Winter 2010

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GIFTS: A STUDY IN COMPARATIVE LAW[*]

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I. INTRODUCTION

Richard Hyland has written a masterpiece of comparative law scholarship. GIFTS: A STUDY IN COMPARATIVE LAW (2009) is a work certain to become a landmark in the extraordinary interdisciplinary conversation about gift giving that has been building to Hyland's crescendo throughout much of the preceding century. Hyland begins the book with the admission that it took him twenty years to complete it. In an era in which law review articles get shorter with each issue and the 800-word op-ed piece is the vehicle of choice for considered debate about major public issues, the idea of anyone devoting such a staggering amount of time to a single project is difficult to contemplate, notwithstanding the resulting two-inch-thick volume in 8-point type. A mere cursory perusal of the book, however, reveals a massive work of such erudition that the length of time Hyland devoted to his endeavor seems neither surprising nor, indeed, unreasonable. This work not only manages to do yeoman's work for the practicing attorney—providing six chapters that survey and compare the essential aspects of the substantive law of gifts in three common law and five civil law jurisdictions—but is also likely to change the terms of future discussions about the gift among comparativists and other scholars in the humanities and social sciences.

Gifts will serve the practicing lawyer well, especially one with a cosmopolitan client base. The bulk of the work consists of six chapters—"The Legal Concept of the Gift"; "Gift Capacity"; "The Gift Promise"; "Making the Gift"; "Revocation"; and "The Place of the Gift"—that survey the law in the common law jurisdictions of England, the United States, and India, as well as the civil law jurisdictions of Germany, Italy, Spain, France, and Belgium. In addition, Professor Hyland frequently gilds the lily with

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[*] RICHARD HYLAND, GIFTS: A STUDY IN COMPARATIVE LAW (2009).

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Roman, medieval, and early modern antecedents, especially where the law encompasses exception layered upon exception, only explicable—Hyland argues—as the excrescence of centuries of legislative tweaking.

But despite the undoubted merits of these six chapters treating the substantive law, Hyland's first chapter—"The Context of Gift Law"—is what lends intellectual force to the substantive material and ultimately makes the work thoroughly compelling. Professor Hyland brings a sophisticated comparativist methodology to bear on the incoherence, indeed the myriad ironies, that permeate the substantive law governing the giving of gifts. His point of departure is Marchel Mauss's ground-breaking 1924 monograph, *Essai sur le don* (translated as *The Gift* (1954)), which argued that the gift is embedded in—and parasitic upon—numerous social institutions, including religion, morality, economics, and aesthetics. Hyland takes up the mantle of Mauss and presses forward, using the massive research he has assembled to argue that gift giving is above all else a social practice that, like language, emanates from the social bedrock fully formed without the law (as distinct from social custom). Because the gift is born independently of the law and flourishes outside of it, gift giving does not fit easily under any legal rubric. Furthermore, not only does the practice of gift giving have little need for the law, but the law that is ultimately brought to bear on it—the private law—is formulated to facilitate market-related activities. And the primary legal vehicle for market-based activity is the contract. Unsurprisingly, then, the private law subsumes the gift within as an afterthought, defined maladroitly, usually by reference to the contract—often as that social interaction that fails to qualify as a contract (for example, under the common law, where a gift is a transfer that lacks consideration).

In organizing the material, Hyland declines to follow the typical comparative law method of dividing legal systems into "families" and then comparing the characteristic representatives of each family. Here, he offers, this approach would be unproductive. With respect to the particulars of the law of gifts, major variations occur within "families," and not between them. Nor does he undertake to examine all facets of the law of gifts. Ultimately, Hyland is interested in uncovering the attitude of each legal system toward the practice of gift giving. Accordingly, his study focuses on such topics as capacity, form, and revocation—aspects of the law most revelatory for his purposes.

As for the eight jurisdictions he covers, Hyland describes his selection as "pragmatic," limited to those whose languages he understands. And where civilian systems are concerned, he has focused on those in which he has been trained and for which there are ample resources in American law libraries. Fortunately, in the case of Professor Hyland, these constraints are

modest indeed. Professor Hyland's facility with languages, ancient and modern, together with his legal training on the Continent render him uniquely qualified to produce a work of extraordinary breadth.

As erudite as this work is, however, the material remains thoroughly accessible. Written in prose that is a model of concise lucidity, the material is readily digested, consumed in chunks either large or small. The material will be useful to someone who picks up the book and reads a section or two, seeking an answer to a particular legal question. But the book is ultimately a page-turner and anyone who absorbs one section is likely to succumb to its richness and turn to the beginning, reading the book as it ultimately demands to be read—from cover to cover.

II. LIKE LANGUAGE: GIFT GIVING AS SOCIAL PRACTICE

In less scholarly hands, the introductory chapter to this work might have been tossed off in a few enticing remarks, a mere provocative prelude to a work devoted to the niceties of the law of gifts per se. Fortunately, Richard Hyland offers us far more. Hyland's first chapter, "The Context of Gift Law," could stand alone as a bona fide treatise in its own right. Instead, this rich introit resonates deeply to facilitate our insight into one of the most complicated fields in the private law. A body of law that, according to Professor Hyland, is profoundly ironic and ultimately incoherent, the law of gifts does not define so much its object as struggle with it as a thing apart. Whether in the common law or the various civil law regimes examined in this ambitious work, the law of gifts, Professor Hyland points out, is little more than a litany of case-specific judgments that "boil down" to a maze of rules and exceptions.

Interestingly, Professor Hyland begins the journey into this material by reminding us that gifts were outlawed in the French Revolution as subversive of the new order. When the National Assembly attempted to abolish primogeniture (so-called feudal tyranny at the hearth), the subversive potential of the gratuitous *inter vivos* transfer of property—the gift—quickly became apparent. When the paterfamilias became unable to secure patriarchal entitlements to his oldest son at death, he transferred his rights to his scion during life, thereby undermining not only the new domestic order, but also the pursuit of equality throughout the larger body politic. In 1793, the French legislature responded to this practice by making the *inter vivos* transfer of property within the family illegal.

Whatever the progressive aspirations of the revolutionaries, Professor Hyland discerns in this particular act the distrust of gifts that has haunted European law since at least the second century B.C.E. with the enactment of the *lex Cincia*. "Gift giving and Western law have been in conflict from the

beginning," Hyland asserts. Historically, regardless of the jurisdiction, the law has been uncomfortable with, perhaps even hostile to, the gift.

Such distrust is born of a number of factors, according to Hyland, all of which underscore the extra-legal character of gift giving. Gift giving is first and foremost a social practice that, like language, percolates up from the social bedrock unabetted by the law and its adjudicative apparatus: "Like linguistic rules, the norms governing gift giving are enforced among native speakers without being promulgated, often without a conscious understanding that the speakers are following rules." A comparison to the institution of contract underscores Hyland's point: While the normative basis of the contract may be parasitic on the moral (and extra-legal) practice of promise-keeping, the contract is distinct from the promise in that the contract is legally enforceable. For any contract, the apparatus of the law must be available to protect the first performer. In contrast, gift giving as a practice can flourish even if subject only to autonomous and extra-legal norms and enforcement mechanisms. "The giving of gifts, perhaps more than any other field governed by the private law, is already structured by customary norms before it becomes a legal institution." Born independently of the law and flourishing outside of it, gift giving is not easily subsumed within any legal rubric.

But, for Professor Hyland, the practice of gift giving does not merely flourish outside the law, it flourishes despite it. In Western legal systems, the world of the law and the world of the gift exist for different purposes; indeed, they occupy different realms. Thus, when the categories of the law are overlaid on the practice of gift giving, the fit can be only poor and confusion inevitable. According to Hyland, private law is formulated for the market-related activities about which it is chiefly concerned. The mirror of the market in the law is the law of contract. Therefore, when traditional private law concepts subsume the gift within the law, the gift is defined by reference to the contract—as that social interaction that either fails to qualify as a contract (for example, under the common law where a gift is a transfer that lacks consideration, the essential requirement for contract formation) or qualifies as a contract, albeit as a special instance (for example, the promise to make a gift, which is, absent reliance, unenforceable for lack of consideration). In short, where the primary purpose of the private law is to facilitate the market, the gift enters as an afterthought at best.

If the gift is subsumed within the private law only as something alien to it, it can come as no surprise that the primary response to the gift by the law has been to try to restrict it. The prototypical private law transaction entails an explicit, rationally self-interested quid pro quo. If the prototypical transaction is based on rational self-interest, then the urge to give something

away for nothing is inexplicable. Indeed, the gift can be seen only as idiosyncratic, even aberrant. The law responds by focusing primarily on those gratuitous transactions that, from the point of view of exchange in the marketplace, provide grounds for concern. At times, the restriction is paternalistic, seeking to protect individuals from the urge to give away their property, invoking (for example) considerations of competency, especially when the gift is large. But, in the final analysis, Western gift law is a critique of gift giving. The law can offer only the perspective of individual self-interest on activities embedded in the web of social custom.

What Western law has never done is come to terms with the fundamentally different social dynamic governing the gift. For insight into that which the law has never addressed—the essential nature of the social practice of gift giving—Hyland turns to a literature in which he is equally at home—foundational cross-cultural and comparativist work in the social sciences by such scholars as Emile Durkheim, Bronislaw Malinowski, Claude Lévi-Strauss, and Thorsten Veblen. Notwithstanding the sophistication of this material, however, Hyland does not suggest that the gift presents anything but a challenge, whatever the discipline, to anyone who would attempt to develop a coherent account of the practice. "The gift [entails] a bewitching and indecipherable unity of opposites and contradictions." Even though the gift is altruistic, directed at the well-being of others, even involving sacrifice, it can also serve the donor in the way of "self-promotion, fame, and advancement." Moreover, the gift presents "the virtually incomprehensible intermingling of freedom and obligation." Any gift must be an act of the donor's free will and cannot be compelled. Nevertheless, social custom prescribes complex rules, making many gifts incumbent upon the donor. Even if social science has recognized in the gift the "paradoxical relationship between gratuitousness, on the one hand, and social obligation, on the other," not even social science has satisfactorily cracked the "riddle of the gift." For anyone devoted to the study of the law and interested in the law of gifts, all that can be said is that, presently, for any Western legal regime, the gift serves as a Rorschach test with respect to certain fundamental values: "The way each system chooses to order gift giving, and especially the extent to which it favors or restricts the process, speaks to that system's understanding of gratuitous action and its vision of social relationship."

For Professor Hyland, the law of gifts, as it currently stands, reveals as paradigmatic for Western law those social relationships that are framed by the market and lived out there. Consequently, an expectation of rational, self-interested action becomes the lens through which not only market behavior is understood but all socially significant human behavior is validated. Accordingly, gifts are marginalized, relegated to the intimate world of the

family (and at times, as in the French Revolution, even deemed subversive), because gift giving presents a direct challenge to the claim that self-interested action informed by means-end rationality is the paradigmatic social behavior. As a consequence of this marginalization, not only do we overlook other, less linear insights into the market (such as the constitutive role of gift giving in fostering mutual trust, an essential background condition of quid pro quo exchange), but our understanding of all social relationships suffers.

Professor Hyland maintains that, to unpack the riddle of the gift, we have no choice but to go to the essence of social relationship in a liberal society and investigate how individual agency operates within societal forms. Then the gift can be seen for what it is—both a voluntary act and a gesture, the full import of which only can be discovered by interpreting it within a larger social practice. At that point our vision of the market will also become more complex.

III. SUBSTANTIVE LAW OF GIFTS

When Professor Hyland turns to the substantive law of gifts, he does a remarkable job of bringing order to a body of law that earlier in his book he has prepared us to expect to be hostile to the practice of gift giving, serving instead to mirror (and validate) other, more fundamental social values. Indeed, even within the law of a particular legal regime, we are prepared to find little coherence. Nevertheless, even though we expect few tidy analogues as we move from jurisdiction to jurisdiction, Professor Hyland points out those that are present and, when functional equivalents exist, juxtaposes them. Always methodical, he brings a fine intelligence to the material, content at times just to set the law out, without demanding (or imposing) more rigor on it than it will bear.

In each of his six chapters concerning the substance of the law, after first broadly framing the aspect of the law to be addressed there, Professor Hyland divides the material into sections and then moves in each section (or subsection) seriatim through the selected jurisdictions, often providing the Roman, medieval, and early modern legal antecedents of current rules. This addition of historical materials not only enriches the work but, as he points out, at times sense can be made of contemporary law only by locating it historically. "[T]wo thousand years of legislation have left some legal systems with an historical accumulation of rules, exceptions, and exceptions to exceptions . . .," Professor Hyland explains. To the extent legal systems legislate against this background, the tendency is to make corrections that consist of "highly subtle variations."

An outline of almost any section or subsection of Professor Hyland's work would serve beautifully to illustrate the depth and breadth of his expertise as well as the organization and presentation that he brings to the material. In his chapter "Making the Gift," the section on form requirements—the need to make a gift in a particular way—is simply one of many possible examples. Hyland begins with an historical prelude of a few pages (having already established the importance of form requirements in an earlier chapter where he has explained that they serve in some legal regimes to indentify a transfer as a gift). Because he admonishes the reader at the outset that the imposition of form requirements can frustrate donor intent, we are not surprised when, as we move through the eras, we see the pendulum swing, with form requirements in the ascendency in some eras and requirements loosening (thereby to empower the donor) in others.

Hyland begins with the Romans. The *lex Cincia* imposed no universal form requirements for the execution of gifts (the necessary mode depending upon the type of property being transferred), but in the early fourth century C.E., the Emperor Constantine, responding to the pressure to bring order to diverse practices throughout the Roman Empire, promulgated a single set of requirements for all gifts (and also made the gift a bilateral act to be executed immediately so that title transferred immediately). In the sixth century, the Emperor Justinian pushed back against the Constantinian requirements, necessitating no writing, requiring registration only for larger gifts, and (creating an important precedent in certain civil law jurisdictions) requiring that gifts be structured along the lines of the law of sales. During the early Middle Ages, the pendulum swung back again, as form requirements were effectively loosened when governmental authorities ceased to function. The early modern period saw form requirements in the ascendancy again when, in sixteenth century France, the Ordinance of Villers-Cotterêts of 1539 required all gifts to be registered, not so much for validity but to protect donees from third-party challenges. (The requirement of registration for validity per se in France came with the Ordinance of 1731.) Hyland also informs us that in eighteenth-century Prussia only gifts concluded before a court were fully effective.

Hyland then turns to survey form requirements imposed under contemporary law. He begins with the requirements under German law, which he describes as "minimalist." German law imposes no universal form or method for executing a gift, but requires various legal forms, depending on the type of property (as did the *lex Cincia*). In most cases, the making of a gift is accomplished by means of a legal transaction; however, a gift can also be made by means of other acts or omissions. For example, in the case of real property, a gift requires an agreement before a notary or other stipu-

lated authority, together with recordation. A gift of a right enforceable against a third party may be made by assignment, provided words of present transfer are used. If the language contains only a promise to assign in the future, this "gift promise" is void unless done in notarial form. (As indicated above, Professor Hyland devotes an entire chapter to gift promises, which are interesting because they lie on the cusp between gift and contract.)

Italian law falls at the other end of the spectrum from German law and, for all but modest gifts, requires a ritual known as a "public act." To make a gift (as opposed to another type of transfer), the act must be completed in the presence of a notary. To make a gift of movables, there must be an enumeration of the items to be transferred. Various exceptions apply with respect to gifts of modest value, customary gifts, indirect gifts, and others (all of which Professor Hyland treats in depth).

In their form requirements, France and Belgium lie between Germany (imposing no general formalities for a valid gift disposition) and Italy (requiring an elaborate procedure). Professor Hyland characterizes the French tradition as a "complex play of rule and exception." Like the Italian code, the French code provides that a gift disposition is valid only if accomplished by notarial act; however, Hyland claims that "three exceptions in the French case law have long since swallowed the rule." Professor Hyland treats the basic rule (including the requirement of a notarial act with justifications) and then turns to the exceptions (providing in-depth treatment of manual gifts, disguised gifts, and indirect gifts).

Professor Hyland also treats the form requirements under the law of Spain before he comes to the common law (specifically as it stands in the United Kingdom, the United States, and India). Like the German regime, the common law imposes few universal form requirements to effect the transfer of a gift, but a gift is valid if it complies with the transfer requirements appropriate for the type of property concerned. Under the common law, however, transfers at law (transferring legal title) must be distinguished from transfers in equity (creating beneficial interests), this distinction between law and equity having no analogue in civil law regimes. The equitable doctrine, a preference for delivery, and the permissive use of a writing (allowing the transfer of a deed of gift to suffice for the transfer of the property itself in certain instances) add complexity to an otherwise minimalist regime. Under the common law, that the donor intend to make an immediate transfer is a universal requirement for the gift to be effective, whatever the type of property. Professor Hyland tracks this requirement with respect to real property, movables, chattels, life insurance, bank passbooks, joint accounts, and more. He also addresses situations involving delivery where it is either ambiguous or constructive.

IV. COMPARATIVE LAW METHODOLOGY

Any review of this book must also take note of Professor Hyland's substantial and highly provocative chapter on comparativist methodology as applied to the law in general and to the law of gifts in particular. Functionalism—the predominant comparative law methodology—is particularly strained when applied to the law of gifts, Hyland asserts. But further, any attempt to use a functionalist methodology to compare the law of gifts across various regimes exposes certain problematic presuppositions regarding the relationship between law and society that underlie all functionalist methodology as applied to the law. In short, the law governing the giving of gifts presents special challenges for functionalism and thus invites a significant reconsideration of traditional comparative law methodology. Professor Hyland outlines the incoherencies of comparative law functionalism to introduce the different methodology used in his study.

Since 1900 and the birth of modern comparative law in Paris, Professor Hyland informs us, comparativists have struggled to arrive at a methodology with which to compare rules emanating from diverse legal regimes. Professor Hyland acknowledges in the work of early twentieth-century social scientists, such as Durkheim, the beginnings of a rigorous methodology for the comparison of institutions across distinct societies. In the hands of Durkheim and others, functionalism quickly became the predominant approach, first for social scientists and later for legal scholars. Whatever the usefulness of functionalism in the social sciences (and Professor Hyland does not overlook recurring criticism in the evolution of the methodology there) when functionalism was adopted as a method to compare legal regimes, it harbored a number of problematic assumptions. Most significantly, legal functionalism has assumed that all modern societies face similar problems generated by comparable situations (a view the influential legal comparativists Konrad Zweigert and Hein Kötz termed the *praesumptio similitudinis*, or presumption of similarity) and, further, that the law is brought to bear on this extra-legal world as a problem-solving device. Thus, functionalism would dictate that, when situations and problems are aligned, governing laws can be readily analogized, making for an easy inter-regime comparison as to the problem-solving efficacy of a particular law or set of laws.

Critics of functionalism have argued, however, that actual problems differ significantly from society to society. For any society, its history, culture, religion, and even language lend nuance to the challenges of shared existence. Furthermore, in the case of legal functionalism, the methodology proceeds upon an even deeper assumption—that is, that the law is distinct

from the society it is designed to structure. But the relationship between law and other social institutions and practices is far more complex, Hyland points out, with law effectively a practice part and parcel with other practices, at times even parasitic on them.

Professor Hyland argues that functionalism as used in comparative law is not so much functionalism per se, but rather what Professor Hyland terms "purposivism." To attribute a particular function to a law (its putative problem-solving aspect) legal functionalism simply looks to the rationale that law-making and law-interpreting agents ascribe to the rule. Undoubtedly, the policy goals of those who promulgate a given rule, as manifested in legislative intent or the policy reasons offered in a judicial opinion, are relevant to any understanding of the function of that law. For Professor Hyland, however, attention to the conscious reasons of law-makers is only the beginning of the inquiry into the true social function (or perhaps multiplicity of functions) of any law.

Drawing on the work of sociologist Robert Merton and others, Hyland maintains that any functionalist inquiry must distinguish between "emic" and "etic" reasons for a rule. Etic reasons represent the perspective of the actor and take at face value the conscious motivations of those involved in law-making and law-interpreting. At the level of the etic, the purpose of any rule is simply the conscious purpose of those making or interpreting the law. On the other hand, emic reasons emanate from the independent observer, who can locate the rule in a wider cultural framework, as a structural element there.

For the century that modern comparative law has existed, it has pursued the "function" of legal rules, oblivious to the distinction between the etic and emic. According to Professor Hyland, comparative law functionalists generally do not ask whether legal institutions might have objective functions that differ from the goals lawmakers intend to achieve with the promulgation of particular rules. Rather, comparative law methodology assumes that a norm's social function coincides with the purposes legal actors ascribe to it.

The law of gifts presents particular challenges to comparative law methodology as it currently stands. At the most basic level, this methodology would view the law of gifts as a problem-solving device vis-à-vis donative activity. But the autonomous nature of gift giving means that it is governed by norms that are customary and arise prior to the intervention of the legal system. Thus, law does not facilitate the gift in the same way that it does other social institutions. And, according to Hyland, the practice of giving gifts suffers: "Modern legal systems tend to prohibit what they cannot integrate." This means that, oblivious to the emic, contemporary comparativist

methodology can only adopt an uncritical posture and seek to justify legal restrictions on the practice. Hyland rejects this functionalist/purposivist outcome. He instead maintains that altruism is not a social problem so great as to merit the degree of attention—and the magnitude of restriction—it has received courtesy of the law of gifts. At this juncture the inadequacies of a functionalist methodology informed only by the etic become more apparent.

A comparative approach to gift law as dictated by contemporary functionalism faces an additional hurdle, however. Gift law remains problematic for those who would attempt to "connect the dots" pursuant to contemporary methodology (setting aside the autonomous nature of gift giving). Contemporary functionalism seeks to discern the function (or purpose), of gift giving across legal regimes in order to discern the precise problem that the law is meant to solve. But even when taken only at the etic level, gifts serve a host of purposes. In other words, unlike the law of sales, where functionalism can take as its point of departure a broad-based agreement about the purpose of commodity exchange in the market, gift giving has no single purpose. Rather, the gift occurs in and facilitates myriad social situations.

As an alternative to purposivism, Professor Hyland proposes what he calls "an interpretive approach"—a methodology that accounts for both the emic and the etic in comparing gift law across multiple jurisdictions. For Hyland, as for the functionalists, etic purpose is key to understanding the law. Unlike the functionalists, however, he denies that etic purpose is appropriately taken at face value. Indeed, Hyland maintains that etic purpose is only the beginning of an inquiry into the "function" of any law. From the etic, Hyland moves to the emic. Armed with both, Professor Hyland can discern within any law not only the part it plays as a social intervention, but also—and most importantly—its role in structuring a larger culture, particularly as an expression of the culture in which it is embedded.

In selecting the basic materials for his study, Professor Hyland is entirely deferential to categories in play within a given legal regime. In each legal system studied here, there is a discrete body of law, he tells us, that is labeled with the term "gift" (or with a term that can be translated into English as "gift"). The norms of gift law that he begins with are those each legal system has gathered under this rubric. This is the case even though, in virtually every jurisdiction, there are transactions that are in common parlance called "gifts," but that are not subject to the law of gifts in the given regime. For example, many civilian jurisdictions exclude customary gifts from the legal definition, as well as gifts to employees or customers (probably to free them from the restrictive regime of gift law, such as the rules of capacity and the form requirements). Such transactions are ignored for purposes of

this study. Simply put, Professor Hyland's inquiry takes as its point of departure the black letter law of gifts.

But as he pursues the etic and emic reasons for any law, Professor Hyland is more inclusive with respect to his materials. Comparativists in general always have been predisposed to compare "the law as applied," Hyland tells us. Accordingly, most comparativist studies typically focus not on statutes but on case law. This is because, in offering a rationale for the law, courts typically do not simply interpret the legal text, but also make a judgment about how the law in question appropriately facilitates a certain social structure; that is, they supply what judges believe about the social context of the rules together with the goals they believe they are pursuing—in other words, an etic rationale for the law. But an inquiry such as Hyland's that attends to the etic but moves on to the emic must draw upon more than the internal resources of the law—statutes, opinions, precedents, and so on. He argues that the patterns that he is seeking to elucidate require that he take "into account all of the law's elements . . . including the myriad statements made by legislators, judges, and scholars about the purposes and meaning of the norms"—what Professor Hyland calls "a collective fabric of justification."

Professor Hyland declares that, at the end of the day, he is about something very different from the functionalists. Functionalism approaches the law and legal institutions prepared to discover a certain rationality or linearity behind what Hyland terms "the maze of cultural phenomena." And in many instances, Professor Hyland maintains, this rationality is a proxy for utility maximization. As a comparativist, Hyland's aspirations are grander as well as more subtle. Instead of the functionalists' pursuit of linear rationales (and utility maximization), Hyland aims to unearth and examine "how major Western legal systems imagine goals for themselves, how they develop and apply their concepts, and how they use their thoughts about gift giving as a means to discover their own premises and convictions." What is important is not whether the law of gifts achieves its stated purposes (whether it is an effective instrument by which to solve some putative social problem), he tells us. What is important about the law of gifts is what it can reveal to us about "the symbolic significance of the gift for the legal imagination."

V. CONCLUSION: A NAGGING QUESTION

It is interesting that Professor Hyland begins this deep and provocative book with the French Revolution and the view there that gifts were subversive. Hyland takes us through the dramatic events in which the gift was outlawed, but then he quickly moves to tie this extraordinary decision to the

particular distrust with which the Western legal tradition has treated the gift since Roman times. In doing this, he sets the stage for his claim that, at least in the modern era, this unease has resulted from the attempt to subsume a social practice—one that percolates up from the social bedrock independent of the law and replete with contradictions and ironies—within the structure of a private law framed for the linear quid pro quo of the market. But in Professor Hyland's own recounting, the treatment of the gift during the French Revolution does not seem to be so much about securing the market or its normative foundations in the law. The decision made there to outlaw the gift seems more about the subversive possibilities of private orderings—possibilities that would obtain in any era—than the fumbling ineptitude of a legal regime attuned to the linear decision-making of the market and attempting to regulate an institution that is organic.

Ultimately, Professor Hyland's interest in the gift is in its role—both as a challenge and an opportunity— vis-à-vis the private law. Hyland uses the law of gifts as an avenue through which to explore aspects of the private law. Clearly, his hope is that his insights will, as they join the collective fabric of justification, propel the private law forward, into an era in which it will transcend its role in Western legal systems as the primary vehicle by which normative foundations of the market are secured. Presumably, when the private law rises to the challenge of the gift, the private law—indeed all of Western legal systems—will make substantial progress down the long road to a regime of genuine ordered liberty.

What is missing, however, is a clear indication from Professor Hyland as to whether the gift itself is a good thing. He undoubtedly believes the law of gifts to be important because of its revelatory role in any emic methodology as applied to the private law. And Professor Hyland leaves no doubt as to the universality of the practice. But whether, beyond its role as a midwife in the freeing of the private law, the gift is actually a good thing—a social practice to be nurtured, indeed encouraged to flower—is not clear.

Whether the gift is ultimately a good thing is important, however, because there is more than an undercurrent of an idea in Professor Hyland's book that the gift must inevitably confound the law, that it is inevitably subversive of legal order. And the events of the French Revolution that Hyland recounts at the outset of this work only drop the first hint. As the chapters unfold, there is enough material here about the autonomy of the practice of gift giving vis-à-vis the law to raise doubts as to whether gift giving can be subsumed within the formalism of legal categories, even categories no longer calculated to undercut altruism as a threat to the normative foundations of the market. "The gift is an autonomous institution that no legal system can domesticate[,]" Professor Hyland declares. Indeed in a

highly revelatory footnote, he even quotes the legal scholar Cosimo Marco Mazzoni, "The gift is an event that brings disorder into clear and defined relationships, such as those modeled on the bond of obligation." What Professor Hyland does not address is whether a practice that gives voice to personal predilections, validates the idiosyncratic, and lends legitimacy to private orderings must always push back against all but the most libertarian legal order. If the gift must confound the law, the question is whether this malocclusion between the law and an important and pervasive social practice is something we want to tolerate, or indeed to encourage, and for what reasons.

In the final analysis Professor Hyland leaves implicit the social value of gift giving. And he relegates to a later time the task of going case-by-case to determine what, if any, social virtue inheres in each of the myriad species of gifts that arise out of the social bedrock. In the face of this extraordinarily scholarly and erudite book, however, such concerns are mere afterthoughts, ideas that emanate from the penumbra of the work. What Professor Hyland makes very clear is that neither the true value of the gift nor the essential attributes of different types of gifts can be discerned until we disencumber the gift from the shackles of quid-pro-quo jurisprudence. At this stage in the development of the collective fabric of justification, however, we only can congratulate Professor Hyland on twenty years well spent and thank him for the judicious application of his time and talent.