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Fides, bona fides, and bonus vir: Relations of trust and confidence in Roman Antiquity

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Abstract

This article investigates the link between the Roman notion of *fides* and the contemporary notion of fiduciary duties. Etymologically, the word “fiduciary” derives from *fides*. The Roman *fides* was very complex concept, blending religious, social, and legal valences. The religious and social *fides* entered Roman law in a substantive form, as *bona fides*, and as a standard of judgment, in the form of *bonus vir*. It is submitted that a close analogy can be drawn between *bonus vir* and the contemporary fiduciary standards.

Keywords

fides; *bona fides*; Roman law; fiduciary duties; fiduciary powers

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1. Introduction

Trust and confidence are essential elements in many social and legal relations. In law, the trust and confidence that one person reposes in another are often regarded as the hallmarks of a special category of legal relations, called fiduciary relations. Examples of fiduciary relations include trustee-beneficiary, agent-principal, director-corporation, doctor-patient, parent-child or state-aboriginal nations.¹ It is generally understood that the family of fiduciary relations is open, and courts apply this label in new contexts based on relevant indications, such as unilateral power, trust and confidence or vulnerability. The consequences of labelling a legal relation as fiduciary are quite severe: the person holding discretionary power and in whom trust and confidence are placed is bound by strict fiduciary duties, imposing high standards of unselfishness and fidelity. Such persons must avoid actual or potential conflicts of interest, must disgorge unauthorised benefits even if not pursued in bad faith or at the other party's expense, and must exercise their decision-making power based on relevant considerations only.²

Over the past decades, the family of fiduciary relations has expanded significantly into various areas of private and public law. The growth of the fiduciary family has often been unprincipled, based on loose analogies with established fiduciary categories. Consequently, fiduciary relations and fiduciary duties are considered among the most ill-defined and misleading legal concepts.³ At times, the search for an essential, common denominator of the fiduciary relations turns to exploring the literal meaning of the word "fiduciary."⁴ This line of inquiry points to the word *fides* and its role in Roman law. Looking to Roman law for the essence of fiduciary relations and duties is, at first sight, a promising endeavour. Many of the quintessential fiduciary institutions recognized in contemporary law, such as the trust, the mandate, the partnership, or the guardianship were recognized in Roman law as relations governed by *bona fides*. The historical investigation, thus, faces the additional task of elucidating the relations between *fides* and *bona fides* within the social and legal context in which these concepts developed. At a closer look, however, *fides* reveals itself as a concept of tremendous complexity. The present article traces the evolution of *fides* throughout the historical stages of Rome in Antiquity. It underlines how the emphasis in this multi-faceted concept shifted from its religious charge to its social nature, and finally to its legal consequences.

Semantically, one of the core meanings of *fides* was confidence, both in an active sense of reposing confidence in another and in the passive sense of creditworthiness that one enjoys in others' view.⁵ *Fides*, was thus associated with relations of inequality, where a subordinate and vulnerable party reposed confidence in a powerful and dominant party. These relations of inequality based on *fides* were regulated by multiple normative systems that co-existed in Rome. At the dawn of Roman civilization, when the mighty pontiffs administered the religious and the secular law, breach of *fides* was regarded as a violation of the divine law

¹ See Remus Valsan, "Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law", *McGill University Doctoral Dissertation* (2012) 16, available online at www.collectionscanada.gc.ca/thesescanada/index-e.html.

² *Ibid.* at 35.

³ Paul D. Finn, *Fiduciary Obligations* (1977), 1.

⁴ In *R. v. Neil*, for instance, Justice Binnie of the Supreme Court of Canada tried to identify the content of a lawyer's fiduciary duty using a terminological analysis of "fiduciary." "The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary." (*R. v. Neil* [2002] 3 S.C.R. 631 at 643). See also Peter Birks, "The Content of Fiduciary Obligation", 34 *Israel Law Review* (2000) 3, 8.

⁵ See section 3 below.

(*fas*), and exposed the offender to divine punishment. Such breach of *fides*, however, rarely gave rise to a cause of action under the secular law (*ius*), during this time. In the last decade of the 6th century BCE, when Rome passed from Monarchy to Republic, the religious and civil jurisdictions became separate, and the pontiffs lost a great part of their extensive judicial powers. During this transition, many instances of breach of *fides* that had been punished under divine law, but that were not recognized under secular law, were taken over by the emerging magistracy of censorship. Charged with the preservation of the ancestral customs and values, the censors punished offenses against *fides* with the quasi-legal penalty of ignominy (*ignominia*), which placed a stigma on the individual and deprived him of his good social status. From around the middle of the 3rd century BCE, the peregrine praetor rendered the breach of *fides* in certain core social relations actionable under the law applicable to relations between Romans and foreigners (*ius gentium*, “the law of the peoples”). Almost two centuries later, the urban praetor included the core relations founded on *fides* under the protection of the law applying between Roman citizens (*ius civile*, “the civil law”), which granted these relations full legal recognition. At the same time, *bona fides* took on a life of its own and emerged as a distinct concept.

Although *fides* was a fundamental concept of the quotidian religious and social life of Rome, its role as a legal concept was less momentous. This was not the case, however, for *bona fides*, its main offspring, which became one of the most important concepts in the legal traditions influenced by Roman law. *Fides* as confidence reposed and trustworthiness enjoyed remained confined to rules of limited applicability and particular legal institutions. Although duties of loyalty and care inspired by the pre-legal *fides* were consecrated in legal institutions such as guardianship (*tutela*), fideicommissary obligation (*fideicommissum*), fiduciary agreement (*fiducia*), partnership (*societas*), or mandate (*mandatum*), the religious, social, and moral *fides* never crossed into the legal sphere as a core concept of an abstract fiduciary office. Although not an essential part of the positive law, *fides* continued to act as a powerful catalyst and deterrent of behavior, and enjoyed implicit recognition by law as a socially binding standard. *Fides* also played a central role as a benchmark of judicial decision making in the form of the *bonus vir* standard (the judgment of an archetypal upright man). The *bonus vir* standard of decision making, it is submitted, is the concept that unites the Roman *fides* with the contemporary theory of fiduciary duties. *Bonus vir* has been invoked in the 18th and the 19th centuries as the standard that persons holding fiduciary powers should use to guide their exercise of discretion.

The remaining part of this article is structured as follows. Section 2 introduces *fides* as an omnipresent notion in Roman life. Section 3 is an in-depth etymological and semantic analysis of *fides*. Section 4 traces the meaning of this concept under the divine law and social customs, with particular focus on the relations of patronage (*clientela*) and friendship (*amicitia*). Section 5 explores the substantive and procedural roles of *fides* in the secular law. Section 6 links the *bonus vir* standard of exercise of discretion with the current theory of fiduciary duties. Section 7 concludes.

2. The Romans, people of *fides*

Romans considered themselves a people of *fides*. The Greek historian of the 1st century BCE, Diodorus Siculus, reported that the Romans had the habit of persistently talking about *fides*.⁶

⁶ “[T]he Romans, harping as they did on the word *fides*, certainly ought not to protect assassins who had shown the greatest contempt for good faith.” Diodorus Siculus, *The Library of History, Books 21-32*, trans. by Francis R. Walton (1957), 83-84.

For Cicero *fides* was the foundation of justice⁷ and the holiest thing in life,⁸ and for Valerius Maximus it represented security for all human happiness.⁹

The relations of *fides* were numerous and complex among the Romans. *Fides* represented the cornerstone of friendship (*amicitia*) and patronage (*clientela*), the high creditworthiness associated with nobility, the ultimate form of surety and godly protection. The Romans also applied *fides* to many aspects of their international relations. Good faith in war (*fides in bello*) required Roman combatants to demonstrate fair play and chivalry toward their adversaries. In case of negotiations with the enemy, good faith in negotiations (*fides in colloquio*) required the belligerents to respect scrupulously the integrity of the delegates from the other side. When a foreign community surrendered itself unconditionally, the concept of surrender to Rome's faith (*deditio in fidem*) prohibited the Romans to massacre or enslave the conquered peoples.¹⁰ At the intra-community level, the relations of confidence between citizens (*fides quiritium*) imposed a general duty of protection among them and a duty of loyalty to the interests of Romans as a whole (*res publica*). The fidelity of the troops (*fides militium*) required soldiers to protect their comrades and to obey loyally the superiors' orders. The duty to protect the citizens and the state (*fides senatus*) demanded the senators' loyalty to their public commitments and fairness in debates and decision making.¹¹ For magistrates, judges, and witnesses, *fides* imposed specific duties that ensured a fair trial and the preservation of the public confidence in the judicial system.¹²

So vital was *fides* for the Romans, that they deified it. As it was the case with other human qualities, such as courage (*virtus*), justice (*iustitia*), dutifulness (*pietas*), decency (*pudor*), and chastity (*pudicitia*), the Romans elevated the virtue of *fides* to the rank of goddess.¹³ The veneration of Fides goes back to the earliest antiquity. According to Varro, the Romans adopted her from the Sabins, an ancient nation from central Italy.¹⁴ Dionysius of Halicarnassus, Titus Livius, and Plutarch credited Rome's second king, Numa Pompilius (715-672 BCE) with the introduction of the cult of Fides.¹⁵ But this divinity is not firmly attested in Rome until the middle of the 3rd century BCE, when Atilius Calatinus built a temple of Fides on the Capitol. Besides being used for occasional meetings of the Senate, the temple was the guarantor of the observance of duties imposed by international treaties.¹⁶ The primary role of Fides was to protect honesty and fidelity in the execution of obligations. She watched over the agreements concluded by joining of the right hands (*dextrarum iunctio*), protected those who acted loyally, rewarded those who worshiped her by granting them social credit, and punished heresy by loss of good standing.¹⁷

⁷ Cicero, *On Duties* 1.7.23, in John Higginbotham (trans.), *On Moral Obligation: A New Translation of Cicero's De officiis* (1967), 46.

⁸ Cicero, *Against Verres*, 2.3.3 in Charles D. Yonge (trans.), *The Orations of Marcus Tullius Cicero*, vol. 1 (1878), 297.

⁹ See Fritz Schulz, *Principles of Roman Law*, trans. by Marguerite Wolff (1936), 224.

¹⁰ Barry Jolowicz and Herbert F. Nicholas, *Historical Introduction to the Study of Roman Law* (1972), 65, n. 3.

¹¹ Gérard Freyburger, *Fides – Étude sémantique et religieuse depuis les origines jusqu'à l'époque augustéenne* (1986), 103-132.

¹² See generally Freyburger, *supra* note 11 at 99-228.

¹³ Cicero, *On the Commonwealth and On the Laws*, ed. by James E.G. Zetzel (1999), 140.

¹⁴ Marcus Terentius Varro, *On the Latin Language*, trans. by Roland G. Kent, vol. 1 (1977), 64-71.

¹⁵ Dionysius 2.74-75 in Earnest Cary (trans.), *The Roman Antiquities of Dionysius of Halicarnassus*, vol. 1 (1937), 535-539; Livy, *The History of Rome: Books I-IV*, trans. by Aubrey De Selincourt (2002), 54-55; Plutarch, *The Lives of the Noble Grecians and Romans*, trans. by John Dryden (1978), 363-365.

¹⁶ William R. Nifong, "Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law", 49 *Duke Law Journal* (2000) 1092, 1095; Marcel Le Glay, "La dexiosis dans les mystères de Mithra" in J. Duchesne-Guillemin (ed.), *Études Mithriaques: Actes du 21 Congrès International, Téhéran, (Acta Iranica 17)*, vol. 4 (1978) 279, 291-292.

¹⁷ Freyburger, *supra* note 11 at 248.

As Dumézil pointed out, the cult of Fides had little in common with the contemporary idea of religious devotion. Numa, the Roman king credited with the establishment of the cult of the goddess Fides, enjoyed the reputation of a skilled negotiator with the gods. His religious convictions were based not so much on piety as on the belief that the gods will be loyal to their promises. Therefore, the acts of worship of Fides, notably the offering, resembled more the acts of commerce, of exchange between deities and humans, than acts of piety.¹⁸ Although a deified virtue, *fides* retained a pragmatic role. Offerings to Fides had little, if any, devotional charge. They were perceived as a sort of exchange with an almighty partner whose divine status offered the best assurance for reciprocation. At the level of relations between mortals, *fides*, the symbolic goddess located in the mind of every virtuous Roman, ensured that voluntary promises and the duties associated with a certain status or role (*officia*), would be observed, under pain of religious and social stigmatization. The geographic, economic, and cultural growth of the Roman state and the diversification of exchanges with neighbouring nations multiplied the valences and roles of *fides*. The religious component, however, was carried forward, to variable extents, in all manifestations of *fides*. As Cicero warned, if the reverence toward the gods was to be abolished, *fides* among individuals would disappear shortly afterwards.¹⁹

3. Etymologic roots and semantic evolution of *fides*

The complexity, versatility, and omnipresence of *fides* in Roman life render this Roman value almost impossible to be grasped fully by modern researchers. The noun *fides* was the object of numerous studies by linguists, historians, and jurists, but owing to its complex nature and to the scarcity of original materials, little agreement has been reached about its exact semantic range. As Lemosse cautioned, any attempt to find a comprehensive and homogenous definition of *fides* is destined to fail.²⁰

Of Indo-European roots, *fides* evolved with the Roman society to become a fundamental social, religious, and later, legal concept. The noun *fides* derives from the adjective *fidus* meaning trustworthy, reliable. *Fidus*, in its turn, derives from the Indo-European root **bheidh-*, meaning to trust, to confide. From a strict etymological point of view, the noun *fides* meant confidence that one inspires in others.²¹ The etymological studies of *fides* suggest that, originally, this notion referred to relations of inequality, in which the party with a lower standing reposed confidence in another, of higher rank, with the expectation or certitude of receiving a benefit in return.

The exact original meaning and semantic range of *fides* remain disputed. According to one current of thought, *fides* was originally a religious word, designating good standing in a divinity's eyes maintained by purity and truthfulness, and the general idea of a divine supervision of contracts between humans.²² According to another current of thought, *fides*

¹⁸ Georges Dumézil, *Idées romaines* (1969), 56-59; Georges Dumézil, *Mitra-Varuna: Essai sur deux représentations indo-européennes de la souveraineté* (2d ed., 1948), 71-75.

¹⁹ Charles D. Yonge (trans.), *Cicero's Tusculan Disputations: Also Treatises On the Nature of the Gods, and On the Commonwealth* (1877), 210.

²⁰ Maxime Lemosse, "L'aspect primitif de la *fides*" in Maxime Lemosse, *Études Romanistiques* (1991), 62.

²¹ Georges Dumézil, *Idées Romaines*, *supra* note 18; Freyburger, *supra* note 11 at 29-31. According to Meillet, *fides* also acted as noun for the verb *credo*, thus driving out of the Latin vocabulary the ancient noun *credes* (Antoine Meillet, "Latin *credo* et *fides*" 22 *Mémoires de la Société de Linguistique de Paris* (1920), 215-218).

²² See Burkard W. Leist, *Alt-Arisches Jus Civile*, vol. 1 (1892), trans. by Albert Kocourek, in Albert Kocourek and John W. Wigmore, *Primitive and Ancient Legal Institutions* (1915), 481-498; Jean Bayet, *Histoire politique et psychologique de la religion romaine* (2nd ed., 1969), 141.

originated as a profane word, and although *fides* and its verb form *crēdō* were associated with religion in pre-Christian Rome, their religious connotations, in the sense we ascribe today to the word “religious,” came about only with the rise of Christianity.²³ Religious connotations aside, the advocates of an originally secular meaning of *fides* disagree widely on the exact sense of this concept in Monarchy and Republic. On one hand, some authors believe that the original *fides* was devoid of any moral value. It conveyed ideas such as guarantee for promise or the physical power that a person had over another. The moral connotations of *fides* came about only in imperial times, following its use as a rhetorical term. On the other hand, some authors contend that the moral sense of “confidence that one reposes” has always been the core meaning of *fides*.²⁴

These academic disputes demonstrate that, given the scarcity of extant texts from the Monarchy and Early Republic periods, it is not possible to identify precisely the original meaning of *fides*. The sources of the Later Republic, however, allow for a more precise investigation. Freyburger demonstrated that, by the end of Republic, the central meaning of *fides* was confidence, in the active form of confidence reposed and the passive sense of confidence enjoyed or creditworthiness.²⁵ The active sense of *fides* designated the action of reposing confidence in, or giving credit to someone, in the sense of believing that he will act in accordance with his social status. In *Partitiones Oratoriae*, Cicero equated the active *fides* with a belief (*opinio*): “*fides* is a firmly established opinion, while emotion is the excitement of the mind to either pleasure or annoyance or fear or desire.”²⁶ In other contexts, such as “having confidence in someone” (*fidem habere*), “giving someone due credit” (*fides habere alicui*) or “placing confidence in someone” (*confidere alicui*), the active meaning of *fides* points to the act of granting or recognizing the good social standing of someone.²⁷ The passive meaning of *fides* was more relevant and used more often than the active form. The passive *fides* connoted “credit” both in the abstract sense of verisimilitude, plausibility (*probabilitas, quae ad credendum apta sunt*),²⁸ and in the social sense of consequence of good reputation, good standing.

Creditworthiness, the passive meaning of *fides*, emphasises its social nature. People were perceived as trustworthy as a result of their honourable behaviour, but also as a consequence of their social and economic status. The higher a person’s social rank and wealth were, the greater the social credit that was granted to him. The direct proportionality between social standing and creditworthiness explains why, in the archaic period, only the rich and powerful enjoyed a plenitude of *fides*. This does not mean that the more socially humble did not enjoy *fides*—creditworthiness; their credit, however, was inferior to that of the dominant class. This situation is illustrated in Table 1.4 of the Law of the Twelve Tables, which provides that only a property-holder (*adsiduus*) could act as guarantor (*vindex*) for another property holder, whereas anyone could be guarantor for a lower-class citizen (*proletarius*).²⁹ Similarly, in a relation of patronage (*clientela*), *fides* of the patron (*patronus*) and that of the client (*cliens*)

²³ Georges Dumézil, *Idées Romaines*, *supra* note 18 at 55-56.

²⁴ See Eduard Frankel, “Zur Geschichte des Wortes Fides”, 71 *Rheinisches Museum für Philologie* (1916), 187; Richard Heinze, “Fides”, 64 *Hermes* (1928), 140; Andre Piganiol, “Venire in fidem”, 5 *Revue Internationale des Droits de l’Antiquité* (1950), 339, 345; Gerhard von Beseler, “Fides” in *Atti del Congresso Internazionale di Diritto Romano*, vol. 1 (1934), 133-143; Luigi Lombardi, *Dalla “fides” alla “bona fides”* (1961); Joseph Hellegouarc’h, *Le Vocabulaire latin des relations et des partis politiques sous la République* (2d ed., 1972).

²⁵ Freyburger, *supra* note 11 at 43-66.

²⁶ Cicero, *A Dialogue Concerning Oratorical Partitions* 3, in Charles D. Yonge, *The Orations of Marcus Tullius Cicero*, vol. 4 (1879), 488.

²⁷ Hellegouarc’h, *supra* note 24 at 33.

²⁸ Freyburger, *supra* note 11 at 43.

²⁹ “For a better-off person (*adsiduus*), let the *vindex* (surety) be a better-off person; for a proletarian tough citizen, let anyone who wishes be *vindex*.” (A. Arthur Schiller, *Roman Law: Mechanisms of Development*) (1978), 150).

entailed different obligations: protection and loyal obedience, respectively.³⁰ The wealth and power of the socially superior facilitated the maintenance of their social credit by giving them the possibility to offer protection, by rendering them less impressionable, and by conferring higher authority (*auctoritas*) on them. Conversely, given that social credit was one of the most valuable possessions of a person, the powerful had strong incentives to abide by the standards of behaviour associated with their status, in order to maintain their trustworthiness in the eyes of society.³¹

The passive meaning of *fides* acquired three main subsequent meanings: loyalty, promise, and protection.³² The transition of the basic passive meaning of *fides*, “acquired confidence” (credit) to a secondary passive meaning, “the attitude that attracts confidence,” generated the connotation of “loyalty.”

Such semantic transition from the general notion to the attitude consistent with that notion was a natural occurrence in Latin. The Latin had a tendency to “moralize” abstract notions by transferring them into the realm of *mores*, the Roman system of customs, virtues, and values.³³ In Roman society, creditworthiness was tightly related to social morals: it was the assessment by society of the behaviour of an individual. The desire to attract or reinforce the confidence of others and thus to gain or preserve social credit was one of the main reasons of one’s loyalty. Loyal behavior, manifested by the effective keeping of one’s word, is the objective and traditional meaning of good faith-loyalty. The subjective aspect, which represents a late semantic addition, designates a moral virtue with various facets: the inner propensity to keep one’s word because of ethical standards and ideals, honesty and sincerity, in the sense of absence of deceptive intent or ulterior motive.³⁴ Objective loyalty generated good reputation (*fama*) and social credit (*fides*), and therefore was very important to Romans, who were careful to avoid the suspicion of improbity (*suspicio perfidiae*), which could attract infamy (*infamia*).

Another meaning of the passive *fides* is *fides* as promise. *Fides*-promise encompassed various forms of promises: a simple verbal commitment (e.g., *seruare fidem*), a promise formalized by shaking the right hand (e.g., *fidem dare*), an oath (e.g., *ius iurandum*), or the most solemn oath, a public treaty (*foedus*). In all such instances *fides*-promise was in fact a particular instance of *fides*-credit. The majority of Latin expressions in which *fides* refers to a promise can be construed as referring to the pledging of one’s credit as a guarantee for an obligation.³⁵ *Fidem dare* literally means “offering one’s credit as pledge;” *fidem obligare* or *fidem obstringere* could be interpreted as binding one’s credit through a solemn act; *fidem promittere* literally means “putting forward one’s credit;” *fidem liberare*, in conjunction with *fidem obligare*, signifies the discharge of one’s credit by fulfilling the promise.³⁶

Fides-protection is the outmost point in the evolution of *fides*. Latin is the only Indo-European language that presents this connotation of the concept *fides*. Similarly to *fides*-loyalty and to *fides*-promise, *fides*-protection comes from the basic meaning of the passive *fides*, namely “social credit.” The notion of *fides*-protection appears in the context of invoking or soliciting the *fides* of a powerful person, generally through loud calls and imprecations. The person whose protection was invoked could not remain indifferent to such calls, usually made in the presence of others, without jeopardizing his credit. Once the credit of a person

³⁰ See Section 4.3 below.

³¹ Thomas Collett Sandars, *The Institutes of Iustinian* (1970), 36.

³² Freyburger, *supra* note 11 at 49-74.

³³ *Ibid.* at 57.

³⁴ *Ibid.* at 54.

³⁵ See Section 5.2 below.

³⁶ Freyburger, *supra* note 11 at 65-66.

was put in play in such a fashion, the solicited person had to honour the request of protection in order to maintain his good standing or even to avoid the perverse effects of infamy. Corroborating both fundamental meanings of *fides*, i.e., confidence reposed and confidence aroused in someone else, Benveniste maintained that the parties to a relation involving confidence were necessarily on inequality of footing. Idioms such as “to surrender oneself to the *fides* and power of someone else” (*se in fidem et potestatem alicuius tradere*), or in the context of international relations, “to surrender to the *fides* and sovereign power of the Romans” (*se in fidem ac dicionem populi Romani tradere*), convey the idea that the party that reposed *fides* in another was at the mercy of the latter. Such relations were not unilateral; they involved a certain degree of reciprocity: placing confidence in another secured the other’s protection. The empowered party exercised authority but had to protect the other, while the submissive party had to be obedient but enjoyed protection and security.³⁷ The nature of the inequality between parties in a relation based on *fides* evolved from complete surrender of one party, generating the extensive and discretionary power of the other, to an ascendancy of moral or spiritual nature. The evolution of private law and the creativity of the praetors in Later Republic made possible the creation of *bona fides*, designating mutual reliance and self-restraint between contractual partners, which, in a sense, was the opposite of the ancient *fides*. Another important conclusion that these studies entail is the primacy of the social nature of *fides*. The crux of *fides* was not the inner, moral propensity to abide by promises and *officia*, but the actual behavior, the positive actions that one performed and that created or re-enforced the social credit.³⁸ The spread of Hellenistic civilization, the influence of the Stoic philosophers, and Cicero’s monumental work, however, considerably augmented the moral charge of *fides* during the last decades of the Republic.

4. *Fides* in divine law (*fas*) and social customs (*boni mores*)

During the Monarchy and in the early stages of the Republic, Rome had no clearly defined legal system. There was no single sovereign authority to set and enforce the law, and the settlement of disputes often amounted to private vengeance. The private order of Rome was regulated by three normative systems: *fas* (divine law), *boni mores* (social customs), and *ius* (secular law). Divine law was the body of laws regarded as laid down by the gods to regulate the behavior of humans on earth. Such rules were binding to all humankind, rather than to a given ethnic group, and had primacy over secular or human law. Secular law was the body of secular norms comprising legal customs (*ius moribus constitutum*), and to a lesser extent, statutes (*lex*). Social customs (*mos maiorum*, later known as *boni mores*) comprised the body of ancestral values and norms of behavior upheld by the Roman community.³⁹ The social relations founded on *fides* were regulated to various extents by the precepts of divine law, social customs, and later, secular law.

4.1. *Fides* and divine law (*fas*)

³⁷ Émile Benveniste, *Le vocabulaire des institutions indo-européennes*, vol. 2 (1969), 118-119. See also Timothy J. Moore, *Artistry and Ideology: Livy’s Vocabulary of Virtue* (1989), 36 (“Regardless of which theory is correct concerning the origin and basic meaning of *fides*, the word is clearly at its root connected with relationships of trust, and *fides* when it can be called a virtue is the moral quality of a person or a group which causes that person or group to deserve the trust of others.”).

³⁸ Hellegouarc’h, *supra* note 24 at 23-27; Zeba A. Crook, *Reconceptualising Conversion: Patronage, Loyalty, and Conversion in the Religions of the Ancient Mediterranean* (2004), 207-208.

³⁹ James Muirhead, *Historical Introduction to the Private Law of Rome* (1916), 15-23; Adolf Berger, *Encyclopedic Dictionary of Roman Law* (1953), s.v. “*boni mores*”, “*fas*”, “*ius (iura)*”.

The archaic system of justice administration under the Monarchy was built around the college of pontiffs. The pontiffs were not priests in the modern sense, as they were not devoted to the service of any particular god. They were heads of the national religion, and as such, servants of the state. Their power and authority was primarily the result of the significant scientific, legal, and religious knowledge they possessed.⁴⁰

From presiding over religious affairs and rituals, the pontiffs gradually became directly involved in the administration of justice in general, criminal or civil.⁴¹ The boundaries of the pontiffs' jurisdiction are unclear. It is generally assumed that the priests of ancient Rome had a great share in the administration of justice, but is not easily determined what that share was. The question is rendered more complex by the fact that religious matters penetrated all aspects of life, blurring the line between religious, secular, and social norms. What can be said with certitude is that in the early Monarchy the administration of justice by pontifical judges gave a strong religious nature to the Roman law in general.

Towards the end of the Monarchy, the separation of the royal and pontifical offices, and the subordination of the latter to the former, generated a process of separation in law between secular and religious and between public and private. At the jurisdictional level, the separation of the offices of king (*rex*) and pontiff (*pontifex*) led to the extension of regal authority over the direct administration of criminal and civil justice. The king judged the most important criminal and civil cases in person, and entrusted the lesser ones to senators. Starting with the reign of Servius Tullius (578-535 BC), public cases were separated from the private disputes, the latter being delegated to private judges. The pontiffs retained jurisdiction over religious and ceremonial matters, such as the management of the state Calendar.⁴²

As long as the civil and religious judicial authorities were in the same hands, divine and secular law were not always clearly separated. A great part of early criminal law in the early Monarchy, for instance, had a sacral character in the sense that the wrongful behaviour amounted to an offense against society and a sin against the gods of the community at the same time. The idea of crime independent of sin emerged only toward the end of the Monarchy, when religious and secular authorities were separated.⁴³

Thus, for the most part of the Monarchy, the laws regulating public wrongs belonged to divine and secular laws at the same time.⁴⁴ The scattered extant references to public wrongs allow us to reconstruct some of the sanctions that the pontiffs applied for offenses against society and the gods. Minor offenses against divine authority were redeemable by offerings to the affronted deity (*hostia piacularis*) and possibly compensation to the injured person. More serious offenses, however, which brought a divine curse over the entire community, could be purged only by the perpetrator's death. Where the pontiffs found such inexpiable wrongs, they proceeded to outlawing the wrongdoer (*sacratio*) by declaring that he was consecrated to the gods of the underworld (*sacer esto*). Declaring a man *sacer* was one of the earliest penalties for public wrongs, and among the most severe.⁴⁵ *Homo sacer* was an outcast in every sense of the word: he was banned from taking part in any institution of the state, civil or religious, and his goods were forfeit to the service of the offended deity (*sacratio bonorum*). He was no

⁴⁰ The pontiffs ("bridge-builders") derived their names from their function, which was as sacred as it was politically important, of conducting the works of building and demolition of bridges over the Tiber, Theodor Mommsen, *The History of Rome*, trans. by William P. Dickson, vol. 1 (1885), 230.

⁴¹ Edwin C. Clark, *History of Roman Private Law*, vol. 1 (1906), 432.

⁴² Clark, *supra* note 41 at 465-466.

⁴³ *Ibid.* at 450-451.

⁴⁴ The earliest formulated Roman law, that of public wrongs, belongs to both divine and secular law (*ibid.* at 575-576).

⁴⁵ See Berger, *supra* note 39, s.v. "sacer."

longer divinely protected and could be killed by anyone with impunity. The severity with which the breach of divine law was met ensured the efficacy of these rules, despite their religious rather than civil nature.⁴⁶

Grave breaches of *fides* were punished by a declaration of *sacer* since the earliest times. Dionysius recounted that, since the times of Romulus, breach of *fides* in a patronage relation was an “impious and unlawful” act that rendered the disloyal patron or client liable to be put to death with impunity.⁴⁷ The penalty of *sacratio* for breach of *fides* in patronage is officially stipulated for the first time in the Law of the Twelve Tables. Table 8.21 provides that “if a patron defrauds a client, let him be *sacer* (accursed).”⁴⁸

Breach of a solemn promise was another instance of breach of *fides* that came within the purview of the pontiffs. Breach of promises reinforced by an appeal to the gods was considered a sin against the divinities invoked, and thus attracted religious sanctions. The reinforcement of a promise by a solemn appeal to gods was accomplished either by a solemn oath (*iusiurandum*) or by a solemn promise (the ancient *sponsio*).

The solemn oath was the practice by which a god was called upon to witness the promisor’s creditworthiness and to punish him in case of breach. The Romans appealed to various deities to witness their pledge of *fides* in a solemn promise. According to Titus Livius, the Romans used to swear on Jupiter, the king deity of ancient Rome and the patron of laws and social order.⁴⁹ Dionysius mentioned that the early Romans used the altar of Hercules (called *Ara Maxima*, “the greatest altar”), built in the cattle market, to make solemn promises in their commercial transactions.⁵⁰ The custom of invoking Hercules when concluding contracts, and confirming them by oath, led to the identification of Hercules with Dius Fidius, the god of *fides*. Hercules and Dius Fidius were used interchangeably as recipients of oaths. Dius Fidius, in turn, was replaced by the goddess Fides as recipient and protector of promises guaranteed with the promisor’s *fides*.⁵¹

Despite not being recognized under secular law, promises made before the gods and guaranteed with *fides* were taken very seriously. Dionysius remarked that, after Numa had raised *fides* to the rank of goddess, an oath taken upon a man’s own *fides* was the greatest form of promise, weighing even heavier than the presence of witnesses.⁵² Gellius also pointed out the extreme rarity of failure to perform an undertaking entered into within sight and hearing of a deity.⁵³

Because divinities were invoked, violation of a sworn promise or a false oath were considered acts of sacrilege and came under the sway of divine law. Perjury, if premeditated and intentional, was one of the grave sins for which no offering (*piacularis hostia*) could bring atonement. Such a sin brought excommunication from the community, and in the most serious instances, forfeiture to the divine wrath by pontifical outlawing of the wrongdoer (*sacratio*).⁵⁴

⁴⁶ Muirhead, *supra* note 39 at 15-18.

⁴⁷ Earnest Cary, trans., *The Roman Antiquities of Dionysius of Halicarnassus*, vol. 1 (1937), 343.

⁴⁸ Schiller, *supra* note 29 at 151.

⁴⁹ Livy, 21.45 in Livy, *The History of Rome: Books XXI-XXX*, trans. by Aubrey De Selincourt (1965), 71.

⁵⁰ Dionysius, 1.40 in Cary, *supra* note 47 at 133.

⁵¹ Varro believed Dius Fidius to be the equivalent of the Sabine deity Sancus and of the Greek Hercules (Marcus Terentius Varro, *On the Latin Language*, trans. by Roland G. Kent, vol. 1 (1977), 64-71.

⁵² Dionysius, 2.75 in Cary, *supra* note 47 at 536-537.

⁵³ “An oath was regarded and kept by the Romans as something inviolable and sacred. This is evident from many of their customs and laws...” (Aulus Gellius, 6.18.1 in John C. Rolfe, trans., *The Attic Nights of Aulus Gellius*, vol. 2 (1927), 75.

⁵⁴ Abel H. J. Greenidge, *Infamia: Its Place in Roman Public and Private Law* (1894), 72; John Mason Lightwood, *The Nature of Positive Law* (1883), 191-198.

Because of such severe penalties, use of the solemn oath declined with the rise of more flexible forms of binding agreements.⁵⁵

The ancient form of solemn promise (*sponsio*) was another form that fell under the jurisdiction of the pontiffs.⁵⁶ In its most primitive form, *sponsio* designated the ritual of wine pouring that was usually part of the solemn oath (*iusiurandum*) ceremonial. The role of the sacrificial wine pouring was to increase the binding force of the solemn oath. It symbolized the blood that would be spilt if the gods were affronted by the breach of the promise. In a second stage, *sponsio* as wine pouring became an independent ritual that was used without the oath in important agreements of private nature, such as marriage, or in alliances (*foedera*) between different clans.⁵⁷ In a third stage, the wine-pouring ceremony was omitted, and the ancient *sponsio* became a form of solemn promise involving sacramental formulas.

The religious solemn promise was intimately connected with *fides* as observance of commitments. As accessory to other solemn acts, the religious solemn promise offered an added security by the ritual invocation of the gods to participate in the ceremony. As long as the solemn promise was used to reinforce a principal act, it assumed an inferior place as a *fides* alongside the central act, which was entered into with the fullest solemnity of the oath (as in the case of a political alliance) or with the ceremonial joining of the right hands (as in the case of marriage). At a later stage, the solemn promise developed into a form of making formal promises between humans (as opposed to a promise from a human to a god), involving the sacramental words “do you undertake?” (*dare spondes?*), “I undertake” (*spondeo*). The religious element subsisted in this technical form of the solemn promise, albeit implicitly. It is likely that breach of promise amounted to breach of *fides*, the duty to keep one’s promises, and constituted an offense against the deities that were called to witness the agreement. However, no clear evidence survives that could prove beyond doubt that the pontiffs punished breach of the technical solemn promise as a dishonoring of the goddess Fides or of other deities.⁵⁸

The bond of marriage (*foedus matrimonii*) was another bond of *fides* overseen by the pontiffs. The use of the word *foedus* (alliance, bond) indicates that the marriage was a bond of *fides*. *Fides* and *foedus* were intimately linked concepts, the former being an indispensable part of the latter. At the same time, the bond of marriage was a religious institution. Throughout the Monarchy, the Roman marriage was a religious duty that a man owed to his ancestors and to himself.⁵⁹ The ceremony of marriage was a religious one, performed by the pontiffs in the presence of ten witnesses. The gesture by which each spouse engaged their *fides* toward one another and toward the gods was the ceremonial joining of the right hands (*dextrarum*

⁵⁵ William H. Buckler, *Origin and History of Contract in Roman Law Down to the End of the Republican Period* (1983), 12.

⁵⁶ The origins and the functions of the early *sponsio* are highly controversial. For a review of the main theories concerning the ancient *sponsio*, see Buckler *supra* note 55 at 17-20. See also Max Kaser, *Roman Private Law: A Translation*, trans. by Rolf Dannenbring (3rd ed., 1980), 49 (“The term *sponsio*, if the word *spondere* was employed, points to a promise made under oath which originally had not been actionable in civil procedure, but which had a religious sanction: he who perjured himself was exposed to the vengeance of the god by whom he had sworn”).

⁵⁷ Carl W. Westrup, *Introduction to Early Roman Law: Comparative Sociological Studies, the Patriarchal Joint Family*, vol. 4 (1950), 146. See also Michael H. Crawford, “Foedus and Sponsio” 41 *Papers of the British School at Rome* (1973), 1-7.

⁵⁸ B.W. Liest, “The Fides Commandment” in Albert Kocourek and John W. Wigmore, *Primitive and Ancient Legal Institutions* (1915) 481, 492-495.

⁵⁹ See Fustel de Coulanges, *La cité antique: Étude sur le culte, le droit, les institutions de la Grèce et de Rome* (7th ed., 1879), 41-54.

iunctio),⁶⁰ accompanied by invocations and sacrifices offered to the gods (the goddess Fides quite probably included).⁶¹ Breaches of marital duties were punished by the pontiffs with religious sanctions, forfeiture of property, and in the most severe cases, with consecration to the infernal gods.⁶²

During the Monarchy and in Early Republic, the constraining power of *fides* was of a religious and social, rather than legal nature. *Fides* did not act as an ordinary security, because in case of default it ensured no immediate measure for indemnifying the promisee. Its power resided in the threat of religious or social sanctions, rather than in immediate redress for the wronged person.

4.2. Fides, social customs (boni mores), ignominy (ignominia), and infamy (infamia)

Mores (plural of *mos*) were the body of rules of behaviour accepted by the common consent of all members of a community. If observed for a long time, they acquired the status of legal customs. As a result of centuries of development, *mores* came to be referred during the Republic as *mos maiorum*, the custom of the forefathers, or *mores civitatis*, the customs of the city. Not strictly customary law, the values of the customs of the forefathers were sufficiently authoritative to restrain the excessive exercise of a legal prerogative and to ensure the observance of socially recognized duties for which secular law offered no protection. The Greek influence in the Hellenistic period led to the transformation of the customs. Writers, historians, and orators of that time, such as Plautus, Sallustius, and Titus Livius, decried the weakening of the customs of the forefathers by the newly acquired habits. The expression “social customs” (*boni mores*) was introduced to refer to the customs of the forefathers (*mos maiorum*), as contrasted with the new customs, the *mali mores*.⁶³

Fides belonged to the customs of the forefathers since ancient times, and numerous authors attested to the fact that it was part of the social customs.⁶⁴ The protection of the customs of the forefathers by the Roman censor played an important role in the evolution of the concept of *fides*.

From the middle of the 5th century BCE until the end of the Republic, the task of watching over the Roman social customs was granted to censors (*censores*). Beside the registration of citizens and the assessment of their property (*census*), and the administration of public finances, the censors were charged with *regimen morum*, the preservation of the social customs.⁶⁵ The censors’ power to decide on the moral worth of a person was a natural outgrowth of their principal charge, the *census*.

The task of drawing the list of citizens and determining whether or not a person was fit for public service granted the censors wide discretionary powers to decide on questions of fact, such as whether a citizen had the qualifications required by law or custom for the rank that he claimed. The transition from matters of fact to questions of law came naturally, and the censors gradually assumed the role of guardians of the principles of Roman morality encompassed by the social customs. In this capacity, the censors were able to decide in many

⁶⁰ Jean Imbert, “Fides et Nexum” in *Studi in onore di Vincenzo Arangio-Ruiz*, vol. 2, (1953), 339, 352; Le Glay, *supra* note 16 at 280, note 5.

⁶¹ Édouard Cuq, *Les Institutions Juridiques des Romains*, vol. 1 (2nd ed., 1904), 59.

⁶² Muirhead, *supra* note 39 at 25.

⁶³ Muirhead, *supra* note 39 at 18-21; DH Van Zyl, *Justice and Equity in Cicero* (1991), 96; Berger, *supra* note 39, s.v. “mores (mos);” “mores (mos) maiorum;” “boni mores.”

⁶⁴ Felix Senn, “Des origines et du contenu de la notion de bonnes mœurs” in *Recueil d’études sur les sources du droit en l’honneur de François Gény* (1934) 53, 62.

⁶⁵ Alan E. Astin, “Regimen Morum”, 78 *The Journal of Roman Studies* (1988), 14-34; Berger, *supra* note 39, s.v. “regimen morum.”

matters of private and public life that escaped the reach of secular law. Thus, the censors became examiners of the moral worth of individual citizens, and bestowed honour and dishonour according to their sense of duty. The various important duties that came to be associated with the office of censorship rendered this office a “sacred magistracy” (*sanctus magistratus*), the second most important in the state after the dictatorship.⁶⁶ Instances branded by the censors as deviating from the socially desirable rules of conduct established by social custom were multiple. A first group of cases concerned the abuse or neglect of a legally recognized prerogative. For example, the censors intervened to condemn the misuse of power by a head of the family (*paterfamilias*), who displayed cruelty or over-indulgence toward members of his family. In the case of a monetary loan, the censors condemned the creditor who deprived the debtor of the opportunity to ransom himself, his family, or the property given as security, in order to avoid becoming a debtor under arrest (*addictus*).⁶⁷ In a second group of cases, the censors intervened to enforce certain duties (*officia*) that were not applicable under secular law but were imposed by social customs, such as the respect and obedience that persons in an inferior position owed their superiors (*obsequium et reverentia*), chastity (*pudicitia*), and the various duties imposed by *fides*.⁶⁸ The censors’ assessment of moral worth and punishment of moral disgrace had a quasi-judicial nature. Many features of the censorial trial resembled a trial before a judge (*judicium*).⁶⁹ Several procedural rules were put in place to mitigate the arbitrariness of the censors’ decisions. The accused had to be summoned before the censors; there were always two censors, and the decision had to be made unanimously; the accused had the right to be assisted by an advisor; the censors’ decision had to specify the cause for which the accused had been degraded (*subscriptio*). Despite such similarities with a criminal trial at law, the proceedings before the censors did not amount to a full-fledged trial before a judge. As Cicero pointed out, many procedural requirements for a regular trial, such as sworn evidence or maintenance of records, were often absent from censorial proceedings.⁷⁰ Moreover, ignominy was not a penal punishment. It led to disqualification and loss of social credit, but it did not have a criminal nature, as was the case with the praetorian infamy. Although ignominy was not a legal penalty, its effects went beyond the mere diminution of the social credit that a person enjoyed among his fellow citizens. It created various disqualifications or disabilities. For ordinary citizens, the censors could punish those who deviated from the standards imposed by custom by expelling them from their tribe and by degrading them to the status of aerarians. In case of equestrians, the censors could take away their publicly-funded horse (*ademptio equi*). The censors could also decree the removal of senators from the senate (*motio* or *ejectio e senatu*). Breach of the various duties imposed by *fides* triggered not only religious or social blame, but also censorial condemnation, in the form of the quasi-judicial ignominy, and later, the juridical sanction of infamy, provided for by the praetor’s edict and Justinian’s law. Throughout most of the Republic, when the censors enjoyed a broad supervision over social customs, many instances of breach of *fides* that came under the censors’ jurisdiction were likely to be set forth in the censors’ edict. Because of the scarcity of extant sources, our knowledge of the censors’ edict is fragmentary. Nevertheless, some conclusions may be drawn from historical circumstances and later regulations.

The first clue to point toward broad censorial jurisdictional powers over breaches of *fides* is

⁶⁶ Arthur H. Clough (ed.), *Plutarch’s Lives*, vol. 2 (1875), 316.

⁶⁷ Muirhead *supra* note 39 at 161.

⁶⁸ Muirhead *supra* note 39 at 22. See also Greenidge, *supra* note 54 at 62-74 for a more detailed classification of the cases of social digression that attracted censorial punishment.

⁶⁹ The censors’ trial was sometimes called *iudicium de moribus* (Greenidge, *supra* note 54 at 51).

⁷⁰ William Ramsay, *A Manual of Roman Antiquities* (9th ed., 1873), 164-171.

the time gap between the pontifical jurisdiction and the secular jurisdiction over breaches of *fides*. The transition from the religious penalties imposed by the pontifical jurisdiction to the criminal law penalties at the end of the Republic left a jurisdictional gap that was filled up by the censorial condemnation.⁷¹

Jurisdiction over perjury is one such example where the censors filled the jurisdictional gap. As show above, during the Monarchy, perjury was a matter of religious law. Premeditated false testimony and broken oaths were inexpliable sins, punished by the pontiffs with declaration of *sacer* and consecration to the godly wrath. After the old pontifical sanctions for perjury had died out, the secular law declined to punish the offenses against gods. The principle of the Roman law was, in respect to perjury, that the wrongs done to the gods were for the gods to avenge (*deorum injurias diis curae*).⁷² But what the civil law refused to deal with, the censorship might and did punish.⁷³

The scope of the censors' powers can be inferred also from later documents. Greenidge reconstructed the censorial edict based on the praetorian *edictum perpetuum* and on the *Lex Julia Municipalis*, also known as the Table of Heraclea:⁷⁴

We possess a very valuable connecting link between the censor's and the praetor's use of the conception of infamy in the *Lex Julia Municipalis*, which is a codification of the most permanent portion of the censorian *infamia*, the cases codified being employed as the basis for disqualification for the position of a senator in a municipal town. It is in fact the earliest codification—at least the earliest known to us—of the principles usually recognised by the censors.⁷⁵

The hypothesis that the praetorian edict is a continuation of the censors' edict is supported also by the fact that the praetor did not establish infamy as a rule of law, but built on the pre-existing notion of infamy to create special exclusions from the right to postulate in court for persons found guilty of infamy.⁷⁶

Based on the two documents mentioned before, it is quite likely that the censors had jurisdiction over several relations where breach of *fides* was considered a particularly condemnable deviation from social custom: partnership, deposit, mandate, guardianship, and fiduciary agreement. Starting with the censors' edict, breach of *fides* in such relations was regarded as severe moral turpitude, and consequently was punished by ignominy. In later times a condemnatory judgment for breach of *fides* in such relations attracted infamy, provided for by the praetor's edict and by Justinian's law.⁷⁷ Cicero emphasized that breach of *fides* in such relations was a particularly heinous wrongdoing:

For if there are any private actions of the greatest, I may almost say, of capital importance, they are these three—the actions about trust (*fiducia*), about guardianship

⁷¹ Greenidge, *supra* note 54 at 66-67.

⁷² Cornelius Tacitus, *Annals*, 1.73 in Michael Grant (trans.), *The Annals of Imperial Rome* (1989), 74.

⁷³ Greenidge, *supra* note 54 at 72.

⁷⁴ The *Lex Julia Municipalis* does not contain the words *ignominia* or *infamia*, but in treating the cases of disqualification for certain public offices, it enumerates nearly the same cases as those that appeared almost two centuries later as cases of *infamia* in the *edictum perpetuum*. The *Lex* excludes persons who fall within its terms from being senators, decurions, or counselors of their city, from voting in the senate of their city, and from occupying magistracies that gave access to the Senate.

⁷⁵ Greenidge *supra* note 54 at 116-117.

⁷⁶ William Smith, *Dictionary of Greek and Roman Antiquities* (2nd ed., 1859) s.v. "infamia;" Watson agreed that it is quite likely that the praetorian *infamia* was based on the censorian *infamia* (Alan Watson, *Roman Private Law Around 200 B.C.* (1971), 143).

⁷⁷ In contrast with the censorian ignominy, the only purpose of the praetorian infamy was to preserve the dignity of the praetor's court by disqualifying the ill-reputed members from initiating legal actions in this court as representatives or advocates of a party to the trial. Therefore, only a person of integrity was allowed by the Edict to postulate. (Smith, *supra* note 76 s.v. "infamia").

(*tutela*), and about partnership (*societas*). For it is equally perfidious and wicked to break faith (*fidem frangere*), which is the bond of life, and to defraud one's ward who has come under one's guardianship, and to deceive a partner who has come himself with one in business.⁷⁸

Guardianship offers a good example of how *fides* was protected by the praetor's infamy, and in earlier times, by the censorial ignominy. According to Aulus Gellius, guardianship was among the most important relations of *fides* that a man could have, being surpassed only by parenthood. Wards entrusted to the *fides* of a guardian had primacy over the latter's clients, guests, or spouse. The duty to protect the wards, like that to protect the clients, was among a man's most sacred roles springing from *fides*: In accordance with the usage of the Roman people the place next after parents should be held by wards entrusted to our honor and protection (*fidei tutelaeque nostrae creditos*); that second to them came clients, who also had committed themselves to our honor and guardianship (*qui sese itidem in fidem patrociniūque nostrum dederunt*); Of this custom and practice there are numerous proofs and illustrations in the ancient records, of which, because it is now at hand, I will cite only this one at present, relating to clients and kindred. Marcus Cato in the speech which he delivered before the censors *Against Lentulus* wrote thus: 'Our forefathers regarded it as a more sacred obligation to defend their wards than not to deceive a client.'⁷⁹

The praetorian supervision of guardianship was extremely strict. No mischief was tolerated, and defaulting on the part of the guardian triggered infamy even if was caused by accidental circumstances. Moreover, the guardian could be condemned for infamy even for mere suspicion of misadministration of the ward's affairs. Guardians were also prohibited from marrying their wards or from giving them in marriage to their sons, because such acts were deemed tantamount to a confession of maladministration. These harsh rules attest to the fact that the praetors were concerned with preserving guardian's creditworthiness, to the point where not even the appearance or suspicion of breach of *fides* was tolerated. According to Greenidge, these severe rules were emblematic of the manner in which *fides* was protected by ignominy and infamy throughout the history of Roman law.⁸⁰

As Greenidge convincingly argued, punishment for breaches of *fides* in such relations set forth in the *Lex Julia Municipalis* and in the praetor's *edictum perpetuum* is the continuation of a similar treatment applied in earlier times by the censors. Hence, many of the rulings established by early censorship in private law relations must have been carried over into the classical and post-classical infamy.⁸¹

4.3. *Between social customs and secular law: Patronage (clientela) and friendship (amicitia)*

Roman society of Later Republic and Empire was a growing machinery of personal networks of friendships, patrons and clients, lubricated by socially-defined duties attached to given positions or statuses (*officia*), and by authoritative customary principles. As Gelzer insightfully remarked, "the entire Roman people, both the ruling circle and the mass of voters whom they ruled, was, as a society, permeated by multifarious relationships based on *fides* and on personal connections..."⁸²

⁷⁸ Cicero, *For Q. Roscius, the Actor* 6.16, in Charles D. Yonge (trans.), *The Orations of Marcus Tullius Cicero*, vol. 1 (1878), 92-93.

⁷⁹ Aulus Gellius 5.13.1-4, in John C. Rolfe (trans.), *The Attic Nights of Aulus Gellius*, vol. 1 (1927) at 418-421.

⁸⁰ Greenidge, *supra* note 54 at 138-140.

⁸¹ Greenidge, *supra* note 54 at 66-67.

⁸² Mathias Gelzer, *The Roman Nobility*, trans. by Robin Seager (1969), 139.

Patronage and friendship were both social relations based on *fides*.⁸³ The link between the two institutions is controversial. Traditionally, the two institutions were regarded as fundamentally different. Friendship designated a relation between free and equal persons, based on mutual affection and loyalty; patronage was seen as a relation of dependence between persons of unequal social standing, wealth, or power, motivated by need and self-interest.⁸⁴ As patronage evolved from an ancient serfdom relationship of complete subservience and dominance to a relation based on ethical imperatives, the line between patronage and friendship became blurred.⁸⁵ By Later Republic, patronage became a relation based on *fides* and esteem (*gratia*), in which affection and asymmetrical loyalty were due. Because of this transformation, by Later Republic, friendship and patronage were based on the same ethical concepts: kindness (*benignitas*), trust (*fides*), goodwill (*benevolentia*), and honor (*existimatio*).⁸⁶ The fundamental difference between the two types of relations sprung from the position of the parties relative to each other: whereas friendship was based on equality of footing, community of interests, and parity of mutual favors, the client in a patronage was by definition unable to return favors of equal importance and settle his debt of honor to his patron.⁸⁷

5. *Fides, bona fides, and the secular law (ius)*

In Rome, as elsewhere, the first rules that were articulated into laws concerned public wrongs, offenses against society as a whole or against the gods, who cursed the entire society. As noted in Section 4.1 above, during the Monarchy, public wrongs involving *fides* were punishable by pontiffs under the divine law. In the early Republic, breaches of *fides* were regarded as offenses against the traditional values of the community and were punished by the censors with ignominy.

Legal rules concerning private wrongs, i.e., wrongdoings against the person or property of an individual, which did not affect the community or the gods, emerged much later.⁸⁸ Apart from the alleged reforms of Servius Tullius,⁸⁹ little is known about the legal regime of private wrongs during the Monarchy.

Breach of *fides*, as such, was never recognized as a direct cause of action under secular law. The Roman civil law presupposed the multitude of social relations based on *fides* and the social or religious mechanisms to prevent or remedy breaches of confidence. Until the development of the actions arising from agreements made in good faith (*bonae fidei iudicia*) by the peregrine praetor, divine law and social customs ensured that the religious and social and aspects of *fides* worked side by side to enforce duties and promises.

Although during the Monarchy and in Early Republic the secular law did not deal directly with breaches of *fides*, the contract of surety (*nexum*) and the formal promise (*sponsio*) were two institutions in which the legal norms and the social dictates of *fides* were tightly

⁸³ “The tie between friends, like that between patrons and clients, was one of *fides*.” (P.A. Brunt, *The Fall of the Roman Republic and Related Essays* (1988), 39).

⁸⁴ Koenraad Verboven, *The Economy of Friends: Economic Aspects of Amicitia and Patronage in the Late Republic* (2002), 49.

⁸⁵ This dividing line was blurred also by the use of friendship (*amicitia*) as a euphemism for relations of dependence between patron and client (Verboven, *supra* note 84 at 49).

⁸⁶ The common ethic framework led some authors to consider patronage as a variant of friendship (*ibid.* at 11).

⁸⁷ *Ibid.* at 62.

⁸⁸ Clark, *supra* note 41 at 581-608.

⁸⁹ See Dionysius 4.9, in Earnest Cary, (trans.), *The Roman Antiquities of Dionysius of Halicarnassus*, vol. 2 (1939), 293-297.

interwoven. Even in such cases, however, the formal vestment, not underlying substantial transaction, was the source of liability.

5.1. *Fides and nexum*

In early Roman society, sale and loan were the principal business transactions. In a sale, the purchaser was protected by the seller's obligation to repay double the value of the sale in case of eviction. In a loan of money, the only thing that the lender got immediately in return was a promise to pay. Therefore, to induce the borrower to repay, the lender used various means of pressure. A destitute debtor would first relinquish his property, then would offer to set off the debt by his or his family's labor. To compel the debtor to transfer the property or to provide the labor, the creditor, often a patrician, had the option to keep the debtor, frequently a plebeian, in chains or in prison. This form of surety was accomplished through the institution of *nexum*.⁹⁰

Nexum was a solemn act, performed in the form of a sale. It involved the use of copper and scales (*per aes et libram*) and the pronouncement of solemn formulae (*nuncupatio*). The object of the moot sale was a thing, or through a legal fiction, the debtor's person (*nexus*). Bound to his creditor by a relation of *fides*, the debtor submitted himself to the discretion of the creditor until full repayment of the debt.⁹¹

According to Titus Livius, *nexum* was one of the strongest bonds of *fides*.⁹² As Imbert emphasised, the reference to *fides* in this passage was not a mere rhetorical twist. *Fides*, in this context, did not mean the moral *fides* of the first century BCE; it designated the ancient social relation of submission and discretionary power.⁹³

The religious and social imperatives of *fides*, recognized by the divine law and the social customs, failed to shelter debtors from abuses or cruel treatments by their creditors, and Titus Livius remarked that the link of *fides* became one of punishment.⁹⁴

5.2. *Fides, sponsio, and stipulatio*

Section 4.1 above shows that the ancient solemn promise (*sponsio*) belonged to divine law and to pontifical jurisdiction. Because of the absence of sources, there has been extensive debate concerning the period when *sponsio* became actionable under the secular law, but no consensus has emerged. It is conjectured that this happened as a consequence of the *Lex Poetelia* of c. 326 BCE,⁹⁵ or of the adoption of the *Lex Silia*, probably in 277 BCE.⁹⁶ The discovery of the new fragments of Gaius in 1933,⁹⁷ however, showed that *sponsio*, understood

⁹⁰ Henry John Roby, *Roman Private Law in the Times of Cicero and of the Antonines*, vol. 1 (2000), 309; Jean-Claude Richard, "Patricians and Plebeians: The Origins of a Social Dichotomy" in K. A. Raaflaub (ed.), *Social Struggles in Archaic Rome* (2005), 107, 119. The literature on *nexum* is vast and marked by many controversies. As Buckler observed, "There is no more disputed subject in the whole history of Roman Law than the origin and development of this one contract." (Buckler, *supra* note 55 at 22).

⁹¹ The oldest mention of *nexum* comes from the Law of the Twelve Tables: "When he shall perform *nexum* and *mancipium*, as his tongue has pronounced, so is there to be a source of rights." (Table 6.1 in Michael H. Crawford (ed.), *Roman Statutes*, vol. 2 (1996), 583.

⁹² Livy, 8.28 in Titus Livius, *The History of Rome*, trans. by D. Spillan, vol. 1 (1872), 541.

⁹³ Imbert, *supra* note 60 at 344.

⁹⁴ Livy, 6.34 in Titus Livius, *The History of Rome*, trans. by D. Spillan, vol. 1 (1872) at 433-434.

⁹⁵ Clark, *supra* note 41 at 618.

⁹⁶ Muirhead, *supra* note 39 at 230.

⁹⁷ See Francis de Zulueta, "The New Fragments of Gaius", 24 *The Journal of Roman Studies* (1934), 168-186, and 25 *The Journal of Roman Studies* (1935), 19-32, and 26 *The Journal of Roman Studies* (1936), 174-186.

as a promise to pay a definite sum of money, was known and actionable at the time of the Law of the Twelve Tables.⁹⁸

Sponsio probably appeared in secular law in three capacities: (a) as a general form of contract adapted to a multitude of transactions; (b) as a form used in procedural law; and (c) as a mode of contracting suretyship.⁹⁹ In all three forms, *sponsio* consisted of a question asked by the promisee and answered by the promisor. The answer had to conform literally to the question, any difference or interruption between question and answer rendering the *sponsio* void.

During the early Republic, as the force of the religious law decreased, the religious charge of *sponsio* started to fade, and the word *spondere* (“I undertake”) became obsolete.¹⁰⁰ Thus, a simplified version of *sponsio* was created, in the form of *stipulatio*. In contrast with *sponsio*, which was confined to Roman citizens only, *stipulatio* could be used by non-Romans as well, and could be expressed in any terms, provided that the question and the answer corresponded and were unambiguous. From this moment onward, *stipulatio* became the generic name for formal promises, and *sponsio* was restricted to the special case where the word *spondere* was used in the question and answer.¹⁰¹

The scope of *stipulatio* was very broad: any agreement could be given legal effect if its formal requirements were observed. Most notably, *stipulatio* was used to provide a personal security. In Gaius’s time (AD 130-180) three forms of suretyship were formed through *stipulatio*: *sponsio*, *fidepromissio*, and *fideiussio*. *Sponsio* and *fidepromissio* could be used to guarantee only obligations from verbal contracts (*verbis*). *Sponsio* was accessible only to Roman citizens, whereas *fidepromissio* was open also to peregrines. The expressions used in *sponsio* were:

- Do you solemnly engage to grant the same? (*Idem dare spondes?*)
- I bid it be done on my *fides* (*Spondeo, fide mea esse iubeo*)

In *fidepromissio*, the solemn words were:

- Do you promise the same, on your *fides*? (*Idem fideipromittis?*)
- I promise the same of my *fides* (*Fide promitto*)

In Justinian’s time, all three forms were fused into one type of suretyship, the *fideiussio*, which did not require any of the formalities of *sponsio* or *fideipromissio*. It merely implied a request (*iussio*) that the principal debtor be given credit on the *fides* of the surety. Hence *fideiussio* was used to guarantee any kind of obligation: verbal, literal, real, consensual, and in some opinions, even natural.¹⁰²

The creation of *stipulatio* was a cornerstone event not only in the Roman law of contract, but also in the role of *fides* as guarantee for promises. The simplified form of question and answer provided by *stipulatio* rendered legally binding many relations that hitherto depended largely on *fides* and its religious and moral penalties.

⁹⁸ Jolowicz and Nicholas, *supra* note 10 at 280-281.

⁹⁹ Buckler *supra* note 55 at 95. The literature on the original nature and role of *sponsio* and its relation to *stipulatio* is enormous. For a review of the main theories, see Reinhard Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1996), 117-125.

¹⁰⁰ It is not possible to determine with precision the date when *stipulatio* sprung from *sponsio*. Buckler believed that this should have happened with the creation of the magistracy of the peregrine praetor (Buckler *supra* note 55 at 98). Kaser believed that the *stipulatio* of the classical law was created by the fusion of the ancient *sponsio* with the secular forms of surety for appearance in court (*vades* and *praedes*). See Kaser, *supra* note 56 at 49-50.

¹⁰¹ Buckler *supra* note 55 at 96-98

¹⁰² Berger, *supra* note 39, s.v. “adpromissio”, “sponsio”; Reinhard Zimmermann, “Stipulatio” in Simon Hornblower and Antony Spawforth (eds.), *Oxford Classical Dictionary* (3rd ed., 1996), 1444-1445; Rudolph Sohm et al., *The Institutes: A Textbook of the History and System of Roman Private Law*, trans. by James C. Ledlie, (3rd ed., 1907), 298-299; Alan Watson, *The Law of Obligations in the Later Roman Republic* (1965), 1-10.

5.3. Fides, *the upright man* (*bonus vir*), and *good faith* (*bona fides*)

The way in which the notion of good faith (*bona fides*) emerged from the concept of *fides* remains largely unclear, owing to the semantic diversity of *fides*, but also to the scarcity of original resources from the Republican period. Most likely, *bona fides* drew upon both *fides* as guarantee for promise and *fides* as standard of behaviour required by divine law, social custom, and in certain relations by secular law.¹⁰³

Roman law historians linked the emergence of *bona fides* with the activity of the upright man (*bonus vir*), the arbitrator voluntarily chosen by the parties (*arbiter ex compromisso*), and the peregrine praetor (*paetor peregrinus*), within a socio-economic context characterized by the intensification of commercial exchanges among Romans and between them and the peregrines. At the same time, *bona fides* was consecrated by the actions arising from agreements made in good faith (*bonae fidei iudicia*) as the juridical yardstick for determining the extent of the condemnation. In post-classical times, *bona fides* lost its technical sense and was again conceptualized in an ethical sense, opposite the notions of intention to harm (*malignitas*), deceit (*dolus*), or violence (*vis*).¹⁰⁴

Bona fides was regarded by some authors as the *fides* of the Roman *bonus vir*, called to play the role of arbiter in an extra-judicial dispute.¹⁰⁵ *Bonus vir* was a Roman male citizen who was seen as a model of honesty and righteousness.¹⁰⁶ To be worthy of the name *bonus vir*, a high *fides*-creditworthiness was required: the person had to enjoy excellent reputation, reinforced by skills, repeated praiseworthy acts, and special concern for communitarian values. The moral character of the *bonus vir* had a double aspect: negative and positive. The negative side had to do with being free of fault; the positive side was the active proof of trustworthiness, manifested in repeated commendable actions.¹⁰⁷

An important aspect of the profile of the *bonus vir* was being an esteemed arbiter. In this context, *bona fides* represented the *fides* of the *bonus vir* arbiter, as materialized in an equitable and just decision. The arbitration of the *bonus vir* is one of the oldest methods of extra-judicial settlement of conflicts practiced in Rome. Strong evidence of the popularity and pervasiveness of this type of arbitration in Roman life is the acronym ABV, *arbitrium boni viri*, which appeared in a list of legal abbreviations dating back to the times of the Law of the Twelve Tables, compiled by the Roman grammarian Marcus Valerius Probus in the second half of the first century AD.¹⁰⁸

¹⁰³ See Martin J. Schermaier, “Bona Fides in Roman Contract Law” in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (2000), 63, 82.

¹⁰⁴ Kaser, *supra* note 56.

¹⁰⁵ See, e.g., Schermaier, who argued that the ideals of *bonus vir* and *bene agere* (proper conduct) were the main pillars of *bona fides* (Schermaier, *supra* note 103 at 89); Gagarin and Woodruff argued that *bona fides* was a standard applied by the *bonus vir*, which involved a moral judgment of the parties’ behaviour (Michael Gagarin and Paul Woodruff, “Early Greek Legal Thought” in F. Dycus Miller and C.A. Biondi (eds.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (2007), 7, 29; Schmidlin examined the ethical content of *fides* and pointed out that *bona fides* is associated with *bonus vir* and the *societas virorum bonorum* (Bruno Schmidlin, “Der verfahrensrechtliche Sinn des ex fide bona im Formularprozess”, in Ulrich von Lubtow et al. (eds.), *De Iustitia et Iure: Festgabe für Ulrich von Lubtow zum 80. Geburtstag* (1980), 359-371, discussed in Van Zyl, *supra* note 63 at 98, n. 406.

¹⁰⁶ Berger, *supra* note 39, s.v. “vir bonus.” Cato the Elder defined the *bonus vir* as a skilled farmer: “And when they would praise a worthy man (*bonus vir*), their praise took this form: ‘good husbandman, good farmer’; one so praised was thought to have received the greatest commendation.” (Cato, *On Agriculture*, preface, in William D. Hooper (trans.), *Marcus Porcius Cato, On agriculture* (1934), 3).

¹⁰⁷ Leist, *supra* note 22 at 485.

¹⁰⁸ Marcus Valerius Probus, “On the Single Letters of Fragments” in Josef Aistermann, *De M Valerio Probo Berytio* (1910); Derek Roebuck and Bruno de Loynes de Fumichon, *Roman Arbitration* (2004), 64.

Arbitration by the *bonus vir* was a purely private and informal method of resolving disputes. The disputing parties were free to choose any man enjoying a strong reputation for honesty and righteousness, and entrust him with the settlement of a dispute they were unable to sort out by themselves. In settling the dispute, the *bonus vir* was called to exercise equitable discretion and decide according to the social standards of fairness and good sense. Although the *arbiter bonus vir* was not bound by the positive law, as a righteous man, he was expected to take it into consideration.¹⁰⁹ The criterion used by the *bonus vir* in rendering his decisions was “that which is right and equitable” (*bonum et aequum*), a standard combining objective elements and principles derived from equity (*aequitas*).¹¹⁰ The Roman state was not involved in any stage of the dispute settlement. It was not involved in the appointment of the arbiter, as was the case under the procedures known as *legis actiones*, *iudicis arbitrive postulatio*, or *arbiter ex compromisso*. The state could not be called either to compel the *bonus vir* to perform the duties he had undertaken or to enforce his decision. Any party dissatisfied with *bonus vir*’s decision could bring the matter before the state courts.¹¹¹

The disputes brought before the *bonus vir* were diverse. Marcus Porcius Cato (commonly surnamed “the Censor” or “the Elder”) provides a variety of instances, mostly involving farming matters, where the judgment of a *bonus vir* was called upon to solve a disagreement. Such disputes concerned agricultural leases,¹¹² contracts for the harvesting of an olive crop,¹¹³ the quality of wine,¹¹⁴ or determining the boundary between properties.¹¹⁵ Justinian’s Digest also provides many examples of cases where the judgment of a *bonus vir* was required, such as determining the amount of a dowry,¹¹⁶ the shares in a partnership,¹¹⁷ the length of time that should be allowed to carry out a payment obligation contracted in Rome but executable in Ephesus,¹¹⁸ or the fulfilment of the condition in a conditional sale.¹¹⁹

Instances of *bonus vir* arbitration that have come down to us emphasize two important characteristics of this type of conflict resolution. First, the role of the *bonus vir* was predominantly that of an assessor, figuring out the proper solution using common sense calculations. His role was often confined to deciding specific and foreseeable issues in contracts rather than judging whether a wrong has been committed.

Second, the meaning of *bonus vir* evolved from designating a concrete trustworthy person to an abstract standard of judgment that was expected from a person in a position to decide for someone else (e.g., the surveyor or the guardian who were bound “to reason as a *bonus vir* would do,” *ac si viri boni arbitrato*).¹²⁰

Bonus vir as an idealized standard of reasoning became common. The Digest provides numerous examples where the standard of *bonus vir* was used to give legal effect to incomplete¹²¹ or ambiguous¹²² documents. Eventually, the Romans imposed the standard of

¹⁰⁹ “Horace, *Epistles*, 1.16.40-45 in Niall Rudd (trans.), *Satires and Epistles* (1979), 161.

¹¹⁰ Adele C. Scafuro, *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy* (1997), 141-153.

¹¹¹ Roebuck and Fumichon, *supra* note 108 at 46-66.

¹¹² Cato, *On Agriculture* 149.1, in William D. Hooper, *supra* note 106 at 135-136.

¹¹³ Cato, *On Agriculture* 144.2-3, 145.3 in William D. Hooper, *supra* note 106 at 127-131.

¹¹⁴ Cato, *On Agriculture* 148.1, in William D. Hooper, *supra* note 106 at 133-134.

¹¹⁵ Agennius Urbicus, *On Land Disputes*, in Brian Campbell, *The Writings of the Roman Land Surveyors: Introduction, Text, Translation and Commentary* (2000), 46.

¹¹⁶ Dig. 32.43 in Theodor Mommsen and Paul Krueger (eds.), *The Digest of Justinian*, vol. 3, trans. by Alan Watson (Philadelphia: University of Pennsylvania Press, 1985) at 86-87.

¹¹⁷ Dig. 17.2.6, in Mommsen and Krueger, vol. 2, *supra* note 116 at 498.

¹¹⁸ Dig. 45.1.137 in Mommsen and Krueger, vol. 4, *supra* note 116 at 675.

¹¹⁹ Dig. 18.1.7 in Mommsen and Krueger, vol. 2, *supra* note 116 at 514.

¹²⁰ See *supra* note 115 and note 116; see also Scafuro, *supra* note 110 at 141-153.

¹²¹ Ulpian provided a hypothetical example of the usefulness of the standard of *bonus vir* in the case of an ambiguous will. If the testator instructed the heir to make three payments, one each year, it would mean three

bonus vir to all forms of arbitration, including *arbiter ex compromisso*¹²³ and *recuperatores*.¹²⁴

The arbitration of the *bonus vir* is a particularly important stage in the transformation of *fides* from a social and moral value into the legal *bona fides*. The *bonus vir* was a trustworthy member of the community, abiding by the social code of honour and enjoying a high level of social credit (*fides*). Because of this trustworthiness, the *bonus vir* was often called to act as arbiter in a diverse array of private disputes. His *fides* was perceived as a strong guarantee that his reasoning would be in accord with the general sense of fairness and with the positive legal norms. In time, the *fides* of the *bonus vir* became an idealized standard of reasoning for those in a position to decide for another. Many persons who had discretion to affect another's interests, such as guardians and fiduciary heirs, were required to exercise judgment as a *bonus vir* would, taking into account relevant considerations and remaining disinterested. The *bonus vir* not only possessed the two virtues that were essential for trustworthiness (*fides*), namely justice (*iustitia*) and prudence (*prudencia* or *sapientia*), but was also endowed with an uncanny ability to resist self-serving impulses and avoid any suspicion of deceit.¹²⁵ This concept of procedural *fides*, reinforced by the *fides* of the peregrine praetor, contributed to the genesis of *bona fides* as a legal concept.

Between the 4th and 5th century AD, before the drafting of the Justinian compilations, the contractual *bona fides* acquired a double meaning. The objective *bona fides* was the general

equal payments. If the testator only mentioned that the heir make unequal payments, "those are owed (unless the testator has specifically given the choice to the heir) which a good man judges [*quas vir bonus fuerit arbitrates*] consistent with the resources of the deceased and the situation of the property." (Dig. 33.1.3 in Mommsen and Krueger, vol. 3, *supra* note 116 at 102).

¹²² "But, although a *fideicommissum* worded 'if you should wish' may not be due, it will be due if the wording is 'if you judge it good,' 'if you think it suitable,' 'if you hold it,' or 'shall hold it advantageous.' For there he has not left full discretion to the heir, but has committed a trust to him as an upright man [*sed quasi viro bono commissum relictum*]. Moreover, if a *fideicommissum* is left 'to such a one, if he has deserved well of you,' the *fideicommissum* will certainly be due, provided that the fideicommissary has behaved in a way that an upright man would think deserving [*quasi apud virum bonum collocare fideicommissarius potuit*]. And if left to him 'if he does not offend you,' it will equally be due, and the heir will not be able to justify a claim that the fideicommissary is undeserving, if another man who is upright and not antagonistic would admit him as deserving [*si alius vir bonus et non infestus meritum potuit admittere*]." (Dig. 32.11. in Mommsen and Krueger, vol. 3, *supra* note 116 at 73-74). See also Roebuck and Fumichon, *supra* note 108 at 62.

¹²³ *Arbiter ex compromisso* was appointed by both parties to a conflict, who agreed in an act called *compromissum* to pay a penalty if one or the other failed to comply with the arbiter's verdict. The activities of the *bonus vir* and *arbiter* overlapped, but were not identical: whereas the *bonus vir* mostly assessed facts, the *arbiter* was also authorized to determine the penalty and pronounce judgment. Although the arbiter was held to the general standard of *bonus vir*, the benchmarks for his decisions were set forth in greater detail, according to the stage of the judicial act under his scrutiny. He decided *ex fide*, at the formation stage, *ex aequo* with regard to the object and effect of the act, and *ex fide* and *ex aequo* concerning its completion. The extra-judicial arbiter judged according to the requirements of the social and moral concepts of *fides* and *aequum*. His decisions were *bonae fidei*, as opposed to those of the magistrates, which were *stricti iuris* (Roebuck and Fumichon, *supra* note 108 at 94-152; Friedrich Ludwig von Keller, *De la Procedure Civile et des Actions chez les Romains* (2nd ed., 1870), 424-425; Berger, *supra* note 39, s.v. "arbiter ex compromisso").

¹²⁴ *Recuperatio* was the procedure designated to settle conflicts between Roman citizens and foreigners. The *recuperatores* acted as private adjudicators in the second stage of the trial (the stage *in iure*). There were no strict rules regarding their competence aside from the general standard of *boni viri*. Roebuck and Fumichon 65; William W. Buckland, *A Manual of Roman Private Law*, (2nd ed., 1939) at 384-385; Muirhead, *supra* note 39 at 223-225.

¹²⁵ See Cicero, *On Obligations*, transl. by P.G. Walsh (2000) 2.9.33: "Trust reposed in us can be established by two qualities, that is, if people come to believe that we have acquired prudence allied with justice... As for men of justice, in other words good men [*boni viri*] trust in them depends on their having no suspicion of deceit and injustice in their make-up. So these are the men to whom we believe our safety, our possessions, and our children are most justifiably entrusted."

expectation that persons should behave honestly and fairly in legal transactions. Acting dishonestly was considered to be against the dictates of good faith (*contra bonam fidem*). The subjective *bona fides* designated the belief that one's actions were just and lawful and did not violate another's legitimate interests.¹²⁶ In certain contexts, the subjective good faith also designated the unawareness of a legal shortcoming, such as the good faith purchase of a fugitive slave. In the law of property, *bona fides* had a particular meaning. The person who possessed the property of another may, insofar as the general rules of law permitted, acquire the ownership of such property by use (*usucapio*). In such case, *bona fides* consisted of believing that his possession originated in a good title, i.e., the transferor was the owner of the transferred property.¹²⁷

5.4. *Fides and bonae fidei iudicia (actions arising from agreements made in good faith)*

The transformation of the *fides* of the *bonus vir* into the standard of *bona fides* was a complex process influenced by the complex social and economic realities of the late Republic. In archaic Rome, the socio-economic exchanges were limited to the narrow Roman community, where the status of everybody was clearly defined and their *fides*-social credit known. With the expansion of Roman commercial activities throughout the Mediterranean basin, and the increasing influx of foreigners into Rome, economic interactions took place between persons who had no knowledge of the other's creditworthiness. In these circumstances, it is likely that commercial practice adopted *fides*-creditworthiness of the *bonus vir* as an abstract criterion for assessing the obligations of each contractual party.¹²⁸ The new social and economic realities called for legal reforms that would grant legal recognition of the informal relations based on *fides* developed between Romans or between Romans and foreigners. To adapt to the new economic and social realities, the number of praetors was increased, and around 242 BCE the office of peregrine praetor was created to deal with disputes between foreigners and citizens.

The task of reforming the civil law (*ius civile*) was entrusted to a group of jurisdictional magistrates, comprising the praetors, the officers known as *curule aediles*, and the provincial governors. Using their power to formulate legal principles in order to settle a dispute (*iurisdictio*), the praetors created principles, institutions, and remedies that were not based on civil law, and which later formed the *ius honorarium* ("the law laid down by magistrates"). The creation of *ius honorarium* had a double justification. First, because of its rigidity, the *ius civile* was inadequate for the administration of justice among Roman citizens. Second, the *ius civile* was not applicable to legal relations between Romans and foreigners or between foreigners.¹²⁹

¹²⁶George Mousourakis, *The Historical and Institutional Context of Roman Law* (2003), 34.

¹²⁷Jolowicz and Nicholas, *supra* note 10 at 152. Similarly, Levy-Bruhl distinguished two manifestations of the legal *bona fides*. First, there is the social *bona fides*, introduced by the *ex fide bona* clause in the *bonae fidei iudicia* to provide legal support for the duty to contract fairly and to prevent further abuses caused by the rigidity of *ius civile*. This manifestation of *bona fides* requires the contracting parties to act fairly toward each other, as a *bonus vir* or *bonus paterfamilias* (an upright head of the family) would do. This type of *bona fides* is devoid of any moral content, imposing a reasonable behavior on the contracting parties, not too greedy but also not excessively scrupulous. The second manifestation is the moral *bona fides*, synonym of sincerity (Henri Lévy-Bruhl, "Book Review of *Dalla 'Fides' alla 'Bona Fides'* by Luigi Lombardi", 39 *Revue des Etudes Latines* (1962) 438, 439.

¹²⁸Roberto Fiori, "*Fides et bona fides: Hiérarchie sociale et catégories juridiques*" 4 *Revue Historique de Droit Français et Étranger* (2008), 456, 474, C.C. Turpin "Bonae Fidei Iudicia", 23 *Cambridge Law Journal* (1965), 260, 262; Kaser, *supra* note 56 at 33.

¹²⁹Kaser, *supra* note 56 at 19.

Bonae fidei iudicia are one of the most prominent examples of such praetorian innovations. Historians hold controversial views regarding the original purpose of actions of this type. Some authors believe that they were created by the peregrine praetor for the commercial relations between foreigners or between Romans and foreigners, but other legal historians are inclined to believe that such actions were initially created by the urban praetor for relations between Roman citizens.¹³⁰ Using their authority, the praetors created the *bonae fidei iudicia* to litigate relations whose binding character resided not on the written law, but on the constraining force of *fides* as a social, moral, or religious concept. Since they were not based on the civil law, *bonae fidei iudicia* were available also to foreigners.¹³¹ Initially part of *ius honorarium*, *bonae fidei iudicia* were introduced into civil law between the end of the 2nd and the beginning of the 1st century BCE.¹³²

The original attestations of this type of action are scarce. The most important references come from the writings of Cicero, Gaius, and Justinian. The oldest reference is found in Cicero's *On Duties*. Cicero mentioned that at the time of Quintus Mucius Scaevola (140-88 BC) the *bonae fidei iudicia* covered five legal relationships: the guardianship (*tutela*), the fiduciary agreement (*fiducia*), the mandate (*mandatum*), the purchase and sale (*emptio, venditio*), and the lease and hire (*locatio, conductio*).¹³³ Gaius's *Institutes*, of c. 161 AD, add to the list the administration of another's affairs without authority (*negotiorum gestio*), the deposit (*depositum*), the partnership (*societas*), and the action for recovery of a dowry (*rei uxoriae*).¹³⁴ Finally, Justinian's *Institutes*, of 533 AD, extended the list with the actions concerning division of property (*actiones familiae herciscundae* and *communi dividundo*).¹³⁵ These relationships were not marked by a particular emphasis on *fides* as keeping one's word, but rather on *fides* as compliance of the dominant party with a traditional standard of behavior expected by society in such relations. The exact role played by *fides* and *bona fides* in the new actions is, however, controversial. On one hand, it has been argued that *bonae fidei iudicia* were aimed at enforcing relations in which *fides*, as a duty to keep one's promise existing outside of civil law, was invoked as basis of actionability.¹³⁶ On the other hand, the creation of *bonae fidei iudicia* was regarded as a purely procedural reform, aimed at conferring greater freedom on the judge (*iudex*) by allowing him to determine the amount of the award

¹³⁰ Many scholars attribute the development of *bonae fidei iudicia* and other early institutions of the *ius gentium* ("the law of the peoples") to the judicial activity of the peregrine praetor. Consequently, such actions were recognized only subsequent to the creation of the office of peregrine praetor, in 242 BCE (see Béatrice Jaluzot, *La bonne foi dans les contrats: étude comparative de droit français, allemand et japonais* (2001) at 26, n. 4; Raymond Monier, *Manuel Élémentaire de Droit Romain*, t.1, (6th ed., 1970), 153, n. 2). Other authors believe that these actions were introduced by the urban praetor. According to Wieacker, the fact that the *bonae fidei iudicia* were later considered part of the civil law is more easily explained if these actions had initially been the creation of the urban praetor (see Franz Wieacker, "Zum Ursprung der *bonae fidei iudicia*", 80 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (1963), 1; André Magdelain, "Gaius IV, 10 et 33: Naissance de la procédure formulaire", 59 *Tijdschrift voor Rechtsgeschiedenis* (1991), 239, 248). Watson adopted a similar position, arguing that although it is not clear that the obligations based on good faith belonged to the civil law from the beginning, the *bonae fidei* actions were consecrated by the activity of the urban praetor and not by the peregrine praetor (Alan Watson, *Law Making in the Later Roman Republic* (1974), 89-92).

¹³¹ Kaser, *supra* note 56 at 18-19, 33.

¹³² Jaluzot, *supra* note 130 at 75.

¹³³ Cicero, *On Duties* 3.17.70, in Higginbotham, *supra* note 7 at 46.

¹³⁴ Gaius, *Institutes* 4.62 in Francis de Zulueta (trans.), *The Institutes of Gaius* (1946).

¹³⁵ Justinian, *Institutes* 4.6.28 in John B. Moyle (trans.), *The Institutes of Justinian* (2d ed., 1889) at 182. These enumerations do not exhaust the category of *bonae fidei iudicia*. See Jolowicz and Nicholas, *supra* note 10 at 211-212.

¹³⁶ Turpin *supra* note 128 at 262; Kaser, *supra* note 56 at 19, 33.

according to the equity of the case, and not according to the principles of civil law (*ex iure Quiritium*).¹³⁷

Turpin argued that a separation between the *bonae fidei iudicia*, in which *fides* was originally invoked as the ground of obligation, and those in which it was, from the beginning, only the measure of the judge's discretion, may be a false dichotomy. Even in actions in which *fides* was the basis of liability, it must also have influenced the extent of judicial discretion. In a claim for an *incertum* (a promise of something not clearly definable or distinguishable from other things of similar kind), the issues of establishing the plaintiff's liability and ascertaining the amount due could not be easily separated. If *fides* governed the former issue, it could not be without relevance to the latter.¹³⁸ Similarly, Schermaier pointed out that the answer to the question whether *bona fides* was a new source of obligations or merely a tool for the judge to assess the standard of performance may lie somewhere between the two hypotheses. Extra-legal ties based on *fides* existed before the introduction of the *bonae fidei iudicia*, and for some of these legal remedies were introduced before the said actions. For the social standard of *fides* to become legally relevant, however, it had to be integrated into one of the claims protected by a procedural formula. It may be assumed that the role of *fides* within the formula was to create a new source of obligations and to increase the judge's discretion.¹³⁹

The creation of the *bonae fidei iudicia* represents a central episode in the history of *fides* as a legal concept. *Bonae fidei iudicia* turned *fides* into a legal concept by consecrating it as a standard of judicial reasoning (the interpretation of facts and the individualization of punishment as a *bonus vir* would have done), and as a source of implicit obligations (the obligations that the social *fides* attached to a relation or position). Nevertheless, breach of *fides* was not treated similarly in all instances of *bonae fidei iudicia*. In some relations, such as purchase and sale (*emptio venditio*) or lease and hire (*locatio conductio*), breach of *fides* amounted to breach of an informal, express, or implied promise. In other relations, such as guardianship (*tutela*) or mandate (*mandatum*), where the traditional *fides* (confidence reposed and creditworthiness enjoyed) found its main manifestations, breach of *fides* was considered particularly heinous and it led to infamy.¹⁴⁰

6. *Fides, bonus vir, and fiduciary relations*

The evolution of *bona fides* continued beyond Roman antiquity, throughout the medieval *ius commune*. During this period, the concept was enriched with numerous legal, ethical, and Christian valences, and became an extraordinarily complex, if not undefinable, legal institution.¹⁴¹ Although an amorphous notion, good faith evolved to be one of the foundational concepts of contemporary private law. At its core, good faith evokes bilateral duties of keeping one's promise, abstaining from deceiving the other party, and abiding by duties that can be implied as a matter of fair contractual interpretation.¹⁴² Such mutual obligations of

¹³⁷ Wieacker, for instance, argued that several institutions rooted in the sacral, extra-legal *fides*, such as guardianship (*tutela*), fiduciary agreement (*fiducia*), and primitive partnership (*societas*) were already recognized by the civil law and sanctioned by *legis actiones* at the time the praetor created the *bonae fidei iudicia*. In the case of such relations, the *bona fides* was invoked in the formula of the new actions created by the praetor not as a source of obligations, but only as a means to modernize the existing remedies (Wieacker, *supra* note 130, discussed in Turpin, *supra* note 130 at 264-265).

¹³⁸ Turpin, *supra* note 130 at 266.

¹³⁹ Schermaier, *supra* note 103 at 74-75.

¹⁴⁰ Jolowicz and Nicholas, *supra* note 10 at 288.

¹⁴¹ See James Gordley, "Good faith in contract law in the medieval *ius commune*" in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (2000), 93, 116.

¹⁴² *Ibid.* at 117.

good faith exist in fiduciary relations as well, but it is generally agreed that the duty of good faith is not a fiduciary duty.¹⁴³ *Bona fides*, therefore, is not particularly useful in understanding the essence of fiduciary relations and fiduciary duties.

The concept of *bonus vir*, however, appears a more promising one. As Section 5.3 above shows, the meaning of *bonus vir* evolved from designating a concrete trustworthy person into an abstract standard of judgment that was expected from a person having discretionary power over someone else's interests. The standard of *bonus vir* resembles closely the standards imposed by contemporary law on fiduciaries in two respects. First, considerations of self-interest are excluded *ab initio* from the exercise of judgment. As Cicero's work shows, a person is a *bonus vir* only if he can resist acting in his own interests to another's detriment.¹⁴⁴ Second, the judgment is based on relevant objective factors as opposed to being guided only by the decision-maker's free will. The resemblance between the two models may be more than a mere coincidence. The *bonus vir* standard appears in several instances in relation to the early jurisdiction of the English Court of Chancery. The celebrated American jurist Norton Pomeroy described the equitable jurisdiction of early Chancellors as the exercise of a power to do justice according to the requirements of the Roman principle *arbitrium boni viri*.¹⁴⁵ *Bonus vir* was mentioned also in relation to the use, the forerunner of the trust. Lord Bacon defined the use as "the equity and honesty to hold the land in *conscientia boni viri*,"¹⁴⁶ i.e., according to the conscience or judgment of a *bonus vir*. The work of Lord Stair offers another example. Stair described the position of a general mandatary as requiring the exercise of discretion as a *bonus vir* would: "The obligation arising from mandate is chiefly upon the part of the mandatar, to perform his undertaking... Where the mandate is not special, it must be performed *secundum arbitrium boni viri*."¹⁴⁷

The presence of the "judgment of a *bonus vir*" in the writings of early modern legal scholars as a standard of exercise of discretion over another's interests is remarkable. This concept conveys the idea that persons occupying positions of trust and confidence are expected to exercise discretion based on relevant factors, excluding considerations of self-interest. The same idea lays at the heart of the contemporary law of fiduciary duties.¹⁴⁸

7. Conclusion

Fiduciary relations are a constantly expanding legal category. The increasing applicability of fiduciary duties and the continuing tendency to invoke breach of these duties as an instrumental shortcut to alluring legal remedies create a pressing need for conceptual clarity. Some scholars look back to the etymological and legal origins of the word "fiduciary," in hope of elucidating the essence of the fiduciary relation. This article traced the origins of *fides* and its evolution in early Roman law. It showed that *fides* entered the secular law mainly as *bona fides*, which evolved into a cornerstone of contemporary private law applicable across a wide range of contractual relations. In contrast, *bonus vir*, a standard of judgment based on

¹⁴³ Valsan, *supra* note 1, 44-47.

¹⁴⁴ Cicero, *supra* note 125 at 3.19: "If a good man, then, should have this power, that by snapping his fingers his name could creep by stealth into the wills of the wealthy, he would not use this power, not even if he had it for certain that no one at all would ever suspect it... [T]he just man, and he whom we deem a good man, would take nothing from any man in order to transfer it wrongfully to himself."

¹⁴⁵ John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, vol. 1 (1881), 35-36.

¹⁴⁶ Francis Bacon, *The Works of Lord Bacon: With an Introductory Essay*, vol. 1 (1838) 584. See also Edward Hilliard (ed.), *Sheppard's Touchstone of Common Assurances*, vol. 1 (7th ed., London: J&WT Clarke, 1820) 501 (defining the use as "the [right in equity to have the] profit or benefit of lands and tenements; or, as others define it, the equity and honesty to hold the land in *conscientia boni viri*...").

¹⁴⁷ James Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland* (1759), 115.

¹⁴⁸ Valsan, *supra* note 1, 180-194.

fides, appears to be a more promising path for linking the Roman *fides* with contemporary fiduciary duties.

In ancient Roman society, where the legal sphere was circumscribed by complicated and rigid procedures, *fides* belonged to the realm of “pre-law.”¹⁴⁹ The archaic *fides* was a religious and social concept, intimately linked with the idea of subordination and inequality between parties. Perceived as a magic virtue, *fides* was associated with the total and confident surrender of one party or nation to another, generating a discretionary, even magic power of the dominant party over the weaker one. Under the jurisdiction of the pontiffs, the failure to observe the requirements of *fides* was regarded as a sin that could render the offender *sacer*, exposing him to the wrath of the gods and that of his fellow citizens. Under the censorship, breach of *fides* turned the upright and honest into the evil and disloyal, and attracted ignominy, a punishment with severe social consequences. Under the praetorian jurisdiction, breach of *fides* triggered infamy. The infamous could no longer offer his social credit as a pledge, and was precluded from postulating and testifying as witness, or from asking for witnesses in the praetor’s court.¹⁵⁰

In the pre-classical period, the archaic *fides* ceased to be a source of actual subordination and dominance, and evolved toward a relation of confidence or moral ascendancy. Toward the end of the Republic, the relations of power and subordination between politically equal citizens were no longer permitted. From that period onward, *fides* designated primarily confidence between equals or between parties voluntarily placed on a footing of inequality. In the late Republic, *fides*-confidence acquired a multitude of meanings, including respect of promise, protection, and creditworthiness. *Fides*-confidence had almost the opposite of the archaic connotation of complete abandonment and discretionary domination. The focus of *fides* moved from dominance to protection, from the powers of the dominant party to its duties toward the protected one. Despite its importance, *fides* was not a legal concept as such, in the sense of being governed by precise rules and remedies. Toward the end of the Republic, *bonae fidei iudicia*, actions were created for the most important relations based on *fides*.

From the perspective of substantive law, *fides* as confidence reposed and trustworthiness remained confined to rules of limited applicability and to particular legal institutions. Duties of loyalty and care inspired by the pre-legal *fides* were consecrated in guardianship (*tutela*), fideicommissary obligation (*fideicommissum*), fiduciary agreement (*fiducia*), partnership (*societas*), mandate (*mandatum*), and possibly the administration of another’s affairs without authority (*negotiorum gestio*). The step of turning these discrete legal manifestations of the dictates of *fides* into a general regime of an abstract fiduciary position was never taken. What Roman law knew, therefore, was no more than specific fiduciary institutions and offices, each developed and employed in its own circumscribed sphere of the law. The metamorphosis of *fides*, however, did not end when the Dark Ages set in. With the rise of Christianity, canon law and ecclesiastic courts, the religious, moral, and legal sides of *fides*, were fused to create a concept of unparalleled complexity. From a procedural perspective, however, *fides* as confidence reposed and trustworthiness penetrated civil law in the form of *bonus vir*, the archetypal Roman citizen who enjoyed high social creditworthiness. *Bonus vir* evolved from an actual arbitrator to a standard of decision making applicable to persons holding discretionary authority over the interests of others. The *bonus vir* standard, requiring absence of self-interest and exercise of discretion based on relevant considerations, is the closest that Roman law came to an abstract fiduciary position.

¹⁴⁹ Jean Imbert, “De La Sociologie au Droit: La ‘Fides’ Romaine” in *Droits de l’antiquité et sociologie juridique: Mélanges Henri Lévy-Bruhl* (1959), 407, 411.

¹⁵⁰ Fiori, *supra* note 128 at 469-470.