Equality in Exchange

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This Article is about the ancient idea that in an exchange the value of what each party gives should be equal to the value of what he receives. Once, when university study of law meant primarily the study of an idealized Roman law, academic jurists regarded this idea as a basic principle of the law of contracts. They did not expect the law to remedy every unequal exchange, for to do so might be unsettling for commerce. But they regarded an unequal exchange as unjust in principle and thought that the law should provide a remedy where practical.

In the nineteenth century, jurists confidently abandoned this principle. Some argued that equality in the values exchanged was a meaningless concept; others claimed that judicial remedies were an unwarranted interference with the judgment of the parties. In France, Germany, England, and the United States, unequal exchanges still sometimes were remedied, but those cases, rather than the ones in which a remedy was denied, came to be considered anomalies. Some jurists thought that no relief should be given in these cases; others defended relief by means of arguments that did not seem to depend upon the principle of equality in exchange.

In the twentieth century, there has been a revival of interest in the problem of unjust exchange and in legal doctrines such as unconscionability in England and America, Wucher in Germany, and lésion in France. Yet these doctrines are still defended in terms reminiscent of the nineteenth century. A remedy is appropriate, not because the disparity in values is itself an evil, but because that disparity is evidence of some other evil. According to some French jurists, the evil is fraud, mistake, or duress; according to certain Germans, it is the exploitation

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of another's distress; according to some Americans, it is the abuse of an unequal bargaining position. The idea that the disparity in value is an evil in itself still seems to involve swampy and mystical notions of value that the nineteenth-century jurists did well to reject.

This Article reconsiders the principle of equality in exchange. In law, as in other fields, a good idea is sometimes rejected because it is poorly understood or because it does not fit with current intellectual fashions. By the time intellectual fashions have changed, the idea itself may be all but forgotten. The first part of this Article will suggest that the idea of equality in exchange is one such instance. Properly understood, it involves neither a mystical notion of value nor a paternalistic view of contract law. It appeared to do so in the nineteenth century partly because the idea was poorly understood, and partly because of the exaggerated role that jurists then ascribed to the will of the parties in contract formation. The second part of this Article will suggest that without coming back to some such idea we cannot adequately explain the relief the law gives when an exchange is unjust. It will show that one cannot explain relief by saying that the disparity in price is evidence of some other evil. The third part of this Article will then examine the relief courts actually are giving when an exchange is one-sided. Whatever courts may say, what they do is remarkably consistent with the principle of equality in exchange. The principle aim of this Article, then, is not to change what we are doing, but to enable us to understand it.

I
THE MEANING OF EQUALITY IN EXCHANGE

A. The Aristotelian Theory

Pre-nineteenth-century jurists and philosophers\(^1\) developed the doctrine of equality in exchange by drawing upon two different authorities. One was a theory of exchange proposed by Aristotle in his *Nichomachean Ethics*;\(^2\) the other was a Roman text in the *Corpus iuris civilis* of Justinian, which provided a legal remedy for those who sold land at less than half its just price.\(^3\) Before the Aristotelian theory was even known in Europe, the Roman text had been extended beyond sales of land to provide a generalized remedy for any large disparity in the values exchanged, that is, for what the medieval jurists termed *laesio enormis*.\(^4\) Eventually, the Aristotelian theory was used to explain

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1. See text accompanying note 92 infra.
2. ARISTOTLE, NICHOMACHEAN ETHICS V [hereinafter cited as ETHICS V], in THE BASIC WORKS OF ARISTOTLE 927 (R. McKeon ed. 1941).
3. CODE OF JUSTINIAN [CODE] 4.44.2; see id. 4.44.8.
4. See text accompanying notes 202-36 infra.
why this remedy was given. The remedy provided for *laesio enormis* will be discussed later in this Article. Our initial concern will be with the Aristotelian theory and the criticisms directed against it.

In the Fifth Book of the *Nichomachean Ethics*, Aristotle presents three ideas in quick succession.\(^5\) One is the distinction between distributive and commutative justice. The second is a principle that some jurists still say underlies the law of unjust enrichment: that no one should be enriched at another's expense. The third is the distinction between contract and tort. Most lawyers still encounter all three ideas, although they do not think of them as closely related. For Aristotle, however, each idea followed logically on the heels of the other.

Distributive justice, according to Aristotle, "is manifested in distributions of honor or money or other things that fall to be divided among those who have a share in the constitution." Commutative justice "plays a rectifying part in transactions between man and man."\(^6\) Distributive justice follows a geometrical proportion. Each citizen receives a share of whatever there is to be divided. It is the mathematics of dividing a pie.\(^7\) Aristotle noted that there is no one correct principle for determining the share each person should receive. Rather, a particular society will adopt a principle consistent with its political regime. Democracies favor the principle that each citizen should receive an equal share. Aristocracies tend to divide goods according to "excellence." Even an illegitimate regime will have a characteristic principle. In an oligarchy, which Aristotle regarded as the corruption of an aristocracy, goods are divided according to the principle that "them that has, gets": the mere possession of wealth and power is recognized as a claim to receive them.\(^8\)

Commutative justice, in contrast, follows an arithmetic proportion.\(^9\) It is concerned not with sharing resources, but with preserving each citizen's share. Therefore, the party who has lost resources to another has a claim for the amount necessary to restore his original position.\(^10\) It is the mathematics of addition and subtraction, of balancing accounts.

To paraphrase Aristotle only slightly, commutative justice operates on the principle that no one should gain by another's loss. This

\(^5\) *Ethics* V, *supra* note 2, at 1130b-33b.

\(^6\) *Id.* at 1330b-31a.

\(^7\) *Id.* at 1131a-31b.

\(^8\) *Id.* at 1113a. On the different kinds of political regimes, see *Aristotle, Politics* III, 1179a-88b, in *The Basic Works of Aristotle*, *supra* note 2, at 1113.


\(^10\) *Ethics* V, *supra* note 2, at 1132a-32b.
principle later made its way into Roman law in a famous passage of the *Corpus juris*: “By nature it is equitable that no one should be made richer by another’s loss or injury.”¹¹ The text eventually played a major role in developing the modern law of unjust enrichment. According to modern scholars, if the principle stated in this text was not taken directly from Aristotle, it was taken from a pool of classical ideas to which he had been a prime contributor.¹²

Nevertheless, what Aristotle had in mind when he spoke of commutative justice was not unjust enrichment in the modern sense, but rather contract and tort. He distinguished two kinds of commutative justice: the “voluntary,” which includes “such transactions as sale, purchase, loan for consumption, pledging, loan for use, depositing, letting,” and the “involuntary,” which includes such “clandestine” acts as “theft” and “adultery” and such “violent” acts as “assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult.”¹³ This distinction may be the linear ancestor of the one we draw between contract and tort. Our distinction ultimately derives from the Roman jurist Gaius, who divided obligations into the two classes, *contractus* and *delictus*. Some modern scholars believe that Gaius took the distinction from Aristotle.¹⁴ Before Gaius, other Roman jurists had discussed what we would call particular contracts and torts without drawing the general distinction.

Thus, for Aristotle, contract and tort were two different kinds of commutative justice, both subject to the principle that no one should become richer at another’s expense. In tort, this principle requires that a person who has deprived another of his resources must compensate him by the amount necessary to restore his initial position. In contract, the principle requires that parties exchange performances of equal value.¹⁵ Aristotle’s interpreters sometimes expressed this idea by saying that the exchange should impose the same burden on each of the parties.¹⁶

B. Criticisms of the Aristotelian Theory

The Aristotelian theory can be attacked on two levels. One might

¹¹. *Digest* of Justinian (Digest) 50.17.206 (“Ture naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.”). The principle is also stated in Digest 12.6.14.


quarrel with Aristotle’s political ideal by arguing, for example, that society should not concern itself with achieving or preserving a given distribution of wealth. Alternatively, one might question the attempt to apply the theory to the law of contracts. For example, one might doubt that the distribution of wealth between the parties remains the same at any contract price. Or one might argue that contract law should be concerned with implementing the decisions of the parties rather than preserving a given distribution of wealth.

This Article will bypass objections to Aristotle’s political ideal, not because that ideal is self-evident, but precisely because it is not. The ideal is subject to varying interpretations depending upon which resources are regarded as common and hence subject to distribution, which institutions are trusted to do the distributing, and which principles are supposed to guide those institutions. Moreover, the idea that a society should be concerned with maintaining a given distribution of wealth has been seriously disputed since at least the time of Hobbes and Locke.\footnote{17. According to Hobbes and Locke, society exists to preserve the kind of benefits people might have enjoyed in an asocial state of nature, benefits such as life (for Hobbes) or life, liberty, and property (for Locke). Since such benefits belonged to individuals prior to the formation of society, such theories leave little room for distributive justice. They also leave little room for commutative justice in the sense of preserving a given distribution of wealth. \textit{T. Hobbes, Leviathan} 223-24 (C. Macpherson ed. 1968); J. Locke, \textit{Second Treatise}, in \textit{Two Treatises of Government} (P. Laslett ed. 1960).}

In order to see what implications Aristotle’s ideal has for contract law, the reader is asked to grant, at least for argument’s sake, that redistributions of wealth among citizens should be avoided unless they are part of a program designed to redistribute wealth more justly.\footnote{18. The program for redistributing wealth may, of course, leave considerable room for individual initiative. For example, charitable subscriptions and other gifts may be enforced because in these transactions wealth is likely to move in a positive direction since the very person who becomes poorer has decided that wealth should be transferred. See text accompanying note 138 infra.} A reader who is not persuaded by the later criticisms of Locke, Hobbes, and their successors might agree with this premise on something like the original Aristotelian grounds. He might believe, for example, that society should promote a just distribution of wealth; that, accordingly, it should try to preserve the distribution it has managed to achieve; and that, in any event, inequities in the distribution should be corrected through some common plan rather than by individuals who go about redistributing wealth on their own. An agnostic on matters of political theory might find the principle plausible by analogy to certain other branches of law. A person who innocently comes into possession of another’s property is required to return it; indeed, even if he is paid money by mistake he is required to return it, although he has no spe-
specific property that belongs to another. To generalize a bit, when it is clear that wealth has been transferred from one person to another, the law seems to expect that there be a reason. In any event, whether or not the reader is persuaded by the Aristotelian political theory or by the legal analogy, he is asked to accept the premise for argument's sake so that we may see how it might apply to the law of contracts.

Characteristically, the nineteenth-century arguments against the principle of equality in exchange were not presented as arguments about political theory. Instead they were presented as matters of common sense to be judged on their own merits. The two most common arguments were that one could not speak meaningfully of equality in exchange and, that even if one could, the terms of exchange were a matter the contracting parties should be free to decide.

1. Equality in Exchange

The argument that one could not meaningfully speak of equality in exchange was confidently advanced by the eighteenth-century jurist Christian Thomasius. He said that defenders of the idea imagined value as an intrinsic property of things. But value depends on the "mere judgment of men," and in a contract, on the judgment of the contracting parties themselves, not of other people. Therefore, according to Thomasius, Aristotle's distinction between distributive and commutative justice was misconceived.

When Prussian law was codified by the Allgemeines Landrecht of 1794, Suarez explained for the drafting committee that Thomasius had refuted "the whole theory" underlying the old Roman remedy of laesio enormis. The new code provided that a disparity in price would not invalidate a contract "in and of itself." Nevertheless, mistake would

20. Id. §§ 15, 19.
21. Id. § 25.
22. Allgemeines Landrecht für die Preussischen Staaten § 58 note 8, at 646 (7th ed. C. Koch 1978). Suarez's views may have been influenced not only by Thomasius, but by his own more voluntaristic outlook on contracts, an outlook that seems in certain ways to have anticipated the will theories of the 19th century. In his lecture on the "Allgemeine Grundsätze des Rechts," which appears in C. Suarez, Vorträge über Recht und Staat 228 (H. Conrad & G. Kleinheyer eds. 1960), he says almost nothing about laesio. However, he does say that promise and acceptance form the essence of a contract and that the requirements for a valid contract are legal capacity; an object; a free, serious, and definite will; and compliance with statutory formalities. Id. at 271. He regarded fraud or mistake as the reason for granting relief when the price was disproportionate. See 1 Allgemeines Landrecht für die Preussischen Staaten, supra, § 58 note 8, at 646.
be "presumed" when the buyer paid twice the normal price. The remedy also was abolished in Bavaria in 1861, in Saxony in 1863, and in commercial matters by the Allgemeines deutsches Handelsgesetzbuch of 1861. Endemann, defending the last measure in his commentary on commercial law, gave much the same argument as Thomasius: "It is wholly unclear what a value corresponding [to the goods] should be taken to mean: the value of the goods is one amount here and another there, one amount for the seller and another for the buyer . . . ."

In France, Berlier offered a similar argument when the Civil Code was drafted: "Things do not in general have a true price, a just price; they are worth less to one person, more to another . . . but the price is known only by the agreement itself." He and other members of the drafting committee wished to abolish relief, but their view prevailed only in part. Article 1118 of the Civil Code provided that lésion or disparity in value would not invalidate a contract as a general rule. At Bonaparte's urging, however, an exception was made in article 1674 of the Civil Code for land sold at less than five-twelfths its value.

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24. Id. I 11 § 59.
25. Landtagsabschiedes of Nov. 10, 1861, § 282.4, [1861-1862] Gesetzblatt, quoted in M. Danzer, Das Bayerische Landrecht (Codex Maximilianus Bavariicus civilis) vom Jahre 1756 in seiner heutigen Geltung 229-30 (1894). Until then, the earlier remedy of laesio enormis had been preserved in the Codex Maximilianus Bavariicus civilis IV iii §§ 19-22 (enacted in 1756).
27. Allgemeines deutsches Handelsgesetzbuch art. 286 (1861) (gross injury, "including injury over the half," does not void contract).
30. Id. at 65, 188, 194.
31. Article 1118 provides that lésion "vitiates certain, but not all contracts and these only with respect to certain persons, as is explained in the appropriate section." For the exceptions contained in the Code, see note 157 infra. For additional exceptions provided by statute, see text accompanying notes 158-61 infra.
32. Bonaparte's argument was that the manner in which a person disposes of land is "not without importance to society" and that the law should ensure that he does not sacrifice "in a moment of folly the inheritance of his fathers and the patrimony of his children to the violence of his passions." 14 J. Locré, supra note 29, at 89, 90-91. The more traditional argument that the "equity" of contracts required a just price had been made by Bigot-Préameneu on the drafting committee. 12 id. at 195. It has sometimes been thought that this argument lost out because of the bourgeois or liberal spirit of the French Revolution. Yet the French revolutionaries seem less hostile to the earlier remedy than their contemporaries in Prussia. There, the remedy was abolished in 1794 for reasons like those Berlier gave on the drafting committee in France. See text accompanying notes 22-24 supra. While the revolutionaries did temporarily suspend the remedy, Décret qui abolit l'action en rescision des contrats de vente, 14 fructidor An III, 38 Collection Générale des décrets rendus par la Convention Nationale 160 [hereinafter cited as Coll. gén.]; 2 Lois civiles (intermédiaires) 319-20 (Paris 1806), the suspension was prompted
Nevertheless, throughout the nineteenth century, some French jurists continued to insist that value was "subjective" and that the exception was unwarranted.\textsuperscript{33}

The same argument was advanced in England and the United States to explain the traditional rule that the common law would not examine the adequacy of consideration. This explanation suggested that the rule had been designed to avoid judicial scrutiny of the fairness of an exchange. Although that may be an implication of the rule, Professor Simpson has pointed out that the judges who fashioned it were not actually confronting the problem of what to do about hard bargains, but the problem of what promises to enforce.\textsuperscript{34} In a two-party exchange, the doctrine of consideration was rather straightforward: consideration could be found in what the promisor was to receive in return. Had these been the only promises that the common law judges wished to enforce, the doctrine might have developed quite differently. But they also chose to enforce certain promises involving three parties or detrimental reliance as well as certain gratuitous arrangements such as gifts promised prospective sons-in-law, and gratuitous loans and bailments.\textsuperscript{35} The consideration for these promises was not a recompense but some circumstance that made the case appear special and deserving of a remedy.\textsuperscript{36} To demand adequate consideration in those cases would be to defeat the purpose of the doctrine since adequate consideration could only be found in a two-party exchange. Thus it came to be said, in the famous words of \textit{Sturlyn v. Albany},\textsuperscript{37} that "when a thing is to be done, be it never so small, this is a sufficient consideration to ground an action." In that case, the plaintiff had leased to a

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\textsuperscript{33} According to Demolombe, the value of things was "relative" and "subjective." Therefore, a difference in the values exchanged was "more or less inevitable." 1 C. DEMOLOMBE, \textsc{traité des contrats ou des obligations conventionnelles en général} 180 (2d ed. Paris 1870) (1st ed. Paris 1868-1870). Similarly, Laurent argued that the doctrine of \textit{lésion} would be defensible only if the value of things were "absolute." But things worth one amount "from a commercial point of view" might be worth quite a different amount to the parties because of their "needs, tastes and passions." 15 F. LAURENT, \textsc{principes de droit civil français} 559-60 (3d ed. 1878) (1st ed. Brussels 1867-1876).
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\textsuperscript{34} A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 445-49 (1975).
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\textsuperscript{35} \textit{Id.} at 416-52.
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\textsuperscript{36} \textit{Id.} at 425, 446.
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third party who granted his estate to the defendant. The plaintiff had demanded the rent from the defendant, who had promised to pay if the plaintiff would show him a deed proving the rent was due. The showing of the deed was said to be consideration. As Simpson points out, the case has nothing to do with the enforcement of hard bargains.38

Of course, to note that the rule against examining the adequacy of consideration was developed for another purpose is not to deny that it has been applied to enforce hard bargains. How often is difficult to determine, although in the nineteenth and twentieth centuries, when cases have been more fully reported, one can find what may be instances. For example, in Massachusetts, a contract was upheld in which a party agreed not to run a competing stage coach line in return for one dollar;39 in Georgia, one in which a company agreed to clear tree stumps off farm land at a price that proved insufficient to cover the cost of clearing them;40 in Minnesota, an agreement by a corporate treasurer to pay personally the face value of a corporate bond which she later alleged was worth far less;41 in Texas, a usurious loan.42

To find such cases, however, one must dig through stacks of others that cite the same rule but involve rather different problems. Some involve procedures designed to prevent problems of unfairness from arising.43 Some involve aleatory contracts in which the consideration does not seem inadequate when one takes into account the risk run by the party who received more than he gave.44 In others, one of the parties

38. A. Simpson, supra note 34, at 447.
39. Pierce v. Fuller, 8 Mass. 223 (1811). However, the party benefiting from the agreement claimed there was other consideration, including his purchase of the competing line.
40. Yaryan Rosin & Turpentine Co. v. Haskins, 29 Ga. App. 753, 116 S.E. 913 (1923). However, the contract might be interpreted as aleatory, that is, as a bet about whether the price would prove sufficient to cover the cost.
42. Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Ct. App. 1949). Another example may be Young v. Stephenson, 82 Okla. 239, 200 P. 225 (1921), where the general manager of a company promised three persons that if they each bought 2,000 shares in his company at the market price of $9.70 per share, he would guarantee that within 30 days each shareholder would receive a price of $15 per share. The general manager, who was to receive $1 per share when the price reached $15, was held to his promise when it did not. Id. at 242, 200 P. at 228.
43. For cases in which specific performance was granted when the contract was made at an execution sale or at a price fixed by arbitrators, see notes 305-06 infra. One early case often cited for the proposition that the law will not examine the adequacy of consideration involved a procedure of another kind: the defendant denied owing plaintiff $100 but promised to pay the money anyway if the plaintiff would swear that the money was due. The plaintiff's oath was held to be consideration for the $100. Brooks v. Ball, 18 Johns. 337 (N.Y. 1820).
44. E.g., American State Bank v. National Life Ins. Co., 297 Ill. App. 137, 17 N.E.2d 256 (1938) (purchase of annuity for life where annuitant died shortly thereafter); Cates v. Bales, 78 Ind. 285 (1881) (contract to buy into an insurance scheme which seems to have had the properties of a chain letter); Teeter v. Teeter, 332 Mich. 1, 50 N.W.2d 716 (1952) (purchase of partner's interest for $50 per month during the partner's life, a contract that the court said would have been "extremely favorable" had the partner died or the business prospered); Mandel v. Liebman, 303
received a benefit de facto although the rights he purchased were legally invalid.\footnote{45} Many more cases do not involve a two-sided exchange at all. Some involve gifts, as when a dying man gives a promissory note for a huge sum to those who have cared for him in illness,\footnote{46} or a philanthropist promises money to a college that will name a fund after her.\footnote{47} Others involve reliance, as when one person guarantees another's credit.\footnote{48} Some involve three-party situations where the consideration is

\footnote{N.Y. 88, 100 N.E.2d 149 (1951) (author employed a manager for 10% of author's earnings, a percentage that the court found to be standard in the industry); Embola v. Tuppela, 127 Wash. 285, 220 P. 789 (1923) (miner borrowed $50 from a friend to go to Alaska to try to recover property worth $500,000, which had been sold by his guardian while the miner was committed as insane; he was to pay his friend $10,000 if he succeeded). Similar are contracts to discontinue suit when there is doubt about the outcome, e.g., Flannigan v. Kilcome, 58 N.H. 443 (1878); contracts to purchase a quietclaim deed from a party who has no interest in the land when there was doubt about his interest at the time of the purchase, e.g., Mullen v. Hawkins, 141 Ind. 363, 40 N.E. 797 (1895); and contracts to protect a party against possible claims even when no claims are forthcoming, e.g., Hubbard v. Coolidge, 42 Mass. (1 Met.) 84 (1840). Also similar are sales of patents when the sale was made to settle or avoid litigation, e.g., Hall Mfg. Co. v. American Ry. Supply Co., 48 Mich. 331 (1882), or when the patented invention later proves to be useless, e.g., Hardesty v. Smith, 3 Ind. 39 (1851); Howe v. Richards, 102 Mass. 64 (1869); Nash v. Lull, 102 Mass. 60 (1869). A similar case involved the purchase of a secret formula that later became known to the public. Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655 (S.D.N.Y. 1959), aff'd, 280 F.2d 197 (2d Cir. 1960) (per curiam).}

\footnote{45. Eg., Bartlett v. Holbrook, 67 Mass. (1 Gray) 114 (1854) (invalid patent nevertheless created de facto monopoly); Marston v. Swett, 66 N.Y. 206 (1876) (same). A case that also turned on the actual effect of a legally invalid transfer of rights—although one that may have reached the wrong result—is Sanborn v. French, 22 N.H. 246 (1850). There the court upheld a contract in which a married woman was given a $50 note to convey a life estate to a third party. The court noted that even if the conveyance were invalid, it would give color of title to the third party and cloud the woman's own title.}

\footnote{46. Eg., Clark's Appeal, 57 Conn. 565, 19 A. 332 (1889); Worth v. Case, 42 N.Y. 362 (1870). Similarly, in Earl v. Peck, 64 N.Y. 596 (1876), the court upheld a note for $10,000 given by a dying man to his housekeeper as a gift and as remuneration for past services. Similarly, courts have enforced contracts in which one family member promised to leave a large amount of property to another who promised to care for him until his death. Eg., Peter v. Griffin, 184 Iowa 1061, 169 N.W. 441 (1918); Thompson v. Ramack, 174 Iowa 155, 156 N.W. 310 (1916); Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917). In some cases the promisor not only intended a gift, but the promisee relied, or the consideration may not have been adequate given the risk that the promisor would live a long time.}

\footnote{47. Eg., Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927). Similarly, promises that were primarily intended as gifts have been enforced when the consideration amounted to a pledge to name a child after the promisor. Eg., Wolford v. Powers, 85 Ind. 294 (1882); Gardner v. Denison, 217 Mass. 492, 105 N.E. 359 (1914). In Schuman v. Berg, 37 Cal. 2d 174, 231 P.2d 39 (1951), the court enforced a man's promise to support his illegitimate son if the mother would name the son after him. That promise may not have been meant primarily as a gift, but, as the court noted, the mother also promised not to sue the father—a promise that might have "great intrinsic value." Id. at 186, 231 P.2d at 45.}

\footnote{48. The question of whether a one-sided exchange should be enforced when the advantaged party relied on the contract without knowing of its one-sidedness is discussed at text preceding and accompanying note 139 infra. The cases referred to here do not involve that problem. In some of these cases, one party pledged to hold the other harmless if the second party did a certain act. Eg., Lawrence v. McCalmon, 43 U.S. (2 How.) 425 (1844) (mother's promise to guarantee her
not inadequate, given the role of the third party. In short, so far as

son's debts if money advanced to him); Train v. Gold, 22 Mass. (3 Pick.) 380 (1827) (promise by
creditor's attorney to indemnify sheriff against claims brought against him for levying execution).

In other cases, the contract was not an economic exchange but a gift made to encourage or
enable certain conduct by the promisee. E.g., DeVencman v. Shaw, 69 Md. 199 (1888) (uncle prom-
ised to pay for nephew's trip to Europe); Hamer v. Sidway, 124 N.Y. 538 (1891) (uncle promised
$5,000 to nephew if he would not drink, smoke, swear, or play cards or billiards until the age of

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In still other cases, the contract would not have appeared one-sided to the promisee who
relied because the promisor was acting in part out of generosity, or because the contract involved a
risk, or because any disparity in the values exchanged was not striking. In Ga Nun v. Palmer, 216
N.Y. 603, 111 N.E. 223 (1916), a 70-year-old woman, alone and unmarried, promised $70 per
month and $20,000 after her death to the plaintiff if she would come and live with her as a com-
panion. Plaintiff did so, giving up her business as a dressmaker. Cardozo held that the contract
was enforceable, giving as one of his reasons that the law will not examine the adequacy of consid-
eration. Id. at 609, 111 N.E. at 225.

49. When three parties are involved, A, B, and C, a court cannot judge whether a contract
between two of them is one-sided simply by looking at the value of what each received from the
other.

It may be that A had previously entered into a fair contract with B, and B with C, and that C
then made a seemingly one-sided contract with A, but one that is not unfair since it excuses A
from paying B and B from paying C on the earlier contracts. An early example may be Sturlyn v.
Albany, 1 Cro. Eliz. 67, 78 Eng. Rep. 327 (Q.B. 1587), described in the text. In that case, the
landowner was merely trying to recover from the person occupying his land the rent due from the
owner's immediate tenant. A more modern example is Manson & MacPhee v. Flanagan, 233
Mass. 150, 123 N.E. 614 (1919), where a subcontractor who had not been paid for his materials
and labor by his general contractor obtained a promise of payment from the homeowner in return
for his own forbearance to file a lien. Although the subcontractor would have had the right to file
a lien only for the value of his labor, which was a small part of the value of labor and materials for
which the owner had agreed to pay, the court enforced the contract noting that "mere inadequacy
of the consideration" does not invalidate a contract. Id. at 153, 123 N.E. at 614.

Another possibility is that C has promised A a performance to which C is already bound by a
previous contract with B. A may be receiving something for little or nothing, but at any rate, B is
losing nothing. For example, in Perkins v. Clay, 54 N.H. 518 (1874), a butcher had sold his
business, promising not to compete with the buyer, and later made the same promise to a second
party who was purchasing the business from the first buyer. The court found some consideration
for the second promise and enforced it, noting that the adequacy of consideration is irrelevant.

A third possibility is that C has promised A that if A will deal with B, C will answer if B fails
to perform. This is a special case of the promise to another to hold him harmless if he takes a
certain action, a case discussed in note 48 supra. To enforce the promise is not to enrich A at C's
expense, but to reimburse A for a loss that C has caused him.

A fourth, and more troubling possibility is that C has promised to reimburse A for a loss A
suffers on his contract with B, but neither A's contract with B nor his loss was caused by C's
promise. Normally, the doctrine of consideration would prevent C's promise from being en-
forced. But sometimes courts have found some consideration for the promise and enforced it.
Whetler or not they should do so, they are at any rate not enforcing a contract that gives one
party a windfall and the other a corresponding loss, as they would if they enforced a two-party
exchange without regard to the adequacy of consideration. Here, one of the two parties must take
a loss; the courts are merely preferring to place the loss on the party who promised to suffer it.
Such cases are relatively rare, and a departure from the normal tendency of the common law to
leave the loss on the party who first incurred it. See, e.g., Haigh v. Brooks, 10 Adol. & El. 309, 113
Eng. Rep. 119 (Q.B. 1839), where defendant gave plaintiff a guarantee for money owed plaintiff by
a third party that read "in consideration of your being in advance to [the third party] in the sum of
£ 10,000." The court upheld the guarantee by a forced construction of "being in advance": conce-
ivably it might refer to money to be advanced. Id. at 319-20, 113 Eng. Rep. at 123. The courts
one can tell from appellate reports, avoiding interference with hard bargains has been the occasional consequence of the rule rather than its main purpose.

Nevertheless, nineteenth-century jurists began to defend the rule on the ground that to examine the adequacy of consideration would raise imponderable questions about value. The rule was a good one, according to Joseph Story, because the value of a thing "must be in its nature fluctuating and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would." Chitty and Metcalf explained that there were "no means" for determining whether consideration was adequate. William Story thought the inquiry would involve a "psychological investigation into the motives of the parties," a view also held by Addison. Pollock addressed the subject by quoting part of Hobbes' attack on Aristotle's concepts of distributive and commutative justice: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give."

This explanation did not square easily with another rule inherited from the eighteenth century: that courts of equity will not grant specific performance of an unconscionable bargain. Just how firmly established this rule was in the eighteenth century is currently a matter of dispute between Professors Simpson and Horwitz. They do agree, however, that when eighteenth-century courts applied the rule, the reason they often gave was that the terms of exchange were harsh or op-

also placed the loss on the party who promised to suffer it in Hind v. Holdship, 2 Watts 104 (Pa. 1833) where, in assigning his floundering business to the defendant, a manufacturer insisted that the defendant promise that his workmen would receive their back wages. When the workmen sued, the court enforced the promise, finding the assignment was consideration and disregarding the disparity of values between the assignment and the promise. A more typical case is a promise to pay the debts of a relative who has died insolvent. Some courts will enforce such promises, saying that the cancellation of even a worthless note is consideration. E.g., Judy v. Louderman, 48 Ohio St. 562, 29 N.E. 181 (1891). Other courts will not enforce them. E.g., Newman & Snell's State Bank v. Hunter, 243 Mich. 331, 220 N.W. 665 (1928).

pressive. Had that explanation survived into the nineteenth century, it would have conflicted with the view that a court could not examine the fairness of an exchange. But as Simpson observes, the rationale changed. The disparity in price came to be considered as "evidence of fraud, not as an independent substantive ground, and not as constituting hardship." Although the fraud theory never swept the field, it found its way into many treatises beginning with a very early one by Powell in 1790. Indeed, Joseph Story, William Story, and Metcalf argued that the fraud theory must be correct since questions of value are imponderable.

The influence of the fraud theory on the actual practice of the courts will be discussed later. Our present concern is the argument about the imponderability of value which, we have now seen, was advanced in one form or another in Germany, France, England, and the United States. In its essentials, the argument was a simple one. "Value" may mean value to the parties, value on the market or from a "commercial point of view," or some "absolute" or intrinsic value. The third does not exist since value varies with time and place and "will depend upon ten thousand different circumstances." The second is irrelevant since it reflects the value which third parties put on a commodity. And so one is left with value to the parties themselves. But that is "relative," "subjective," and not discoverable without a "psychological investigation" into their motives. Moreover, it is precisely what the parties determined for themselves when they made the contract. If this line of reasoning is correct, then however right it may be in other situations for the law to prevent one party from being enriched at the other's expense, the principle has no application to the law of contracts.

2. **Private Autonomy**

In addition to this argument about value, there was another even

60. J. Story, *supra* note 50, at 399.
63. *See* text accompanying notes 275-308 *infra*.
64. *See* text accompanying notes 50-54 *supra*. 
more popular argument about the proper concerns of contract law that
was also advanced by nineteenth-century jurists. For Endemann, the
new German commercial code was justified in abolishing relief, not
only because value was relative, but also because the “determination of
the price” should “be left to the free agreement of the parties.” Similarly, for Berlier, another reason for abolishing the doctrine of *lésion*
was that “[a]n adult’s duty is to contract with prudence” and therefore “[t]he law owes him no protection against his own acts.” Many Eng-
lish and American jurists used a similar argument to explain why in-
adequacy of consideration is not a ground for relief at common law
and not a basis in itself for relief in equity. According to Joseph Story, for example:

> [E]very person who is not from his peculiar condition or circumstances
> under disability is entitled to dispose of his property in such a manner
> and upon such terms as he chooses; and whether his bargains are wise
> and discreet or profitable or unprofitable or otherwise, are considera-
> tions not for courts of justice but for the party himself to deliberate
> upon.

By the general principles of contract law a party is bound to what he
has agreed. To give relief would violate those principles. This argu-
ment was made in conjunction with the argument about value by Chit-
ty, Addison, Metcalf, and William Story. It was also advanced
in one form or another by Leake, Taylor, Bishop, Smith, New-
land, and Hammon.

For one who took the argument about value seriously, this argu-
ment about party autonomy was almost a corollary. If value is “subjective,” then there is no source outside of the agreement of the parties by
which one could judge the fairness of exchange. Interference by a
court would not only be improper but arbitrary. As the quotations
from Berlier and Story suggest, however, the two arguments were often
presented as alternative routes to the conclusion that inequality was not

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65. 2 W. ENDEMANN, supra note 28, at 556.
66. 12 J. LOCRI, supra note 29, at 188.
67. J. STORY, supra note 50, at 337.
68. 1 J. CHITY, supra note 51, at 7.
69. C. ADDISON, supra note 53, at 12.
70. T. METCALF, supra note 51, at 163.
71. W. STORY, supra note 52, at 435.
73. W. TAYLOR, A TREATISE ON THE DIFFERENCES BETWEEN THE LAWS OF ENGLAND AND
SCOTLAND RELATING TO CONTRACTS 17 (London 1849).
74. J. BISHOP, supra note 59, at 18.
75. J. SMITH, THE LAW OF CONTRACTS IN A COURSE OF LECTURES DELIVERED AT THE LAW
INSTITUTION 56 (Philadelphia 1847).
76. J. NEWLAND, supra note 59, at 357.
77. L. HAMMON, supra note 59, at 692.
a ground for relief. Even if a party made a bad or imprudent bargain, the bargain was his to make.

By itself, however, the second argument could also lead to a less radical conclusion. The French jurist Glasson, for example, agreed that the doctrine of lésion violated the "principle of freedom of contract" by which "one must accept the responsibility and the consequences of one's actions." Nevertheless, he argued, although the doctrine did not square with the general principles of contract law, relief was not necessarily a bad idea. Relief was justified for reasons of "humanity."78

Attempts to defend relief on humane or equitable grounds while conceding a violation of the normal rules of contract law were more popular among nineteenth-century German jurists than among the French. Most French jurists sympathetic to the doctrine of lésion explained its purposes much as Anglo-American jurists explained relief in equity. According to Duranton,79 Colmet de Santerre,80 and Marcadé,81 inadequacy of price was not an independent ground for relief but evidence of fraud or mistake or duress.

The German explanations typically looked more like Glasson's. The Roman text mentioned earlier,82 which gave a remedy to one who sold land for less than half its value, was an exception to the general principle of contract law. That principle was given by another Roman text, written several hundred years earlier at a time when the Roman economy was under less strict control.83 According to this text, in a sale "it is permitted by nature for one party to buy for less and the other to sell for more, and thus each is allowed to outwit the other."84 According to Vangerow, this earlier text stated a principle "lying in the nature of things."85 According to Windscheid, the principle was rooted "in

78. 1 E. GLASSON, ÉLÉMENTS DU DROIT FRANÇAIS CONSIDÉRÉ DANS SES RAPPORTS AVEC LE DROIT NATUREL ET L'ÉCONOMIE POLITIQUE 550, 553 (2d ed. 1884).
82. CODE 4.44.2. See text accompanying note 3 supra.
83. DIGEST 19.2.22.3. Modern scholars explain the conflict between this text and CODE 4.44.2 by pointing out that they were written at very different times. The earlier text reflects the law during the classical period when "parties were entirely free to fix the price." F. SCHULZ, CLASSICAL ROMAN LAW 528 (1951); see R. DEKKERS, LA LÉSION ÉNORME 19 (1937). CODE 4.44.2, which came much later, is ascribed to the Emperor Diocletian. Some scholars believe that it was actually added by Justinian's compilers. E.g., R. DEKKERS, supra, at 16-23.
84. DIGEST 19.2.22.3. See also DIGEST 4.4.16.4.
85. 3 K. VON VANGEROW, LEITFADEN FÜR PANDEKten—VORLEsUNGEN § 611 note 1, at 328-29 (Marburg & Leipzig 1847).
the nature of a contract of sale.” Holzschuher explained that the earlier text had to be the one which expressed the general rule because the later text interfered with “the binding force of contracts.” Nevertheless, the general rule could be bent on occasion. As Windscheid said, “are there not limits to the advantage one contracting party can take of the other?” Some pointed to the language of the later text itself, which said that the seller of land should have a remedy because “it is equitable” (humanum est). The question then was how big a hole “equity” had knocked in the general rule. Some wished to limit the text to sellers of land because it was an exception; others wished to extend it to buyers of land and to other kinds of transactions because such relief would be equally “equitable.” Still, partisans of both views agreed that they were dealing with an exceptional kind of relief that deviated from the normal principles governing contracts.

The argument was the same, whether it was put forward to exclude relief or to characterize it as an equitable exception. By the general principles of contract law, a party is bound to what he agreed. Interference with the agreement would infringe on “the freedom of contract” and “the binding force of contracts.” The fact that these nineteenth-century slogans have become unpopular should not blind us to the strength of the argument. A court that relieves a party from a hard bargain seems to have made itself judge of whether the bargain is “wise and discreet or profitable or unprofitable,” as Joseph Story said. If that is so, then interference with the bargain seems indeed to violate a modern understanding of what contract law is all about and not merely some antiquated view. Contract is a private arrangement that the courts, if necessary, will enforce. When a court judges the wisdom of the arrangement, it is making the decision normally reserved for the parties. Moreover, a contract would not be binding if the mere fact

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87. 3 R. von Holzschuher, Theorie und Casuistik des gemeinen Civilrechts 729-30 (Leipzig 1864).
88. 2 B. Windscheid & T. Kipp, supra note 86, at 665 & n.2.
89. 3 K. von Vangerow, supra note 85, § 611 note 1, at 328-29 (describing the arguments of other authors); 2 C. von Wächter, Pandekten § 207, at 472-73 (1881).
90. E.g., 3 R. von Holzschuher, supra note 87, at 729-30; 3 K. von Vangerow, supra note 85, § 611, at 328-29; 2 C. von Wächter, supra note 89, § 207, at 472-73. Some said that the exception should be limited to sellers because it was meant to protect those in need, and sellers who accepted a low price would be more likely to be needy than buyers who paid a high one. E.g., G. Puchta, Pandekten § 364 (9th ed. 1863) (1st ed. Leipzig 1838); F. von Keller, Pandekten 333 (Leipzig 1861).
91. E.g., 2 J. Seuffert, Praktisches Pandektenrecht § 272, at 98 (3d ed. Wurzburg 1852) (1st ed. n.p. 1848-1849). Even those who wanted to limit the exception admitted that it was applied more broadly by the courts. E.g., 3 K. von Vangerow, supra note 85, § 611 note 1, at 329; 2 C. von Wächter, supra note 89, § 207, at 472-73.
that an agreement was unwise or unprofitable were a reason for giving relief. After all, any party who tries to escape from a contract will have found it unwise or unprofitable.

Nineteenth-century jurists, then, gave two reasons for rejecting the earlier idea that exchange required equality. It was not useful or meaningful to speak of equality in the value of the performances exchanged. In any event, a court would violate the general principles of contract law by interfering with a bargain the parties had made. Even now, both arguments appear straightforward and difficult to answer. One is led to wonder why they did not appear equally straightforward and strong to the earlier jurists who were convinced that an exchange requires equality. That is the next question to which this Article will turn.

C. Equality in Exchange Reconsidered

The jurists whose views on the fairness of prices were representative of the Aristotelian tradition belonged, for the most part, to schools of thought that legal historians term the “late scholastic” and the “early natural law school.” The late scholastics flourished from the late fifteenth through the early seventeenth centuries and included such writers as Domenico Soto, Ludovicus Molina, and Leonard Lessius. The early natural lawyers flourished in the seventeenth century and included such writers as Hugo Grotius and Samuel Pufendorf. The discussion that follows is primarily concerned with the views of these jurists. No attempt will be made to describe the differences and nuances in their views. Instead, the discussion will focus on those opinions that were so widely held that few writers of the period would have disagreed with them (and citations of particular jurists who held these opinions will consequently be illustrative rather than exhaustive).

By the eighteenth century, the attacks on the Aristotelian philosophical tradition had become so intense that it becomes hard to tell whether a particular writer still represents the main currents of that tradition. In order to avoid this difficulty, the work of eighteenth-century natural lawyers will not be discussed here. Nor, for a similar reason, will the work of jurists of the fourteenth century who were often familiar with Aristotle, but were less concerned with philosophizing than with interpreting their Roman texts. Before the late scholastic period, those interested in exploring Aristotle’s theory of the just price were, for the most part, theologians and philosophers whose interest in law was a byproduct of their interest in moral philosophy. Mention of their work will be confined to a few key figures such as Albertus Magnus and Thonas Aquinas whose views were the starting point for
Thomasius claimed that the doctrine of equality in exchange rested on the belief that value was an intrinsic property of an object. In fact, the earlier jurists and philosophers who developed the doctrine seemed to have enjoyed pointing out that the just price of goods did not correspond to their inherent worth or usefulness. As it happens, they did believe that in a noneconomic sense, some things were inherently worth more than others. People, for example, were worth more than other living things and living things were worth more than nonliving. They also believed that some things were more useful than others. The bread that sustained life was more useful than luxuries such as diamonds. But they pointed out that economic value did not correspond to intrinsic worth or usefulness. Otherwise, a diamond would sell for less than a mouse, which has a greater inherent worth, and for less than a loaf of bread, which is more useful.

Moreover, the earlier jurists and philosophers did not believe that the value of goods exchanged was to be measured by the personal satisfaction or advantage that they conferred on the person who received them. On the contrary, they maintained that the seller should not be able to charge more than the true value of the goods even if the buyer was benefited by a much greater amount.

As Noonan and de Roover have pointed out, the earlier writers identified the true value or just price of goods with the market price set under competitive conditions by normal trading among buyers and sellers provided that the public authorities had not set a price. Although Aristotle had not explicitly identified the just price with the market price, that identification was made almost as soon as his works were studied in the West. Albertus Magnus, one of the founders of the Aristotelian tradition, described the just price as the amount that goods are worth in the estimation of the market (fort) at the time of

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92. For a recent and thorough study of these views of the just price, see O. Langholm, *Price and Value in the Aristotelian Tradition* (1979).
93. *See*, e.g., D. Covarruvias, *Variarum ex iure Pontificio, Regio et Caesaro Resolutionum* ii, iii no. 4 (Lyon 1568); L. Molina, *De justitia et iure*, disp. 348 no. 3 (Venice 1614); D. Soto, *De justitia et iure libri decem* VI, q. 2, a. 3 (Salamanca 1553).
94. *See* text accompanying note 133 infra.
His pupil Thomas Aquinas put the case of a merchant who arrives at a famine-stricken city after passing several other grain-bearing ships on the way. For Thomas, the question was not whether the famine level price of grain was fair, but whether the merchant could sell at that price without revealing that enough grain was en route to relieve the famine. He answered that, as a matter of justice, the merchant could remain silent and sell.

Late scholastic jurists of the sixteenth and seventeenth century and natural lawyers of the seventeenth century usually explained that the market price reflects the needs of buyers, the scarcity of goods, and the costs of producing them. All three factors were discussed by earlier writers in the Aristotelian tradition, and had been mentioned, albeit cryptically, by Thomas Aquinas. Thus, the earlier writers did not regard the just price as a stable price, but one which differed from one day to the next and from one region to the next in response to differences in need, scarcity, and cost. A striking example is Thomas' case of the price of grain in a famine.

Twentieth-century scholars, like nineteenth-century jurists, have had trouble understanding how unstable market prices were supposed to preserve equality. Thus, earlier in this century, many scholars assumed that the earlier writers must have meant something else: perhaps that the just price of goods was an amount equal to their cost of production. The earlier writers did say that the just price was a market price that reflected the cost of production. Nevertheless, as more recent scholarship has pointed out, they could not have meant that the

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98. ALBERTUS MAGNUS, COMMENTARII IN IV SENTENTIARUM PETRI LOMBARDI: Dist. 16, art. 46 in 25 OPERA OMNIA (Paris 1890).

99. THOMAS AQUINAS, SUMMA THEOLOGICA, supra note 16, II-II, q. 77, a. 3 ad 4.

100. L. LESSIUS, DE JUSTITIA ET IURE II, xxi, dub. 4 (Paris 1628); L. MOLINA, supra note 93, disp. 348; D. SOTO, supra note 93, VI, q. 2, a. 3.

101. See, e.g., H. GROTIIUS, DE IURE BELLI AC PACIS LIBRI TRES II, xii, 14 (B.J.A. de Kantervan Hettinga Troop ed. 1939); S. PUFENDORF, DE IURE NATURAE ET GENTIUM LIBRI OCTO V, i, 6 (Amsterdam 1688).

102. See O. LANGHOLM, supra note 92, at 61-143.

103. He mentions labor and expenses and indigentia or need in his COMMENTARIA IN X LIBROS ETHICORUM AD NICHOMACHUM V, lect. IX in 21 OPERA OMNIA (New York 1948). The role of scarcity is recognized implicitly in his case of the grain merchant, note 99 and accompanying text supra.

104. E.g., D. COVARRUUVIAS, supra note 93, II, iii, no. 5; PAULUS DE CASTRO, COMMENTARIA to CODE 4.44.2 no. 4 (Venice 1495); L. MOLINA, supra note 93, disp. 348 no. 3; D. SOTO, supra note 93, VI, q. 2, a. 3; H. GROTIIUS, supra note 101, II, xii, 14; S. PUFENDORF, supra note 101, V, i, 6.

105. E.g., S. HAGENAUER, DAS "JUSTUM PRETIUM" BEI THOMAS AQUINAS 1 (1931). Hagenauer was following still earlier scholars who distinguished the "subjective" factors of need and scarcity from the "objective" factors of labor and expenses, and believed that Thomas had emphasized the latter. E.g., R. KAUULLA, DIE GESCHICHTLICHE ENTWICKLUNG DER MODERNEN WERTTHEORIEN 53 (1906); E. SCHREIBER, DIE VOLKSWIRTSCHAFTLICHEN ANSCHAUUNGEN DER SCHOLASTIK SEIT THOMAS VON AQUIN 120 (1913).
just price equals the cost of production. The just price was a market price that reflected need and scarcity as well as costs and thus could change from day to day.106

Sometimes, the earlier writers do seem to say that goods should sell for the amount it costs to produce them. A famous example is the interpretation which Albertus and Thomas placed on an obscure passage in Aristotle. Aristotle had said that in an exchange between a house builder and a shoemaker, the house must be to the shoes as the builder is to the shoemaker.107 Albertus and Thomas took him to mean that the price of houses must be to the price of shoes as the labor and expenses of producing the one are to those of producing the other. If the price of houses were lower, Albertus says, then houses would not be built.108

Since, however, they both identified the just price with a fluctuating market price,109 they could not have meant that the builder must always sell at a price equal to his costs of production. Presumably, they meant that the price of houses corresponds to the builder's costs (although it will not always do so) and that if it does not (ever), the builder will cease to build.110 They were speaking of what should happen and of what must happen normally or eventually if goods are to be produced. Some of the later writers were clear on this point. The merchant must sell at the market price even though, at that price, he may sometimes recover more or less than his costs.111

The question, then, is how these writers could have thought that an exchange at this fluctuating market price would preserve equality. One possibility is that they thought the market worked in some very different way than we do, in a way which we with our more sophisticated economics barely can imagine. If so, their principle of equality might be so thoroughly incompatible with modern economics that anyone who believed the one would have to reject the other. It is important to exclude this possibility before going any further. The earlier writers did have a different idea of how the market works, but the difference does not explain why they thought equality was preserved at the market price. That problem remains the same whether one subscribes to our modern economics or to their earlier, more primitive ideas about the market.

106. See, e.g., O. LANGHOLM, supra note 92, at 28-31; de Roover, supra note 96.
107. ETHICS V, supra note 2, at 1133a-33b.
108. THOMAS AQUINAS, supra note 103, V, lect. IX; ALBERTUS MAGNUS, ETHICA V, ii, 9-10 in 7 OPERA OMNIA (Paris 1890).
109. See text accompanying notes 97-98 supra.
110. See de Roover, supra note 96, at 421-22.
111. E.g., D. COVARRUVIAS, supra note 93, II, iii, no. 4; L. LESSIUS, supra note 100, II, xxi, dub. 4; L. MOLINA, supra note 93, disp. 348 no. 7; D. SOTO, supra note 93, VI, q. 2, a. 3.
a. Earlier Economic Ideas

The earlier writers, like the modern economists, thought that the market price set by normal trading under competitive conditions reflected the willingness of buyers to purchase, the quantity of goods available, and the cost of producing them. But they had a different idea of how the market takes account of these factors. Modern economists analyze the market by describing independent supply and demand curves that intersect at a unique equilibrium price. Supply is a schedule of the amounts of a commodity that will be offered for sale at a range of possible prices. In the short run, supply is determined by the amount of a commodity on hand; in the long run, by its marginal cost of production. Demand is a schedule of the amounts of a commodity that buyers will purchase over that same range of possible prices. The market “clears” at the price at which supply and demand are equal. At any lower price, there will be waiting lines of buyers. At any higher price, stocks of commodities will go unsold in the short run, or, in the long run, commodities will not be produced even though buyers are willing to pay the cost of producing them.

The earlier jurists did not know of a unique equilibrium price nor of any mechanism by which need, scarcity, and cost would determine such a price. When they described how the market price or just price is determined, they often said that under given conditions of need, scarcity, and cost there will be a range of prices that are more or less just. The just price at which people will trade is determined by the communis aestimatio, which is the judgment of buyers and sellers as to the price that will best reflect need, scarcity, and cost. Once the just price is determined, everyone must trade at that price whether or not his own judgment agrees with the communis aestimatio. To have conceived of a unique equilibrium price, the earlier writers would have had to imagine separate schedules of supply and demand. This they failed to do. They knew which factors led prices to rise and fall, but they did not study each factor separately as an independent variable. According to Langholm, this “basic failure to separate demand and supply as separate arguments in the value formula” was “a defect in the Aristotelian market model which was never quite straightened out in the scholastic

112. See, e.g., L. Lessius, supra note 100, II, xxi, dub. 2; D. Soto, supra note 93, VI, q. 2, a. 3; H. Grotius, supra note 101, II, xii, 14; S. Pufendorf, supra note 101, V, i, 9.
113. See, e.g., D. Covarruvias, supra note 93, II, iii, no. 4; L. Lessius, supra note 100, II, xxi, dub. 2; L. Molina, supra note 93, disp. 348, no. 7; Sylvester De Prierio, Summa emplio no. 7 (Venice 1591); D. Soto, supra note 93, VI, q. 2, a. 3; S. Pufendorf, supra note 101, V, i, 8.

Grotius apparently held similar beliefs since he says the price is determined by “taking account” of these various factors, and he uses the phrase communis aestimatio to describe how a risk is priced in an insurance contract. H. Grotius, supra note 101, at II, xii, 14 & 23. See note 112 supra.
Not knowing of an equilibrium price, then, they thought that need, scarcity, and cost were more or less adequately reflected at a range of possible prices. Not having a mechanism to determine how need, scarcity, and cost affected the market price, they ascribed this role to human judgment, to the *commnis aestimatio*. It was not an unreasonable view for people who knew what factors led prices to rise or fall but who had never drawn supply and demand curves.

It is now easier to see why the earlier writers' statements about production costs strike us as peculiar. Although they said that the producer does recover his costs, they did not explain how the market takes account of cost while also reflecting need and scarcity. Partly for this reason, some modern scholars have imagined that the earlier writers were struggling between two alternate theories of the market price, one based on cost and the other on need and scarcity.\textsuperscript{115} As Langholm observes, however, the earlier writers themselves were apparently unaware of any such tension.\textsuperscript{116} In their simpler account, the market price depended on as many factors as the persons making the judgment or *aestimatio* took into account. Since they did not believe that market forces alone determined a unique price, they were not searching for a mechanism by which the market price reflected cost. Unlike modern economists or pre-quantum-theory physicists, they were not trying to found a science in which a given set of forces would yield a determinate result.

These same considerations explain why the early writers joined modern economists in condemning monopoly, but were more open toward price regulation. Monopolies were bad because the market price was supposed to reflect need, scarcity, and cost rather than the desire of a small group to get rich.\textsuperscript{117} Regulated prices, however, were legitimate and, on occasion, wise. In setting a price, the public authority was simply substituting its own judgment about the price that would best reflect need, scarcity, and cost for the judgment or *aestimatio* of buyers and sellers.\textsuperscript{118} Since the earlier writers believed that need, scarcity, and cost were reflected more or less adequately at a range of prices, they did not have the modern economist's fear of upsetting a unique equilibrium, thereby causing scarcities or waiting lines of buyers.

\textsuperscript{114} O. Langholm, *supra* note 92, at 116.

\textsuperscript{115} See E. Schreiber, *supra* note 105; Baldwin, *supra* note 9, at 77-78.

\textsuperscript{116} O. Langholm, *supra* note 92, at 34-35, 89.

\textsuperscript{117} E.g., L. Lessius, *supra* note 100, II, xxi, dub. 21; D. Soto, *supra* note 93, VI, q. 2, a. 3; H. Grotius, *supra* note 101, II, xii, 16.

\textsuperscript{118} See L. Lessius, *supra* note 100, II, xxi, dub. 2 & 4; L. Molina, *supra* note 93, disp. 347 no. 4. Similarly, Grotius and Pufendorf describe the regulated price as one that will accord with the range of just prices that the market sets. H. Grotius, *supra* note 101, II, xii, 14; S. Pufendorf, *supra* note 101, V, i, 8.
critics of free market economics sometimes come close to this earlier idea of how markets work. Whatever the merits of the economists’ theoretical model, they feel that in practice the market depends rather more on human judgment and permits rather more latitude.

In any event, these differences between the early writers and modern economists are differences over how the market works rather than what the market is supposed to do. For the earlier writers as for the modern economists, the market was supposed to reflect need, scarcity, and cost. Both also recognized that a market that reflects need and scarcity could not always reflect cost perfectly: sometimes the seller makes a greater or a lesser amount. Thus, whichever idea one held of how the market works, the question would still remain: How can the market price preserve equality? We now return to that question.

b. Equality and the Market Price

One can see how the market price would preserve equality if the market price always returned the seller his costs, as the earlier writers thought it would normally or eventually, or as modern economists think it does in a long term equilibrium. In that event, an exchange would not make the seller any richer in purchasing power. Similarly, in a certain sense, the buyer would be made no poorer. He would have paid only the amount needed to produce the commodity. Moreover, if prices were stable, he could always resell what he had purchased for precisely the amount he had paid for it (less the amount it had physically depreciated or the amount he had consumed). In these circumstances a party demanding a higher or lower price would be in the odd moral position of asking that another party transfer wealth to him.

Precisely because the market price would preserve an equality in purchasing power if it returned the seller his costs, it is hard to see how that price could preserve equality even when it returned the seller a greater or lesser amount, as the earlier writers knew it sometimes would. Some modern scholars have tried to get around the problem by assuming that the earlier writers equated the just price with the cost of production. More recent scholars are less willing to evade the problem. As Langholm observes, what the earlier writers said about equality and cost would converge with what they said about need and scarcity “if the just price idea had expressed exactly what we now call long-run equilibrium price.”¹¹⁹ But, he notes, that could not be what the earlier writers meant, since their just price was a fluctuating market price. Moreover, they did not envision a stable, long-run equilibrium: they

¹¹⁹. O. Langholm, supra note 92, at 34.
only knew that normally or eventually the producer must recover his costs or he would stop producing.

The earlier writers, as mentioned earlier, do not seem aware of a tension between what they say about cost and what they say about need and scarcity. Apparently, they thought that once they had explained that the market price fluctuated to reflect need and scarcity and that it eventually returned the producer his costs, they had said all that needed to be said.

In fact, their account of need, scarcity, and cost does suggest two ways in which the market price might be expected to preserve equality. Although the earlier writers did not clearly distinguish them, they are the only two ways in which the problem could be solved. Either an exchange at the market price is not really unequal even when the seller does not recover his costs, or it is unequal but the inequality is not one that commutative justice is supposed to correct.

The first alternative is suggested by the statement that eventually or normally the producer will recover his costs. If so, does it matter that he will not recover exactly that amount in any given contract? Over enough contracts the end result will be equal. And the seller who received less than his costs of production could just as easily have received more. Viewed in this way, a series of contracts is like a series of fair bets. The end result of a sufficient number of bets will be equal. Moreover, each bet is equal, not in its result, but actuarially, since the person who won had no greater chance of winning than any other bettors. Soto actually offers an argument like this to explain why changes in the market price do not lead to unfairness:

It is a most fallacious rule that one should always sell for the amount for which he buys plus the amount of labor and risk he incurs plus his profit. Rather, if a merchant lacking in skill and ignorant of business buys for more than is just, or if bad fortune buffets him, for example, because an unexpected abundance of goods mounts up, he cannot justly exact the expenses that he incurred. And conversely, if someone is more diligent or more fortunate because he happens to buy for less or because fortune smiles on him and later there is an unexpected scarcity of goods, surely he may justly sell for more, and, indeed, he may do so on the same day and in the same place even though the merchandise has not been improved in any way. For as the business of buying and selling is subject to fortuitous events of many kinds, merchants ought to bear risks at their own expense, and on the other hand, they may wait for good fortune.\footnote{120}

Similarly, other writers recognized that a seller's costs included "risk" as well as "labor and expenses," even though they may not have

\footnote{120. D. Soto, supra note 93, VI, q. 2, a. 3.}
had the risk of price fluctuations specifically in mind.\textsuperscript{121} Lessius observed, for example, that “this is the condition of merchants, that as they may gain if they receive goods at small expense, so they may lose if the expense was disproportionate or extraordinary.”\textsuperscript{122} One must be careful not to read into these remarks a modern notion of expected values or of the way risks are reflected in costs. Nevertheless, the earlier jurists recognized that a price can be fair, not because sellers actually recovered the value of their labor and expenses, but because, as they might have recovered more, they might also have recovered less.

Alternatively, the earlier writers might not have been troubled by the possibility that particular transactions were unequal because they did not expect commutative justice to rectify every inequality. They believed that the market price fluctuates to take account of need and scarcity. Thus, there is a good reason why it should fluctuate. Moreover, if these fluctuations could be prevented or damped, it would be up to the public authorities to do so by setting the same price for everybody. In contrast, when the parties do not contract at the market price, it is nearly always for a bad reason. Either a party was unaware that he could get a better price in the market, or he was unable to use the market, circumstances Lessius described as “ignorance” or “necessity.”\textsuperscript{123} In neither case is there a good reason why he should be disadvantaged.

By this interpretation, commutative justice requires not that perfect equality be preserved, but that avoidable and needless inequalities be corrected. The earlier writers did not make this argument explicitly. Nevertheless, they had shown that there was a good reason for the market price to fluctuate and no good reason for parties to contract at any other price. Perhaps they thought that no more needed to be said.

Whatever the earlier writers may have had in mind, the entire argument just sketched can be restated more precisely and more persuasively in terms of modern economics. Suppose it is true, as the reader was asked to grant earlier, that redistributions of wealth should be avoided, at least when they are not part of a program of redistribution set up by someone authorized to do so. Suppose next that the economy were actually in the long-run equilibrium state hypothesized by econo-

\textsuperscript{121} L. Molina, \textit{supra} note 93, disp. 348, no. 7; S. Pufendorf, \textit{supra} note 101, V, i, 10. Moreover, the canon law of usury had recognized at an early date that price fluctuations were a risk for which a seller or buyer might charge. According to the canon law, if a merchant made a contract for a deferred performance, he could set a price that reflected uncertainty about the market value of the performance at the time it was due. But he could not set a price that would give him an assured profit since that would simply camouflage a loan at interest. \textit{Corpus Iuris Canonici} X 5.19.6, \textit{In civitate}. The passage is from a 12th-century papal letter. \textit{See} Baldwin, \textit{supra} note 9, at 49-50.

\textsuperscript{122} L. Lessius, \textit{supra} note 100, II, xxi, dub. 4.

\textsuperscript{123} \textit{Id}; D. Soto, \textit{supra} note 93, at VI, q. 3, a. 1.
mists: prices would never change and producers would always recover their costs. In that event, contracts at the market price would not change the wealth of the parties in the sense of the purchasing power that each of them commands. Under these conditions, it is hard to see why a contract should be enforced at any other price than the market price since any such contract would change the distribution of purchasing power. And were we living in such a world where plane fares never rose or fell, and where peaches sold year in and year out for the same price, we would not easily be persuaded to regard a contract at a different price as anything other than an unjustified gain for one party and an unjustified loss for the other.

Does it matter then that we live in a world where prices do fluctuate? Suppose now that people know in advance that prices fluctuate, but not in which direction or by how much. If markets behave as economists say they do, the market price will discount for the risk. The price on one day will accurately reflect the odds that the price may be different on the next. If so, then, even though a seller may sometimes sell high, or a buyer may find himself richer for having bought when he did, their contracts will still be equal in the actuarial sense described earlier. As in the case of a fair bet, at the time a contract is made, one cannot say that it enriches either party at the other's expense, although it will have that effect in the future.

Presumably, a society wishing to avoid redistributions of wealth would prefer that contracts be equal in outcome and not merely actuarially. Such a society would therefore prevent price fluctuations entirely by freezing prices if it could do so without fear of causing greater evils. But the result, according to economists, would be to waste goods that would accumulate unsold or to ration goods among buyers according to some arbitrary principle such as the place they hold in line. To avoid these consequences, a society might compromise by allowing prices to fluctuate, thereby settling for an actuarial equality rather than a perfect equality in outcome. Nevertheless, there would still be no reason for enforcing contracts not made at the market price. If the market accurately discounts for the risk of price fluctuations, contracts at any other price will not be equal even in the actuarial sense. They will give one party an expected gain and the other an expected loss. Even if the market does not perfectly discount the risk, the market price will still be the best evidence of the actuarially fair price. The market price depends on the judgment of many buyers and sellers as to what future prices will be. In contrast, a contract price deviating from the market price was determined by only two parties, one of whom was acting under circumstances of ignorance or necessity that prevented him from taking advantage of the market.
Next, suppose that there are some risks that are not discounted in
the market price because they are wholly unforeseen. It is admittedly
rather difficult to distinguish this case from the last since the most un-
likely events can be foreseen at some degree of probability. Still, sup-
pose there are such risks and that because of them contracts at the
market price are sometimes unequal even in the actuarial sense. The
society must then ask itself again whether to tolerate the inequality to
avoid greater evils or whether to remedy the inequality by freezing
prices. If prices remain unfrozen, the society will have decided to ac-
cept the market price, whatever its inequalities, so that the market can
clear. But there will still be no reason for enforcing contracts at other
than the market price. Such contracts tend to cause further inequalities
that there is no need to tolerate. Even if they do not—if, by happen-
stance, a seller who would otherwise suffer a loss due to wholly unfore-
seen risks meets a buyer who through ignorance or necessity can be
prevailed upon to pay more than any other buyer is being charged—the
contract still should not be enforced. If sellers generally are required to
suffer a loss so that the market may clear, it would seem odd to exempt
a particular seller simply because he happens to find some ignorant or
necessitous person to make the sacrifice for him.

This line of argument parallels one recently advanced by Professor
Eisenberg in defense of the American doctrine of unconscionability. Eisenberg asks what reasons a society might have for enforcing a con-
tract at one price rather than another. He concludes that enforcement
will find its “strongest justification” when contracts are made at the
market price and the economy is in a “steady state.” Under these con-
ditions, the price will be efficient, the same for all buyers and sellers,
and sufficient to return the producer his costs. Nevertheless, if prices
fluctuate so that producers do not always recover their costs, there will
still be compelling reasons for enforcing contracts at the market price:
that price will still be the same for all buyers and sellers, and it will still
be the efficient price. Eisenberg then examines a range of situations,
such as those involving distress and monopoly, in which contracts are
made at other than a competitive market price; in each instance the
reasons for enforcing them are less compelling or absent.

A difference between Eisenberg’s argument and mine is our reason
for believing that ideally the market price should return the seller his

124. M. Eisenberg, The Bargain Principle and Its Limits: Enforcing and Reviewing Bargain
Promises (Sept. 21, 1981) (currently unpublished manuscript on file with the California Law Re-
view). The parallel is hardly coincidental since this line of argument had not occurred to me until
I had the privilege of reading Eisenberg’s manuscript.
125. Id. at 26.
126. Id. at 23-25.
127. Id. at 30-61.
costs. Eisenberg argues that "a promisee should usually be entitled, at a minimum, to recover an amount equal to his costs . . . ."128 I have argued that a price that covers costs is both an ideal minimum and an ideal maximum because at that price the wealth of the parties remains constant. Consequently, my argument is open to an objection to which Eisenberg's is less vulnerable. At a price that covers costs, the "wealth" of the parties remains the same only in the sense that the purchasing power of the assets they hold does not change. The personal satisfaction or benefit that they derive from the assets they hold obviously does change since the parties would not exchange unless each expected to derive more benefit from what he receives. In this sense, the "wealth" of each party increases, and perhaps by different amounts. Thus, one might object that my argument ignores the change in wealth that must occur in any exchange. It ignores a basic problem that has concerned a great many writers: how the mutual benefits of exchange are to be divided.

It should first be observed that one would not be concerned about this problem unless one held a certain kind of theory about how wealth should be distributed. One would not worry about dividing the benefits of exchange if one believed, for example, that each citizen ideally should receive an equal amount of purchasing power, however unequal their capacities might be to derive personal advantage or satisfaction from what was bought. The citizens would then be like a dozen heirs dividing a heterogeneous collection of objects in their grandfather's estate by auctioning them off among themselves, all bids to be made in poker chips, and each heir starting with an equal number of chips. Alternatively, one might have a theory in which some heirs, or some members of society, ought to start with more chips, not because of the personal satisfaction they will derive, but because of the good use they will make of what they acquire or because they shoulder a greater share of familial or societal responsibilities. Dividing the benefits of exchange becomes a problem only when one's theory of wealth distribution requires that these gains be taken into account. For example, an heir who loved the grandfather's property might persuade the others that he should get more chips so as to maximize the total satisfaction that the property could produce.129 An heir who was lukewarm might

128. Id. at 27.
129. This heir would be applying a utilitarian criterion for distribution while neglecting Bentham's dictum that "the effect of a portion of wealth upon happiness" must be discussed "without reference to the sensibility of the particular individual and the external circumstances in which he may be placed." Bentham's reason was that one cannot know about such matters. "Difference of character is inscrutable; and there are no two individuals whose circumstances are alike." J. BENTHAM, Principles of the Civil Code pt. I, ch. 6, in 1 THE WORKS OF JEREMY BENTHAM 297, 305 (J. Bowring ed., Edinburgh 1859). Presumably, however, if one could judge the sensibilities of indi-
argue that he should have more chips so that each heir would enjoy equal personal satisfaction from what he acquired.130 Even then, however, the heirs might agree to an equal division of chips because the "amount" of personal satisfaction each derives is hard to determine.131

Yet even if one wished to take account of these personal benefits in a theory of wealth distribution, one still could not defend a theory of exchange in which the parties were supposed to divide the benefits of exchange among themselves. First, in a complex and interdependent society, it is impossible to imagine the benefits of exchange as separate from and added to an "amount" of benefit one would otherwise enjoy. Without exchange, most of us would starve. But if life itself is considered a benefit of exchange, only a curious theory would expect each person to return this benefit or even a "share" of it to the innumerable persons who conferred it. Second, even if one could separate out some additional amount of benefit derived from exchange, there would be no principle for allocating a portion of it to each of several contracts. The pleasure of a vacation trip is brought about by the combined purchase of transportation, food, drink, lodging, and recreation, absent any one of which the trip would be no pleasure at all. Third, even if there were a way to allocate the benefits of exchange to particular exchanges, there would still be no reason why the seller should have a share of these benefits. If one wanted to take account of these benefits in a theory of wealth distribution, it would be for some purpose such as to maximize these benefits or to divide them equally. There would be no reason why the benefits should go to a seller who, by happenstance, dealt in a commodity that produced satisfactions greatly in excess of its cost or found a particularly anxious buyer.

In short, to the extent it is a problem at all, the problem of dividing

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130. This heir might try to show that his criterion for distribution follows from Rawls's concept of an "original position"—a claim that Rawls himself would presumably reject. Rawls asks how advantages would be divided by persons who do not know, in advance, what position in society they will occupy. J. RAWLS, A THEORY OF JUSTICE 11-22 (1971). On that basis, the heir would argue, more advantages should be given to persons less able to employ them since that will tend to equalize their position and the position of those better endowed. This line of argument conjures up the specter of another kind of monster with the opposite characteristics of the "utility monster" described in note 129 supra. This new monster would be a being so wretched that its misery could only be alleviated, and it could only be brought to a status roughly equivalent to that of other members of the community, if it were allowed to consume virtually all the community might possess. Rawls presumably would reject the argument of this heir that matters of individual disposition should be taken into account in the "initial position," since one of the advantages of Rawl's system is supposed to be that it avoids the need for such interpersonal comparisons.

131. As Bentham says in his argument for the desirability of equality in the distribution of wealth. See note 129 supra.
the benefits of exchange is one of distributive justice rather than com-
mutative justice. 132 Even one who thought these benefits should be di-
vided would have to do it by assigning citizens a certain amount of
purchasing power, allowing them to trade, and then readjusting their
shares of purchasing power until they approximated his ideal. The sys-
tem of exchange itself should merely avoid random redistributions of
purchasing power.

This issue has been discussed at length because it is central to the
argument that an exchange can be unfair. If the seller had some moral
or equitable claim to the benefits that exchange confers on the buyer,
no exchange would be unfair as long as the buyer knew what he was
receiving and what he was giving up in turn, since all such exchanges
were presumably of some benefit to the buyer. The seller, however, has
no such claim. Therefore, he should not be permitted to take a portion
of this benefit even if the ignorance or necessity of the buyer permits
him to dictate a price that does so. The earlier authors expressed this
idea by saying that the seller could not increase the price because of the
"singular utility or necessity of the buyer." 133 Otherwise, they ob-
served, one could charge the poor a higher price than the rich since the
goods that enable the former to survive may be unimportant to the
latter. 134

One of the nineteenth-century arguments can therefore be an-
swered: the argument that one cannot speak of equality in exchange
since value at the market price is irrelevant and value to the parties
subjective and not discoverable without a psychological investigation
into their motives. We have seen that the market price is not irrelevant
to a society interested in avoiding purposeless or random redistribu-
tions of purchasing power. If prices were stable, contracts at the mar-
ket price would return the seller his costs and purchasing power would
not be redistributed. If prices are unstable, contracts at the market price
may not be equal in outcome, but they still may be either equal in the
actuarial sense or equal to the extent possible if worse evils are to be
avoided. And if a society decides that such evils are more tolerable
than the inequalities caused by exchange at the market price, the rem-
edy is for public authorities to intervene and set a more equal price at
which everyone must trade. In contrast, the personal value or benefit
each party derives from the exchange is relevant only in that each party
must receive such a benefit if they are to exchange advantageously.
Neither can claim that the other party should share that benefit with
him.

132. See text accompanying notes 6-12 supra.
133. L. Lessius, supra note 100, II, xxi, dub. 4; see L. Molina, supra note 93, disp. 348, no. 5.
134. E.g., L. Molina, supra note 93, disp. 348, no. 5.
Before considering the second of the nineteenth-century arguments, it must be stressed that even at an ideal stable market price, a contract would be equal only in the sense that it avoids redistributions of purchasing power. One still might have objections to the way purchasing power is distributed. The objections might include a claim that certain market prices, such as the wages of labor, are unfair because they give a certain group less than the share of wealth it ought to receive. While this is an objection to a market price, it is based on considerations of distributive rather than commutative justice.¹³⁵

2. The Second Argument Reconsidered: Private Autonomy in the Law of Contracts

The second nineteenth-century argument can now be answered more easily. According to this argument, the general principles of contract law bind the parties to what they have agreed. A court that interferes is ousting party autonomy by making itself judge of the wisdom or profitability of the bargain; moreover, if contracts are to be binding, the fact that the bargain was unwise or unprofitable cannot be a ground for relief.

This argument requires us to consider the role of party autonomy in contract formation. One very important role was mentioned earlier. Each party agrees to exchange because he believes he will receive something of greater value to him than what he is to give in return. Therefore, the exchange will benefit each party, at least in his own eyes, by comparison with no exchange at all. The decision by each party that the exchange will do so is a minimum condition for the exchange to occur; however, it is not the only decision that each party may need to make. A party must also decide whether he can receive a better deal by dickering, waiting, or going elsewhere. However advantageous an exchange may be in comparison with no exchange at all, it will still be less advantageous than an exchange on better terms.

The nineteenth-century argument fails to distinguish between these two types of decisions. The argument applies with full force only to decisions of the first kind. As long as a party knows what he will receive and what he will give up, it is indeed his business to decide whether the one is worth more to him than the other. The “wisdom” of the decision, whether he is buying dinner dishes or data processing equipment, depends on his aspirations and his circumstances, which will differ from one buyer to the next. He is in a unique position and, perhaps, the best position to judge. In any case, it is hard to imagine a

¹³⁵. For a discussion of distributive and commutative justice, see text accompanying notes 5-16 supra.
law of contracts that does not, as a general principle, leave the "wisdom" of that decision to the parties.

The decision as to whether the price offered is the best available is quite different. It is a decision that all potential buyers and sellers face whatever their aspirations and circumstances. A decision to buy bananas for more when they can be obtained for less will be unwise no matter who is buying them. Moreover, to decide wisely, one must know, not only about one's own needs, but about what others will do: what a particular party will offer if one dickers, what others will offer if one shops around, or what they will offer someday if one waits. Since these matters do not turn on the aspirations and circumstances of a particular party, they are not matters that he is uniquely qualified or perhaps even particularly well qualified to judge. Fortunately, this second decision is made for the parties whenever a definite market price is known to all and available to all. If so, dickering or bargaining over the price is pointless since only the market price will be acceptable to both parties. There is no point in shopping around since both parties know the price that other parties are offering. The only way either party could obtain a better price is by waiting for the market price to change. In the hypothetical world imagined earlier in which market prices never changed, even this alternative would not be open to them. The only real decision each party would have to make is a decision of the first type: whether what he receives at this price is worth more to him than what he gives. A party's autonomy to make this decision would be complete; his autonomy to make the second decision would be virtually nonexistent. If a party wishes to contract at all, there is only one price he can "choose," and he need not deliberate to find out what it is.

In the real world of fluctuating prices, there is the alternative of waiting for a better price. The existence of a definite market price, however, protects buyers and sellers against misjudging whether to wait. If the market accurately discounts the risk of price fluctuations, a party will not gain or lose in the actuarial sense, whether or not he waits. The contract will be no more unwise than any other contract that involves a fair gamble. Even if the market does not accurately discount the risk, it at least reflects the cumulative judgment of all buyers and sellers. Whether he waits or not, a party will have acted no more "unwisely" than many others. In short, as long as there is a definite market price available to all, the parties hardly have the opportunity to exercise their judgment unwisely.

It is a mistake, then, to think that because it is up to each party

136. See text accompanying notes 120-22 supra.
whether to contract at a given price, it is therefore up to each party to decide at what price he will contract. The former decision admittedly belongs to the parties and depends on matters that they are uniquely qualified to judge. But a court that requires the parties to contract at the market price, if they contract at all, is neither questioning such a decision nor recognizing the failure to make it wisely as a ground for relief. The court is merely putting them in the same position as any two parties trading on a market with a definite price. It is not infringing on any autonomy that either party would exercise under normal circumstances in a normal market.

The matter becomes even clearer when one thinks of the abnormal circumstances that could induce a party to accept a price that differs from the market price. As mentioned earlier, the disadvantaged party must have been either unaware of the market price or unable to use the market. These circumstances constrain his choice and limit the kind of freedom or autonomy that the law has reason to value. In a normal market, each party has two alternatives. He can merely exchange one thing for another without either party being enriched or impoverished. Or, if he wishes to enrich the other party, he can make him a gift. The law has reason to value either exercise of his autonomy: the exchange, because it enables each party to receive what he needs without changing the distribution of wealth; the gift, because it changes the distribution of wealth in what is likely to be a positive, rather than an arbitrary, direction since the decision is made by the very person who becomes poorer. In contrast, when one party cannot use the market because of ignorance or necessity, he cannot choose between these alternatives. He can only obtain what he wants by enriching the other party. Admittedly, the other party now has one more option than he had in the normal market situation: that of enriching himself by taking advantage of the necessity or ignorance of another. The law, however, has no reason to value this exercise of autonomy.

The argument just made has been simplified by leaving out two complicating circumstances. First, suppose the parties do contract at other than the market price. While the disadvantaged party would presumably have exchanged at the market price if he had the chance, it may be hard to know whether the advantaged party would have done so. Consequently, if a court reforms the contract, it may deprive the advantaged party of the kind of autonomy that each party ought to have: the choice of whether or not to contract at a given price.

One solution, adopted in the French doctrine of lésion and the older Roman doctrine of laesio enormis, is to give the advantaged party

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137. See text accompanying and following note 123 supra.
138. See note 13 supra.
the choice of either rescinding the contract or making up the difference in the price.\(^{139}\) Sometimes, however, circumstances will have changed and rescission may not put the parties back where they were before. At that point, a court might ask whether the advantaged party knew of the price disparity when the parties contracted. If so, and if at that time the law required him to exchange at the market price or not at all, he is in a weak position to protest that he has been deprived of his autonomy. The court then could enforce the contract at the market price. In the comparatively rare case in which rescission is inappropriate and the advantaged party did not know of the price disparity, the court is confronted with uncomfortable alternatives. If it enforces the contract as written, one party is unjustly enriched; if it modifies the contract, the other party may be forced to exchange at a price to which he might not have agreed. A court that was greatly upset by the prospect of a forced exchange might enforce the contract as written. A more reasonable solution, however, would be to enforce the contract at the price closest to the market price at which it is certain that the advantaged party would still have agreed to exchange. If that party is in the business of buying or selling similar goods or services and continually making contracts at the market price, the court could enforce the contract at that price. Otherwise, the court would enforce the contract at a price at which, in all likelihood, and as far as one can know such things, he will still be happy to have exchanged even if the terms are less favorable than the contract price.

A second complicating circumstance is present when the market price is not as definite or as easily ascertainable as it is in markets for fungible goods. With unique goods, such as land, it is often impossible for all potential buyers to bid simultaneously. Consequently, a seller will be uncertain about how much other buyers may offer; a buyer will be uncertain about how much he may have to offer if he looks elsewhere. The parties, then, may dicker with each other and shop around, which would be pointless in a perfect market with a definite price. They also may wait to buy or sell as, indeed, they might in a perfect market. Here, however, their waiting serves a different purpose. They are not necessarily waiting for the market price to change, but simply to know what the market price is.

In cases of this kind, there are two reasons not present in more perfect markets for respecting the price agreed upon by the parties. One is that a court may find it hard to determine whether the contract price at the time of contracting was a fair reflection of the market price and the uncertainties of the market. The other is that the efforts of the

\(^{139}\) See Code civil art. 1681 (on \textit{lésion}); Code 4.44.2 (on \textit{laesio enormis}).
parties to find a better price by dickering, waiting, and shopping around will bring them closer to the ideal market price that would prevail if all potential buyers were bidding simultaneously. If a court steps in too often and too readily, the parties will lose their incentive to make these efforts, and, given the inaccuracy of the court’s determinations, the result may be rewritten contracts that deviate more from the hypothetical market price than do the original agreements. In imperfect markets, then, the law has a reason to value the autonomous decision of the parties as to what the price of their contract should be. The reason, paradoxically, is that the parties will be more likely to contract at a price that approximates the market price.

On the other hand, there are reasons why a court should be more concerned about protecting parties using these imperfect markets. Where goods are unique and bidding is not simultaneous, a party is much more dependent on his own judgment of market conditions and hence more likely to be hurt. Moreover, particularly in the case of houses or land, a party without the experience necessary to protect himself is often forced to deal in an imperfect market to meet his ordinary needs. Given the competing considerations, a court can only ask how certain it is that the contract price deviated from the market price, how much the disadvantaged party was harmed, and to what extent the disadvantaged party could have protected himself. The greater and more certain the harm and the less the ability to protect against it, the more willing the court should be to give a remedy. It should be noted that these questions will often be answered better if they are answered together rather than separately. The less the ability of the disadvantaged party to protect himself, the more certain the court may be that there was a great deviation; the greater and more obvious the deviation, the more convinced it may be of that inability.

Another quite different case in which there is no definite market price is one in which there is simply no relevant market. One example would be rescues carried out far at sea. Here, as in the imperfect market just considered, the parties will bargain if they have time to do so, although they cannot shop around or wait for a better deal elsewhere. Their bargaining, however, does not serve the same purpose as in the case of imperfect markets, since it does not bring them any closer to agreeing on the market price. Instead the parties bargain merely over how much one party can appropriate of the personal benefits that the exchange confers on the other. Since he has no claim to a share of these benefits,\textsuperscript{140} and since there is no market, and hence no considerations such as the need for price rationing to justify a price higher or

\textsuperscript{140} See text accompanying note 133 \textit{supra}.
lower than his costs, a court should allow the rescuer his costs plus whatever additional amount is necessary to ensure a price at which he would willingly have contracted. 141

The difficulty with the nineteenth-century argument, then, is that it does not distinguish between different kinds of autonomy which the law should value differently. The parties’ decision to exchange or not at a given price ensures that any exchange they make will be beneficial in their eyes. In contrast, their ability to determine the price at which they exchange serves a useful purpose only in the imperfect markets described, and there the purpose is to encourage the parties to contract at the market price. In a more perfect market with a definite price, the parties would always exchange at that price, absent ignorance or necessity, unless one party wished to change the distribution of wealth in the other’s favor by making him a gift. Where there is ignorance or necessity, a party may be induced to make what amounts to a gift even though he does not wish to change the distribution of wealth. Such an exercise of party autonomy has no value; nor is it even autonomous in the sense that decisions to give or to exchange at the market price are autonomous. It is not true, then, that there is only one kind of party autonomy that the law must always respect by holding the parties to what they agreed.

These two different types of autonomy were distinguished implicitly and automatically by Aristotle’s definition of exchange. What was “voluntary” about the “voluntary” kind of commutative justice was not that the parties determined the price at which they would exchange. Rather, it was that the parties determined whether to exchange at the price that commutative justice required. 142

Eventually, the Aristotelian definition of exchange, and with it the implicit distinction between these two kinds of party autonomy, was grafted onto the Roman law of contracts. The Romans had never worked out the implications of Aristotle’s definition. Instead, their contract law remained for the most part a law of particular contracts, each with its own particular rules. For example, they had a set of rules for lease, for partnership or societas, for gift or donatio, and for gratuitous contracts of loan, bailment, and agency known as mutuum, commodatum, depositum, and mandatum. They classified these contracts, not according to whether they fit the Aristotelian definition of voluntary commutative justice, but according to the way in which they became binding under Roman law. Sale, lease, partnership, and gratuitous agency, for example, were all classed as contracts consensus since they became binding on consent; gratuitous loans and bailments

141. See text accompanying note 139 supra.
142. See text accompanying notes 5-16 supra.
were contracts *re* since they were only binding when the object loaned or bailed was actually delivered.\(^\text{143}\)

In the thirteenth century, when translations of the *Ethics* first became available in the West,\(^\text{144}\) an effort began to apply the Aristotelian definition to Roman contract law. Philosophers and theologians such as Thomas Aquinas distinguished between exchanges based on commutative justice and gratuitous arrangements based on the Aristotelian virtue of "liberality," which leads a person to make gifts. They then tried to place the Roman contracts in one category or the other.\(^\text{145}\) By the fourteenth century, this enterprise seems to have influenced leading jurists as well. An example is the formulation of the doctrine of *causa*, which identified two reasons for giving an agreement legal recognition: because it was made to receive something in return, or because it was made out of "liberality."\(^\text{146}\) By the sixteenth and seventeenth centuries, jurists were developing systems to classify the Roman contracts according to the type of *causa* for which they were made.

An example is the system of Hugo Grotius. He defines a contract as a kind of act advantageous to another. Such acts could be either gratuitous or reciprocal. Gratuity acts could be purely gratuitous, like the Roman *donatio*, or they could involve an obligation on the part of the person benefited, like the Roman contracts of gratuitous bailment or agency. Reciprocal acts could be exchanges like sale or lease, or poolings of interests like *societas* or partnership. In either case, they required equality. In an exchange, the things traded had to be equal in value; in a partnership, the share each partner took out had to be equal to the share he put in.\(^\text{147}\) As Professor Watson has noted, Grotius' system was a most un-Roman way to distinguish among the Roman contracts.\(^\text{148}\)

Although Grotius’ scheme differed in important respects from those of other jurists,\(^\text{149}\) a common feature of such systems was the distinction between those contracts in which something was sought in return, and which therefore required equality, and those in which some benefit was liberally conferred. Once this distinction was drawn, the

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\(^{145}\) Thomas Aquinas, *Summa Theologica*, supra note 16, II-II, q. 61, a. 3; see John Duns Scotus, *Quaestiones in Librum quartum Sententiarum* dist. XV, q. 2, in 18 Opera omnia 277-318 (Vives ed. 1894).

\(^{146}\) Bartolus de Saxoferrato, *Commentaria* to Digest 35. 1. 17.2 (Venice, 1615) [hereinafter cited as Bartolus, Commentaria]; Baldus de Ubaldis, *Commentaria* to Code 8.41.7, Code 4.30.13 (Venice 1577) [hereinafter cited as Baldus, Commentaria].


\(^{149}\) L. Lessius, *supra* note 100, II, xvii, dub. 3, no. 16; Sylvester de Prierio, *supra* note 113, *contractus* no. 3; D. Soto, *supra* note 93, VI, q. 2, a. 1.
distinction between the two types of party autonomy described earlier followed implicitly. If an exchange requires equality, then the parties to an exchange are free to decide whether to contract at a fair price, but they are not free to decide at what price they will contract. At any price other than the market price, the contract enriches one party at the expense of the other, a result that is not permissible unless the disadvantaged party actually intends, not merely to exchange, but to make a gift. As Grotius observed: "Nor is it enough for anyone to say that what a party has promised beyond equality should be regarded as a gift. For such is not the intention of the contracting parties, and should not be presumed to be, unless it appear." 150

These earlier ways of defining contract are very different from those that became popular with the rise of the "will theories" of the nineteenth century. These earlier definitions start by identifying the goals that contracts are supposed to enable the parties to accomplish. The sorts of private autonomy that the law will respect then follow from these goals. In contrast, nineteenth-century definitions of contract tend to begin with the idea of autonomy itself. Germans typically defined contract by speaking of "manifestations of will." 151 Frenchmen such as Demolombe explained that "consent is the contract itself." 152 Americans and Englishmen defined contract in terms of promise, will, or consent. 153 The nineteenth-century innovation was not the idea that the parties must consent in order to be bound. Continental jurists such as Grotius had been saying for centuries that contracts are formed by promises or expressions of will, 154 just as Aristotle had said that exchange must be "voluntary." 155 The innovation, as Simpson has pointed out, 156 was to regard consent as a sort of Grundnorm from which the basic rules of contract law should be derived. The business of contract law was to see whether an agreement had been made and, if so, to enforce it according to its terms, subject to whatever extra requirements the law might impose.

Once that step was taken, any requirement that the parties must contract at a certain price or on certain terms seemed to be both an interference with the freedom of contract and a violation of the general

150. H. Grotius, supra note 101, II, xii, 11.
152. 1 C. Demolombe, supra note 33, at 47. See 1 L. Larombiere, Theorie et Pratique des Obligations 39 (2d ed. 1885) (1st ed. Brussels 1857-1858); 1 F. Laurent, supra note 33, at 478.
153. For an account of the rise of this approach, see Simpson, Innovation in Nineteenth Century Contract Law, 91 L.Q. Rev. 247, 265-69 (1975).
154. E.g., H. Grotius, supra note 101, II, xi, 2-4; S. Pufendorf, supra note 101, III, vi.
155. See text accompanying note 13 supra.
156. Simpson, supra note 153, at 266.
principles of contract law. The reason was that freedom of contract and the general principles of contract law were now defined without reference to the goals that contract law was to enable the parties to pursue. We can now see some reasons why that was not a sensible way to look at either contract law or party autonomy.

First, unless enforcement of promises is considered an end in itself, one must ask to what end they are being enforced. To ask that question is to ask, as the earlier jurists did, about the kind of arrangement the parties are making and the purpose which that arrangement serves in society. If mutually beneficial exchanges serve a useful purpose and random redistributions of wealth do not, then the society should enforce transactions that enable the parties to do the one and not the other.

Furthermore, if one does define party autonomy or freedom of contract in vacuo, one cannot even claim to be better protecting party autonomy. Enforcing a contract at other than the market price protects the freedom of one party to profit from the ignorance or necessity of the other, but sacrifices the freedom the other party would enjoy in a normal well-functioning market. Contract law cannot protect freedom in the abstract; rather, it must determine what kind of freedom it will protect. To do so, it must ask what goals each party should be free to pursue. If there are reasons why a party should be free to exchange but should not be free to redistribute wealth in his own favor, then the law should insist that he exchange without redistributing. To put it another way, exchange should require equality. Ut dicit Aristoteles.

II
ATTEMPTS TO EXPLAIN RELIEF WITHOUT THE PRINCIPLE OF EQUALITY

Thus far, this Article has tried to show that the nineteenth-century criticisms of the principle of equality in exchange were misguided. It will now examine the attempts of nineteenth-century jurists and their successors to explain—without invoking the principle of equality—why relief is sometimes given when a contract is one-sided. It will be seen that such attempts offer no real hope of explaining the relief that courts have actually been willing to give.

Despite the scepticism of nineteenth-century jurists, remedies for one-sided contracts did not disappear. As noted earlier, for almost two centuries the French Civil Code has given a remedy to a seller who parted with land for less than five-twelfths its value. 157 In France in the

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157. CODE CIVIL art. 1674. For the drafting history, see text accompanying notes 30-32 supra. There is also an exception in favor of unemancipated minors (article 1305) and, since 1968, for
twentieth century, special statutes have given similar remedies to buyers of fertilizer, seeds, and fodder who pay a quarter more than their value;\textsuperscript{158} victims of sea\textsuperscript{159} or aviation accidents\textsuperscript{160} who pay inequitable amounts for rescue or salvage; and those who sell artistic and literary property for less than five-twelfths its value.\textsuperscript{161} As will be seen later, French courts have extended relief even further by stretching such doctrines as fraud, mistake, and duress.\textsuperscript{162}

In nineteenth-century Germany in areas where Roman law remained in force, courts continued to give a remedy based on the text of Code 4.44.2.\textsuperscript{163} Notwithstanding the objections of many law professors, the courts construed the text to give a general remedy for one-sided exchanges, not merely a remedy to sellers of land.\textsuperscript{164} In 1900, this remedy was abolished with the enactment of the German Civil Code. The drafters of the Code had originally intended to abolish relief entirely. At the eleventh hour, however, their draft was amended to add a second paragraph to what is now article 138: "A transaction is also void when a person exploits the necessity, indiscretion or inexperience of another to obtain the grant or promise of pecuniary advantages for himself or another which are in striking disproportion to the performance given in return."\textsuperscript{165} The first paragraph merely provided that a transaction is void when it violates "good morals." Since the enactment of the Code, German courts not only have been voiding one-


\textsuperscript{161} Law of Mar. 11, 1957, art. 33, [1957] Recueil Dalloz, Législation [D.L.] 102, 104. Also, in 1935, to prevent sales at excessive prices, sellers of certain businesses were required to disclose the returns of the previous three years to potential buyers. Law of June 29, 1935, art. 12, [1935] D.P. IV 313, 323. Although the statute did not provide relief for a buyer who paid too much despite the disclosure, courts have sometimes conveniently "presumed" that the high price was due to some exaggeration of the returns even though direct evidence would have been available. \textit{See}, \textit{e.g.}, Judgment of Oct. 4, 1955, Cour d'appel, Paris [1957] Recueil juris-classeur périodique, la semaine juridique [J.C.P.] IV 65.

\textsuperscript{162} \textit{See} text accompanying notes 79–81 \textit{supra}.

\textsuperscript{163} \textit{See} text accompanying notes 82–91 \textit{supra}.

\textsuperscript{164} 3 K. VON VANGEROW, \textit{supra} note 85, at 329.

\textsuperscript{165} BÜRGERLICHES GESETZBUCH [BGB] art. 138(2). This provision has since been amended. \textit{See} text accompanying notes 247–48 \textit{infra}.
sided contracts under the second paragraph, but also have been giving relief under the first paragraph in cases where the requirements of "necessity, indiscretion or inexperience" are less than perfectly met.\footnote{See text accompanying notes 182-86 infra.}

During the nineteenth and twentieth centuries, English and American courts of equity continued to apply the doctrine of "unconscionability" to deny specific performance and to rescind one-sided contracts. The rationale supposedly was that one-sidedness was evidence of fraud. In the United States, the doctrine has recently been extended by section 2-302 of the Uniform Commercial Code, which authorizes courts to give relief from "unconscionable" sales in cases in law as well as in equity. The Second Restatement of Contracts has followed suit with a similar provision applicable to contracts in general.\footnote{RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).} Although the scope of such provisions is still uncertain, they have been applied in some quite striking cases to modify contracts with excessive price terms.\footnote{See text accompanying notes 265-67 infra.}

These remedies will be described in a later section of this Article.\footnote{See text accompanying notes 237-309 infra.} Here, it is enough to note that in France, Germany, England, and the United States throughout the last two centuries, a party to a contract could obtain at least some relief under at least some circumstances. The question thus arises: why is relief of any kind given?

The explanation suggested earlier in this Article is that, in principle, an exchange requires equality. The disproportion in the price term is itself a reason for giving relief. That does not mean that relief should be given whenever a price term is disproportionate. If the courts are not to cause more inequalities than they cure, they should confine relief to cases where the price is clearly disproportionate and the disadvantaged party is badly hurt and less able to protect himself. In the last section of this Article it will be seen that French, German, and American courts have limited relief in ways consistent, by and large, with this account of why relief should be given and how it should be limited.

The problem, however, is that for almost two hundred years a disproportion in the price has not generally been considered an evil in itself that warrants relief. If, as many nineteenth-century jurists believed, equality in exchange is a mystical notion or if the proper function of contract law is merely to enforce a bargain according to its terms, it is hard to explain the fact that any relief is given. Some nineteenth-century jurists were willing to concede that no such explanation could be given and called for the abolition of all forms of relief.\footnote{See text accompanying note 33 supra.}
Other jurists, however, groped for ways to justify some relief without invoking a principle of equality in exchange or acknowledging that the disproportion in the price term was itself an evil to be remedied. As mentioned earlier, some nineteenth-century French and American jurists argued that the disproportion in price was merely evidence of something else, such as fraud, mistake, or duress. That explanation remains popular in France. Some nineteenth-century German lawyers took the rather confusing position that relief was justified as a sort of “equitable” exception to the normal rules of contract. A somewhat similar view remains popular in Germany. Relief is not given because the disparity in the price term is itself an evil, but, following the language of the Civil Code, because it is immoral to exploit the weakness of another. More recently, some American writers have described their unconscionability doctrine as a means of providing relief for those subject to a bargaining disadvantage. But none of these attempts to explain relief without a principle of equality in exchange is really satisfactory. Considered closely, either they do not work or they work only on the assumption that a disproportion in price is itself an evil to be corrected.

Many French jurists still explain relief in a manner once popular in common law countries as well: it is given because of a “defect in consent” such as fraud, mistake, or duress. The French refer to this account as the “subjective theory” of their remedy for lésion.

One objection to the theory was raised by Demolombe and Glasson in the nineteenth century. If a court is merely giving relief for fraud or mistake or duress, there is no point to a doctrine of lésion since the contract is already invalid for one of these reasons. As Demolombe put it, one cannot “borrow . . . a slight dose of each to concoct a distinct defect which, not being exactly mistake, duress or fraud, is composed of these three defects . . . .”

Modern defenders of the subjective theory have responded by describing the “defect in consent” as something other than standard mistake, duress, or fraud. They claim that lésion is evidence of the victim’s urgent need or his ignorance of the price he should accept. Per-
haps their nineteenth-century predecessors had the same idea in mind, since they often spoke of "moral constraint" and "error in evaluation." 177

Modern critics of the theory usually object that French courts give relief for lésion without any inquiry into the ignorance or need of the victim. 178 If that were the only objection, the theory could be defended rather easily. Its proponents could explain the remedy for lésion as an attempt to avoid problems of proof or they could argue that French courts should make such an inquiry.

The fundamental difficulty with the "subjective theory" is that the "ignorance" that supposedly is the basis for the relief can only be described as an ignorance of the market price; similarly, the "constraint" under which the disadvantaged party supposedly suffered can only be described as an inability to obtain the market price. Proponents of the theory cannot mean that relief should be given merely because a party was ignorant of the profitability of his bargain or constrained to enter into it in order to avoid a worse alternative. Every party who wants out of a bargain has found it unprofitable, and every party who agrees to a contract does so in order to avoid some less desirable alternative. Ignorance and constraint are remedied only when they cause a lésion, only when they lead one party to accept a price less favorable than the one others receive through normal trading.

A proponent of this theory would therefore be forced to claim that a remedy is given because the ignorance or constraint that causes a deviation from the market price is an evil, even though the deviation from the market price is not in itself an evil that should be remedied. It is hard to see what sense that position makes. Ignorance and constraint can only be evils if they lead to some harm; if that harm is a deviation from the market price, then the deviation must not only be an evil, but precisely the evil for which a remedy is being given.

The element of truth in the "subjective theory" is that deviations from market price do indeed occur because of ignorance or necessity. Moreover, as mentioned earlier, one sensible way for a court to limit its interference with the prices set in imperfect markets would be to ex-

177. 5 A. Demante & E. Colmet de Santerre, supra note 80, at 32; 10 M. Duranton, supra note 79, at 200-01; 4 V. Marcadé, supra note 81, at 357-58. Glasson makes a similar remark. Relief is provided because the buyer took advantage of the seller's necessities. 1 E. Glasson, supra note 78, at 554. But Glasson regards this as a humanitarian reason, id. at 553, and denies that relief can be justified "by purely legal arguments," id. at 549.

amine the ability of the disadvantaged party to protect himself,\textsuperscript{179} to ask why he was ignorant or unable to use the market. To ask how a party could have avoided an evil only makes sense, however, if one regards what happened to that party as an evil. All that happened to the ignorant or needy party is that he failed to receive the price received by others.

In Germany, many nineteenth-century jurists defended relief as a sort of “equitable” exception to the normal principles of contract law.\textsuperscript{180} In part, their reason was textual: Code 4.44.2, which they were interpreting, said that relief should be given because “it is equitable” (humanum est). But in part they may have thought that once they had admitted that relief was an exception and ascribed it to “equity,” they no longer needed to explain why relief was given. That view, however, is rather difficult to understand. Presumably, if relief is “equitable,” some harm or unfairness has occurred that ought to be corrected. One would like to know what the unfairness is. Once that is known, one may have to rethink what are commonly regarded as the general principles of contract law.

In the twentieth century, the explanation has become more complex, partly again, for textual reasons. Paragraph two of article 138 of the Civil Code voids a transaction in which one person “exploits” certain enumerated weaknesses of another to obtain advantages in “striking disproportion” to what he gives in return. As will be described later, German courts found this provision rather confining.\textsuperscript{181} In cases where there was less evidence of the “necessity, indiscretion or inexperience,” of the disadvantaged party, they began to void contracts under the first paragraph of article 138, which simply provides that a transaction against “good morals” is void. Then the question became what had to be established for relief to be granted under paragraph one, other than a “striking disproportion” in the value of the performances exchanged. In 1936, that question was put to the Reichsgericht, then the highest court for civil matters. It answered that a “striking disproportion” by itself could not void a contract under paragraph one since then there would be no point to the limitations of paragraph two. But, the court said, the extra element required by paragraph one was that the advantaged party have displayed a “reprehensible attitude” by exploiting the “precarious situation” of another. Furthermore, a court could sometimes infer from the mere size of the disproportion that the situation of the disadvantaged party had been precarious and that the other party had behaved reprehensibly, either by taking advantage of

\textsuperscript{179} See text preceding note 140 supra.
\textsuperscript{180} See text accompanying notes 82-91 supra.
\textsuperscript{181} See text accompanying notes 249-64 infra.
that situation knowingly or by failing to know of it through gross negligence.182

This analysis of article 138 has remained the official position of the courts183 and been adopted by most of the commentators.184 Willful or grossly negligent exploitation of another’s difficulties is against good morals and hence a ground for relief under paragraph one; paragraph two merely describes the special case in which conduct is immoral because it exploits certain specified weaknesses. As will be seen, however, the requirement of willful or grossly negligent exploitation of a precarious situation has almost no practical significance, since a court can nearly always find some circumstance indicating weakness; if necessary, a court can even infer exploitation from the size of the disproportion alone. The court will assume that the conduct in question was willful or negligent unless the contrary is shown,185 and the advantaged party will almost never succeed in showing that he was careful or at least only moderately negligent in protecting the party disadvantaged by the bargain. Thus, one German jurist has charged that the requirement is almost a fiction.186

Nevertheless, this account of article 138 appeals to German jurists, not only because it helps to reconcile their texts, but also because it suggests an explanation of why relief is given. Relief is given because of the immoral conduct of the advantaged party who has reprehensibly exploited the precarious situation of another. Hence, the contract is not void merely because of the disproportion in the values exchanged, but because of the willful or grossly negligent conduct of one of the parties.


184. E.g., PALANDT, BÜRGERLICHES GESETZBUCH § 137 note 2a (by H. Heinrichs) (35th ed. 1966); 1 T. SOERGEL & W. SIEBERT, BÜRGERLICHES GESETZBUCH § 138 note 134 (by W. Hefermehl) (12th ed. 1979) [hereinafter cited as SOERGEL]; 1 J. von STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 138 note 42 (by H. Dilcher); see 2 W. FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS § 18 7 c. Larenz denies that a court could infer a “reprehensible attitude” from the size of the disproportion alone, but he has in mind the very special case of a Freund schaftskauf in which the disproportion is due to the generosity of the seemingly disadvantaged party. K. LARENZ, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS § 22 III b 3, at 369 (2d ed. 1972).

185. See notes 183-84 supra.

This explanation has been accepted by certain French jurists disenchanted with the "subjective theory."\(^{187}\)

The German explanation, however, involves the same sort of difficulty as the French "subjective theory." It seems hard to maintain that a "disproportion" in the values exchanged is of itself neither unfair nor an evil to be remedied, but that one who exploits another's precarious situation and causes such a disproportion is acting against good morals. A situation can only be described as "precarious" by reference to some harmful consequence that might occur. Conduct can only be described as "exploitive" if some unfair advantage is taken. Yet here, the only harm that attends the "precarious situation" of the one party, and the only advantage taken of him by the other, seems to be the disproportion in the values exchanged. If the disproportion were not viewed as an evil in itself, it is hard to see why one would care about either the situation or the conduct.

If, however, the disproportion is in itself an evil, then one must ask why it matters whether the advantaged party knew of it or could have known at the time of contracting. One reason was considered earlier.\(^{188}\) If it is difficult to put the parties back where they were before entering into the contract and the enforcement of the contract on more moderate terms raises dangers of a forced exchange, the advantaged party who did not know of the disproportion when he contracted can legitimately ask the court to take his interests into account in tailoring relief. Beyond that, it is hard to see why knowledge or negligence should matter. However innocently a party has taken an unjust advantage, nonetheless he is retaining it.

A final element in the German explanation is the idea that offending transactions violate good morals. Perhaps this is merely a way of saying that "exploitive" transactions will be void under the "good morals" provision of paragraph one. But one sometimes gets the impression that the phrase is not regarded as a mere label; to say a transaction violates "good morals" is vaguely felt to explain why relief should be given: the transaction offends the mores of society. If so, then this explanation, like the nineteenth-century German jurists' references to "equity," fails to explain very much. The fact that jurists or courts or the population at large regard something as inequitable or against good morals is certainly evidence that some evil has occurred. But one would still like to know what the evil is. Otherwise, one might

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188. See text accompanying note 139 supra.
as well say that relief is given because an offending transaction is "unlawful."

Rather than a full-blown theory, American writers have developed a series of distinctions that underscore the fact that one of the parties to an "unconscionable" contract may have been in a weak position. The weak position is often described as a "bargaining disadvantage." The presence of a "bargaining disadvantage" is sometimes called a flaw in the "bargaining process" that results in "procedural unconscionability." If the "process" were unflawed, but still resulted in objectionable terms, the result would be "substantive unconscionability."190

Eisenberg has noted that the distinction between "procedural" and "substantive" unconscionability tends to break down in key cases.191 We can now see why it tends to break down. As noted earlier, any party who accepts worse terms than the market offers must have been unaware of the market price or unable to use the market.192 If any such unawareness or inability is "procedural unconscionability," then "procedural unconscionability" is present whenever there is "substantive unconscionability," and the distinction is no longer particularly useful. On the other hand, one might define "procedural unconscionability" more narrowly to mean only those difficulties that it is particularly hard for the disadvantaged party to surmount. In that event, "procedural unconscionability" is a continuum ranging from difficulties that no one could surmount to those that anyone but the party before the court could have mastered. Nevertheless, "procedural unconscionability," thus narrowly defined, is a useful idea. As noted earlier, one sensible way to limit relief is according to the ability of the disadvantaged party to protect himself.193 In that sense, it is true that a great deal of "procedural unconscionability" or a grave "bargaining disadvantage" makes out a stronger case for relief.

Still, it is not helpful to speak of "procedural unconscionability," "bargaining disadvantages," or flaws in the "bargaining process" when one is trying to explain, not how relief should be limited, but why it should be given at all. It is sometimes thought that because "procedural unconscionability" looks like fraud, mistake, or duress, relief for

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189. For example, Ellinghaus defended the unconscionability doctrine not by arguing that he had a theory of unconscionability, but by arguing that the vagueness of the term was an advantage since it permits the courts to explore. Ellinghaus, In Defense of Unconscionability, 78 YALE L.J. 757, 760-61 (1969).

190. The distinction was suggested by Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA. L. REV. 485 (1967).


192. See text accompanying and following note 123 supra.

193. See text preceding note 140 supra.
“procedural unconscionability” is somehow compatible with traditional notions of contract law; the question then becomes how to explain “substantive unconscionability.” This approach, however, leads to the same difficulties as the French notion of “defects in consent” and the German idea of a “precarious situation.” One cannot describe “procedural unconscionability” or a “bargaining disadvantage” except as a circumstance that prevents a party from obtaining the market price. Consequently, there would be no reason to be concerned about the circumstances unless one already believed that a party should have the benefit of the market price.

To take the most dramatic example of what is commonly styled a “bargaining disadvantage,” suppose the captain of a ship in distress has enough time to bargain for help with his only possible rescuer. Since there is no access to a market, the parties may reach an agreement at any price from the cost of rescue on up to the value that the captain puts on his life, his ship, and his cargo. To say that this captain has a “bargaining disadvantage” does not, presumably, mean that he is in a worse position than the other captain to determine at what point the price will be set within the range of possible prices. In that respect, they are in an equally good position. Thus, to speak of a “bargaining disadvantage” is presumably to speak of the situation itself in which bargaining occurs: the ship is sinking with only one rescuer in sight. Suppose then that the ship is going down with many rescuers in sight and that the captain has plenty of time to choose among them—that is, suppose there is a competitive market. In that case, even the fact that his ship was sinking presumably would not count as a bargaining disadvantage any more than a patient is said to have a bargaining disadvantage in dealing with doctors because he needs surgery, or people in general are said to have a bargaining disadvantage in buying food because they will starve without it. Thus, the “bargaining disadvantage” seems to be merely the inability to obtain the competitive market price. Properly speaking, it is not a “bargaining disadvantage” at all nor a flaw in the “bargaining process.” It is a condition without which bargaining will not occur.194 In a perfectly competitive market, there is no

194. See T. Schelling, The Strategy of Conflict (1963). Schelling analyzes the strategies that each party might pursue in bargaining situations where both parties will benefit by reaching some agreement although they might reach a number of different agreements, some more favorable to one party and some to the other. According to Schelling, the correct strategy for each party is to pick terms favorable to himself and then try to convince the other party that it is a choice of these terms or no deal at all. For example, the party insisting on these terms might bluff or pretend to be unable to see where his own advantage lies. Schelling’s analysis raises another consideration. Supposing one has such a bargaining process, why should its outcome be respected? If the terms to which the parties ultimately agree are determined either by their ability to misrepresent their intentions or else by chance, it is hard to see why a term is fair simply because it is the result of bargaining.
range of possible prices and hence nothing to bargain over. The parties simply contract at the market price.

In any event, one would only be concerned about the captain's inability to use the market if one regarded the market price as fair. Courts seem to do so since they intervene to help the captain but not the patient who needs surgery but has his choice of doctors. When they intervene, of course, they do not give the rescuer the market value of his services, since usually there is no relevant market. Instead, American admiralty courts will give him an amount that reflects the costs he incurred, his investment in rescue equipment, his skill, and the risks to which he was exposed, as well as a premium that varies with the value of what he has rescued and the risks to which it was exposed. With the exception of the premium, which can best be explained as a pragmatic attempt to avoid a forced exchange and to ensure that the rescuer has an incentive to rescue, the courts are doing what an ideal market price in a stable equilibrium would do: they are returning the rescuer his costs. This is what they should do since, absent a relevant market, there is no need to ration goods among buyers and hence no reason to allow a price in excess of cost. In any event, there is no reason to regard the original contract as "procedurally unconscionable" unless one first regards this price as a fair one.

195. See G. Gilmore & C. Black, The Law of Admiralty 578-79 (2d ed. 1975). Similarly, German and French courts will reduce the price demanded for rescue to a reasonable amount. For Germany, see Handelsgesetzbuch § 747; for France, see note 159 supra.


197. Id. at 559 n.84a.

198. See text accompanying note 141 supra.

199. Professors Posner and Landes argue that relief should be given not because the price is "procedurally unconscionable," but because it will lead to inefficiency. Shipowners will not be encouraged to invest the right amounts in salvage and rescue equipment. Landes & Posner, Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEG. STuD. 83 (1973). While Posner and Landes claim to have shown that a judicially imposed price is more efficient, they do not claim to have proven that this price cannot be more fair as well. Indeed, they conclude their article with a "challenge" to scholars who invoke "notions of fairness and justice" to develop a theory to explain what is meant by a fair price. Id. at 128. This Article has attempted to meet that challenge.

Granting, however, that the judicially imposed price is desirable because it is efficient, there are still difficulties in explaining the outcomes of rescue cases solely in terms of efficiency and without reference to fairness. To begin with, as Posner and Landes admit, efficiency is not the goal the courts have consciously been pursuing: at best, the gain in efficiency is an "unwitting" result of the courts' decisions. Id. It is preferable, however, to explain judicial decisions in terms of goals that the courts were actually pursuing. Furthermore, if efficiency were the only reason for relief, relief would be given not because of the effect on the two parties before the court, but because of the effect on future investment and future decisions to rescue. But it is hard to believe a court would deny relief in a particular case because the circumstances were so strange that they would not be likely to arise in the future. It also is hard to believe that the sympathy one feels for the disadvantaged party is irrelevant and that the sole reason for granting relief is to encourage appropriate investments by other parties. Moreover, from the perspective of efficiency, the evil remedied in these cases is relatively insubstantial: at best, these decisions will have caused a slight
Bargaining can also take place in imperfect markets of the kind described earlier where all potential buyers cannot bid simultaneously. Because of the uncertainty of the market price, parties will dicker and shop around, and the more they do so, the closer they are apt to come to what the market price would be if bidding were simultaneous. Here again, one can speak of the "bargaining disadvantages" of one of the parties. Again, however, one can only explain a "bargaining disadvantage" as a circumstance that prevents a party from obtaining the market price, or a price as close to it as a reasonable amount of dickering and shopping could achieve. If we define "bargaining disadvantage" broadly to mean any uncertainty in the price a party could ultimately obtain or any constraint on the time he has to look for it, there will be a bargaining disadvantage wherever there is an imperfect market. But as in the rescue case, the difficulty a party encounters is not, properly speaking, a bargaining disadvantage but a condition for bargaining to occur. If we define "bargaining disadvantage" narrowly, to mean an uncertainty or a constraint that is particularly hard for one party to overcome, we will have limited relief to those least able to protect themselves and thus have provided a necessary incentive for the parties to dicker and shop around and exchange at a price approximating the market price. In either case, however, there is no reason to care about flaws in the bargaining process unless one first cares about the market price toward which that process normally leads.

The American, German, and French approaches we have examined all tend to look for evils in the way the contract was made rather than in the terms of the contract itself. The evil is a "bargaining disadvantage," the "exploitation" of a "precarious situation," or a "defect in consent." Such approaches seem more compatible with the approach to contract law we have inherited from the nineteenth-century jurists who tended to define contract, not in terms of the sort of arrangement to which the parties consented, but in terms of consent itself.

increase in the gross national product by encouraging appropriate investments in rescue and salvage equipment. In contrast, from the perspective of fairness to the parties, the evil remedied is quite substantial since the party in danger could be held up for enormous sums. And it is better to explain a line of decisions by identifying the substantial evil they correct rather than a relatively trivial one. Finally, as Posner and Landes point out, one test of a theory is its comprehensiveness. *Id.* at 84-85, 128. The theory advanced in this Article purports to explain not only the results in the rescue cases, but the results in other price unconscionability cases, such as those in which there was a market but the disadvantaged party was ignorant of the market price. These cases cannot be easily explained in terms of efficiency. Indeed, in discussing unconscionability elsewhere, Posner argues that: "Economic analysis, at least, reveals no grounds other than fraud, incapacity and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract." R. Posner, *Economic Analysis of the Law* 87 (2d ed. 1977). If a "comprehensive" theory is one that explains what the courts are doing, Posner's theory is less comprehensive.
Thus, it is not surprising that jurists who wished to relieve a party from his contract looked for some defect in consent or some flaw in the means by which it had been obtained. Yet to explain relief by a flaw in the contracting process is unsatisfactory, since one would not care about the flaw, or even be able to describe it, unless one were concerned about the disproportionate exchange that the process produced. For the nineteenth-century jurists, the alternative seemed to be to explain relief as a mysterious interference with the normal rules of contract law, an "equitable" exception, as the nineteenth-century Germans described it. This explanation is also unsatisfactory. To explain relief as a mysterious exception is actually to explain very little. A number of French, German, and American scholars have consequently moved away from these explanations and recognized that the disparity in price is itself a reason for giving relief. The question which then arises, and which few but Eisenberg have addressed, is why the disparity should matter. This Article has suggested a very old answer: neither party to an exchange should be enriched at the other's expense.

III
A Note on Remedies

Thus far, little has been said about the remedies available in France, Germany, and the United States to a party disadvantaged by a one-sided contract. Less has been said about the older remedy of laesio enormis that was once thought to be based on the Aristotelian principle of equality in exchange. Little has been said because the remedies available at a given time and place are not neat illustrations of the theories of contract then in favor. These remedies have been shaped as much or more by the desire of jurists to reconcile their authorities and to reach what seems to be a sensible practical result.

In this section, it will be seen that laesio enormis owed less to the Aristotelian principle of equality than to a Roman legal tradition that was in place before the Ethics was read in Europe. Conversely, the modern remedies, which owe little directly to any theory of equality in exchange, are in certain respects more consistent with the Aristotelian

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200. See Ellinghaus, supra note 189, at 787-93 (United States); Hackl, supra note 186 (Germany). French authors who take this view are generally said to believe in an "objective" in contrast to a "subjective" theory. E.g., J. Radouant, supra note 178, at 131; H. Lalou, supra note 178, at 113; I. R. Demoque, Traité des obligations en général 620 (1923); see E. Gaudelet, H. Desbois & J. Gaudelet, supra note 178, at 80-81; L. Josserand, supra note 178, at 131. Since 1932, this "objective" theory has been the official explanation of lesion of the highest French civil court, the Cour de cassation. See Judgment of Dec. 28, 1932, Cass. req., [3933] D.P. 1 87. See also Judgment of Mar. 21, 1933, Cass. req., [1933] D.P. 1 235; Judgment of Apr. 21, 1950, Cass. civ. [1950] J.C.P. No. 5800. For the similar view of the Court d'appel of Paris, see Judgment of Oct. 11, 1962, Cour d'appel, Paris, [1963] Recueil Dalloz, Jurisprudence [D. Jur.] 288.
principle and with the theory espoused in this Article than with the older remedy of *laesio enormis*. Thus, however radical the idea of equality in exchange may sound, the practical conclusion of this Article is neither that we should return to the older remedy nor that we should institute some major reform of the remedies we now have, except possibly in France. There, reform may be necessary since article 1118 of the Civil Code provides that *lesion* will not in general vitiate a contract and thus prevents a court from giving overtly and consistently the relief that French courts have often been willing to give. But the practical conclusion of this Article is that, at least in Germany and the United States, courts should continue to do much as they are doing, albeit more self-consciously and with more understanding of the principle at stake.

A. Laesio Enormis

As mentioned earlier, the Aristotelian principle of equality was eventually married to a Roman text, Code 4.44.2, which provided a remedy for those who sold land at less than half its just price. The marriage was announced soon after translations of the *Ethics* became available in the West in the thirteenth century. Thomas Aquinas and Duns Scotus considered the Roman text to be an application of the Aristotelian principle. By the fourteenth century, the jurist Baldus, an admirer of Aristotle, had discovered the principle of equality in another Roman text mentioned earlier that said it was “equitable” that neither party be enriched at the other’s expense. Baldus concluded that “in contracts, equity or equality must be served, both in interpretation and in the justification of the contract itself.” Code 4.44.2 provided a remedy because of the “natural equity” that contracts entail. Eventually, when law and philosophy drew together more closely, the connection was made explicit. The late scholastic jurists and early natural lawyers commonly explain the remedy by observing that contracts are based on Aristotle’s commutative justice.

Nevertheless, the remedy had already taken shape by the time the

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201. *See* note 31 *supra*.
202. *Thomas Aquinas, Summa Theologica, supra* note 16, q. 77, a. 1, ad 1; *John Duns Scotus, supra* note 145, dist. XV, q. 2.
205. *Baldus, Commentaria, supra* note 146, to Code 4.44.2 no. 18.
206. *Id.* Therefore the remedy should be available in all contracts based on “the same reason and equity.”
Aristotelian principle was found to explain it. By the thirteenth century, Code 4.44.2 had been expanded into a generalized remedy for one-sided contracts by a school of jurists known as the Glossators that originated when the academic study of Roman law first began around 1100. There is no evidence that even the last and most influential members of the school, Azo and Accursius, had access to the newly translated works of Aristotle.\(^{208}\)

Nor did the Glossators have a theory of their own to explain why such a remedy ought to be given. Their closest approach to a theory was to characterize a disparity in price as a kind of fraud which appears from the thing itself (\textit{dolus ex re ipsa}). But that description was not meant as a theory of why relief should be given. They were not saying, as certain nineteenth-century jurists did, that a disparity in price was evidence of fraud in the normal sense. They were merely noting a parallel between the remedies for normal fraud and the remedy of Code 4.44.2. They had identified two kinds of fraud, causal and incidental. Unlike modern lawyers, who define fraud by looking to the conduct of the defrauding party, such as misrepresentation or concealment, they were looking to the effect of the fraud on the victim. Causal fraud induced a party to contract, as when a person bought a horse because he believed he had lost his own. Incidental fraud changed the price at which he contracts, as when a person bought a horse because he mistakenly believed it to have some desirable quality. At that point, the Glossators noted a resemblance to Code 4.44.2. It also provided a remedy for someone who had paid the wrong price. Accordingly, they described this remedy as one for an incidental fraud that occurs without any intent to defraud, as a remedy for \textit{dolus} that is not intentional (\textit{ex proposito}) but \textit{ex re ipsa}. This unintended “fraud” was fraudulent only in its effect.\(^{209}\)

This scheme for classifying fraud is almost the opposite of the nineteenth-century theories just mentioned. Those theories avoided recognizing the disparity in price as an evil in itself by saying that the disparity was only evidence of fraud. The Glossators defined incidental fraud in terms of the evil it produced, and that evil was the disparity in price. Perhaps for that reason, their account remained popular even after the rise of the Aristotelian theory. In any event, it did not compete with that theory because it did not purport to offer an alternative explanation of why a disparity in price was an evil. They began by

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presuming that it was and then distinguished the case where such a result was produced intentionally from the case in which it was not. In the former case, there would be a remedy even for small disparities; in the latter, Code 4.44.2 would apply and there would be a remedy only for disparities that exceeded half the just price.

Although they had no theory of why relief should be given, the Glossators reached certain conclusions about when it should be given. Some of these conclusions fit very well with the later Aristotelian explanation. First, as early as the twelfth century, the Glossators had already turned Code 4.44.2 into a generalized remedy rather than merely one for sellers of land.\textsuperscript{210} If Code 4.44.2 was to be generalized, something had to be done with another Roman text, one that later became a favorite of the nineteenth-century German writers. It said that the parties to a sale could “outwit” each other as to the price. Accursius eventually “reconciled” this text by explaining that the parties could outwit each other as a matter of “strict law.” But when the disparity was too large, the “equity” of Code 4.44.2 gave a remedy.\textsuperscript{211}

A second series of conclusions that also fitted well with the later Aristotelian theory concerned the determination of the just price. The Glossators concluded that the just price was the common price. Their source was a Roman text that said that a thing is worth “the amount for which it can be sold.”\textsuperscript{212} According to Accursius, the text meant the amount for which it is sold “commonly.”\textsuperscript{213} This was a conclusion that a jurist with no developed theory might reach on his own, without the Roman text. Any other would have implied that entire markets might be trading at an unjust price and thus called thousands of seemingly normal transactions into question.

If the just price was the common price, it followed that the just price did not include the special benefit of the exchange to a particular buyer, since the common price was the same for all buyers. Thus, as Accursius observed following a Roman text, the just price was not determined “according to the affection of individuals or utility to

\textsuperscript{210} \textsc{Brachylogus} III, xiii, 8 (Frankford 1743). This summary described the remedy as one for “objects sold.” Another work, written in the early 13th century, describes a yet earlier debate that assumed that buyers also have a remedy. The question was whether the buyer seeking a remedy must have paid twice or only one and a half times the just price. \textit{See} \textsc{Hugolinus de Presbyteris, Diversitates sive dissensiones dominorum super toto corpore iure civilis} § 253 (G. Haenel ed., Leipzig 1834). The latter view, incidentally, was later adopted by \textsc{Accursius, Glossa ordinaria} to Code 4.44.2 to \textit{iudicis} (Lyon 1549) [hereinafter cited as \textsc{Accursius, Glossa ordinaria}], and became the dominant view until a renewal of the controversy in the 17th and 18th centuries.

\textsuperscript{211} \textsc{Accursius, Glossa ordinaria}, \textit{supra} note 210, to Code 4.44.2 to \textit{humanum est}.

\textsuperscript{212} \textsc{Digest} 36.1.1.16.

\textsuperscript{213} \textsc{Accursius, Glossa ordinaria}, \textit{supra} note 210, to Digest 35.2.63.
Furthermore, if the just price was the common price, it would differ from day to day and from region to region. Thus, Accursius noted that “according to diversity of place, the prices of goods are diversely established.” Similarly, he observed that one who sold an object for less than half what he once paid for it did not make out a case for relief for “it could be . . . that when the sale of the object to him occurred, it was worth more than when he now sells.”

These considerations suggested a method for estimating the just price. For movable property it was the market price at the time and place the contract was made. Land might not have a definite price, but one could estimate its value by the two methods that are still in use in condemnation cases: by examining “sales of places located nearby,” and by examining “the quantity of returns.”

Since these conclusions fit well with the Aristotelian theory, they made it easier for later jurists to point to laesio enormis as an instance of what Aristotle had been talking about. Other conclusions fit well enough, although they might not have been drawn if one merely had the theory itself to go on without the influence of the Glossators and their Roman texts. The most important example is the requirement that the contract price deviate by half from the just price. The Glossators required a deviation by half because that was the size of the one described in Code 4.44.2. Once this rule was established, it could be reconciled with the Aristotelian theory by noting that there are practical reasons for ignoring smaller deviations, an explanation of Code 4.44.2 given by Thomas Aquinas and many after him. Still, if one were facing the question for the first time with the theory in mind but without the Roman authority, one might not want to measure the importance of a deviation merely by the fraction of the price that it represents. By the Aristotelian theory, the evil to be prevented is a redistribution of wealth; the formula takes no account of the amount of the purchase or the fraction that the deviation represents of the wealth of the parties. Thus, Pufendorf later charged that the rule worked unfairly since a small percentage deviation in the price of a major purchase could cause more harm than a large percentage deviation in the price of a smaller item.

Still other conclusions of the Glossators could be squared with the

214. Id. to Code 4.44.6 to non est.
215. Id. to Digest 13.4.3 to varia.
216. Id. to Code 4.44.4.
217. Id. to Code 4.44.2 to iudicis.
218. THOMAS AQUINAS, SUMMA THEOLOGICA, supra note 16, q. 77, a. 1, ad 1.
Aristotelian theory only with great difficulty. The most important example concerns the effect of a statement in the contract that the parties are renouncing their right to contest the price or that anything beyond half the just price should be regarded as a gift to the other party. Azo and Accursius decided that such provisions were valid.\textsuperscript{220} In part, they were influenced by certain Roman texts which upheld clauses renouncing other rights.\textsuperscript{221} In part, they were also influenced by the term they had used to describe the remedy: \textit{dolus ex re ipsa}.\textsuperscript{222} Since remedies for fraud normally protect those under some misapprehension, it was tempting to push the analogy and allow the victim of this kind of “fraud” to renounce the remedy if he had his eyes open. Azo then concluded that if the victim expressly renounced the remedy, he must have had his eyes open. “For then it can always be seen that he knew the object was worth more than the half. And indeed one who knows is not deceived.”\textsuperscript{223}

That conclusion is hard to square with the Aristotelian principle of equality. Early on, Duns Scotus attacked it with an argument similar to one made later by Grotius.\textsuperscript{224} If the parties do not intend to give, the contract should not have the effect of a gift whatever language they have inserted in the contract; “the result would be for a gift to accompany any contract.”\textsuperscript{225} Several late scholastic jurists pointed out that the same ignorance or necessity that led one party to accept an unfair price would also lead him to waive the remedy.\textsuperscript{226}

Despite these arguments, most jurists held to the traditional view that renunciations of the remedy might be valid. Nevertheless, they began to find ways to invalidate some of them. Some of these ways were legalistic in the extreme. According to the great fourteenth-century jurist Bartolus, a party who renounced his remedies against the contract in general language would not be understood to renounce the benefit of Code 4.44.2. To lose that remedy, he must say so expressly.\textsuperscript{227} Similarly, a party who merely said he was making a gift of the amount beyond the just price would be understood to mean a small excess, one within half the just price. To lose his remedy, he would have to specify the amount of the excess.\textsuperscript{228} Other ways of invalidating

\textsuperscript{220} Accursius, Glossa ordinaria, \textit{supra} note 210; Azo, Summa codicis, \textit{supra} note 209, to Code 4.44.
\textsuperscript{221} \textit{E.g.}, Digest 2.1.14.9.
\textsuperscript{222} See text accompanying notes 209 \textit{supra}.
\textsuperscript{223} Azo, Summa codicis, \textit{supra} note 209, to Code 4.44.
\textsuperscript{224} See text accompanying notes 150 \textit{supra}.
\textsuperscript{225} John Duns Scotus, \textit{supra} note 145.
\textsuperscript{226} See P. Parisius, Consilia cons. XII, no. 88 (Venice 1543). The argument is discussed in D. Covarruvias, \textit{supra} note 93, II, iv, no. 3; L. Molina, \textit{supra} note 93, disp. 349, no. 14.
\textsuperscript{227} Bartolus, Commentaria, \textit{supra} note 146, to Code 4.44.2.
\textsuperscript{228} Id.
renunciations provided protection for people who were particularly easy prey. According to Bartolus' pupil Baldus, a renunciation would not bind a person who was simple or uneducated or dealing in a commodity not familiar to him. The reason he gave was that "no one should be presumed to throw away what is his own."\(^2\)

The late scholastic jurists generally followed Bartolus and Baldus. The renunciations were valid, but they must be specific and could not be made by persons of less than normal sophistication such as "women, children, and rustics."\(^2\) Some jurists still worried about the frequency with which these renunciations found their way into notaries' handbooks and thence into contracts. They argued that "these renunciations are written more because of the form (ex tabellionum stylo) than because of the consent of the contracting parties."\(^2\) Such renunciations should therefore be invalid, or else valid only if the parties themselves requested such a clause, or if it had been read to them out loud, or put in their own handwriting.\(^2\)

Eventually, fairly general agreement was gained on setting some outside limit beyond which the parties could not renounce the remedy. They could not do so, it was said, if the deviation went well beyond half the just price, if it was not merely *enormis*, but *enormissima*.\(^2\)

The practical result could be reconciled with the Aristotelian principle of equality. If some deviations were to be tolerated for pragmatic reasons, it made sense to tolerate a greater deviation when the victim was better able to protect himself. Nevertheless, it is difficult to explain in Aristotelian terms why renunciations should be permitted at all.\(^2\)

But for the legacy of the Glossators, it is not clear that jurists would have allowed the relief given a sophisticated party for an injury that was *enormis* but not *enormissima* to depend on whether he had renounced the remedy.\(^2\)

We can now ask how this older remedy compares with the sort of a

\(^{229}\) BALDUS, COMMENTARIA, supra note 146, to Code 4.44.2. nos. 21-24.

\(^{230}\) See D. COVARRUVIAS, supra note 93, II, iv, no. 3; P. PARISIUS, supra note 226, cons. XII, no. 85; P. DECIUS, CONSILIA cons. CLXXX no. 4 (Venice 1570).

\(^{231}\) D. COVARRUVIAS, supra note 93, II, iii, no. 4. Covarruvias himself was critical of this argument. Id. Covarruvias rejected these arguments.

\(^{233}\) E.g., id. at II, iv, no. 5; L. MOLINA, supra note 93, disp. 349 no. 14; P. PARISIUS, supra note 226, cons. XII, nos. 80-81; J. RUBEUS, CONSILIA cons. CI, no. 2 (Lyon 1540).

\(^{234}\) Perhaps the popularity of the Aristotelian theory encouraged jurists to find these ways of invalidating renunciations. In any event, they seem more reluctant to do so in the 18th century when the theory was on the wane. See, e.g., 2 J. CARPZOVUS, PROMPTUARIUM JURIS PRACTICUM to Laesio, no. 14 (Leipzig, Zittar 1727); W. LAUTERBACHIUS, COLLEGIUM THEORETICO—PRACTICUM XVIII, v, 19 (ed. nova, Tübingen 1763-1765); S. STRYKUS, USUS MODERNUS PANDECTARUM XVIII, v, 1 (7th ed. Halle a.d Saale 1730); J. VOET, COMMENTARIUS AD PANDECTAS XVIII, v, 17 (Halle 1778).

\(^{235}\) See text accompanying notes 227 supra.
remedy that was said to be desirable earlier in this Article. There is a rough correspondence. The older requirement of a deviation of one-half took rough account of two of the factors that a judge might consider in attempting to limit relief: how certain it is that a deviation actually occurred and how badly the injured party was hurt. The rules about the validity of renunciations took rough account of the third: how able the injured party was to protect himself.

Nevertheless, the older remedy took account of these factors only roughly. For example, certainty that a deviation occurred depends not merely on how large the deviation appears to be, but on the imperfection of the market. Estimates of the market price of wheat are more reliable than those of houses, and those of houses are more reliable than those of art works. Again, the harm done to the injured party depends not merely on the size of the deviation compared with the contract price, but on the wealth of the parties and the size of the purchase. A small deviation in the price of a major item that represents a large fraction of the buyer's wealth will injure the buyer more than a small deviation in the price of a large one. Similarly, the rules on the validity of renunciations took only rough account of the ability of the disadvantaged party to protect himself. Apparently, instead of asking directly about a party's abilities, the judge was merely to determine if the party fell within a group deemed to possess less than normal sophistication such as the uneducated or underage. More importantly, the ability of a party to protect himself was considered only in determining whether his renunciation of the remedy was valid. Finally, the judge was apparently to inquire separately about the size of the deviation and the ability of the party to protect himself, even though, as noted earlier, these questions are often best answered together.  

There was, however, an advantage in the roughness of the earlier remedy. It limited judicial discretion by providing a more definite rule. Supposedly, to see if relief should be given, the judge needed only to make a finding as to market value, multiply that value by .5, see if the remedy was renounced in the contract, and determine if the injured party belonged to one of the groups deemed to be less sophisticated. One who trusts clear rules more than he trusts judicial discretion might well prefer something like the older remedy, rough or not.

Nevertheless, in the twentieth century, the trend in many areas of law has been away from reliance on rigid rules and towards greater reliance on the judge. Thus, a modern remedy would probably allow the judge to limit relief by taking direct account of the certainty that there has been a deviation, the harm done, and the ability of the in-

236. See text preceding note 140 supra.
jured party to protect against that harm. It will now be seen that this is
the sort of remedy that French, German, and American courts have
been developing.

B. Modern Remedies

If one pays attention to what courts say rather than what they do,
relief for a disparity in price would seem to be an innovation. In
France, such relief is supposedly available only in special cases pre-
scribed by statute. In Germany, relief is supposedly available only
when some circumstance, in addition to the disparity in price, renders
the transaction immoral. In the United States, until recently, relief was
supposedly available only in equity and only when the disparity in
price evidenced fraud; recent cases that give relief because of the "un-
conscionability" of the price term are thought to have broken new
ground. But neither European nor American courts have been doing
quite what they have been saying.

In France, the courts have extended relief beyond the statutorily
prescribed cases by a series of fictions. The fees of certain profes-
sionals such as agents d'affaires have been opened to scrutiny on the
bizarre ground that the contract they make, called a mandat, is de-
scended from the Roman contract of mandatum which, as mentioned
earlier, was a gratuitous agency. Since the contract was once gratui-
tous, the courts supposedly have the right to review its terms for fair-
ness when a fee is charged. French jurists acknowledge that the
courts have simply carved out a new nonstatutory exception.

In other cases, the courts have "found" a violation of the normal
requirements for a valid contract. Fraud has been found when the only
evidence of it was that a naive art purchaser had paid too much to an
art critic whose reputation he trusted, or that a judgment creditor
sold his rights for a fraction of their value. Mistake has been found
where the only mistake was to agree to more rent than the poor condi-

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237. See text accompanying note 61 supra.

238. E.g., Judgment of Jan. 12, 1863, Cass. req., [1863] D.P. I 302; Judgment of May 28, 1913,

239. E.g., A. Rieg, supra note 178, at 195; B. Storck, supra note 157, at § 1614.

240. Seventeenth-century paintings appraised at 140,000 francs had been sold for 750,000
francs. The court stressed that the inexperienced buyer had placed particular confidence in the
no. 7435.

241. The judgment creditor relinquished for 1500 francs a judgment worth 60,000 francs. The
court noted that no one would do such a thing "without taking leave of his senses," and that
according to an expert report, he had been "in a state of depression." Judgment of June 2, 1930,
tion of the premises warranted. Those who sold personal property cheaply because of urgent need not caused by the buyer have sometimes been given relief for duress. A woman who paid a geneologist for information about an inheritance was said to have bought nothing, and hence to have made a contract without a cause, because the geneologist knew the information would reach her anyway. An eighty-year-old man who sold his property for trivial services from people who had "captured his confidence" was said to have sold for no price at all, and hence not to have sold. The true ground for relief in these cases is the disparity in price plus, most often, some circumstance indicating that the victim was hard pressed, ignorant, inexperienced, or trusting. Although the French courts do not consistently give relief in such cases, neither do they confine relief to the statutory exceptions.

In Germany, paragraph two of article 138 of the Civil Code provided originally that a transaction is void when one party has exploited the "necessity, indiscretion or inexperience" of another to obtain advantages in "striking disproportion" to the performance given in return. To make the provision harmonize with a criminal statute,

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242. The lessee had taken a villa on the Côte d'Azur for one month for 6000 francs. The court noted that the rent alone would permit him "to assume the premises were correspondingly desirable" and that he had been told the villa was comfortably equipped. However, the villa was poorly maintained and filthy, the furniture inadequate, and major construction work was going on nearby. Judgment of Nov. 29, 1968, Cass. civ., [1969] G.P. Jur. 63.

In a similar case, a lease was voided for what was called an error in "agricultural value." The lease was for a farm that required major work before it could be made profitable since the vineyards and orchards were in poor condition and much of the land uncultivated. The court noted that the lessee could not have understood the work necessary, that the lessor knew he needed property that could rapidly be put in order, and that the lessor had failed to make the "objective initial presentation" that would have informed the lessee of the difficulties. Judgment of May 4, 1956, Cass. soc., [1957] J.C.P. II no. 9762.

243. Duress was found where the tenants of a paralyzed old man threatened to discontinue their services to him unless he made them substantial gifts. Judgment of Jan. 27, 1919, Cass. req., [1920] S. Jur. I 198. After the war, there were a number of cases in which fugitives sold their property cheaply and were found to have acted under duress. E.g., Trib. cant. Cernay, [1947] G.P. Jur. I 90. Even before, the Law of April 29, 1916 allowed courts to revise the terms of contracts for rescue and salvage at sea, the courts had refused to enforce one-sided contracts on the grounds of duress. Judgment of Apr. 27, 1887, Cass. req., [1888] D.P. I 263.


245. Property worth 21,000 francs had been exchanged for a monthly payment of 100 francs and room and board for the rest of the old man's life and the expenses of his funeral. The court observed that he had known the beneficiaries of this contract only a short time and that the periodic payments were hardly worth more than the interest on the sum transferred. Judgment of Jan. 26, 1931, Cass. civ., [1931] G.P. Jur. 441. In a similar case, the court found a derisory price, and hence no price and no sale, when minors with the consent of their guardian had transferred a business for a price equal to one-tenth its yearly income. Judgment of May 3, 1922, Cass. req., S. Jur. I 310.

246. BGB art. 138(2).
247. STRAFGESETZBUCH [StGB] § 302a.
an amendment in 1976 changed the phrase "necessity, indiscretion or inexperience" to read "distressed situation, inexperience, lack of judgmental ability or grave weakness of will."\(^{248}\)

As mentioned earlier, German courts soon became uncomfortable with the requirement that the disadvantaged party have one of an enumerated set of weaknesses.\(^{249}\) One way of relaxing this requirement is to infer, when the disproportion is great, that the disadvantaged party was indiscreet or lacking in judgment or willpower; this has been done even in the absence of evidence that he displayed these traits on other occasions.\(^{250}\) More significantly, early in this century, German courts began to skirt the requirements of paragraph two by applying paragraph one of article 138, which simply says that transactions violating "good morals" are void.\(^{251}\)

The result, as already described, was a controversy over what requirements other than the presence of a striking disproportion would be necessary to obtain relief under paragraph one. The official position of courts and commentators is that the disproportion alone is not enough for relief, since then paragraph two would be superfluous. The extra element necessary is said to be that the advantaged party have acted reprehensibly by exploiting the precarious situation of the other party.\(^{252}\)

The merits of this position have already been discussed.\(^{253}\) As a practical matter, however, the result has been to create the sort of flexible remedy recommended earlier. When the disproportion is less striking, the court can apply paragraph two and insist on evidence of one of the enumerated weakness, or it can apply paragraph one and


\(^{249}\) See text accompanying note 182 supra.

\(^{250}\) A party need not show that he was suffering from some physical or mental disability or that he is generally inept or gullible. 1 Soergel, supra note 184, § 138 note 71 (by W. Hefermehl); see 1 J. Von Staudinger, supra note 184, § 138 note 103 (by H. Dilcher). When a shopkeeper sold on credit, to a twenty-two-year old, goods priced at 9547 marks, even though the young man's parents had advised the shopkeeper not to sell to the young man, and even though the shopkeeper knew that at the time of purchase that the young man lacked judgment, the Reichsgericht said that these circumstances suggested "indiscretion" and should not have been ignored by the lower court that denied him relief. "[I]ndiscretion is a lack of reflection, and a carelessness as to the consequences of one's transactions of which another is aware." Judgment of Apr. 18, 1905, Reichsgericht, [1905] JW 366, 366. In another case in which the disadvantaged party had signed a 38-page contract after barely a half hour's perusal, the court noted that the size of the disproportion itself could raise the question of "indiscretion" or "inexperience," and that the circumstances mentioned strongly implied indiscretion. Judgment of Mar. 14, 1929, Reichsgericht, [1929] JW 3161. As a practical matter, as Professor Dawson has observed, the greater the disproportion, the more willing the courts become to conclude there was indiscretion. Dawson, Unconscionable Coercion: The German Version, 89 HARV. L. REV. 1041, 1061 (1976).

\(^{251}\) See text accompanying notes 182-86 supra.

\(^{252}\) See notes 182-85 and accompanying text supra.

\(^{253}\) See notes 187-88 and accompanying text supra.
insist on evidence of a "precarious situation." When the disproportion is great, the court can apply paragraph one without looking very hard for such evidence. And, if necessary, the court can play the final trump by inferring reprehensible exploitation from the size of the disproportion alone. As a practical matter, the court rarely needs to do so since it can nearly always find some circumstances indicating weakness. For example, in the sale of a share in a business for a fraction of its value, the circumstance was the seller's need for ready cash.\textsuperscript{254} In the sale of laundry equipment for four times its value on heavy credit terms, it was the buyer's inexperience as shown by the fact that the seller had advertised the equipment as suitable for starting a home business, knowing that the ad would attract the inexperienced.\textsuperscript{255} Loans at exorbitant rates of interest have been struck down because the print was fine,\textsuperscript{256} the language was unclear,\textsuperscript{257} the monthly interest and total amount eventually due were disclosed but not the yearly interest rate,\textsuperscript{258} the borrower needed cash in a hurry,\textsuperscript{259} or the borrower could have given such security that he should have received a loan at more favorable rates.\textsuperscript{260} Leases have been struck down on the basis of some very general evidence that the lessee was inexperienced, combined with the fact that only an inexperienced person would have agreed to such a one-sided lease.\textsuperscript{261} By applying paragraph one, the court has gained a flexibility it would not have if it had to parse the requirements of paragraph two.

Although the catalog of weaknesses in paragraph two has been bypassed, the requirement of "exploitation" in paragraph two supposedly applies to paragraph one as well. The court and most commentators continue to say that the advantaged party must have known, or by gross negligence have failed to know, of the size of the disproportion and whatever other circumstances make the contract exploitive.\textsuperscript{262} However, the requirement has made virtually no difference in practice. The advantaged party's knowledge or gross negligence is not proved by the disadvantaged party; it is inferred by the court from the disproportion itself plus whatever other circumstances indicate weakness.\textsuperscript{263} Rarely, if ever, will a party who has taken undue advantage be able to escape by proving he used due care to avoid taking undue advantage,
or, at any rate, that he was moderately but not grossly negligent. As Hackl has observed, it is almost a fiction to say there is such a requirement. Thus, if one looks to what the courts do rather than what they say, their remedy is much like the one described earlier. It gives relief where there is a disproportion, but limits relief by taking account flexibly of the harm done and the ability of a party to protect against it.

In American law, a similar remedy seems to be emerging as part of the doctrine of "unconscionability." As mentioned earlier, the Uniform Commercial Code has now authorized courts, whether at law or in equity, to give relief from "unconscionable" sales, and Section 208 of the Second Restatement of Contracts contains a similar provision applicable to contracts in general. Both provisions give the courts more opportunity for selective surgery than the German remedy which simply voids offending transactions. The American courts may deny enforcement, strike an unconscionable clause, or "so limit" the application of the clause as to "avoid any unconscionable result."

In several well known cases, the price term itself has been found unconscionable. In Jones v. Star Credit Corporation, for example, relief was given where a freezer worth $300 had been sold for $900 plus over $300 in credit charges. In Frostifresh v. Reynoso, the same result was reached where a refrigerator that had cost the seller about $350 was sold for $900 plus about $250 in credit charges. In American Home Improvement, Inc. v. MacIver, the defendant had agreed to pay about $1750 plus $800 in credit charges for the purchase and installation of fourteen windows, a door, and a coating for the sidewalls of a house. The contract was said not only to violate a statute requiring disclosure of credit charges, but to be unconscionable because the goods and services were worth "far less" than the price.

Such cases have attracted attention, both because they deal with the unconscionability of the price term and because they seem to involve little more than a gravely abnormal price term. Admittedly, in the three cases just mentioned the buyer was in a somewhat weak position since he was dealing with a professional salesman who, in at least one

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265. See text accompanying note 167 supra.
of these cases, was visiting the buyer in his own home.\textsuperscript{271} In Jones, the buyer also happened to be poor and on welfare;\textsuperscript{272} in Frost,\textsuperscript{fresh} he was poor and spoke only Spanish, and although the salesman spoke to him in Spanish, the contract was in English.\textsuperscript{273} Nevertheless, one is reminded of the German opinions where, when the disparity in price is great enough, relief is given although the evidence of the precarious situation of the disadvantaged party is scanty.\textsuperscript{274} The American doctrine may thus come to operate much like the German doctrine, with definite evidence of some reason the party could not protect himself being demanded when the disproportion is smaller but not when it is very great.

One reason for expecting the new doctrine of unconscionability to operate this way is the way the old doctrine of unconscionability actually did operate. Only in a very few cases was it plausible to explain relief by saying that the disproportion was evidence of fraud. The victim of fraud in any normal sense of the term will usually know what the other party has done to defraud him. The other party can then deny it, and the disproportion will be evidence of whom to believe. In a few cases there actually was such a dispute, for example, over whether a sheriff's sale has been collusive, and the price paid can plausibly be said to be evidence of the fraud.\textsuperscript{275} In most of the cases, however, there was no charge of fraud in the ordinary sense that facts had been concealed or misrepresented.

In many of these cases, as one might expect, there was not merely a disproportion but some definite reason why the disadvantaged party had difficulty protecting himself. He was drunk,\textsuperscript{276} ill,\textsuperscript{277} feebleminded,\textsuperscript{278} a drug addict,\textsuperscript{279} or the contract was with a trusted business

\textsuperscript{271} Jones v. Star Credit Corp., 59 Misc. 2d at 190, 298 N.Y.S.2d at 264-65.
\textsuperscript{272} \textit{Id}.
\textsuperscript{273} 52 Misc. 2d at 26, 274 N.Y.S.2d at 757.
\textsuperscript{274} See text accompanying notes 253-61 supra.
\textsuperscript{275} \textit{E.g.,} Byers v. Surget, 60 U.S. (19 How.) 303 (1856) (collusion suspected in sheriff's sale); Clement v. Reid, 9 Miss. (9 S. & M.) 535 (1848) (same). Similarly, in State Fin. Co. v. Smith, 44 Cal. App. 2d 688, 112 P.2d 901 (2d Dist. 1941), the disproportion in price might have been taken as evidence of misrepresentations as to the condition of a truck; in Paratore v. Perry, 239 Cal. App. 2d 384, 48 Cal. Rptr. 682 (2d Dist. 1966), the disproportion might have been taken as evidence of misrepresentations that repairs on neighboring property would damage that of the seller. In both cases, however, it is hard to tell how much significance the court attached to the possibility of misrepresentation.

\textsuperscript{276} \textit{E.g.,} Babcock v. Eagle, 58 Mont. 597, 194 P. 137 (1920). Shading off from these cases are others in which the disadvantaged party was a chronic drinker but perhaps not drunk at the time of contracting. \textit{E.g.,} Kukuloki v. Bolda, 2 Ill. 2d 11, 116 N.E.2d 384 (1954).

\textsuperscript{277} \textit{E.g.,} Strauss v. Madden, 219 Md. 535, 150 A.2d 230 (1959).

\textsuperscript{278} \textit{E.g.,} Brooke v. Berry, 2 Gill 83 (Md. 1844).

\textsuperscript{279} \textit{E.g.,} In re Vought's Estate, 76 Misc. 2d 755, 351 N.Y.S.2d 816 (Surr. Ct. 1973) (drug addict, alcoholic, and ill from pancreatitis and diabetes); Leathers v. Deloach, 140 Tenn. 259, 204 S.W. 633 (1918) (morphine addict).
partner or friend on whose judgment the disadvantaged party relied;\textsuperscript{280} he was in urgent need of cash to pay off creditors;\textsuperscript{281} or the subject of the agreement was something such as mineral rights, which no one but an expert would be able to appraise correctly.\textsuperscript{282}

In other cases, there was evidence of some kind of disability, but one which people normally manage to surmount: a party was twenty-one and selling land,\textsuperscript{283} or seventy and selling a patent,\textsuperscript{284} he had been drinking but it is not clear how much;\textsuperscript{285} he did not know his equity in the property only because he did not make a simple calculation.\textsuperscript{286}

In other cases, the disadvantaged party seems to have been under no disability except his failure to know, or in one case, to remember the market price. Relief was given to a physician who had exchanged property worth $11,800 for property worth $15,000 but subject to a $15,000 mortgage which he had agreed to pay.\textsuperscript{287} Relief was given to the operator of an automobile repair shop who had acquired a house valued at $12,000 and then sold it twelve days later for $2,400 to a machinist with a sixth-grade education who had never owned real estate before.\textsuperscript{288} Similarly, relief was given when a trustee sold land for one-tenth its value,\textsuperscript{289} when the owner of a fruit farm parted with it for property worth little more than its mortgage, which he also assumed,\textsuperscript{290} and when the owner of a four-family flat exchanged it for a vacant lot in which he would have an equity worth half the equity he had given up.\textsuperscript{291} In 1914, a telephone company was relieved of a contract it had made with a railroad to install telephones in its depot and provide telephone service forever for free where the only consideration given by the railroad was the permission to install.\textsuperscript{292}

Thus, long before Jones and Frost/\textit{fresh}, in practice if not in theory, courts were willing to give relief when the exchange was sufficiently one-sided, even when there was little or no evidence that the disadvantaged party could not protect himself. It is hard to tell how consistently the courts gave relief. Still, it is striking that in the great

\begin{itemize}
\item \textsuperscript{280} E.g., Sizemore v. Miller, 196 Or. 89, 247 P.2d 224 (1952); Hall v. Perkins, 3 Wend. 626 (N.Y. 1829).
\item \textsuperscript{281} E.g., Lampley v. Pertuit, 199 So. 2d 452 (Miss. 1967).
\item \textsuperscript{282} E.g., West Ky. Coal Co. v. Nourse, 320 S.W.2d 311 (Ky. 1959).
\item \textsuperscript{283} E.g., Clitherall v. Ogilvie, 1 S.C. Eq. (1 Des.) 250 (1792) (sale by 21-year-old); Gasque v. Small, 21 S.C. Eq. (2 Strobh. Eq.) 72 (1847) (purchase by 21-year-old).
\item \textsuperscript{284} E.g., Gillette v. Metzgar Register Co., 243 Mich. 48, 219 N.W. 644 (1928).
\item \textsuperscript{285} E.g., Rupniewski v. Miazga, 299 Pa. 190, 149 A. 193 (1930).
\item \textsuperscript{286} E.g., Nelson v. Nelson, 57 Wash. 2d 321, 356 P.2d 730 (1960).
\item \textsuperscript{287} State Security & Realty Co. v. Shaffer, 176 Mich. 639, 142 N.W. 1058 (1913).
\item \textsuperscript{288} Miller v. Coffeen, 365 Mo. 204, 280 S.W.2d 100 (1955).
\item \textsuperscript{289} Wright v. Wilson, 10 Tenn. (2 Yerg.) 294 (1829).
\item \textsuperscript{290} Koch v. Streuter, 232 Ill. 594, 83 N.E. 1072 (1908).
\item \textsuperscript{292} Great N. Ry. Co. v. Sheyenne Tel. Co., 27 N.D. 246, 145 N.W. 1062 (1914).
\end{itemize}
bulk of cases in which relief was denied and specific performance of the contract was granted, the contract was not simply a one-sided exchange.

In many cases, the transaction was not purely an exchange: the party seemingly disadvantaged had intended to confer a benefit on the other because of friendship or family ties or gratitude.\textsuperscript{293} In other cases, the contract was not shown to be one-sided. Sometimes the court found that the consideration was adequate\textsuperscript{294} or noted that the evidence of value was conflicting.\textsuperscript{295} In other cases, although the result of the contract was one-sided, the contract had involved a risk, such as uncertainty about title,\textsuperscript{296} about how long a person would live,\textsuperscript{297} about the

\textsuperscript{293} E.g., Eyre v. Potter, 56 U.S. (15 How.) 42, 60 (1853) (widow conveyed property inherited from her late husband to his children out of “motives of affection”); McCargo v. Steele, 160 F. Supp. 7 (D. Ark.), aff'd, 260 F.2d 753 (8th Cir. 1958) (old man conveyed property to his secretary, intending to be “generous”); Engle v. Engle, 209 Mich. 275, 176 N.W. 547 (1920) (admittedly unequal division of property among heirs); White v. Thompson, 21 N.C. (1 Dev. & Bat. Eq.) 493, 494 (1837) (father sold land to son out of “natural love and affection”); Knobb v. Lindsay, 5 Ohio 468 (1832) (prisoner conveyed land to a friend who had paid his bail); Fripp v. Fripp, 14 S.C. Eq. (Rice Eq.) 84, 107 (1839) (man assigned his share of his brother's estate to his sister-in-law as a “kind and liberal action”); Sarter v. Gordon, 11 S.C. Eq. (2 Hill Eq.) 121, 139 (1835) (slaves previously purchased from the buyer's father were resold to the buyer at a low price; the seller was supposedly acting out of “humanity”). Sometimes, however, the very closeness of the relationship may lead a court to deny enforcement out of a fear that undue influence was used.\textsuperscript{298} See In re Estate of Johnson, 233 Iowa 782, 784, 791, 10 N.W.2d 664, 666, 669 (1943) (decedent had married his housekeeper, and they made a joint and mutual will, providing that each would inherit the other's property; his property was substantial, hers insignificant). Moreover, if a contract looks too much like a gift, a court may apply the rule that promises of gifts cannot be specifically enforced. E.g., Frank v. Gaylord, 119 N.J. Eq. 427, 182 A. 614 (1936).

\textsuperscript{294} E.g., Qualyle v. Mockert, 92 Idaho 563, 447 P.2d 679 (1968) (trial court found consideration adequate); Scott v. Hobinck, 188 Iowa 155, 174 N.W. 1 (1919) (same). In other cases, the court conceded there might be some disproportion, but said it was not very great. E.g., Hamilton v. Hamilton, 162 Ind. 430, 70 N.E. 535 (1904); Herdeman v. Berge, 18 Tenn. (1 Yerg.) 202 (1836); Simpson v. Green, 231 S.W. 375 (Com. App. Tex. 1921). In still other cases, the court observed that there was no proof that the consideration was inadequate. E.g., Macrum v. Embry, 291 Ala. 400, 282 So. 2d 49 (1973); Hendler Creamery Corp. v. Lillich, 152 Md. 190, 136 A. 631 (1927); McManus v. Boston, 171 Mass. 152, 50 N.E. 607 (1818); Raney v. Barnes Lumber Corp., 195 Va. 956, 81 S.E.2d 578 (1954).


\textsuperscript{296} E.g., Sutherland v. Sutherland, 187 Kan. 599, 358 P.2d 776 (1961); Osgood v. Franklin, 2 Johns. Ch. 1 (N.Y. Ch. 1816).

\textsuperscript{297} An example is a contract in which an old person promises a large sum in return for care for life. E.g., Henderson v. Fisher, 236 Cal. App. 2d 468, 46 Cal. Rptr. 173 (1st Dist. 1965); Olson v. Rasmussen, 304 Mich. 639, 8 N.W.2d 668 (1943); Green v. Thompson, 37 N.C. (2 Ired. Eq.) 365 (1842). These cases often involve two other considerations as well: (1) often care is to be provided by a relative or friend, as in the three cases just cited, and so the payment may be intended in part as a gift; (2) often it is hard to judge the burdens that the agreement imposes on the person rendering care and thus it is hard to tell if the contract is one-sided. In Green, the court remarked that in view of the personality and drinking habits of the man to be cared for, the service may have been cheap at the price. Id. at 369.
size of mineral deposits, or about the value that land would have in the future. In these cases the contracts were not shown to be actuarially unfair at the time they were made. In other cases, the party seemingly disadvantaged had been seeking some side benefit in addition to the price he paid. He sold stock to his employees so they would have an interest in his company's welfare; he sold land to a railroad so that the value of his remaining land would rise; or he sold a corner of his farm to a service station so that he would not have to drive to town for repairs. In still other cases, the court was not in a position to determine the value of the things exchanged. For example, when two railroad companies agreed that each could build tracks over the other's rights of way, and one later objected that the contract was one-sided, the court noted that "when the contract, as in this case, furnishes no standard or measure for estimating the relative advantages, it would be extremely hazardous for the court to attempt a solution."

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298. E.g., Heyward v. Bradley, 179 F. 325 (4th Cir. 1910) (owner agreed to sell phosphate deposits for $20,000 if the buyer elected to purchase after making tests; specific performance granted despite the discovery of deposits worth $70,000, since the buyer paid $2,500 for tests which would have been a "total loss" if paying quantities of ore had not been found).

299. See Chicago Title & Trust Co. v. Illinois Merchants' Trust Co., 329 Ill. 334, 160 N.E. 597 (1928). Nevertheless, a few words of caution are in order about the way courts occasionally handle contracts involving a risk. Occasionally, they have simply neglected to take account of the risk and denied specific performance because the end result was one-sided. E.g., Marks v. Gates, 154 F. 481 (9th Cir. 1907), where a prospector and a backer entered into a grubstake contract, the prospector to receive $1,000 and the cancellation of a $11,225 debt, the backer to receive a one-fifth interest in any property the prospector might acquire in Alaska; specific performance was denied when the prospector acquired property worth $750,000. Sometimes a court will go to the opposite extreme of refusing to examine whether the consideration was inadequate once it has observed that the contract did involve a risk. E.g., Marsh v. Lott, 8 Cal. App. 384, 97 P. 163 (2d Dist. 1908) (3-month option to buy land for $100,000 given for 25$); Chicago Title & Trust Co. v. Illinois Merchants' Trust Co., 329 Ill. 334, 160 N.E. 597 (1928) (no investigation of terms of option); see Adams v. Peabody Coal Co., 230 Ill. 469, 82 N.E. 645 (1907) (option for $1, but the court enforced it without noting that options involve a risk). Sometimes courts have tried to assess the actuarial fairness of the terms, but have gravely overestimated their own abilities. See, e.g., Wecks v. Pratt, 43 F.2d 53 (4th Cir. 1930), where the court refused to enforce a sale for $100,000 of a formula that would make automobile fuel out of water, observing that the formula must be far more valuable than that. Sibley, J., concurring in the result but not on this point, noted that the discovery was of "undemonstrated value." 43 F.2d at 57. Finally, the risk has occasionally been so great that a court has denied specific performance on the ground that the contract amounted to an "enterprise of chance." E.g., Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir.), cert. denied, 323 U.S. 769 (1944) (party agreed that in return for $5,000 he would pay $150,000 for some worthless bonds if he were successful in prosecuting some dubious claims against the government).

300. E.g., Kludt v. Counett, 350 Mo. 793, 168 S.W.2d 1068 (1943); see Larson v. Superior Auto Parts, Inc., 275 Wisc. 261, 81 N.W.2d 505 (1957).


303. South & N. Ala. R. Co. v. Highland Ave. & B.R. Co., 98 Ala. 400, 405, 13 So. 682, 684 (1893); see Osborne v. Locke Steel Chain Co., 153 Conn. 527, 532, 218 A.2d 526, 530 (1966) (enforcement of contract to give retiring chairman of the board $15,000 per year for life in return for his agreement to give advice and not to compete; the court observed there was no way to
there are cases in which the court granted specific performance but in which no evidence showing a disproportion appears in the court’s opinion.304

There is another class of cases in which the contract was enforced although it was intended purely as an exchange and there was evidence showing a disproportion. In these cases, however, some procedure had been followed that was supposed to produce fair terms. For example, the property was purchased at a sheriff’s sale,305 or the price had been determined by arbitrators selected by the parties.306 Thus, the courts had a good reason for not allowing the procedure to be called into question.

Thus, even though courts have not invariably given relief when an exchange is gravely one-sided, they have done so more often and more consistently than the remarks of commentators, or their own remarks, would lead one to suppose. Admittedly, the relief most often granted was not rescission but a denial of specific performance. In theory, the advantaged party still had the right to recover damages. But one can be sceptical about how often he succeeded. Since the merger of law and equity, he would normally have to seek specific performance and damages in one unified proceeding. Usually, the very evidence presented to show that the contract was not unconscionable would also show that his damages were small. Furthermore, since the damage claim would require a jury trial, advantaged parties may have been understandably reluctant to seek damages at all. In any event, one

establish that these services were not worth that amount); R.L. Smith v. Pickwick Elec. Coop., 212 Tenn. 62, 367 S.W.2d 775 (1963) (enforcement of contract in which landowners receive service from electrical cooperative but must allow the cooperative to place electric lines under their land without extra payment).


Since the courts did not stress the need for such a finding, these cases might be taken to mean that specific performance would have been granted even if there had been a finding that the contract was one-sided. Indeed, in the cases just cited the courts say that inadequacy of consideration, without more, will not defeat specific performance. Hotze v. Schlanser, 410 Ill. at 270, 102 N.E.2d at 133; Ullsperger v. Meyer, 217 Ill. at 267, 75 N.E. at 484; Payne v. Clark, 409 Pa. at 561, 187 A.2d at 771. What a court says it will do, however, and what it actually will do when confronted with convincing evidence of a one-sided contract are two different things. If one looks merely at the holdings of these cases, rather than to the language of the opinions, they can be read narrowly to mean merely that the person objecting to a one-sided contract must provide evidence of its one-sidedness.

305.  *E.g.*, Erwin v. Parham, 53 U.S. (12 How.) 196 (1851); Delafield v. Anderson, 8 Miss. (7 S. & M.) 630 (1846). Sometimes, however, purchasers at a sheriff’s sale have been denied specific performance when the disproportion was particularly great or where there was suspicion of fraud. *E.g.*, Schaefer v. Moore, 262 S.W.2d 854 (Mo. 1953); Modisett v. Johnson, 2 Blackf. 431 (Ind. 1831) (alternative holding).

scholar has found only two cases in which a party who had failed to obtain specific performance still managed to obtain damages.\textsuperscript{307} Before the merger of law and equity, a party could, in theory, seek damages in a separate action. Again, however, much of his evidence that damages were high might also show that the contract was very one-sided and might, therefore, alienate the jury making the award. One cannot know how many plaintiffs recovered how much. Still, if they had been flocking into the courts, one would expect to hear something about it in the appellate opinions. As noted earlier, however, very few of the cases in which appellate courts say they will refuse to examine the adequacy of consideration actually involve an exchange where the consideration was inadequate.\textsuperscript{308}

In France, Germany, and the United States, then, courts have been giving remedies when a contract is one-sided. Unlike the older remedy of \textit{laesio enormis}, these modern remedies give the courts considerable flexibility in deciding how to limit relief. Particularly in France and the United States, one cannot tell how consistently these remedies have been given. One could also wish that the courts were more self-conscious about the limitations they impose on relief. Generally speaking, the greater the deviation and the more obvious the weakness of the disadvantaged party, the more likely it is that the courts will give a remedy. But one would prefer a closer examination of how certain it is that a deviation occurred, how gravely the injured party was harmed, and how able he was to protect himself. What is needed, therefore, is neither a return to the older remedy nor, except possibly in France, the creation of new ones.\textsuperscript{309} What is needed is a more consistent and thoughtful use of the remedies that courts are now giving.

\textbf{CONCLUSION}

Thus, the primary aim of this Article is not to change what we are doing but to enable us to explain it. Any satisfactory account, it has been seen, must explain why the deviation in the contract price is an evil to be corrected; it cannot merely identify a flaw in the way the contract was formed or appeal to unelaborated notions of "equity." This Article has suggested a reason why the deviation is an evil: performances exchanged ought to be equal in value so that neither party is enriched at the other's expense.

It may seem odd that to arrive at this answer, this Article has canvassed such a range of authors living at different times, each with a

\begin{footnotesize}
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\item \textsuperscript{308} See text accompanying notes 34-54 supra.
\item \textsuperscript{309} See text accompanying note 201 supra.
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somewhat different idea. Although Aristotle believed that exchange requires equality as a matter of commutative justice so that neither party is enriched at the other’s expense, the idea of equality presented here is not quite that of Aristotle. While he may have believed that equality was preserved at the market price, he did not work out the consequences of that idea. Some of the consequences were eventually worked out by the scholastics and the natural lawyers, who also reorganized Roman law to reflect the distinction between contracts of exchange and liberalities. Yet the idea of equality presented here is not quite the same as theirs. Without the insights of modern economics, they could not be clear about how or when the producer would recover his costs or why the market price should govern even if he did not. Moreover, none of these ideas of equality was held by the Glossators, who worked out the remedy of *laesio enormis*, or by the modern courts, who worked out more flexible remedies. Still, although it would be historically false to think that all the philosophers and jurists and courts who have worried about a one-sided exchange had the same idea in mind, one can still learn from each of them about a problem they all confronted. It is like the six blind men and the elephant. The historical experience of each blind man was different. But if one considers what each of them knew, one can see what an elephant might be.