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# EQUALITY IN EXCHANGE

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## I. EQUALITY OF WHAT?

Does equality matter to the normative evaluation of exchange? If so, equality of what? In a series of publications over two decades, James Gordley has vigorously articulated and defended a set of views about equality in exchange drawn from the Scholastic jurists in the Aristotelian tradition. In these works Professor Gordley has repeatedly asserted that, in the Scholastic tradition he intends to defend, justice in voluntary exchange "requires that parties exchange performances of equal value."<sup>1</sup> Gordley argues that this principle of justice is crucial for explaining why courts enforce some kinds of agreements but not others and why courts interpret contracts the way they do.

In particular, Gordley defends the Scholastic distinction between contracts for making gifts and contracts for making exchanges—a distinction that rests on the role of equality in those transactions. Gordley says that Thomas Aquinas and others distinguished exchanges based on equality of what is exchanged from gifts in which one person enriches another at his own expense. The unilateral act of bestowing a gift was said to express the virtue of liberality while the bilateral act of exchange was said to express the virtue of commutative justice.<sup>2</sup> The Scholastics thought that every contract must have a rational ground or *causa*, based on the intention of the maker of the

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1. See James Gordley, "Equality in Exchange," in *California Law Review* 69 (December 1981) 1587 at 1590. In this tradition, the terms of a contract must not only correspond to the will of the parties, but also be fair: "In a contract of exchange, these terms maintained equality in the value of what was given and received." See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), 110. "In voluntary transactions, commutative justice requires the parties to exchange resources of equivalent value." Gordley, "The Principle Against Unjustified Enrichment," in *Gedächtnisschrift für Alexander Lüderitz* (Munich: C.H. Beck, 2000), 213-231, at 218. "The rules [of contract law] should require, so far as practicable, in the case of an exchange, that each party receives an equivalent. . . . Each party obtains something he wants by giving something of equivalent value in return." Gordley, "Contract Law in the Aristotelian Tradition," in P. Benson, ed. *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001), 265-334, at 267 and 309.

2. "Philosophers and theologians such as Thomas Aquinas distinguished between exchanges based on commutative justice and gratuitous arrangements based on the Aristotelian virtue of 'liberality,' which leads a person to make gifts. They then tried to place the Roman contracts in one category or the other." Gordley, "Equality in Exchange," 1623.

contract: one ground would be the exchange of equivalents while another ground would be the bestowal of a benefit. "According to the doctrine of *causa*, every enforceable contract had to be made for one of two *causae* or reasons: 'liberality,' or the receipt of a performance in return for one's own."<sup>3</sup> These two distinct *causae* become the basis for the later distinction between gratuitous and onerous contracts: "The natural lawyers . . . thought there was a fundamental distinction between promises to give and promises to exchange. According to the doctrine of *causa*, these were the two types of promises that ought to be binding."<sup>4</sup> A gratuitous contract enriches one party at the other's expense while an onerous contract requires an exchange of equivalent value.<sup>5</sup> It must be noted that both of these kinds of contracts are defined on the explicit assumption that such transactions are essentially of a zero-sum nature: in gift, one party enriches the other party at his own expense; in exchange, neither party is enriched.<sup>6</sup> Finally, just as an act of commutative justice in exchange must be carefully distinguished from an act of liberality in the bestowal of a gift, so must commutative justice be carefully distinguished from distributive justice. According to Gordley, the proper intention of the act of exchange must be to preserve the existing distribution of wealth; he assigns to the government exclusive responsibility for the just distribution of wealth and he says that acts of exchange ought not to be used to redistribute wealth.<sup>7</sup>

I will attempt to evaluate the merit of these claims and try to resist the temptation to quibble with Gordley about whether they are genuinely Aristotelian; I will, however, concede that Gordley's claims are widely shared

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3. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 77.

4. *Ibid.*, 137.

5. "In a gratuitous contract, the donor must actually intend to benefit the other party. . . . In an onerous contract, a party must receive, not simply a counterperformance, but one of equivalent value." Gordley, "Contract Law in the Aristotelian Tradition," pp. 297-298. Of the late Scholastics: "They thought that there were two good reasons or *causae* why one party might confer a benefit on the other. One was liberality: he wished the recipient to benefit at his own expense. The other was voluntary commutative justice: he wished to receive, as of right, something else in exchange for what he gave." Gordley, "The Principle Against Unjustified Enrichment," 227.

6. Gordley is clear about the zero-sum nature of these transactions: ". . . an act of liberality did enrich one party at the other's expense . . . commutative justice meant, not merely that each party received something in return for what he gave, but that each received something equivalent in value to what he gave. Thus, the principle against unjust enrichment was not really violated because neither party was enriched." See "The Principle Against Unjustified Enrichment," 227.

7. "While distributive justice secures a fair share of wealth for each person, commutative justice preserves the share that belongs to each. . . . If the distribution of wealth is unjust, it should be changed by a social decision, rather than by individuals who go about redistributing wealth on their own. . . ." Gordley, "Contract Law in the Aristotelian Tradition," 267 and 308.

by the late "Scholastic" jurists he discusses. All of these claims stem from Gordley's understanding of equality in exchange, so we must first get clear about what Gordley means by "equal value" in exchange. Gordley's frequent assertion that justice in exchange requires that the performances exchanged be equal in "value" is fundamentally ambiguous and invites misunderstanding—an invitation that has been accepted by several of Gordley's critics. As an avowed Aristotelian, Gordley does not explicitly invoke Aristotle's own distinction between "use value" and "exchange value" to disambiguate his own definitions of what is being equated in exchange.<sup>8</sup> If we understand the equality of value in terms of use-value, understood as the subjective utility of what is exchanged, then justice in exchange would mean that each party to the exchange would derive the same overall benefit from it. But Gordley is clear, in other contexts, that what makes for equality in exchange is not the subjective use value of what is exchanged: "I am not claiming that each party places the same personal value on what he gives and gets, or that each party should place the same personal value on what he receives as the other party does. . . ."<sup>9</sup> What is equated, then, in an exchange, is not use value but exchange value, as measured in money—that is, the market price. If each party to an exchange receives the same exchange value as measured in money, then each party preserves his stock of what Gordley calls "purchasing power."<sup>10</sup> By defining equality in exchange in terms of market prices and the purchasing power of the parties, the notion that both gifts and exchanges are zero-sum transactions becomes intelligible. For when I transfer a gift of a certain price to another person, their gain in purchasing power exactly equals my loss; and when we exchange at equal market prices, each of our stocks of purchasing power remain constant. By contrast, if we define gifts and exchanges in terms of their subjective use-value, then all voluntary transactions would have a positive sum. It is a basic principle of modern economics that one man's gain is not necessarily another man's loss; but this principle assumes that what matters in a transaction is the subjective well-being of each party. Gordley admits that in terms of use value, all voluntary transactions are of a positive sum, but he insists that the norm of justice governing exchanges requires equality of market price in what is exchanged,

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8. See Aristotle, *Politics* I, 9, 1257a 6-13.

9. See "Contract Law in the Aristotelian Tradition," 312.

10. Gordley admits that the ambiguity of his expression "equal value" has caused misunderstanding among his critics: "Critics of my argument have sometimes missed the point that I am claiming that exchange at the market price preserves (so far as possible) each party's share of purchasing power. Of course, the personal value that each party places on the resources he receives will necessarily be greater than the value he places on the resources he gives. Otherwise he wouldn't exchange." See "Contract Law in the Aristotelian Tradition," 312.

so that the stock of purchasing power of the parties is not changed by the exchange.

Let's pause to consider the logical structure of the Scholastic analysis of gift and exchange transactions. I will develop a simplified Scholastic model for the normative evaluation of transactions as an ideal type so that we can appreciate the integrity and power of this mode of analysis. So my principal concern here is to explore the basic logic of this model rather than to explore the complex deployments of that model by the various Scholastics. In my view, the chief philosophical value of the Scholastic analysis of transactions lies not in its complex applications to real-world problems but in the basic logic of its approach—an approach whose simplicity and clarity forces us to confront the most elementary issues in the morality of gift, transfer, and exchange transactions. As we shall see, there is a striking contrast between the basic logic of this model of transactions and the complex modifications and subsidiary claims that are added to it by various Scholastics as they attempt to evaluate complex real-world legal problems. Just as the beauty and simplicity of the geocentric model of the cosmos became lost amidst the myriad epicycles added to it in order to predict real observations, so the beauty and simplicity of the Scholastic analysis of transactions is often obscured by its complex modifications when deployed in legal analysis. As with any scientific theory we must ask these fundamental questions: Are the peripheral modifications of the basic model logically derived from its core axioms or just *ad hoc* supplements deployed to handle seeming anomalies? Is there an alternative model that might more simply and elegantly account for both the core cases and the seeming anomalies, for both the basic cycles and the myriad epicycles?

What is the basic logic of the Scholastic analysis of transactions? In any transaction, we find both a set of relations and a set of things related or *relata*. The *relata* are the parties to the transaction and the object or objects transferred; they are related by three main relations: the relation between the parties, the relation between the objects (if there is reciprocity), and the relation between each party and the object given or received. Every normative theory of transactions must take account of all of these relations and *relata* but each theory focuses on one or another and subordinates the rest. What is distinctive and important about the Scholastic analysis is its basic focus upon the object or objects transferred rather than on the parties to the transaction; in an exchange, what is most salient for the Scholastics is the relation between the objects exchanged. Of course, the Scholastics also considered the relation between the parties to the exchange and, in particular, whether that relation involved a voluntary and shared agreement or was characterized by fraud, mistake, or duress. But the relation between the parties was logically subordinated to the relation between the objects: if there was an improper

relation between the objects exchanged (for example, a gross inequality in value), then we might explain that injustice by looking to an improper relation between the parties, such as fraud, mistake, or duress. To use our modern concepts of substantive and procedural fairness, the Scholastics thought that justice in exchange was primarily a function of substantive fairness in the relation between the objects exchanged rather than of procedural fairness in the relation between the parties to the exchange.<sup>11</sup> So the Scholastic insistence on the primacy of the relation between the objects exchanged forces us to consider the basic question whether justice in exchange is primarily about the relation of the objects exchanged or primarily about the relation of the parties to the exchange.

Having selected the relation of the objects exchanged as the fundamental locus of justice, the Scholastics had to consider what kind of relation between objects transferred or exchanged was necessary and sufficient for justice. In some transactions objects are merely transferred from one party to another, such as in a gift or a distribution, while in other transactions objects are exchanged. Any theory of transactions focused on the object or objects transferred must make a basic distinction between the unilateral transfer of an object and an exchange of objects. For no one rule about the value of the object or objects transferred will apply to all kinds of transactions: in a gift or distribution, one party transfers value to another, while in an exchange, each party transfers to the other. According to Aquinas, moral acts are classified according to the intention of the agent, so the Scholastic jurists distinguished an intention to enrich another at one's own expense as the basis of the acts of liberality and of distributive justice and an intention to obtain what we need by preserving the equality of resources between the parties as the basis of acts of commutative justice.

This strong distinction between unilateral transfers and bilateral exchanges is necessary for this theory to provide normative standards by which to evaluate the justice of a transaction. For unless we know whether a transaction is a transfer or an exchange, we cannot judge its substantive fairness. If we know the parties intend an exchange, then we know what justice requires, namely, the equal value of the objects exchanged. But what if the transaction is actually a gift or a distribution? In these transactions, there must of necessity be an inequality of what is exchanged, in the sense that one party must enrich the other at his own expense, besides the other moral criteria by

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11. Thus Gordley, for example, rejects the view that "the reason relief should be given is because of procedural unfairness, for example, because of a disparity in bargaining power"; instead, he endorses the Scholastic view that "the reason relief is given must be that the terms are substantively unfair." See "Contract Law in the Aristotelian Tradition," 315-316.

which we might judge the goodness of a gift or distribution. For a theory of transactions focused on objects, rather than on parties, there must be a fundamental difference between an exchange and a transfer, since one involves two objects and the other involves one object. What we shall find among the Scholastics are several arguments supporting a strong logical and principled distinction between transfers and exchanges. Exchanges, gifts, and distributions are said to reflect fundamentally different intentions and to embody different virtues; we will find Scholastics strongly implying that exchanges and transfers are mutually exclusive kinds of transactions. As we shall see, in dealing with actual legal cases, the Scholastics were forced to acknowledge that many morally justified transactions combine elements of transfer and of exchange; unfortunately, in these mixed cases, the requirement of equality in what is exchanged is no longer relevant. Indeed, no theory based on substantive fairness can offer much normative guidance for exchanges involving elements of gifts or distributions, since by definition these mixed transactions lack substantive fairness.

Finally, a theory for the normative evaluation of transactions focused on the value of the objects transferred must offer a means of measuring that value so that we can know whether a transaction is an exchange of equal values or a transfer of unequal value. The Scholastic theory resolutely defines the value of the objects in a transaction by their exchange value; and where exchange is conducted by means of money, the exchange value is the market price. The decision to evaluate the justice of a transaction by means of the price of what is transferred or exchanged leads to some interesting, if counterintuitive, ideas about the intentions of agents in a transaction. Recall that, according to the Scholastics in the Thomistic tradition, every moral act gets its species from the intention of the agent. What this means for the theory of the just price is that a gift becomes defined as an act whereby I intend to enrich another person at my own expense. Yet a virtuous gift-giver might well think that by giving a gift he intends, not to enrich another person at his own expense, but to benefit himself and the recipient; he might indeed think that to give a gift benefits the giver more than the receiver. But if we focus our normative analysis on the market price of the object transferred, then the Scholastics are right that a gift enriches the recipient at the expense of the giver. Similarly, the theory of the just price tells us that a just exchange reflects the intention of the parties neither to enrich themselves nor their partners but to exchange objects of equal market value so as to preserve the equal purchasing power of the parties. Yet a virtuous person entering into an exchange might well say that he intends to find a way to enrich himself and his partner by a mutually advantageous bargain. In short, from the perspective of the moral reasoning of virtuous agents, neither the bestowal of a gift nor the act of exchange is a zero-sum

transaction. Yet according to the theory of the just price, these transactions are of necessity zero-sum. Moreover, the Scholastic analysis of the justice of exchange at market prices offers clear moral guidance for exchanges where there are market prices; but many exchanges involve goods and services for which there is no market price. How can we know if an exchange is just where there is no just price because there is no price at all?

The Scholastic jurists were aware of the gulf between their analysis of transactions in terms of the exchange value of what is transferred and the ordinary practical reasoning of agents who focus, not only on the monetary price, but upon the whole range of subjective benefits gained by voluntary transactions. But the Scholastic analysis of the justice of exchange was oriented, not to the balance of subjective benefits, but to the equality of market prices. I think it clear that the core logic of the Scholastic analysis of transactions reflects specifically legal more than moral concerns. First, to focus on the objects transferred rather than on the parties makes sense within the framework of a legal justice, which judges deeds rather than the virtues of agents. Second, to focus on the value of what is transferred, and thereby to sharply distinguish the bestowal of a gift from an exchange, also makes sense legally, since in terms of legal consequences, gifts are generally unilateral while exchanges are bilateral. And in order to interpret the implied terms of a contract, it is helpful to know whether the parties intended a gift or merely an exchange. Finally, to measure the value of what is transferred in terms of its market price makes sense because courts can take notice of market prices in a way in which they cannot take notice of the subjective benefits of a transaction.

So the Scholastic approach to the evaluation of transactions has a powerful legal rationale. However, the Scholastic theorists did not sharply distinguish the legal from the moral evaluation of transactions. Indeed, they argued that the legal evaluation, while necessarily different from the moral evaluation, must ultimately rest upon a sound moral evaluation. They often argue that the just price represents, not just a sound legal, but also a sound moral standard for evaluating exchanges. After all, Thomas Aquinas solemnly declares "to sell for more or buy for less than a thing is worth [that is, its just or market price] is intrinsically unjust and illicit."<sup>12</sup> Thus, the Scholastics thought of their analysis of the justice of transactions to provide both a sound moral and legal standard. In this paper, I will consider, not the legal, but the moral dimensions of voluntary transactions and explore whether the analysis of the just price is a sound basis for the moral evaluation of the justice of exchanges.

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12. Aquinas, ST II-II, 77.1c.



## II. EQUALITY OF EXCHANGE VALUES?

The Scholastics are certainly right that the concept of equality is absolutely central to the moral evaluation of voluntary exchange. But what kind of equality? In most morally and legally sound exchanges in a market economy, we should expect there to be equality in market price. That is what markets do: they equilibrate supply and demand around a single price. We should expect a high degree of correlation between morally sound market exchanges and equal market prices. Should we conclude that the justice of a voluntary exchange stems essentially from the equal market value of what is exchanged? Here what are illuminating are the cases in which we find morally and legally sound exchanges without equality in market prices and the cases in which we find equality of market prices in exchanges that are not morally and legally sound. What I wish to demonstrate with these two kinds of cases is that equality of exchange value is neither a necessary nor a sufficient condition for making exchanges morally acceptable. In other words, some exchanges at unequal market prices are morally justified while some exchanges at equal market prices are not morally justified. So there are clear exceptions to the precept that equality of market prices is a requirement for justice in exchange. I will argue further that both the normal case of exchange at equal market prices and the exceptions find their common justification in the master norm that in every exchange each party respect the equal moral agency of the other. In short, the Scholastic precept that justice requires the equality of what is exchanged will turn out to be but a special case of the general precept requiring the parties to the exchange to treat each other as moral equals.

Let us begin with Gordley's rather astonishing claim: "It is true that no one will pay more or charge less than the market price if they know what the market price is and are physically able to use the market."<sup>13</sup> He goes on to explain that "ignorance and necessity . . . will accompany every instance of substantive unfairness." But, of course, we are all aware of innumerable exchanges and contracts which deviate widely from the market price quite apart from any ignorance or necessity. There are at least three kinds of exchanges in which inequality in market prices seems morally justified. The first kind is an exchange motivated in part by affection for family and friends, in which I knowingly offer my services or goods to another person at below-market price; a second kind is an exchange motivated in part by a desire to establish a long-term trading relation, in which I offer goods or services below market value as a loss-leader; a third kind is an exchange motivated in part by a felt duty to transfer some of my wealth to someone who needs it, in which

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13. Gordley, "Contract Law in the Aristotelian Tradition," 315.

I knowingly offer my goods or services at below market-value. In the moral evaluation of such exchanges, what seems crucial is that the seller freely and knowingly offered his goods or services at below-market prices; in other words, that the seller was not acting out of ignorance of the market value or out of unjustified duress. In the legal evaluation of such exchanges, evidence of the knowledge and freedom of the seller would seem quite desirable, since apart from that evidence, the inequality of market prices might well be interpreted to signify that the buyer took advantage of the ignorance or necessity of the seller. So the law might require a seller to expressly declare his intention to make a concession to the buyer. Such contracts mix ordinary trading with elements of gift-giving. They are not only common but recognized as morally and legally valid by jurists in the Aristotelian tradition.<sup>14</sup>

The history of the Roman law rule of *laesio enormis* is instructive here. Gordley has discussed the history of the interpretation and application of this rule as an illustration of the importance of the concept of equality of market price in the moral and legal evaluation of voluntary exchange.<sup>15</sup> *Laesio enormis* (Codex 4.44.2) provided relief to a seller who sold his land for less than half its market price; many medieval jurists and theologians understood this rule to rest upon the more general and basic moral principle that justice in voluntary exchange requires equality in market values. Why was relief provided for a large disparity in market values? According to the early Glossators, that disparity constituted a kind of fraud—a fraud manifest in the thing itself (*dolus ex re ipsa*). According to Gordley, the Glossators are not here anticipating the nineteenth-century view that a great disparity in market

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14. Augustine from *De Trinitate*: "We have known people from humanitarian motives to have sold cheaply to their fellow citizens grain for which they had paid a high price." Antoninus: "... experience shows clearly enough that the matter is ordinarily left to those making the exchange so that, having due regard for each other's wants, they judge themselves to give and receive equivalents. . . . Thus a certain real gift or concession commonly accompanies contracts." Both cited in Bernard Dempsey, "Just Price in a Functional Economy," in *Essays in Economic Thought: Aristotle to Marshall*, ed. Joseph Spengler and William Allen (Chicago: Rand McNally, 1960), 45-60, at 49 and 57. Pufendorf admits of "mixed contracts": "So also, if I set a man's salary at more than the work involved warrants, it will be partly giving and partly hiring. This is what great men sometimes do in order to add to their renown, believing that it accords with their position to pay men more generously for their services than they deserve, and in this way adding to their contract a character of generosity." Pufendorf later observes that if one intends to mix a gift into an onerous contract, one must expressly state that intention: "And so no mixture of a contract with a gift is presumed, unless the other party has expressly stated it, or unless it appear that he knew the object or work was under-estimated." Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, vol. 2, the translation of the edition of 1688, by C.H. and W.A. Oldfather (Oxford: Clarendon Press, 1934), V, 2.10, p. 705 and V, 3.8, p. 714.

15. I am drawing here on Gordley's discussion in "Equality in Exchange," 1638-1645.

price is merely evidence of intentional fraud; rather, he says: "This unintended 'fraud' was fraudulent only in its effect."<sup>16</sup> Here we dramatically see the difference between a normative evaluation focused on the relation between the parties and one focused on the relation between the objects exchanged. The nineteenth-century jurists, who focused on the parties, claimed that fraud was a disorder in the relation between the parties, while the Scholastics claimed that fraud was a disorder in the relation between the objects exchanges. According to Gordley, the Glossators located the evil of this kind of fraud in the disparity of the prices rather than in the disparity of the parties.<sup>17</sup> All of this seems to suggest that medieval jurists really believed that justice in voluntary exchange necessarily required a rough equality of market values.

But the history of the interpretation and application of *laesio enormis* raises doubt about whether equality of market value is really so crucial to the justice of voluntary exchange. John Baldwin found that certain contracts of sale appeared already in twelfth-century France in which the seller either expressly waived his right to the remedy of *laesio enormis* or the seller simply stated that he was giving the difference between the market price and the contract price as a gift to the buyer.<sup>18</sup> As always, practice preceded theory, and the practice of expressly renouncing *laesio enormis* for the purpose of making a gift was soon accepted by the jurists as consistent with what justice requires in an exchange.<sup>19</sup> Moreover, the grounds offered by the jurists in defending the renunciation of *laesio enormis* concern, not the equality of what is being exchanged, but equality of the parties to the exchange. The express renunciation of the remedy seemed to remove the likelihood that the buyer had somehow deceived the seller. Gordley cites Azo: "For then it can always be seen that he knew the object was worth more than the half. And indeed one

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16. Gordley, "Equality in Exchange," 1639.

17. "The Glossators defined incidental fraud in terms of the evil it produced, and that evil was the disparity in price." Gordley, "Equality in Exchange," 1639.

18. "Towards the middle of the twelfth century in Lower Languedoc in France certain contracts of sale appeared in which the seller expressly renounced any subsequent use of the remedies of *laesio enormis* to rescind the sale. . . . At the end of the twelfth century and in the south of France a legal device appeared in which the seller declared that whatever difference existed between the just price and the contract price he gave to the buyer as a donation. In this manner the buyer was protected against a future rescinding of the sale because of inadequate price." John Baldwin, "The Medieval Theories of the Just Price" in *Transactions of the American Philosophical Society* 49 (1959) 25.

19. "Beginning with Azo, the thirteenth-century Glossators also accepted the practical device of renunciation of *laesio enormis* by donation. Azo gave brief mention to the device by stating that donation obviously eliminates any claim of a mistake in the price, a claim which was necessary to invoke *laesio enormis*." Baldwin, "The Medieval Theories of the Just Price," 26.

who knows is not deceived." Note that Azo's concern here is not with the disparity of price but with the disparity of the parties; he permits the express renunciation of the remedy of *laesio enormis*, because such an explicit act reveals that the buyer has not taken undue advantage of the ignorance of the seller. By accepting the express renunciation of the remedy, Azo and the later Scholastic jurists are implicitly acknowledging that what matters most for justice in exchange is parity between the parties rather than parity between the objects exchanged. As Gordley rightly observes: "That conclusion is hard to square with the Aristotelian principle of equality."<sup>20</sup>

An express renunciation of the remedy of *laesio enormis* may well signify that the seller was not ignorant of the disparity between the market price and the contract price; but, as the late Scholastics pointed out, even an express renunciation might be the product of duress or fraud.<sup>21</sup> So these jurists began to find ways to restrict the right of renouncing the remedy. Many of these restrictions on this right, says Gordley, "provided protection for people who were particularly easy prey." So, for example, renunciations of the remedy could not be made by "women, children, and rustics." Again, all of these concerns speak to the disparity of the parties, not of the price. Eventually, says Gordley, the Scholastics restricted the right of renunciation of the remedy if the contract price went well below half of the market price. How are we to interpret this particular restriction? Does it reflect the principle that justice requires a rough parity in values exchanged? Not necessarily: even on the assumption that exchange at wildly disparate values is usually morally innocent, we might still want to invalidate such contracts because of the risk they pose for exploitation in even a few cases. In short, both by recognizing the right to renounce the remedy and by attempting to restrict that right, Scholastic jurists seem to be concerned more with the parity of the parties than with the parity of values exchanged. As Gordley acknowledges: "it is difficult to explain in Aristotelian terms why renunciations should be permitted at all."<sup>22</sup>

What we see in the history of juristic commentary on *laesio enormis*, then, can charitably be described as the triumph of common sense over moral principle. Gordley and his Scholastics pronounce general and universal moral precepts that "justice in exchange necessarily requires the exchange of equivalents," or that (in Gordley's words) "ignorance and necessity . . . will accompany every instance of substantive unfairness"; but then they

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20. Gordley, "Equality in Exchange," 1642.

21. "Several late Scholastics pointed out that the same ignorance or necessity that led one party to accept an unfair price would also lead him to waive the remedy." Gordley, "Equality in Exchange," 1642.

22. Gordley, "Equality in Exchange," 1643.

acknowledge the many cases in which justice does not require substantive fairness, as when gifts or distributions are mixed with exchanges. Moreover, the Scholastic analysis of the many exceptions to their general precepts evinces of the many exceptions to their general precepts evince more concern for the parity between the parties to the exchange than to the parity of the values exchanged. We shall find this pattern throughout the literature of the just price: namely, general precepts about the necessity for equality of exchange value, and then ample acknowledgement of the many justified exceptions. Indeed, it is easy to lose sight of the elegant simplicity of the cycles in this theory amidst all the confusing epicycles.

Since the Scholastics acknowledge the moral and legal validity of mixing exchanges with gifts and distributions, they also per force acknowledge that equality of what is exchanged is by no means necessary for those exchanges to be morally justified. But even if equality of what is exchanged is not necessary, perhaps it is sufficient, for making a voluntary exchange morally justified. If two people voluntarily exchange goods or services of equivalent market value, does that equivalence in and of itself provide moral justification? Or could an exchange of equal values morally fail despite that equality? Gordley does not explicitly assert that equality of market price is sufficient for a voluntary exchange to be morally justified, but he sometimes implies as much. In discussing the difference between procedural and substantive unconscionability, Gordley considers the view that "relief should be given when a transaction is substantively unfair only if it is procedurally unfair as well." In the cases we discussed above, the contracts were substantively unfair in Gordley's terms because of the gross disparity in the market value of what was exchanged. Common sense, as well as the jurists we cited, suggests that relief should be granted in those cases only if they involve procedural unfairness, such as the buyer taking advantage of the ignorance or necessity of the seller. By contrast, Gordley insists that we should be concerned with procedural unfairness only if there is doubt about substantive fairness: "the reason relief is given must be that the terms are substantively unfair. If they were not—if a consumer were paying the retail market price for an appliance—no one would care that a salesman could have taken advantage of him." Gordley goes on to say that "procedural unconscionability seems to mean nothing more than any circumstances that would enable the salesman to charge more than the market price."<sup>23</sup> Here we see a beautiful display of the logic of the just price: if the essence of justice in exchange is the equal value

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23. "A court should pay attention to such disadvantages [ignorance or necessity] when there is doubt as to whether a transaction deviated from the market price so severely as to warrant relief." Gordley, "Contract Law in the Aristotelian Tradition," 315-316.

of what is exchanged, then that equality should be sufficient, in and of itself, to secure the justice of the exchange. What does it matter if one party takes advantage of the ignorance or necessity of the other, so long as the terms of the trade are fair? According to this relentless logic, we must accept in morality and in law the right of salesmen to manipulate customers into buying encyclopedias, mortgages, Fuller brushes, Mary Kay cosmetics, and aluminum siding—just so long as they charge no more than the market price. Yet I would think that a salesman might exercise improper influence over his customers not only when he overcharges them but also when he gets them to buy things that they really didn't need. Customers improperly persuaded to buy things they did not really want do not much care that they paid the fair market price; they feel that their naïve desires or fears were unfairly manipulated. They claim to be victims of "procedural unconscionability" and consumer protection statutes in many states allow them to avoid many of these contracts, despite the fact that these exchanges were voluntary (in Aristotle's sense) and substantively fair (in Gordley's sense).

In other places, Gordley does make it clear that substantive fairness alone is not sufficient for moral or legal justice in exchange. Obviously, in any broadly Aristotelian theory, exchanges to acquire things incompatible with a good human life are morally, though not necessarily legally, forbidden. The Scholastic jurists defend the right of the state to enforce even imprudent, self-destructive, and, therefore, morally deficient contracts. In a democratic society, says Gordley, there are special reasons for the law to protect even immoral choices.<sup>24</sup> Of course, none of these concerns applies to our examples of salesmen who improperly pressure unsuspecting customers into purchasing good things for a just price. Following the pattern we have already noticed, Gordley's fundamental precept of the just price, namely, that "procedural unconscionability seems to mean nothing more than any circumstance that would enable the salesman to charge more than the market price" must yield before his commonsense acknowledgment that businessmen "should not promote a product by appealing to people's folly, intemperance, or irrational fear."<sup>25</sup> In other words, procedural unconscionability turns out to mean more than merely the circumstances in which salesmen charge more than the market price. In this way, the simple logic of the just price is modified by what seem to be ad hoc epicycles.

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24. Gordley, "Contract Law in the Aristotelian Tradition," 281-282.

25. Gordley, "Virtue and the Ethics of Profit-seeking," forthcoming in S.A. Cortwright and M. Naughton, eds., *Rethinking the Purpose of Business* (Notre Dame, Ind.: University of Notre Dame Press), 16.

### III. EQUALITY OF THE PARTIES

Gordley is right that equality is central to the justice of voluntary exchanges, but it is the equality of the parties that matters, not the equality of what is exchanged.<sup>26</sup> Justice is a relationship first and foremost between persons, not between things; and the equality of things is valuable only as a manifestation of the rightful equality of persons. Where two parties to an exchange are justly respecting each other's equality in the sense of each other's equal capacity for moral agency, we would expect them usually to exchange values that are in some sense equal (though not necessarily equal in market price, as we shall see). In other words, the equal market value of what is exchanged is often an important manifestation or sign of the respect each party owes to the other. But, as we have seen, the equal market value of what is exchanged is not the only important sign of the rightful equality of the parties. I may blend my exchanges with gifts so long as I make it clear that I know what I do and that my moral agency is not being subordinated to another's by means of fraud or duress. In the case of such liberal exchanges, then, the disparity of what is being exchanged need not signify a disparity of moral agency in the parties. Conversely, as we have also seen, even if an exchange is of equal things, that fact does not in itself establish that the equality of the parties was justly respected. I can subordinate another person's moral agency to my own; I can treat another person as a mere means, even in the context of a substantively fair bargain. What makes for justice in any exchange, whether of equal or of unequal things, is each party's respect for the equal moral agency of the other.

I will not attempt here to set forth a comprehensive account of what "equality of moral agency" means, but I can say a few things. First, we must recognize that parties to an exchange are rarely of equal knowledge, ability, or resources; that is, they are rarely of equal bargaining power. The practice of bargaining through one's attorney no doubt helps to level the playing field. A party with superior bargaining power is often tempted to subordinate the moral agency of the weaker party to his own, to treat him as a mere means. If parties to an exchange are rarely equal in bargaining power, in what sense are they equal? Every party capable of benefiting from an exchange has an equal right to form a conception of the good of his life as a whole and an equal right

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26. In focusing on the equality of the parties to an exchange, I am following Ernest J. Weinrib's discussion of corrective justice in his *The Idea of Private Law* (Cambridge: Harvard University Press, 1995), 76-83. Cf. André Comte-Sponville, *A Small Treatise on the Great Virtues* (New York: Henry Holt, 2001), 68-9: "... the equality essential to justice is an equality not so much between the *objects* exchanged . . . as between the *subjects* involved in the exchange. . . ."

to solicit the cooperation of others in pursuing that conception. In any morally just exchange, each party must respect the capacity of the other to form a conception of a good life and to grasp how this exchange promotes that conception. In other words, in bargaining for what I want from him, I ought not to knowingly provide him something that is either unrelated to his conception of a good life or even knowingly provide him something that he cannot relate to his conception of a good life. As I deliberately bargain in order to promote my own conception of a good life, I should have no reason to doubt that my partner is also deliberately bargaining to promote his conception of a good life. Otherwise, I am not respecting his equal moral agency. I can attempt to persuade him of what I think a good life truly is and how this exchange promotes that good life, so long as I don't resort to deception or coercion. But unlike many "consent" or "will" based theories of justice in exchange, respect for the equal moral agency of the parties to an exchange provides not just procedural but also substantive constraints on acceptable conduct. Any exchange that threatens to attack the capacity for moral agency of either party is obviously unacceptable: no voluntary slavery, self-destruction, degradation of rational faculties, and so forth.

What is the relation of this normative standard of equal respect to the factual standard of equal bargaining power? Parties to an exchange are never equal in all relevant aspects of bargaining power—nor is such equal power necessary for a morally just exchange, so long as each party respects the equal moral agency of the other party. Not only am I able to refrain from exploiting my superior bargaining power, I am able to actively equalize our mutual bargaining power in some respects. So beyond refraining, for example, from using my superior resources to wait out the resistance of my partner, I can also share my superior knowledge and offer my sincere counsel. I think this sincere and generous counsel is quite common in our practices of bargaining. Nor is equal bargaining power sufficient for a just exchange, since parties of equal power might both attempt to manipulate and coerce each other. In short, from the factual equality or inequality of bargaining power we cannot directly infer whether the parties respected each other's equal moral agency. Of course, even if equality of bargaining power is not strictly necessary or sufficient for a just exchange, it is surely important. One is much more likely to respect the equal moral agency of another person if that person has the power to insist upon such respect; conversely, in the presence of vast disparities in bargaining power, it is almost impossible for the stronger party not to manipulate or coerce the weaker party—as when an adult "exchanges" with a small child. So anyone who cares about the justice of exchange must also care about rough equality of bargaining power. A prudent regard for the experience of mankind suggests that a broad balance of power is practically,



if not strictly, necessary for justice in exchange, ranging from the bargains between spouses to the bargains between nations.

So the master moral norm governing all exchanges is that each party must respect the equal moral agency of the other. Since such equal respect usually requires an exchange of equivalents, this master norm accounts for the justice of the just price; at the same time, however, equal respect is perfectly compatible with unequal exchange and even exchanges that are equal are compatible with an absence of equal respect. So it is ultimately the equality of the parties that is crucial for the moral justice of exchange; the equality of what is exchanged is at best a manifestation of the equality of the parties, though, as we have seen, the equality of what is exchanged is neither necessary nor sufficient for the rightful equality of the parties. Of course, there are good reasons for courts to focus their evaluation of the justice of exchange upon the equality of what was exchanged. Courts are severely limited when it comes to discovering moral reality, which is often a matter of motivation and intention. To discern whether parties to a contract have treated each other as moral equals, it is convenient to see if what they exchanged was of equal value. If the exchange was unequal, it is proper to suspect fraud or duress, that is, it is proper to suspect that one party did not respect the equality of the other. Since courts can take notice of the equality of what was exchanged more easily than the moral equality of the parties, they are understandably focused on substantive fairness. Still, I believe that even the legal principles and rules governing contracts are broadly more consistent with the general moral principle that justice in exchange requires equality of the parties than with the limited principle, however salient, that justice in exchange requires equality of market values.

#### IV. EQUALITY IN GIFT-GIVING AND IN BARGAINING

As we saw, the Scholastic doctrine of equality in exchange was developed in close connection to the doctrine of inequality in the act of giving a gift. If an exchange was defined in terms of the equality of what was mutually transferred, a gift was defined in terms of the inequality of the transaction. In an exchange, neither party enriches the other; but, by giving a gift, one person enriches another at his own expense. The Scholastics were right that the question of equality is crucial to understanding the relation between a gift and an exchange; but because they focused on the wrong kind of equality, they misunderstood the real difference between a gift and an exchange. By focusing on persons rather than on things, we will discover that the relation of bargaining requires the moral equality of parties while the relation of gift-giving does not.

Recall that, according to the Scholastic jurists, a gift is a unilateral bestowal of a benefit in which one party enriches the other at his own expense while an exchange is the trading of equal market values. So not only is a gift not an exchange, but gift and exchange are fundamentally different moral acts: a gift is purely altruistic, since one party enriches the other; an exchange, by contrast, is purely self-interested, since neither party enriches the other. For this reason, gift is an act stemming from the virtue of liberality while exchange is an act stemming from the virtue of commutative justice; this moral distinction is then reflected in the legal distinction between gratuitous and onerous contracts. Of course, a single transaction might well express both liberality and commutative justice, but the Scholastic doctrine that every transaction and every contract must have a single rationale makes it difficult to admit mixed transactions. Gordley never explicitly asserts that the act of gift and the act of exchange are mutually exclusive, but he does sometimes imply as much by saying: "If either party had wished to enrich the other party at his own expense, he would have wished to make a gift, not an exchange." The doctrine of *causa* meant, in Gordley's words, that "every enforceable contract had to be made for one of two *causae* or reasons. . . ."<sup>27</sup> If every valid contract had to have a single *causa*, then contracts that mixed two or more *causae* must appear as mongrels. And Gordley says of the late Scholastics: "The concept of final cause allowed them to define these transactions in terms of a single purpose or end: in a gratuitous transaction, to perform an act of liberality; in an exchange, to receive an equivalent for what one gave."<sup>28</sup> If every transaction must have a single purpose, then no transaction can combine a gift and an exchange. Of course, in other contexts, Gordley, like his Scholastics, acknowledges that some justified exchanges mix gift and bargain, but this triumph of common sense over moral principle in no way affects the basic logic of the Scholastic analysis, which, by focusing on the equality of what is exchanged, must make a strong and fundamental distinction between unilateral gifts and bilateral exchanges. I will attempt to show that a focus on the equality of what is exchanged distorts our understanding of the true distinction between a gift and a bargain.

Only a lawyer could suppose that a gift was not an exchange!<sup>29</sup> True, gifts generally create only moral debts, while other transfers generally also create

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27. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 77.

28. *Ibid.*, 110, 166. Cf. 78: "the late Scholastics usually express this idea simply by classifying contracts as either onerous or gratuitous, as made either *causa gratuita* or *causa onerosa*."

29. "For non-lawyers, gifts are exchanges." Jane Baron, cited in Melvin Aron Eisenberg, "The World of Contract and the World of Gift" in *California Law Review* 85 (1997), 821-866, at 841.

legal debts, but in order to understand both gifts and other kinds of exchanges, we must cease to contrast gift with exchange by supposing that one is unilateral and the other bilateral. To view a gift from the perspective of its legal consequences distorts our understanding of the gift relation. Indeed, it is curious that although the late Scholastics often deny that gifts are exchanges, the civil law in many nations allows that gifts might be revoked for ingratitude. So whatever Scholastic legal theory might maintain, civilian legal practice presupposes that gifts are exchanges that create a duty of gratitude from the recipient.

A gift requires a communication of an intention to benefit. And every act of communication involves exchange in the broad sense of reciprocity: think of the exchange of ideas in a conversation, the exchange of vows in a marriage, the exchange of courtesies in social life, the exchange of blows in a fight. One cannot define a gift simply in terms of a unilateral intention to benefit another person, since one can benefit someone else without the recipient knowing that he has been benefited. To benefit someone is not itself to give a gift. Even if given anonymously, a gift requires the recipient to be aware that the donor intended to benefit him. If I place a coin in the road and someone finds it, I have benefited him but I have not made a gift. A gift, like all acts of communication, requires reciprocal awareness of intention: I have not given a gift until the recipient is aware of my intention to benefit him, even if he does not know who I am. So the act of giving a gift is never truly unilateral.

The Scholastics described donative contracts as "gratuitous" while contracts for exchange were called "onerous." But all gifts are simultaneously, if paradoxically, gratuitous and onerous. All gifts are ostensibly gratuitous but in reality onerous.<sup>30</sup> For this reason bribes usually take the form of gifts: since gifts are ostensibly gratuitous, they ensure plausible deniability; and since gifts are actually onerous, they create quite useful kinds of moral debts. The paradox of the gift exchange might be put thus: a virtuous gift-giver not only does not intend to impose any debt upon the recipient, but he finds the whole idea repugnant; yet a virtuous recipient of such a truly free gift nonetheless feels indebted and bound to reciprocate, even if only through gratitude.<sup>31</sup> How

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30. As Marcel Mauss says: "In theory such gifts are voluntary but in fact they are given and repaid under obligation." See his *The Gift*, translated by Ian Cunnison (New York: W.W. Norton, 1967), 1. "Mauss shows that no matter how freely a gift may be tendered, or how unsought it may be, the very fact of its having been presented carries an obligation of equivalent or increased return that can be ignored only on penalty of social disapprobation and loss of prestige. Psychologically, this principle holds for all cultures." Melville J. Herskovits, *Economic Anthropology* (New York: Alfred A. Knopf, 1952), 155.

31. On the role of gifts as bribes, see John T. Noonan, Jr., *Bribes* (New York: Macmillan,

is it that if accept a "free" gift, then I am under a moral duty to reciprocate, if only through gratitude? Perhaps I owe a duty to reciprocate only if I voluntarily accept a gift? We like to suppose that all of our duties are incurred voluntarily. My duty to reciprocate cannot be explained by my will or consent, because in many contexts I am not morally free to reject a gift, so that no matter how unwelcome, I am still bound to reciprocate.<sup>32</sup> Free gifts are intrinsically coercive, so we must be careful not to burden people (especially strangers) with our gratuities.

So all gifts are exchanges and anthropologists have persuasively shown that economic exchange finds its origin in ceremonial gift exchange. Aristotle's word for trade (*metadosis*) means to exchange gifts, and Marcel Mauss argues that archaic Roman contract law reflects these ceremonies of gift exchange.<sup>33</sup> If all gifts are exchanges, then how do gifts differ from other exchanges, such as bargains? Obviously, in giving a gift I can hope and expect to receive at least gratitude in return. Can I demand gratitude from a recipient? Like other aspects of the gift-relation, to demand gratitude would seem paradoxical: yet, as we noted, in many civil law systems, a gift may be revoked as a result of ingratitude. Still, a bargain differs from a gift exchange in that "a bargain involves a transfer that is expressly conditioned on a reciprocal exchange, so that each party is entitled *by the terms of the bargain* to a compensatory reciprocal performance, and in which each performance is presented as the *price of the other party's performance*."<sup>34</sup>

Both gifts and bargains establish relations of communication and exchange between individuals and groups. As such, gifts need not be altruistic any more than bargains need be self-interested: both transactions create goods common to the parties. Gift-giving benefits both parties just as much as bargains. But I think the kinds of relation presupposed in the two kinds of exchanges are

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1984, 685-702. Noonan says of the ideal gift: "Freely given, the gift leaves the donee free" (695). That is true of the intention of the donor; but the donee feels indebted precisely because of that liberal intention. The gift relation must be understood in terms of the reciprocity of intentions between giver and recipient.

32. "To refuse to give, or to fail to invite, is—like refusing to accept—the equivalent of a declaration of war; it is a refusal of friendship and intercourse." Mauss, *The Gift*, 11.

33. "Perhaps then it is not the result of pure chance that the two solemn formulas of contract, the Latin *do ut des* and the Sanskrit *dadami se, dehi me* have come down to us through religious texts." And of *emptio venditio* as two legal acts: "Just as in primitive custom we find the gift followed by the return gift, so in Roman usage there is sale and then payment." Mauss, *The Gift*, 15 and 51.

34. Eisenberg, "The World of Contract and the World of Gift," 841. Unfortunately (pp. 842-843), Eisenberg does not see gratitude as a return gift, so he claims that "gifts may involve exchange or reciprocity but need not. Consider, for example, anonymous gifts, small gifts to charities, gifts to strangers, and services to the dying."

often quite different. I think that bargaining, where it is fair, requires a measure of equality between the parties that is not necessary for gift-giving. For an adult to bargain with a child is almost inevitably a charade: the adult simply uses exchange to manipulate the child and the child cannot grasp the real intentions of the adult. To bargain with an animal is preposterous and, Abraham's success notwithstanding, so is bargaining with God. Such disparities of understanding make it all but impossible for both parties to respect the equal moral agency of the other by recognizing how each party both sacrifices for, and benefits from, this bargain. Bargains are best conducted between two lawyers or similar equals. Interestingly, children can bargain fairly with other children of comparable maturity, but when children differ greatly in maturity bargains degenerate into simple manipulation. Cultural differences can create such inequality in understanding as to make fair bargaining impossible; for example, the profoundly different understandings of property made genuine bargaining between Europeans and Native Americans over land virtually impossible. Nations can bargain treaties fairly with other nations only on the basis of respect for equal sovereignty.

By contrast, gift-giving is perfectly compatible with the widest possible kinds of inequality. God's grace is his free gift to us, though like all gifts it imposes a duty of gratitude; and we offer our sacrifice of alms-giving and fasting as a gift to God. Adults properly give gifts to children and it may be possible to give a gift to a pet, assuming that an animal can recognize such an intention. Since the gift relation requires of the recipient only that he recognize the benevolent intention of the giver, that relation makes much smaller cognitive demands than the relation of bargaining. Gifts often symbolize and embody the inequalities of the gift relation: superiors are expected to make larger gifts than inferiors. The gifts we receive from our parents and from God are too great to ever be fully reciprocated, so we owe them a special kind of gratitude, the gift of piety. God does not owe piety to us nor do parents owe piety to children: these supreme gifts reflect and embody immense disparities.

What the anthropologists tell us about the rise of commercial bargains from ceremonial exchange reveals the crucial role of equality of rights in bargaining. Gift exchange is used predominately within communities, to establish and maintain traditional hierarchies; trade was used predominately between communities, in which hierarchies were often nonexistent.<sup>35</sup> "Thus gift exchange is a means by which the relations of domination and control are established in a clan-based economy."<sup>36</sup> An attempt to recognize the abstract

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35. Herskovits, *Economic Anthropology*, 180-181.

36. C.A. Gregory, *Gifts and Commodities* (London: Academic Press, 1982), 19.

equality of parties to an exchange may explain the common institution of the "silent trade" in which goods are exchanged without any meeting of the parties. By bartering without ever meeting, no party could take advantage of the ignorance or weakness of the other; the silent trade levels the playing field of a bargain, like bargaining through an attorney.<sup>37</sup> Even today, women and minorities find that they get better bargains for automobiles through silent trade on the Internet.

Gift-giving is not only compatible with inequality but gift-giving necessarily subordinates the recipient to the donor, at least temporarily. Often, a wealthy and powerful patron gives large gifts precisely to make clients of the poor and the weak by placing them under an indefinite obligation.<sup>38</sup> It is not surprising that gift-giving can be twisted into an instrument of deliberate domination; more troubling is the fact that gift-giving often creates degrading subordination even from the best of intentions. After all, as we observed, "free" gifts always impose obligations and the more "generous" the gift, the more intolerable is the burden of indebtedness. The subordination of the recipient to the giver, even if just temporary, is intrinsic to the act of giving a gift. As Emerson said: "We do not quite forgive a giver." Of course, in his naïve idealism, the giver is shocked, shocked to discover that his gift is resented because of the debt it imposes, however unintentionally, on the recipient. For the same reason, donor nations receive the hostility of nations they seek to assist.<sup>39</sup> One strong argument for governmental responsibility for welfare was to free the poor from a degrading subordination to wealthy patrons<sup>40</sup>; the same argument is now made in turn for freeing the poor from the degrading dependence on government.

In contrast to the often degrading inequalities of gift-giving, the give-and-take of bargaining ironically appears to be much more honorable. Of course, bargains can be misused by the strong to exploit the weak, but bargains intrinsically acknowledge the equal moral agency of the parties. In many

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37. "It is equally a matter of guess whether or not, as both Schmidt and Grierson believe, this kind of trade developed between tribes of unequal degrees of cultural achievement, which caused them to conduct their trade on the basis of this silent exchange, since they could not meet on a plane of equality." Herskovits, *Economic Anthropology*, 187.

38. "To give is to show one's superiority, to show that one is something more and higher, that one is *magister*. To accept without returning or repaying more is to face subordination, to become a client and subservient, to become *minister*." Mauss, *The Gift*, 72.

39. See Emerson and Dillon cited in Jane B. Baron, "Gifts, Bargains, and Form" in *Indiana Law Journal* 64 (1988-89), 155-203, at 195n.

40. "The gift not yet repaid debases the man who accepted it, particularly if he did so without thought of return . . . charity wounds him who receives, and our whole moral effort is directed towards suppressing the unconscious harmful patronage of the rich almoner." Mauss, *The Gift*, 63.

contexts, the least degrading way to give a gift is in the form of a bargain. That is why it is so important not to sharply distinguish gifts from other kinds of exchanges: because gifts are often most respectfully conveyed through a bargain or deal. Since gratuitous contracts are always partly onerous, why not affirm that onerous contracts ought to be partly gratuitous. By paying his contracts in guineas, the English gentleman made his gifts look like bargains. Of course the late Scholastics were not aware of the anthropological evidence revealing the origins of exchange in the primitive gift relation and in illuminating the differences and similarities between gifts and bargains in all societies. But James Gordley is aware of the analysis of gifts and other kinds of exchange in modern anthropology, and his effort to interpret that anthropology in light of the Scholastic analysis nicely illustrates the limitations of the just price tradition. For the just price tradition is concerned, above all, with the evaluation of the things exchanged—primarily whether those things are of equal value and then whether they meet the genuine needs of the parties. But according to the anthropologists, people in precommercial societies are usually more concerned with the relation of the parties to the exchange than with the things exchanged; or, the things exchanged are valued primarily inasmuch as they manifest and sustain valued relationships.

In the Scholastic analysis, the relation between the parties is subordinated to the value of the objects exchanged: we elicit the cooperation of others as a means to acquire the goods and services that we want. As Gordley says: "the personal value that each party places on the resources he receives will necessarily be greater than the value he places on the resources he gives. Otherwise he wouldn't exchange."<sup>41</sup> In this view, the relation between the parties is subordinated to the relation between things: I give things less valuable to me in order to receive things more valuable to me. But what we learn from the anthropologists is that people in pre-commercial societies do not exchange only or primarily in order to acquire things they need: they often exchange purely as a way to establish and sustain relations between the parties. As Marshall Shalins argues, in all societies, but especially in pre-commercial societies, economic exchange is subordinated to social relations: "If friends make gifts, gifts make friends."<sup>42</sup> Because the Scholastic analysis is so resolutely focused on the objects exchanged, Gordley says above that no one would exchange unless he valued the object he received more than the object he gave. But what the anthropologists teach us about exchange is that it need

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41. Gordley, "Contract Law in the Aristotelian Tradition," 312.

42. Shalins insists that not only gift exchange but also many other kinds of economic transactions are oriented toward the relation between the parties: "the material flow underwrites or initiates social relations." See his *Stone Age Economics* (New York: Aldine Publishers, 1972), 186.

not be oriented toward commodities at all: exchange can be valued wholly or in part for the relations it creates between the parties: "every exchange, as it embodies some coefficient of sociability, cannot be understood in its material terms apart from its social terms."<sup>43</sup>

In this sense, what I "gain" from an exchange is not primarily an object but an affiliation. Of course, the subordination of material exchange to social relations is far from unique to pre-commercial societies: we all use exchange in varying degrees to establish and sustain social relations, from wedding gifts to the scholarly exchange of papers. In these kinds of exchange, we are not primarily oriented toward relation of the value of what is given and gained but to the value of the relation between the parties; or, more precisely, we attend to the value of what is given and gained largely insofar as those values represent the relation between the parties.

The role of exchange as an instrument for creating and sustaining social relations is all but invisible to the Scholastic tradition. For example, Gordley cites Aristotle, who said: "for an association [of exchange] does not arise between two doctors, but between a doctor and a farmer, or in general people who are different and unequal. . . ."<sup>44</sup> If we think of exchange purely in terms of the value of the objects exchanged, then the Aristotelian analysis makes perfect sense. Why on earth would two doctors exchange with each other for what they already have? Wouldn't a doctor exchange with a farmer to acquire what he does not already have? Aristotle's commonsense analysis, however, turns out to be a rash and misleading generalization. Anthropologists have shown that many pre-commercial peoples do in fact routinely transfer goods to obtain goods that they already possess.<sup>45</sup> Contrary to Aristotle and the Scholastic tradition, like exchanges with like, equal with equal: "Hence, especially in economically less complex societies where little specialization of labor exists, such exchanges appear to result in the redistribution of commodities that are in some measure possessed by everyone."<sup>46</sup> The moral significance of this example is not limited to so-called primitive societies; rather, it simply illustrates a universal truth that human beings exchange things

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43. "All the exchanges, that is to say, must bear in their material design some political burden of reconciliation." Shalins, *Stone Age Economics*, 183 and 182.

44. Aristotle, *Nicomachean Ethics*, 1133a 16-18; Gordley cites Aristotle's earlier example of trade between a shoemaker and a housebuilder (1133a 7-10) in his "Contract Law in the Aristotelian Tradition," 312.

45. Mauss cites Radcliffe-Brown: "as each local group and indeed each family was able to provide itself with everything that it needed in the way of weapons and utensils . . . the exchange of presents did not serve the same purpose as trade or barter in more developed communities. The purpose that it did serve was a moral one." Cited in Mauss, *The Gift*, 17-18.

46. Herskovits, *Economic Anthropology*, 181.



quite apart from a desire to obtain the commodities they need. In all societies, though especially in simple ones, the exchange of commodities is a continual process of peacemaking.<sup>47</sup> To understanding this fundamental dimension of exchange, we must look primarily to the relation between the parties, not to the relation between the objects exchanged.

Gordley's discussion of the anthropology of exchange is revealing of the insights and blindnesses of the whole Scholastic analysis. Gordley examines primitive exchange as a kind of contract law in which the exchange of objects is embedded in personal relationships. But instead of focusing on the many ways in which exchange is subordinated to social affiliation or on how the value of an exchange is measured by the value of social relation, Gordley's primitives treat their personal relations as an instrument to "solve" problems in the fairness of exchange. For example, Gordley rightly says that in the absence of a well-functioning market, we are all vulnerable to being fleeced by strangers; so long-term exchange relations with our kith and kin are a kind of insurance program to reduce the risks incurred in exchange. "One of the most fundamental of these problems is preventing substantive unfairness, i.e., ensuring that the terms of exchange favor neither party at the expense of the other." To ensure that our exchanges are equalized over time, we establish long-term trading relations based on personal affiliation. Gordley cites Hickson's view that "a person's wealth does not consist only of his material resources. It includes social relations that enable him to call on the assistance of others in time of need, and he uses his material resources to establish and maintain these relationships."<sup>48</sup> What is revealing about this analysis is the effort to understand social affiliation as itself a kind of wealth and as a means to wealth rather than seeing wealth primarily as a means of cementing relationships.<sup>49</sup> In short, the Scholastic focus on the value of the objects exchanged subordinates the social relation between the parties to the economic aims of the parties. Every human exchange has an economic dimension—even the exchange of martial vows—and every party to an exchange has some concern about what he gives and what he gets. But it is equally true that very many economic transactions are valued in part because of the social relations they establish or sustain. Whereas we moderns might well think of social relations as a source of wealth, "primitive" men may well have thought of

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47. Shalins, *Stone Age Economics*, 187.

48. Gordley, "Contract in Pre-Commercial Societies and in Western History," in *International Encyclopedia of Comparative Law*, vol. 7, chapter 2, pp. 5 and 4.

49. True, the last clause of the quote above refers to using "material resources to establish and maintain these relationships" but these relationships are not valued intrinsically but as a kind of "wealth."

wealth as a source of social relations.<sup>50</sup> The Scholastic analysis of exchange is strikingly blind to the value of the relationships between the parties and to how those relationships bear upon the justice of exchange.

Gordley also seeks to establish that pre-commercial societies are fundamentally concerned with substantive fairness: "Pre-commercial societies also insist on equivalence or reciprocity between what a party gives and what he receives but the equivalence is over a series of transactions. Moreover, what a party must give in return for what he has received can be indefinite. . . ."<sup>51</sup> We should first note how weak is this claim. Gordley is not claiming that pre-commercial societies recognize the justice only of exchanges of equivalent values; there is no primitive just price. Indeed, in the absence of market rates of exchange, there is no objective measure of equivalent value anyway. Moreover, Gordley concedes that justice in these societies requires only "reciprocity" in exchanges; but, as we have seen, even mere gratitude often counts as reciprocity in the gift relation. So reciprocity is a far cry from equivalence.

Gordley nonetheless understands exchange in pre-commercial societies as if it were an approximation of the normative ideal of the just price, except that equivalence is now only a vague reciprocity and is often achieved only over the long run. But according to the anthropologists he discusses, the justice of exchange in pre-commercial societies is not understood in terms of the relation between the objects exchanged but in terms of the relations between the parties to the exchange. In the absence of market prices or even fixed rates of exchange, what counts as just reciprocity is a function of social distance and of social status. As Shalins says: "The social relation exerts governance: the flow of goods is constrained by, is part of, a status etiquette."<sup>52</sup> Shalins distinguishes among generalized, balanced, and negative reciprocity; the type of reciprocity regarded as appropriate depends upon the social distance of the parties. Among close kin, it is regarded as rude to insist upon any tit-for-tat equivalence; only the most general or open-ended reciprocity is appropriate.<sup>53</sup> Indeed, gift givers often seek precisely to create relations of moral debt—relations that would be terminated by the return of an equivalent. The best way to create distance in an intimate relation is to insist upon equivalent

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50. Shalins says of pre-commercial men: "The *objective* of gathering wealth, indeed, is often that of giving it away." *Stone Age Economics*, 213.

51. Gordley, "Contract in Pre-Commercial Societies and in Western History," 5.

52. Shalins, *Stone Age Economics*, 186.

53. Gordley's interpretation of the etiquette of exchange between near kin focuses on the economic risk exposure of the gift giver: "It is among such people that a series of one-sided transactions can continue the longest without arousing fear in the giver." See Gordley, "Contract in Pre-Commercial Societies and in Western History," 6.

reciprocity. Where there is greater social distance, we do not attempt to subordinate our partners by the moral debts of generalized reciprocity; rather, we regard our partners as equals and seek a balanced reciprocity. Where social distance is so great that we regard our partners as strangers, we attempt to exploit them by negative reciprocity, namely, sharp dealing, gouging, and charging "whatever the traffic will bear."<sup>54</sup>

In short, the justice of exchange in pre-commercial societies is determined by the social relations between the parties, not by the quest for a putative "equivalence." Gordley recognizes the role of social distance in determining the kinds of reciprocity (although he interprets social distance very narrowly in terms of risk exposure), but he totally omits the role of social hierarchy in determining the justice of exchange.<sup>55</sup> Yet, not surprisingly, pre-commercial peoples expect wealthier parties to offer more generous terms than poorer parties. Where the parties differ greatly in wealth, justice demands exchanges of non-equivalents—justice requires substantive unfairness.<sup>56</sup> Not only is social rank, like social distance, a key determinant of the justice of exchanges, social rank is inseparable from social distance. For it is in the close relations of friends and family that social hierarchy is most salient; social equality is more characteristic of greater social distance. Although Gordley insists that pre-commercial societies seek to prevent "substantive unfairness" and insist on equivalence of what is exchanged, Shalins observes "in the main run of primitive societies . . . balanced reciprocity is not the prevalent form of exchange. . . . Balanced exchange may tend toward self-liquidation."<sup>57</sup> Where the social relations that matter are both intimate and hierarchical, we should expect the relations of exchange to embody and express that hierarchy. What anthropology teaches us is that justice in exchange is determined by the relation between the parties not by the relation between the objects exchanged.

## V. EXCHANGE AND DISTRIBUTIVE JUSTICE

Just as the Scholastic theory of contracts embodies a strong presumption against mixing gifts and bargains, so the Scholastic theory of justice embodies a strong presumption against mixing distributions with bargains. Thus, Gordley strongly distinguishes distributive from commutative justice: "While distributive justice secures a fair share of wealth for each person, commutative

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54. See Shalins, *Stone Age Economics*, 194.

55. "The vertical, rank axis of exchange—or the implication of rank—may affect the form of the transaction, just as the horizontal kinship-distance axis affects it." *Ibid.*, 205.

56. "Economic imbalance is the key to deployment of generosity, of generalized reciprocity, as a starting mechanism of rank and leadership." *Ibid.*, 207-208.

57. *Ibid.*, 223.

justice preserves the share that belongs to each.”<sup>58</sup> No doubt, if we are convinced that everyone with whom we exchange has a fair share of the wealth of the community, then our aim of transferring wealth by means of our exchanges would lose its rationale. But what if we are convinced that many people with whom we exchange possess less than their fair share of the wealth of the community? Ought we not feel free to mix our bargains with liberality in order to realize a higher degree of distributive justice? When he follows the strict Scholastic logic, Gordley says no: “. . . if the distribution of wealth is unjust, it should be changed by a social decision, rather than by individuals who go about redistributing wealth on their own, and by a centrally made decision, rather than transaction by transaction.”<sup>59</sup> According to the late Scholastic view, society as a whole, acting through the government, ought to establish the proper distribution of wealth, while individuals conducting exchanges ought to preserve that distribution by exchanging equal market values. At other times, of course, common sense again triumphs over doctrine, and Gordley admits that distributions might also be made by private individuals.<sup>60</sup>

We might first note how radical is the Scholastic doctrine that exchange merely preserve the wealth distributed by the government. In a market economy, such as ours, the government does not distribute wealth or purchasing power; rather, wealth and purchasing power are acquired through gifts, exchanges, and succession. The government may make minor changes to the market distribution of wealth and income, but in all market economies these are miniscule. Moreover, even when the government does attempt to alter the market distribution of wealth or income, it does so largely by regulating market exchanges, through minimum wage laws and price supports. In other words, in a market economy both the initial distribution of purchasing power and governmental attempts to alter that initial distribution proceed mainly by means of voluntary exchanges. Given this reality, it seems rather odd to argue that someone who engages in voluntary exchange ought not to be concerned with the effects of his exchange on the distribution of wealth or income.

But setting aside how the distribution of wealth actually takes place in a market economy, what are we to make of the claim that government alone should have the responsibility of distributing wealth, and individuals ought to then respect that distribution in their bargains. To adequately assess this broad claim would require us to develop a comprehensive account of distributive and

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58. Gordley, “Contract Law in the Aristotelian Tradition,” 267; cf. 297.

59. *Ibid.*, 308.

60. *Ibid.*, 298.

commutative justice—so instead, I will merely offer some reasons why an avowed Aristotelian like Gordley ought to revise his understanding of distributive justice. As John Finnis and others have pointed out, the late Scholastic idea that distributive justice is primarily the duty of the government is a distortion of the thought of Aristotle and Aquinas.<sup>61</sup> Aristotle says that “through virtue, the property of each will serve the good of all, according to the proverb, ‘friends’ goods are in common’ . . . when he decides how to use his own property, each [owner] makes part available to his friends and another part available to his fellow citizens.”<sup>62</sup> So according to Aristotle, every property owner must figure out how to make his holdings available to meet the needs of the entire political community under the maxim “individual possession, common use.”<sup>63</sup> Aristotle is also clear that each property-owner’s duty to make his property meet the need of the community is a duty of justice and not merely a requirement of liberality.<sup>64</sup> A virtuous person, he thinks, will distribute his wealth liberally by treating his fellow-citizens as friends, not by degrading them into clients; and we make our wealth available to our friends by, for example, mixing our gifts with our bargains. Thomas Aquinas follows Aristotle in arguing that the property of the affluent, by natural law, must be used to meet the needs of the poor.<sup>65</sup> But when Aquinas formally distinguishes distributive from commutative justice, he unfortunately says that distributive justice concerns the relation of the whole (community) to the (individual) part, while commutative justice concerns the relation of each (individual) part to other (individual) parts.<sup>66</sup> This metaphysics of whole and part understandably led the late Scholastics, and, at times, Gordley, to suppose that distributive justice is the sole prerogative of the government. But Aquinas goes on in the same article to say: “there may be a distribution of common goods, not indeed of a state, but of one family; this distribution may be made by the authority of a private person.”<sup>67</sup> Elsewhere, he is even clearer that the responsibility for

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61. “On Aquinas’s view, anyone in charge of an item of ‘common stock’ will have duties of distributive justice; hence any property-holder can have such duties, since the goods of this earth are to be exploited and used for the good of all. In the newer view (now thought of as traditional), the duties of distributive justice belong only to the State or the personified ‘whole’ (community).” Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 186.

62. Aristotle, *Politics* 1263a 29-35.

63. For Aristotle’s maxim “*idia ktesis, koine chresis*,” see *Politics* 1263a 38-39.

64. Aristotle calls for legislation to ensure that property owners properly distribute their holdings for the common good at *Politics* 1263a 23 and 41.

65. “. . . res quas aliqui superabundanter habent, ex naturali jure debentur pauperum sustentationi.” Aquinas, ST, II-II, 66.7c.

66. Aquinas, ST, II-II, 61.1c.

67. Aquinas, ST, II-II, 61.1 ad 3: “*quamvis etiam distributio quandoque fiat bonorum communium, non quidem civitati, sed uni familiae. . .*” Aquinas’s use of the dative here would

distributing wealth belongs in the first place to the individual property-holder: ". . . it is entrusted to each individual to decide how to dispense his property so as to meet the needs of the suffering."<sup>68</sup>

Both Aristotle and Thomas Aquinas understand property ownership as a kind of trust: civil law permits private ownership on the condition that it serve the common good of the community. Each property owner is a kind of trustee who has a duty of justice to ensure that his property meets the needs of his fellow citizens. According to the principle of subsidiarity implicit in their thought, it would be unjust for the government to claim sole responsibility for distributive justice, for this would deny individuals and communities the right to exercise their best judgment and creative initiative in deciding how their wealth could best serve the common good.

Distributive justice, therefore, is too important to leave to the government alone: first, because the best distribution of wealth requires the creativity and initiative of every person with some surplus to dispense; second, because human beings flourish precisely through the exercise of their practical reason in the exercise of the virtues of distributive justice and of liberality. As we have suggested, mixing our bargains with liberality is often an ideal way to promote both liberality and distributive justice while respecting the equal moral dignity of our fellow citizens.

In our society, the most important thing distributed by the government with respect to voluntary bargains is not wealth or purchasing power but equal legal rights. Government does not create the moral right to exercise one's agency in soliciting the cooperation of others through bargains; government merely recognizes each person's equal moral right to do so by distributing and enforcing equal legal rights. Unlike wealth, government is uniquely competent to distribute our legal rights to voluntary bargains. In every such bargain, we must respect the equal moral and legal rights of the other party; this, not equality of wealth or purchasing power, is what ought to be preserved in the act of bargaining.

## VI. EXCHANGE AND JUST PRICE

It should be clear, by now, that I think that the equality that matters most to the normative evaluation of a bargain is the moral equality of the parties. Equality or inequality in what is exchanged matters only insofar as it is evidence of the moral equality or inequality of the parties. I have attempted

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be rendered literally as: "there may be a distribution of goods common, not to a state, but to one family. . . ."; but this might imply that the common goods are distributed to one family, whereas I read Aquinas here to refer to a distribution of the common goods of one family.

68. Aquinas, ST, II-II, 66.7c.

to show that justice in voluntary bargains does not require an exchange of equal market values, because voluntary bargains are a permissible and often desirable way of pursuing liberality and distributive justice compatible with respect for the moral equality of the parties to an exchange. But perhaps the theory of the just price really only applies to bargains simply, and not to exchanges that mix bargains with liberality. Is it the case, then, that parties who seek to treat each other as moral equals in the pursuit simply of bargains exchange only at the "just price"? In short, is exchange at the just price necessary or sufficient for the moral justice of voluntary bargains?

We must first consider what Gordley and his Scholastics mean by the just price. The theory of the "just price" always reflected legal concerns more than moral ones. A medieval or early modern judge seeking to adjudicate a disputed contract price would first look to the price established by law, since it was assumed that public authority had the right to set any price. If there were no price stipulated by statute, then the judge would look for a legally-binding price in the form of customary law, namely, the custom of the market (*usus fori*)—what we would call the market price. In the civil law tradition, custom has force only in the absence of statute (*cum deficit lex*), so the custom of the market would have force only in the absence of a specific statutory provision.<sup>69</sup> In one sense, any price established by a voluntary bargain is a market price, but the Scholastics needed a more specific view of what constituted a just market price, if it was to serve as a standard to judge the justice of all voluntary bargains.<sup>70</sup> A market price was just, they said, if it reflected the *communis aestimatio*, that is, the average or competitive price (or range of prices) determined by the sum of all transactions.<sup>71</sup> This price was an objective standard in the sense that it represents the intersubjective consensus.<sup>72</sup> The market price might well fluctuate according to local supply and demand, but it was fixed in the sense that it could not be set by a single buyer or seller. In this sense, the market price contrasts with a monopolist's

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69. As Gordley says, "... unless public authority sets a price, the fair price was the market price under competitive conditions." See "Contract Law in the Aristotelian Tradition," 310.

70. In one place, Gordley trades on the ambiguity of the concept of a "market price" when he suggests that an auction price might count as a "market" and therefore as a "just" price: "Whether it [an auction price] is an exception to the rule that normally, the just price is the market price, depends on how one defines the market price." I think it clear, however, that the Scholastic conception of the just price assumed a competitive market price and not an auction price, which is a monopoly price. See "Contract Law in the Aristotelian Tradition," 313.

71. See Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 97.

72. As John Noonan says: "Common, not individual, need is the measure of value." He then cites Buridan: "The value of a good ought to be considered not according to the necessity of the buyer or seller, but according to the necessity of the whole community." Noonan, *The Scholastic Analysis of Usury* (Cambridge: Harvard University Press, 1957), 88.

price, which is set unilaterally and, therefore, does not embody an intersubjective consensus.

The Scholastic analysis of the just price suffers from its attentiveness to narrow legal questions at the expense of a broader moral inquiry into justice in exchange. No doubt there are good reasons for a judge to presume that the legally-stipulated price or, in its absence, the customary market price, is, for the purposes of law, the just price. How could a judge not defer to statutory authority or to common custom? How could a court set aside either a statute or an entire class of transactions conducted at the customary price? A judge essentially has no choice but to define the just price as either the statutory or the customary price. On the other hand, why should a moralist presume that either the statutory price or the customary price is the just price? Even the Scholastic jurists conceded that the customary market price might be unjust, which is why the government has the authority to revoke the customary market price in favor of the statutory price, just as we do with minimum wage laws.<sup>73</sup> Wherever there are fewer employers than workers, and wherever employers are wealthier than workers, labor markets will systematically disadvantage workers. So a moralist is not justified where a judge might be in presuming that the customary market price (in the absence of a statutory price) is just. As for the statutory price, why should a moralist presume that the publicly-stipulated price is just? Wealthy producers and merchants have always attempted and often succeeded in using public legal authority to further their market power. Again, a judge must defer to statutory authority, but why should a moralist?

Furthermore, the normative analysis of bargains in terms of just price provides no standards for evaluating the justice of bargains where there is no market, let alone a market price. For example, I'll lend you my Hardy Boys books, if you if you show me some tricks on a Yo-Yo. Since there is no regular market for the exchange of Hardy Boys leasing and Yo-Yo tricks, there is no custom of the market defining the standard rate of exchange. Nor can we independently compare the market price for Hardy Boys leasing with the market price for Yo-Yo lessons, because either there is no such market price or we don't have any idea what it might be. Such informal swaps, trades, and barters form a large proportion of all bargains in any society. How do we know if such bargains are just? In particular, in the absence of any market

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73. As Gordley says of the Scholastic jurists: "The market price is set by the common judgment (*communis aestimatio*). In their view, the common judgment could be wrong. If the public authorities thought it was wrong, they might fix a different price at which everyone must trade." See "Contract Law in the Aristotelian Tradition," 311.



rates of exchange or market prices, how could we know whether the things being exchanged were in any way equal?

For the absence of a market with established ratios of exchange means the absence of any objective or common metric for assessing the equality of what is being exchanged. Without any objective or common metric, we must turn to the subjective value of the goods or services exchanged to those who exchange them. At a minimum, we would expect in a fair bargain that at least one person is, by his own estimate, better off and that no one is worse off. In addition, we might think that in a fair bargain each party would seek to ensure, not only that the Pareto criterion is met, but also that the subjective benefits of the exchange are somehow equal. I might well resent exchanges in which your subjective benefit seems much greater than mine. Unfortunately, the only possible evidence of the equal subjective benefit from an exchange is the fact that two people who bargained as equals agreed to it. To say that two people gained an equal subjective benefit from an exchange is just to say that they bargained as equals. That's what it is to bargain with an equal: to discover terms of trade with roughly equal costs and benefits.

In short, in the absence of competitive market prices, we are driven ineluctably to look to the equality of the parties—in particular, to how each of them respected the equality of the other. If they were greatly different in age, we might well suspect fraud or coercion. To return to our example, what if the boy who acquires the Hardy Boys books cannot read? What if the boy who acquires Yo-Yo lessons doesn't know what a Yo-Yo is? To respect the other party's equal moral agency means not only not to deceive or coerce or take advantage of his necessity; it also means to be concerned that the other party understand how he is benefited by our exchange. I cannot guarantee that the other party will correctly understand the benefit of our exchange, but I must make reasonable efforts to ensure that he does, and, in particular, not block that understanding.

That equal shares must, in the absence of market prices, be understood as what equal parties will accept is nicely illustrated in a traditional legal procedure. How shall two sons divide their late father's estate into equal shares, when that estate is full of many incommensurable and indivisible items, whose value is as much subjective as objective? According to Lon Fuller: "The classic solution is as follows: Let the older son divide the property into two parts, let the younger son take his pick. (Would it be better to draw lots to see who should make the division?)"<sup>74</sup> I take it that the point of classic procedure, as well as of Fuller's suggested improvement, is to require each

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74. Fuller, *The Principles of Social Order* (Durham, N.C.: Duke University Press, 1981), 180.

party to respect the moral equality of the other by giving one son the right to make the division and the other son the right to make first selection. What matters for justice here is only that the rights of the parties are distributed equally; "equal shares" means here only whatever shares result from the choices of parties with equal rights.

Not all the Scholastics were consistent in insisting that all just bargains take place at the just price. Many Scholastics permit the seller to charge more than the market price if he subjectively values what he is selling more than its just or market price. In a perfectly competitive market, no seller could charge more than the market price, but a seller who has something scarce and in demand, could exercise some monopoly power in getting the buyer to compensate him for his "seller's surplus value." Aquinas, for example, in the same article (ST II-II, 77.1c) in which he tells us that "to sell for more or to buy for less than a thing is worth [its just or competitive price] is intrinsically unjust and illicit," immediately proceeds to tell us that a seller is permitted to sell higher than the just price in order to be compensated for his higher subjective valuation of the item. So monopoly power may be exercised by sellers to the extent that they can realize their "seller's surplus value."<sup>75</sup> But, says, Aquinas, a seller may not set his price above the just price in order to capture the "buyer's surplus value," that is, the seller may not price discriminate: "because the utility that accrues to the buyer stems from the circumstances of the buyer, not from that of the seller: no one ought to be able to sell to another what is not his own. . . ." For a seller to take advantage of a buyer's desire to acquire something even above its competitive market value (putting aside the problem that we are now dealing with monopoly power) is to sell to the buyer something that already belongs to the buyer. I can demand compensation for my subjective valuation of what I sell, but I cannot demand compensation for your subjective valuation of what I sell.

What are we to make of this curious piece of Scholastic economics? To begin, it is striking that Aquinas and others simply set aside their own solemn pronouncements about the moral necessity of exchange at just prices in the case of a seller parting with something that he values more than it is justly

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75. "And thus something can be sold licitly for more than its intrinsic value, so long as it is not sold for more than it is worth to the possessor." Aquinas, ST II-II, 77.1c. Cf. Antoninus: "For practical judgment dictates that when a thing, which in itself is worth ten, is as dear to the owner as though worth twelve, if I propose to own it, I must give not only the ten but as much as it is worth to him according to his desire of retaining it." Cited in Spengler and Allen, *Essays in Economic Thought*, 57-58.

worth.<sup>76</sup> Why would Aquinas in particular, after setting forth a precept that to sell something for more than its just price is intrinsically immoral, go on to permit a seller to do just that? I think the key to reconciling the precept with the seeming exception is found in the master norm with which Aquinas begins his *Sed Contra*: "whatsoever you would have men do to you, you do to them." In other words, by setting forth the Golden Rule as the master norm governing voluntary exchanges, Aquinas is properly focusing our attention on the key requirement of justice in exchange, namely, that each party respect the moral equality of the other party by considering whether he would be willing to trade places with his partner. Normally, of course, this would require us to exchange at equal market values. But exchanges would also be permitted without the requirement of equal market values so long as the master norm of the moral reciprocity of the parties is respected, such as when there is no market value, or when bargains are mixed with gifts, or when a seller wishes to be compensated for his higher-than-market-price valuation of what he is selling. So the precept requiring all sales to be at the just market price and the exceptions to this precept find their common justification in the master requirement that we respect the equal moral dignity of those with whom we trade.

And what are we to make of the asymmetry whereby a seller may realize his own subjective surplus value but not capture the buyer's subjective surplus value? I think Aquinas's concern here as well is with the equality of the parties to the exchange: each party has an equal moral (and, one hopes, legal) right to sell what belongs to him. Since the buyer's surplus value belongs to the buyer, the seller may not attempt to capture it. By selling what does not belong to him, the seller has unjustly acquired more than his just share rights in an exchange. Our equal moral rights to exchange derive from our rational natures; our equal legal rights to exchange are distributed by the government. Every just exchange must preserve our equal moral and legal rights. I may acquire more wealth than you in an exchange (for example, by requiring you to compensate me for my seller's surplus value); but I may not acquire more moral or legal rights than you in an exchange. In the end, the equality that matters most to Aquinas is not equality of exchange value but equality of the rights of the parties. Exchange may or may not preserve the equal purchasing power of the parties; but exchange must preserve the equal rights of the parties, because "no one ought to sell to another what is not rightfully his."

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76. "Curiously, the Scholastics do admit a departure from the market price, when a seller sells a good of peculiar advantage or sentimental value to him." Noonan, *The Scholastic Analysis of Usury*, 88.

## VII. CONCLUSION: ON THE NATURE OF DEVELOPMENT IN MORAL DOCTRINE

If what matters to justice in exchange is that each party respects the moral and legal equality of the other party, then why do the Scholastics focus so resolutely upon the equality of the objects exchanged rather than the equality of the parties? Since an inequality of values exchanged is almost always the effect of an unjust relation between the parties, it is natural to assume that the inequalities of values are the cause of that injustice. Where cause and effect are in frequent or constant conjunction, it is very easy to confuse the one for the other. Nothing is more common in human judgment than to confuse cause and effect. Jean-Jacques Rousseau accused Aristotle of confusing cause for effect in explaining the basis of slavery. Aristotle, says Rousseau, ascribed the servile social behavior of slaves to their servile nature; yet, according to Rousseau, it was the servile social role of the slave that caused their servile nature. "Aristotle was right, but he mistook the effect for the cause."<sup>77</sup> John Stuart Mill similarly castigated his fellow countrymen for confusing cause and effect when attributing the poverty of the Irish to the natural indolence of the Celtic race: "Of all vulgar modes of escaping from the consideration of the effect of social and moral influences on the human mind, the most vulgar is that of attributing the diversities of conduct and character to inherent natural differences."<sup>78</sup> So genuine progress in moral judgment depends upon an awareness of the common tendency to confuse cause and effect and careful efforts to resist that tendency. That progress depends upon wider experience in which hypotheses about cause and effect can be more readily tested. If Irish poverty were caused by innate Celtic indolence, then how do we account for the fact, says Mill, that "No labourers work harder, in England or America, than the Irish. . . ."?

Similarly, since an inequality of values exchanged is very often a sign of an unjust relation between the parties, it is natural to take the sign for what it signifies. Again, nothing is more characteristically human than treating a sign as if it embodied what it signifies: all kinds of idolatry, whether religious or patriotic, take the form of confusing symbols and tokens for the precious reality they signify. Genuine progress in moral judgment again requires an awareness of the common tendency to confuse sign and signified and careful efforts to resist that tendency—a tendency at the root of all forms of superstition, pseudo-science, and magical thinking.

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77. J.-J. Rousseau, *On the Social Contract*, ed. Roger D. Masters (New York: St. Martin's Pres, 1978), I, 2, p. 48.

78. J.S. Mill, *Principles of Political Economy*, 7th edition, Book 2, chap. 9, sec. 3.

In addition to these generic sources of confusion our normative evaluation of exchanges seem prone to a special danger. Because exchanges of goods or services are the visible manifestation of an invisible bond between the parties, we tend to invest the things exchanged with all the moral weight of the relation itself. In other words, we reify the invisible relation between the parties into the visible things exchanged. In this sense, the Scholastic analysis of exchange reflects what Marx would famously call a "commodity fetish." Marx says that people are victims of a commodity fetish when there is "a definite social relation between men, that assumes, in their eyes, the fantastic form of a relation between things."<sup>79</sup> Here the just demand for a proper relation between the parties to an exchange becomes improperly projected upon a demand for a proper relation between things exchanged.

The commodity fetish is especially common in the gift relation, since a gift might be defined as an attempt to reify an invisible relation into a visible thing. Nothing is more common than to confuse the size of a gift with the depth of a love or to use a gift, not merely as an expression of love, but as a substitute for it. What we call "the commercialization of Christmas" is merely one quite dramatic example of the gift fetish. Nor is Marx's commodity fetish unique to modern capitalism: "in Maori custom this bond created by things is in fact a bond between persons, since the thing itself is a person or pertains to a person. Hence it follows that to give something is to give a part of oneself."<sup>80</sup>

The Scholastic analysis of bargain exchanges was prone to the commodity fetish because of their overriding concern with questions of legal justice. Because courts are severely limited in the kinds of evidence they can notice, legal justice inevitably focuses upon the crudest and most visible manifestations of social relations. Thus, in evaluating the justice of an exchange relation, lawyers will look primarily, if not solely, to the relation between the objects exchanged. In such a context, it is very difficult to avoid the temptation to see the relation between the value of those objects as not just a presumptive sign, but as the essence of the justice or injustice of the relation between the parties. Yet, progress in moral and legal judgment depends precisely on the ability to overcome such a temptation.

I think the development of the Scholastic doctrines about usury well illustrate the struggle to overcome the commodity fetish. Because interest charges so frequently accompany exploitative relations between lenders and borrowers, it was common in ancient societies to interpret those interest

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79. Marx, *Capital*, vol. 1 (New York: Charles Kerr and Co., 1906), Part I, sec. 4, p. 83.

80. Mauss, *The Gift*, p. 10. "The transfer of things that are in some degree persons and of persons in some degree treated as things, such is the consent at the base of organized society." Shalins, *Stone Age Economics*, 169.

charges, not just as a possible sign of an improper relation, but as embodying that improper relation—through a kind of monetary fetish. Anyone who lived in a world of loan sharks would likely form such an interpretation of interest charges. Just as charging more or accepting less than the market price was described by the Scholastics as “intrinsically evil,” so was charging interests on loans. The evil of an unjust relationship became reified into the evil of the interest charge itself. Eventually, Scholastic moralists and jurists began to realize that interest charges do not always signify exploitation and, over time, moral and legal analysis began to properly shift from the monetary relation to the social relation. Any borrower must recognize that, if he were a lender, he would want compensation for the fair market opportunity costs of his capital. As Aquinas observed, the Golden Rule is the master norm of justice in exchange, and that rule is addressed to the relation between persons, not between things.

