).

[5] The dynamic part of the 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.

[6] For a synthesis of law and economics scholarship, see G. de Geest (ed.), *Contract Law and Economics – Encyclopaedia of Law and Economics*, Vol. 6, 2nd ed. (Cheltenham: Elgar Publishing, 2011). Also see R.A. Posner, *Economic Analysis of Law* 8th ed. (New York, NY: Wolters Kluwer Law Publishers, 2011).

[7] R. van den Bergh, *The Roundabouts of European Law and Economics* (Den Hague: Eleven International Publishing, 2018), 21-28.

economic theory and policy proposals for an improved legal system[8]. 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 social effects of assessed legal institutions[9]. 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 novel situations"[10].

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 economically inspired conceptual framework and literature review for the categorization of the duty to disclose information. 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 synthesizes main law and economics principles and provides a law and economics treatment of Cicero's case. Finally, some brief conclusions are presented.

II. CONCEPTUAL FRAMEWORK AND LITERATURE REVIEW

One of the most extensively debated questions is under what circumstances an individual has a duty to disclose relevant, valuable information unknown to the person with whom she bargains[11]. What follows is a survey of prior legal and economics literature on the pre-

[8] *Ibid.* See also U. Mattei, *Comparative Law and Economics* (Ann Arbor, MI: The University of Michigan Press, 1997).

[9] 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. See A. Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (London: Hart Publishing, 2006), 11-16. See also G. Calabresi, *The Future of Law & Economics* (New Haven, CT: Yale University Press, 2016); and R.A. Posner, *Divergent Paths: The Academy and the Judiciary* (Cambridge, Mass: Harvard University Press, 2016).

[10] E. Mackaay, *Law and Economics for Civil Law Systems* (Cheltenham: Elgar Publishing, 2013), 6.

[11] Obviously, we are referring here to the common's law concept of unilateral mistake with its civil counterpart. Since the most important doctrinal distinction in the law of mistake is the one drawn between 'unilateral' and 'mutual' mistakes, the focus of our discussion is on the unilateral one.

contractual duties of disclosure, summarizing the major conclusions drawn from the literature[12].

In his seminal article, Anthony Kronman discusses the problem of unilateral mistake and offers an economic justification for the rule that a unilaterally mistaken promisor is excused when his error is known or should be known to the other party[13]. Kronman's analysis, based on a distinction of how the informational asymmetry arose, introduces a basic distinction between two kinds of information – information which is the result of a deliberate search and information which has been casually acquired. He defines deliberately acquired information as socially useful information[14] whose acquisition entails costs which would not have incurred but for the likelihood that the information in question would actually be produced[15]. If the costs incurred in acquiring information would have incurred in any case, the information may be said to have been casually acquired[16]. Thus, if information has been deliberately acquired, non-disclosure should be permitted, since this is the only effective way of providing an incentive to invest in the production of such knowledge. Conversely, if information was casually acquired, then disclosure should be required. However, as Kronman argues, if the information of this sort is socially useful as well, a disclosure requirement will not cause a sharp reduction in the amount of such information actually produced[17]. He argues further that a rule permitting non-disclosure[18] corresponds to an arrangement which parties themselves would have been likely to adopt. In the case of such a gap, reducing transaction costs demands providing a legal rule, which parties would agree to if they had deliberately addressed the problem. This consideration, coupled with a reduction in the production of socially useful information, according to Kronman, suggests that allocative efficiency is best served by permitting one who possesses deliberately acquired information to enter and enforce favorable bargains without disclosing what he knows. A legal privilege of non-disclosure is, in effect, a property right and shows that where special knowledge or

[12] For a synthesis see de Geest, Kovač, *supra* note 3; H. B. Schäefer, C. Ott, *The Economic Analysis of Civil Law* (Cheltenham: Elgar Publishing, 2004); G. de Geest, *Economische analyse van het contracten- en quasi-contractenrecht* (Antwerpen: Maklu, 1994).

[13] A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, in 7 J. Legal Stud. 11 (1978).

[14] From a social point of view, it is desirable, thus promoting allocative efficiency, that information which reveals a change in circumstances affecting the relative value of commodities reaches the market as soon as possible (this information is supplied by individuals either directly, by being publicized, or indirectly, when it is signaled by an individual's market behavior).

[15] These costs may include not only direct search costs but also the costs of developing an initial expertise – for example the costs of attending business school. Kronman, *supra* note 12, at 13.

[16] Kronman, s*upra* note 12, at 13.

[17] 'Casually acquired information represents the ideal limit of a continuum – the case in which the change in magnitude that results from eliminating one of the benefits of possessing certain information is zero. The decline in the production of a certain kind of information which is caused by denying its possessor the right to appropriate the information for his own benefit is small, it is likely to be more than offset by the corresponding social gain that results from avoidance of mistakes;' Kronman, *supra* note 12, at 14.

[18] This has the effect of imposing the risk of a mistake on the mistaken party.

information is the fruit of a deliberate search the assignment of a property right is required in order to ensure production of the information at a socially desirable level.

Assuming that courts can easily discriminate between those who have acquired information casually or deliberately, Kronman, upon economic justification, proposes imposing a duty to disclose on a case-by-case basis. However, as he also recognizes, a rule which calls for a case-by-case application of disclosure requirement is likely to involve factual issues that will be difficult and prohibitively expensive to resolve. Thus, he proposes a uniformly applied blanket rule across each class of cases involving the same sort of information[19].

Kronman's analysis was subsequently picked up, supplemented and modified by many authors. According to Posner, imposing a general duty of disclosure across the board would be inefficient; it would discourage the acquisition of information and often impose the duty of care on the wrong party[20]. In line with Kronman's reasoning, Posner argues that liability for non-disclosure should depend on which of the parties to the transaction, the seller or buyer, can produce, convey or obtain the pertinent information at a lower cost. If the relevant product characteristic is one which the buyer can determine by casual inspection or handling at the time of purchase, then it would be redundant to require the seller to disclose it[21]. Thus, the least cost information gatherer/provider principle should apply. In Posner's view, the case for requiring disclosure is strongest when a product characteristic is not ascertainable by the consumer at low cost. However, government intervention to require sellers to make disclosures may not be necessary either. Competitive pressure may make sellers offer warranties of particular characteristics of a product - a guarantee of results, making the disclosure of information unnecessary[22].

Cooter and Ulen distinguish between productive information and redistributive information[23]. Productive information can be used to produce more wealth, by allocating resources more efficiently. According to them, efficiency demands giving people strong incentives to discover productive facts; in contrast, redistributive information creates a bargaining advantage that can be used to redistribute wealth in favor of the informed party. Investment in discovering redistributive information wastes resources and induces defensive

[19] For example, information about the market conditions or about the defects in property held for sale. Kronman, *supra* note 12, at 17.
[20] Posner, s*upra* note 5, 128-130.
[21] This would be the case when for example determining a product's characteristic requires actual use rather than just presale inspection or handling.
[22] Posner, s*upra* note 5, at 113.
[23] R. Cooter, T. Ulen, *Law and Economics*, 6th ed. (Boston, Mass.: Person Education, 2012).

expenditures among people trying not to lose their wealth to better-informed people[24]. Legislators should create incentives to discover productive information, and should discourage investment in discovering redistributive information. They argue that contracts based on one party's knowledge of productive information should be enforced, whereas contracts based on one party's knowledge of purely redistributive information should not be enforced[25].

Trebilcock states that sellers would generally have to disclose information they possess about material facts to buyers, whether the information is casually or deliberately acquired, unless disclosure is likely to discourage its acquisition[26]. Material facts might be understood to refer to those facts the ignorance of which is likely to substantially impair the expected value of the transaction to the buyer[27]. In contrast, he argues, buyers would generally be under no duty of disclosure, however they acquired superior information, and because we want them not just to acquire the information but to utilize it in transactions, if resources are to be moved from less to more productive users[28].

Wonnell offers the basic structure for a general theory of non-disclosure, and argues that the law in the non-disclosure area makes many economically justifiable distinctions[29]. He discusses the trade-off between exchange-based and promise-based policies in contract law, and offers four additional factors for the calculus affecting buyer's non-disclosure and the non-disclosure of extrinsic facts[30].

Others, while discussing mutual mistake, argue that the existing rights[31] assignment under mutual mistake does not result in either over- or under-production of information[32]. Smith and Smith argue that the possibility that a contract may be avoided (when parties share a mistaken assumption) works like a warranty does in reducing information asymmetries[33]. Both institutions (warranty and mutual mistake) provide incentives to represent accurately

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[24] Defensive expenditures thus prevent redistribution, rather than produce something. It thus wastes resources directly and indirectly. Cooter, Ulen, s*upra* note 22, at 273.

[25] Cooter, Ulen, s*upra* note 22, at 273.

[26] J.M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass: Harvard University Press, 1993).

[27] Trebilcock, s*upra* note 25, at 114.

[28] This bias favoring buyers over sellers in the material non-disclosure rules can be, according to Trebilcock, supported also on other grounds; see *supra* note 25, at 114.

[29] T.C. Wonnell, *The Structure of a General Theory of Non-disclosure*, in 41 Case W. Res. L. Rev. 329 (1991).

[30] Those factors which should be taken into account are the efficiency gains from merging information and resources, internalizing the external benefits of entrepreneurial activities, providing advanced pricing signals of impending changes in supply or demand, and avoiding the opportunistic or extortionate use of disclosed information; Wonnnel, *supra* note 28.

[31] The legal remedy for mutual mistake is a voidable contract.

[32] J.K. Smith, R.L. Smith, *Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information*, in 19 J. Legal Stud. 467 – 488 (1990). See also E. Rasmusen, I. Ayres, *Mutual and Unilateral Mistake in Contract Law*, in 22 J. Legal Stud. 309-345 (1993).

[33] If a product under warranty proves defective, the seller must replace the product or compensate the buyer; *supra* note 19, at 488.

the product and to provide information when information may not be symmetrically distributed. The doctrine of mutual mistake is thus an important facilitator of bargains when self-protective measures and certification are not likely to be supplied[34]. Further, Birmingham emphasizes the inefficiency of over-investment in the search for information[35].

Grossman[36] and Milgrom[37] focus on how much information (which is already at their disposal) would be voluntarily disclosed by sellers. Employing game theory, they find that complete voluntary disclosure of information results because a buyer's negative inference from a seller's silence would lead to an unraveling of any situation in which the seller is silent. Matthews and Postlewaite examine a model with free acquisition of information and disclosure and found that sellers would acquire information and voluntarily disclose it (if they cannot prove that they are ignorant)[38]. However, this complete unraveling does not occur – and some sellers keep silent in equilibrium – under a variety of alternative assumptions. Jovanovic concludes that whether information is of purely private value or not, more than the socially optimal amount of disclosure takes place[39]. He continues that the optimal policy is for the government to subsidize sales without disclosure[40]. Farrell argues that information is costly for sellers to acquire,[41] while Fishman and Hagerty argue that under certain circumstances, rules that limit the discretion in information disclosure increase informational quality and thus improve economic decisions[42]. Okuno-Fujiwara, Postlewaite, and Suzumara provide a fairly general analysis of conditions under which voluntary disclosure leads to complete disclosure of information[43]. They show that incomplete information about whether some information is known or not known by other agents is typically not certifiable, and this may well lead to less than full revealing of private information. Also, if the information structure becomes complex, agents may prefer to reveal nothing to revealing all they know, if those are the alternatives[44]. However, these contributions just discuss how much already

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[34] Smith, Smith, s*upra* note 31, at 488.
[35] L.R. Birmingham, *The Duty to Disclose and the Prisoner's Dilemma: Laidlaw v. Organ*, in 29 WM. & Mary L. Rev. 249 (1988).
[36] J.S. Grossman, *The Informational Role of Warranties and Private Disclosure about Product Quality*, in 24 J. L. and Econ. 461-489 (1981).
[37] R.P. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, in 12 Bell J. Econ. 380-391 (1981).
[38] S. Matthews, A. Postlewaite, *Quality Testing and Disclosure*, in 16 RAND J. Econ. 328-340 (1985).
[39] B. Jovanovic, *Truthful Disclosure of Information*, in 13 Bell J. Econ. 36-44 (1982).
[40] *Ibid.*
[41] J. Farrell, *Voluntary Disclosure: Robustness of the Unraveling Result, and Comments on Its Importance*, in R. Grieson (ed.), *Antitrust and Regulation* (Lanham, MD: Lexington books, 1986).
[42] J.M. Fishman, M.K. Hagerty, *The Optimal Amount of Discretion to Allow in Disclosure*, in 105 Q. J. Econ. 427-444 (1990).
[43] M. Okuno-Fujiwara *et al.*, *Strategic Information Revelation*, 57 Rev. Econ. Stud. 25-47 (1990).
[44] *Ibid.*, at 40.

available information would be eventually disclosed, but are not concerned with the actual acquisition (production) of information.

Still, Shavell[45] builds on the work of Farrell and Sobel,[46] who first investigated costly acquisition of information prior to disclosure. He furthers their model and Kronman's analysis by allowing information to have social value and for buyers to be the parties who acquire information. Shavell's main conclusions[47] are: first, if information is socially valuable[48] because it can be used to raise value, then its disclosure by a seller to a buyer is clearly desirable; second, if information is not socially valuable, then the effort to acquire it represents pure social waste. In this case a disclosure obligation is socially desirable because it would reduce the incentive to acquire such information. Third, if information is socially valuable, then the effort to acquire it is socially desirable if its costs are lower than its expected value. In such a case, for buyers to have an incentive to acquire information, they must have the right not to disclose it. Yet, if they have this right, their incentive to acquire information would be excessive. Thus, as Shavell proposes, it may, or may not be socially desirable for buyers to be free from a disclosure obligation, depending on the particulars of the transaction[49].

Also, Kötz argues that such consideration seems to be not only perfectly legitimate, but also helpful and productive[50]. Gordley, too, supports the imposition of a duty to disclosure and agrees that there should be an exception if one of the parties has expended money or effort to acquire the information[51].

Finally, Grosskopf and Medina reassessed the conventional economic analysis of disclosure, offering additional competition-based argumentation to the aforementioned literature[52]. They argue that parties invest resources in acquiring information not only to strengthen their bargaining position *vis-à-vis* their counterpart (for example the seller) but also to achieve an

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[45] S. Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. Econ. 20-36 (1994).

[46] Farrell, Joseph and Joel Sobel, 'Voluntary Disclosure of Information,' unpublished paper, 1983.

[47] Shavell (*supra* note 44, at 20) examines the model of the acquisition of information and its disclosure, emphasizing two distinctions: whether it is sellers or buyers who decide to acquire information; and whether information is mere foreknowledge or instead is socially beneficial because it can lead to an increase in value.

[48] Shavell (*supra* note 44, at 21) defines socially valuable information as one which allows an action to be taken that raises the value of the good to the party who possesses it.

[49] *Supra* note 38, at 21.

[50] H. Kötz, *Precontractual Duties of Disclosure: A Comparative and Economic Perspective*, in 9 Eur. J. L. and Econ. 5-19 (2000).

[51] J. Gordley, *Mistake in Contract Formation*, in 52 Am. J. Comp. L. 433-68 (2004).

[52] O. Grosskopf, B. Medina, *Why do we know what we know? Reevaluating the Economic Case against Pre-contractual Disclosure Duties and for Break-up Fees*, Bepress, 2006, available at: http://works.bepress.com/barak_medina/2 . Although one should note, in line with Kronman's and Shavell's foundations. See also R.E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, The Duty to Disclose, and Fraud*, in 15 Harv. J.L. & Pub. Pol'y 783 (1992); and A. Kull, *Unilateral Mistake: The Baseball Card Case*, in 70 Wash. U L.Q. 57 (1992).

advantage *vis-à-vis* their competitors (for example other potential purchasers of the same asset), endeavoring to increase the investing party's likelihood of forming a contract.

III. THE DUTY TO DISCLOSE IN ROMAN LAW

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[53]. The binding force of Roman contracts can hardly be overstated, and the formation of contracts rested on consent[54]. However, consent being necessary the circumstances of fraud (*dolus*), violence or threats (*metus*) and mistake might make consent unreal[55].

In cases of *dolus* a consent obtained by such fraud was none the less consent and the transaction was prima facie valid[56]. 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[57]. 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[58]. 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[59].

In instances of mistakes Roman law regarded such contracts void. In *bona fidei* exchanges (sales) the rule was that fundamental mistake avoided contract[60]. On the other hand, error in *substantia* must have been such that contract would certainly not have been made in knowledge of the facts[61].

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 other

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53 W.W. Buckland, *A Manual of Roman Private Law* (Cambridge: Cambridge University Press, 1953), at 278.
54 In most cases also on some other formal requirement; *ibid.* at 251.
55 *Ibid.* at 252.
56 *Ibid.*
57 G. 4.117.
58 Buckland, *supra* note 52, at 252.
59 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 252.
60 Yet, Roman law does not offer any definition on what is fundamental; *ibid.* at 253.
61 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 254.

nonconformity in sales contracts[62]. 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[63]. 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 damages[64]. Those damages had 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[65].

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[66]. With such action the buyer returned the good and asked for the restitution of the price paid[67]. In addition, Donadio suggests 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*[68].

III.1 FAMINE AT RHODES CASE

Cicero's *De Officiis* (On Duties) contains a discussion 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[69]. 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[70].

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[71]. 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

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62 Abatino, Dari-Mattiacci, *supra* note 2, at 401. See also V. Arangio-Ruiz, *La compravendita in diritto romano* (Napoli: Jovene, 1956), 237-239; and M. Talamanca, *Istituzioni di diritto romano* (Milano: Giuffre, 1990), 657-8.

63 See e.g. L. de Ligt, *Fairs and Markets in the Roman Empire: Economic and Social Aspects of Periodic Trade in Pre-Industrial Society* (Amsterdam: Gieben, 1993); and Buckland, *supra* note 52.

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

65 Abatino, Dari-Mattiacci, *supra* note 2, at 408. See also Talamanca, *supra* note 61 at 591.

66 See e.g. A. Watson, *Seller's liability for defects: aedicilian edict and praetorian law*, in 37 Iura 167-175 (1987); and N. Donadio, *La tutela del compratore tra actiones aediliciae e action empty* (Milano: Giuffre, 2004), 37-38.

67 D. 21.1.23.7; D. 21.1.60.

68 Donadio, supra note 65, at p. 34. See also N. Donadio, *Promissio Auctionatoris*, in 39 Index 524-57 (2011).

69 R. Richards, *Cicero and the Ethics of Honest Business Dealings*, Online Journal of Ethics, 1995-1997.

70 *Ibid.*

71 *Ibid.*

expense of others affords us no real advantage[72]. 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[73].

In the case, there is food-shortage and famine at Rhodes, resulting in an extremely high price of corn there[74]. 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[75]. 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[76]. Cicero asks if it is honest of the merchant to benefit from withholding this knowledge from his customers[77].

III.2 CICERO'S ETHICAL REASONING

In setting up the argument and the counterargument, 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[78]. 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[79]. In this case, the invisible hand enforces a fair price in the market[80]. Antipater states that it is one's duty to take the interests of others into account as well as to serve society[81]. 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

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[72] Cicero, Marcus Tullius, *De Officiis. With an English Translation* (W. Miller, transl.) (Cambridge, Mass: Harvard University Press, 1913).
[73] Richards, *supra* note 68.
[74] Cicero, *supra* note 71.
[75] *Ibid.*
[76] Richards, *supra* note 68, at 358-366; B. Koehler, *Thomas Aquinas on the conduct of sales*, in 40 Economic Affairs 358-366 (2020); and Aquinas, *Summa theologiae*, The Logic Museum (https://www.logicmuseum.com/wiki/Authors/Thomas_Aquinas/Summa_Theologiae), II-IIae q. 77 a. 3 s. c.
[77] Cicero, *supra* note 71. See also D. Kimel, *Remedial rights and substantive rights in contract law*, in 8 Legal Theory 313-338 (2002) for a present-day discussion on legal rights and moral rights, and P. Jaffey, *Duties and liabilities in private law*, in 12 Legal Theory 137-156 (2006) for a discussion on private law claims arising from not only breaches of duty or wrongs, but also from acts that the actor is justified in doing.
[78] Cicero, *supra* note 71; Richards, *supra* note 68; and Koehler, *supra* note 75.
[79] Richards, *supra* note 68.
[80] A. Smith, Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations (London: W. Strahan and T. Cadell, 1776). See also de Geest, Kovac, *supra* note 3.
[81] Cicero, *supra* note 71.

committing misrepresentation, he is not obliged to reveal the information[82]. 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[83].

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[84]. He continues that nothing should be sold in this case, but everything should be given away for free instead[85]. Both arguments are acknowledging that the action of keeping the information to himself is to the merchant's advantage[86]. 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[87]. 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[88]. 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[89].

However, the grain itself was not defective in any way[90]. As Aquinas pointed out later, a defect reduces the present value of a good, however, in this case the grain is expected to reduce in value at a future time when the other ships – that the Rhodians are unaware of – arrive on the island[91]. Hence, the disclosure relates to a price risk, which occurs due to a change in market conditions[92]. 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[93]. 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[94]. 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"[95], Cicero

82 Cicero, *supra* note 71; Richards, *supra* note 68; and Koehler, *supra* note 75.
83 Cicero, *supra* note 71.
84 *Ibid.* See also Koehler, *supra* note 75, at 361.
85 Cicero, *supra* note 71.
86 Richards, *supra* note 68.
87 *Ibid.* See also Koehler, *supra* note 75; and Cicero, *supra* note 71, at III, 72.
88 Cicero, *supra* note 71; and Richards, *supra* note 68.
89 Cicero, *supra* note 71.
90 Richards, *supra* note 68.
91 Koehler, *supra* note 75, at 359.
92 *Ibid.*, at 358-366.
93 Cicero, *supra* note 71; and Richards, *supra* note 68.
94 Richards, *supra* note 68.
95 Cicero, *supra* note 71.

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[96].

IV. Comparative contract law and economics on duty to disclose information and famine at Rhodes

This section discusses the general principles of comparative contract law and economics relating specifically to asymmetric information problems and applies these to the famine at Rhodes case. It compares and contrasts them to Cicero's ethical reasoning and derives a number of suggestions for the economic assessment of Roman law on the duty to disclose information.

IV.1 Asymmetric Information Problems

Akerlof's pioneering work on the asymmetric information problem brought informational issues to the forefront of economic analysis[97]. Information asymmetries are one of the main sources of market failures and inefficiency (i.e. adverse selection, moral hazard and misallocation of resources). In other words, the daily state of affairs in contracting is not a nirvana ideal of perfect markets but the one of asymmetric information and resulting market failures where contractual parties may lack essential information about the bargain. An asymmetric information problem occurs when one party has information that the other party does not, and uses this to her advantage[98]. The situation of the merchant and the Rhodians entails a classic asymmetric information problem as the merchant knows other ships with grain are on their way to the island but the Rhodians do not, and the merchant is withholding this information in order to get a higher price for his grain.

The available information to each of the parties affects the contract terms they agree to when there is no mandatory disclosure[99]. Asymmetric information causes market failures, such as adverse selection and the market for lemons[100]. In order to avoid these market failures,

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96 Richards, *supra* note 68.
97 G.A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488-500 (1970).
98 *Ibid.* See also Cooter, Ulen, *supra* note 22.
99 I. Ayres, R. Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, in 99 Yale L. J. 87-130 (1989); L. Bebchuck, S. Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley V. Baxendale*, in 7 J. L. Econ. & Org. 284-312 (1991); K.E. Spier, *Incomplete Contracts and Signalling*, in 23 RAND Journal of Economics 432-443 (1992).
100 Akerlof, *supra* note 96.

contract law can impose sanctions on opportunism to induce information disclosure and to deter and reduce the asymmetric information problems and resulting market failures at the contract formation stage as well as the contract enforcement stage[101]. To some extent, all contract systems impose a duty to disclose relevant private information at the time of contract formation[102]. This duty is especially imposed on professional sellers relating to defects in their goods[103]. If the seller violates this obligation, he will be liable to pay damages. Disclosure duties are used as mandatory regulation of content and performance of consumer contracts. They entail regulatory intervention ex ante. However, contracts are incomplete as parties are boundedly rational. People are just not able to foresee everything or draft extremely complex contracts. Hence, perfectly complete contracts do not exist due to asymmetric information, transaction costs and ex post verifiability and enforceability issues[104]. This presents then also an argument for an ex post intervention in instances of market failures that is activated by litigation as courts reinterpret or even override imperfect contractual terms[105].

IV.2 BEHAVIORAL ECONOMICS INSIGHTS ON EFFICIENCY

Before addressing the optimal doctrine to disclose information and applying it to the famine at Rhodes case F (*infra* IV.4.), one should also note several behavioral insights relevant for comparative contract law and economics analysis.

Namely, efficiency arguments such as rational choice theory sometimes result in the reasoning that consumer contract law should either be deregulated, as any legal intervention with voluntary contracts would not only make sellers but also consumers worse off, or it should focus solely on solving market failures, such as putting a duty to disclose information in place in order to reduce information asymmetries (*supra* IV.1.)[106].

However, according to insights from behavioral economics, rational choice theory does not explain satisfactory well how markets work and how consumers behave in reality[107]. As consumers have biases relating to their willingness-to-pay as well as predictable

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101 Schäefer, Ott, *supra* note 11.
102 Kronman, *supra* note 12.
103 H. Beale *et al.*, *Cases, Materials and Text on Contract Law*, 2nd ed. (Oxford: Hart Publishing, 2019); W. Liao, *The Application of the Theory of Efficient Breach in Contract Law – A Comparative Law and Economics Perspective* (Cambridge: Intersentia, 2017).
104 S.J. Grossman, O.D. Hart, *The costs and benefits of ownership: A theory of vertical and lateral integration*, in 94 J. Pol. Econ. 691-719 (1986); O.D. Hart, J. Moore, *Foundations of Incomplete Contracts*, in Rev. Econ. Stud. 115-138 (1999); L. Kaplow, S. Shavell, *Fairness versus Welfare*, in 114 Harv. L. Rev. 961-1388 (2001), p. 968; S. Bag, *Economic Analysis of Contract Law – Incomplete Contracts and Asymmetric Information* (Basingstoke: Palgrave Macmillan, 2018).
105 Liao, *supra* note 102.
106 A.M. White, *Behavior and Contract*, in 27 Minn. J. L. & Inequality 135-179 (2009).
107 *Ibid.*

misperceptions, and sellers know this and exploit this, consumers do not have fixed prior preferences that they will (be able to) maximize at the lowest cost[108]. Instead, their choices are influenced by sellers and formed by consumer strategies. In reality, situational aspects determine consumer preferences and choice just as much, and probably even more, than their potentially predetermined preferences do as consumers are vulnerable to how the choices are framed to them and to the channels that sellers use to offer them these choices.[109] In addition, consumers take mental shortcuts as they are prone to information overload due to the complexity of products and services[110]. In other words, consumers are boundedly rational[111]. Consumer contracts include many non-salient but often harmful terms exploiting consumers. Hence, deregulation does not improve consumer welfare but actually increases consumer harm, exploitation, opportunism, moral hazard and rent-seeking behavior[112]. This behavioral approach also shows that market failures such as asymmetric information problems are the result of predictable market behavior[113]. Consumers' misperceptions and misunderstanding of contract information are not just the result of a lack of disclosure and literacy, they are also affected by systematic biases and seller strategies exploiting the information asymmetries[114]. Thus, optimal legal intervention should not be reduced to non-intervention in consumer contract law nor should it solely be used to fix market failures, because rational choice theory does not hold in the real world[115]. It is therefore important to introduce regulation relating to consumer contracts that aims to promote equity, productive behavior, cooperation and prevent all types of abusive, exploitative behavior[116]. This can for instance be done by introducing the optimal doctrine relating to the duty to disclose information, but should also focus on the ex ante exclusion of terms that no reasonable consumer would prefer[117].

IV.3 Optimal Doctrine on Duty to Disclose Information

Contract law and economics offers several instrumental principles that can serve as insightful

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[108] *Ibid.*
[109] G. Lakoff, *The All New Don't Think of an Elephant* (Chelsea: Green Publishing, 2014); White, *supra* note 105.
[110] H.A. Simon, *Theories and Decision-making in Economics and Behavioral Science*, in 49 Am. Econ. Rev. 253-283 (1959); A. Tversky, D. Kahneman, *Prospect Theory: An Analysis of Decision under Risk*, in 47 Econometrica 263-291 (1979); A.M. White, *supra* note 105.
[111] Grossman, Hart, supra note 103; Hart, Moore, *supra* note 105.
[112] White, *supra* note 105.
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*
[117] de Geest, Kovač, *supra* note 3; White, supra note 105.

guidelines to law makers while drafting an optimal doctrine relating to the duty to disclose information. This section identifies several principles on the disclosure duty and applies them the merchant's situation in the famine at Rhodes case.

These principles can be, according to de Geest and Kovač[118], compressed into a single general doctrine on duty to disclose information cumulatively fulfills the following conditions:

A is the cheaper cost producer of this information;

The information is valuable to B (i.e., the value is higher than the information and communication costs);

It is unlikely that B possesses the information already;

The information is not entrepreneurial (entrepreneurial information is costly to produce and hard to be compensated for once it is revealed);

The information does not consist of mere opinions and other non-falsifiable statements.

Figure 1: The Optimal Doctrine on Duty to Disclose Information.

This doctrine can successfully deal with all asymmetric information problems, alongside a risk allocation doctrine for symmetrical information problems[119]. Therefore, there is no need for separate doctrines on mistake, fraud or misrepresentation, or even latent defects, as a duty to disclose information encompasses and solves all of these issues[120]. In the following sections, all five conditions will be applied to the famine at Rhodes case.

IV.4 LEAST COST INFORMATION GATHERER

The least cost information gatherer should be the one to produce and communicate the information as it is the party that can obtain the information at the lowest cost[121]. Hence, if the marginal cost of the information is much less for one contractual party than for the other, the information should be disclosed[122]. Obliging the cheaper cost producer to inform the other party is the cheapest way to make sure both parties have the information as it substantially reduces information costs[123]. Arguments that the mistaken party is the least-cost avoider, and should bear the responsibility for the mistake, do not hold in consumer

[118] de Geest, Kovač, *supra* note 3.
[119] *Ibid.*
[120] *Ibid.*
[121] de Geest, Kovač, *supra* note 3; Kronman, supra note 12.
[122] A.M. Johnson Jr., *An Economic Analysis of Duty to Disclose Information; Lessons Learned from the Caveat Emptor Doctrine*, 45 San Diego L. Rev. 79-132 (2008); K.L. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (Chicago, IL: University of Chicago Press, 1988).
[123] de Geest, Kovač, *supra* note 3.

contracts[124]. After all, a contractual interaction between a seller and a buyer is not symmetrical as the seller has superior information and the buyer is imperfectly informed as well as imperfectly rational[125]. In addition, in most consumer contracts the seller knows the consumer's mistake, and is potentially even exploiting it[126]. Thus, when the non-mistaken party knows about the other party's mistake, it is the non-mistaken party that is the least-cost avoider[127]. These situations closely resemble situations where false or misleading information is given[128]. Therefore, they should be regulated when the total benefits of the regulation outweigh its total costs. Mandatory regulation should be tried before other, more interventionist forms of regulation[129].

When one employs the least cost information gatherer principle to the famine at Rhodes case, the available facts of the case show that indeed the merchant is the cheaper cost producer. After all, the merchant is making his way to Rhodes in any case and en route spotted other merchant ships that have been sailing in the same direction. Obviously, it would be much more expensive for the local Rhodians to sail away from their island and try to find out if other merchants are also on their way to supply them with grain. Analytically speaking the Rhodians are clearly not the least cost information gatherer/providers as they are stuck on the island suffering from famine. They have no easy access to a ship and would have to go out of their way at extensive costs to set sail looking for potential merchant ships with grain or even would have to sail to the mainland which might prove to be prohibitively expensive (i.e. their ships have been badly damaged by natural disaster).

IV.5 Information's Value is higher than Information and Communication Costs

The least cost information gatherer should only produce and communicate the information if the sum of the information production and communication costs is lower than the value of the information to the other party[130]. Taking into account both the information production costs and the communication costs seems fairer than the ethical principle of providing the information to the buyer for free[131]. After all, this would be unfair to the seller, as certain

124 O. Bar-Gill, *The Behavioral Economics of Consumer Contracts*, in 92 Minn. L. Rev. 749-802 (2008).
125 *Ibid.*
126 Bar-Gill, *supra* note 123; White, *supra* note 105.
127 *Ibid.*
128 Bar-Gill, *supra* note 123; R.A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, in 73 U. Chi. L. Rev. 111-132 (2006); Kronman, *supra* note 12.
129 Bar-Gill, Oren, *supra* note 123; Epstein, *supra* note 127.
130 de Geest, Kovač, *supra* note 3; Jovanovic, *supra* note 38.
131 Cicero, *supra* note 71.

costs to acquire the information might be involved[132]. Furthermore, it is important to take into account that imposing an obligation to disclose private information at time of contract formation is beneficial as the information may be desirable to the buyer but it also discourages parties from investing in the unnecessary (avoidable) acquisition of information[133].

In this case, the Rhodians must value the information more than it costs the merchant to collect and share the information. Obviously, this condition is fulfilled as the Rhodians highly value the information on an increase in corn supply during this food-shortage. Furthermore, it is not costly for the merchant to collect the information as he casually acquired them on route towards the island when he observed the other ships during his journey to the island[134]. Moreover, communicating to Rhodians that other ships with grain are on their way would not be costly either (or can be done at trivial costs).

IV.6 UNLIKELY THAT OTHER PARTY POSSESSES THE INFORMATION ALREADY

As transferring information might be costly, the information should not be communicated if the other party already has it or if he should have it[135]. This contrasts Antipater's and Cicero's reasoning that the seller should inform the buyer of any detail[136].

However, the Rhodians do not know that more supplies will arrive shortly, and should, economically speaking, not have known this, as it would involve a tremendous effort (transaction costs) for them in those days to figure this out by themselves. This would mean they have to leave their island and set sail for Alexandria. Only then they would be able to spot the incoming ships. A lack of information can lead to misallocations (misallocation of scarce resources) as it may result in either mutually beneficial exchanges not taking place or exchanges that are not mutually beneficial taking place. The available facts of the case suggests that the ignorance costs of the Rhodians are high.

IV.7 NON-ENTREPRENEURIAL INFORMATION

Parties should not be obliged to reveal entrepreneurial information[137]. This is information that is costly to produce and difficult to be compensated for once it is revealed[138]. After all, it

132 Richards, *supra* note 72.
133 Kronman, *supra* note 12.
134 *Ibid.*
135 de Geest, Kovač, *supra* note 3.
136 Cicero, *supra* note 71.
137 de Geest, Kovač, *supra* note 3.
138 The notion of entrepreneurial information is in line with Schumpeter and other members of Austrian School of Economics, who emphasize the importance of individuals who add productive information to the market

is not possible to protect this type of information through intellectual property rights[139]. In addition, entrepreneurial information is also valuable to other players in the market[140], meaning that free rider problems would discourage the production of such valuable/productive information if it cannot be kept secret[141].

According to Kronman, non-entrepreneurial information is information that was casually acquired[142]. In contrast, entrepreneurial information, which is acquired through a deliberate and costly search, should give the information gatherer the right not to share the information with others in order to encourage the search for socially useful information[143]. Without the right to keep such productive information secret free rider problems would discourage the production of the information[144]. By applying this criterion, efficient behavior is induced[145].

As the merchant casually, as a by-product, acquires the knowledge that other merchants are on their way to Rhodes by simply sailing past them, it cannot be considered as entrepreneurial and costly to produce. He simply came across this information. If the Rhodians had been where he was, they would also have acquired this information. Moreover, the Rhodians also do not lack the capacity to understand the consequences of the information as they realize what it means for the famine and grain prices that more ships are making their way to Rhodes[146]. Hence, the information in question is not an entrepreneurial one and the merchant does not have any deeper expert understanding relating to this information.

IV.8 NOT MERE OPINIONS OR NON-FALSIFIABLE STATEMENTS

The last condition entails that parties should not have a duty to share mere opinions or non-falsifiable statements[147]. They should be allowed to lie and conceal opinions and non-falsifiable statements as these types of information are inherently subjective or contain no

(dynamic efficiency). See e.g. J.A. Schumpeter, *Capitalism, Socialism and Democracy*, 2nd ed. [1942] (Floyd, VA: Impact Books, 2014).

139 Cooter, Ulen, *supra* note 22; de Geest, Kovač, *supra* note 3; Kötz, *supra* note 49; Kronman, *supra* note 12.

140 F.A. Hayek, *The Use of Knowledge in Society*, in 35 Am. Econ. Rev. 519-530 (1945).

141 Cooter, Ulen, *supra* note 22; de Geest, Kovač, *supra* note 3; Kötz, *supra* note 49; Kronman, *supra* note 12.

142 Johnson, *supra* note 121; Kronman, *supra* note 12.

143 Kronman, *supra* note 12.

144 de Geest, Kovač, *supra* note 3. See also Kronman, *supra* note 12; V.P. Goldberg *Note on the Price Information and Enforcement of the Expectation Interest*, in V.P. Goldberg (ed.), *Readings in Economics of Contract Law* (Cambridge, Cambridge University Press, 1989), 80-83; J. Gordley, *supra* note 50.

145 Cooter, Ulen, *supra* note 22; Johnson, *supra* note 121.

146 Richards, *supra* note 72.

147 de Geest, Kovač, *supra* note 3; G. de Geest *et al.*, *The Right to Lie: New Law and Economics versus Dutch Labor Law*, in G. de Geest *et al.* (eds.), *Law and Economics and the Labor Market* (Cheltenham: Elgar Publishing, 1999), 34-55.

generally accepted definitions[148].

Yet, the fact that extra grain supply will arrive at Rhodes shortly is a material fact. This information is not an opinion nor a non-falsifiable statement. Therefore, the merchant should according to the economic insights disclose this information to the Rhodians.

To sum up, performed analysis shows that all five economically inspired conditions are fulfilled cumulatively, suggesting that the merchant should disclose to the Rhodians the information that the other ships with grain are on their way as sharing this information is a more efficient way to deal with the asymmetric information problem reported in this ancient Roman case.

V. GENERAL LAW AND ECONOMICS REFLECTIONS ON CICERO'S REASONING

Comparative contract law and economics scholarship may also offer some general reflections on Cicero's reasoning. First, the difference between lying and concealing information does not matter, as telling nothing is always telling something[149]. Namely, when people do not get any information on the quality of a good, they will sometimes presume as it is of an average quality and in other markets they will presume the lowest quality[150]. Whichever presumption is made, the distention between explicitly lying and just concealing information is less relevant than lawyers tend to believe since both activities are intrinsically costly and wasteful[151]. After all, one party invests in misleading through words in case of lying, or that party invests in non-detection in case of concealing[152]. In addition, the other party invests in detection in both cases[153]. 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[154]. 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[155].

A second reflection relates to a duty to reveal everything. Contract law and economics follows the 'less is more' principle.[156] The unimportant information should not be shared, but should

148 *Ibid.*
149 de Geest, Kovač, *supra* note 3.
150 Akerlof, *supra* note 96; de Geest, Kovač, *supra* note 3.
151 de Geest, Kovač, *supra* note 3.
152 *Ibid.*
153 S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2004), p. 295.
154 de Geest, Kovač, *supra* note 3.
155 Fishman, *supra* note 41; Grossman, supra note 35; Shavell, *supra* note 44; Spier, *supra* note 98.
156 de Geest, Kovač, *supra* note 3.

instead be filtered away, as behavioral law and economics has shown that people will otherwise suffer from information overload[157]. 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[158]. Moreover, the condition that the party would not have entered into the contract without the information is not necessary[159]. The underlying economic reasoning is the following: in a perfectly competitive market, any small difference will lead to another decision[160]. 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[161]. 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[162]. 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[163]. Otherwise, contracts would never be binding[164].

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 aedicilian remedies; and b) sellers were not liable for innocent misrepresentation[165]. This prateors remedies were analytically speaking designed to induce information exchange (which boost allocative efficiency) along the scope and subjective knowledge[166]. 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[167]. 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.

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157 Simon, *supra* note 109; Tversky, Kahneman, *supra* note 109.
158 Tversky, Kahneman, *supra* note 109.
159 de Geest, Kovač, *supra* note 3.
160 *Ibid.*
161 *Ibid.*
162 *Ibid.*
163 de Geest, Kovač, *supra* note 3. See also B. Fischhoff, *Hindsight is not Equal to Foresight: The Effect of Outcome Knowledge on Judgement Uncertainty*, in 1 J. Exp. Psychol. 288-299 (1975); P. Slovic, B. Fischhoff, *On the Psychology of Experimental Surprises*, in 3 J. Exp. Psychol. 544-551 (1977).
164 de Geest, Kovač, *supra* note 3.
165 Abatino, Dari-Mattiacci, *supra* note 2, at 404.
166 Such information exchange induced a more efficient matching between goods and buyers: *ibid.*, at 416.
167 *Ibid.*

Third, one can also introduce a distinction between exogenous and endogenous asymmetric information. In the famine at Rhodes case, one can identify the information asymmetry as exogenous in nature, namely the other ships may or may not go to Rhodes, an event independent from both the merchant and the Rhodians[168]. Exogenous asymmetric information entails that even the information status of the possibly informed party, i.e. the merchant, is subject to information asymmetry[169]. In contrast, endogenous asymmetric information takes place when the party that invests in the information acquisition is always commonly known to be fully informed, even if the level of investments incurred remains hidden to the other party[170].

Namely, Schweizer shows that as investments in information are not contractible because they have to take place prior to contract negotiations, disclosure duties should be put in place instead[171]. These residual rights can affect the incentives to invest in and share information if they are anticipated[172]. Hence, mandatory disclosure is more efficient in terms of welfare as the outcome is efficient ex post compared to voluntary disclosure[173]. Moreover, mandatory rules are still necessary for the ones that does not follow them[174].

VI. CICERO AND THE DEBATE ON ECONOMICS VERSUS ETHICS

This brings us to the broader debate of "economics versus ethics". Scholarship has questioned both wealth maximization as a normative value as well as the importance of economic efficiency in maximizing wealth and human welfare[175]. In addition, critics of law and economics state that the pursuit of efficiency should not be the law's sole concern[176].

Legal scholars are often skeptical towards efficiency as a legal objective and argue that wealth maximization does not have a normative value independent of justice[177]. More precisely, it is

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168 U. Schweizer, *Incentives to Acquire Information under Mandatory versus Voluntary Disclosure*, in 33 J. L. Econ. & Org. 173-192 (2021); Shavell, supra note 44; Farrell, *supra* note 40.
169 Schweizer, *supra* note 167.
170 *Ibid.*
171 *Ibid.*
172 *Ibid.*
173 *Ibid.* See also J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, in 2 Legal Theory 325-357 (1996).
174 de Geest, Kovač, *supra* note 3.
175 D.M. Driesen, R.P. Malloy, *Critiques of Law and Economics*, in F. Parisi (ed.), *Oxford Handbook of Law and Economics*, vol. I (Oxford: Oxford University Press, 2017), 300-317; A. Bernstein, *Whatever Happened to Law and Economics?*, in 64 MD. L. Rev. 303-336 (2005).
176 Driesen, Malloy, *supra* note 174.
177 Driesen, Malloy, *supra* note 174; R. Dworkin, *Is Wealth a Value?*, in 9 J. Legal Stud. 191-226 (1980); J. Coleman, *Efficiency, Utility and Wealth Maximization*, in 8 Hofstra L. Rev. 509-551 (1980); J. Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice (Book Review)*, 34 Stanford L. Rev. 1105-1132 (1982); A.T. Kronman, *Wealth Maximization as a Normative Principle*, in 9 J. Legal Stud. 227-242 (1980); E.J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, in 30 U. Toronto L. J. 307-332 (1980); N. Mercuro, T.P. Ryan, *Law, Economics and Public Policy* (Greenwich, CT: JAI Press, 1984); M.C.

stated that Pareto efficiency cannot govern legal decisions in general as they are based on disputes among people[178]. In addition, how does Pareto efficiency then relate to liberty in a situation where people act freely to their own detriment?[179] Furthermore, it is stated that you should not promote actual liberty in the real world by forcing transfers which might have freely been entered into in an ideal world[180]. Kaldor-Hicks efficiency is also not considered a proper normative value because compensation does not actually have to take place in practice, hence, theft or government takings without compensation may be rationalized[181].

In addition, as efficiency presupposes a distribution of resources, law and economics is attacked for, amongst others, neglecting distribution[182]. Hence, its critics consider law and economics utilitarianism[183].

Furthermore, it is argued that an individual's self-interested preferences may differ from what that individual actually believes that society should do, attacking the aggregation of self-interested preferences of individuals as a criterion for value choices in political decision-making[184]. Moreover, the link between allocative efficiency and wealth maximization is also criticized. Namely, some scholars argue that innovation, economic growth and systemic risk play bigger roles in wealth maximization than (in)efficiency does.[185] In addition, strong doubts are cast on the link between individual preference satisfaction and individual welfare because

Nussbaum, A. Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993); M.C. Nussbaum, *Women and Human development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); C.A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, in 35 UC Davis L. Rev. 705-778 (2002); J. Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, in 72 U. Chi. L. Rev. 1237-1298 (2005); M. Chon, *Intellectual Property and the Development Divide*, in 27 Cardozo L. Rev. 2821-2912 (2006); G. Alexander *et al.*, *A Statement of Progressive Property*, in 94 Cornell L. Rev. 743-745 (2009); A. Sen, *The Idea of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 2009); S.M. Roesler, *Addressing Environmental Injustices: A Capability Approach to Rulemaking*, in 114 W. Va. L. Rev. 49-107 (2011).

178 Driesen, Malloy, *supra* note 174; Dworkin, supra note 176; R. Dworkin, *Why Efficiency? A Response to Calabresi and Posner*, 8 Hofstra L. Rev. 563-589 (1980); G. Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, in 100 Yale L.J. 1211-1238 (1991); J. Coleman, *Markets, Morals, and the Law* (New York, NY: Cambridge University Press, 1988).

179 J. Waldron, *Criticizing the Economic Analysis of Law*, in 99 Yale L.J. 1441-1471 (1990).

180 *Ibid.*

181 Driesen, Malloy, *supra* note 174; Posner, supra note 5; Coleman, *supra* note 177; Kronman, *supra* note 176; Calabresi, *supra* note 177.

182 A. Sen, Development as Freedom (Oxford: Oxford University Press, 1999); Nussbaum, *supra* note 176; Waldron, *supra* note 178; Bernstein, *supra* note 174; J.M. Horwitz, *Law and Economics, Science or Politics?*, in 8 Hofstra L. Rev. 905 (1980).

183 Sen, *supra* note 181; Nussbaum, *supra* note 176; Waldron, *supra* note 178.

184 Driesen, Malloy, *supra* note 174; E. C. Baker, *The Ideology of the Economic Analysis of Law*, in 5 Philosophy & Public Affairs 1, 3–48 (1975); M. Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (Cambridge: Cambridge University Press, 1988); Sen, *supra* note 176.

185 Driesen, Malloy, *supra* note 174; D. M. Driesen, *The Economic Dynamics of Environmental Law* (Cambridge: Cambridge University Press, 2003); M. A. Carrier, *Innovation for the 21st Century* (Oxford: Oxford University Press, 2009); R. Cooter, and A. Edlin, *The Falcon's Gyre: Legal Foundations of Economic Innovation and Growth* (Berkeley: University of California Press, 2013); H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2003).

empirical studies show that increasing wealth does not increase happiness once a certain minimum income is reached[186]. Thus, economics and ethics are often portrayed as opposites, namely critics find that the concepts of "efficiency" and "justice" do not align with each other[187].

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[188]. This seems to be the case for Bentham's monistic utilitarianism, which is a kind of reductionism with normative implications[189]. It considers legal rules as irrational and bad law that need to be overcome when they do not pass the utilitarian test[190]. Namely, classic utilitarianism is based on what is good for people, but does not take into account what people would choose themselves or what they would think is good for them[191]. However, there are other forms of utilitarianism, such as Mill's liberal utilitarianism, that include other values than utility alone[192]. When a legal rule fails the utilitarian test in this case, it can still be justified as enhancing other values, such as fairness[193].

Moreover, Posner argues that in practice, a normative economics perspective is rarely rigorously utilitarian[194]. In order to measure utility, information about people's preferences and emotions is needed, which seems unobtainable[195]. Hence, modern law and economics focuses on risk attitudes and consequently severing the linkage between economics and utilitarianism all together[196].

In addition, Kaplow and Shavell aggregate the well-being of individuals, with well-being

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186 R. A. Easterlin, *Will Raising the Incomes of all Increase the Happiness of all*? in 27 Journal of Economic Behavior & Organization 1, 35-47 (1995); R. H. Frank, *Luxury Fever: Why Money Fails to Satisfy In An Era of Excess* (New York: Free Press, 1999); E. Diener, R. E. Lucas, and S. Oishi, S. (2002). Subjective Well-being: The Science of Happiness and Life Satisfaction, in C. R. Snyder, and S. J. Lopez (eds.), *Handbook of Positive Psychology* (Oxford: Oxford University Press, 2002), pp. 463-73; Baker, *supra* note 183; Sagoff, *supra* note 183; Sen, *supra* note 181; M. Adler, and E. A. Posner, *Happiness Research and Cost-Benefit Analysis*, in 37 The Journal of Legal Studies 2, 253-292 (2008); J. Bronsteen, C. Buccafusco, and J. S. Masuret, *Welfare as Happiness*, in 98 Georgetown Law Journal 1583 (2009-2010).

187 See amongst others: Driesen, Malloy, *supra* note 174; Bernstein, *supra* note 174; Waldron, *supra* note 178; R. Michaels, *The Second Wave of Comparative Law and Economics*, in 59 U. Toronto L. J. 197-213 (2009); J.M. Horwitz, *supra* note 181.

188 White, *supra* note 105.

189 G. Tuzet, *Calabresi and Mill – Bilateralism, Moral Externalities and Value Pluralism*, in Global Jurist 1-10, (2019).

190 J. Bentham, *An Introduction to the Principles of Morals and Legislation* [1789] (New York, NY: Hafner Publishing, 1823), pp. 156-158.

191 D.A. Farber, *Autonomy, Welfare, and the Pareto Principle*, in A. Hatzis, N. Mercuro (eds.), *Law and Economics: Philosophical Issues and fundamental questions* (London and New York, NY: Routledge, 2015), 159-182.

192 Tuzet, *supra* note 188.

193 J.S. Mill, *Utilitarianism*, in A.D. Lindsay (ed.), *Utilitarianism. Liberty. Representative Government* (London: Dent & Sons, 1962), 1-60.

194 R.A. Posner, *Norms and Values in the Economic Approach to Law*, in Hatzis, Mercuro, *supra* note 190, 1-15, 6-7.

195 *Ibid.*

196 *Ibid.*

different from pure utility, as individuals' utilities can be weighted to reflect value judgements. Hence, they do not limit their social welfare function to the utilitarian version, as the definition of individual welfare is not limited to utility alone[197]. They 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[198]. Introducing fairness concerns into economic welfare concepts this way, boils down to empirical questions about individual's tastes and preferences[199].

However, economic models are not neutral as everyone views the world through a mental picture frame, meaning that the way we formulate problems is influenced by our own background[200]. 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[201]. This also aligns with the concept of 'moral externalities'[202]. 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[203]. These are 'inalienability rules' which do not permit a transfer between a willing buyer and a willing seller[204]. 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[205]. 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[206]. Hence,

197 Kaplow and Shavell, *supra* note 103, at 976-999; and Posner, *supra* note 193.
198 Farber, *supra* note 190; and Kaplow and Shavell, *supra note* 103, at 976.
199 L. Kaplow, S. Shavell, *Economic Analysis of Law*, in A. Auerbach, M. Feldstein (eds.), *Handbook of Public Economics*, Vol. 3 (Amsterdam: Elsevier, 2002), 1661-1784; R.A. Posner, *A Review of Steven Shavell's "Foundations of Economic Analysis of Law"*, in 44 J. Econ. Lit. 405-414 (2006).
200 E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harmondsworth: Penguin Books, 1974); K. Raworth, *Doughnut Economics – Seven Ways to Think Like a 21st-Century Economist* (London: Random House Business Books, 2017); L.M. Friedman, *Norms and Values in the Study of Law*, in Hatzis, Mercuro, *supra* note 190, 32-42; T. Ruskola, *Legal Orientalism*, in 101 Mich. L. Rev. 179, 190 (2002); Michaels, *supra* note ; Farber, *supra* note 190; R. B. Korobkin, T.S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in 88 Cal. L. Rev. 1051-1144 (2000).
201 Raworth, *supra* note 199.
202 G. Calabresi, *The Future of Law and Economics. Essays in Reform and Recollection* (New Haven, CT: Yale University Press, 2016); G. Calabresi, D.A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, in 85 Harv. L. Rev. 1089-1128 (1972); A. Hatzis, *Moral externalities: An Economic Approach to the Legal Enforcement of Morality*, in Hatzis, Mercuro, *supra* note 190, 226-244; S. Shavell, *Law versus Morality as Regulators of Conduct*, in 4 Am. L. & Econ. Rev. 255 (2002); R.A. Posner, *Should There Be Homosexual Marriage? And if So, Who Should Decide?*, in 95 Mich. L. Rev. 1595-1587 (1997); J. Gardner, S. Shute, *The Wrongness of Rape*, in J. Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), 216; A. Sen, *The Impossibility of a Paretian Liberal*, in 78 J. Pol. Econ. 157 (1970); J.S. Mill, *On Liberty* (London: J.W. Parker and Son, 1859, 2nd ed.), I.9.
203 Calabresi, *supra* note 201; Hatzis, *supra* note 201.
204 Calabresi, Melamed, *supra* note 201.
205 Calabresi, *supra* note 201; Tuzet, *supra* note 188.
206 Calabresi, *supra* note 201.

in case of consumer contracts, 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[207].

In line with 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[208]. Ethics looks at what we should do, which principles should guide our everyday behavior[209]. In Cicero's case, what we should do when what is right and what is advantageous or profitable conflict with each other[210]. 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 look like. 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 disclosed information to 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[211].

Our argument does not follow Kaplow and Shavell's one in their focus on the Pareto principle, as it categorically gives priority to the status quo because the change would not be implemented even if only one person is worse off[212]. Therefore, it considers the interests of those who are made worse off more important than those who are made better off, regardless of whether those gains would be immensely larger than the losses[213]. Hence, the Pareto principle is a one-sided meta-norm as it only looks at one side, the disadvantages[214]. According to de Geest, Kaplow and Shavell actually look at Kaldor-Hicks efficiency in the narrow sense, not Pareto efficiency, as they assume a reciprocal setting in which individuals do not know yet whether the change will make them better or worse off, which dissolves the difference between Pareto and Kaldor-Hicks[215]. However, de Geest argues that this is incomplete as it does not take the optimal distribution of wealth and wealth preferences into account.[216] Therefore, we suggest that one might follow de Geest's reasoning related to Kaldor-Hicks efficiency in the broad sense.

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[207] Bar-gill, *supra* note 123.
[208] Posner, *supra* note 5.
[209] R.M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Oxford University Press, 1981).
[210] Richards, *supra* note 68.
[211] G. de Geest, *Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms*, in Hatzis, Mercuro, supra note 190, 183-202.
[212] Kaplow, Shavell, *supra* note 103, pp. 968-975; de Geest, *supra* note 210.
[213] de Geest, *supra* note 210.
[214] *Ibid.*
[215] Kaplow, Shavell, *supra* note 103, pp. 986-975; de Geest, *supra* note 210.
[216] de Geest, supra note 210.

Namely, according to de Geest, just like Pareto efficiency, fairness maxims also 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[217]. 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[218]. 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[219]. He states that you can ignore the other disadvantages by, for instance, always only caring about the buyer and not the seller[220]. You can also 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[221]. Additionally, you can acknowledge both sides, but instead of choosing a fixed ranking order, you can decide based on "gut-feeling"[222]. However, the relevant option here is to acknowledge both sides, and then balance all these conflicting values using a certain measure[223]. This measure can constitute of monetary losses, happiness losses, or utility losses, for example[224]. This is what Kaldor-Hicks efficiency in the broad sense[225] 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,

217 *Ibid.*
218 *Ibid.*
219 *Ibid.*
220 *Ibid.*
221 *Ibid.*
222 *Ibid.*
223 *Ibid.*
224 *Ibid.*
225 As opposed to Kaldor-Hicks efficiency in the narrow and original sense, which is only analyzed in monetary units (willingness-to-pay). However, willingness-to-pay depends on ability-to-pay, hence, taking the existing income distribution as given and ignoring the optimal redistribution issue (de Geest, *supra* note 210, at 184); and N. Kaldor, *Speculation and Economic Stability*, in 7 Review of Economic Studies 1, 1-17 (1939).

meaning that compensation does not actually have to take place[226]. Moreover, 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, 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[227].

VII. 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

[226] Coleman, *supra* note 186; de Geest, *supra* note 210; Posner, *supra* note 193; Coleman, supra note 177, at 393; Kronman, *supra* note 176; Driesen, *supra* note 184.
[227] de Geest, *supra* note 210.

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. This assessment seems a good example of what de Geest argues relating to the "ethics versus economics" or "fairness versus welfare" debate. He states that 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. This also implies the reduction of the overall transaction costs and boosts allocative efficiency. In concluding so, we looked at both sides of the problem, i.e., the interests of the Rhodians as well as the interests of the merchant, and balanced them against each other.