

RICHARD HYLAND

GIFTS

A STUDY IN
COMPARATIVE LAW

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Man Ray, *Le cadeau* (The Gift)
(c. 1958, replica of the 1921 original)

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*for António Hespanha, Detlef Leenen, Dennis Patterson, and Pablo Salvador Coderch,
my friends in the law, this foreign country*

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As soon as [Dylan] Thomas learned that my informant was
—like most of us—a professor of comparative literature,
he asked: “What do you compare it with?”

—Harry Levin
“Comparing the Literature”

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ACKNOWLEDGMENTS

I began writing this book twenty years ago to repay the debt I owe to three of my teachers. It took somewhat longer than expected, and it is now a little late. Two of them, unfortunately, are no longer alive to receive it.

Peter Schlechtriem asked me to write this book the day I told him I had found a job teaching law. There were no congratulations, just this request. Studying with him had already convinced me that the only way to think about the law was comparatively. I was pleased with myself to receive a commission from one of the world's leading comparativists on my first day on the job. Only now do I understand what he was thinking. If he had waited, even a little, I would have figured out how much work it takes to write even a few decent pages in the law, and I would never have accepted. He wanted someone to write a book like this, and he surely also thought it would do me a lot of good—it would straighten out my misconceptions—if I were to write it. Because he thought the project was important, we argued about my ideas every time we met. With his extraordinary generosity, particularly toward foreigners, he cited an earlier draft of this book in some of his last writings, though, irritatingly, only on points about which I myself remain uncertain and for which he could find no other source. If he were still around, and I am so sorry he is not, there is no doubt he would disagree with most of what I have written. He would explain what was wrong with it in a couple of startlingly insightful sentences. I would not know how to respond, and there would be a few awkward moments of silence. Then he would remember there was a wine fair going on in some small town near Freiburg. He would smile and say we really should take a drive over there and open a bottle together.

Many years before that, in my first year in law school, I had Fritz Kessler for contracts. As we sat around talking after one of his classes, he told us he had been to a meeting of Restatement advisers, and he had expressed his view that American law should abolish the consideration doctrine. After that comment, he told us, they had decided not to invite him back. I could not understand why they would reject Fritz Kessler, the kindest and best human being I have ever met. By the time his course ended, I had decided what I would do with my life. I wanted to be like him. I am a contracts professor because he was a contracts professor. If I could get away with it, I would speak English with his incomprehensible German accent. Actually, I can imitate it a little. Whenever the occasion arises, I cannot resist speaking to my students of *ze g-rrr-eat Holmes*.

A year or so after I finished my American law degree, I applied to a graduate program in private law in Paris. Michelle Gobert was directing the program at

the time. I still cannot figure out why she accepted my application. I know she is intrigued by foreign students, and I was probably one of the first Americans to apply. She surely did not realize that I had never seen the French Civil Code before she walked into the first meeting of her seminar carrying a brand-new copy of the latest Dalloz edition. The room quieted instantly. She looked us over for a long minute without speaking. I do not think anyone feels entirely comfortable in Mme Gobert's presence. She has an air about her of royalty, or of a terribly distinguished French actress. She did not welcome us or chat about administrative matters. She does not enjoy small talk. Instead, she asked simply: *L'article 2 du Code civil, qu'est-ce qu'il dit?* Article 2 of the Civil Code, what does it say?

My classmates were some of the best private law students in France. This was a question to which they knew the answer. One of them explained that article 2 provides for the nonretroactivity of the law. Mme Gobert looked at the student without smiling. Then she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* A different student mentioned Paul Roubier's suggestion that a new law may be applied to *les situations juridiques en cours*, legal affairs that are already in process. Again she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* Another student tried, and then another, each new voice attempting yet a more refined statement of the concepts involved. After each comment, she responded in the same way. It was my first French law class, so I did not know what to think. It seemed like a Zen-like version of the Socratic method. The French students were terrified. This was material they thought they knew, and yet they could not guess what was on her mind. Finally, one of the students had the presence of mind simply to read the code provision aloud. Mme Gobert's eyes lit up. *Mais bien sûr!* she responded. *C'est ça qu'il dit!* But of course! *That's* what it says!

It is always hard to understand why students take what they do from a particular class. Yet I know that the spirit behind that question—the indomitable passion for precision in the law, which is all the more intoxicating because it is impossible to achieve—set the standard I have aspired to attain on every page of this book.

The Max Planck Institute for Comparative and International Private Law in Hamburg generously made it possible for me to spend two summers in the institute's library collecting materials. Ulrich Drobnig, formerly one of the institute's directors, has constantly encouraged me. He provided research grants, read the entire manuscript, and, with his erudition and fine eye for detail, pointed out numerous errors. He also taught me how to cite a mass of foreign material in a consistent manner. Werner Lorenz kindly examined an early draft. Jürgen Basedow and Reinhard Zimmermann helped make it possible for me to publish this work with Oxford, as did Peter Gruss, president of the Max Planck Society.

Roger Dennis and Ray Solomon at the Rutgers Law School in Camden gave me support in every way they could think of and have shown the kind of patience

that I did not know was compatible with law school deanship. Debbie Carr, my secretary, is the best in the business.

My friends at the Rutgers Law School Library in Camden have a magical ability to locate sources in foreign languages from small shreds of bibliographical information. I am grateful to all of them—David Batista, Hays Butler, Gloria Chao, Lucy Cox, Anne Dalesandro, Cathy Fleming, Eric Gilson, John Joergensen, Mary McGovern, and Lori Rowland. I am also grateful to Kent McKeever, Sabrina Sondhi, and their colleagues at the Arthur Diamond Library at Columbia Law School and the librarians of Biddle Library at the University of Pennsylvania Law School. This book would not have been possible if their priceless collections had not been just a walk or a train ride away. Laurent Mayali, director of the Robbins Collection in Berkeley and Sigrid Amedick at the Max Planck Institute in Frankfurt generously located rare sources for me. I am also grateful to inter-library loan librarians all over the country who have been willing to pull rare books from their collections, pack them up, and send them to someone they have never met and whose research they know nothing about.

This project would never have made it past the mountain of photocopies without Jim Morgan's help. He developed a filing system for the boxes of photocopies and spent a year filing the sources in such a way that I have always been able to find them. He has also helped by repeatedly asking when this book was finally going to be published. Over the past fifteen years, dozens of other Rutgers students have worked tirelessly on this book as research assistants. Todd Fox, Jason Cohen, and Brian Bailey were among them. I am lucky that so many gifted students pass through my life at Rutgers. I enjoy working with them immensely, but I now have to admit that it never occurred to me to keep track of who exactly was involved in which of my projects. I am grateful to them all, and embarrassed that I have found no way to discover all their names in order to list them here.

Jeremy Thompson and Sarah Wahlberg helped me translate some of the Latin texts. Annette Beier, Miriam Nabinger, and Ole Böger updated references to the German commentaries. Annette also showed me the kind of hospitality in Heidelberg I always dream of being able to show to others. I think I owe Miriam a letter of recommendation.

A few lawyers, judges, and scholars have been kind enough to review some of what I have written about their legal systems or fields of scholarship. They have all added to the accuracy of the descriptions, though, it goes without saying, the errors that remain are my own. I am grateful to Tracy Andrews, Peter Bogaert, Allain Caillé, Rohit De, Pablo De Doncker, Volker Drecktrah, Georges Durry, Mel Eisenberg, Jay Feinman, Michael Furnston, Antonio Gambaro, Jacques Godbout, Carlos Gómez, Andrew Halpin, Carsten Jungmann, John Langbein, Franziska Leonhardt, Michael Moody, Craig Oren, Alex Pospisil, Rebecca Probert, Sonia Ramos, Anna Riberti, and Martin Schmidt-Kessel. I also benefited greatly from suggestions made by fellow participants in the Fourth Works-in-Progress

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António Hespanha, Detlef Leenen, Dennis Patterson, and Pablo Salvador Coderch have taught me that friendship is an art form. I have spent much of my adult life regretting that I will never be able to find an appropriate way to reciprocate their gestures of friendship, large and small—from saving my life (literally) to causing me rare moments of bliss. Even after having studied generosity for twenty years, I still cannot understand how they are able to do their own very important work and yet always find time for their friends. I wish I could do that.

Dave King, William Logan, and Legs McNeil are more than, closer than, friends. Though they almost certainly will never read a word of this book, they inspire pretty much everything I write.

To Sharka, Rivka, Lorenzo, Toman, and Libuše—all my love.

PREFACE

I have discerning friends who read widely in the natural and social sciences and the humanities but who would never read a book about the law. I have never understood why this is. Of course, many law books are uninspiring, but so are many other books. For some reason, the law seems inherently uninteresting. But why are questions of unconscionability, good faith purchase, and apparent agency necessarily less rewarding than the diet of the Nambikwara?

The problem is even worse than it seems. Even lawyers do not read law books. They consult them, read a couple of pages that might be relevant to the brief they are writing, but they do not take law books home with them. Yet more strangely, this also applies to law professors, especially in the United States. We keep up with the articles in our field, but it is rare for us to sit down with a book about the law and read it through. After teaching for a few years, most of us have developed a personal theory about how the law works. No amount of discussion or case law can convince us that our theories might be wrong. And so most law books, like most talks at the faculty seminar, either tell us something we already know or else they seem to get it very wrong.

This goes even for the classic books of the common-law tradition. There are maybe two dozen books that might legitimately make the claim to be included in the list of the common law's ten great books. Whichever books one puts on that list, it is extremely unlikely that more than a handful of the members of the law-teaching profession has read all ten of them from beginning to end. My guess is that it is less than that, which in any other field would be absurd. It is therefore clear that, now that my parents are no longer alive, no one will ever read this book through from cover to cover. It might be said of it what Byron once said of the work of Southey—Robert Southey, then poet laureate of England. It will be read long after Homer is forgotten. But only then.

Nonetheless, someone might eventually run across the book in a library and open it, if only to see why so many pages have been devoted to a topic as obscure as the law governing the giving of gifts. It therefore might be useful to explain for whom the book was written. I have had four different readers in mind.

The first is the lawyer or scholar, in the United States or abroad, who practices or writes in the various fields that touch on gift law, including the law of trusts and estates—successions law as it is known to the civilians—and the laws of contract and restitution. A surprising number of cases in these fields now involve gifts that have contacts with more than one jurisdiction. A detailed guide to how gifts are treated in the major common- and civil law systems may therefore prove useful. Though the number of legal systems considered here is limited, this

survey manages to include many of the ideas that are discussed in modern legal systems. One problem, of course, as with all books about positive law, is that it will already be out of date by the time it is released. Laws are revised; case law evolves. But this area of the law is complex, and the revisions, which now seem to have become frequent, are often designed to eliminate the problems created by a previous generation's choices. This book discusses the foundational issues in the field in a way that may make it easier to understand the new developments.

Second, the book may interest those who write and teach in the field of comparative law, as well as those who have wondered how, or why, laws should be compared. For reasons that, upon reflection, are obvious and that I have tried to explain elsewhere,¹ broad-based comparative studies are rare, in any field of the law. In fact, this may be the first wide-ranging, detailed comparative study of the law governing the giving of gifts ever attempted, at any time in any language.² Because many of the sources are difficult to find, I have done my best to pack this book full of information—rules, principles, exceptions, and case holdings, history, policy, and doctrinal justifications. My goal has been to provide data to those who think about the differences between the civil and the common laws, data that can be used to support their theories and criticize the theories of others, whatever those theories happen to be. I too have a theory about these differences, but I have done my best not to make it a part of this book.

Third, I have written this book for those who are engaged in comparative work in fields of study other than the law. As will become clear in chapter 2, the methodological difficulties in comparative law have not been settled. It surprised me, though of course it should not have, to discover that the confusion seems to

1. Hyland (2007) 1139–1151.

2. I have encountered nothing similar in English, French, German, Italian, or Spanish. John Dawson's brilliant book, discussed at length below, is a different enterprise. Moreover, no scholar who writes in any of these languages has, to my knowledge, cited to such a study in another language.

Nonetheless I am haunted by a memory. The library where I was working was about to close for the evening. Because I wanted to leave town the next morning, I was rushing to finish my photocopying. The last of the volumes I had gathered was written in a language I do not speak. It might have been Romanian, or maybe Polish. It was a thick book, and, as I remember it, a book written in the 1950s, printed on the acidic paper used at the time for European law books. I could read the title and enough of the table of contents to recognize it as a detailed comparative study of the law of gifts in the major legal systems.

I had five minutes to decide what to do with the book. I now realize I should have photocopied the title page, the copyright page, and the table of contents and filed them away. But I was tired and not thinking clearly. I already had more material than I would ever be able to read. And I knew I would never read an entire book in a language I do not speak. So I left the book on the table next to the copier. I have never run across it again. I have also never seen it cited. I would now give a lot for that book. But I am no longer sure the book is actually a memory, and not simply a dream.

be present whenever comparison is attempted in any field.³ The method that is used here—or, since *method* is much too serious a word for the intuition that lies at the base of this book, I will just call it a thought—is borrowed from discussion about comparison in the social sciences. I hope that, by presenting gift law from the point of view of other disciplines, I help to include the law in the interdisciplinary conversation about the practice and purpose of comparison.

Finally, I have written this book for those who think about gift giving from the perspective of the humanities and the social sciences. The gift has created an extraordinary interdisciplinary conversation, one of the most exciting in all of the human sciences. During the course of these discussions, some scholars occasionally make forays into the law, either into current law or into the long history of the law of gifts. The difficulty is that few nonlawyers have direct access either to the relevant legal norms or to the justifications that are offered to support them. The reason is that it takes an entire academic career—to this I can testify—to learn enough law to be able to make sense of the cases and legal scholarship on these questions. In many legal systems, principal among them the common law, gift law includes, or relies on, some of the most arcane conceptual structures elaborated in any legal system. As a practical matter, it is impossible for any nonlawyer to read and understand the original sources of gift law. Some of the questions are so complex that I now wonder whether even a career studying this material is sufficient preparation for the task.

I have decided that it would not really assist nonjurists to present this material without using legal concepts. As a result, I use legal concepts from the private law to explain the legal concepts involved in gift law. That may make this book seem difficult, but it is not. To the contrary, it offers a means for nonlawyers from any country to acquire a basic common-law legal vocabulary, much as law students do during their first year of law school. Because I have tried to translate the foreign legal concepts, all that is needed is a willingness to look up a few words in an English dictionary. For this purpose I recommend an unabridged dictionary rather than the legal dictionaries, which, in the languages I know, are inadequate and misleading.

Graz, in the garden of Gasthaus Meinhart
June 2008

3. “The most serious sign of the precarious state of our study [of comparative literature] is the fact that it has not been able to establish a distinct subject matter and a specific methodology.” Wellek 282. “[A] *methodology* of comparative political analysis does not really exist.” Lijphart 682 (emphasis in original).

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1. THE CONTEXT OF GIFT LAW

1. *Prohibition.* The French revolutionaries abhorred gift giving. And the gifts they most detested were those that parents were in the habit of giving to their children. As soon as the occasion presented itself, the National Convention prohibited those gifts. It forbade them all, absolutely and without exception. Because this book explores why the legal mind so often concludes that gift giving is a danger to society, it seems reasonable at the outset to ask how the revolutionaries justified their position.

2. *Absolute control.* Gratuitous transfers had played a role in French family life for a thousand years. Though laws and customs varied greatly by region and period, at the end of the *ancien régime* primogeniture generally governed descent among the nobility. The eldest son took the château and at least half of the family's real estate.¹ Succession rights among commoners were complex. Both rich and poor peasants in the Mediterranean south followed the Roman law tradition that allowed the father to choose his heir (*coutume de préciput*).² The father's goal was to avoid fragmenting his estate. He gave his property to his heir and left his other children with a scanty inheritance.³ To pass his property to his favorite son, the father used three traditional forms of gratuitous transfer (*libéralité*)—the *inter vivos* gift (a gift completed while the donor is alive), the last will and testament, and the contractual designation of a principal heir (*institution contractuelle*)—and excused his heir from having to return the property to the executor of the father's estate (*dispense de rapport*).⁴ As Le Roy Ladurie explained, gifts were the instruments the father used to reach beyond his grave to impose inequality and to guarantee that his property would remain intact.⁵

To the revolutionaries, the family father was a despot, an absolute monarch within his small realm who tolerated no disobedience.⁶ Yet even despots cannot escape the consequences of their actions. By privileging one of his offspring, the

1. Traer 42; Ourliac and Malafosse 401–406.

2. Le Roy Ladurie 61–65.

3. Id. 62.

4. Yver 155–226.

5. Le Roy Ladurie 63.

6. Traer 41.

father left his daughters and his other sons at the mercy of the heir.⁷ The selection so often turned sibling against sibling that many fathers kept their choice a secret so they might die in peace. When Chancellor d'Aguesseau, the creator of modern civilian gift law, first proposed the Ordinance of 1731, the regional *parlements* were outraged at its publicity provisions. If the father could not keep his choice confidential, he would be pulled into the rancor that his choice often generated.⁸

3. *Reform.* As soon as the Bastille fell, pamphleteers and petitioners began to rage against the unequal inheritance rules that seemed to be responsible for favoritism, feudalism, and geographic particularism.⁹ The petitions argued that only an end to gift giving could restore equality within the family, permit love within households, and end the tyranny of the strong over the weak.¹⁰ Political clubs formed to press for a more egalitarian system.

The revolutionaries immediately took up the cause and dismantled the successions law of the ancien régime piece by piece.¹¹ They passed many statutes and decrees, all with the same goal: to institute absolute equality among heirs of the same degree. In 1790, the National Assembly abolished primogeniture.¹² In a hushed moment in April 1791, Talleyrand read to the Assembly a speech Mirabeau had dictated as he was dying.¹³ The marquess argued that it violated the laws of nature and the principle of equality to permit parents to leave unequal shares to their children. He proposed that parents be permitted to make gratuitous transfers of only one tenth of their estates. The remainder was to be divided equally among heirs of the same degree. Robespierre rose to second the critique.¹⁴ The Assembly voted to require intestate estates to be divided equally among the testator's children, regardless of gender or birth order.¹⁵

7. Once the heir was chosen every other member of the household was marked in the eyes of village society on a subtle scale of deference and respect. Monteil likened the nominated heirs of the bourgeois families of Rodez to petty kings with the cadets acting as subjects [E]ach rural collectivity possessed an invisible superstructure of biological and emotional obligations as well. The constraints of kinship and household position were tenacious and allowed little freedom of manoeuvre.

Jones (1985) 101.

8. Regnault 594; Lagarde 25–26.

9. Desan 145, 167.

10. Id. 171.

11. Traer 158.

12. Decree of 15 Mar. 1790 art. 11. Most remaining feudal privileges were abolished by the Decree of 13 Apr. 1791.

13. Mirabeau, "Discours sur l'égalité des partages dans les successions en ligne directe" (2 Apr. 1791), in 24 Mavidal and Laurent 510–515.

14. Discussion contribution (5 Apr. 1791), in id. 562–564.

15. Decree of 8 Apr. 1791 art. 1.

The reforms grew more egalitarian as the revolution became more radical.¹⁶ In 1793, little more than a month after the Convention voted to execute Louis XVI, the deputies attacked the remaining vestiges of paternal power. France was at war with most of Europe. Prices were rising, the sansculottes were rioting, and counterrevolutionaries were active everywhere. Parents who favored the old regime had discovered that they could prevent their children from participating in the revolution by threatening them with disinheritance.¹⁷ The Convention decided to prevent its enemies from using successions law as a weapon. It decreed that children should inherit equally and charged a committee to present a draft.¹⁸ Pénierès again raised the issue two days later and asked that a committee consider how to prevent disinheritance.¹⁹ The root of the problem, in Mailhe's view, was the right to make a will. He proposed that it be abolished and asked that the matter be referred to committee. Gensonné made clear that if anything was to be done it had to be done quickly. Once it became known that the Convention was considering abolishing testamentary succession, the revolution's opponents would make alternative arrangements and the chance for change would be lost for a generation. Lamarque suggested that there was no need to abolish the right to make a will. The Convention could prohibit legacies in direct line while permitting bequests to collateral relatives. Buzot thought that any concessions would benefit the enemy. A parent could simulate a sale to a relative, who would then leave the property to the parent's chosen heir. Mailhe explained that, by the same reasoning, *inter vivos* gifts and the contractual designation of an heir should be abolished as well. Prieur de la Marne trumped all the others by demanding that the prohibitions operate retroactively to the fall of the Bastille. "Without that, you sacrifice the younger descendants who are devoted to the Revolution; you endorse the hatred fathers have for their patriotic children."²⁰ Duroy rose with a point of order. To avoid excesses resulting from momentary enthusiasm, the Convention had agreed not to enact legislation of general interest without a committee report. The others disagreed, and the vote was taken. The Convention prohibited transfers in direct line, though, for the moment, it decided not to make the prohibition retroactive. On 7 March 1793, in one of the most extraordinary of history's forgotten acts, the French legislature prohibited parents from making gratuitous transfers to their children.²¹

16. For a history of these reforms, see Desan 141–177.

17. Pénierès, Discussion contribution (7 Mar. 1793), in 59 Mavidal and Laurent 680.

18. Decree of 5 Mar. 1793.

19. The debate cannot have lasted more than an hour. For the discussion, see 59 Mavidal and Laurent 680–683. The debate is summarized in Desan 148; 5 Duvergier 185; Carette (1843) 220–221.

20. Discussion contribution (7 Mar. 1793), in 59 Mavidal and Laurent 682.

21. "The National Convention decrees that the power to make gratuitous transfers to direct descendants, whether *mortis causa*, *inter vivos*, or by contractual gift, is abolished;

Over the next several months, as the Convention lost its taste for compromise, the prohibitions escalated. The next to go were inter vivos gifts given by parents to the prejudice of their children, whether to collateral relatives or strangers. All such gifts were invalidated back to the fall of the Bastille.²² At the same time, the Convention voided all gifts given by collateral relatives to the prejudice of their presumptive heirs, whether to other collateral relatives or to strangers. These gifts were also retroactively invalidated back to the beginning of the revolution.²³ Retroactivity had an extraordinary reach, since heirs could receive inheritances only if they returned gifts received prior to 14 July 1789.²⁴ Two months later, a new decree voided all inter vivos gifts. The prohibition was made retroactive to include gifts given during the four and a half years since the fall of the Bastille.²⁵ Théophile Berlier, one of the decree's drafters, took the floor to explain that, because the provision restated the law of nature, it should not be considered retroactive.

The reign of nature and reason was born on 14 July 1789. It was still feeble at the time. It is true that it rose to its true stature only later, but that was the moment it began. You have not legislated with retroactivity. Instead you have simply tied the effects to their cause. You have proclaimed that property acquired gratuitously since that great event must be distributed according to the rules that you have prescribed with regard to those who nature designated to receive them, and you have removed the obstacles that might result from contrary provisions emanating either from human beings or from the law.²⁶

4. *Hérault de Séchelles*. For those who lived through those events, equality was more than a theoretical demand. The revolutionary prohibitions caused property to be seized from privileged donees and distributed to neglected heirs. For some legislators, personal and ideological interests merged. The life of Marie-Jean

and, as a result, that all descendants will have an equal right in the division of the property of their ascendants." Decree of 7 Mar. 1793.

22. Decree of 5 Brumaire II art. 12. Gifts to impoverished servants were maintained. Decree of 5 Frimaire II art. 1.

23. Decree of 5 Brumaire II art. 13.

24. Id. arts. 8–9; Decree of 17 Nivôse II art. 8 par. 1.

25. Decree of 17 Nivôse II art. 1 par. 1. There were numerous exceptions. For example, if the donee, at the time of the gift, had assets not exceeding 10,000 pounds (*livres*), a gift not exceeding that sum was valid. Id. art. 34. Gifts given in marriage settlements were also maintained, as were gifts given by a donor who died without relatives. Id. arts. 15, 32. The provisions of the Decree of 5 Brumaire were abrogated. Id. art. 61. Bequests (and presumably gifts) to charitable organizations were not excepted from retroactive effect. Decree of 22 Ventôse II no. 5.

26. Berlier, "Rapport d'un nouveau travail sur les donations et successions" (22 Ventôse II [12 Mar. 1794]), in 86 Mavidal and Laurent 388 no. 76

Hérault de Séchelles is exemplary. He seems to have been instrumental in lobbying for retroactivity.²⁷

Hérault came from a distinguished family of the *noblesse de robe*. His great-grandfather had served as Louis XIV's finance minister and had given his name to the Seychelles archipelago. Hérault was first cousin to the Duchess of Polignac, a confidant of Marie Antoinette, who had him appointed advocate general of the Parlement of Paris while he was still eighteen. Despite his noble lineage, fully documented back to 1390, Hérault joined the revolution and was present at the storming the Bastille.²⁸ In December 1789 he was among the first judges appointed by the revolution. He proclaimed his zeal for the defense of freedom in his acceptance address.²⁹ His older judicial colleagues were offended by his comments and reported them to his grandmother. There was a heated discussion. Hérault refused to back down, broke with his family, and was disinherited. Once he was elected to the Legislative Assembly his ideas moved further to the left. He twice chaired the Convention. He was the sole author of the Declaration of the Rights of Man and of the Citizen of 1793 and the principal drafter of the Constitution of Year I (1793).³⁰ For close to a year, he served on the Committee of Public Safety.

A report has survived of a prerevolutionary moment that may have convinced Hérault of the dangers of gift giving. Just a few years before the revolution, Hérault, as a young magistrate, argued a gift case before the Châtelet court. The case involved a deceased donor who had made three gifts to the poor of the parish of St. Sulpice but had left nothing to his poor relatives. Hérault convinced the court to invalidate the gifts because they had not been completed using the required forms. Dominique Joseph Garat, editor of the *Journal de Paris*, jotted down Hérault's argument and described the scene in a detailed news report.³¹ One phrase in the piece seems to have come directly from Hérault's plaidoyer, namely his view that, though the gifts demonstrated a laudable humanitarian sentiment, only an unenlightened mind would make gifts in those circumstances—the gifts had been dictated *par un sentiment d'humanité peu éclairée*.³²

Less than a decade later, Hérault, then at the summit of power, miraculously found himself in a position to prohibit such unenlightened transfers. As he did, it must have seemed unjust that his zeal for liberty had left him impecunious,

27. Merlin de Douai, Discussion contribution, National Convention (5 Floréal III [24 Apr. 1795]), in Panckoucke and Thuau-Grandville no. 219 at 890 (9 Floréal III [28 Apr. 1795]). Merlin's comments are summarized in Carette (1843) 325–326 note 2.

28. Anchel.

29. Dard 135; Bernier 57.

30. Dard 225–226.

31. Garat 903–904; Dard 6–7.

32. Schama discusses Garat's article in his history of the French Revolution. Unfortunately, his reading of it and his report of the incident are inaccurate. Cf. Schama 162–163.

and even more unjust that equality in inheritance had been achieved only a short time after he had been disinherited. As Merlin de Douai later explained, Hérault stood to gain 80,000 pounds (*livres*) of annual income if equality among heirs was made retroactive to the fall of the Bastille.

During the discussion of the successions provisions of the draft Civil Code, the poet Fabre d'Églantine, one of Hérault's close friends, proposed making equality among heirs retroactive. Merlin de Douai and Cambacérès opposed retroactivity. They argued that it violated the prohibition against retroactive legislation contained in article 14 of the Declaration of the Rights of Man. The proponents of retroactivity responded that article 14 applied only to the criminal law. Private law norms could be given retroactive effect all the way back to the Flood. Ramel, one of the delegates, saw that Merlin was perplexed. He leaned over and explained that the idea had come from Hérault, who had drafted the Declaration of the Rights of Man with retroactivity in mind.³³ Several orators had criticized the retroactivity provision in the Declaration for its limitation to penal matters, but Hérault had insisted and his draft had passed.

The retroactive prohibition of gift giving was also approved, and the legislative committee was asked to draft appropriate legislation. Merlin and Cambacérès, who were on the committee, refused to work on a measure with which they so strongly disagreed.³⁴ They eventually charged Berlier with the task because he had been out of the country during the debates. He too adamantly refused and even tried to resign to avoid the task.

Once the decree was drafted and approved, the Convention was deluged with petitions from outraged peasants demanding that it be rescinded.³⁵ During the debate on those petitions, Merlin rose to explain the circumstances that had led Hérault to suggest retroactivity. Merlin favored prohibiting parental gifts and agreed that heirs should take equally, but he thought the retroactivity provision was excessive. His proposal that it be suspended was passed. Moreover, article 14 of the Declaration of the Rights of Man was subsequently revised to prohibit retroactive legislation in the civil law as well, a prohibition that still survives (CC art. 2).

Hérault de Séchelles was not present at that debate and never had the chance to defend himself against the conflict-of-interest charge. He had been linked with Danton, convicted of complicity with the émigrés, and guillotined a year

33. In 1796 Bonneville also suggested that Hérault was responsible for the retroactivity legislation. Émile Dard, Hérault's principal biographer, noted that he could not confirm that claim from the debate transcripts. Dard 136 note 1. As one of the Convention's presiding officers, however, Hérault would not have needed to make the proposal himself.

34. The lawyers in the Convention knew that d'Aguesseau had not given retroactive effect to the Ordinance of 1731. Ordinance art. 47.

35. Traer 163.

earlier, together with Danton and Fabre d'Églantine. That was just three months after the Decree of 17 Nivôse that made his fortune.

5. *Retraction*. The retroactivity provision was suspended and ultimately retracted.³⁶ During the deliberations on the Civil Code, Tronchet described retroactivity as “the abuse of an overheated imagination by a brilliant metaphysical theory, the destruction of all parental authority, an unjust equality.”³⁷ It took decades for French jurists to unravel the legal chaos that retroactivity and its subsequent abrogation created.³⁸ In 1800, the Directory removed the mandate of equality and validated gifts and wills, provided they were done in the required formalities and did not exceed the disposable share.³⁹

6. *Legacy*. It now seems extraordinary that a legislature once contemplated prohibiting parents from giving gifts to their children, a practice that has been engaged in at all times and in all places. It is stranger still that those lawmakers actually acted on their idea. The explanation for their measures seems obvious. The revolutionaries looked at gift giving through the eyes of disadvantaged siblings and focused on the role that gift giving played in the oppressive structure they were seeking to overthrow. The decrees were an aberration, a moment of excess in excited times.

Yet the history of gift law suggests that the actual explanation is more complex. Gift giving and Western law have been in conflict from the beginning. Since the first gift legislation, the *lex Cincia* of the Roman Republic, jurists have seen in gift giving a danger to family and society.⁴⁰ Though the revolutionary prohibition was eventually lifted and gifts permitted in France, a distrust of gift giving has often haunted the law. Distrust was the policy foundation for d'Aguesseau's eighteenth-century formulation of the law of gifts, the substance of which passed into the French Civil Code and ultimately into the laws of Europe and most of the civilian world. And there the suspicion about gift giving survives to this

36. Decree of 5 Floréal III; Decree of 9 Fructidor III; Carette (1843) 326 note 2 *in fine*.

37. Tronchet, Discussion contribution (21 Pluviôse XI [10 Feb. 1803]), in 12 Fenet 305.

38. For the attempts to manage the effects of abrogation, see Decree of 3 Vendémiaire IV; Law of 18 Pluviôse V.

39. Law of 4 Germinal VIII arts. 1, 3.

40. In the evaluation of legal acts (*Rechtsgeschäfte*) the total freedom of individual will should be considered the rule. Roman law instituted exceptions to the rule only in those rare cases that seemed to present a particular danger that the freedom might be abused. Examples include ... the limitations on gift giving, and its complete prohibition between spouses, since precisely in the case of the gift, cool self-interest can more easily take advantage of good-natured, unsuspecting carelessness than it can in other types of transactions.

Savigny (1841) 5 note d.

day, together with its constant companion, “the eternally mistreated figure of the gift.”⁴¹ It thus seems more accurate to see in the revolutionary decrees the moment in which a long-standing hostility to gift giving surfaced in pure form.

A. NOTIONS OF THE GIFT

7. *Customary norms.* The giving of gifts, perhaps more than any other field governed by the private law, is already structured by customary norms before it becomes a legal institution. Because gift giving did not develop in mutual interaction with the law, it operates with relative autonomy. Extra-legal norms and enforcement mechanisms are usually sufficient. The social understanding that competes with much of modern gift law is the insight that quite a lot occurs in society that is not, and should not be, governed by the law.

For example, the marriage ritual is almost everywhere an occasion for gift giving. The customs include fabulously intricate gift exchange in the Gujjar villages of northern India,⁴² different kinds of monetary gifts offered at the traditional Jewish wedding,⁴³ as well as, at the minimalist extreme, the single, unreciprocated gift, usually of housewares, that a guest must bring to a wedding in the United States, or, according to some specialists, send within the year.⁴⁴ Much of the time gifts must be reciprocated, which means a return gift must be given in a value closely, but not exactly, equivalent to the opening gift.⁴⁵ Such obligations, though socially binding and usually respected, are not imposed by the legal sources. In fact, many of these norms are not written at all. Instead, they operate at such a subliminal level that we may be surprised to learn that rules are involved. In Middletown (Muncie, Indiana), the giving of Christmas gifts follows a uniform pattern, yet the participants seem to be unaware they are

41. García García 899.

42. Raheja 118–147.

43. Zelizer 88–89.

44. *Bride's Book of Etiquette* 275. Radcliffe-Brown's description of wedding gifts among the Andaman Islanders seems to describe our own customs as well. “At marriage the giving is one-sided, no return being expected, for it is an expression not of personal friendship on the part of the givers, but of the general social good-will and approval. It is for this reason that it is the duty of everybody who is present to make some gift to the newly-married pair.” Radcliffe-Brown (1948) 238.

45. Schwartz 6. “Returning ‘tit for tat’ transforms the relation into an economic one and expresses a refusal to play the role of grateful recipient. This offense represents a desire to end the relationship or at least define it on an impersonal, non-sentimental level.” Id.

following rules.⁴⁶ Perhaps most curiously of all, these rules are often not enforced. They have no explicit form, no institutional backing, and little moral sanction.

The social practice that seems most closely to resemble these aspects of gift giving is language. Gifts are actions that convey meaning.⁴⁷ Theodore Caplow concluded that every culture has a *language of prestation* to express the nature of interpersonal relationships, particularly on special occasions, just as verbal language conveys meaning in other ways.⁴⁸ The language of gift giving, Caplow suggested, is learned in early childhood and becomes assimilated to the personality as it is used with increasing assurance and understanding. Like linguistic rules, the norms governing gift giving are enforced among native speakers without being promulgated, often without a conscious understanding that the speakers are following rules. The sanction for violating the rules is the inability to communicate.

Legislation attempting to dictate language use generally proves to be ill-advised.⁴⁹ Even the spelling rules promulgated by academies, dictionaries, and grammar books are usually unable to alter actual practice.⁵⁰ If gift giving is indeed a form of language, the law, in its encounter with it, faces a unique challenge. In attempting to govern the giving of gifts, the law undertakes a mission somewhat like wrestling with Proteus—the kind of task at which generally only epic heroes have been successful.

8. *Encounter with the law.* A number of consequences flow from the primarily extra-legal character of gift giving, particularly because, in the West, the world of the law and the world of the gift inhabit such different environments. Private law is formulated for the market-related activities about which it is chiefly concerned.

46. Although we infer from the uniformities observed in Middletown's Christmas gift giving that, somewhere in the culture, there must be statements to which the observed behavior is a response, the crucial point is that we cannot find those statements in any explicit form. Indeed, they are not recognized by participants in the system. In effect, the rules of the game are unfamiliar to the players, even though they can be observed to play meticulously by the rules.

Caplow 1317.

47. Camerer S182. "Gift exchange, in effect, is a language that employs objects instead of words as its lexical elements." Caplow 1320.

48. Caplow id.

49. "It is beyond doubt that people will learn a new language when they perceive the economic and social advantages of doing so. And if they do not want to change to a new language, legal measures are not going to do any good [E]ven in situations in which people do want to acquire the new language, we find that attempts to impose it officially invariably backfire." Nunberg 121, 122 (examining numerous examples).

50. "[M]ost attempts at reform of French spelling in the last two centuries have drawn protests, and many well-meaning attempts have failed [T]he *Académie* did not ultimately succeed in standardizing spelling because its own members refused to abide by its rules." Schiffman 118, 298 note 78.

It has often proven incapable of grasping the fundamentally different social dynamic that governs gift giving. From the point of view of the *quid pro quo* that defines the law's prototypical transactions, giving something away for nothing is an inexplicable event. Whoever engages in it is either incompetent or misguided—and in need of legal protection. The law and its concepts are often designed to domesticate this dangerous world. When it cannot be domesticated, the law often attempts to limit its reach. In other words, Western gift law is a critique of gift giving. It offers the perspective of individual self-interest on activities structured by social custom.

As a first consequence, the law attempts to restrict gift giving. The law's primary goal, when it confronts this realm, is often to protect citizens from the urge to give away their property. Protection is thought to be necessary because gift giving is not based on rational self-interest to the same extent as is exchange in the marketplace. For example, the appropriate limit for gifts to relatives or to charities is not clearly established, and some legal systems are concerned that donors might easily become prodigal. Moreover, it is thought that heirs and family are victimized when the donor decides to give away the clan's wealth. The survival of the family as an institution seems to depend on confining gift giving within narrow limits.

The second consequence is the confusion gift giving creates in the law. Legal systems generally have no choice but to employ traditional private law concepts to structure the law of gifts. Unfortunately, concepts from the language of exchange are unable to describe the world of the gift. In some cases, the concepts applied in gift law cannot even be defined. They are frequently incoherent, even when examined in the terms of the legal system that created them. A further difficulty arises from the fact that judges themselves inhabit both the world of the marketplace and the world of the gift. Despite the law's protective aspirations, the case reports show that judges are constantly attempting to validate gift transfers they consider meaningful, even though those transfers would be void under the letter of the law. These case-specific judgments have transformed gift law into a maze of rules and exceptions that, in the end, conceal the courts' impromptu efforts to reconcile the law with the strikingly different world it seeks to govern. In any case, because gift law comes to gift giving with its own agenda, the legal notion of the gift coincides even less with ordinary language than is the case with other concepts in private law.

9. *Everyday notion.* In daily usage, various transactions are spoken of as gifts. These include the presents given to friends and close relatives on special occasions, transfers within the family to reduce taxes or as an advancement of inheritance, surprises between spouses, incentives given to good customers and productive members of the sales force, awards made to employees upon retirement, and donations to charity.

Particularly in civilian jurisdictions, however, these transactions are not all subject to the law of gifts to the same extent. For example, gifts of modest

value—sometimes known as customary gifts—are often excluded from the scope of gift law. Due to their business context, incentives to customers and sales representatives are in some systems also not considered gifts. Gifts between spouses are commonly governed by an elaborate set of exceptions to the general rules. In some systems, special provision is made for remunerative gifts, which may include gifts given to employees upon retirement.

10. *Legal notion.* Gift law governs the enforceability and legal consequences of certain gratuitous transactions. Though legal conceptions of the gift vary considerably from one legal system to another, gift law focuses chiefly on those gratuitous transactions subject to the private law that, from the point of view of exchange and the marketplace, provide grounds for concern. These generally include larger gifts made between family members or given to charitable institutions.

As discussed in detail below, the most adequate notion of the gift for comparative law purposes involves the transfer of an interest that occurs in conjunction with four additional elements. First, the transfer is gratuitous, a characteristic that is often inferred either from the absence of a quid pro quo or from the fact that the donor acted without being obligated to do so. Second, certain subjective factors are present, usually either donative intent or the parties' agreement about the gratuitous character of the transaction. Third, the transaction takes place *inter vivos*, which distinguishes gifts from transfers made under a will. Finally, the object of the transfer involves rights, particularly property rights, rather than services or other types of advantage.

When these elements coincide, a number of consequences often ensue. The capacity requirements for both making and, surprisingly, even for receiving a gift are often more restrictive than those imposed on parties to nongratuitous transactions. Promises held to be gift promises are less likely to be judicially enforced than those that are part of a bargain. When it comes to making the gift transfer, some systems mandate complex form requirements. If they are lacking, the gift is usually held to be void. Some legal systems reduce the warranty obligations of the donor and, in certain circumstances, impose an obligation on the part of the donee to provide the donor with support. Furthermore, a gift may be revocable, even after it has been fully executed.

11. *Characterizations.* In a comparative perspective, the field of gift law has received a variety of systematic placements. In the common law, because executory gift promises are generally not enforceable at law, gifts are considered an aspect of property law, namely a transfer of title without consideration. The enforceability of gift promises is governed by equity. The legal systems derived from the French Civil Code tend to consider the gift and the last will and testament together as the two forms of gratuitous transfer (*libéralité*). Germanic legal systems, together with most recent civilian codifications, characterize the gift—not merely the accepted gift promise, but also the gift transfer itself—as

a contract, for which particular rules are elaborated in the special part of contract law. These differing characterizations are examined in detail below.⁵¹

12. *Complexity.* It would be irresponsible not to emphasize at the outset that the law that governs gift giving is one of the most complicated fields in the private law, and that is true in most of the legal systems examined here. As the extent of the complexity becomes clear, it is a perfectly understandable reaction, at least it was mine, to close the books and wonder why so much law has been created to govern something so essentially simple.⁵² After the initial frustration wears off, the complexity becomes interesting, and then, finally, meaningful. As mentioned above, the complexity is symptomatic rather than coincidental. Gift law is always intervening in the ongoing social practice of gift giving. The complexity is due chiefly to the difficulty of defining and preventing those gifts that a legal system considers dangerous while at the same time allowing gift giving to continue.

Gift law has always been complex. Despite all the research, we know little of the content and purpose of the first Western gift law, the *lex Cincia*, the Roman law that governed gift giving for half a millennium. The difficulty arises partially because the *lex Cincia* survives today only in excerpts and fragments. The fact remains that we are unable even to make an educated guess as to exactly what it provided, which gifts were covered, which were excepted, and whether it provided a cause of action (*actio*) or merely a defense (*exceptio*). From the beginning modern gift law has been confused as well. Modern American legal scholarship, even as we first glimpse it—in the first sentence of the first article of the first issue of the first American law review—is already complaining about the befuddling complexity of the law of gifts.⁵³

B. APPROACHES TO GIFT GIVING

13. *Total social phenomena.* Marcel Mauss's short work *Essai sur le don*, translated into English as *The Gift*, has inspired much of the modern thinking about gift giving. In his essay, Mauss suggested that institutions such as gift exchange and

51. *Infra* nos. 1314–1352.

52. The desire, however, of power and influence, of esteem among men, of winning a friend or propitiating an enemy,—all these are among the active principles of our being; gratitude, too, the love of family, friendship, and that wider affection for humanity which prompts the generous possessor of goods to impart of his abundance to those who have not. Hence no artificial system of laws is needed, no social polish, to give easy play to machinery whose motive power lies deep in the human heart.

2 Schouler § 55 at 60–61.

53. Comment (1852) 1. The article discusses the *donatio mortis causa*. The sentence is quoted *infra* no. 972.

potlatch in primitive and archaic society are *total social phenomena* because they involve numerous social institutions, including religion, the law, morality, politics, the family, economics, and aesthetics.⁵⁴ Such phenomena cannot adequately be described from the point of view of any one discipline.⁵⁵

Mauss's intuition about the all-encompassing nature of gift giving in pre-modern society applies with equal force to gift giving in contemporary culture. All that is needed to be convinced of this is to glance at the tables of contents of the scholarly journals. A debate about the nature of gift giving is thriving in all the disciplines that deal with human thought and society. A discussion so wide-ranging is difficult to summarize, especially within the confines of a study such as this one. Nonetheless, basic concepts from that discussion provide the context for any comparative discussion of the law of gifts. Chief among them is the peculiar difficulty of reconciling the individual and the social aspects of gift giving, the moment of freedom and the moment of obligation.

14. *Individual and society*. Virtually all human activity involves both the exercise of individual will and the formative influence of social structure and tradition. For most of human history, these two elements did not seem to conflict to the extent they do today. How else are we to understand the decision of Socrates, that arch-individualist, to accept a judgment of death that he considered unjust? Modern culture formulates this relationship as an opposition. We think of life in terms of the proper allocation of time and energy between what we owe to others and what we owe to ourselves.

Parents become aware of how the individual and society conflict when the time comes to read fairy tales to their children. *Once upon a time* and *They lived happily ever after* magically transport us to other times and places, or, to be more accurate, to the place from which the tradition announces some of its most cherished wisdom. According to Bettelheim, children benefit from hearing these tales at a young age.⁵⁶ Yet much about these tales obviously points in the wrong direction, particularly the overt gender bias. Women appear as witches or villains; or they seem vain, idle, or foolish; or they passively wait to be brought back to consciousness by a prince's kiss.⁵⁷ Yet if we want to read fairy tales to our children, we have no choice. These are the stories the tradition offers. We can comment on them (though Bettelheim discourages that), place them in context, and provide our own interpretations, but, whatever we do, we are constantly negotiating with the tradition. Fairy tales cannot be created to order. Paul Veyne asked whether the Greeks believed in their myths.⁵⁸ The question turns out to

54. Mauss (1990) 3, 79.

55. Hyde xv.

56. Bettelheim 3–19.

57. Tatar 94–119.

58. Veyne.

be misconceived. The Greeks believed in their myths when they were useful; they ignored them when they were not. Whichever tack they took, they had no choice but to come to terms with the specific myths they inherited.

The opposition between individual and collective is inherent even in the market, though, since market theory has largely been left to economics, the social constitution of the market is usually forgotten. It is true that residents in industrial societies are offered a wide selection of commodities and a seemingly endless choice of toothpastes and cell phones (and cell phone plans), but the market does not provide a way for an individual to purchase decent public transportation, universal health care, or good public education. The limits to the market's offerings are elements of the social constitution of the market, which is reflected in the market's mirror in the law, the law of contract.

One of the goals of both social science and the humanities has been to examine the relationship between our individual and social selves. One of the reasons for all the scholarly fuss about gift giving today is that it encapsulates this relationship in a bewitching and indecipherable unity of opposites and contradictions. Gift giving is about the Other; it involves self-sacrifice; it is dedicated to the pursuit of altruistic goals. Yet it is also about self-promotion, fame, and advancement. Gifts help create and maintain friendships and love affairs, gifts are cherished symbols of affection, but they may also produce ruthless competition and provide a means to humiliate an opponent. In gift giving, the relationship between individual act and social practice becomes mysteriously complex. One way to investigate how individual agency operates within societal forms is to explore the riddle of the gift.

1. Anthropology

15. *Marcel Mauss*. Ethnographers have found much to criticize in Mauss's methodology. He never engaged in fieldwork, never experienced what Malinowski called the imponderabilia of actual life,⁵⁹ but instead gathered data from epic literature, travel diaries, and field reports.⁶⁰ His work on gifts has also been criticized for comparing a single, particular aspect of widely varying cultures in the attempt to discover a universal constant of human life, a method that some have argued assumes an unchanging and homogenous human nature.⁶¹

Nonetheless, Mauss's essay on the gift was one of the founding moments of cultural anthropology.

What happened in that essay, for the first time in the history of ethnological thinking, was that ... the social ceased to belong to the domain of pure quality—anecdote, curiosity, material for moralizing description or for

59. Malinowski 18.

60. Reinhardt 102–103.

61. Silber (2000) 116.

scholarly comparison—and became a system, among whose parts connections, equivalences, and interdependent aspects can be discovered.⁶²

In fact, Mauss attempted to create new relationships between sociology, biology, psychology, history, linguistics, and psychoanalysis and, in the space thereby created, provide a new role for the study of the total human being, *l'homme total*, *l'homme tout entier*.⁶³ The total human being is the living organism in which the psychological and social meet, a being it is possible to study as a complex whole. In his work on the gift, Mauss followed Durkheim in exploring the efficacy of the social context as it manifests itself in the socialized behavior of the individual.⁶⁴

Anthropologists today are still deeply involved in the controversies Mauss initiated. Many of their contributions have been based on a particular reading of Mauss's text, and the belief that he had uncovered a universal element of human society, a basic human principle, namely that human beings are engaged in multiple social relationships involving the reciprocal giving and receiving of gifts.⁶⁵ Moreover, these gifts are paradoxical. Though they seem to be the product of individual will and initiative, they are in fact compulsory as a matter of social custom.⁶⁶

Mauss's understanding of the gift was partly inspired by ethnographic studies of gift giving in non-European societies. As a result, anthropologists have examined a wide variety of cultures to ascertain whether Mauss's conception of the gift might represent something of a universal across all types of societies and whether, in the end, there is any difference between the way gifts are given in premodern societies and the way they are given in our own.⁶⁷ As Mauss wrote, "It is possible to extend these observations to our own societies. A considerable part of our morality and our lives themselves are still permeated with this same atmosphere of the gift, where obligation and liberty intermingle."⁶⁸ In fact, there seems to be a considerable amount of empirical evidence to support the claim that the obligations involved in gift exchange continue to govern modern society as well.⁶⁹ Davis has calculated that the proportion of goods circulating as gifts among the West African Hausa people is not significantly different from the proportion in modern societies.⁷⁰

62. Lévi-Strauss (1987) 38.

63. Karsenti 73.

64. Id. 78.

65. Geary 129.

66. Mauss (1990) 13.

67. Geary 131.

68. Mauss (1990) 65.

69. "[T]here are some hard data to back up the didactic point, that we are as much obliged by rules of reciprocity as primitive peoples are." Davis (1972) 409.

70. Id. 419–421.

In other words, implicit in the anthropological approach is the idea that gift giving is practiced in all societies, though not always generalized throughout society and with different functions according to the circumstances.⁷¹ Of course, theories that rely on transhistorical and trans-social universals are always risky. Human beings are social by nature and cannot confront an otherwise changing world while remaining essentially unchanged. Nonetheless, to anyone convinced that reality is a constantly changing social construction, there is something eerie about the way gift giving often serves as the initial interface between radically different cultures. As Michael Harbsmeier has noted, the initial interaction between the Old and the New Worlds took the form of reciprocal gift giving, which both sides conducted with subtlety and nuance.⁷² Once it became apparent that the New World's inhabitants understood the practice of gift giving, the Europeans shamelessly took advantage of the custom, exploiting their fears and good will to gain friendship, trust, and dominion. Yet without some commonality in their understanding of the institution, none of these strategies could have succeeded.⁷³ These historical examples illustrate the difficulty of coming to any firm conclusion about the relationship of similarity and difference among human cultures.

a. Clan-based Societies

16. *Kula*. In some societies, gifts form part of a social network that has taken on a life of its own. In the Trobriand Islands, for example, Malinowski encountered a society in which life revolved around a pair of gift-giving cycles known as the *kula*.⁷⁴ Twice a year, villagers undertook long canoe voyages to exchange gifts with partner villages. One of the *kula* partners offered *soulava*, long necklaces made of red shell, while the other presented white shell bracelets known as *mwali*. Some time after receiving their gifts, donees became donors. *Soulava* passed through the ring of islands in a clockwise direction, while the *mwali* moved in the opposite direction. Malinowski concluded that *kula* did not involve barter or exchange. It was rather a case of mutual gift. The giving of gifts in Melanesian society was not a market transaction but rather a concatenation of obligations arranged into chains of mutual prestations, with the give-and-take

71. "For gift-exchange is not only the significant form in which archaic societies reproduce themselves; giving and taking are also the elementary activities through which sociability became rich in evolutionary chances, and upon which any community-building process still rests." Berking 31.

72. Harbsmeier 390–410.

73. See Reinhardt 123–129 for an analysis of the initial gift exchange between Columbus and the inhabitants of Guanahani, the still unidentified island where Columbus first made landfall. For a description of the gift exchange between Bougainville and the natives of Tahiti, as well as Lapérouse's exchanges with the residents of Easter Island, see Greene.

74. Malinowski (1964) 81–104.

extending over generations.⁷⁵ For the Trobriand Islanders, market phenomena were secondary to the main purpose of their lives, which was the giving and receiving of gifts.⁷⁶

Anthropologists have occasionally romanticized the kula as an expression of generalized altruism. Subsequent fieldwork, however, has revealed that the kula was actually a form of agonistic gift exchange, by which donors competed with each other for prestige and rank.⁷⁷ The Trobriand Islanders were obsessed with gift exchange because it provided a mechanism for choosing their social leaders.

17. *Potlatch*. The potlatch among the First Nations of the American Northwest involved the giving away of enormous quantities of goods. It took place during ritual celebrations held on important social occasions that often involved dancing and feasting.⁷⁸ Like the kula, the potlatch did not involve altruistic giving. Among the Kwakwaka'wakw (formerly known as the Kwakiutl), potlatch was rather a continuation of warfare by other means.⁷⁹ Potlatches were planned like military campaigns. The participants were occasionally humiliated to the point of committing suicide.⁸⁰

18. *Contemporary analogues*. Analogous behavior seems to be observable in contemporary society as well. Lévi-Strauss, who was fascinated with how modern society incorporates many of the practices of primitive cultures, argued that the American exchange of Christmas gifts, practiced by different social classes with religious fervor, resembles a gigantic potlatch, implicating millions of individuals and causing permanent disequilibrium in the family budget.⁸¹ Thorsten Veblen understood conspicuous consumption as competition by means of expensive gifts.⁸² Until recently, middle- and upper-class wives were modern society's principal ceremonial consumers of goods. The reputation of the head of household, Veblen argued, depended on showering her with unnecessary and extravagant gifts. As women have entered the workplace, that role has gradually passed to children and in some cases to pets.⁸³

75. Malinowski (1989) 67.

76. Malinowski (1964) 100–101. For a more exchange-oriented understanding of the kula, see Strathern.

77. Weiner 131–148. For a critique of the understanding of gift giving as altruism, see Schroeder 851–859.

78. For a description of a Kwakwaka'wakw potlatch, see Halliday 18–88, particularly 73–88. Halliday was a photographer and, from 1906 to 1932, the Indian agent for what was then known as the Kwakiutl Agency.

79. Codere 118–125.

80. Id. 122–123.

81. Lévi-Strauss (1969) 56.

82. Veblen 83–85; Schwartz 2–3.

83. "Sure, the hotelier and real estate magnate Leona Helmsley left \$12 million in her will to her dog, Trouble. But that, it turns out, is nothing much compared with what other

b. To Give, to Receive, and to Reciprocate

19. *Chains of gifts.* In clan-based societies, a gift is not principally the transfer of an object from one individual to another. Its more important role is to create and maintain long-term relationships among social groups. This is often the role of gift giving in contemporary society as well. For example, the extraordinary culture of gift giving among the Japanese seems to have its origin in rituals devoted to group solidarity.⁸⁴

As Mauss suggested, gift giving does not function as a series of discrete transactions. Instead, each transfer creates a debt, which in turn must be reciprocated. The fact that reciprocation takes place over time, and thus requires the parties to cultivate a relationship, distinguishes the gift from the exchange, which, paradigmatically, is reciprocated immediately and thus does not require, or even encourage, a continuing bond. To refuse to reciprocate a gift means to deny the relationship. Primitive and archaic societies are constituted by a culture of gift giving that consists of the obligations to give, to receive, and to reciprocate.⁸⁵ Mauss was particularly interested in discovering the rules of primitive law or self-interest that require a gift to be reciprocated. He speculated that some power might reside in the gift that causes the donee to feel obligated to offer a gift in exchange.⁸⁶

In attempting to answer this question, Mauss noted that some informants in the ethnographic literature seemed to suggest a metaphysical basis for reciprocity—namely that a spirit residing in the gift wished to return to its home.⁸⁷ Mauss suggested that reciprocity may be due to the belief that something of the owner continues to reside in the gift object even after the transfer. There seems to be evidence, for example, that the ancient Scandinavians believed that objects acquired their owners' personal characteristics. In fact, the word *nautr* in Old Icelandic referred both to the donor and to the gift the donor bestowed.⁸⁸ In our own day, books donated to libraries, particularly by important figures, often are furnished with bookplates so that subsequent readers may know of the books'

dogs may receive from the charitable trust of Mrs. Helmsley, who died last August." Strom 1.

84. In traditional Japanese society gifts of food or drink, such as rice or sake, were offered to gods and other supernatural beings. The gods returned the gifts so that human beings might share the food and receive divine power. As a result, commensalism became an essential characteristic of Japanese social groups, and the sharing of community power became anchored in an extremely ritualized practice of giving and reciprocating gifts. Befu 447–451.

85. Mauss (1990) 13.

86. Id. 3.

87. Id. 11–12.

88. Gurevich 136; Pétursdóttir 61.

provenance.⁸⁹ Nonetheless, scholars have quarreled over the interpretation of the ethnographic reports Mauss relied on,⁹⁰ and it is now agreed that, whatever its basis, the phenomenon of reciprocity is considerably more complex.⁹¹ In fact the phenomenon of reciprocity reaches beyond gift giving to include all gratuitous action. Once I ask a favor of someone, it is very difficult to refuse when that person asks a favor of me.

Mauss's major contribution was his decision to group apparently dissimilar activities from widely diverse cultures—phenomena as disparate as the birthday present and the potlatch—under the single concept of the gift.⁹² After discovering that gifts must usually be reciprocated, Mauss might simply have characterized gifts as a type of exchange and assimilated them to market behavior. Instead Mauss recognized that these diverse phenomena share a fundamental similarity: they are all instances in which individual action, whatever the individual's motivation, plays a constitutive role in the creation of social relations. Moreover, by insisting on the contradictory notion of gift exchange, he shifted the focus from modern, developed society to preliterate cultures, thereby making clear that societies involving commodity exchange are not necessarily more advanced than those without it. By identifying a commonality in all human culture, he reduced the sense of distance and difference between developed and developing societies and shifted the focus from economics to total social interaction, thereby including all aspects of human life in the analysis.

c. Social Reproduction

20. *Marginalization of gift law.* Given that Mauss's essay and the discussion he provoked occupy a central role in cultural anthropology, it may seem odd that none of these texts play any role in the admittedly rare doctrinal discussions about how best to structure the law of gifts. The law's ignorance of the anthropological debate on these questions, however, is more than coincidence. The refusal to allocate a constitutive social function to gift giving is a premise on which both developed society and modern law are based.⁹³ A market-oriented legal system carefully distinguishes among the different exchange-oriented contracts and correspondingly marginalizes gift law. Western legal codifications arose from the rejection of the gift economy and the identification of the private law with the market. For this reason, an understanding of the modern law of gifts requires

89. Marais 326.

90. Sahlins (1972) 149–168.

91. Godelier 10–107; Wiener 44–65.

92. Reinhardt 120.

93. "Naturally gift giving has no significant economic meaning for economic life." Kieckebusch 285.

a brief comparison of our contemporary conception of gift giving with the understanding present in clan-based societies.⁹⁴

21. *A reproductive role.* In *Ancient Society*, Lewis Morgan drew on the anthropological data available at the time to present a vision of society as a reproductive mechanism. In the societies he discussed, kinship and land tenure were both needed for social reproduction—the one essential for creating offspring, the other providing the basis for cultivation.⁹⁵ Building on Morgan's contribution, Mauss argued that clan-based societies are not essentially subsistence economies, even though they do not produce principally for exchange. Instead, the transfer of things serves as a vehicle for the creation and maintenance of social relationships. In fact, exchange, as we know it, is impossible in clan-based societies. These cultures often do not know private property, and thus no individual has a right to alienate anything. Mauss considered gifts to represent transfers of inalienable objects between persons who are mutually dependent. Because the things are inalienable, they are loaned rather than sold. Throughout their useful life they maintain a bond with all the persons through whose hands they pass. An individual's goal, in such a society is not to maximize profit but rather to acquire as many gift-debtors as possible, partially to be confident of assistance in case of emergency.

22. *Creation of hierarchy.* In such societies, gift giving also participates in the maintenance of social hierarchy. The giving of a gift promotes both solidarity and dominion. Donees become indebted to their donors and to some extent dependent, at least as long as the gifts have not been reciprocated.⁹⁶ In certain circumstances, the inequality created by the gift can create and maintain a social system of dependency. In the Icelandic sagas, important personages insisted on taking property by purchase rather than gift in order to avoid the dependency relationship.⁹⁷ Those who control sufficient wealth to be prolific in gift giving establish their superiority and place both donees and less magnanimous donors in a subordinate position. Individuals in these societies strive to accumulate wealth, not so they can retain it but rather so they might have more to give away.

In *The Elementary Structures of Kinship*, Claude Lévi-Strauss suggests that women, particularly nubile women, represent the supreme gift.⁹⁸ Since the

94. For a brief summary of the classical anthropological discussion, see Gregory 15–24.

95. Morgan's underlying vision was rooted in an understanding of social reproduction, though the concept did not become explicitly available until it was formulated by Marx. Morgan himself spoke in terms of *social organization*, by which he meant interpersonal relationships, and *political organization* or the allocation of land. Morgan 62.

96. Godelier 12.

97. Gurevich 130–131.

98. Lévi-Strauss (1969) 65. For a feminist critique of the anthropological tradition that runs from Malinowski to Lévi-Strauss, see Weiner 1–19.

incest taboo prohibits marriage within certain relationships, marriage is the system whereby one consanguineous group gives away its sisters in order to receive wives. Because such exchanges take place only once every generation, the giving of things helps to preserve the relationships necessary to enable clans to obtain brides.⁹⁹

d. Comparative Notes

23. *Paradoxes.* What anthropologists have discovered about gift giving is paradoxical in the extreme. On the one hand, gift exchange seems to be something close to a universal practice in human societies and is in most situations governed by the three Maussian obligations—to give, to receive, and to reciprocate. Gift giving creates chains of giving through time and maintains broad networks of relationships. On the other hand, no institution serves as many different, and conflicting, roles as does gift exchange. At one extreme it creates pathways of good will and serves as a physical embodiment of the sentiments of love and affection, while, at the other, it imposes crushing obligations and symbolizes relationships of domination and dependence.

Another paradox has to do with the relationship between gift and exchange. Gifts are one-sided actions; they are the prototypical unilateral act, the transfer of property without a *quid pro quo*. Yet gifts must be reciprocated. The mandatory quality of the counter-gift is just as integral to the nature of the gift as its unilateral quality.¹⁰⁰ No one has yet developed the conceptual vocabulary to describe this seeming contradiction. “It is especially difficult to describe the reciprocal relationship involved in gift giving by means of a terminology based on the conception of the gift as a unilateral transfer.”¹⁰¹

Everyone who has received a gift has felt the urge to restore the balance, *sich revanchieren*, to take revenge, as is said in German. The coincidence in time of gift and counter-gift, together with the mandatory equivalence in their value, are in some societies so marked that the transaction is easily mistaken for an exchange. In fact, gift and exchange can resemble each other so closely that the gift may appear to be nothing but a market transaction. The ultimate paradox is that, at that moment, the gift, this universal feature of social interaction, vanishes into mirage, chimera, and illusion.¹⁰²

99. Gregory 90.

100. “But there is also the legal side, a system of mutual obligations which forces the fisherman to repay whenever he has received a gift from his inland partner, and vice versa. Neither partner can refuse, neither may stint in his return gift, neither should delay.” Malinowski (1989) 22.

101. Pappenheim 80.

102. If the gift and the counter-gift are unequal, then there’s a winner and a loser, and possibly exploitation and trickery. If, on the other hand, they are the same, then there’s apparently no difference between the gift and a rational, self-interested

24. *Unexplained.* In other words, the most interesting features of gift giving remain unexplained. The most obvious conundrum is the virtually incomprehensible intermingling of freedom and obligation. Essential to the practice is the shared belief that gift giving is an act of the donor's free will. If the donee senses that the donor feels compelled, the transaction fails in its purpose.¹⁰³ And yet everyone knows that gifts are not freely given, that social custom prescribes complex rules concerning gift giving behavior, and that most gifts are anything but optional. The obligation is so strong that it is extremely difficult to waive. No matter what the host says, a savvy guest will always bring a bottle of wine or a bouquet of flowers, and a *no presents* line on a birthday invitation has little effect. No one has managed to articulate this paradoxical relationship between gratuitousness, on the one hand, and social obligation, on the other.

25. *Inevitable failure.* The anthropological discussion makes clear that, when a legal system seeks to regulate gift giving, it sets for itself an impossible task. The gift is the ultimate shape-shifter, one about which we understand next to nothing. So little is understood about gift exchange that the law cannot possibly get it right.

For this reason, a comparative study of gift law cannot focus on determining the optimal approach. All it can hope to do is demonstrate which of the manifold aspects of gift giving each legal system chooses to privilege as it promulgates its rules. The way each system chooses to order gift giving, and especially the extent to which it favors or restricts the process, speaks to that system's understanding of gratuitous action and its vision of social relationship.

2. History

26. *Contemporary approach.* Some historians have used the pattern of the three Maussian gift obligations as an organizational schema by which to understand gift giving in the different historical periods.¹⁰⁴ More contemporary historians, however, refuse to consider Mauss's system as a pure form of universal social activity with shared meanings and preestablished harmony.¹⁰⁵ Gifts are seen instead as modeling devices, as a family name for a range of forms that can be honored in their breach or even mixed and matched according to the particular

mercantile exchange. In short, either the gift results from uncharitable motives and is therefore illegitimate or it is non-existent, illusory.

Godbout and Caillé 5.

103. No equivalence exists between what the donee has done and what is given. No obligation is imposed which the donee must fulfill. The donee's thanks are but the ghost of a reciprocal bond. That the gift should operate coercively is indeed repugnant and painful to the donor, destructive of the liberality that is intended.

Noonan 695.

104. "Twenty years ago I showed that gift-giving in the Homeric poems is consistent, I might even say absolutely consistent, with the analysis made by Mauss." Finley 145.

105. Algazi 12.

meaning a social actor wishes to convey.¹⁰⁶ In fact, historians have begun to conceive of gift giving not in terms of any type of fixed structure but instead as “contested constructions of social transactions,” of meanings negotiated between social actors.¹⁰⁷

27. *Modern philanthropy.* In several nuanced studies, the historian Ilana Silber has argued that gift giving is not as uniform as Mauss suggested. Troubled by the essentializing nature of the Maussian vision, she has suggested, for example, that the obligation to reciprocate is not universal,¹⁰⁸ a fact many have noted.¹⁰⁹ It is lacking, for example, in modern philanthropy. She believes that this difference suggests that many of the other institutions that Mauss grouped together under the category of the gift might also best be examined as separate institutions.¹¹⁰

An anthropologist might respond that modern philanthropy displays traditional traits of competitive giving. Major donors continue to seek recognition, which can be provided only by other major donors, in the form of memberships, awards, and publicity. Moreover, the donor continues to be identified with the gift object. One of the incentives for major donations is that they permit the donor to be memorialized by naming a school, a hospital facility, a scholarship, or an academic chair. Reciprocity too is present. The opening gift is the wealth that society has bestowed on the donor. Those engaged in philanthropy often speak of it as a way to “give something back” to the community.¹¹¹

The methodological issue historians confront is whether it is useful to remove modern philanthropy from the ambit of the broad concept of the gift, or whether it represents instead a particular variation. However this issue is resolved, it remains clear that the structure of gift giving is intimately related to the context of the gift—the power relations between the parties, the social hierarchies, the requirements of social reproduction. As Algazi has pointed out, the particular contribution of the historian to this discussion is to historicize the various theoretical concepts of the gift, to demonstrate that they are embedded in particular historical conjunctures, and to evaluate their meaning in different historical contexts.¹¹² “[I]f historians of pre-modern Europe are to contribute fruitfully to

106. Id. 15.

107. Id. 10.

108. Silber (2000) 118–119. She speaks of “the possibility of a new, non-monolithic approach, more intent to start mapping out a diverse range of gift-processes (e.g. ideologically reciprocal vs. non-reciprocal) than to keep searching for the latter’s ‘essential’, or ubiquitous features.” Id. 119.

109. Marais 305.

110. Silber (1998) 146–147. Silber argues that modern charitable giving is indirect and impersonal in the sense that it is a gift made to strangers. It creates no personal bond and no expectation of a return gift.

111. See Shore.

112. Algazi 20.

the ongoing dialogue with sociology and anthropology, then their contribution could hardly consist in subsuming their findings under fixed, general models. Rather, it must provide precise reconstructions of the variety, richness, and internal contradictions of European traditions.”

a. Classical Antiquity

28. *No general concept.* There was no general concept of gift in classical antiquity.¹¹³ Both Greek and Latin distinguished various types of gifts, and, in both, the meaning of gift giving was wider than the concept we use today. Brief moments of this complex topic are particularly relevant here.

i. The Homeric Epics

29. *Wide latitude of meaning.* The Homeric word for gift—*δῶρον*—also referred to many transactions that are unrelated to our current understanding of the concept.

[T]he word “gift” was a cover-all for a great variety of actions and transactions which later became differentiated and acquired their own appellations. There were payments for services rendered, desired or anticipated; what we would call fees, rewards, prizes, and sometimes bribes Then there were taxes and other dues to lords and kings, amends with a penal overtone ... and even ordinary loans—and again the Homeric word is always “gift.”¹¹⁴

There were also the celebrated *xenia*, guest-friendship gifts, which “extended the rights and duties proper to kinship and close comradeship beyond the *demos* to foreigners.”¹¹⁵ Each type of gift required reciprocity. “It may be stated as a flat rule of both primitive and archaic society that no one ever gave anything, whether goods or services or honours, without proper recompense, real or wishful, immediate or years away, to himself or to his kin. The act of giving was, therefore, in an essential sense always the first half of a reciprocal action, the other half of which was a counter-gift.”¹¹⁶

30. *Competitive giving.* Gift giving in Homeric society generally constituted a public declaration of status, with superiors giving to create obligations in others and to cause their dominion to be recognized, while inferiors gave to foster favor and goodwill. Competitive giving occurred when relative status was uncertain.¹¹⁷ The lavishness of some of the competitive giving had the same goals as a potlatch, namely to elevate the donor’s prestige and to place the donee under heavy obligation. The *Iliad* recounts two paradigmatic examples of competitive

¹¹³ Wagner-Hasel (2003) 167.

¹¹⁴ Finley 66; see also Donlan 3–4.

¹¹⁵ Donlan 6; see also Wagner-Hasel (2000) 79–130.

¹¹⁶ Finley 64.

¹¹⁷ Donlan 6.

giving—the extravagant gifts Agamemnon offered to Achilles, which included seven well-peopled cities, and the equally lavish gifts given by Achilles for Patroclus's funeral.¹¹⁸

ii. Aristotle

31. *Right giving.* A passage in the *Ethics* suggests that Aristotle already understood the paradoxical nature of gift giving. He mentions that giving is the province of the free human being, of the gentleman (ἐλευθέριος), and yet every aspect of giving is socially determined. “Free human beings will give for the sake of beauty. They will give properly (ὀρθῶς), to those to whom it is necessary to give, as much as and when required, and in all other respects according to what is proper.”¹¹⁹

iii. The Roman Vision

32. *Dona and munera.* Classical Latin distinguishes two types of gifts, *dona* and *munera*.¹²⁰ The *munus* was the more specific category. Though delimitation is difficult, it seems to have included those gifts that, for whatever purpose, were considered socially, and later legally, obligatory, including both customary gifts given in appropriate amounts on the occasion of special events and festivals; gifts given as recompense for professional services that, in the Roman view, were to be performed without compensation; and also the games, feasts, and public construction required to maintain the prestige of those in positions of power. *Donum*, the more general category, included the vast range of giving, and more specifically designated the spontaneous gift designed to begin a new relationship.

Gift giving was a central part of late Roman aristocratic life.¹²¹ To begin with, because there was little trade and the wealthy lived largely off the produce of their own estates, gift giving permitted them to obtain otherwise unavailable luxuries. Gifts often consisted of edible delicacies, rare books (all books were rare), exotic animals, and sacred relics, such as keys made from the chains of St. Peter. Second, Roman citizens aspired to glory, which could be attained not only by military greatness and political success, but also by impressive charitable contributions.¹²² Large donations, particularly to beautify the city, were necessary to please the plebs and garner public support.¹²³ Constantine instituted the practice of making significant gifts to soldiers and veterans, particularly of land complete with cattle and seed, as a means to retain their loyalty, and also endowed

118. *Iliad* bk. 9 lines 121–156 (Agamemnon), bk. 23 lines 29–34, 168–176, 257–270 (Achilles); Donlan 2.

119. *Nicomachean Ethics* 1120a, bk. 4 sec. 1 lines 12–13.

120. Michel nos. 787–814; Archi (1964) 935; Ascoli (1894) 175 note 2.

121. Wood 301–304.

122. Byrne 1045.

123. Id. 1050.

churches with land and precious ritual objects.¹²⁴ Roman emperors were expected to be especially generous, yet they were not to be profligate or squander the state's resources.¹²⁵ Nonetheless, the extravagance of certain public practices, particularly during the republic, calls to mind a potlatch.¹²⁶ At the end of the empire, political office had become so identified with great giving that public service often bankrupted the officials.¹²⁷ Finding the proper path between miserliness and prodigality required considerable wisdom.

33. *Latin literature.* Despite the centrality of gift giving to Roman political life, the Romans remained suspicious because they thought gifts lacked the rationality of exchange.¹²⁸ It was not until the Christian period that gift giving came to be seen as a laudable expression of generosity. Thus, during the classical period Roman writers expressed a guarded view. As Zimmermann explains, the Roman *bonus vir* did not squander his assets. Instead he did his best to preserve them for himself and his familia.¹²⁹ Cicero reminded his son that, though it was important to give to the poor, gifts should be given in moderation. Many had squandered their wealth by indiscriminate giving—Cicero may have had Julius Caesar in mind—and the impoverishment that can result can lead to crime. Cicero was particularly opposed to gift expenditures designed to win public approbation, including public banquets, the distribution of meat to the people, gladiatorial shows, games, and combat with wild beasts.¹³⁰

Some writers focused instead on the dangers gift giving poses to donees, an insight taught by an episode in the Trojan War. In the *Aeneid*, as the Trojans gathered around the wooden horse, Laocoon warned them of the danger—*Timeo Danaos et dona ferentis*, I fear the Greeks, even when they are bearing gifts.¹³¹ Martial conveyed the same idea in his *Epigrams*. "I abhor the crafty and cursed trickery of presents; gifts are like hooks; for who does not know that the greedy sea bream is deceived by the fly he has gorged: Every time he gives nothing to a rich friend, O Quintianus, a poor man is generous."¹³²

34. *Lex Cincia.* The stoicism of the Roman vision is evident in the republican *lex Cincia de donis et muneribus*, a *plebiscitum* passed in 204 B.C. during the tribunate of M. Cincius Alimentus. For five hundred years it seems to have been the only Roman law governing gift giving. One of its provisions prohibited payment to lawyers who argued cases, either in the form of fees or as gifts. The remainder

124. Dupont 315, 318, 320–321.

125. Wood 310.

126. Michel nos. 835–836.

127. Byrne 1058.

128. D'Ors § 120.

129. Zimmermann 482.

130. Cicero, *De officiis* bk. 2 secs. 15–17 nos. 54–64.

131. *Aeneid* bk. 2 line 49.

132. Bk. 5 no. 18 lines 6–10. Translation from 1 Martial 309.

seems to have regulated gift giving more generally. The restrictions concerning gift giving have not survived intact and can only be surmised. They seem to have limited the amount that could be given as a gift and may have required gifts to be made with certain formalities. Savigny concluded that the *lex Cincia* prohibited gifts of greater than a stated (but now unknown) value (*ultra modum legitimum*), unless made by *mancipatio*, *in iure cessio*, or delivery.¹³³ The fact that the amount of the *modus* remains uncertain makes it difficult to establish the purpose of the norms. Ascoli thought that the value of the *modus* could not have been very high.¹³⁴ In contrast, Savigny argued that it was designed to assure sufficient reflection before larger amounts were gifted.¹³⁵ Others have suggested that the law was designed to address large gifts given to politicians by rich families.¹³⁶

It seems that the law was later altered to apply only between certain categories of individuals (*personae non exceptae*). Relatives to the fifth degree seem to have been excepted, as were family members who were dependents (*in potestate*) of

133. Savigny (1850) 332. Savigny's essay was originally published in 1818, a few years before the discovery and eventual publication of the *Fragmenta vaticana*, which provide additional information about the *lex Cincia*. Savigny argued that the amount stated in the law was 20,000 *sestertii*. Savigny (1850) 353–357.

Mancipatio and *in iure cessio* were two early Roman forms for transferring title. Nicholas 62–64. Neither survived into the law of Justinian.

The *mancipatio* required the presence of five witnesses and the *libripens*, who held a pair of bronze scales. For a gift, the donee, while holding the gift object in one hand and a piece of bronze in the other, recited specified words, struck the scales with the piece of bronze, and then gave the bronze to the donor. All participants had to be Roman citizens. *Mancipatio* was used only for the conveyance of free persons *in postestate*, slaves, and property known as *res Mancipi*, such as beasts of burden, Roman land, and praedial servitudes, including rights of way. Nicholas 105–106.

In iure cessio was applicable to any type of property but, in practice, was used chiefly for the creation of *iura in re aliena*, which included various types of servitudes. For a gift, the donee held the gift object before the magistrate and recited the opening words of the *vindicatio* action, which were identical to the initial clause of the *mancipatio*. The donor did not assert a competing claim, and the object was adjudged to the donee.

Delivery (*traditio*) was a form of conveyance accepted by Justinian. Nicholas 117–118. The extent of rights transferred depended on the reason for the transfer (*iusta causa*). In principle, *traditio* was accomplished by the acquisition of possession in terms of both intent and physical control (*animo et corpore*). In most cases, at least a minimum of physical transfer was required. For the case of immovables and bulky movables, *traditio longa manu* permitted transfer by visual designation, a type of symbolic delivery. When the property was already in the possession of the transferee, *traditio brevi manu* did not require a renewed transfer.

134. Ascoli (1894) 182–183.

135. Savigny (1850) 334–335.

136. Byrne 1101. Baltrusch argued that the *lex Cincia* prohibited gift giving principally in order to prevent jurists from showing undue preference for their richer clients and to require them to respect their fiduciary obligations (*fides*). Baltrusch 63–69.

those excepted.¹³⁷ The catalog of permitted gift relationships was large enough to include all those generally considered members of the ancient family.¹³⁸ The thought may have been that family members would not be able to exert improper pressure on the paterfamilias. Ulpian called the *lex Cincia* a *lex imperfecta*. Though his meaning is uncertain, it seems that, though the described gifts were prohibited, the law provided no remedy to recover the property if the gifts were made.¹³⁹ In other words, they were not void.¹⁴⁰ The prohibition was perhaps interpreted as a defense (*exceptio*), which permitted the donor to revoke the gift at any time before it was perfected.¹⁴¹ The effect may have been to make it impossible for the donee to require the donor to perform an unexecuted gift. In the late classic period, the donor's failure to revoke an executed gift demonstrated enduring intent (*perseverantia voluntatis*), which prevented the heirs from revoking—*morte Cincia removetur*.¹⁴²

The arresting fact is that the concept of the gift, *donatio*, was probably unknown to Roman law before the *lex Cincia*.¹⁴³ In other words, the law first recognized the gift in order to prohibit it.¹⁴⁴

b. The Middle Ages

35. *An aspect of feudal society.* Gift giving so dominated the thoughts of medieval thinkers that Bracton considered the gift to be “the most celebrated and famous of the *causae acquisitionis*.”¹⁴⁵ Yet there was no single medieval discourse of the gift, no common cultural code of gift giving, and no single model according to which all gifts behaved.¹⁴⁶ Nonetheless, the medieval practices of gift giving, when compared to a system of commodity exchange, revealed several differences. It created and preserved social relationships and encouraged solidarity and community. Yet it also created and maintained long-term social hierarchies. Gift giving was for both reasons a constitutive element of feudalism.

137. Ascoli (1894) 222–223; Savigny (1850) 341–345; Girard 989–994; Ourliac and Malafosse 455–456; Zimmermann 482–484. Dawson speculated that the classical Roman jurists did not support the limitations because they made no mention of them in their surviving writings. There also seems to be little evidence that repentant donors took advantage of the law. Dawson (1980) 19–20.

138. Archi (1964) 932.

139. Id. 940–942.

140. 2 Windscheid § 367 note 7 at 558.

141. Biondi nos. 4, 8; Michel nos. 464–466.

142. “The Cincia prohibitions are removed at death.” Archi (1964) 944–945; Ascoli (1894) 193–195.

143. Archi (1964) 931.

144. Michel no. 466.

145. 2 Bracton 49.

146. Algazi 20–21.

It is difficult to estimate the extent to which gifts were generally exchanged among the bulk of the population. Altruistic gifts, gifts based on pure affection, seem to have been rare in the early Middle Ages. In fact, there is remarkably little evidence of personal gift giving at all.¹⁴⁷ This may have been because, in the absence of extensive commodity transactions, exchanges of all types were limited.

i. Germanic Custom

36. *Hierarchy*. Gift giving experienced a distinct evolution among the Germanic tribes.¹⁴⁸ Gifts apparently were not part of original Germanic legal thought.¹⁴⁹ Based on two passages from Tacitus,¹⁵⁰ Scovazzi has argued that gifts developed from the unilateral transfers that followers made to demonstrate their loyalty to their leaders. Tacitus mentioned silver vessels, cattle, and grain. Though the subordinates sought their leaders' benevolence, the superiors obligated themselves to nothing by accepting the gifts. Later, the leaders began to give gifts to their lieutenants, including arms, rings, and armbands. These gifts, though running in the opposite direction, were also designed to reinforce the hierarchy. Hierarchy, however, contradicted the ancient Germanic custom of equality of right. In fact, the acceptance of a unilateral gift was considered a vile act of servitude. For example, those migrating from Norway to Iceland at the end of the ninth century refused to accept gifts of land from earlier settlers in order to emphasize their independence.¹⁵¹

Scovazzi argued that the hierarchical relationships established by unilateral gift giving produced a reaction. In both literary and legal texts, a countergift gradually emerged as a condition to making the opening gift irrevocable. Gifts were eventually structured as bilateral transactions that were not perfected until receipt of the countergift. This would explain the compensatory payment celebrated in Lombard law (*Launegild* or *Lohngeld*), the countergift required of the donee at acceptance.¹⁵² The requirement of a counterprestation graduated from

147. Curta 697.

148. The following is drawn largely from Scovazzi.

149. Bellomo 955.

150. *Germania* chaps. 5, 15.

151. Scovazzi 253–255.

152. On reciprocal gifts (*De launegild*). If a man gives his property to someone else and afterwards he who made the gift seeks a reciprocal gift in return, then he who received [the gift] or his heirs—if he cannot swear that [a return gift] had been provided—shall return [the gift] singlefold (*ferquido*), that is, in the same amount as it was on the day it was given. But if he does so swear, he shall be absolved.

Edictus Rothari art. 175 in Drew 83, original in Beyerle 46. See also art. 184 in Drew 86, Beyerle 49; Liutprandi Leges art. 73 in Drew 175, Beyerle 133–134. See generally Pappenheim.

a moral to a legal obligation over time.¹⁵³ Similarly, the morning gift (*Morgengabe*) was the wife's counterpart to the husband's marriage gift.

Drew, on the other hand, derives the Launegild from the centrality of the family bond in Germanic custom.¹⁵⁴ To preserve property within the family, Lombard law essentially forbade individual alienation of family property.¹⁵⁵ Gifts were prohibited unless, by countergift, similar value was returned to the family's holdings. Drew speculated that the rigorous prohibition of gift giving was present in early Germanic law, and that, by the time of Rothair's Edict, the law required a symbolic return rather than a return of equivalent value. In many Lombard gift acts the return gift consisted of a relatively worthless trinket.¹⁵⁶ Pappenheim, however, points out that return gifts of great value are also documented.¹⁵⁷ The lack of a countergift did not void the gift but rather permitted the donor or the donor's heirs to recover either the gift or something of equivalent value.¹⁵⁸ A gift to the church was valid without a return gift.¹⁵⁹

The Lombards did not recognize the concept of the gift until they converted to Christianity and private property became more widespread.¹⁶⁰ Even then, Lombard law permitted the revocation of gifts upon the birth of a child or for the donee's ingratitude. It was assumed that the donor would not have made the gift if such events had been foreseen.

ii. Official Gifts

37. *Great value.* Throughout the early Middle Ages, the sources document a lively exchange of gifts among kings, popes, bishops, and abbots.¹⁶¹ These gifts were an element of political and diplomatic strategy.¹⁶² They sometimes flowed from the more to the less powerful as a means to create relations of dominion. These were gifts of great value that served to overwhelm the recipients and put them lastingly in the donor's debt.¹⁶³ Gifts included spices, perfumes, horses, precious books, fabrics woven with gold, and handcrafted objects in gold and silver. The donor often expected—and even requested—a return gift. The gifts—*munera*,

153. Scovazzi 257–258.

154. Drew 245 note 46.

155. Bellomo 956, citing Edictus Rothari art. 172.

156. Gino Gorla suggested that the Lombard return gift represented a formality and demonstrates that either a form or a sufficient cause is generally needed to make gratuitous transfers irrevocable and gift promises enforceable. 1 Gorla 30.

157. Pappenheim 37–38.

158. Id. 49.

159. Bellomo 956.

160. Id.

161. Kulischer 89.

162. Hannig 153.

163. Curta 698.

dona, xenia, benedictiones—came either from the donor's possessions or manufacture or had to be obtained.¹⁶⁴ The gifts were often exchanged at festive meals (*convivium et munera*), which were essential for the conclusion of peace treaties, together with the brotherly kiss and a shared visit to Mass.¹⁶⁵

Gifts in the early Middle Ages also served as a substitute for war, a means to achieve goals that had been unsuccessfully sought in battle—a continuation of warfare by different means.¹⁶⁶ Weaker lords were known to offer presents and hostages to stronger armies about to attack them. The offerings prevented the attack, averted destruction, and achieved peace, often through submission to the overlordship of the stronger party.¹⁶⁷ These gifts were not simply a form of spoils but instead were praised throughout the period as a resourceful application of the *ars donandi*.¹⁶⁸ Agonistic gift giving was also a constant feature of medieval power relations.¹⁶⁹

In addition, gifts were used to constitute public authority after the demise of the Roman Empire. With the decline of the Roman administration, the primary means of creating reciprocal duties passed to the system of gift exchange.¹⁷⁰ Public authority in the early Middle Ages consisted of a constellation of personal alliances created primarily by the giving of gifts.¹⁷¹ The powerful used gifts to recruit retainers, to obtain secret information, and to entice others to engage in criminal acts. Retainers, on the other hand, used gifts to obtain favors and appointments from their lords.¹⁷² As with gifts given between rulers, these gifts too were usually exchanged at elaborate feasts, and the feasts themselves were considered a form of gift.¹⁷³

38. *Bribes and taxes.* There seems to have been a floating boundary between bribes and *instrumental gifts*. Both were used to assure the stability of power relations. In fact, the reciprocal quality of the gift encouraged fluidity in this regard. Gifts seem to have been given without condition, yet every donee knew that something was expected in return. Gifts were therefore used both to express gratitude for services rendered and to encourage prestations that otherwise would not have been forthcoming.¹⁷⁴ Throughout most of the Middle Ages,

164. Kulischer 89.

165. Hannig 153; Grøbech 56.

166. Curta 693.

167. Id. 693 note 123.

168. Hannig 149–150.

169. Id. 155.

170. Hannig 156–157.

171. Curta 677.

172. Curta 685–686.

173. Id. 692 note 118.

174. Valentin Groebner has used the Germanic *miet* to explore the characterization difficulty. Groebner 229–232.

feudal taxes and tributes were made to rulers in the form of gifts (*dona*), for which protection and other services were given in return.¹⁷⁵

39. *Schenkbücher*. From the fourteenth century, Swiss and German cities maintained specially designed gift catalogues (*Schenkbücher*), listing donations to princes, diplomats, messengers, and meritorious citizens.¹⁷⁶ Gift giving was considered the city officials' most important duty. They were charged with making gifts that redounded to the city's honor and profit. *Schenken*, in both medieval and modern German, means both to give a present and to pour a liquid. Most municipal gifts involved alcohol. Gifts of wine (*Schenkwein*), given in specially designed jugs to prominent visitors and meritorious citizens, constituted a public proclamation of the bond. The quantity and quality of the wine corresponded to the rank of the visitor.¹⁷⁷

40. *New Year's gifts*. Hirschbiegel has documented the astonishing evolution of New Year's gifts, from the Roman *strenae* to the late medieval *étrennes*.¹⁷⁸ The practice was so widespread and so extravagant that both Roman writers and the church tried to limit or forbid it. On the first of each year until the French Revolution, gifts were exchanged at festive banquets in noble residences. This courtly gift culture was based on reciprocal prodigality and agonistic waste. Only those with the means to participate in the system could vie for power. The king's control of taxation made him the mightiest and most prodigal giver of gifts. He occupied the center of the system.¹⁷⁹ Especially among the French and Burgundian nobility, the presents consisted of fabulously intricate works of art.¹⁸⁰ Hirschbiegel's catalog of rare and exquisite gifts—from tableware, goblets, artisan jewelry, and paternosters, almost all of it of gold and silver and studded with diamonds, pearls, and other precious stones, to horses and tooled saddles—reveals perhaps better than any summary the extraordinary role that gift giving must have played in the constitution of social relations.¹⁸¹

175. Hannig 152.

176. Groebner 223–224.

177. Id. 224–226.

178. Hirschbiegel 37–69.

179. Id. 17.

180. In 1393, for example, Jean, Duke of Berry, gave Charles VI an image of St. George standing on a dragon. Two diamonds were encrusted at the sides of the saint's helmet visor, a pearl on the flat surface, a large ruby and a pearl on the hilt of the sword, and pearls at either end of the cross. The image also contained a large cut ruby and four other cabochon rubies. Id. 370 no. 547.

181. The catalog includes over 1,800 objects given as aristocratic New Year's gifts between 1381 and 1422. Id. 314–514.

iii. Religious Gifts

41. *To the church.* Gift giving served a religious function as well. The medieval aristocracy was bound by long-standing gift relationships with church institutions, particularly the monasteries. Between the ninth and twelfth centuries, “donations to monasteries constituted a phenomenon of such massive proportions that it has been referred to as ‘the most powerful current animating the economic life of the time.’”¹⁸² The gift of large land holdings to the church formed the institution of *laudatio parentum*, gifts by which a family, to obtain a spiritual blessing, authorized a land transfer to a Christian saint and to the religious community the saint protected.¹⁸³ The church thereby acquired dominion over vast tracts of land, a wealth that was immobilized and served as the economic foundation for the church’s struggles against secular authority.

42. *To Brahmins.* The Catholic Church was not the only religious institution that regularly received gifts from the faithful. Brahman priests in India were required by caste rules to maintain independence from employment. They therefore accepted compensation for performance of their priestly functions only in the form of gifts (*dakshina*).¹⁸⁴ Gifts that were not forthcoming could be compelled. Because of their magical powers, Brahmins could take revenge by means of curses or deliberate mistakes in the prescribed rituals. During certain periods the gifts consisted of extensive land grants or agricultural rents to be received in perpetuity. According to Brahmanic theory, Brahmins alone were permitted to receive gifts of land.

c. The Early Modern Period

43. *The Mortmain Act.* The intimate connection between gifts and feudal power caused the political institution of gift giving to fall into disrepute at the beginning of the early modern period. Distrust of ecclesiastical charity became so widespread in England that, in 1736, Parliament passed the Mortmain Act to protect a testator’s family from disinheritance.¹⁸⁵ As stated in the act’s preamble,

[G]ifts or alienations of lands, Tenements or Hereditaments, in *Mortmain*, are prohibited or restrained by *Magna Charta*, and divers other wholesome Laws, as prejudicial to and against the common Utility; nevertheless this publick Mischief has of late greatly increased by many large and improvident Alienations or Dispositions made by languishing or dying Persons, or by

182. Silber (1995) 210, quoting Duby 174.

183. White 19–39.

184. Bendix 161–162.

185. Jones (1969) 109–113.

other Persons, to uses called *Charitable Uses*, to take Place after their Deaths, to the Dishersion of their lawful Heirs.¹⁸⁶

44. *The Ordinance of 1731*. As Voltaire famously noted, France under the ancien régime was governed by so many different legal customs, 144 by his count, that travelers changed laws almost as often as they changed post-horses. “[W]hat’s true in the Faubourg Montmartre becomes false at the Abbaye St-Denis. May God have pity on us!”¹⁸⁷ With the goal of unifying the customs and creating a single code of laws, Henri François d’Aguesseau, chancellor to Louis XV, promulgated a number of private law decrees, including the Ordinance of 1731,¹⁸⁸ the direct ancestor of modern French codification and the central document in the history of the civilian law of gifts.¹⁸⁹ His confidence that unification could be achieved was probably due to his admiration for the treatise of his teacher and friend Jean Domat and his studious consultation of the work of Joseph Bretonnier, who had brilliantly attempted to reconcile and restate French law.¹⁹⁰ Yet little is known about how d’Aguesseau chose one customary solution over another. Two likely influences were his mercantilist economic views and his Jansenist convictions. As a mercantilist, he believed that, in a well-run state, wealth should be concentrated in the hands of those who would use it productively and thereby provide tax revenues.¹⁹¹ Transactions outside of the market may thus have seemed especially suspicious. D’Aguesseau’s strict Jansenist morality caused him to disfavor speculative ventures, including card games, the stock market, and banking.¹⁹² In order to assure that a contract was not scandalous or contrary

186. Mortmain Act of 1736 sec. 1. The Magna Charta of Henry III already prohibited gifts into mortmain. Ch. 36. In 1279 and 1290, Parliament again prohibited gifts to religious or other institutions that would increase mortmain. Statute of Mortmain of 1279 sec. 2; Statute of Westminster (*Quia emptores*) of 1290 ch. 3. The crown was concerned because feudal dues and other incidents could not be extracted from property held in mortmain. Raban 3–4. A system of royal licenses soon emerged and the church found ways to use them to advantage. Though effort and expense was involved, the church’s freedom of action was not greatly impaired. Id. 23, 26.

187. “Customs—Usages,” in 8 Voltaire 48–49 (translation revised).

188. Ordinance concerning gifts of 1731.

189. 1 Regnault 50–57.

190. For d’Aguesseau’s legislative activity, see Monnier 280–368. For his relationship with Domat, id. 316–326. For his reading of Bretonnier, id. 328–332. Bretonnier’s *Receuil* was first published in 1718. For Bretonnier’s views on the difficulty of unifying French customary law, see Bretonnier lxxvii–lxxviii. Bretonnier noted that Aristide (d’Aguesseau’s pen name) first suggested to him the project of his *Receuil*. In Bretonnier’s view, d’Aguesseau was a Hebrew prophet sent from God who brought to the task of legislation profound scholarship, long experience, and a passion for justice. Id. lxxxix–xc.

191. Bayart 99–100. For an analysis of d’Aguesseau’s mercantilist views, see Harsin 213–226.

192. Carbonnier (1953) 40–41; see also Storez 551–565.

to social mores, he thought it necessary to examine its cause. Because d'Aguesseau believed that gift giving was more susceptible to duress and undue influence than were market transactions, he decided to subject the practice to stricter legal control.

d. The Market Economy

45. *Common-law evolution.* The evolution of the common law was based on different concerns, particularly the difficult task of reorienting the writ system away from its focus on land tenure and toward actions relevant to resolving disputes arising in the marketplace. Because gift giving was an activity associated more with feudalism than with entrepreneurship, the later forms of action generally ignored the giving of gifts. Equity, the other major component of modern common law, regulated gift giving only in situations of marked unfairness. As a result, gifts in common-law countries have long been governed largely by extra-legal norms.

46. *Economic liberalism.* In the mid-nineteenth century, the limited intervention of the common law in gift giving was reinterpreted from the perspective of economic liberalism. Oliver Wendell Holmes, a leading architect of American law, narrowly interpreted the scope of contract law to preserve as much scope as possible for the self-regulated activity of the individual subject.¹⁹³ Holmes therefore sought to restrict the intervention of the courts to situations in which there was a quid pro quo.¹⁹⁴ Implicit in his vision was the idea that individuals should be permitted to decide for themselves whether to perform gratuitous promises.

47. *Development of the market economy.* As the market economy developed, legal concepts were reformulated from a market perspective.¹⁹⁵ "[C]ommon law doctrines create incentives for people to channel their transactions through the market."¹⁹⁶ Because gift giving, even when mutual, does not involve a bargain, the law considered it an anomaly, a unilateral transaction in which a donor, for no good economic reason, gives something away. Gift giving represented an unproductive exchange, an idiosyncratic whim that, if too often repeated, leads to destitution.

A gratuitous transfer (*l'acte à titre gratuit*) is, in all senses, the *exception*. It is even, economically speaking, an absurd act, one that, from many points of view, poses serious risks. In fact, one of the typical forms of the gratuitous transfer, the gift, often serves ends completely different from those that

193. For the canonic but controversial discussion of the limitations Holmes sought to impose on American contract law, see Gilmore (1974) 14–61.

194. "[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise." Holmes 230.

195. Horowitz 160–210; Gilmore (1974).

196. Posner (2007) 249.

constitute its essence: the intention to give, to gratify. The pure and true *animus donandi* certainly should not be entirely proscribed—if only not to encourage a too pessimistic conception of humanity—but it is permissible to say that an act, at least *inter vivos*, that is inspired solely by the desire to gratify, is *rare*.¹⁹⁷

48. *Emancipation*. The gift became the quintessential nonmarket transaction. As the eighteenth century Enlightenment campaigned for individual freedom, it recognized that, in the feudal version of the gift economy, an individual lived under long-term dependencies that were impossible to sunder, whereas, under a system of commodity exchange, individuals are free to enter and exit from relationships as they choose. In his *Solitary Walker*, Rousseau captured the potential tyranny of the gift economy, a tyranny all the more powerful because it is willed by neither participant.¹⁹⁸ Because the market was able to break apart the web of dependency that characterized feudalism, it became the Enlightenment's ally in the quest for human freedom. Whereas the gift signified dependence, exchange meant freedom.¹⁹⁹ In this process, the virtues of rationality and freedom became identified with commodity transactions, whereas gift giving was

197. 8 De Page no. 2 (emphasis in original).

198. I know that there is a kind of contract, indeed the most sacred of contracts, between the benefactor and the recipient; together they form a kind of society, which is more closely knit than the society which unites men in general, and if the recipient tacitly promises his gratitude, the benefactor likewise commits himself to continue showing the same kindness as long as the recipient remains worthy of it, and to repeat his acts of charity whenever he is asked and is capable of doing so. These are not explicit conditions, but they are the natural consequences of the relationship which has just come into being. A person who refuses a gratuitous favour the first time it is asked of him gives the person he refuses no grounds for complaint, but anyone who in a similar situation refuses the same person the same favour which he had previously granted, frustrates a hope which his behaviour has authorized; he disappoints and belies an expectation which he himself has brought into being. This refusal is felt as being harsher and more unjust than the former, but nevertheless it is the product of an independence which is dear to our hearts and cannot be relinquished without difficulty.

Rousseau 97–98 (Sixth Walk).

199. The market makes free. The economy based on exchange is a system of freedom. The obligational relationship and exchange are born and evolve in free societies The economy based on the gift, and thus on the values that rest on the unilateral gratuitous act, is an economy deprived of the perspective of freedom, it is a society that maintains the ties of personal dependence. Both feudal society and Roman civilization found in the client relationship the reason and the cause of personal relations based on the concession of favors, of benefits, of privileges of which the donor is the sole dispenser because titular of a personal power over other subjects.

Mazzoni 705.

understood to result from an irrational impulse, derived either from emotions of affection, from the desire for dependence, or from excessive religiosity.²⁰⁰ Schroeder's masterly Hegelian-Lacanian reading of the gift transaction makes clear that, to German idealism, the gift compared unfavorably to contract as a means to promote mutual recognition and freedom.²⁰¹ By the end of the nineteenth century gift giving had acquired a negative valence. Donors were those who sacrificed their families in quest of elusive goals such as divine grace or posthumous recognition.²⁰²

"Gift-exchange ... has been fractured, leaving gifts opposed to exchange, persons opposed to things and interest to disinterest. The ideology of a disinterested gift emerges in parallel with an ideology of a purely interested exchange."²⁰³ The sphere of commodity exchange became gendered as male, whereas communal and personalized labors that could not as easily be commodified because they have neither beginning nor end, such as the bearing and raising of children, keeping house, and managing affective relationships, were relegated to the women's sphere.²⁰⁴

e. Comparative Notes

49. *Response to particular circumstances.* Historians have shown how gift giving has responded to the historically existing aspects of different societies. The goals of the historian are also appropriate for this comparative study. The goal here is to explore how gift norms dialogue with other aspects of a society's culture and

200. Here had I time I could inveigh with warmth against those base, those wicked women, who calmly play their arts and false deluding charms against our strength and prudence, and act the harlots with their husbands! Nay, she is worse than whore, who impiously profanes and prostitutes the sacred rites of love to vile ignoble ends, that first excites to passion and invites to joys with seeming ardour, then racks our fondness for no other purpose than to extort a gift, while full of guile in counterfeited transports she watches for the moment when men can least deny.

Mandeville 100.

For a modern statement of the idea, see Eisenberg (1997) 847: "[T]he world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship."

201. Gift, in contrast, is not merely the failure to achieve perfect mutuality and equality in practice, it is one-sided and hierarchical by its very nature. Consequently, insofar as the modern rule of law in the constitutional state is based on an ideal of equality and autonomy, there is an inherent logic in the law's privileging of contractual relations and suspicion of gift.

Schroeder 903. See also id. 870–873.

202. Marais 289–292.

203. Parry 458.

204. Margolis 13; Di Leonardo.

history and contribute to a particular social understanding of the role of gift giving. Comparative law participates by revealing essential differences in legal conception and doctrinal construction, even among otherwise similar legal orders. Because, as the historians remind us, these conceptions change over time, this comparative study also examines the evolution of this give-and-take between gift norms and social practice.

3. Economics

50. *Direct challenge.* Gift giving provides economics with a direct challenge. Economists seek to explain human behavior in terms of rational, self-interested action. One of the fundamental premises of most economic models is that individuals are principally actuated by self-interest.²⁰⁵ Economists are aware that the premise is not realistic. Human beings act from many motivations. Yet the assumption helps to show the contribution egoistic behavior can make to the general good.²⁰⁶ Economists often conclude that a decentralized market guided by price signals in which actors are motivated by self-interest is superior to the alternatives.

51. *Self-interest and gift giving.* The problem for the economist is that much of gift giving does not seem to fit the mold of self-interested action. A donor parts with something and gets nothing in exchange. Because economics is concerned with the role of self-seeking action and because much contemporary gift giving appears to be based on altruistic motives, it might be expected that economics would leave gift giving to one side. But that is not what has happened. Instead, economists have challenged themselves to explain the gift economy in terms of self-interested action. In much of the literature, the goal is to explain why a rational person would engage in gift giving. "Why would 'economic man' ever make a promise without receiving in exchange something of value from the promisee ... ?"²⁰⁷ In other words, the challenge to economics is to explain the practice of gift giving based on a conceptual structure that, at least at first glance, seems foreign to the gift relationship.

52. *Inadequacy.* Inadequacy is a typical problem. The question is why gifts are often made in kind rather than in cash.²⁰⁸ Because economic theory suggests that money is the perfect gift,²⁰⁹ both donor and donee should prefer a gift of cash to a gift in kind. With a gift of cash, the donor avoids the time-consuming quest for the perfect gift, while the donee can choose among all the riches of the

205. "Each individual or family generally is assumed to have a utility function that depends directly on the goods and services it consumes." Becker 1065; see also Sen 317.

206. Sen 321.

207. Posner (1977) 411–412.

208. Ven (2000) 3.

209. Solnick and Hemenway 1303.

market. Nonetheless, as everyone knows, and as empirical research seems to confirm, though money is frequently gifted,²¹⁰ a cash gift is often improper.²¹¹ This fact creates what Waldfogel has called *the deadweight of gift giving*. His research among Yale undergraduates has shown that the inadequacy of Christmas gifts creates a deadweight loss of between a tenth and a third of the value of the gifts.²¹² In other words, donors and donees are obviously not attempting to maximize utility in a traditional economic sense.

a. Proposed Explanations

53. *Various issues*. Three discussions in the economics literature are relevant to this study, namely those seeking to explain why rational donors give gifts, why gift giving survives in a fully commodified economy, and why gift promises are made.

i. Donor Motivation

54. *Numerous theories*. Economists have proposed numerous constructions to reconcile the giving of gifts with the assumption that rational individuals maximize utility. Unfortunately, no theory consistent with the rational action model is able to explain all of the conduct typically associated with gift giving.

(A) ALTRUISM

55. *Pure altruism*. The simplest explanation for gift giving is that donors are altruistic. In economics terms, the donor's own preferences include optimizing the donee's utility.²¹³ Though intuitively apt, the pure altruism thesis fails to explain some aspects of gift giving. For example, it is inconsistent with the fact that gifts are often not given in cash. The cash gift would provide the greatest increase in donee utility.²¹⁴ Pure altruism also cannot explain why charities publicize the names of their donors, or why large gifts are broadly communicated and publicly celebrated.²¹⁵

56. *Warm-glow altruism*. To solve these problems, some economists suggest that altruism is not pure. Donors also think of themselves when they give. They give because they have developed a personal taste for giving, they "experience a 'warm glow' from having 'done their bit.'"²¹⁶ Donors derive utility from helping others

210. Zelizer 85–91.

211. "The look of horror and disbelief on many subjects' faces when asked to imagine giving money to the person they had chosen was perhaps the best indication of their general reluctance to use it as a gift." Webley and Wilson 99.

212. Waldfogel (1993) 1328. See also Waldfogel (1996).

213. Ven (2000) 4–5; Posner (1977) 412; Becker.

214. Ven (2002) 478.

215. Posner (1997) 574.

216. Andreoni 1448.

to become more satisfied, and particularly from their own contributions.²¹⁷ Thus, their goal is not just to improve the donee's situation but also to experience the pleasure that assisting others provides.²¹⁸

From a noneconomist's point of view, the warm-glow thesis seems accurate. Its problem is on a different level. To begin with, it explains nothing. No formula is needed to reach the conclusion that donors give away property because it gives them pleasure. More importantly, including donative pleasure in the definition of self-interest creates a tautology.²¹⁹ It is circular to suggest that individuals seek to maximize utility and then to define utility as whatever they happen to be seeking to maximize.

(B) SOCIAL RELATIONSHIPS

57. *Symbolic utility.* The symbolic utility thesis is based on the understanding that reciprocal gift exchange, by producing mutual sympathy and recognition, yields the self-respect that comes from having gained the respect of others.²²⁰ In contrast to substantive utility, which involves material advantage, symbolic utility provides what is needed to affirm the psychological advantage of mutual bonds.²²¹ The thesis is that donors give because they enjoy the relationships that gift giving produces. Gift exchange persists alongside the market economy because, though the market provides higher substantive utility, it cannot provide symbolic utility. Once again, the explanation seems accurate. Yet once again it is tautological. Once utility is redefined to include the noneconomic benefits of mutual respect, there is no need for economic analysis.

58. *Social approval.* The social approval thesis is based on the theory that individuals have two basic goals: economic gain and social acceptance. The thesis suggests that gifts are given to increase the donor's social approval rating.²²² Empirical research suggests that donors are more generous when their gifts are publicized. Other research confirms that individuals have a taste for social status and approval.²²³ For example, it appears that charitable gifts are rarely made

217. Arrow 348.

218. I finally provided a *dénouement* by buying the apples from the little girl and letting her share them out among the little boys. Then I had one of the sweetest sights that the human heart can enjoy, that of seeing joy and youthful innocence all around me, for the spectators too had a part in the emotion that met their eyes, and I, who shared in this joy at so little cost to myself, had the added pleasure of feeling that I was the author of it."

Rousseau 146 (Ninth Walk).

219. Sen 322.

220. Ven (2000) 5–7.

221. Klundert and Ven 4.

222. Ven (2000) 7–8.

223. Ven (2002) 465.

anonymously.²²⁴ The suggestion is that the desire for social approval is as important as the need for consumption goods. “[P]eople not only want to be admired, but also want to be admired more than others.”²²⁵ Status attaches to those with great wealth. But wealth itself is not usually observable. The wealthy obtain status by doing what only the wealthy can do, which is to live on a grand scale.²²⁶ Status can be gained by consumption, but it is also can be gained by giving gifts.

Social approval is difficult to obtain in the market because the market, in its pure form, is an anonymous institution. Moreover, a certain type of social approval is incompatible with the market. Though universities solicit donations, they would refuse to sell naming rights to the highest bidder. The sale would diminish the reputation of both parties to the transaction. A charitable donation, on the other hand, even in an equivalent amount, confirms that the university is worthy and that the donor is a patron of culture. “In a phrase, people value reputations for generosity, ingenuity, and fair-mindedness; but if one could purchase such reputations, then they would cease to exist.”²²⁷ In the social approval model, two factors influence the amount of the gift. The first is the correlation between value and the magnitude of social approval. Social approval increases with the value of the gift. The second is the fact that concern about status differs among individuals. As a result, some individuals give more than others.

The social approval thesis integrates gift giving into the framework of rational action by redefining utility to include the goal of social approval. Because social approval is not available in the market but can be obtained by making gifts, especially charitable donations, individuals who seek approval act rationally when they give gifts. The difficulty with the thesis becomes apparent when we ask why social approval cannot be obtained in the market. It seems obvious that social approval is produced by participating in activities that benefit society, often by sacrificing time, money, and energy that otherwise might be devoted to self-serving activity. A charitable donation, therefore, represents a renunciation of personal interest to achieve a social benefit. But the assumption of the rational self-interest model has always been that rational individuals prefer their private interests to social benefit. The social approval thesis has simply redefined self-interest in such a way that it accords with the type of action individuals tend to engage in. The thesis thus fails to integrate gift giving into the model of rational self-interest. Moreover, the thesis fails to explain some aspects of gift exchange, such as anonymous giving.

224. Posner (1997) 574 note 17.

225. Ven (2002) 468.

226. Posner (1997) 575.

227. *Id.* 574.

(C) MARKET RELATIONS

59. *Trading partners.* Another thesis explains gift giving as a market mechanism with a signaling function. Buyers and sellers can use gift giving as a means to locate trustworthy trading partners.²²⁸ Eric Posner points out that some nonlegal mechanism such as trust must be present to account fully for those contracts, known as relational contracts, in which the contract's value depends on the parties' ability to rely on each other over time.²²⁹ Relational contractors seek trustworthy partners. The argument is that gift giving provides a reliable signal of trustworthiness. Those who sincerely intend to enter into long-term relationships can afford to make significant gifts, whereas those who are focused on short-term gains cannot.²³⁰

The thesis correctly recognizes that gift giving can create and maintain a relationship of sympathy and mutual respect. It then suggests that this characteristic of gift giving can have subsidiary benefits in the market. However, this thesis explains little about the vast field of gift giving beyond market relations. It also does not attempt to explain anonymous giving.²³¹

(D) COMMITMENT

60. *Unexplained.* Amartya Sen grasps more of the practice of gift giving, but at the cost of abandoning much of the model of rational self-interest. Sen distinguishes between two motivations for giving assistance to others: sympathy and commitment.²³² Donors who contribute to homeless shelters because it pains them to think of the plight of the homeless give out of sympathy. When they give because they wish to improve the living conditions of the homeless, they give out of commitment. Sympathy is a type of egoism, a variety of self-interest. Commitment is not. Someone who gives out of commitment chooses to use resources to improve society at the price of a diminution in the donor's own personal welfare. As Sen notes, much economic theory assumes that properly informed individuals will choose to maximize personal utility. Economic theory has no place for a distinction between personal choice and personal welfare.

In other words, the basic quality of much modern gift giving, the choice to improve another's welfare with no equivalent compensation, cannot be explained by the economic model of the rational actor. As Sen points out, human beings do

228. Ven (2000) 12–16.

229. Posner (1997) 578.

230. *Id.* 579–580.

231. In its sociological version, signaling theory becomes an attempt to understand how meaning can be conveyed when gift giving is assumed as a social convention. See Camerer. By using this conventional background, sociological analysis is able to explain many features of inadequate giving. However, this method is not available to economic analysis, which is attempting to explain the convention itself.

232. Sen 326.

not spend every waking moment maximizing personal gain.²³³ Many of us go out of our way to help complete strangers. We do this based on what Sen calls social conditioning. Our lived relationship to the world is largely a result of the context produced by socialization. Economics does not address the role of social custom and tradition. When this context is ignored, gift giving seems irrational. "The *purely* economic man is indeed close to being a social moron. Economic theory has been much preoccupied with this rational fool decked in the glory of his *one* all-purpose preference ordering. To make room for the different concepts related to his behavior we need a more elaborate structure."²³⁴

The challenge is to understand the rationality of the socially aware human being who is both actor and acted upon, who has volition and agency but at the same time acts within social forms that represent an internalization of social custom. We do not always maximize utility, we occasionally give gifts, and yet we have no doubt that our choices are rational. It seems imprudent to settle for a theory that models anything less than the whole of our being, especially if the part that is left out is so fulfilling.

ii. Gift and the Market

61. *Allocation of goods.* Kenneth Arrow suggested that economists who investigate the gift economy suffer from a particular blindness. Contrary to standard economic models, the allocation of goods and services in modern society does not take place entirely by exchange.²³⁵ This is true not only for intangibles like respect, love, and status, but also, for example, for such critical items as the blood supply. Philanthropy has always been an essential part of economic systems. Public goods, ranging from roads and street lighting to foreign aid, education, and cultural offerings, have grown dramatically as a share of the domestic economy.²³⁶ Personal services are donated both to the local Little League and to the political system. The redistribution of wealth through the tax system also does not take place through the market.

Arrow agrees with Eric Posner's observation, mentioned above, that non-economic virtues such as truthfulness are essential to the economic system. "Virtually every commercial transaction has within itself an element of trust"²³⁷ In Arrow's words, the categorical imperative and the price system are complements. As a result, even the overwhelming commodification of modern society will not cause the gift economy to vanish.²³⁸

233. Id. 331–332.

234. Id. 336 (emphasis in original).

235. Arrow 344.

236. Sen 330.

237. Arrow 357.

238. For the fear that the gift economy is on the way out, see Klundert and Ven 20–21.

62. *Production value.* Yet even Arrow fails to grasp the true economic importance of gift giving in modern society. Despite the frequently expressed view that gift giving is a sterile, useless activity, a relatively large proportion of modern economies is devoted to producing gifts. Davis calculates that about 4 percent of consumer expenditure in the UK is the result of donor purchases.²³⁹ The value of manufacturers' sales of commodities used for gifts exceeds sales by the ship-building and marine engine industry and approaches the total sales from coal mining. "In this sense gifts are five times more important in the economy than all nuts and bolts and screws; forty-five times more than cement; eighty-six times more than glue. In short, the apparently small percentages conceal really quite important magnitudes."²⁴⁰ Davis included only new purchases in his calculations, what we call presents. He did not include the value of existing property, both real and personal, that is gifted every day.

63. *Redistributional effects.* Gifts also play an important role in redistributing wealth to those in whose hands the gift property has a higher utility. Redistribution may have a positive effect on aggregate demand²⁴¹ and may enhance the utilities of both donor and donee.²⁴²

iii. Gift Promises

64. *Deferred giving.* Economic analysis encounters unexpected difficulty in explaining the familiar institution of the gift promise. Economists seek to understand why donors sometimes wish to defer gift giving, why they prefer to make a promise rather than an immediate transfer, and why they announce their intentions in advance. They also consider whether gift promises should be legally enforceable and the consequences that would result if donors were bound to their promises.

(A) ECONOMIC ANALYSIS

65. *Reasons to defer.* Shavell suggests three reasons why donors may wish to defer their gifts.²⁴³ Donors may not have sufficient assets when the promise is made, they may be able to attain a higher return on principal than their donees, or they may wish to keep their options open in light of possible contingencies, such as unforeseen economic difficulties, new investment opportunities, or the donee's ingratitude.

66. *Reasons to announce.* Richard Posner suggests that donors benefit by announcing their intentions in advance. The promise increases the likelihood

239. Davis (1972) 412.

240. Id.

241. Eisenberg (1979) 4.

242. Hochman and Rodgers 543.

243. Shavell 402.

that the gift will be made in the future, which in turn increases the present value of the gift and therefore the donor's own utility.²⁴⁴ Because there are no costs to a gift promise, the promise itself increases net social welfare. Goetz and Scott suggest that the importance of a promise is that it provides information about the future.²⁴⁵ The promise will give the donee greater confidence that the gift will be made and will encourage the donee's beneficial reliance.²⁴⁶

67. *Reasons to be bound.* Shavell suggests that donors generally do not wish to be bound to their gift promises.²⁴⁷ However, some donors may prefer enforceability to distinguish themselves from those who seek to entice the donee to rely but do not in fact intend to make the promised gift. In that situation, the binding gift promise improves the welfare of both donor and donee. On the other hand, Kull argues that enforcing gratuitous promises benefits donors by permitting them to arrange their affairs in a secure manner. If gift promises are not binding, donors can attain their goals only through more cumbersome arrangements, such as a trust.²⁴⁸

68. *Effects of a binding promise.* Shavell concludes that the effects of a binding gift promise are not always positive. If gift promises were binding, donors who fear financial setbacks may reduce the number of promises they make, and therefore perhaps also the number of gifts. Posner's premise is that gift promises should only be enforced when the net gain from enforcement exceeds the enforcement cost. He concludes that the case for enforcement is stronger when the promised transfer is larger.²⁴⁹

Goetz and Scott provide a subtle economic analysis of the incentive structure surrounding the gift promise. They believe that the goal of enforcing promises is to maximize what they call the net beneficial reliance derived from promise making.²⁵⁰ That can be achieved by increasing the donee's confidence in performance without overly reducing the total number of promises. Goetz and Scott reject the award of expectation damages because they believe it would overdeter promise making.²⁵¹ They also reject reliance damages because courts do not have a cost-effective means to make the subtle judgments required to make a proper damage award.²⁵² Goetz and Scott conclude that the parties themselves, by adjusting their actions to take account of any perceived uncertainty of performance,

244. Posner (1977) 412.

245. Goetz and Scott 1267.

246. *Id.* 1276–1283. For a critical analysis of this rigorous but difficult article, see Fellows (1988).

247. Shavell 419–421.

248. Kull 59–64.

249. Posner (1977) 414–415, 420, 426.

250. Goetz and Scott 1321.

251. *Id.* 1287.

252. *Id.* 1290–1291, 1309.

can more accurately maximize beneficial reliance than can the courts. In sum, the extra-legal sanctions available to the promisee together with the adjustments both parties can make to accommodate contingencies provide a satisfactory substitute for legal enforcement.

(B) DIFFICULTIES

69. *Practical problem.* The practical problem the gift promise presents is how the law should react when the donee relies on a gift promise that the promisor later decides not to perform. Economists have therefore tried to determine the situations in which social welfare is increased by enforcing a gift promise. In some circumstances they would compensate the donee for detrimental reliance. Significantly, economic analysis has not yet been able to distinguish the two different cases that frequently arise.

70. *Change of heart.* The first case involves the donor's change of heart. Donors may change their minds after making a promise, but not principally, as the economists assume, due to unforeseen financial reversals. Sometimes the relationship between the parties changes. If, given the relationship, the promise was socially proper when it was made, and if that relationship continues, it seems likely that the gift will be completed. If, however, the donee and the donor have drifted apart, if the donee has been ungrateful or in some other way has disappointed the donor, the gift may no longer be appropriate. Goetz and Scott suggest that the parties might agree in advance to the consequences of a change in circumstances. The two scholars also recognize, however, that a donative promise is fragile and that it is likely to be difficult to spell out the consequences of the donee's ingratitude.²⁵³

When the results of economic analysis are examined from the point of view of social practice, the economists' questions—the potential economic gain from the promise and the economic loss from reliance—seem to be of secondary importance. The economic perspective does not take account of the subtle interpersonal context of the relationship between the parties, which is the essence of the gift relationship. When that relationship changes, money damages may not be appropriate, even in the face of significant detrimental reliance.

71. *The executor's refusal.* In the common law, suits to enforce gift promises are usually brought against the donor's estate.²⁵⁴ It is not the donor who recants the promise but the donor's executor, and not because the donor has decided against the gift, but rather because the executor is prohibited from making transfers that are not legally required. If the donor maintained the promise until death,

253. Id. 1304–1305.

254. Kull 45–46.

there seems to be no reason not to enforce the full expectation value of the promise.²⁵⁵

In other words, depending on the circumstances, it may not be appropriate to award damages even in the case of reliance, or it may be proper to award expectation damages even without reliance.²⁵⁶ The economic approach has not yet focused on this central distinction.

b. Comparative Notes

72. *Much is ignored.* Economists' assumptions exclude much that is essential about gift giving. The problem is not just that their motivation theses do not form a comprehensive theory.²⁵⁷ The problem is rather that the theses have little explanatory force. Economics is unable to grasp that gift giving is both a voluntary act and an element of social practice.²⁵⁸ The obvious question is whether the same is true of the law.

The inadequacy problem serves well as an example. As discussed above, economic analysis attempts to reconcile the theoretical postulate that cash would be the best gift with the fact that gifts are often given in kind. The difficulty, it turns out, is with the formulation of the problem. As a moment's reflection makes clear, cash given as a gift is not a universal equivalent. Zelizer has pointed out that the donee who receives a check as a birthday present is not free to spend it on just anything.²⁵⁹ The check cannot be cashed for groceries or used to pay a gambling debt. Instead, the gifting of money transfers the difficult choice of an appropriate gift from the donor to the donee. Since the thank-you note must mention how the money was spent, the donee who receives cash has the task of finding a gift that is suitable to the relationship. In this regard, gift certificates, though they restrict the donee's freedom of choice, help the donee understand the type of gift the donor had in mind. In other words, much of economic analysis of gift giving has been devoted to resolving a puzzle that does not exist.

255. "In all the cases just mentioned, however, the promisor died solvent without a change of heart. Whether the promisee would have been allowed to recover against the wishes of the promisor, or to take his place in line with creditors, is sheer conjecture." Gordley (1995) 579.

256. "[T]he presumptive unenforceability rule makes sense for a renounced promise and makes no sense for an unrepudiated promise." Fellows (1988) 28.

257. "As it stands, no single theory can explain everything." Ven (2002) 479.

258. "Probably the main explanation for the neglect of social interactions by economists is neither analytical intractability nor a preoccupation with more important concepts, but excessive attention to formal developments during the last 70 years. As a consequence, even concepts considered to be important by earlier economists, such as social interactions, have been shunted aside." Becker 1091.

259. Zelizer III.

i. Relationships as Externalities

73. *Essential to the market.* For economics, moral sensibility is an externality. The market relies on mutual trust, yet economics is unable to grasp the gift relationship that creates and maintains this trust. It is symptomatic that Waldfogel, as he calculated what appeared to him to be the deadweight loss of Christmas giving, instructed his Yale undergraduates to ignore any “sentimental value”²⁶⁰ when estimating the value of the gifts they received. Other investigators have determined that a gift’s sentimental value is significant.²⁶¹ Many respondents ascribe a value to the gifts they receive that exceeds their cost.²⁶² In other words, when all factors are included, gifts actually create value.

Because the relational context is so crucial to the gift relationship, a comparative study must find a way to take account of it. The difficulty, of course, is that legal norms, like the economists’ model, often do not explicitly consider the relationship between the parties. Yet the courts consider these subtleties. In this field, the path to the heart of the matter leads through an analysis of the facts of individual cases.

ii. Subeconomies

74. *Differing contexts.* Both economics and the law focus on the market economy. Yet the reproduction of a modern society, even economic reproduction, depends on numerous subeconomies. Each of those subeconomies functions according to its own logic and rules. Davis distinguishes four:²⁶³ the market, governed by commercial and labor law; the redistributive economy of taxation and state expenditure; the family economy, governed by family law and the expectations of family life; and finally the gift economy, governed by the Maussian obligations and the law of gifts.

As Davis noted, even this enumeration ignores much of economic life. No picture of modern transactions is complete without an account of other economies as well: the patronage economy, the expenses of turning out the vote and lobbying for the pork; the vice economy, including drug traffic, illegal gambling, and prostitution, practices often governed by their own norms, such as the code of silence (*omertà*); the war economy, which causes the destruction of lives and capital for symbolic and material goals and which is partially subject to international law; the legal economy, including transactions between lawyers and clients as well as agreements and exchanges between opposing counsel, including sub-subeconomies, such as the forensic economy and agreements and exchanges with the police and plea bargains; and the volunteer economy, which involves

260. Waldfogel (1993) 1331.

261. Solnick and Hemenway 1301. For Waldfogel’s response, see Waldfogel (1996).

262. Solnick and Hemenway 1300.

263. Davis (1972) 408.

services rendered for the public good and which are excluded from the gift economy because no transfer of rights is involved.

Given the numerous economies required for social reproduction, it is obvious that rules developed for the relatively narrow practice of market exchange cannot possibly govern all of these fields. And it becomes clear that the motivational analysis that applies to rational actors in the marketplace does not always describe rational action in other contexts. A comparative study of the law should examine how the law interacts with the rules native to the domains it governs.

iii. Market Blindness

75. *Grasping the essential.* The failings of economic analysis mirror similar failings in the law. The same presuppositions and the same blindnesses are present in both. Sometimes the law discourages gift giving because, from the point of view of the rational, self-interested actor, it is absurd to give something away without getting something in return. Economists reformulate gift giving to reconcile it with the self-interested actor. But the unsatisfying results of their efforts suggest instead that the economics of the marketplace are irreconcilable with the gift economy. We live in (at least) two different and somewhat incompatible worlds. We experience the incompatibility at certain moments, such as when we are stumped about the proper present for a boss or a secretary, but we generally do not conceptualize the problem.

To grasp the relationship between these different spheres, it is useful to analyze the role that social custom and practice play and the obligations they impose from beyond the law. In other words, this study can succeed only to the extent that it abandons Western law's self-understanding as the predominant source of social norms. Extra-legal norms are not always an enemy to be besieged and vanquished. In the end, both economics and the law should expand the concept of the rational actor. A legal system is dysfunctional if it understands rationality only in terms of market-oriented behavior and then protects against or prohibits everything else.

4. Philosophy and Sociology

76. *Meaning and paradox.* Philosophy and sociology seek the meaning contained within the paradoxes that constitute the social practice of gift giving. As discussed above, gifts must be given freely, and yet, at the same time, they are obligatory. The giving of a gift is experienced as a discrete, individual act, yet it necessarily participates in a chain of repeated events. The gift cannot be seen as a quid pro quo without destroying its gratuitous character, yet gift giving always involves the obligation to reciprocate. Gifts establish and confirm relationships, they express gratitude, they do favors for friends; and yet they establish hierarchy, they annoy, they embarrass, and they dominate. In no other social institution are such conflicting meanings encoded and conveyed, often at the same time.

Among the gift-related questions that philosophers and sociologists seek to answer, two are particularly relevant here: first, whether any coherent meaning can be found in the practice of gift giving, and, second, whether gift theory can play a role in social reform.

a. The “Pure” Gift

77. *Contract and gift*. As the gratuitous transaction surrendered its central role in societal reproduction to the marketplace, it was retooled to fit the needs of the private sphere and individual conscience.²⁶⁴ This is what Helmut Berking has called the transition from *Gabe* to *Geschenk*, from social gift to individual present.²⁶⁵ As Eisenberg has explained, we live today in two worlds, in a *world of contract* and a *world of gift*.²⁶⁶ Whereas market exchange augments public wealth, the gift is considered a *sterile transaction*.²⁶⁷ Yet its economic infertility has been its boon. The gift is now *pure*. It is the product of individual whim, an act done without obligation. In this modern conception, the gift has been reconciled with individual freedom by eliminating its connection to dependency and promoting its role as a direct expression of individual altruism.²⁶⁸ The selflessness of the gift provides a counterpoint to the market economy, which can leave conscience to one side and focus without reserve on the pursuit of self-interest.

78. *Spheres of influence*. Gift giving has now been relegated to particular spheres, including the intimacy of friends and family. Individuals who have developed a sensitivity for gift giving can use gifts to maintain relationships at the desired level or to advance them toward greater intimacy.²⁶⁹ In the private sphere, gifts given during familiar rites of passage—presents for birthdays and holidays, weddings, anniversaries, graduations, and baby showers, gifts given to the host or hostess at dinner parties, and those placed under the pillow by the tooth fairy—operate to create and maintain relationships, though of course they may also serve as a mechanism of hierarchy and control. Santa Claus, that most industrious of gift givers, retains the ability to withhold gifts to assure good behavior. And he is all the more unapproachable since his gifts cannot be reciprocated.²⁷⁰

264. Godelier 207.

265. Berking 3.

266. Eisenberg (1997) 823 *passim*.

267. Bufnoir 487, quoted in Fuller (1941) 815.

268. Carrier (1990) 20–21; see also Emerson.

269. “What makes gift selection an elaborate and difficult task, however, is that gifts not only reflect social ties but can redefine them. Giving an overly personal gift to a mere acquaintance, a much too expensive gift to a fiancée, or an impersonal gift to one’s mother confuses, annoys, or offends by implying or forcing a mistaken definition of the social relation.” Zelizer 78–79.

270. Schwartz 4.

A particularly developed example of the role gift giving plays in maintaining close personal relationships is found in the German institution of the godparent (*Taufpate*), who, in exchange for honorary status in the family, has been expected, in certain regions and in certain periods, to make prescribed presents at specific moments in the child's life. The godparent purchases the clothing worn to baptism (*Taufkleid*), is responsible for the baptismal certificate (*Patenbrief*), and inserts the baptismal medal (*Patentaler*) into the baptismal cushion (*Taufkissen*). At Christmas the godparent makes a gift of a new piece of clothing, at New Year's a pretzel, at Easter a specific number of eggs, at the beginning of the school year a backpack, at confirmation a watch or a chain, and at marriage a meaningful monetary gift.²⁷¹ In the Austrian region of Gmunden, it was long customary for the godparent (*Goden*), shortly after the child's birth, to bring chicken soup as a gift (*Weigert*). The soup was always contained in a special bowl (*Godenschale*) that was custom-decorated with a picture of the child's name saint and was accompanied with a distinctive lid, saucer-shaped and fitted with three short feet to support it when it was turned upside down.

79. *Modern philanthropy.* Another role of the pure gift is the modern practice of public charity. The monotheist religions, which systematically ethicize social behavior, have developed a particularly extensive culture of disinterested giving.²⁷² Virtually everyone in modern society, at one time or another, is involved in either the giving or the receiving of charity. Media reports of natural catastrophes and social cataclysms in distant parts of the world have globalized this activity. The vast majority of these gifts represent only a small portion of any individual's wealth, though charity also functions on a vaster scale, namely in the elite world of charitable giving that occupies much of the lives of the wealthy, involving charitable board meetings and gala balls.

Of course, it would be naïve to suppose that considerations of self-interest and obligation play no role in private gift giving and philanthropy. Gifts given to secretaries, letter carriers, apartment house door personnel, and even occasional romantic partners may partially represent compensation and are in any case obligatory. In the realm of public charity, large corporations often make donations based on a rational calculation of potential profit. Individual donors able to make significant gifts use their charitable giving to compete for seats on charity boards, to establish social rank and prestige, and to affix their names to buildings, grants, and prizes. At times it may even be difficult to determine whether the contribution represents a charitable donation or the purchase price for

271. "Thus these are gifts the child can, under normal circumstances, take for granted, to which it has a customary right and which in turn involve a certain reciprocity, including the invitation of the godparent to all family celebrations." Weber-Kellermann 5–6.

272. Parry 467–469.