

DO WE BELIEVE IN GENEROSITY?: REFLECTIONS ON THE RELATIONSHIP BETWEEN GIFTS AND EXCHANGES

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What are gifts? Do they derive from a “detached and disinterested generosity”?¹ Are they means toward establishing “a feeling-bond between two people,”² or, more generally, of constructing “a wide range of possible social worlds as stable arenas for social interaction”?³ Are they fundamentally “sentimental arrangements,”⁴ “one-sided proposition[s]”⁵ of “relatively trivial” economic significance?⁶

Or perhaps gifts only *seem* to have these qualities.⁷ Rather than proceeding from generosity, it is possible that gifts are obligatory and

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1. *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960) (quoting *Commissioner v. LoBue*, 351 U.S. 243, 246 (1955)). Defining gifts has proved troublesome in the tax context. The courts must define gifts because property acquired by “gift” is excluded from income under section 102 of the Internal Revenue Code. I.R.C. § 102 (1988). In addition, “a contribution or gift” for certain charitable purposes is deductible under section 170 of the Internal Revenue Code. I.R.C. § 170 (1988). For a recent attempt to define “gift” in connection with the latter provision, see *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

2. LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 56 (1979); see also Patrick Geary, *Sacred Commodities: The Circulation of Medieval Relics, in THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 169, 173 (Arjun Appadurai ed., 1986) (arguing that the goal of certain medieval gift-giving was “the establishment of bonds between giver and receiver”).

3. DAVID CHEAL, *THE GIFT ECONOMY* 136 (1988); see also Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161, 174 (1960) (“the norm of reciprocity is a concrete and special mechanism involved in the maintenance of any stable social system”).

4. S.J. Stoljar, *A Rationale of Gifts and Favours*, 19 MOD. L. REV. 237, 237 n.1 (1956).

5. Henry W. Ballentine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 131 (1914).

6. Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 4 (1979). Lon Fuller maintained that “a gift is . . . a ‘sterile transmission.’” Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941) (quoting CLAUDE BUFNOIR, *PROPRIÉTÉ ET CONTRAT* 487 (2d ed. 1924)).

7. For more detailed development of these questions, see Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1988-1989).

interested.⁸ The feelings they reflect or construct may be less those of trust and connection than of domination and control.⁹ Instead of being economically insignificant, gifts and the process by which they are exchanged may constitute a unique and important economy of non-material as well as material goods.¹⁰

What are exchanges? Are they impersonal, precisely calculated transactions designed to satisfy the preferences of self-interested rational utility maximizers?¹¹ Do exchanges empower individuals and foster autonomy by allowing people to determine their own legal relations?¹² Are they economically significant transactions "which conduce . . . to the production of wealth and the division of labor. . . ."¹³

Or perhaps exchanges only *seem* to have these qualities. Perhaps, as Professor Rose suggests, "the category of exchange requires the very element of unilateral generosity that seems to make gift so strange."¹⁴ Perhaps the self-interest that purportedly drives productive markets requires forms of trust and cooperation conventionally associated with gifts.¹⁵ Perhaps conventional economic productivity requires a complex interaction of gift-giving and exchange-bargaining.¹⁶

8. MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 1 (Ian Cunnison trans., 1967).

9. C.A. GREGORY, *GIFTS AND COMMODITIES* 19 (1982). Gregory distinguished clan-based from class-based societies in this respect. *See id.* at 15-24. Others have been willing to generalize more widely. *See, e.g.*, Barry Schwartz, *The Social Psychology of the Gift*, 73 AM. J. SOC. 1, 4 (1967) (arguing that, through gifts, people maintain ascendancy by regulating the indebtedness of others to them).

10. *See* George C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597, 606 (1958) (suggesting that social behavior is an economy in which "[p]ersons that give much to others try to get much from them, and persons that get much from others are under pressure to give much to them").

11. *See* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 42 (1990); *see also* GREGORY, *supra* note 9, at 19 (noting that in a class-based economy, "commodity exchange establishes a relationship between the objects exchanged, whereas gift exchange establishes a relationship between the subjects").

12. *See* Fuller, *supra* note 6, at 809.

13. *Id.* at 815; *see also* Paul R. Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 853 (1941) ("The enforcement of business exchange promises plays an important part in the working of our economic system."); Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 946 (1958) ("Bargaining is an important pattern of conduct in economic activities that serve our material wants . . .").

14. Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 315 (1992).

15. *See id.*; *see also* Rose, *supra* note 11, at 52-53:

As legal categories, then, “gifts” and “exchanges” seem remarkably unstable, both at the core and on the periphery. Definitions of each are seriously contested. Gifts may be understood either in terms of generosity and sentiment or in terms of selfishness and domineering power.¹⁷ Exchanges may be understood either in terms of arm’s length self-seeking or in terms of community-based trust.¹⁸ These ambiguities within the definitions of the core concepts make it impossible to draw clear boundaries between the two categories and render it inevitable, as Professor Rose argues, that gifts will “leak” into exchange and vice versa.¹⁹

Does it matter that gifts and exchanges cannot be sustained as discrete categories? Why has the distinction seemed important? One arena in which the gift/exchange dichotomy has seemed salient is that of form: unlike exchanges, which have sometimes been seen as intrinsically self-policing,²⁰ gifts have traditionally been the subject of highly formal requirements, which are said to promote deliberation in giving and to enhance the reliability of the evidence that a gift has been made.²¹ Yet many of the formalities of the law of donative transfers — especially those of wills law — have come under attack in recent

[T]here is a gap between the kind of self-interested individual who needs exclusive property to induce him to labor, and the kind of individual who has to be there to create, maintain, and protect a property regime. The existence of a property regime is not predictable from a starting point of rational self-interest. . . .

Cooperation . . . is a preference ordering that the classical property theorists weren’t counting on in theory, but that they can’t do without.

Id.

16. See Rose, *supra* note 14, at 315-16. “If we do not understand gift very well as a matter of economic theory . . . then we really do not understand exchange much better, because exchange depends at some deep level on giving. . . . [Exchange] make[s] the business world go round.” *Id.* at 316-17.

17. See Baron, *supra* note 7, at 194-98.

18. See Rose, *supra* note 14, at 308-13.

19. *Id.* at 308-09.

20. See, e.g., Karl N. Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 YALE L.J. 704, 743 (1931) (“The existence of bargain equivalency does indeed commonly evidence positively that the promise was deliberate . . . [and] gives . . . fair ground for believing that some promise was in fact made . . .”).

21. For the traditional arguments concerning the functions of form in donative transfers, see Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 1-5 (1941); Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 U. ILL. L. REV. 341 (1926). For a critique of the functional justification, see Baron, *supra* note 7.

years,²² and a trend to reduce formalities is discernible in the 1990 revision of Article II of the Uniform Probate Code, which both eliminates many formalities altogether and also allows courts to excuse harmless errors in complying with those formalities that remain.²³ While formalism and the ideology it reflects are by no means dead,²⁴ they are, thankfully, not flourishing either.

Putting aside matters of form, for what other reasons have we asked questions about the "nature" of giving and the differences between gifts and exchanges? Often it appears that we ask these questions in order to determine whether, as individuals, we are (or can learn to be) altruists or whether we are, instead, selfish egoists.²⁵ Consider, for example, Professor Rose's description of the "quintessential gift" as "an unforced, one-sided transfer, motivated by generosity and a spirit of selfless love without thought of reciprocity."²⁶ Surely if such gifts are given, then humans must be altruistic (or, at least, have altruistic possibilities).²⁷

Motives, however, are never clear, as Professor Rose's "leakage" examples demonstrate.²⁸ Psychologists²⁹ and sociologists³⁰ have made

22. See, e.g., John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489 (1975); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541 (1990).

23. See UNIFORM PROBATE CODE art. II, pt. 5 (1990), especially § 2-503.

24. See Baron, *supra* note 7.

25. See ROBERTA G. SIMMONS ET AL., GIFT OF LIFE: THE SOCIAL AND PSYCHOLOGICAL IMPACT OF ORGAN TRANSPLANTATION 444-45 (1977) (examining the connection between giving and altruism in the context of organ donation); RICHARD M. TITMUS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 88-89, 198-99 (1971) (examining why people give blood); see also CHEAL, *supra* note 3, at 85-86 (describing the folk belief that gift giving derives from an "ideology of love," according to which feelings of generosity "spring directly from the individual's being, without social intervention").

26. Rose, *supra* note 14, at 302.

27. See SIMMONS ET AL., *supra* note 25, at 444 (suggesting that "altruistic behavior is intrinsically rewarding for great numbers of donors").

28. Rose, *supra* note 14, at 302-08.

29. See, e.g., Ronald Cohen, *Altruism: Human, Cultural, or What?*, in ALTRUISM, SYMPATHY, AND HELPING: PSYCHOLOGICAL AND SOCIOLOGICAL PRINCIPLES 79, 82-83 (L. Wispé ed., 1978) (describing the "hedonistic paradox" whereby "even the most unselfish act may produce a psychological reward for the actor"); Martin L. Hoffman, *The Development of Empathy*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 41 (J. Phillippe Rushton & Richard M. Sorrentino eds., 1981) (suggesting that hidden, unconscious, or tacit self-regarding motives can always be seen as constituting the "real" source of apparently other-oriented behavior).

the same point: unconsciously, we may behave altruistically — help others — for selfish, egoistic reasons.³¹ If the “pure gift”³² is never given, then maybe we are not altruistic after all.

Or maybe we have been seeking altruism in the wrong place. Professor Rose challenges the conventional association of exchange with self-interest³³ and suggests that at least some degree of “unilateral generosity”³⁴ is necessary to “make the business world go round.”³⁵ In this view, altruism is very much alive, but it is hidden under the deceptively coercive exterior of the state³⁶ and the falsely selfish appearance of the market.

There is a descriptive point to be made here: just as the category “gift” is shot through with behaviors and consequences we conventionally associate with the category “exchange,”³⁷ so the category “exchange” is shot through with “giving.”³⁸ To the extent that we believe that legal distinctions can and ought to be based on real differences in human behavior, there is something wrong with the categories; they don’t “fit” the facts.³⁹ Categories that require transactions to be one-sided *or* two-sided, other-directed *or* self-interested, generous *or* selfish are not terribly helpful if human motivations are inevitably complex and mixed.⁴⁰

30. See, e.g., PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 17 (1964) (stating that beneath the apparent “altruism” of social life is an underlying “egoism”: “the tendency to help others is frequently motivated by the expectation that doing so will bring social rewards . . .”).

31. For a provocative challenge to this point, see Jon Elster, *Selfishness and Altruism*, in *BEYOND SELF-INTEREST* 44 (Jane J. Mansbridge ed., 1990).

32. Rose, *supra* note 14, at 316.

33. *Id.* at 308-14.

34. *Id.* at 315.

35. *Id.* at 317.

36. *Id.* at 314-15. Professor Rose’s treatment of Leviathan is a bit ambiguous. Leviathan is coercive in “fore[ing] upon us an involuntary reciprocal exchange.” *Id.* at 314. Yet Leviathan “rests on an initial act of giving too. . . .” *Id.* at 315. Does the initial gift of the organizational efforts necessary, in Professor Rose’s view, to create the state render Leviathan’s enforcement of contracts less coercive?

37. See Baron, *supra* note 7, at 194-98.

38. Rose, *supra* note 14, at 315.

39. See Jay M. Feinman, *The Jurisprudence of Classification*, 41 *STAN. L. REV.* 661, 679 (1989) (describing the use of factual similarities and differences in schemes of legal classification).

40. See Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS*, *supra* note 2, at 3, 11-12 (“Gifts, and the spirit of reciprocity,

The problem may be deeper than is conveyed in the hackneyed notion of "mixed motives." It may derive from the law's underlying, oversimplified, conception of the human purposes served by both gifts and exchanges. Notwithstanding doctrines that treat gifts and exchanges as fundamentally different types of transactions,⁴¹ the law assumes that both are animated by atomistic individualism. Both, after all, are means of disposing of property, and there is no doubting the association between property and individual autonomy in our legal and social theory.⁴² Whether by making unilateral, economically sterile⁴³ "gifts," or by entering into bilateral, wealth-enhancing "exchanges," individuals are seen as expressing and actualizing their "freedom"; freedom of disposition, freedom of testation, freedom of contract, freedom of choice.⁴⁴

Professor Rose is not alone in questioning this vision of autonomous individuality based on "free" choices. Martha Minow, for example, has suggested that "this notion of the autonomous rights-bearing individual presupposes a community — a community willing to recognize and enforce individual rights. . . . Autonomy, even as an aspiration, is

sociability, and spontaneity in which they are typically exchanged, usually are starkly opposed to the profit-oriented, self-centered, and calculated spirit that fires the circulation of commodities. . . . [T]his is a simplified and overdrawn series of contrasts."); Jane J. Mansbridge, *Preface*, in *BEYOND SELF-INTEREST*, *supra* note 34, at x-xi ("Before modern social science began to rely so exclusively on self-interest to explain human action, most major thinkers realized that human beings had benevolent and malevolent as well as self-interested motives.").

41. For discussions of some of these differences, see Baron, *supra* note 7; Mary Louise Fellows, *Donative Promises Redux*, in *PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 27* (Peter Hay & Michael H. Hoeflich eds., 1988); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

42. See, e.g., Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 611 n.1 (1988) ("No one disputes the influence of individualism on the Western concept of property."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 605 (1988) ("[I]t seems no coincidence that the doctrines of fixed promisekeeping and fixed property entitlements developed more or less contemporaneously with a social theory that originally envisioned a radical separateness among human beings.").

43. See *supra* note 6.

44. See Baron, *supra* note 7, at 158 n.4, 167 n.62 (examining donative transfers as the expression of freedom); Fuller, *supra* note 6, at 806 (examining exchange as the expression of freedom: "When a court enforces a promise it is merely arming with legal sanction a rule . . . previously established by the party himself."). However, the connection between choice and freedom has been questioned. See Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 884-85 (1988).

the invention of a cultural and linguistic community."⁴⁵ No wonder, then, that we cannot realize ourselves as "free" individuals through self-seeking exchange except by "giving" a little, that is, by recognizing and trusting others.⁴⁶ Conventional images of gifts and exchanges alike seem impoverished by the internally-contradictory, unworkable assumption of a radical separation between self and other.

Rethinking the gift/exchange dichotomy, then, may require a rethinking of our idea of individualism as freedom *from* others.⁴⁷ It may be perfectly accurate to say, as conventional wisdom has it, that in giving and exchanging we express individualism. But that individualism does not have to imply separation. We give *to* others, and we trade *with* others; neither activity can be done by any individual alone. If these activities are expressions of autonomy, then it may be appropriate to reconceive autonomy in terms of relationship or connection. As Jennifer Nedelsky has suggested, "people do not exist in isolation, but in social and political relations. People develop their predispositions, their interests, their autonomy — in short, their identity — in large part out of these relations."⁴⁸ Professor Rose is right to remind us that the interconnected processes of giving and exchanging help constitute us not as isolated, selfish individuals but as a culture or community.⁴⁹

Nonetheless, while I am heartily in favor of any project that encourages us to rethink the relationship between the individual and the community, I am not entirely comfortable with the notion of the market

45. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 300 (1990).

46. See Rose, *supra* note 14, at 310. Competition for the lion's share of the positive gains from an exchange can prevent exchange; to avoid this haggling problem, "one party or both parties may simply be generous. . . ." *Id.*

47. On the American idea of autonomy as a wall of rights isolating individuals from potentially-threatening others, see Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS, Spring 1990, at 162, 167.

48. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 21 (1989); see also MINOW, *supra* note 45, at 302-03 (noting that "[e]ach statement of an individual's rights implicitly or explicitly draws reference to others and thus expresses interconnection at the very moment that the individual asserts his or her autonomy. . . . [A]ll rights claims imply relationships among mutually dependent members of a community.").

49. See Rose, *supra* note 14, at 316 ("The 'exchange gift' looks forward to a future history of dealings, and it leads to all the branching and variety that comes with a history and ultimately a culture.").

as the medium for the cultivation and vindication of trust. Professor Rose relies on relational contract and game theories to assert that there is a good deal of flexibility and cooperation among business dealers and that "[t]he sharp bargainer is by no means the image of success in commerce"⁵⁰ All this may be so, but I wonder how many ordinary consumers would describe even their years of shopping at the same neighborhood supermarket as a series of "successive trustful relations."⁵¹ Between the "twilight edges of the market," where one-shot dealers trade with "gullible strangers,"⁵² and the realm of "*doux commerce*," in which "trade and commerce . . . soften manners and make those engaged in commerce more attentive to the needs of others,"⁵³ lies a large grey area.

As Professor Rose has noted elsewhere, the rhetoric we use about ourselves and our institutions can matter a great deal.⁵⁴ I understand her now to assert that insofar as the "powerfully self-interested rhetoric of contract law"⁵⁵ assumes "a world of individuals whose dealings with each other are based on entitlement and self-interest rather than fellow-feeling,"⁵⁶ it is both incomplete and inaccurate because it leaves out the "systematic" element of gift that lies "at the center of quite normal kinds of exchanges."⁵⁷ Yet I am concerned that we not substitute for the old rhetoric simply a new, equally-misleading rhetoric which suggests that, in fact, we have little to fear from the market. Just as over-differentiating gifts from bargains can devalue "giving" compared to "commodity exchange,"⁵⁸ so, I fear, emphasizing the pervasiveness of trust in trade can legitimate market processes that, to many, are experienced as neither kindly nor amicable.⁵⁹

50. *Id.* at 310.

51. *Id.* at 316.

52. *Id.* at 310.

53. *Id.* at 313.

54. See Rose, *supra* note 42, at 610 ("[A]s rhetoric," crystalline, formal rules and muddy, flexible standards "suggest quite different ways that each self-contained individual should behave and converse with all those other self-contained individuals.").

55. Rose, *supra* note 14, at 311.

56. Rose, *supra* note 42, at 605.

57. Rose, *supra* note 14, at 311; see *id.* at 315-16.

58. See Baron, *supra* note 7, at 189, 200-01.

59. For a discussion of the way ideas can function "hegemonically" to legitimate the status quo by encouraging the view that things are already about as good as they can be, see Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 413, 418 (David Kairys, rev. ed. 1990).

It is not, after all, as if the market as an institution needs much help or defense. Especially in comparison to gifts, market exchanges tend to be depicted and understood as inherently natural, necessary and good.⁶⁰ Given the relatively high regard in which market bargains have traditionally been held, one wonders whether exchange as a concept is really in need of the moral boost it receives from the discovery that it is implicitly generous.

The legal literature discussing both the consideration doctrine and the formalities required for donative transfers tends to dichotomize and distinguish gifts and exchanges.⁶¹ Gifts have never fared well in the comparisons. Generosity has been viewed as both uncommon and suspicious.⁶²

Professor Rose's analysis of the ubiquity of generosity in exchange — or at least at the start of exchange — is, I think, a welcome antidote to the skepticism with which gifts have been treated. Yet I fear that the cure has the potential to perpetuate the disease. As a value worthy of respect in its own right, generosity can be just as diminished or marginalized by being incorporated into exchange as it can by being too thoroughly distinguished from exchange. Professor Rose leaves me wondering: Do we really believe in generosity at all?

60. See Baron, *supra* note 7, at 182-86. For a detailed account of qualities conventionally attributed to the market, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

61. See Baron, *supra* note 7, at 179-88.

62. *Id.* at 188-89.

