

**The Foundation of Business Ethics:
The Morality of Bargaining¹**

Paper for Presentation at the Fifth International Symposium on Catholic Social Thought
and Management Education: Business as a Calling, The Calling of Business.

Universidad de Deusto
Bilbao, Spain
July 15-18, 2003

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1) The Bargain as the Essence of Business.

Business ethics is usually discussed in the context of the decisions faced by managers in complex modern enterprises: what is the corporation's responsibility to its shareholders, employees, customers, and the wider community? What should managers do when their responsibilities to these various constituencies come into conflict? These common questions of applied business ethics assume the fact of modern factor markets (that is, markets in land, labor, and capital), the profit motive, complex business organizations and bureaucracies, and even the separation of management and ownership. No doubt contemporary corporate life poses many ethical challenges to modern managers—challenges that merit ethical reflection. But a philosopher wants to identify the fundamental, essential, and universal feature of business activity: if we peel away all the historically-contingent facts about the organization of business and of markets, what are we left with? Perhaps, as with peeling an onion, we will be left only with a strong odor. Certainly vibrant business activity existed before the advent of modern factor

¹ I am indebted to the comments of my colleague, Lucas Swaine, on an earlier draft of this paper and to discussions with Mark Stein. I also wish to thank my indefatigable copy editor, Karen Liot.

markets, the management of labor, and corporations. There is vibrant business today apart from these institutions, and there will be business in the future with quite different institutional arrangements. Business activity has taken many different forms throughout history.

Does business have an essence or only a history? I think of business activity as an ensemble of historically-evolving institutions and practices by which people cooperate to meet their needs. Among these practices are gift-giving, authoritative requisition and rationing, and bargaining. Although business activity is possible without bargaining, the historically dominant mode of business activity is the bargain. Adam Smith rightly begins his account of human economic activity by noting our natural propensity to “truck, barter, and exchange one thing for another.” This propensity to exchange commodities is as fundamental to human nature as is language, for both language and exchange are uniquely and universally human activities. A human community without exchange is just as unimaginable as one without speech. All voluntary exchanges are either gifts or bargains or some mix of the two. Although lawyers are inclined to regard gifts as unilateral transfers, everyone else understands that gifts always involve reciprocity, if only the reciprocity of gratitude. True, reciprocity in gift-giving is not usually legally enforced, which is why lawyers often think of gifts as mere transfers, but in the civil law gifts sometimes can actually be revoked for lack of gratitude.² A gift is an exchange in which reciprocity, though usually expected, is not an express condition of the initial transfer. A bargain is an exchange in which reciprocity is an express condition of the initial transfer. Gifts create open-ended and generally informal moral debts while

² For an analysis of the gift exchange in relation to other kinds of exchanges, see James Bernard Murphy, “Equality in Exchange,” The American Journal of Jurisprudence 47 (2002): 85-121, at 100-110.

bargains create specific and often legally-enforceable debts. To do business, then, is mainly to bargain, that is, to “come to terms” that specify what shall be exchanged for what. Of course, bargaining is found not merely in business, but also in politics and marriage. However, bargaining is much more central to business than to politics or marriage, where other modes of cooperation are more salient.

2) Two Approaches to the Morality of Bargains.

So if bargaining is the dominant and most basic mode of business activity, then perhaps the fundamental question of business ethics is: what conditions, if any, are necessary and sufficient for a bargain to be morally justified? What makes for a moral bargain? Defining the morality of bargaining turns out to be much more difficult than we might expect. Like the concept of time, the notion of a fair bargain is wrapped in the mystery of its own familiarity. To understand contrasting normative approaches to bargains, we must first consider the logical structure of a bargain. In any bargain, we find both a set of relations and a set of things related or *relata*. The *relata* are the parties to the bargain and the objects exchanged; their three main relations are: the relation between the parties, the relation between the objects, and the relation between each party and each of the objects exchanged. Every normative theory of bargains must take account of all these relations and *relata*, but each theory focuses on one or another and subordinates the rest. What is most essential to the morality of bargaining: the relation of the parties to the objects exchanged, the relation of the objects exchanged to each other, or the relation of the parties to each other?

My concern here is with the basic morality of bargaining, not with the law of contract. Not because contract law is amoral: indeed, our courts frequently refuse to enforce some kinds of contracts on the grounds that they are “unconscionable.” There is no widely accepted theory of what makes some bargains unconscionable, but when courts refuse to enforce contracts they appeal to moral principles of fairness, rationality, freedom, and equality.³ Nonetheless, courts are severely constrained in their capacity to evaluate the morality of bargains. To begin with, they have access to only very indirect evidence of the intentions of the parties to contracts. For this reason alone, courts of law must sometimes rely on very crude measures of the substantive fairness of bargains as a sign of the procedural fairness of the bargainers. The intention of one party to take illicit advantage of another party will often, though not always, be reflected in the gross inequality of the values exchanged. Because courts lack reliable knowledge of the intentions of parties to a bargain, they must tolerate a huge range of sharp dealings and hard bargains. Yet the intentions of the parties will be essential to the proper moral evaluation of bargains. Moreover, precisely because bargains are so essential to vibrant business activity, we all benefit from a robust freedom to bargain limited by only a few bright lines of law. In bargaining, surely, the certainty of our legitimate expectations is of especially high value: that the law be settled is perhaps more important than that it be settled right.

In short, there are sound moral reasons for law to tolerate many morally unsound bargains. But if business ethics means more than obeying the law, if there are moral duties and moral ideals of fair dealing more demanding than the minimal standards of

³ For two deeply opposed theories of the justice of contracts, see James R. Gordley [The Philosophical Origins of Modern Contract Doctrine](#) (Oxford: Clarendon Press, 1991) and Ernest J. Weinrib [The Idea of Private Law](#) (Cambridge: Harvard University Press, 1995).

law, what are those moral duties or ideals? We have all probably been the victims of shady, though legal, dealing: what is it about these bargains that makes us think them unfair? A fundamental theory of the moral justice of bargains ought to help us understanding why the law refuses to enforce some kinds of bargains: for example, if the relation between the objects exchanged is central, we would expect courts to focus on substantive unconscionability; but if the relation between the parties is central, then courts should focus on procedural unconscionability. My focus will be on the conditions for morally sound bargains. Herein lie two obvious dangers: the first is a legalism that reduces the moral demands upon bargainers to those enforced by law; the second is a moralism that imposes such high-minded demands on bargains that we might lose the benefits of free, creative, and robust practices of bargaining. A sound morality of bargaining will ask that we do more than merely obey the law but not so much that we threaten to squelch the whole practice of bargaining or become irrelevant to the hurly-burly of business.

I will consider two prominent approaches to the morality of bargains. The first is the family of theories focused upon the relation between each party to an exchange and the objects exchanged. In this approach, bargains are morally justified because each party agrees to the exchange; the focus is on the will or consent of the parties to the terms of the bargain. Naturally, different philosophers will have very different interpretations of what constitutes genuine and voluntary agreement. Hobbes famously championed this approach: “The value of all things contracted for is measured by the appetite of the contractors; and therefore the just value is that which they be contented to give.”⁴

Hobbes here articulates a minimal theory of consent based simply on the coincidence of

⁴ Hobbes, Leviathan xv, 14.

opposed preferences: we agree to an exchange because I value your object more than my object and you value my object more than your object. The focus here is on the relation of each party to the objects exchanged, not on the relation of each object to the other, or on the relation of each party to the other. In other words, a sound bargain might involve objects of very unequal market values and parties of very unequal bargaining power, just so long as each party gets the object he or she prefers.

The other main approach to the morality of bargains focuses more on the relation between the objects exchanged. According to this approach, a bargain is justified only when the parties agree to it and the objects exchanged are of equal market value. Thomas Aquinas gives a classic articulation of this tradition of the just price: “to sell for more or to buy for less than a thing is worth [that is, its just or market price] is intrinsically unjust and illicit.”⁵ This approach to the morality of bargains is clearly focused on the relation between the objects exchanged: the equality of market price is here thought to be a necessary or even a sufficient condition for the justice of a bargain. So long as the objects exchanged are of equal market value, the relation between each party to what he gives and what he gets might be very unequal and the relation between each party and the other party might be very unequal. In other words, each party might value what he gains very differently and each party might be of very different bargaining power.

Each of these approaches offers a plausible account of the morality of bargains: So long as the parties agree to a bargain, who is to gainsay that agreement? Or how could any bargain be justified if not at equal market values? I have presented the agreement approach first because it is the simplest and because the tradition of the just price arose in response to perceived failures of the agreement approach. We shall discover profound

⁵ Aquinas, ST II-II, 77.1c.

shortcomings to both approaches, and I shall suggest a quite different way to evaluate the morality of bargains.

That parties agree to a bargain might be a *prima facie*, but hardly a conclusive, reason to respect the morality of that bargain. In the first place, it depends upon what is meant by “agreement.” In Aristotle’s causal theory of voluntary action, a deed is voluntary inasmuch as the agent is the cause: so if I, as a ship’s captain, throw my cargo overboard to save my life in a storm or if a tyrant coerces me to act by threatening to kill my family, my actions, says Aristotle, are still voluntary.⁶ An action would be involuntary if its cause were external to the agent, as when I am moved by the wind. So I voluntarily sign a contract even if gun is held to my head but not if someone else moves my hand. An action is also involuntary if it stems from ignorance: if I sincerely and innocently thought I was buying a bicycle then I did not voluntarily buy an automobile.⁷ So either fraud or mistake about the object could cause a bargain to be involuntary. I should be clear that, for Aristotle, being voluntary is necessary but not sufficient for a just bargain; he insists that there also be a proper equality between the values exchanged.

A more demanding view of voluntary consent is offered by Robert Nozick, who says that a person acts voluntarily so long as no one wrongfully constrains his or her options.⁸ In this view, a starving person voluntarily agrees to be my slave so long as I did not wrongfully cause his starvation. Any bargain, no matter how much desperation on one side or pressure on the other, is voluntary so long as no one resorts to wrongful coercion or fraud. So Nozick’s normative conception of the voluntary rules out the

⁶ Aristotle says of these cases: “These sorts of actions, then, are mixed. But they would seem to be more like voluntary actions.” *NE* 1110a 12.

⁷ Aristotle says “everything caused by ignorance is non-voluntary” at *NE* 1110b 18.

⁸ See Nozick’s account of voluntary exchange in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 262-265.

tyrant's extortion but not the desperation of the ship's captain in jettisoning his cargo. By this account, I may use whatever legal, economic, or natural advantages I have to exploit your weakness in driving a hard bargain. But how is meaningful choice possible for the party radically weaker in power, knowledge, and resources? How well am I likely to choose under conditions of desperation? Would someone rationally agree to such a principle if he or she thought it possible to be the weaker party to such an exchange? Is the moral principle of reciprocity undermined by such radical inequality of benefits? Would a good person take such advantage of someone else's desperation?

Most economists defend all voluntary bargains on the grounds that they are Pareto improving. On this view, a voluntary bargain by definition must make at least one party better off and no party worse off. Of course, this would be true if each individual were an infallible guide to his own well-being. But we are far from infallible. At least four sources of our fallibility come to mind: disparity in bargaining power, ignorance, weakness of the will, and moral vice. Even if we were all capable of sound deliberation about our own true well-being, we are all likely to make rash and mistaken judgments in the context of vast disparities in bargaining power. What chance do I have in reaching a just bargain with someone who is much wealthier, smarter, and more knowledgeable? The stronger party can wait me out, wear me down, manipulate me, pressure me, hide relevant information, etc. As a result of these disparities in bargaining power, I might well agree to a bargain that leaves me worse off and that I may well later regret, such as accepting unsafe working conditions.

Moreover, quite apart from being taken advantage of, I am often my own worst enemy. I might well be ignorant of what I bargain for or mistaken about how it will help

me. Because of an addiction or some other weakness of my will, I often agree to bargains that I know will make me worse off and that I will regret. Philosophers have given several different accounts of these failures of voluntary choice, but almost all recognize the pervasiveness of these failures. Aristotle would say that my will is weak because my desires are not adequately educated by reason; St. Paul would say that the perversity of sin causes me to do that which I hate; Hume would say that my first-order desire to accept the bargain was stronger than my second-order desire to have a different first-order desire. Finally, in the presence of moral vice, I will agree to bargains that make me worse off and that I will not even regret, such as, for some, gambling. So the fact that I agree to a bargain is far from conclusive evidence that I will benefit from that bargain.

These well known disparities in bargaining power and defects in the human will have led philosophers and lawyers to look to the morality of bargains not merely in the agreement of the parties but also in the substance of what they have exchanged. In this tradition of the “just price,” a voluntary bargain morally justified only when the market values of the objects exchanged are equal.⁹ Instead of focusing upon the relation between each party and the objects they desire, the tradition of the just price focuses upon the relation between the objects exchanged. Although these theorists were also interested in the defects of human will, especially those caused by mistake, fraud, or duress, the quality of the will was subordinated to the equality of the exchange. For example, if we found a gross inequality in the value of the objects exchanged, then we might explain that injustice by looking to a defect in the will of the parties, due to mistake, fraud, or duress.

⁹ For an analysis and defense of the just price tradition from Aristotle through the late-scholastics, see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991); for a critique of the just price tradition, see my “Equality in Exchange”.

Conversely, if there were equality in the market value of the exchanged objects, that equality would be sufficient for making a just bargain, despite considerable mistakes, fraud, or duress. So long as the bargain was substantively just, as measured by the equal values exchanged, the parties have no grounds for complaint about procedural unfairness, as measured by unequal bargaining power, duress, mistakes, or other defects in the process of coming to agreement.

Undoubtedly, we would normally expect voluntary bargains to result in exchanges of roughly equal market values. After all, that is what markets do: they equilibrate supply and demand around a single price. Should we thus conclude that the justice of a voluntary bargain stems essentially from the equal market value of what is exchanged? Cases in which we find morally justified bargains without equality of market prices and cases in which we find equality of market prices in exchanges that are not morally justified are illuminating. I wish to demonstrate in these two kinds of cases that equality of exchange is neither a necessary nor a sufficient condition for making bargains just. In other words, some bargains at unequal market prices or in the absence of market prices are justified while some bargains at equal market prices are unjustified.

If equality of market values were necessary for justice in bargaining, then how would we evaluate bargains where there is no market price? In many kinds of informal bargains we buy and sell or barter services and commodities for which there either is no market price or we have no way of knowing what that market price might be. In addition to the many simple societies of the past and present lacking regular markets, we all make bargains to do things or trade things for which market prices are not available. I might trade you Yo-Yo lessons for an old Hardy Boys book. To determine whether these

bargains are just, we must look to something other than the equality of market prices. But even where there are market prices, there are at least three kinds of bargains in which a significant inequality of market prices seems morally justified. In each of these cases, I am justified in knowingly offering my goods or services at below market values: The first kind is a bargain motivated in part by affection for family and friends, in which I mix my bargain with a gift; a second kind is a bargain motivated in part by a desire to establish a long-term trading relation by means of a loss-leader; a third kind is a bargain motivated in part by a felt duty to transfer some of my wealth to someone who needs it, in which I mix my bargain with distributive justice. In the moral evaluation of such exchanges, it is crucial that the seller freely and knowingly offers his goods or services at below-market prices; otherwise, we might suspect that he or she was acting from ignorance or under unjustified duress. The law might well require that such a seller expressly declare his or her intention to make a concession to the buyer.

We can see that many just bargains occur in the absence of market prices or with very unequal market values. In short, equality of market prices is not necessary for justice in bargaining. But is equality of market value sufficient for justice in bargains? If what we exchange is of equal market value, does that fact settle the question of 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 the logic of the just price, we must accept the right of salesmen to manipulate customers into buying encyclopedias, 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 they really don't need. Customers improperly persuaded to buy things they don't want care little that they paid the fair market price; they feel that their naïve desires or fears were unfairly manipulated. So equality of what is exchanged is not sufficient for making a bargain just.

3) Respect for the Moral Equality of the Parties.

In morally justified bargains we expect the parties to agree about what they surrender and what they gain and we expect the market values of what they exchange to be roughly equal. But, as we have seen, the sheer fact of agreement, though necessary, is not sufficient for moral bargains; and the equal value of what is exchanged turned out to be neither necessary nor sufficient for justified bargains. To return to the logic of bargains, the voluntary theory of morality is right to focus on the will of the parties but wrong to focus on the desire of the parties for what is exchanged. The coincidence of opposed preferences is not an adequate basis for achieving a morally justified bargain, since those preferences are so easily distorted by moral vice, weakness of the will, ignorance and duress. The will of parties toward each other, not toward the objects exchanged, matters most to morality in bargains. Similarly, the just price approach to bargains is right to focus on equality but wrong to focus on the equality of what is exchanged. A kind of equality of the parties to the exchange is what matters most.¹⁰

Justice is a relationship first and foremost between persons, not between preferences or things. Agreement about opposed preferences and equality of things are

¹⁰ 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), pp. 76-83. Cf. André Comte-Sponville, A Small Treatise on the Great Virtues (New York: Henry Holt, 2001), pp. 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...."

valuable only as a manifestation of the rightful equality of persons. Of course, where two parties to an exchange show proper respect for each other's moral equality we would expect them to come to agreement about an exchange of values that are in some sense equal (though not necessarily equal in market price). In other words, agreement about 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. If I knowingly blend my bargains with gifts or transfers then my moral agency is not being subordinated to another's by means of fraud or duress. In the case of such liberal bargains, then, the disparity of what is being exchanged need not signify a disparity of moral equality of 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 is necessary for a moral bargain, whether of equal or of unequal things, is each party's respect and concern for the moral equality of the other.

I will not attempt here to set forth a comprehensive account of what "moral equality" 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 a bargain has an equal right to form a conception of the good of his life as a whole and an equal right to solicit the cooperation of others in pursuing that conception. In any morally just bargain, each party must respect the capacity of the other to form a conception of a good life and to grasp how this bargain promotes that conception.

In respecting the moral equality of my bargaining partner, I must respect both his will and his welfare—though in different ways. I must respect his conception of what he wants insofar as is consistent with my conception of his welfare. If I believe that what he wants is destructive of his welfare or the welfare of another, then I must refuse to bargain; here my own conception of his welfare, not his conception, is relevant. Of course, this is a purely formal restriction and its moral soundness will depend upon the content of my conception of his welfare. But insofar as what he wants is consistent with my conception of his welfare, I must respect his conception of what he wants: even if I offer something that genuinely promotes his welfare, I must respect his right to refuse it. Naturally, I can attempt to persuade him of what I think a good life truly is and how this bargain promotes that good life, so long as I don't attempt to foist a bargain upon him by means of deception or manipulation. If I do not respect his right to understand the relation between this bargain and his own conception of a good life, then I am not treating him as a moral equal. 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. I cannot guarantee that I, let alone he, will make a wise choice. But I should have no reason to believe that this

bargain violates my conception of his welfare or his conception of what he wants.

Otherwise, I am not respecting his moral equality.

What is the relation of this normative standard of moral equality to the factual standard of equal bargaining power? Parties to a bargain are rarely equal in all relevant aspects of bargaining power—nor is such equal power necessary for a morally sound bargain, so long as each party respects the moral equality of the other. 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. This sincere and generous counsel is quite common in our practices of bargaining. Nor is equal bargaining power sufficient for a morally justified 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 moral equality.

Even if equality of bargaining power is not strictly necessary or sufficient for a good bargain, it is no doubt quite important. One is much more likely to respect the moral equality 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 “bargains” with a small child. So anyone who cares about the morality of bargaining 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 bargaining, ranging from the bargains between spouses to the bargains between nations.

So the master moral norm governing all bargains is that each party must respect the moral equality of the other. Such a master norm takes in the procedural justice concerning how the agreement between the parties is reached as well as the substantive justice concerning the fairness of what is exchanged. The procedural constraints upon the formation of our agreement will exclude withholding pertinent information, manipulating sub-rational desires and fears, or taking advantage of another's duress. And since respect for moral equality usually requires an exchange of equivalents, this master norm also accounts for the substantive justice of the just price; at the same time, however, respect for moral equality is perfectly compatible with unequal exchanges, and even exchanges that are equal are compatible with an absence of respect for moral equality. So it is ultimately the moral equality of the parties that is crucial for the morality of bargains; 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.

4) Equality of the Parties in Bargains and in Gifts.

The immense importance of the moral equality of the parties is especially manifest when we contrast bargaining with gift-giving. Fair bargaining 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 moral equality 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 or she 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.

Gift-giving is not only compatible with inequality, it intrinsically 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.¹¹ Of course, 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.¹² One strong argument for governmental responsibility for welfare was to free the poor from a degrading subordination to wealthy patrons¹³; 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 the give-and-take of bargains intrinsically

¹¹ “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.” Marcel Mauss, The Gift, trans. Ian Cunnison (New York: W.W. Norton, 1967), p. 72.

¹² See Emerson and Dillon cited in Jane B. Baron, “Gifts, Bargains, and Form” in Indiana Law Journal 64 (1988-89): 155-203, at p. 195n.

¹³ “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, p. 63.

acknowledges the moral equality of the parties. In many contexts, the least degrading way to give a gift is in the form of a bargain. The common view that gift-giving is always noble and altruistic while bargaining is always vulgar and selfish cannot be sustained: bargaining is often more compatible with moral equality among persons than is gift-giving.

5) How Voluntarism and Just Price Converge upon Equality of the Parties.

The most sophisticated champions of the voluntary and the just price approach to justice in bargains both at least implicitly recognize the importance of the equality of the parties. In the voluntarist approach to bargains, agreements are morally justified when all parties are assumed: a) to be rational, meaning at least to have a consistent set of preferences; b) to have either perfect or at least adequate information; c) to be autonomous, at least in the sense that they act on their own behalf; d) to have the same basic rights to make agreements. Moreover, genuine agreement is usually thought to be uncoerced, meaning that parties must refrain from deceit, threats, subrational rhetorical appeals, and other methods by which one party attempts to subordinate the moral agency of another. In other words, the very notion of a free, rational, and uncoerced agreement seems to require that each party respect the moral equality of the other. That our preferences for commodities are conveniently opposed, so that we each want what the other has, is not enough. The justice of an agreement is less a matter of the relation of parties to the objects exchanged than a matter of the relation of the parties to each other. In short, the very notion of an agreement embodies a commitment to some kind of equality between the parties.

The tradition of the just price also manifests at least implicit respect for the equal moral agency of the parties. A rule of Roman contract law is instructive here: laesio enormis (Codex 4.44.2) provided relief to a seller who sold his land for less than half its market price.¹⁴ Medieval Scholastic jurists interpreted this rule to reflect the doctrine of the just price and they extended the rule to other commodities. According to some of these jurists, such a disparity of market values constituted “objective fraud” (dolus ex re ipsa), that is, a fraud in effect even if not in intent. Still, these same jurists permitted parties to renounce the right to the remedy of laesio enormis, if that renunciation were explicitly declared in the contract. The great jurist Azo observed that if the seller expressly makes a concession to the buyer, then we need not worry about fraud, since “one who knows is not deceived.” Later, this right to waive the remedy of laesio enormis was restricted for fear that the act of renouncing the remedy could itself be the product of fraud or duress. These restrictions focused upon protecting the interests of those parties least able to protect their own interests; so, for example, women, children, and rustics were denied the right to renounce the remedy. In short, both by recognizing the right to renounce the remedy of laesio enormis and by restricting that right, the jurists of the just price tradition seem to be more concerned with the parity of the parties than with the parity of market values exchanged. They treat a disparity of market prices as *prima facie* but not conclusive evidence of some defect in the relation between the parties. These jurists focus their concern upon bargains in which respect for the equal rights of the parties is least likely due to vast disparities in bargaining power.

We noted that Thomas Aquinas articulated the view that justice in exchange required the equal value of what is exchanged (ST II-II, 77.1c). But it is important to

¹⁴ For the sources of my discussion of laesio enormis, see my “Equality in Exchange,” pp. 93-95.

note that Aquinas begins his analysis of the morality of bargains by citing the Golden Rule. 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 its exceptions find their common justification in the master requirement that we respect the equal moral dignity of those with whom we trade.

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 respects the moral equality of the other. If they were greatly different in age, we might well suspect fraud or coercion. To return to our example of an exchange of a Hardy Boys book for Yo-Yo lessons, what if the child who acquires the Hardy Boys book cannot read? What if the child 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 or she is benefited by our exchange. I cannot guarantee that the other party will correctly

understand the benefit of our exchange, but I must avoid blocking his or her 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?)"¹⁵ I take it that the point of classic procedure, as well as of Fuller's suggested improvement, is to require each 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. So long as we are confident that each of these parties will respect the moral equality of the other, we are confident that their choices will lead to a morally justified division of property; indeed, in this context, "equal shares" means whatever results from the choices of parties who must treat each other as moral equals.

¹⁵ Fuller, The Principles of Social Order (Durham, N.C.: Duke University Press, 1981), p. 180.