

GIVING, TRADING, THIEVING, AND TRUSTING:
HOW AND WHY GIFTS BECOME EXCHANGES, AND
(MORE IMPORTANTLY) VICE VERSA

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Does anybody really ever give anything away? Well, yes and no. Consider our sayings about gifts — what is the most famous one? I think it must be, “Don’t look a gift horse in the mouth.” This old chestnut suggests that if you get something for nothing, you ought to just be satisfied. The presumption is that, yes, people do give things away sometimes, just out of niceness, and that the appropriate reaction is gratitude and not nitpicking.

But this adage tells us something else too — that some people *do* look in the gift horse’s mouth, presumably because they think (sometimes rightly) that it really may be a pretty decrepit old nag. In short, yes, Don Donor might sometimes make a free gift out of just plain niceness, but there is no denying Doris Donee’s suspicion that Don is really just trying to get rid of a piece of junk, and get (unjustified) credit for doing so.

Another of our famous sayings makes this very point, and hones it even sharper: “Beware of Greeks bearing gifts.” The Greeks’ most famous “gift” was a horse, by the way, and the adage tells you that

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She dedicates this article to Oshi, who will know why.

you would be a fool not to have a close look at that nag.¹ The warning is that what looks like a gift may be a trick, and the old saying suggests that if you are too ready to believe that the other guy is being generous (or maybe foolish), you yourself might just get robbed. A so-called gift can really be an anti-gift, a underhanded way to take something from you under the guise of giving.² The anti-gift from the sorcerer or witch is only a sinister variant on the theme, and anthropological literature — and literature generally — is full of people who are terrified of poisonous anti-gifts, the gifts that, like the Maltese Falcon, really take away.³ In short, however nice it might be to believe in spontaneous gift-giving, gifts seem to have a dangerous edge.

When we come to exchange, we can breathe easier. Exchanges do not make us worry about all these ambiguities. Exchanges are like pure gifts in one way: both are types of transfer, and in both, property goes from somebody to somebody else. But they are very different, too. Though gifts themselves are often the subject of exchanges, generally speaking we think of the pure "gift" as a *unilateral* transfer — I give you something for nothing. On the other hand, "exchange" entails *reciprocal* transfers — something goes from me to you, while something else comes back from you to me. Exchanges might not be generous, but at least we can figure out the parties' motives.

Or at least we think we can. The main subject of this essay is the set of patterns in which those motives get mixed up. The essay is about the ways in which the seemingly pure gift and the seemingly pure exchange melt together — patterns in which the unilateral aspects of gift transfers blur into the reciprocal aspects of exchange transfers, and vice versa.

Unfortunately, exchanges are not the only contrasts to gifts. In order to make sense of both gift and exchange, we have to make some room for a third and more scandalous type of transfer — one that also contrasts with gift, but in a different way. What is the third type of transfer? It is the transfer by fraud or force.

1. For the Trojan horse story, see THE ODYSSEY OF HOMER 132-33 (Ennis Rees trans., 1960). For a fuller though slightly different version of the story, see Dictys of Crete, *A Journal of the Trojan War*, in THE TROJAN WAR: THE CHRONICLES OF DICTYS OF CRETE AND DARES THE PHRYGIAN 19, 110-14 (R.M. Frazer, Jr. trans., 1966).

2. Ralph Waldo Emerson's famous essay on gifts discusses one version of the gift that diminishes the donee: gifts may be vexing because they invade one's independence and self-sufficiency. See Ralph Waldo Emerson, *Gifts*, in THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON 402, 403-04 (Brooks Atkinson ed., 1940).

3. See, e.g., JEAN KERBOULL, VODOO AND MAGIC PRACTICES 56, 61 (John Shaw trans., 1977) (giving examples of voodoo poisonings under guise of generosity). The Maltese Falcon, of

Back up for a minute to gifts and exchanges. Both of these types of transfer are generally thought to be undertaken voluntarily. The third type of transfer, the scandalous and illegitimate one, is larceny (or in the civil version, conversion). The larcenous transfer is like a gift insofar as it is unilateral. But unlike a gift, it is not voluntary on the part of the donor — I take something from you without your consent, or in the case of the trick, without your informed consent.

Larceny, the unilateral but nonconsensual transfer, is marvellously variegated. It includes the coarse armed robber, the stealthy thief, and the sneaky embezzler. Among others, it includes those trickster “Greeks bearing gifts,” along with the modern con artists who always seem to be giving away something for nothing. The old common law name for that kind of thing was “larceny by trick”;⁴ even though I may use the image of giving you something, I am really trying to get something from you, against what would be your will if you had better sense, or perhaps, if you were less blinded by your own greed.⁵ Muggings, burglary, sneak-thefts, confidence games — they are all larcenies of one sort or another.

One might plot the relationship between gift, exchange, and larceny as follows:

	voluntary	involuntary
unilateral	gift	larceny
reciprocal	exchange	[?]

The trouble with this chart is that odd blank in the lower right hand corner. On the vertical axis, gift contrasts with exchange in a neat opposition of types of voluntary transfers (unilateral versus reciprocal). On the horizontal axis, gift and larceny make another neat opposition of the types of unilateral transfers (voluntary versus involuntary). But the neat oppositions stop there, because of the emptiness of that lower right hand box. It is hard to think of systematic examples that fit into

course, brought bad luck to its possessors. See DASHIELL HAMMETT, *THE MALTESE FALCON* (1934).

4. For “larceny by trick,” and the related “false pretenses,” see WAYNE R. LAFAYE & AUSTIN W. SCOTT, *HANDBOOK ON CRIMINAL LAW* 627 (1972).

5. For an instance of what appears to be a remarkably durable variation on the fine art of duping greedy persons, see J.W. CECIL TURNER, 2 *RUSSELL ON CRIME* 931-33 (12th ed. 1964) (con artist with victim “find” something that appears valuable; after discussion of options, con artist leaves the item “temporarily” with the victim, taking from the victim some pledge of money or goods as security; con artist disappears with victim’s goods, leaving victim with worthless bauble. Russell’s treatise first reported this trick in 1824. An almost identical scenario was reported in the summer of 1991 in the *New York Times*. See John Tierney, *In This Lotto, All They Need Is a Dollar and a Dupe*, *N.Y. TIMES*, May 17, 1991, at A1, col. 2.

the lower right category — transfers that are at once reciprocal and involuntary. To be sure, we might think of isolated instances where goods are exchanged reciprocally but against the parties' wills. One example might be a case in which a parent forces two feuding children to restore each others' purloined toys. But such examples are rather hard to concoct.

I will come back to this fourth category later, because it turns out to be quite important after all. As a preliminary matter, though, the fact that we draw pretty much of a blank for this box tells us something else about the way we imagine transfers. If we cannot easily think of examples for this blank box — the category of *reciprocal* but *involuntary* transfers — then maybe we just assume that reciprocal exchange, by its very nature, is likely to have everyone's consent. The very fact of getting something back in return, as we do with exchanges, "explains" the voluntary quality of our exchange transfers. Hence we do not have to worry much that reciprocal transfers might be involuntary.

Perhaps that is why exchange seems like such a comfortable category of transfer. We have an easy scenario in mind for exchanges. Exchanges are voluntary because everyone gets something out of the deal. Actually, we have easy scenarios for larcenies, too, even though they are not particularly attractive scenarios. Larcenies occur at the will of the taker, and are foisted on the "giver" by force or fraud. We understand the motives here too — "gimme, gimme," as infants say, though no doubt there are sometimes other motives at work too, such as the wish to display dominance.⁶

On the other hand, the gift transfer is trickier to figure out. It is a leftover category with no easy scenario, because it seems to be voluntary without being reciprocal — I willingly give you something, but I expect nothing in return. Insofar as voluntariness and reciprocity overlap, the pure gift seems an anomaly.

This leads back to the opening question: Does anybody really ever give anything away, in the sense of sheer niceness, making the voluntary, unilateral transfer? Anthropologists talk about gift-giving a great deal, and while some anthropological accounts of gifts contrast the sociable spontaneity of gift with the calculating self-interest of exchange, other anthropological accounts might make us pretty skepti-

6. See 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) (explaining that medieval seizures of property showed difference in status as well as direction of subordination).

cal.⁷ For example, some explanations of the famous “potlatch,” the orgy of giving that periodically overcame the Kwakiutl Indians of the Pacific Northwest, suggest that all this gift-giving was really much closer to trading than to sheer generosity. Some say that the potlatch was a form of insurance — it was a revolving exchange relationship, in which the kin-group with the most successful annual catch gave away wealth in a kind of rough circle of reciprocity, so that all kin-groups were assured that they would not go hungry in a year of bad luck — though in return, they had given away a great deal during their own lucky years.⁸ A more recent explanation attributes the potlatch to larceny, or more specifically to the threat of armed robbery. The successful kin-group gave away wealth in order not to be attacked and have their wealth taken by force.⁹ Neither version looks much like unilateral generosity, and quite aside from the potlatch issue, a considerable amount of anthropological literature does not talk about the pure gift at all, but rather about “gift exchanges.”¹⁰

None of this makes the unilateral gift sound like a very robust category. When we shift to the less exotic subject of our own law, we find that here too, gifts seem to be treated as something of an anomaly. It is not that the law discounts the possibility of unilateral generosity. On the contrary, unilateral generosity is encouraged in our law in a variety of ways, such as the protection of “good Samari-

7. See MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (Ian Cunnison trans., 1967). Mauss especially stressed the “obligatory and interested” quality of gift-giving over any aspects of spontaneity. *Id.* at 1, 3. For a more recent comment along this line, see Arjun Appadurai, *Introduction: Commodities and the Politics of Value, in THE SOCIAL LIFE OF THINGS*, *supra* note 6, at 3, 10-12 (criticizing some anthropologists’ tendency to romanticize gift and draw overly sharp contrasts with market exchange).

8. The chief proponent of this view is Stuart Piddocke. See Stuart Piddocke, *The Potlatch System of the Southern Kwakiutl: A New Perspective*, in *ECONOMIC ANTHROPOLOGY: READINGS IN THEORY AND ANALYSIS* 283 (Edward E. LeClair & H. Schneider eds., 1968).

9. Bruce Johnson, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 *J. LEGAL STUD.* 41, 62 (1986). Johnson, an economist, revises the views of Helen Codere. See HELEN CODERE, *FIGHTING WITH PROPERTY: A STUDY OF KWAKIUTL POTLATCHING AND WARFARE 1792-1930* (1950). This idea of gift-giving as theft-avoidance is related to the view that gift-giving often has the function of creating or cementing social relations, sometimes in dangerous situations. See, e.g., Geary, *supra* note 6, at 173 (noting that gifts aimed at establishing social relations helped to overcome suspicion of strangers).

10. See, e.g., MAUSS, *supra* note 7.

tans" who come to the assistance of others who are in need.¹¹ But gifts as such are certainly not expected as a matter of routine, and are at least slightly mistrusted.¹²

I will give a number of examples of this skepticism in the sections that follow, but in general, the legal mistrust of gift takes the same two tacks as the potlatch explanations above. First, as with the potlatch examples, a number of legal doctrines hint that what appear to be "gifts" are really exchanges in disguise, so that the so-called gift may be made intelligible by the same element of self-interest that seems to make exchange transfers intelligible.¹³ A second and even more mistrustful strand of doctrine suggests, like the second strand of potlatch explanations, that apparent gifts may really be larcenies — sometimes I "give" you something, but it is only because you force, threaten or trick me. Such a "gift" is certainly unilateral, going from the rightful owner to the wrongful taker, but it is not freely given.

11. For example, the liability of tortfeasors to rescuers suggests that one may foresee spontaneous third party rescue attempts at the scene of an accident and thus owe the rescuer an independent duty of care. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 44, at 307-08 (5th ed. 1984). For social value of gratuitous gifts, see also RICHARD M. TITMUS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971) (analyzing blood donations to strangers as purely altruistic and describing these donations as preferable to commercial blood collection). Support for the category of altruism comes from a somewhat unexpected quarter: the modern law and economics literature recognizes interdependent utilities. See Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 411-12 (1977); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401, 401-02 (1991); see also Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1267 (1980) (describing "beneficial reliance" in donative promises).

12. See Jane B. Baron, *Gifts, Bargains and Form*, 64 IND. L.J. 155 (1989). An older legal-economic view of gifts dismissed gifts as unimportant, representing mere transfers of wealth rather than wealth-enhancing exchange. For a description of this view, see Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 3-6 (1979) and Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941). For a very critical view, see Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 49-50 (1992). The more recent economic recognition of interdependent utilities undermines this older view by noting enhanced utility in the donor. See Posner, *supra* note 11; Shavell, *supra* note 11. Posner, however, returns to the unimportance theme in suggesting that most gifts are small and are confined to family settings. Posner, *supra* note 11, at 417; cf. TITMUS, *supra* note 11 (important gifts made among strangers).

13. These views of gifts as disguised exchanges may be common in the culture at large, even in the verbal encouragements we give to generosity: "Cast your bread upon the waters," my mother used to say, "and it will come back as cake." I now believe that she was embellishing a saying that only has the bread "come back to you," but that's my Mom. Cf. MAUSS, *supra* note 7, at 40 (commenting that successive gifts in archaic societies are returned with "interest").

Thus on either line of doctrine, what looks like a gift may not be a gift at all, but rather an exchange (if reciprocal and hence voluntary) or a larceny (if unilateral and hence involuntary). I will discuss both views at greater length, but together, they would suggest that the chart above would look like this:

	voluntary	involuntary
unilateral	[]	larceny
reciprocal	exchange	[]

That is to say, there is really no entry in the upper left box, either — there is no such thing as a transfer that is at once unilateral and voluntary. “Gifts,” then, appear to be merely *purported* gifts; they really are exchanges or larcenies in disguise. All this suggests once again that gifts need a lot of explaining — particularly on the issue of whether there is such a thing as an honest-to-goodness gift, one that is not just a concealed exchange or larceny.

One way to approach this issue is to challenge the very notion that gifts are somehow problematic. On this argument, it is not gifts, but the problematization of gifts, that is the illusion. It is an illusion rooted in cultural bias, and more specifically, in the gender bias that is so pervasive in our culture. Why gender bias? Well, as the sociologist David Cheal points out, gift-giving activities, at least in the modern west, are very much dominated by women.¹⁴ Like other things that women do, gifts may seem relatively invisible because the movers and shakers — the leaders in traditional scholarship, jurisprudence, and everything else — just do not care what women do. Hence they either do not see women’s actions at all, or they explain them in some wildly inappropriate rhetoric. “Women give gifts? So what? All that matters is what men do, and what men do is exchange things or swipe them.” That, in a nutshell, is how a feminist critic might caricature the position that genuine gifts are somehow problematic.¹⁵ The caricature suggests that gifts are not problematic at all — we just have a cultural bias that has made us look for them in the wrong places.

My own mode of approaching the issue, though somewhat related

14. DAVID CHEAL, *THE GIFT ECONOMY* 6, 29, 181-83 (1988).

15. *See id.* at 7-8 (describing feminist Nancy Hartsock’s critique of self-interested theories of gift-giving).

to this feminist argument about culture and rhetoric, does not attempt to answer the question of why gifts have been treated as problematic. Instead, it focuses on a preliminary question: *Are* gifts really very important? My answer is that they are, and that the category of gift plays a quite substantial role in our legal culture, no matter what our rhetoric suggests. More particularly, however, I will argue that the categories of gift and exchange are much more mutually dependent than might appear on the surface.

My first task will be to take up some examples of gifts, to consider the degree to which the legal category of gift really is a blank. I am looking to see whether or how completely the legal "gift" really leaks out into exchange on the one hand, and larceny on the other. Then I will turn to the law of exchange, which seems so robust a category, but which turns out not to be. The reason is because exchange also leaks out into the other categories of gift on the one hand, and larceny on the other. Indeed, it is fairly commonplace to find "exchanges" that are really closer to larcenies, but what is more interesting is that exchanges have a strong element of gift as well.

As it turns out, our law has a considerable solicitude not only for the unilateral generosity that appears in gift relationships, but for the unilateral generosity that occurs in exchanges too, even if our legal rhetoric obfuscates the point. One key factor turns out to be the blank fourth box, the involuntary reciprocal transfer — but of that, more later.

I. GIFT LEAKS INTO EXCHANGE AND THEFT; OR, BAD GIFTS AS THEFTS, GOOD GIFTS AS EXCHANGES

Reconsider, for a moment, the quintessential gift. It is an unforced, one-sided transfer, motivated by generosity and a spirit of selfless love without thought of reciprocity. The general attitude of the common law is that this kind of transfer may happen sometimes and should even be encouraged, but that it is not always to be expected and may have to be proved against presumptions to the contrary.¹⁶

These legal presumptions about gifts contrast with the presumptions in the law of contract. As every first-year law student knows,

16. See Baron, *supra* note 12. Some scholars suggest that the proof requirements for donative promises are the result of evidentiary and related problems, and consequent enforcement costs. See Eisenberg, *supra* note 12, at 4-5; Posner, *supra* note 11, at 414-17. *But see* Kull, *supra* note 12, at 51-55 (criticizing this view and arguing that various evidentiary safeguards are available for donative promises).

contracts normally require “consideration” to support the deal — something has to bespeak a reciprocal exchange. However, once consideration is shown, no matter how miniscule, the traditional common law presumes that the deal is a deal — a real and enforceable contract.¹⁷ But gifts are different. As the legal scholar Jane Baron has noted, the enforcement of a promised gift is said to require a special showing of the donor’s intent.¹⁸

Indeed, it is just in these special showings that we can see how the gift category gets swallowed up by exchange on the one hand, and by larceny on the other. The most highly developed portions of the law of gift, or as this legal rubric is more technically known, “donative transfer,” probably revolve around wills — the bequests made at the time of death.¹⁹ This in itself only reinforces a certain cultural skepticism about gifts. In the case of transfers at death, the donor is pretty much stuck. She can’t take it with her, or get anything for it when she goes, and so the only thing she can do is to give it away. On the other hand, we might think that if the donor *could* take it with her, she probably would; the only reason she makes a “gift” is because she cannot do anything else. Thus, the element of generosity in wills is at best, shall we say, somewhat forced since death is the ultimate robber.

Moreover, the traditional law of wills is notoriously rigid and suspicious: the will must be in writing, and must be signed, and indeed signed in the right places, and must have two or three witnesses. Otherwise, the whole thing may fall apart.²⁰ One reason for this rigid stance, of course, is that the donor is not around any more for interrogation, and the only way we can be sure that she intends to make

17. See E. ALLAN FARNSWORTH, *CONTRACTS* 66-69 (1982) (noting traditional view and modern deviations).

18. Baron, *supra* note 12. Andrew Kull’s new article on donative promises argues that for all the black letter “consideration” verbiage to the contrary, the courts do enforce gratuitous promises “actually made and seriously intended.” Kull, *supra* note 12, at 43. For more on the rhetoric of consideration, see *infra* text accompanying note 34.

19. See RESTATEMENT (SECOND) OF PROPERTY — DONATIVE TRANSFERS § 33 (ten. draft No. 12, 1989). A number of the other problems addressed in this draft also typically arise with bequests on death, such as issues concerning the rule against perpetuities.

20. For these and other will formalities, see JOHN RITCHIE ET AL., *CASES AND MATERIALS ON DECEDENTS’ ESTATES AND TRUSTS* 190-203 (7th ed 1988); see also RESTATEMENT, *supra* note 19, at 73-79 (Statutory Note to § 33.1 describing formalities and witness requirements).

some particular gift is to require her to jump through a number of formalistic hoops while she is still alive. Will formalities are the way that we get her to prove that she seriously intends the gift in the will.²¹

But why are we so anxious about the issue of her intent? Why are we so worried that she might not really have meant it? What we sometimes fear is larceny — that the purported gift really is a theft. The thief here is the person who improperly receives a bequest, and this thief effectively commits a double larceny: he takes both from the testator (since the “gift” violates the testator’s wishes) and from alternative recipients of the estate (since they really should have gotten the goodies).

Who then is the proper recipient? Those who are named in the will are usually proper recipients, but not always, or not always exclusively. Sometimes persons named in the will may be challenged, and here one sees the way gifts blur into larcenies. One major example is the will that is contested on grounds of “undue influence” — undue influence exercised on the testator by someone named as a beneficiary in the will. What’s the story here? Well, usually some smoothtalking or handsome or beautiful young thing pays extraordinary attention to the befuddled older testator, and just coincidentally talks the testator into changing the will.²² The surface argument here is a variant on larceny, that is, fraud. In effect, the smoothie tricks the testator, and then takes the estate unilaterally, both from the testator and from the alternative legatees.

Just below this argument is a sub-argument that the smoothie really never did enough for the testator to warrant any bequest at all. Here we see the way gift spills out in the other direction — in the direction of exchange. Consider another way one can contest a will: persons who are not named in a will at all can sometimes take some of the estate’s proceeds, on the argument that the testator promised to leave them something in the will. Such a purported promise is viewed with some suspicion by the courts. But in a fairly common claim, the claimant professes to have performed long and devoted service to the deceased, because the deceased promised to make it up to the faithful claimant when the will was read. In other words, the

21. RITCHIE, *supra* note 20, at 196.

22. See, e.g., *In re Estate of Swenson*, 617 P.2d 305 (Or. Ct. App. 1980) (holding that elderly woman’s friend and sometime helper’s “assistance” in changing woman’s will for friend’s benefit amounted to undue influence).

claimant tries to prove the promised gift in the will by showing an element of reciprocity. But this means that the promised "gift" is really a kind of exchange, a payment for services.²³

Note where this leaves the "gift" of the will. The bad gift is larceny in disguise, while the good gift would have been exchange in disguise. Once again, there is nothing left in the category of just plain gift.

One sees this pattern — good gift is really exchange, bad gift is really larceny — even more sharply in a quite different corner of the law where the rhetoric of gift is in common usage, namely in the "dedications" of land that real estate developers are said to give to municipalities. It is a common practice among municipalities to require new developments to set aside and "dedicate" some street areas to the public. In recent decades, these required dedications have expanded to parkland, recreational facilities, and other such public places.²⁴ The arguments for and against such transfers are an interesting variant on the way that gift fades into exchange on the one hand, or larceny on the other.

Indeed, it scarcely occurs to anyone that a real estate developer "dedicates" land to a city in the sense of a unilateral gesture of pure generosity. When these so-called dedications turn into legal disputes, all the arguments revolve around whether these dedications are (good) exchanges on the one hand or (bad) larcenies on the other. The municipalities generally try to get this arrangement characterized as an "exchange." They assert that the new development requires the existing citizenry to undertake new services and obligations, and that the new development's "dedication" is just a way of compensating for those increased service demands.²⁵ The developers are likely to take the "larceny" view. The cities, they say, ask for far more than is warranted by the increased demands of new development, and indeed

23. See *Kennedy v. Bank of Am.*, 47 Cal. Rptr. 154 (Cal. Ct. App. 1965) (allowing domestic and business assistant, who alleged a promise of bequest from the testator, to make claim against estate in *quantum meruit* for value of services rendered). Interestingly enough, the testator as a rule can even bargain from beyond the grave, making the bequest conditional on specified behavior of the recipient (e.g., refraining from alcohol), though the condition cannot be against public policy (e.g., a condition requiring an illegal act, or refraining from marriage). See RESTATEMENT, *supra* note 19, at 127-28, 145-48.

24. See, e.g., *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971).

25. See, e.g., *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977) (en banc).

the "dedication" amounts to an uncompensated and illegal "taking" of the developers' property.²⁶ That is to say, the developers' characterization is another variant on force or fraud. Note that here too, the good gift (or dedication) is exchange and the bad gift is larceny.

Parenthetically, one curious aspect of these public "dedications" is the very fact that they employ the rhetoric of gift, when their foundation in exchange seems so obvious. There is a technical reason, and I mention it because a variant on such doctrines shows up in our thinking about private gifts too, as well as in some other matters considered later in this essay.

Technically (and especially in older doctrine), a legislature cannot contract away its legislative authority, but must stay loose and flexible in the exercise of that authority, on the theory that the public's needs may change and thus the public's agents cannot be tied down by contract.²⁷ Public agencies do make contracts, of course, but there is a considerable body of law distinguishing the subjects that are appropriate for contract by public officials from those that are "legislative" or "governmental." In principle, "governmental" matters are not supposed to be fixed into the hardened form of completed contractual exchange, whereby one legislature effectively binds future legislatures.²⁸ This doctrinal point suggests that the municipality's deal with the real estate developer must be framed in the language of "dedication" instead of "contract." As a technical matter, because of the legislature's effective contracting disabilities, the municipality cannot cut a simple contractual deal exchanging municipal services for the developer's land. And so, though some commentators in related legal areas have called for a more realistic terminology, we generally still call this arrangement a "dedication" from the developer to the city, rather than a reciprocal "contract" between the two.²⁹ But perhaps the most important point is the set of assumptions underlying these

26. For some related issues, see *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that requirement of an easement for public access to beach as condition of receiving a building permit was a "taking" of property).

27. See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 817 (1879).

28. See EUGENE MCQUILLAN ET AL., *THE LAW OF MUNICIPAL CORPORATIONS* § 10.38, at 1111-13 (3d ed. 1988).

29. For the closely-related traditional prohibition against "contract zoning," which some commentators think is at least partially misguided, see Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Governmental Land Use Deals*, 65 N.C. L. REV. 957, 978-82 (1987).

technicalities of terminology. We limit the legislature's contracting competence in order to assure its longer-range ability to change its mind as it serves a shifting set of public needs. Hence, we talk about it as the un-obligated recipient of a gift, rather than the self-obligating maker of deals.

An oddly similar thought process affects another older body of law about private owners' "implied dedications" of land to the public at large, though here the doctrine works against even the language of gift. Farmers have often allowed hunters and others to cross their uncultivated lands, and a venerable tradition of cases has protected landowners who behave in this neighborly fashion by refusing to treat their permissiveness as implied "dedications" of land for roadways or other general public access. Indeed the older courts remarked that any inference of a completed and hence irrevocable "gift" to the public would disincline owners to neighborliness and would instead induce farmers to put up fences and engage in other "churlish" behavior.³⁰ There is some recent evidence to support this view. In some cases about California beachfront properties not too long ago, the courts more or less ignored the older viewpoint, and concluded that when the owners permitted public access to the beach, these owners implicitly "dedicated" their beachfront to the public's use.³¹ But the beachfront owners, now faced with the prospect of losing control of their property interests permanently, responded by using fences, dogs, and even dynamite to keep the public away.³²

Note that in the older view of "implied dedication," the notion of "gift" did not seem to be synonomous, or even compatible, with generosity. The completed gift is generally irrevocable in law. But the old dedication cases suggested that generosity, like the legislative authority, must be open-ended, flexible, and revocable. The completed gift, on the other hand, is a "done deal," and whatever qualities of generosity may have induced it in the first place are finished by the very completion of the gift.

The law of wills and dedication, then, opens up a certain gap between generosity on the one hand, and gift on the other. In these various branches of "donative" law, the good gift leaks into exchange,

30. *E.g.*, *Gore v. Blanchard*, 118 A. 888, 891 (Vt. 1922).

31. *E.g.*, *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970) (en banc).

32. See Michael A. O'Flaherty, Note, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092, 1096 (1971).

the bad gift leaks into theft, and the completed gift itself seems to lack the element of ongoing generosity. The legal treatment of dedication in particular suggests that generosity, like public legislative action, is a continuous activity and that its essential qualities may be lost in the form of the completed gift. *Giving* is different from *gift*, and gift itself is an unstable category. The completed gift turns into exchange when it is good, and larceny when it is bad.

II. EXCHANGE LEAKS INTO THEFT — OR IS IT GIFT ?

At first blush, exchange seems vastly simpler and less opaque than gift. The paradigmatic legal version of exchange is the contract, the promise whose reciprocal character is guaranteed by “consideration.” In traditional contract law, any consideration whatever, even the common law’s “peppercorn,” is sufficient to ground a contractual relation.³³ On that theory, you can give me a peppercorn in exchange for my house, and the law will not inquire into the sufficiency or character of the “consideration” that I receive. Any reciprocity at all will do to support the enforcement of the agreement.

This view of contract and consideration, of course, obviously leaks into gift. This lopsided deal looks to an outsider rather as if I am actually *giving* you my house.³⁴ Indeed, one might speculate that a reason for the peppercorn doctrine was to make gifts *easier*: by not inquiring into the adequacy of consideration, the courts could validate what were effectively gifts. The formalism of consideration was the magic wand to transform (suspicious) gifts into (fictitious but acceptable) mutual exchanges. By contrast, Continental European law has taken a less fanciful approach. The Continental civil law has traditionally been more ready to inquire into the adequacy of consideration in contracts.³⁵ But the civil law, although it places imposing formal requirements on promises to make gifts, seems to have no need to conjure up “consideration” for what are actually gifts, or to create fictitious contracts to disguise gift-giving.³⁶

33. For the “peppercorn” theory, along with the modern movements away from it, see FARNSWORTH, *supra* note 17, at 66-69.

34. *Id.* at 68; *see also* Kull, *supra* note 12, at 42-44 (noting the courts’ manipulations of consideration doctrine to enforce gratuitous promises).

35. *See* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1625-27 (1981).

36. *See* Baron, *supra* note 12, at 191-94. For civil law formalities on donative promises, *see* Eisenberg, *supra* note 12, at 12-15; *see also* Kull, *supra* note 12, at 58-59 (explaining civil law formalities as effort to avoid donative evasion of continental rules of forced heirship).

Even in the common law countries, modern legal developments have made a number of inroads into the older "peppercorn" notion of consideration. We now find a number of doctrines through which the courts do ask more closely about the adequacy of consideration in reciprocal transfers. But the reason is not a fear that the "contract" is a gift; rather, it is the fear that the "contract" is a larceny.³⁷ Among the most notable of these new developments is an ever-growing doctrine of "unconscionability," particularly in consumer law.³⁸ Over the last generation, courts have increasingly been called upon to overturn contracts, especially consumer contracts, in which there is some evidence of grossly unequal terms together with what is called "unequal bargaining power" (often meaning lopsided deals between knowledgeable commercial dealers on the one hand, and ignorant consumers on the other).³⁹ Indeed, unconscionability is only one of a number of doctrines, some quite ancient, that interfere with unequal bargains or exchanges on the ground that they are at best pointless transfers and at worst larcenies, and not worth enforcing.⁴⁰

But these well-known leakages of exchange into gift on the one hand and larceny on the other are still somewhat marginal to the larger legal subject of contract law. That larger subject includes the vast majority of contracts, where promises are indeed more or less equal and reciprocal. Thus, by contrast to the category of gift, which can be seen as dissolving almost completely into exchange on the one hand or larceny on the other, the category of exchange seems to be a thoroughly sturdy one in legal thinking. Only the unusual and idiosyncratic *unequal* exchanges fade off into the categories of gift or theft.

Even this seeming sturdiness is challenged, however, by modern game theory. Ordinary exchange presents a problem, and it takes the following form: If I trade my tomatoes for your shoes, we are presumably both better off, because I want the shoes more than the tomatoes, and you want the tomatoes more than the shoes. Thus the trade is a "positive sum game," because by engaging in it, we realize gains from

37. See FARNSWORTH, *supra* note 17, at 67-68.

38. See, e.g., *id.* at 313 (stating that consumers are the most successful users of unconscionability doctrine); Gordley, *supra* note 35, at 1627; Arthur A. Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

39. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

40. See Gordley, *supra* note 35, at 1609-17, 1625-37; see also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 597-601 (1988) (discussing the moral judgment implicit in doctrines to avoid forfeiture, which seek to prevent unfair results).

trade: both of us gain and neither of us loses. Thus we should both be anxious to cut the deal, right?

Wrong, and here is why. Let us suppose that the total gains from trade amount to a sum of X. We have to decide how this X amount is to be divided between us. There is no set rule for this, and indeed we could conceivably jockey for position to the point that we never cut the deal at all.⁴¹ Thus, inside this positive sum game of exchange, there lurks a zero sum game in which I gain only at your expense, and vice versa. In our effort to take the lion's share of X — the gains from trade — we may completely outsmart ourselves and fail to come to agreement at all.⁴²

How is this impasse to be broken? Well, sometimes it is broken by a larger market. Impasse normally occurs only in what are called "thin" markets, where there are not a lot of shoes and tomatoes around that could sell at some market price fixed by the great mass of the buyers and sellers.⁴³ Leaving aside the point that even a thick market is made up of many thin mini-markets, there are still lots of recognizably thin-ish markets, where we do not have a larger market that effectively dictates how we split the gains from trade. In these thin markets, we do have the potential problem of endless haggling over our respective shares of the gains.

Even if the market is thin, there is another way to get around the haggling problem. One party or both parties may simply be generous and *give* a little for the sake of the larger bargain. Indeed, this happens all the time among business dealers.⁴⁴ The sharp bargainer is by no means the image of success in commerce, but instead may well be a fringe person, a con artist on the twilight edges of the market — someone who can find no trading partners except gullible strangers.⁴⁵

41. See Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 232-34 (1990) (commenting that there is no "canonical theory" to explain splitting gains in deal and that strategy of hard bargaining could result in no deal at all).

42. See Robert Cooter, *The Costs of Coase*, 11 J. LEGAL STUD. 1 (1982); see also JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 94 (1989) ("Bargaining has an inherent tendency to eliminate the potential gain which is the object of the bargaining." (quoting Leif Johansen, *The Bargaining Society and the Inefficiency of Bargaining*, 32 KYKLOS 497, 520 (1979))).

43. Strictly speaking, the purchaser and seller whose price decides the market price are the *marginal* purchasers and sellers, rather than *all* the purchasers and sellers.

44. See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 467.

45. See Rose, *supra* note 40, at 600-01 (noting that "sharp" bargaining is a characteristic of one-shot transactions rather than ordinary business relations).

The punchline, then, is that there may be an element of giving at the center of quite normal kinds of exchanges, and indeed, if someone does not give, the exchange may never get off the ground. Moreover, this seems to be the case even in roughly equal exchanges, so that exchange seems to have a far more systematic "gift" element than is suggested by the powerfully self-interested rhetoric of contract law.

This point is reinforced by some other game-theoretic considerations, particularly in "games" in which the parties do not act simultaneously. Let's go back to the tomatoes and shoes. Perhaps sometimes we can exchange these goods simultaneously, but in many instances, one party has to commit herself before the other does. Let us suppose that I have to deliver the tomatoes first, so that you can have something to eat while you are making the shoes. I must give the tomatoes to you in the expectation of receiving the shoes later. Why would I do that? If I am really a self-interested utility maximizer, I will be nervous about you, and if you are a maximizer too, you will take my tomatoes and run, or so it seems. After all, what is to stop you? But if I am afraid that you will cheat me, I will refuse to commit myself, and the trade will fall through, along with all the gains we might have made from it.

Thus even the most trivial exchanges may represent what is widely known as the "prisoners' dilemma," the would-be positive sum game that seems destined to fail. Even though the parties would be jointly better off if they could cooperate, their dominating strategy leads both not to cooperate. Hence, they lose the gains that would have accrued to cooperation.⁴⁶

Again, we have the question: How can people get around this dilemma? One currently popular answer to this question relies on the impact of repeated exchange and reputation.⁴⁷ I can safely leave my tomatoes with you if we contemplate future dealings. We both know that I may be cheated once, but that I am likely to retaliate, and at a minimum I will probably refuse to deal with you in the future. Hence, before you run off with my tomatoes, you too have to calculate that you will lose the benefits of what would have been our future course of trading. In this way, it is said, the fear of mutual retaliation keeps us both in line.

The trouble with this solution is that it does not really explain the first step: How can I be reassured by future dealings when they have

46. For the Prisoners' Dilemma, see Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 RES. IN LAW & ECON. 1 (1982).

47. Best-known is ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

not yet started and when as yet we have no history of dealings? How do I know any dealings will ever get off the ground at all?⁴⁸

Another possibility is quite similar. I may entrust you with my tomatoes if we are engaged with each other on a number of fronts other than shoes and tomatoes — if we are members of the same family, for example, or if we are in the same religious group, or are members of some other version of a close-knit community.⁴⁹ As a member of such a group, I can safely drop off the tomatoes and wait for the shoes, because I know that you do not want to be ostracized from the group that we both belong to.

This possibility is undoubtedly a real one in an empirical sense if not in a logical one. Indeed, for a time, the Atlantic trade was dominated by members of just such groups — especially Quaker and Jewish traders whose minority religious status made mutual reliance especially important — for whom it was safe to invest in the ship's cargo and await the profits many months later.⁵⁰ Similarly, Asian and West African immigrants to America, trusting one another on the strength of their common community membership, formed (and continue to form) mutual credit associations.⁵¹ Ostracism from such a community is a serious threat, and the threat makes it possible for members to trust one another *in the present* to make good on commitments *in the future*.

All this, of course, does not solve the logical question: How do such multi-front communities get started? How does *their* history begin, in the absence of a successful prior history? One could go on at length about innate tendencies, genetically programmed or other-

48. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988); ANTHONY DE JASAY, *SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM* (1989). These and other authors note that there is also an "endgame" problem: each party has an incentive to cheat at the end of the relationship, but each one, fearing endgame cheating by the other, has an incentive to cheat at the second-to-last move, all the way back to the first move.

49. See Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility* (pt. 2), 90 AM. HIST. REV. 547, 556 (1985); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 177-82 (1991) (discussing close-knit social groups).

50. Haskell, *supra* note 49, at 556 (citing Daniel Snydacker, *Traders in Exile: Quakers and Jews of New York and Newport in the New World Economy, 1650-1776* (1982) (unpublished Ph.D. dissertation, John Hopkins University)).

51. See IVAN H. LIGHT, *ETHNIC ENTERPRISE IN AMERICA: BUSINESS AND WELFARE AMONG CHINESE, JAPANESE, AND BLACKS* 19-44, 58-61 (1972).

wise, or about the evolutionary robustness of cooperative institutions.⁵² But the bottom line once again is that somebody, sometime, has to make something like a gift. As a logical matter, at least temporarily, I have to just *give* you my tomatoes, or nothing will ever get started between us. I just have to trust you, with no very logical reason to expect reciprocity.⁵³ Perhaps this is why the philosopher Annette Baier observes that the issue of trust is the central problem in modern ethics.⁵⁴ In our context, this is pretty much the same as observing that *giving* lies at the heart of exchange, even if giving is a part of a larger culture.

The subject of gift-giving was not lost on some of the eighteenth century political economists who theorized on commerce and exchange, though they discussed the relationship differently. They did not particularly note an element of gift preceding exchange relations, but they did think that exchange relations would foster the willingness to behave in a more gracious manner. The economic historian Albert Hirschman has reminded us about all the eighteenth century hopes for "*doux commerce*" — the theories that trade and commerce would soften manners and make those engaged in commerce more attentive to the needs of others.⁵⁵ Hard-headed statesmen like Alexander Hamilton had no use for such notions,⁵⁶ and leftists like Marx and Engels ridiculed them.⁵⁷ But some modern historians have suggested that there may indeed have been something to the idea that exchange relations can heighten "sensibility." Some recent historians have argued that the eighteenth century's expanded commerce fostered philanthropy as commercial venturers came to feel sympathy with the

52. See DE JASAY, *supra* note 48, at 76-80 (criticizing notion that "Institutional Darwinism" leads to survival of "nice" social institutions).

53. See ELSTER, *supra* note 42, at 195-99 (noting "magical" element to thinking that others will follow one's own good example).

54. See Annette C. Baier, *What Do Women Want in a Moral Theory?*, 19 *NOUS* 53, 57 (1985) (proposing that a central concept of "appropriate trust" is essential to a complete and consistent moral theory).

55. ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 56-63 (1977).

56. *THE FEDERALIST* No. 6 (Alexander Hamilton).

57. HIRSCHMAN, *supra* note 55, at 62 (commenting on Marx's description of violent capitalism, followed by his sardonic comment: "Das ist der *doux commerce!*").

plight of very different kinds of persons and to feel more confidence in their own powers to make a difference.⁵⁸

This still leaves open the question of where the initial generosity came from in the first place in the exchanges that set off all this generosity. There is another well-known answer to this problem, however, and it is contract law itself. The law of contract acts as a substitute for the threat of individual retaliation or group ostracism. The specter of my legal enforcement makes you keep your agreement, and permits me to trust you so that I can leave my tomatoes with you while awaiting your delivery of shoes, and so that our exchange can get underway and come to a successful fruition.

And indeed contract law is very sensitive to the plight of the party who has performed his or her side of the bargain, only to face the absconding breacher.⁵⁹ What all this adds up to is the pivotal role of contract law. Contract law permits the initial element of gift, that first trusting step, to be made with confidence at the outset of exchange relations, and contract law thus assures a regime of greater wealth and gains through exchange.

And who enforces contract law? Why, Leviathan does.⁶⁰ It is Leviathan — the state — who ensures that we can make our trades and get the gains that come from them. But notice that the acts of Leviathan fall precisely into the previously empty lower right hand box of the early pages of this essay.⁶¹ Leviathan forces upon us an involuntary reciprocal exchange. The exchange is involuntary, in the sense that each of us, in our most rational utility-maximizing souls, could do better in the short run by cheating each other. But Leviathan is there to make us carry through our deals for our own long-term good. When we know that Leviathan is going to make us behave, we can start the pattern of dealing in the first place and carry on to even more wealth-enhancing deals in the long run. Thus exchange may rest

58. Haskell, *supra* note 49. This theory generated considerable controversy. See Ashworth, *The Relationship Between Capitalism and Humanitarianism*, 92 AM. HIST. REV. 829 (1987); David B. Davis, *Reflections on Abolitionism and Ideological Hegemony*, 92 AM. HIST. REV. 797 (1987).

59. See, e.g., FARNSWORTH, *supra* note 17, at 586-88 (noting the courts' preference for collapsing time of performance of bilateral contracts, in order to reduce vulnerability of first performing party).

60. THOMAS HOBBS, LEVIATHAN 105 (Oxford Univ. Press 1967) (1909) (asserting that contracts in which neither party has yet performed are "Voyd . . . [absent some] common power . . . with right and force sufficient to compell performance. . .").

61. See Table, *supra* p. 297.

on an initial act of giving, but Leviathan — the state's enforceable contract law — guarantees that the initial act of giving ripens into reciprocal exchange.

Or does it? The trouble with Leviathan is that Leviathan rests on an initial act of giving too, and for much the same game-theoretic reason that exchange does.⁶² Someone has to do the work of setting up Leviathan. Governance and law do not just happen, but entail some people's doing the organizing and talking and committee work. And of course if we were all waiting around for sure payoffs, governance would never get started. We would all calculate that we would be better off if we let some other sucker do all the organizing and then we could enjoy the profits later. If all of us acted in this way, nothing would happen, and we would presumably never get ourselves any contract law, or any other law, for that matter. But luckily, at least some people make a gift of their organizational efforts, and it is noteworthy how many political myths (including our own constitutional hagiography) revolve around the notion of founders-as-law-givers.⁶³

The oddly anomalous category of gift, then, seems central to exchange. Exchange may rest on gift directly: one party is left exposed to the danger of loss, at least temporarily, and gives over her goods in trust, even without the assurance of reciprocity. Or exchange may rest on gift indirectly: we create outside enforcement mechanisms that enable us to take those first risky steps with some confidence, but those enforcement mechanisms, that old Leviathan, only get started because someone *gives* the time and energy needed for organizing them. Either way, the category of exchange requires the very element of unilateral generosity that seems to make gift so strange.

But this brings us back to that peculiar parenthetical, in the context of "implied dedications," about gift and generosity. It was remarked earlier that the legal treatment of "dedication" opened up a gap between gift and generosity. A too-quick designation of a transfer as a "gift" freezes the giver. Once we say that the generous person has made a gift, and has no more choice in the matter, we may squelch that person's generosity in the future, and encourage what the older courts called "churlishness."

62. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 48-53 (1990).

63. This was suggested by Geoffrey Miller, University of Chicago Law School.

The kind of "gift" that is involved in exchange relations, on the other hand, is not the completed gift. Rather, it is like a gift of a more ongoing character, somewhat like the endless rounds of gift-giving described by anthropologists, where the giving and receiving of gifts are essential to cementing social relations and are never properly completed.⁶⁴ So too in modern Western exchange practice, the initial "gift" is made in the expectant hope of reciprocity, but the success of reciprocity opens up a realm of trust, where the parties can deal with each other in successive trustful relations. Indeed, as often happens in business dealings, once that realm is entered, the parties can agree to change their requirements, restructure their deals, forgive minor errors, and generally behave with each other in an amicable, trusting, and productive way.⁶⁵ In a more general way, as the eighteenth century theorists suggested, the general climate of business relations makes further relations easier and more fluid, because in that climate, most people think that deals are to be honored. What begins as a gift of trust, then, ripens into an exchange when that trust is vindicated, and finally into a culture in which new first-step gifts of trust can be made with confidence.

Thus in a way, the gift entailed in exchange is more open-ended and flexible than the entirely gratuitous unilateral transfer of the pure gift. 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. Small wonder, then, that anthropologists are so interested in gifts.

If we do not understand gift very well as a matter of economic theory — and I suspect that we do not⁶⁶ — then we really do not understand exchange much better, because exchange depends at some deep level on giving. The only thing we really understand is larceny,

64. See RENA LEDERMAN, WHAT GIFTS ENGENDER: SOCIAL RELATIONS AND POLITICS IN MENDI, HIGHLAND PAPUA NEW GUINEA 149-50 (1986) (discussing social relations that are embodied in gift exchanges and explaining that it is not thought desirable or sociable to have accounts settled); Geary, *supra* note 6, at 172-73 (discussing gifts aimed at establishing social relations).

65. See Macaulay, *supra* note 44; see also Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977); Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 783-85, 804-05 (1974).

66. FRANK, *supra* note 48 (suggesting necessity of "irrational" passions for various economic and other endeavors); see also CHEAL, *supra* note 14, at 4, 61-62 (stating that rationalist theories misinterpret gift).

but appearances to the contrary notwithstanding, larceny does not make the business world go round. Exchange does, and Leviathan does, and hence gift — or rather gift-*giving* — does, in a culture in which giving is a reasonable thing to do.

