
THE UNIVERSITY
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# JUST PRICE THEORY: A REASSESSMENT

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# Abstract / Lay Summary

The main aim of this thesis is to provide a reassessment of the age-old idea that there is a just price of things. It does so by endorsing a virtue-based approach to price justification, one that is both value pluralist and context-sensitive. A virtue-based approach to price justification offers a way of dealing with the set of questions posed by the idea of the just price which is neither a rejection of their meaningfulness (what I call 'just price scepticism') nor a complete endorsement of the old 'Scholastic doctrine' of the just price based on keeping equality of value in exchange—or, as medieval Scholastics would call it, 'commutative justice'. The proposed approach involves the development of different conceptions of the just price based on different values—efficiency, distributive egalitarianism, autonomy-as-nonalienation, autonomy-as-sovereignty—and the incorporation of those conceptions into a wider normative framework that allows us to identify certain values as more normatively significant in some contexts than in others. When a price manifests one or more of the aforementioned values and it is perceived within the appropriate context—that is, in a context in which those values are normatively significant—then the price so perceived is called just. This understanding of justice in pricing entails the recognition that the reasons justifying prices need not be justice-based reasons, and that the medieval search for the just price is, in fact, a search for equality that is not exhausted by the equality between goods exchanged required by commutative justice.

The thesis aims to find a place for just price theory in contemporary legal and political philosophy. If the arguments presented in the thesis are correct, then just price theory is still relevant for the law and we have no good reasons for dismissing the questions about just prices posed by medieval Scholastics. Moreover, I argue that it is possible to incorporate typically modern concerns over efficiency, distributive justice, and autonomy into a theory of the just price, and that the adoption of a pluralist and context-sensitive normative framework allows us to keep the insights from different conceptions of the just price while, at the same time, rescuing the deeper meaning of the medieval search for equality in exchange, namely, the search for substantive equality as a condition for treating each other as equals in exchange.

# Declaration

As per the Assessment Regulation (n 34) for Research Degrees at the University of Edinburgh, I confirm:

(a) That this thesis has been composed solely by myself;

(b) that the work contained in this thesis is my own; and

(c) that it has not been submitted for any other degree or professional qualification.

Chapters 1 and 2 of this thesis reproduce—with slight modifications—paragraphs and arguments that have been previously published in the following article:

Joaquín Reyes, *Beyond Commutative Justice: Contract Law, Justice, and Just Prices,* 7 Latin American Legal Studies (2021). This article is open access and I retain the copyright. No permission is needed to reproduce it.

Joaquín Reyes Barros

Edinburgh, 16 June 2021

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# Introduction

Short of studying the composition of angelic bodies, the anatomy of the unicorn or the squaring of the circle, one would not typically feel compelled to ask whether the subject-matter of one's field of inquiry actually exists. However, to inquire about what makes a price just is for many scholars very much like asking what makes a circle square. "A contradiction in terms"[1], "a question absolutely devoid of meaning"[2], "inveterate fallacy"[3], "futile medieval search"[4], "a frozen and lifeless relic of an earlier age"[5], "a nebulous concept invented by pious monks who knew nothing of business or economics and were blissfully unaware of market mechanisms".[6] These are some of the expressions that contemporary scholars have used to describe the age-old idea that one can buy or sell goods for more or less than their 'just price.' As the reader may already suspect, I believe that these scholars were wrong in dismissing just price theory so quickly.

Although the term 'just price' is as old as commercial exchange—commercial records show that the term was already of common usage in the times of Hammurabi, the Babylonian King—[7], its meaning has come to be associated with a particular conception, one usually referred to as the 'Scholastic doctrine' of the just price. According to the Scholastic doctrine, the just price is that which keeps arithmetical equality of value between things exchanged. Whenever that price is paid, justice in exchange—or, as medieval thinkers would call it, 'commutative justice'—is achieved. What makes a price just, therefore, is that it manifests the value of commutative justice.

On the face of it, the idea that the just price is the price that keeps equality in exchange may seem like a sketchy but nonetheless adequate definition of the just

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[1] RG Collingwood, 'Economics as a Philosophical Science' (1926) 36 International Journal of Ethics 162, 174; Friedrich A von (Friedrich August) Hayek, *The Constitution of Liberty* (Routledge 1990) 442.
[2] Collingwood (n 1) 174.
[3] Ludwig Mises, *Human Action: A Treatise on Economics.* (third revised edition, 1966) 203–204.
[4] Friedrich A von (Friedrich August) Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge 1993) 238.
[5] Jacob Viner, *Religious Thought and Economic Society: Four Chapters of an Unfinished Work* (Jacques Melitz and Donald Winch eds, Duke University Press 1978) 12 The phrase is directed to Scholastic economic thought as a whole.
[6] Raymond de Roover, 'The Concept of the Just Price: Theory and Economic Policy' (1958) 18 The Journal of Economic History 418, 418 The author thus characterises the view of modern economists regarding the doctrine of the just price.
[7] John W Baldwin, 'The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries' (1959) 49 Transactions of the American Philosophical Society 1, 8.

price. However, a moment's reflection should make us wonder whether it is entirely satisfactory. Indeed, can prices even *be* just or unjust? And if so, what is so especial about keeping equality of value between things in exchange for price justification? And even assuming that keeping equality between things exchanged is valuable, does it deserve to be treated as the sole source of justice when it comes to pricing? Can other values besides commutative justice—such as efficiency, autonomy, or perhaps distributive justice—also make prices just? The following work is an attempt to answer these and other related questions.

This thesis is divided into two parts, each with three chapters. In what follows I provide a brief summary of each chapter. Most of what is said here can also be found either in the introduction or the conclusion of each chapter. Some readers will welcome the signposting, but others may be annoyed by what may seem like distracting repetition. The latter can proceed directly to Chapter 1. However, and to avoid disappointments, those readers might want to take a look at the final paragraphs of this introduction, where I talk about what *not* to expect from the present thesis.

Part One sets out the key building blocks of the theory of the just price proposed in this dissertation. Here I will argue that explaining what we mean by a 'just price' is relevant for contract law (Chapter 1), that the concept of the just price is not a contradiction in terms, and that many critiques of the just price are in fact best understood as providing grounds for alternative conceptions of the just price (Chapter 2). Chapter 3 focuses on developing these conceptions of the just price further: the 'Efficiency Conception' of the just price (the 'EC'), the 'Distributive Justice Conception' of the just price (the 'DJC') and the 'Autonomy Conception' of the just price (the 'AC'). The exposition and development of these different conceptions is meant to show that there is more to just price theory than the Scholastic doctrine of the just price and its exclusive commitment to commutative justice would make it appear. I elaborate in what follows.

Chapter 1 explains why questions about just pricing are relevant for contract law. I argue that this is the case because the intelligibility of deep-seated private law rules depends upon establishing a normative standard that allows legal officials to distinguish between just and unjust prices. To substantiate this claim, I analyse two contract law doctrines: civil law remedies against *laesio enormis* and the doctrine of unconscionability. In this chapter I also claim that the institutionalisation of standards of just pricing in the law introduced a different logic into contract law, one at odds with

the “liberalistic (rather than paternalistic) spirit of [Classical] Roman Law.”[8] This new logic reshaped the normative structure of contract law by highlighting one specific aspect of it—price normativity—that, from a freedom-of-contract perspective, remains otherwise opaque. I further argue that this institutionalisation has revolutionary implications for private law. This for two reasons. First, because the introduction of price normativity in the law for *any* price-related practice tends towards its expansion to *all* price-related practices. Secondly, because of the kind of reasons that it incorporates into the law—reasons based on *substantive* (as opposed to merely *formal*) justice. To illustrate the connection between these two reasons and how they together account for the revolutionary aspect of just price theory, I propose a reconstruction of the reasoning that led medieval Scholastics to expand the remedy against *laesio enormis* from the selling of land to every contractual exchange of goods. To be sure, these claims presuppose that prices are the kind of entity justice can be predicated upon, and that it is not the case that questions about just pricing are meaningless or incoherent, something which I show to be the case in the next chapter.

Chapter 2 considers and rejects several arguments against the very idea of a just price. In dealing with these objections, I intend to show not only that those who have argued against the possibility of just price theory were wrong, but that they were usually wrong in quite interesting and insightful ways, that is, in ways that actually allow us to further develop the theory of the just price. This is because, rather than providing reasons for a complete rejection of the just price, some of these objections are best understood as providing alternative *conceptions* of price normativity—alternative, that is, to the Scholastic conception of the just price based on commutative justice. In this sense, this chapter starts laying the groundwork for subsequent chapters of the thesis, in that it suggests that there is more to price normativity than commutative justice.

The first argument that I consider in Chapter 2 is what I term the ‘Argument from Bad Metaphysics’. According to this argument, the concept of the just price only makes sense if one assumes certain metaphysical beliefs about value that are now universally discredited. I argue that this is a fallacious argument, and that we should look elsewhere in order to find insight into just price theory.

[8] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 255.

The second argument that I consider in Chapter 2 is the 'Argument from Value-Free Economics', which claims that the recognition of economics as a value-neutral science entails a rejection of the value-laden approach to prices that just price theory represents. Based on the idea that the normative assumptions that unite positive and normative economics imply that price discourse in economics is normatively biased towards efficiency and higher outputs, I propose a reinterpretation of Collingwood's claim that the just price is a "contradiction in terms"[9]. I suggest that Collingwood's position is best described as an argument for just institutional arrangements regarding prices—the just price, according to Collingwood, would be the price that can be fetched under just institutional arrangements regarding exchange—and against the identification of the just price with the market price. Recognising the normative assumptions of price discourse in economics brings to the fore that prices are *institutional* facts as opposed to brute or natural facts. The lesson to be learned from this argument is that the institutional nature of prices makes price normativity dependent upon the kind of value or values that the political community wants to see realised in its institutional arrangements. This means that price normativity need not be synonym with value monism in price justification, and that arguments from efficiency sometimes must give way to other values such as commutative justice, distributive justice, or autonomy. This also shows, however, that the emphasis on commutative justice as the sole *locus* of price normativity is also a limited and, to that extent, inadequate account of price justification.

The third argument I consider in Chapter 2 is the 'Argument from Consent', as well as a structurally similar argument from economic theory that I call the 'Marginalist Objection' to just price theory. According to this argument—famously made by Hobbes—"[t]he 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."[10] Here I will suggest that if just price theory is to move forward, then we should move away from contemporary debates that link the Scholastic doctrine of the just price with the 'labour theory of value/marginalism' debate (I shall say a bit more on this by the end of this introduction). Secondly, I will show that the argument from consent does not give us reasons to dismiss the idea of just prices altogether. Quite the opposite: it

[9] Collingwood (n 1) 174.
[10] Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1688* (Edwin Curley ed, Hackett Publishing Company 1994) Part I, Chapter XV [14] [74-76] 94.

provides us with an alternative conception of justice in pricing, one that links justice and consent.

Chapter 3 goes on to develop the pluralistic insight hinted at in the second chapter, namely, that other values apart from commutative justice such as efficiency, distributive justice, and autonomy can also play a role in determining the just price. This chapter maps these conceptions of the just price and their underlying normative commitments as a first step to integrate them within a more robust account of price justification—the one that will be offered in Part Two. After identifying these other values as grounds of price justification, I develop three alternative conceptions of the just price: the 'Efficiency Conception' ('EC'), the Distributive Justice Conception (the 'DJC'), and the 'Autonomy Conception' (AC) of the just price. To be sure, to discuss every possible account of efficiency, distributive justice, and autonomy and their normative implications for a theory of just price would be a daunting task which, I am afraid, would have very limited chances of success. Instead, I have decided to evaluate specific versions of these grounds of price justification. My treatment of each of these values revolves around one fundamental premise, namely, that since wealth is a power-conferring feature, inegalitarian patterns of wealth distribution affect justice in pricing by systematically benefitting those who have more background wealth—the 'rich'—at the expense of those who have less—the 'poor'. For this reason, I argue that efficiency-based and autonomy-based conceptions of the just price should be specified in a way that involves, as a success condition, an equal distribution of wealth. The demand for an equal distribution of wealth is also at the centre of the specific version of distributive justice that I discuss in the chapter, which I call *distributive egalitarianism*. This chapter concludes by offering two challenges to the conceptions reviewed here. The first challenge concerns the relationship and compatibility between the DJC—which is committed to an equal distribution of wealth—and the price system—which seems to have a built-in bias towards keeping inequality of wealth. The second challenge concerns the AC and the authorisation for injustice that a certain understanding of the value of autonomy—autonomy understood as sovereignty, that is, as the value of having the final word in matters that are relevant to you—seems to entail.[11]

[11] I borrow the idea of 'autonomy-as-sovereignty' from David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159.

Part Two of the thesis is an attempt to meet these two challenges by incorporating some insights from a virtue-based *approach* to justification into these conceptions of the just price. A virtue-based approach to price justification is fundamentally different from the conceptions of the just price reviewed in the first part of the thesis. That is the reason I do not call the proposed approach a 'conception' of the just price. Conceptions of the just price—such as the ones reviewed in Chapter 3—are concerned with identifying a value or cluster of values that prices ought to manifest to be deemed just. A virtue-based approach to price justification is not engaged in the same task. The main task of the proposed approach is to identify normative contexts in which a plurality of values can be meaningfully applied. In this sense, a virtue-based approach to price justification is a normative framework that complements the value-based conceptions of the just price reviewed in Chapter 3.

Now, this complementary role of the proposed approach is possible only if the conceptions of the just price are conceived as *partial* accounts of the just price, and not as conceptions of what a just price *is* or what it *consists in*, as if they were meant to identify all the necessary and sufficient conditions to count a given price as just. A monist approach to value is incompatible with the value-pluralism of a virtue-based approach to price justification. Therefore, the proposed approach serves as a complement to these conceptions provided that they are not taken to be conceptions that identify necessary and sufficient conditions for justice in pricing. A virtue-based approach to price justification sees all previous conceptions as attempts at finding *typical* conditions for the presence of values (efficiency, autonomy, distributive justice) associated with justice in pricing, values that may be normatively salient in some contexts and not in others.

Chapter 4 presents a MacIntyre-inspired account of practices and institutions, one in which virtue appears as a necessary condition for the subsistence of price-related practices. According to MacIntyre, virtue allows practices to resist the necessary but nonetheless corrupting effect of institutions. If the MacIntyrean account of the relationship between virtue, practices and institutions is plausible—and I will not argue for more than its plausibility—then a virtue-based approach to price justification is also plausible. This chapter also introduces the main features of a virtue-based approach to price justification that will help overcome the two challenges for just price theory that I previously noted. These features are *value-pluralism* (which includes motivational pluralism) and *context-sensitivity*. The first of these features will figure

prominently in my answer to the allegedly inegalitarian nature of the price system (the first challenge mentioned above), whereas context-sensitivity will play a significant role in identifying the role of autonomy-as-sovereignty in price justification (the second challenge).

Chapter 5 considers the relationship between distributive egalitarianism and the price system. As noted above, the first challenge to be met by the previously mentioned conceptions of the just price concerns the relationship between market prices and distributive justice, and the potential incompatibility between just price theory and distributive egalitarianism. In a nutshell, the challenge is this: if prices are typically just only if the price system manifests a commitment to wealth equality, but, at the same time, the very existence of the price system contributes to wealth inequality, then a system of prices that manifests a commitment to wealth equality seems to be unfeasible. Distributive egalitarianism could only be perfectly achieved in a society in which there is no price system at all. Therefore, it would seem to be the case that distributive egalitarianism demands something much more radical than mere just prices. A commitment to distributive egalitarianism would entail a demand not for just prices, but for the abolition of the price system altogether. In this chapter I address two related objections to the idea that a price system manifesting a commitment to wealth equality is not a feasible alternative, which I call the *Epistemic Objection* (an egalitarian price system would fail to convey accurate information about relative scarcity) and the *Incentives Objectio*n (an egalitarian price system would fail to provide enough incentives to work). After reviewing a few alternative replies, I argue that, despite the undeniable empirical hurdles that the application of such a system would have to overcome, a virtue-based approach to price justification allows us to claim that there is no conceptual incompatibility between the price system and distributive egalitarianism. As will become clear, the feature of *value pluralism* (and motivational pluralism) will play a significant role in the argument. Towards the end of this chapter, I also discuss the role of private law in the reshaping of the price system according to the ideal of wealth equality.

Chapter 6 is the final chapter of the thesis and considers the place of autonomy-as-sovereignty in price justification. This chapter attempts to rescue autonomy-as-sovereignty as a value able to justify prices by connecting the value of autonomy understood as sovereignty with a certain conception of *commutative* justice. I argue that when prices are perceived by the relevant agents as stemming from a relational

context—rather than as the product of the non-relational context of the market—this imposes a constraint on autonomy: it is not any kind of autonomy-as-sovereignty that matters for the justification of consented prices, but only *reasonable* autonomy, that is, autonomy in connection with a certain form of reciprocity. In contrast, when prices are considered as a product of non-relational contexts such as the price system, their ability to manifest distributive justice and/or efficiency is more salient for their justification than their ability to manifest autonomy-as-sovereignty. I further argue that autonomy-as-sovereignty *can* trump concerns over distributive justice or efficiency *only if and when* contractual relationships are nested in another non-contractual relationship—that is, when we are in the presence of what contract law theorists call a 'relational contract'. This is the normative context in which claims of price justification based on the value autonomy-as-sovereignty can be successful. Therefore, prices stemming from contracts consisting in one-off exchanges or which do not help in constituting further non-contractual relationship are unable to be justified by appealing to autonomy-as-sovereignty.

The Scholastic doctrine of the just price focused on commutative justice. Critics rejected the doctrine and, when doing so, appealed to values such as consent, autonomy, distributive justice, and efficiency. The arguments presented here suggest that these critiques can be reinterpreted as alternative conceptions and therefore be incorporated into a wider normative framework for just price theory, one that I call a virtue-based approach to price justification. At the heart of these arguments is the conviction that the kind of inquiry the Scholastic tradition of the just price represents must be valued and preserved, but also revised and partially restated in more pluralistic terms.

Indeed, I believe that the Scholastic doctrine of the just price was not far off the mark when it identified the goal of just pricing as that of achieving equality in exchange. However, after incorporating the insights from alternative conceptions of the just price, we can now see that the search for a just price is also the search for the conditions under which we are able to *treat each other as equals in exchange*.[12] For the Scholastic doctrine of the just price, those conditions amounted to keeping equality of value between things exchanged—the requirements of commutative justice. However,

[12] In a similar vein James Bernard Murphy, 'Equality in Exchange' (2002) 47 American Journal of Jurisprudence 85.

the subsequent rejections of the doctrine of the just price can be seen, from the standpoint of a virtue-based approach to price justification, as attempts to show that commutative justice is not a sufficient condition to treat each other as equals in exchange: if, for instance, commutative justice allows us to dismiss autonomously consented prices, or if commutative justice is construed in a way that disconnects it from normative concerns over inegalitarian patterns of wealth distribution (distributive justice), or if it is pursued disregarding how resources are allocated to their best employment (efficiency), etc. then prices indicating commutative justice might nevertheless fall short as proper manifestations of what it is to treat each other as equals in exchange.

Before proceeding to the first chapter, I would like to clarify that this thesis is not about the 'Scholastic doctrine' of the just price. Although I refer to the thesis according to which the just price is the price that manifests commutative justice as the 'Scholastic doctrine' of the just price—a thesis which I associate with Aquinas more than with anyone else within that tradition—and although I do make references to the Scholastic tradition and I suggest some ways in which that tradition should be read, I am not particularly interested in getting Aquinas or any other Scholastic thinker 'right', nor am I especially interested in defending my own understanding of that tradition. The only reason I engage with Aquinas' or any other person's views on the just price is because I believe that they have articulated some insight in a way that allows for philosophical progress. However, if anyone would like to argue the Scholastic tradition ought to be understood in a somewhat different way, that is completely fine with me. The Scholastic tradition spans over nearly six centuries, and it is itself a synthesis of at least three other traditions (Aristotle's philosophy, Roman Law, and the Patristic tradition), so I would not be surprised to find out that my own understanding of it is only partial. What *would* be surprising to me is to find that only one reading of that tradition is possible, and that it happens to be my own. For this reason, I am not particularly interested in defending my own understanding of that tradition, nor do I believe that anything of substance bears on it for present purposes. I am sure that some readers might find this lack of preoccupation with the 'Scholastic doctrine' surprising for someone working on just price theory, while others might welcome the breath of fresh air. Nevertheless, for those interested in Scholastic economic thought and their doctrine of equality in exchange and the just price, I refer to what I think are

some of the best studies on the subject in this footnote.[13]

Which brings me to a closely connected and final point. There is a tendency in the literature about just price theory to see the debate over the just price as a debate over the sources of economic value, and even to interpret the Scholastic doctrine of the just price either as a precursor of the labour-theory of value –Marx even being called "the last of the Schoolmen"[14] – or as an early statement of value marginalism—"the Schoolmen were the forerunners of the late-nineteenth-century economists who 'discovered' the subjective theory of value."[15] I am convinced that this is a mistake, and that we should be careful not to identify just price theory with the debate over the sources of economic value. The reason is, quite simply, that, as a normative theory, just price theory is not concerned with the question 'Where does value come from?', but rather with 'What makes value coming from such and such *just*?'. To be sure, there is indeed much at stake on how we go about answering the former question.[16] But an inquiry into the sources of value is incapable of providing an answer to the question about what it is that makes prices just. The failure to see this point is, in my view, a major shortcoming of just price theory, and one this thesis attempts to remedy. If this is correct, then it would also explain, incidentally, why Aquinas was, as Joel Kaye put

[13] John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press 1957); Baldwin (n 7); Marjorie Grice-Hutchinson, *Early Economic Thought in Spain, 1177-1740* (Liberty Fund 1978); Odd Langholm, *Price and Value in the Aristotelian Tradition: A Study in Scholastic Economic Sources* (Universitetsforlaget 1979); Odd Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power* (Cambridge University Press 1998); Joel Kaye, *Economy and Nature in the Fourteenth Century: Money, Market Exchange, and the Emergence of Scientific Thought* (Cambridge University Press 1998); Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Martinus Nijhoff Publishers 2013); Joel Kaye, *A History of Balance, 1250-1375: The Emergence of a New Model of Equilibrium and Its Impact on Thought* (Cambridge University Press 2014).

[14] Richard Tawney, *Religion and the Rise of Capitalism* (John Murray, Albemarle Street, W 1926) 36: 'The true descendant of the doctrines of Aquinas is the labor theory of value. The last of the Schoolmen was Karl Marx.'; For a similar view, see Selma Hagenauer, *Das 'Justum Pretium' Bei Thomas von Aquino : Ein Beitrag Zur Geschichte Der Objektiven Werttheorie /* (W Kohlhammer, 1931); For a contemporary reassessment of both the just price and the labour theory of value, see Mark R Reiff, *Exploitation & Economic Justice in the Liberal Capitalist State* (Oxford University Press 2013); For a broader approach towards reconciling Scholastic economic thought and Marx, see Alasdair MacIntyre, *Ethics in the Conflicts of Modernity: An Essay on Desire, Practical Reasoning, and Narrative* (Cambridge University Press 2016) 106ff.

[15] Alejandro A Chafuen, *Christians for Freedom: Late-Scholastic Economics* (Ignatius Press 1986) 103: '[It is] clear and unambiguous. For the Schoolmen, value in exchange depends on value in use (...) For this reason the Scholastic utility theory of value must be understood as a subjective one. In effect, the Schoolmen were the forerunners of the late-nineteenth-century economists who "discovered" the subjective theory of value.'; See also Murray N Rothbard, *Economic Thought Before Adam Smith: An Austrian Perspective on the History of Economic Thought*, vol 1 (Edward Elgar 1995); Decock (n 14) 520 n1714 and the literature cited therein.

[16] Cf Mariana Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (First edition, Allen Lane 2018).

it, “uncharacteristically vague”[17] on the problem of what exactly is that makes two things *equal* for the purposes of exchange. The reason is that Aquinas was interested in engaging in a normative debate about justice in pricing, but he was not equally interested in answering the question of where economic value comes from, and that he was aware that the answer to the latter question does not automatically answer the former.

There is still a lot of work to do on just price theory. What I present in the following pages is, in many ways, no more than introductory, and I am only too aware that there are many arguments and objections relevant to the present thesis that are merely touched upon or even passed over altogether. Therefore, it would be extremely naïve to think that this thesis settles any of the debates surrounding just price theory. My hope with these pages is to start what I see as a much-needed conversation about just prices among legal and political philosophers.

[17] J Kaye *History of Balance* 97.

# Part One: Conceptions of the Just Price

Part One of the thesis lays the groundwork for the theory of the just price put forward in this dissertation. As I have already noted in the introduction of the thesis, this part of the thesis attempts to motivate two fundamental claims, namely, (1) that to explain the concept of the just price is relevant to contract law (Chapter 1), and (2) that many critiques of the just price are best understood as providing grounds for alternative conceptions of the just price (Chapters 2 and 3). The exposition and development of these different conceptions is the main aim of Chapter 3, which is meant to show that there is more to just price theory than the Scholastic doctrine of the just price and its exclusive commitment to commutative justice would make it appear.

# Chapter 1: *Explanandum*

In our experience as market agents, we encounter many situations in which the price of a certain good seems 'wrong', either because it is exorbitant, a 'rip off', 'too much', or, at the other extreme, because it is 'a bargain' or 'too little'. Whether it is a professional extracting enormous profits for a job he would be willing to do for less, a seller charging more for a good because he knows how intensely the buyer wants it, a buyer taking advantage of the ignorance of the seller to buy cheap a costly item, or even a hardware store increasing the price of its snow shovels just after a snowstorm, it seems to be the case that the price paid for some goods does not match the price they ought to have, *i.e.*, their *just* price.[1]

These intuitions have their legal counterpart in the form of institutions, rules, and practices dealing with unequal exchange. Civil law remedies against *laesio enormis*[2], price unconscionability in the Common Law[3], prohibitions on price gouging, the practice of courts in giving relief for price disparity[4], among others, are examples of private law rules, institutions, and practices shaped by a concern for the fact that

[1] The snow shovel example is taken from Daniel Kahneman, Jack Knetsch and Richard Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76 American Economic Association 728; For further empirical research regarding our moral intutions about price fairness, see also Sarah Maxwell, 'What Makes a Price Increase Seem "Fair"?' (1995) 3 Pricing Strategy & Practice; Bradford 21; Sarah Maxwell and others, 'Reactions to a Price Increase: What Makes It Seem Fair' (2013) 13 69; ibid; Timothy J Richards, Jura Liaukonyte and Nadia A Streletskaya, 'Personalized Pricing and Price Fairness' (2016) 44 International Journal of Industrial Organization 138; Farid Tarrahi, Martin Eisend and Florian Dost, 'A Meta-Analysis of Price Change Fairness Perceptions' (2016) 33 International Journal of Research in Marketing 199; Holger Herz and Dmitry Taubinsky, 'What Makes a Price Fair? An Experimental Study of Transaction Experience and Endogenous Fairness Views' (2018) 16 Journal of the European Economic Association 316.

[2] On *laesio enormis*, see James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press 2006) 364 ff; For the reception of laesio enormis in the Common Law, see Nathan Isaacs, 'The Revival of the Justum Pretium' (1920) 6 The Cornell Law Quarterly 381, 400: "The apparent absence of a doctrine of laesio enormis from our law is neither an indication that it is not at times a wholesome doctrine, nor that the Anglo-American system is utterly incapable of expanding to meet the situation for which such doctrine was designed."

[3] See generally Sinai Deutch, *Unfair Contracts: The Doctrine of Unconscionability* (Lexington Books 1977); James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 154–158; Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (n 2) 365; Andrea Perrone, 'The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks' (2014) 122 Rivista Internazionale di Scienze Sociali 217, 218.

[4] James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1645; See also John R. Commons' approach to the just price as the 'reasonable price' based on the practice of courts in dealing with price justification in John R (John Rogers) Commons, *Legal Foundations Of Capitalism* (Madison : University of Wisconsin Press 1968); For a useful overview, see Yngve Ramstad, 'John R. Commons's Reasonable Value and the Problem of Just Price' (2001) 35 Journal of Economic Issues 253.

certain goods are being sold for more or less than they 'ought' to be.[5] This legal institutionalisation of our moral intuitions about right and wrong prices—and not the moral intuitions themselves—constitutes the subject matter of this chapter.

The aim of this chapter is twofold. The first aim—developed in Section 1—is to describe some of the remedies against inequality in exchange—namely, civil law remedies against *laesio enormis* (Section 1.1) and the common law doctrine of unconscionability (Section 1.2)—in order to show that these institutions are unintelligible without resorting to some standard of price fairness, *i. e*., without some conception of what a just price is. This is true, I shall argue, even for so-called 'subjective' or consent-based accounts of *laesio enormis* and for purely procedural or evidentiary accounts of unconscionability. These remedies—or, more precisely, the normative standard of fair pricing implicit in these remedies—will become the *explananda* of subsequent chapters of the thesis.

Although *laesio enormis* and unconscionability are the most paradigmatic cases of price normativity in the law, they are not unique. In fact, there are many other cases of price normativity beyond the realm of equality in exchange, and even beyond the confines of private law. Towards the end of this section, I offer a list of some of these other cases of price normativity in the law, and hint at some of their particularities—especially their concern for *distributive* instead of *commutative* justice—that make it the case that, while they remain relevant for the aim of this thesis, nevertheless they deserve a separate treatment from contractual remedies against inequality in exchange.[6]

The second aim of this chapter—developed mostly, but not exclusively, in Section 2—is to make clear why explaining the *explananda* matters. It does so by substantiating what I term, somewhat provocatively, a *revolutionary* reading of legal remedies against inequality in exchange. The proposed reading is this: the

[5] For recent signs of a decline of the impact of just price theory in private law, see, for example, the explicit exclusion of just pricing as a standard of fairness in Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR).* (2009) 225: "II. - 9:406 Exclusions from unfairness Test (2): For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, *nor to the adequacy of the price to be paid*." (emphasis added).
For its exclusion in the United States, see *Restatement (Second) of Contracts §79*: "if the requirement of consideration is met, there is no additional requirement of equivalence in the value exchanged."

[6] The relationship between just prices and distributive justice will be analysed in later chapters, especially in Chapters 3 and 5.

institutionalisation of standards of just pricing in the law introduced a different logic into contract law, one at odds with the "liberalistic (rather than paternalistic) spirit of [Classical] Roman Law."[7] This new logic *reshaped* the normative structure of contract law by highlighting one specific aspect of it—price normativity—that, from a freedom-of-contract perspective, remains otherwise opaque. To substantiate this claim—not in any robust sense of demonstrating it, but in the weaker sense of making it plausible—I draw attention to the fact that, while the rise of will theories of contract in the nineteenth century led to a rejection of the Scholastic doctrine of the just price, it did not lead to the abolition of price normativity in the law. Rather, when confronted with remedies against inequality in exchange, will theorists proposed a consent-based reinterpretation of price normativity. I argue that this reinterpretation, taking place while the whole theological and moral edifice of Scholasticism was being explicitly rejected, is a reason to believe that the Scholastic idea of just prices hinted at a deeper truth about the normative structure of contract. For then it became clear, even in the eyes of its critics, that a standard of fair pricing is needed in order to make sense of contract law, even if not the specific standard of fairness conceived by medieval Scholastics.

Section 2 also expands on the claim that the introduction of price normativity in the law is *revolutionary*. I argue that this is so for two different but related reasons. First, because the introduction of price normativity in the law for *any* price-related practice tends towards its expansion to *all* price-related practices. The second reason concerns the kind of considerations—reasons based on *substantive* (as opposed to merely *formal*) justice—that price normativity recognises into the law of contracts. To illustrate the connection between these two reasons and how, when taken together, they account for the revolutionary aspect of just price theory, I propose a reconstruction of the reasoning that led medieval Scholastics to expand the remedy against *laesio enormis* from the selling of land to every contractual exchange of goods.

Before proceeding, I would like to note that this chapter does not put forward any argument whatsoever for adopting the Scholastics' answer—or any other answer, for that matter—to the set of questions posed by the idea of just prices. The proper assessment of such answers—and the proposal of a more robust theory of the just price—will be the object of later chapters of the thesis. Neither does this chapter offer

[7] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 255.

answers to the many objections against the very idea of a just price put forward by many contemporary scholars. These objections against just price theory will be properly addressed in the next chapter. The purpose of this chapter is much more modest. It is simply to draw attention to the fact that price normativity is a feature of contract law that requires a proper explanation. The argument of this chapter, therefore, can be evaluated independently of whether the objections against just price theory—including the attempts to dismiss the *explananda* as irrelevant—are successful.[8] For to dismiss the *explananda* as irrelevant, first it is necessary to know what the *explananda* is. And *that*—plus the suggestion that attempting to explain the *explananda* actually increases our understanding of contract law—is the purpose of this chapter.

## 1. *Explanandum*: Price Normativity in the Law

In this section, I substantiate the claim that the intelligibility of deep-seated private law rules and institutions depends upon establishing some normative standard of fair pricing. To do so, I shall focus on two paradigmatic legal remedies against inequality in exchange: civil law remedies against *laesio enormis*, and the common law doctrine of unconscionability. I shall briefly discuss their historical development from Roman Law to the present and show that neither of these institutions is intelligible without putting forward a normative standard for prices, *i.e.,* a standard against which to judge whether something is being sold for more or less than its *just* price. To stress the pervasiveness of the problem of price normativity for the law, towards the end of the section I point to some instances of price normativity outwith the boundaries of contract law.

### *1.1. Price Normativity in the Civil Law: Remedies Against Laesio Enormis*

According to Classical Roman Law, the price in a contract of sale had to fulfil two

[8] This independence does not mean that conclusions from other sections would not have a bearing on the relevance of the *explananda*. The point is that it is nonetheless possible to evaluate the content of this section in its own merits and think that it gives at least *pro tanto* reasons for the relevance of the *explananda*, even if those reasons are, in the end, outweighed by stronger reasons against it.

requisites: it had to be meant seriously (*verum*[9]) and it had to be certain (*certum*[10]). A just price (*iustum pretium*) was not required. Indeed, the text of the *Digestum* explicitly stated that "the nature of sale and purchase allowed buying for less what is worth more and selling for more what is worth less." [11]

However, in the late empire—*circa* 300 AD—two texts added to the Justinian Code—C. 4.44.2 and C. 4.44.8—challenged the received wisdom about price fairness. In sharp contrast with the "liberalistic (rather than paternalistic) spirit of Roman Law",[12] these additions to the Code introduced a different logic into Roman private law, one "inconsistent with earlier codifications of Roman law, none of which had provided for relief for mere inadequacy of price".[13] These Roman texts—especially C.4.44.2[14]—allowed the vendor of a portion of land that received less than half the just price to ask the buyer for either the rescission of the contract or the difference between the price paid and the 'true' (*verum*) or 'just' (*iustum*) price of the thing.[15]

Despite the lack of clarity of the texts themselves, and the fact that they only dealt with one specific situation—a seller of land receiving less than half the just price—medieval jurists were prone to interpret the remedy granted in these texts as a legal implication of a more general normative standard: commutative justice.[16] According to commutative justice, whenever there is a disproportion in value between things exchanged—that is, whenever one thing is bought or sold for more or less than

[9] D. 18.1.36: 'cum in venditione quis pretium rei ponit donationis causa non exacturus, non videtur vendere.'
[10] D. 18.1.7.1: 'Huiusmodi emptio "quanti tu eum emisti"(…) valet (…) magis enim ignoratur, quanti emptus sit, quam in rei veritate incertum est.' Zimmermann (n 7) 253. See also the literature cited therein.
[11] D. 19.2.22.3: "Quemadmodum in emendum et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus iuris est." ("The nature of sale and purchase allowed buying for less what is worth more and selling for more what is worth less, the reciprocal taking of advantage; this is also the rule in leases and hires.)". As translated in Alan Watson (ed), *The Digest of Justinian*, vol 2 (University of Pennsylvania Press 1998) 106.
[12] Zimmermann (n 7) 255.
[13] Scott Pryor, 'Revisiting Unconscionability: Reciprocity and Justice' in Robert F Cochran and Michael P Moreland (eds), *Christianity and Private Law* (Routledge 2020) 196.
[14] C.4.44.2: "Rem maioris pretii sit u vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit."
[15] The first sentence of C.4.44.2 has 'iustum pretium' and the second 'verum pretium'. This is one of many inconsistencies of the text itself. See Zimmermann (n 7) 259–264.
[16] Ruth Sefton-Green (ed), 'Mistake, Misrepresentation and Precontractual Duties to Inform: The Civil Law Tradition', *Mistake, Fraud, and Duties to Inform in European Contract Law* (Cambridge University Press 2005) 47. In a similar vein, Zimmermann (n 7) 266–267.

its just price—equality in exchange is lost, and therefore, the exchange is unjust.[17] After identifying this general principle of justice underpinning the Roman texts, medieval jurists quickly extended the original scope of the remedy by analogy to similar cases. Thus, by the beginning of the twelfth century the remedy had already been expanded to apply both to buyers and sellers and to other transactions different from the selling of land, shortly becoming a generalised remedy against price disparity.[18] According to this general remedy, a party in a contract was granted relief if that party had suffered a gross injustice, literally an "enormous injury" (*laesio enormis*). The injury (*laesio*) was considered *enormis* whenever the price deviation was so significant that the price actually paid for a thing did not amount even to half of its just price. If such an injustice obtained, then the plaintiff could ask the defendant either to rescind the contract or to pay the difference missing from the price paid to reach at least half the just price of the thing.

Now, there was one fundamental question medieval jurists had to address in order to make sense of *laesio enormis*, namely, the question of how to estimate the just price of a good. To answer this question, Scholastics interpreted two maxims of Iustinian's *Digestum*—"[t]hings acquire their value from their general usefulness not from the particular approach or utility of individuals"[19], and "prices of things are to be taken generally and not according to personal affections nor their special utility to particular individuals"[20]—as providing grounds for identifying the just price with the market price.[21] Thus, for instance, Albertus Magnus (c. 1200-1280) claimed that the just price is that for which a thing can be sold according to the estimation of the market (*secundum aestimationem fori*) at the time of the sale[22], and a few centuries later the

[17] The idea of equality in exchange has Aristotelian roots. Cf. Aristotle, *Nichomachean Ethics* V, 5.
[18] Gordley, *The Philosophical Origins of Modern Contract Doctrine* (n 3) 65; James Gordley, Hao Jiang, and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (second edition, Cambridge University Press 2021) 193-194. The most detailed account of the doctrine of the just price among twelfth and thirteenth century medieval scholars is still John W Baldwin, 'The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries' (1959) 49 Transactions of the American Philosophical Society 1.
[19] D 35.2.63 pr: "pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur." As translated in Alan Watson (ed), *The Digest of Justinian*, vol 3 (University of Pennsylvannia Press 1998) 213.
[20] D 9.2.33 pr: "pretia rerum non ex affectione nec utilitate singulorum, sed communiter fungi" As translated in Alan Watson (ed), *The Digest of Justinian*, vol 1 (University of Pennsylvannia Press 1998) 289.
[21] On this, see Baldwin (n 18) passim; See also Raymond de Roover, 'The Concept of the Just Price: Theory and Economic Policy' (1958) 18 The Journal of Economic History 418, passim.
[22] Albertus Magnus, *Commentarii in IV Sententiarum Petri Lombardi (Dist I-XXII)*, in *Opera Omnia XXIX* (1894) 638: "Justum autem pretium est, quod secundum aestimationem fori illius temporis potest valere res vendita.". Cited in Odd Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents*

Dominican theologian Domingo Bañez (1528-1604) would still claim that there is no just price by natural law, but only by positive law, or from the common estimation of the market.[23] Based on these and other texts, it is easy to see why the claim that Scholastics identified the just price with the market price has been deemed to be "so obviously correct as to be almost a truism."[24]

However, medieval Scholastics were aware that market prices are not always the best way to estimate the price of a thing. Markets can produce prices that are nothing but a signal of the stupidity or avarice of both buyers and sellers. In this sense, late Scholastics referred to the market price not as the *just*, but as the *natural* price of things, a price that accounts even for ill-founded estimations.[25]

How can the just price be estimated when there is no market price that can be taken as reference (or when there is no market price at all)? Official regulation of prices is one alternative, especially when the market price is not available due to the cupidity of market participants. Although some Scholastics did recommend fixed prices for all basic commodities—most notably, Henry of Langenstein (1325-1383), "who of all the scholastics was the most hostile to the free market"[26]—in most cases such fixed prices would not be available, nor desirable.

In the absence of either market prices or officially regulated prices, the just price would be arrived at by *pactum*, that is, by bargaining.[27] The process of bargaining could be described thus: First, the seller places a higher value on the thing than the buyer. Then, the bargaining process starts, in which the seller gradually lowers his price, and the buyer gradually raises his, until they arrive at a price that is mutually beneficial and, therefore, both can agree upon. Once the seller has offered his lowest bid, and the buyer after all decides to buy, then both parties reach an agreement.[28] Since there is no exact point in which both parties agree, the estimation of the just

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*of Choice and Power* (Cambridge University Press 1998) 85 I have slightly changed Langholm's translation.

[23] D Bañez, *Decisiones de Iustitia et Iure, tomus quartus* (1654) II-II 77 1 272: "Nullum est pretium iustum lege naturali, sed solum lege positiva, vel ex communi aestimatione fori." The translation in the main text is my own.

[24] Odd Langholm, *Price and Value in the Aristotelian Tradition: A Study in Scholastic Economic Sources* (Universitetsforlaget 1979) 580; Odd Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power* (Cambridge University Press 1998) 85.

[25] Alejandro A Chafuen, *Christians for Freedom: Late-Scholastic Economics* (Ignatius Press 1986) 104; Alejandro A Chafuen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (Lexington Books 2003) 86.

[26] Murray N Rothbard, *Economic Controversies* (Ludwig von Mises Institute 2011) 141.

[27] *Cf* Albertus Magnus, *Ethica* V.2.9, in *Opera Omnia VIII* 355.

[28] Langholm (n 22) 102.

price admits a certain latitude.[29] Focusing on this latitude, John Duns Scotus (1266-1308) claimed that bargaining would be endless unless each party is able to sacrifice something in favour of the other, which makes it the case that "a donation accompanies every contract."[30]

For medieval jurists any deviation from the just price, no matter how small, constituted an injustice, though not necessarily a legally recognised wrong. According to medieval jurists, small deviations from the just price must be tolerated for the sake of social stability.[31] Compared to the moral principle underlying the remedy against *laesio enormis*, the legal remedy itself, tolerating a price deviation of half price above and below the just price, must have seemed a most lenient legal standard, especially considering that, whereas human law should not forbid every injustice, "Divine Law leaves nothing unpunished that is contrary to virtue".[32]

What happened with *laesio enormis* after Scholasticism? Once the moral, metaphysical, and theological framework upon which Scholasticism was built was explicitly rejected, new theoretical frameworks for understanding contract law were developed. The rise of 'will theories of contract' in the nineteenth century—stressing the 'autonomy of the will' as the only source of contractual obligations—led to a forceful rejection of the Scholastic doctrine of the *iustum pretium*. Nevertheless, these theories did not lead to the complete abolition of *laesio enormis*. Instead, will theorists proposed a consent-based reinterpretation of it, in which the legal remedy was no longer explained as an implication of commutative justice, but as an exceptional remedy for cases in which price disparity was so extreme that it could reasonably be assumed that one of the parties did not *really* or *fully* consent to the contract price. An extreme disparity of value constituted evidence of an underlying defect in consent—error or mistake, duress, fraud, etc.—but no longer an injustice in itself.

This consent-based reinterpretation of *laesio enormis* reinforced—and was reinforced by—a more general departure from the Aristotelian and Scholastic understanding of justice, which was gradually replaced by a typically liberal

[29] See, for instance, Aquinas, *Summa Theologiae* II-II q 77 a 1 *ad primum*.
[30] Scotus *Ordinatio* IV 15, in John Duns Scotus, *John Duns Scotus' Political and Economic Philosophy* (Allan B Wolter tr, The Franciscan Institute 2001).A B Wolter (translator), *John Duns Scotus' Political and Economic Philosophy* (2001) 47. Scotus's gift doctrine would be repeated by Odonis, Nider, Bernardino of Siena, Antoninus of Florence, and would rapidly become "a commonplace" (Langholm dixit) within Scholasticism. Langholm (n 22) 104.
[31] Cf Aquinas, *Summa Theologiae* II-II q 77 a 1 in c.
[32] Aquinas, *Summa Theologiae* II-II q 77 a 1 *ad primum*.

(Hobbesian) account of justice, one in which there is no such thing as non-elective obligations, and the human will is the sole source of normativity. Hobbes is explicit: "the definition of INJUSTICE is no other than *the not performance of covenant*. And whatsoever is not unjust, is *just.*"[33] From this it follows—also according to Hobbes—that "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."[34]

Remedies against *laesio enormis*, therefore, did not disappear from the civil law after the nineteenth century. Although the doctrine did suffer some major setbacks during that period and at one point it may have seemed doomed, laesio enormis is still very much alive in European contract law and beyond.[35] But the consent-based reinterpretation of it, turning it from an *objective* injustice to a *subjective* defect in consent, helped to change its *location* within contract law rules and principles: it went from being a *generalised* remedy against inequality in exchange available to buyers and sellers of any kind, to an *exceptional* remedy for some contracts and available only to certain persons.[36] Thus, remedies against *laesio enormis* still remain in force in many legal systems throughout the world, albeit in a more restrictive form than in the medieval period. The general tendency among contemporary jurisdictions is to narrow relief for *laesio enormis* to certain specific cases, and to treat it as an exception to the general rules governing contract law.[37]

Germany and France are good examples of this contemporary relocation of *laesio enormis*, but also of its pervasiveness and its potential to rise again after prolonged periods of decline. In Germany, Section 138 (2) of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB) grants relief when there is a "striking disproportion" of value between the performances exchanged. German jurists tend to consider this provision as an equity-based exception to the general principle of freedom of contract.[38] Modern German courts have regularly applied this rule and extended its scope to different kind of contracts, albeit also confirming the consent-based reinterpretation of *laesio enormis,* by considering disparity between price and value as

[33] Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1688* (Edwin Curley ed, Hackett Publishing Company 1994) Part I, Chapter XV [2] [129-131] 89.
[34] ibid Part I, Chapter XV [14] [74-76] 94.
[35] Sefton-Green (n 16) 53.
[36] The importance of relocating remedies against laesio enormis will be further discussed later on in Chapter 5.
[37] For a nice summary of the many signs of decline of the doctrine of laesio enormis in Europe during the 19th century, see Zimmermann (n 7) 267–268.
[38] § 138 (2) BGB. Cf Gordley, Jiang and von Mehren (n 18) 197-198.

an indication of underlying exploitation.[39] The contemporary renaissance of *laesio enormis* in German case law might indicate a shift towards a broader scope for application in the future.[40]

In France, the *Code Civil* regulates *lésion* as a basis for rescission only for some contracts and only as to certain persons.[41] According to Article 1674, relief is given to the seller if she has been wronged by more than seven twelfths in the price of an immovable good, in which case she has the right to request the rescission of the sale, even if she expressly renounced in the contract to the faculty to request this rescission and declared that she was making a gift of the value surplus. In addition to the Code, statutory provisions have given a similar remedy for special cases.[42] Thus, although the 2016 reform of contract law in France—the first complete revision of French contract law in over 200 years—did change the regulation of *lesion* in the *Code Civil*, it did not abolish the remedy. Moreover, the evolution of French contract law—in particular, the prominence given to the principle of good faith in the 2016 reform and the now extended protection against unfair contractual terms—seems to indicate a shift towards a more prominent place for general standards of price fairness in contract law in the future.[43]

Remedies against *laesio enormis* can also be found in the legal systems of Austria[44], the Netherlands,[45] Spain (Catalonia and Navarra),[46] South Africa,[47] Brasil,[48]

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[39] BGH, Judgment of 2 February 2000, VIII ZR 12/99 (reported in EBE 2000). See.Sefton-Green (n 16) 55.

[40] On the renaissance of *laesio enormis* in German case law, see Theo Mayer-Maly, 'Renaissance Der Laesio Enormis?' in Claus-Wilhelm Canaris (ed), *Feestschrift für Karl Larenz zum 80 Geburstag am 23 April 1983.* (C H Beck 1983). See also Sefton-Green (n 16) 55.

[41] Before the 2016 reform, Article 1118 of the Code stated this explicitly. The reform abrogated Article 1118, but *lésion* is still a basis for rescission only for some contracts and only as to certain persons in French contract law.

[42] Gordley, Jiang and von Mehren (n 18) 212-213: 'Special statutes have given a remedy to buyers of fertilizer, seeds, and fodder who pay a quarter more than their value; victims of sea or aviation accidents who pay an unfair amount for rescue or salvage; and those who sell artistic or literary property for less than five-twelfths its value'.

[43] On this, see Solène Rowan, 'The New French Law of Contract' (2017) 66 International & Comparative Law Quarterly 805, 818–820 and passim.

[44] Rena Van Den Bergh, 'The Long Life of Laesio Enormis' (2012) 57 Studia Universitatis Babes Bolyai - Iurisprudentia 35, 35.

[45] ibid.

[46] Silvia Valmaña Valmaña, 'Evolución histórica del concepto de justo precio y de la rescisión por "laesio ultradimidium"' (2015) 16 Revista de Derecho UNED 741, 741.

[47] Bergh (n 44).

[48] Código Civil, Artigo 157. The Brazilian Civil Code distinguishes between a 'subjective' element (inequality between the parties) and an 'objective' element (gross disparity between goods or services exchanged)

Colombia,[49] Argentina,[50] Chile,[51] and many other legal systems throughout the world, including some mixed jurisdictions such as Lousiana.[52] Other mixed jurisdictions, such as Scots Law, reject it as a ground for rescission. In Scotland, courts usually reject *enorm lesion* even as evidence of fraud.[53] Although the institutional writers were quite familiar with *laesio enormis* and the Scholastic doctrine of the *iustum pretium*, they consistently rejected it.[54] As Viscount Stair put it, Scottish jurists were aware that the Romans allowed for a remedy "*which our custom alloweth not*."[55]

### *1.2. Price Normativity in the Common Law: The doctrine of Unconscionability*

It has been said that the history of *laesio enormis* and the just price "is indeed the history of unconscionability."[56] This is only partially true. While both remedies have their distant origins in the same obscure Roman texts from the Justinian Code—C.4.44.8 and, especially, C.4.44.2—the doctrine of unconscionability, unlike *laesio enormis*, did not develop as a narrowly defined remedy against gross disparity of value. Rather, its development in the fourteenth century as a doctrine under the

[49] In Colombia, *laesio enormis* only requires an objective disparity between goods exchanged. It is not treated neither as a defect in consent nor as a reason for nullity of contract. See Fernando Hinestrosa, *Tratado de Las Obligaciones II. De Las Fuentes de Las Obligaciones: El Negocio Jurídico*, vol 1 (Universidad Externado de Colombia 2015) 1137.

[50] *Código Civil*, artículo 1132. In Argentina, unlike Colombia, *laesio enormis* can give rise to nullity of contract. For an excellent overview of the situation of laesio enormis in Argentina, and also showing that the divide between objective and subjective theories of laesio enormis is political, not juridical, see Diego Papayannis, 'La Lesión Subjetiva-Objetiva En El Derecho Argentino' (2005) 81 Lecciones y Ensayos 71.

[51] The Chilean Civil Code regulates *laesio enormis* not only for buying and selling, but for many other contracts as well. See Código Civil Chileno, articles 1890 (buying and selling), 2231 (loan agreements with interests), 2466 (antichresis), 1601 (liquidated-damages clause), 1291 (acceptance of a bequest), 1405 (partition of assets), 2455 (mortgage), etc. Remedies for *laesio enormis* allow the injured party to seek either restitution or rescission of contract. On the role of *laesio enormis* in Chile, see Nathalie Walker Silva, *La Rescisión Por Lesión En El Código Civil Chileno: Historia, Regulación y Vínculos Con Las Nulidades* (Tirant Lo Blanch 2019).

[52] See, for example, Article 2589 of the *Lousiana Civil Code*: "The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable. Lesion can be claimed only by the seller and only in sales of corporeal immovables. It cannot be alleged in a sale made by order of the court."

[53] Jose Thomson, 'Judicial Control of Unfair Contract Terms' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland*, vol 2: Obligations (Oxford University Press 2000).

[54] ibid.

[55] Stair, *The Institutions of the Law of Scotland* (1681) 1, 10, 14: "the question is here, whether in these [onerous or permutative] contracts there be a moral necessity to keep an exact equality, that whosoever ex post facto, shall be found to have made an unequal bargain, the gainer ought to repair the loser. In this the Romans did not notice every inequality, but that which was enorm, above the half of the just value; which our custom alloweth not."

[56] Alphonse M Squillante, 'Unconscionability: French, German, Anglo-American Application' (1969) 34 Albany Law Review 297 at 313.

common law action of *assumpsit* had a much more ambitious goal: to distinguish enforceable from unenforceable promises. This development linked unconscionability to an idiosyncratic understanding of promises—one in which promises are valid only if there is *consideration*, *i. e.*, a counter-performance or at least the promise of a counter-performance. Although this connection narrowed its scope of application to common law jurisdictions—in which a contract is a kind of promise, whereas in most civil law jurisdictions a promise is a kind of contract[57]— it also widened the scope of the doctrine by allowing it to take a broader approach to contractual justice. Indeed, unlike *laesio enormis*, the doctrine of unconscionability is not exclusively concerned with price fairness: it includes cases of inequality of bargaining power, exploitative labour conditions, lack of meaningful choice, etc.

It is usual to distinguish between procedural unconscionability and substantive unconscionability.[58] Procedural unconscionability refers to defects in the bargaining process. It includes cases of lack of meaningful choice on the part of one of the parties, superiority of bargaining power (by definition the case in adhesion contracts), cases of 'unfair surprise'—*i.e*. 'fine print' clauses and other hidden elements in a contract—sharp practices, and other forms of deception or fraud.[59] Substantive unconscionability, on the other hand, includes any kind of one-sided terms in a contract, regardless of defects in the bargaining process. Its scope is, therefore, potentially unlimited, including any clause present in a contract. Usual cases of substantive unconscionability include warranty disclaimers, exclusion of remedies, acceleration of payments, termination clauses, choice of forum, waiver of defences, waiver of damages in case of delay of performance, and, of course, excessive or unconscionable prices.[60]

Price unconscionability raises the question of how to determine whether a price

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[57] See, for instance, the French *Code Civil*, article 1124: "A unilateral promise is a contract by which one party, the promisor, grants another, the beneficiary, a right to have the option to conclude a contract whose essential elements are determined, and for the formation of which only the consent of the beneficiary is missing." John Cartwright, Benédicte Fauvarque-Cosson & Simon Whittaker (translators), *The Law of Contract, the General Regime of Obligations, and Proof of Obligations*: http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

[58] The distinction was first used by Arthur Allen Leff, 'Unconscionability and the Code. The Emperor's New Clause' (1967) 115 University of Pennsylvania Law Review 485, 487: "The law may legitimately be interested both in the way agreements come about and in what they provide. A 'contract' gotten at gunpoint may be avoided; a classic dicker over Dobbin may come to naught if horse owning is illegal. Hereafter, to distinguish the two interests, I shall often refer to bargaining naughtiness as 'procedural unconscionability', and to evils in the resulting contract as 'substantive unconscionability".

[59] Cf Deutch (n 3) 122–136.

[60] ibid 140.

is unconscionable—in other words, it raises the question of how to estimate fair prices, a problem already discussed under *laesio enormis*. As said earlier, markets, fixed-prices regulation and bargaining between the parties were all mechanisms deemed capable of arriving at fair prices.[61]

There is an ongoing discussion regarding the role of procedural and substantive elements in unconscionability that also applies to determining unconscionable prices. For many legal scholars, unconscionability only requires evidence of procedural defects, inequality of exchange being, at best, merely an indication of bargaining inequality.[62] Some scholars, however, have argued the exact opposite: that substantive unconscionability alone is sufficient to vitiate a contract, inequality of bargaining power serving merely as a warning sign of a potentially unfair outcome.[63] There are also hybrid theories, in which procedural and substantive unconscionability remain functionally different elements, both needed in order to find a contract or clause unconscionable.[64] One popular test employed by courts to solve unconscionability-related issues is Spanogle's 'sliding scale' test. According to this test, "the harsher the terms, the less concerned the court seemed [should seem] about the method used to create those terms".[65] Thus, when there is gross substantive unfairness, only a minimal amount of procedural unfairness is (should be) needed to vitiate the contract, and, viceversa, when there are gross defects of procedure, a minimal unfairness in the contract terms would or should suffice for the contract to be declared unconscionable.

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[61] See Section 1.1. above.

[62] Famously, Lord Denning in *Lloyds Bank Ltd v. Bundy* [1975] QB 326 [1975] QB 326. More recently in the United States: *Samenow v Citicorp Credit Services*, Inc. 253 F. Supp. 3d 197 (2017). Many legal scholars also support this view of unconscionability. See, for instance, PS Atiyah, *An Introduction to the Law of Contract* (Fifth edition., Clarendon Press 1995) 126–129; Marcus Moore, 'Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability' (2018) 134 Law Quarterly Review 257, 279.
In US contract law, this argument is supported by the exclusion of adequacy of consideration as a requisite for the enforcement of a promise. *Restatement (Second) of Contract* §79:
"If the requirement of consideration is met, there is no additional requirement of
(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
(b*) equivalence in the values exchanged*; or
(c) "mutuality of obligation." (emphasis added)

[63] Gordley, 'Equality in Exchange' (n 4); James Gordley and Hao Jiang, 'Contract as Voluntary Commutative Justice' (2020) 2020 Michigan State Law Review 725.

[64] Leff (n 58); Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1960) 370; Deutch (n 3) 119–122.

[65] John A. Spanogle Jr., "Analyzing unconscionability problems" 117 (7) UPalRev (1969) 931 at 950.

Unlike *laesio enormis*, price unconscionability provides no fixed standard that would allow judges to know when a price is unconscionable—it is all left to *conscience*.[66] Nevertheless, the procedural vs substantive unconscionability debate has the exact same structure as the justice-based vs consent-based interpretation of remedies against *laesio enormis.* In both cases the debate is not about whether having or not a normative standard against which to judge prices, but rather about which specific normative standard—commutative justice or autonomy—should prevail.[67]

Starting as a very specific common-law remedy in equity, now, with the emergence of consumer law and the pervasiveness of contracts of adhesion, unconscionability has become one of the most general principles of civil and commercial law in many common-law jurisdictions, especially in the United States.[68]

### *1.3. Other Cases of Price Normativity in the Law*

It should not come as a surprise that the two most important examples of price normativity in the law—*laesio enormis* and price unconscionability—are also examples of contract law remedies against inequality in exchange. The reason for this is that the Scholastic doctrine of the just price was developed within the normative framework of commutative justice—that is, justice regarding the mutual dealings between two persons—and was based on Aristotle's treatment of equality in exchange in Book V 5 of his *Nichomachean Ethics*.[69] The doctrine of the just price, as originally developed by Scholastics, was a doctrine of *commutatively* just prices. The question of *distributively* just prices was not part of their concern.[70]

Things have certainly changed since then. The institutionalisation of price normativity in the law has been increasingly extending beyond the original *explananda* of Scholastic just price theory. There has been a shift from remedies against inequality in exchange to rules and institutions with much broader implications for distributive

[66] The obvious question is: *whose conscience?* On this issue, and arguing that the concept of conscionability is built around an objective picture of conscience based on the idea that conscience is an inner response to a possible gap between one's action and one's moral duties, see Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press 2018) 44–65.

[67] This tension between different normative standards of just pricing will be further developed in the following chapters.

[68] The leading case is *Williams v. Walker-Thomas Furniture Co. 350 F.2d 445*. As for legislation, unconscionability is applicable to the sale of goods in Section 2-302 of the Uniform Commercial Code. It is also mentioned in the *Restatement (Second) of Contracts* (1979) §153

[69] de Roover (n 21); Baldwin (n 18); Gordley, 'Equality in Exchange' (n 4); Gordley, *The Philosophical Origins of Modern Contract Doctrine* (n 3); Langholm (n 24); Langholm (n 22).

[70] On this, see also the remarks on the Aristotelian concept of distributive justice in Chapter 3.

justice. To list just a few cases of currently existing legal rules and policy proposals in need of a normative standard to evaluate prices:

1) Fair rent laws[71]
2) Fair or minimum wages laws[72]
3) Maximum wages proposals[73]
4) Fair tax proposals[74]
5) Universal Basic Income (UBI) proposals[75]
6) Quasi-UBI schemes (old-age pension, child benefits, conditional cash transfers, guaranteed minimum income, negative income tax[76], etc.)
7) Prohibitions on price gouging (raising the price on goods and services in the event of a natural disaster or other crisis) [77]
8) Prohibitions on price discrimination (charging different prices to different groups of consumers for an identical good)[78]
9) Antitrust laws protecting consumers from high prices
10) Consumer laws protecting consumers against abusive clauses
11) Public utility laws[79]
12) Practice of the courts in giving relief for price disparity[80]
13) Implied duties of fair dealing and good faith[81]
14) Prohibitions on algorithmic spoofing or layering in financial markets (market manipulation techniques in which traders outstrip other market participants by

[71] On fair rent laws and its connection to just prices, see David Nelken, *The Limits of the Legal Process : A Study of Landlords, Law, and Crime* (Academic Press 1983) 15.
[72] See, for instance, Indian Parliament's *Minimum Wages Act* (1948).
[73] The Scholastic idea of a just price is linked to the idea of a 'living wage' as a maximum wage. On this, see Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power* (n 24) 125. On the case for a maximum wage, see Sam Pizzigati, *The Case for a Maximum Wage* (Polity Press 2018).
[74] See, for instance, the proposal to reform the federal tax code in the United States: the *Fair Tax Act* (2017) (H.R. 25/S.18).
[75] Although UBI proposals generate great global interest (Andrew Yang's proposal of a *freedom dividend* as part of his presidential campaign in the United States is a case in point), UBI has not yet been tried in any jurisdiction. Finland's basic income experiment—usually cited as an example of UBI scheme—focused only on the unemployed and was not for life (it only ran for two years, from 2017 to 2019). An UBI is income for everyone, for life, with no strings attached. On UBI, see Philippe Van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* (Oxford University Press 1997); Philippe Van Parijs and Yannick Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy* (Harvard University Press 2017); Louise Haagh, *The Case for Universal Basic Income* (Polity Press 2019).
[76] The idea of a negative income tax was first introduced in Milton Friedman, *Capitalism and Freedom* (Fortieth Anniversary Edition, The University of Chicago Press 2002) 191-194.
[77] See, for instance, Alabama Code § 8-31-4 (2017), Florida State §501.160 (2017), Mississippi Code Ann. §75-24-25 (2008), Ohio Rev. Code Ann. §1345.01 (2009), California Penal Code § 396 and §396b. On price gouging in general, see the influential Matt Zwolinski, 'The Ethics of Price Gouging' (2008) 18 Business Ethics Quarterly 347.
[78] See, for instance, the US federal law *Robinson-Patman Act* of 1936 (or Anti-Price Discrimination Act, Pub. L. Nº 74-692, 49 Stat. 1526 (codified at 15 United States Code (USC) §13).
[79] On this, see William Boyd, 'Just Price, Public Utility, and the Long History of Economic Regulation in America' (2018) 35 Yale Journal on Regulation 59.
[80] Gordley, 'Equality in Exchange' (n 4) 1645; Commons (n 4).
[81] See, for instance, *Restatement (Second) of Contracts* §205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

creating an illusion of supply and demand for some traded assets)[82]

While not every one of these contemporary rules, policies, practices, and institutions has historical roots in Scholastic just price theory—although some of them clearly do[83]—they all have in common that they resort to a normative standard against which to judge prices, be it of goods, basic services (public utility laws), labour (fair wages laws), or even life as a whole (UBI schemes, quasi-UBI schemes, maximum wages laws, etc.). Some of these examples— (13), and possibly (7) and (10)– fit more or less squarely within the boundaries of traditional contractual exchange. However, some of them refer to special kinds of prices that, besides the generic issues around commutatively just prices, present their own specific set of issues stemming from concerns over distributive justice—fair rents and fair wages (the price of labour) are the most obvious examples. Moreover, public utility laws, UBI and quasi-UBI proposals relate almost exclusively to concerns over distributive justice.

For better or worse, and regardless of the future of institutions such as *laesio enormis* and unconscionability, there are reasons to believe that price normativity will continue to shape the normative landscape of the law in the future.

## 2. Revolutionary Scholasticism (or Why Explaining the *Explananda* Matters)

The previous section ended with the acknowledgement of an ever-increasing scope for price normativity in the law, shifting from legal rules in the law of contracts to broader institutional settings. This new and broadened scope of the *explananda*—which may be explained as a shift from commutative to distributive justice—provides a stark contrast to the originally narrow scope of remedies against inequality in exchange, showing that price normativity in the law has come a long way since its humble origins in the two obscure Roman texts granting a remedy for the seller for the selling of land for more than half of its *iustum pretium*.

The original scope of price normativity in the law now appears to us as

[82] In the UK, spoofing is not a specific offence, but it may contravene regulatory provisions in the EU *Market Abuse Regulation (596/2014*) and amount to a criminal offence under the *Financial Services Act 2012* or the *Fraud Act 2006*. In the US, spoofing is explicitly prohibited under the *2010 Dodd-Frank Act.* I thank Chloe Kennedy for suggesting the connection between algorithmic spoofing and just pricing.
[83] For instance, the modern idea of a maximum wage is strikingly similar to the Scholastic idea of a *family wage* as an *upper limit on profits*. See Langholm (n 22) 124; Boyd (n 79).

extremely narrow—and arbitrarily so. Indeed, why grant a legal remedy only to unfair pricing for the selling of land? And why, in fact, only to the seller? And why just sales? What about leases (fair rents), and other types of contracts such as labour contracts (fair wages)? And why not expand the idea of just prices from private to *public* goods (public utility laws)? There seems to be nothing in the concept of just prices limiting its scope only to prices of a certain kind.

In this section, I propose an explanation for this phenomenon. I would like to suggest that the reason for the increasing expansion of the explananda is that adopting *any* standard of price fairness for *any* price-related practice entails answering two questions at once: a more general and conceptual question regarding price normativity itself—*i.e*., 'Can prices be (un)just?'—and another, more specific, question concerning the adoption of a specific criteria of price fairness—*i.e.*, 'Are there reasons to adopt this specific criteria of price fairness applying to prices within this kind of transaction? The adoption of *any* criteria of price fairness entails answering 'Yes' to both questions. However, the normative significance of each answer is quite different. I elaborate in what follows.

The affirmative answer to the first question involves affirming the existence of a set of reasons that would otherwise be deemed non-existent in the eyes of the law. Thus, the affirmation of price normativity—the affirmative answer to the question 'Can prices be (un)just?'—*reshapes* the normative landscape of the law by allowing the parties to invoke a set of reasons that make *visible* (intelligible) what was previously *invisible* (unintelligible) to the law, namely, *unjust pricing*. By contrast, the normative significance of the adoption of a specific criteria of price normativity is more modest. The affirmative answer to the question concerning whether there are any good reasons for adopting a specific normative standard of price fairness for a particular kind of transaction merely acknowledges the existence of *pro tanto* reasons for adopting that specific normative standard to *that* specific kind of transaction—that is, reasons that count if favour of the adoption of that specific standard, but that can nevertheless be outweighed by other reasons. As noted above, the specific standard of just pricing adopted in Roman Law was half price above or below the just price, and the specific kind of transaction was the selling of land.

What accounts for the potential for expansion of price normativity is precisely the connection between the relatively modest normative significance of the second answer and the 'revolutionary' acknowledgement of a whole new set of reasons

produced by the first answer. Indeed, since the reasons that justify the adoption of price normativity for a certain kind of transaction are merely *pro tanto* reasons, they can be outweighed at any time by weightier considerations. But once the first question ('Can prices be (un)just?') is answered in the affirmative, finding strong, principled, reasons to insulate certain price-related practices from justice-based considerations becomes increasingly difficult.

To illustrate this point in more detail, in what follows I propose one way of reconstructing the reasoning that allowed medieval jurists—and may allow others in the future—to conclude that there should be a generalised remedy against *laesio enormis* in the law of contracts. The idea is to show how the potential for expansion embedded in the very doctrine of the just price allowed medieval jurists to both morally justify and at the same time legally create a remedy against inequality in exchange as a general remedy in contract law. By doing so, I attempt to illustrate how a revolutionary reading of price normativity in the law could work—that is, how adopting a specific criteria of price fairness for certain cases can lead to more general normative implications to an entire field of law (in this case, contract law).

### *2.1. Revolutionary Scholasticism: A formal reconstruction and explanation*

For clarity of exposition, I shall give the full reconstruction first, and the explanation of each step of the reconstruction later.

Here is the complete reconstruction:

(i) According to the normative structure of the Roman legal system, it is impossible to sell something for more than its just price.

(ii) Two authoritative legal provisions [=the remedy against *laesio enormis*] grant[s] relief for cases in which a piece of land has been sold for more than its just price.

(iii) [From (i) and (ii)] The remedy against *laesio enormis* is incompatible with the normative structure of the Roman legal system.

(iv) If an authoritative legal provision *x* is incompatible with the normative structure of the legal system *y*, then *x* creates an exception to *y*, while still forming part of *y*.

(v) [From (iii) and (iv)] The remedy against *laesio enormis* creates an exception to the Roman legal system, while still forming part of the Roman legal system.

(vi) If there is a general normative standard coherent with the internal logic of an exceptional legal remedy, and there are no countervailing considerations, then that remedy should be expanded by analogy to other cases that respond to the same logic.

(vii) Commutative justice [=keeping equality of value between things exchanged] is a normative standard coherent with the internal logic of the remedy against *laesio enormis.*

(viii) There are no countervailing considerations

(ix) [From (vi), (vii) and (viii)] The remedy against *laesio enormis* should be expanded by analogy to other cases responding to the logic of commutative justice.

(x) Every contractual exchange of goods responds to the logic of commutative justice.

(xi) [From (ix) and (x)] The remedy against *laesio enormis* should be a remedy available in every contractual exchange of goods.

Before proceeding, a few points about this reconstruction should be kept in mind for the rest of the explanation.

First, the proposed reconstruction does not entail an empirical claim about how medieval theologians actually reasoned when expanding price normativity, but one possible reconstruction of the way in which they *could have reasoned* in order to explain and justify the expansion of price normativity that, for whatever reason, actually took place in the medieval period.

Second, the 'should' in the conclusion is normative, not predictive. This means that the conclusion is not that price normativity *will expand* in the future, nor that this expansion was a historical necessity. The circumstances of fact (historical, political, cultural, etc.) that allowed for its expansion in the medieval period may or may not be repeated in the future. However, it does follow from this reconstruction that if price normativity is *not* allowed to expand, there will be a set of justice-based reasons unconformed to, and those reasons will be awaiting conformity until price normativity reaches its full expansion.[84] Thus, the formal reconstruction is meant to illustrate how

[84] The idea of justice-based reasons awaiting conformity is partially inspired by—but quite different from—John Gardner's *continuity thesis*. See John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 102: "[The continuity thesis] is the thesis that, when a contract was breached or

someone trying to deduce the revolutionary implications of price normativity in the law *could reason* in the future so as to make a normative point about their current legal system. This does not mean, of course, that the 'revolution' will be successful, for there may be other normative forces at play, even within the same legal system, that may run in the opposite direction to price normativity (more on this last point later).

With these considerations in mind, let me explain how it was possible for Scholastics to reach the final conclusion:

(xi) The remedy against *laesio enormis* should be a general remedy available in every contractual exchange of goods.

There was one obvious difficulty to reaching this conclusion: the already mentioned "liberalistic (rather than paternalistic) spirit of Roman Law."[85] This difficulty could be stated as follows:

(i) According to the normative structure of the Roman legal system, it is impossible to sell something for more than its just price.

(ii) Two authoritative legal provisions grant relief for cases in which a piece of land has been sold for more than its just price [authoritative legal provisions=remedy against *laesio enormis*]

(iii) [From (i) and (ii)] The remedy against *laesio enormis* is incompatible with the normative structure of the Roman legal system.

(iv') If an authoritative legal provision *x* is incompatible with the normative structure of a legal system *y*, then *x* cannot be a part of *y*.

From these premises, the conclusion follows:

(v') The remedy against *laesio enormis* cannot be part of the Roman legal system.

But as we know, this is not the conclusion reached by medieval jurists. Why not? There is one obvious reason: there were two authoritative legal provisions—C. 4.44.2 and 4.44.8—that referred to the selling of land for more than its *iustum pretium*. Therefore, medieval jurists had reasons to interpret those texts in a way that would make them coherent with the rest of Roman Law.

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any other wrong was done to another person, various reasons went unconformed to, and those reasons are still awaiting conformity."

[85] Zimmermann (n 7) 255.

However, medieval jurists could have done that without challenging the received wisdom regarding just prices. In fact, they could have easily interpreted '*iustum pretium'* as nothing more mysterious than '*certum pretium'* or '*verum pretium'*, two ideas well known to Roman Law, *verum pretium* even being expressly mentioned in C.4.44.2. So, they could have concluded something different from (v') by reinterpreting the idea of *iustum pretium* and make it fit with the 'liberalistic' logic of Roman Law. Thus, they could have argued the following:

(ii') Two authoritative legal provisions [=the remedy against *laesio enormis*] only cover situations in which a price is *verum* but not *certum*, *certum* but not *verum*, or neither *verum* nor *certum*.

(i') An authoritative legal provision that covers situations in which a price is *verum* but not *certum*, *certum* but not *verum*, or neither *verum* nor *certum* is compatible with the normative structure of the Roman legal system.

Therefore,

(iii') [From (i') and (ii')] The remedy against *laesio enormis* is compatible with the normative structure of the Roman legal system.

This would have been an easy solution to the interpretative problem posed by *laesio enormis*. However, medieval jurists chose not to take this path. Instead, they accepted (i), (ii), and (iii), but challenged the truth of (iv'). For clarity, let me repeat these premises here:

(i) According to the normative structure of the Roman legal system, it is impossible to sell something for more than its just price.

(ii) Two authoritative legal provisions grant relief for cases in which a piece of land has been sold for more than its just price [authoritative legal provisions=remedy against *laesio enormis*]

(iii) [From (i) and (ii)] The remedy against *laesio enormis* is incompatible with the normative structure of the Roman legal system.

(iv') If an authoritative legal provision *x* is incompatible with the normative structure of a legal system *y*, then *x* cannot be a part of *y*.

How can proposition (iv') be challenged? By appealing to a well-known rule of interpretation: *exceptio probat regulam*, the exception confirms the rule. Using this

interpretative rule, proposition (iv') can be replaced by:

(iv) If an authoritative legal provision *x* is incompatible with the normative structure of a legal system *y*, then *x* creates an exception to *y*, while still forming part of *y*.

Therefore,

(v) [From (iii) and (iv)] The remedy against *laesio enormis* creates an exception to the Roman legal system, while still forming part of the Roman legal system.

Now we have a complete argument to interpret the remedy against *laesio enormis* as an exceptional remedy in Roman law. The complete argument so far is this:

(i) According to the normative structure of the Roman legal system, it is impossible to sell something for more than its just price.

(ii) The remedy against *laesio enormis* covers situations in which a piece of land has been sold for more than its just price.

(iii) [From (i) and (ii)] The remedy against *laesio enormis* is incompatible with the normative structure of the Roman legal system.

(iv) If an authoritative legal provision *x* is incompatible with the overall normative structure of the legal system *y*, then *x* creates an exception to *y*, while still forming part of *y*.

(v) [From (iii) and (iv)] The remedy against *laesio enormis* creates an exception to the Roman legal system, while still forming part of the Roman legal system.

But this is just the first step. We must still account for the *revolutionary* nature of the rule, *i.e.*, for the fact that once price normativity is recognised as a feature of *some* contracts, it has the ability to expand to *all* contracts. In other words: we need to explain *how the exception can become the rule*.

Why were Scholastics able to expand the scope of *laesio enormis*? Because they resorted to a supra-legal (moral) normative standard sharing the same bipolar normative structure as contract law—*i.e.*, a structure that "connects two, and only two,

persons"[86]—that they saw embedded within the very definition of the remedy against *laesio enormis*.[87] This standard is what Aquinas—inspired by Aristotle's idea of keeping equality in exchange—called *commutative justice*. This is explained in Aquinas' *Summa Theologiae* thus:

> Whatever is established for the common advantage, should not be more of a burden to one party than to another, and consequently all contracts between them should observe equality of thing and thing. Again, the quality of a thing that comes into human use is measured by the price given for it, for which purpose money was invented, as stated in *Ethic.* v. 5. Therefore, if either the price exceed the quantity of the thing's worth, or, conversely, the thing exceed the price, there is no longer the equality of justice: and consequently, to sell a thing for more than its worth, or to buy it for less than its worth, is in itself unjust and unlawful.[88]

Commutative justice and the idea of keeping equality of value between things exchanged operates as the driving normative force behind the revolutionary expansion of price normativity in the law. I elaborate on this point in what follows.

As noted above, the scope of application of commutative justice is the whole field of contractual exchange. In other words, every contract involving exchange of goods ought to keep equality of value between things exchanged. From this it follows that for *every* transaction of goods involving a price, the price of the exchanged goods ought to conform to the requirements of commutative justice, *i.e.*, ought to keep equality between what is given and what is received. If the law recognises this standard for some price-related transactions but not to others, *and there are no countervailing considerations* (see the next paragraph), then price normativity in the law should be expanded by analogy to those other cases. Otherwise, there will be a set of justice-based reasons unconformed to, and those reasons will be awaiting conformity until price normativity reaches its full expansion.

This does not mean, of course, that there cannot be other normative forces at play, even within the same legal system, that might run in the opposite direction than commutative justice. These normative forces count as countervailing considerations. What is more, given that private law operates under the assumption of formal equality, and that the concept of a just price runs opposite to the fiction of formal justice, commutative justice is bound to be met with resistance from the host legal system.

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[86] Ernest Joseph Weinrib, *The Idea of Private Law* (Rev edition, Oxford University Press 1995) 64.
[87] On bipolarity, see ibid 63-66.
[88] Aquinas, *Summa Theologiae*, II-II q 77 a 1 in c.

Nevertheless, as the original remedy expands and the logic embedded in it increasingly appears to be a more pervasive feature of contract law, there can come a time when the exception becomes the rule, and contract law institutions could be conceptualised under a different light. More precisely: equality in exchange—and with it, price normativity—can be increasingly recognised as a typical aspect of the normative structure underlying our contractual practices—as part of the normative landscape of contract law. [89]

With these considerations in mind, the structure of the argument to expand *laesio enormis* and turn it into a generalised remedy against inequality in exchange can be reconstructed as follows:

(vi) If there is a normative standard coherent with the internal logic of a legal remedy, and there are no countervailing considerations, then that remedy should be expanded by analogy to other cases that fit that same logic.

[89] Two related examples—the debate over abortion laws and the parallel debate regarding registration of stillbirth laws—might help to clarify the point. In 2017, the Chilean Senate approved a bill allowing abortion under limited circumstances (three exceptional cases). Before the bill was approved, abortion was criminalised in Chile without exception. Due to its limited scope (only three exceptional cases), the approved bill did not meet the expectations of pro-abortion-rights groups, who advocated for legalising abortion in *all cases*, at least during the first trimester of pregnancy. Nor did it meet the expectations of anti-abortion groups, who were in favour of keeping abortion illegal *in all cases*. One of the arguments of anti-abortion movements to oppose the bill—not necessarily the best one—was that introducing abortion in these three cases would give legal grounds to a political demand for increasingly pro-abortion legislation.

Defenders of the bill pointed out that this was a *slippery slope* argument. However, the most charitable way to interpret the anti-abortion argument seems to be that the new legislation allowed for a set of considerations regarding women's rights that, before the passing of the law, had no legal weight against anti-abortion legal arguments. In other words: the new abortion law would *reshape* the normative landscape,.*i.e*., it would change the normative structure of the law by giving legal recognition to a set of considerations—women's reproductive rights—that were invisible to the law before the passing of the bill.

Consider now a second example: On 13 August, 2019, the Chilean Senate approved a bill to allow registration of stillbirth. The bill allowed parents to register stillborn babies into the Civil Registry so that they can be buried and identified with a first name and their parent's last name. The bill was promoted mainly—but not exclusively—by anti-abortion movements. Pro-abortion-rights movements opposed the bill on the grounds that the recognition of stillbirth would threaten abortion rights in the future: if the law recognises that a stillborn child has the right to be given a name in the same way as any other dead child, then it is difficult to claim that unborn children have no legal personhood, thus threatening the legality of abortion.

It is easy to see that the pro-abortion-rights argument against registration of stillbirth has the form of a *slippery slope* argument. But the point seems to be, again, that allowing for the registration of stillbirth would mean to introduce a set of considerations regarding the human dignity of the stillborn that might counterweight the future expansion of abortion rights. To be sure, allowing the registration of stillbirth need not be a threat to legalised abortion nor viceversa. But both bills introduced a different set of reasons within the law that will remain unconformed to unless they reach their full expansion—and, in this sense, they are indeed bills that, however sensible, do create a certain normative tension within the legal system.

(vii) Commutative justice [=keeping equality of value between things exchanged] is a normative standard coherent with the internal logic of the remedy against *laesio enormis.*

(viii) There are no countervailing considerations

(ix) [From (vi), (vii) and (viii)] The remedy against *laesio enormis* should be expanded by analogy to other cases responding to the logic of commutative justice.

(x) Every contractual exchange of goods responds to the logic of commutative justice.

Therefore,

(xi) [From (ix) and (x)] The remedy against *laesio enormis* should be a remedy available in every contractual exchange of goods.

Now we have the full argument:

(i) According to the normative structure of the Roman legal system, it is impossible to sell something for more than its just price.

(ii) Two authoritative legal provisions [=the remedy against *laesio enormis*] grant[s] relief for cases in which a piece of land has been sold for more than its just price

(iii) [From (i) and (ii)] The remedy against *laesio enormis* is incompatible with the normative structure of the Roman legal system.

(iv) If an authoritative legal provision *x* is incompatible with the normative structure of the legal system *y*, then *x* creates an exception to *y*, while still forming part of *y*.

(v) [From (iii) and (iv)] The remedy against *laesio enormis* creates an exception to the Roman legal system, while still forming part of the Roman legal system.

(vi) If there is a normative standard coherent with the internal logic of an exceptional legal remedy, and there are no countervailing considerations, then that remedy should be expanded by analogy to other cases that respond to the same logic.

(vii) Commutative justice [=keeping equality of value between things exchanged] is a normative standard coherent with the internal logic of the remedy against *laesio enormis.*

(viii) There are no countervailing considerations

(ix) [From (vi), (vii) and (viii)] The remedy against *laesio enormis* should be expanded by analogy to other cases responding to the logic of commutative justice.

(x) Every contractual exchange of goods responds to the logic of commutative justice.

(xi) [From (ix) and (x)] The remedy against *laesio enormis* should be a remedy available in every contractual exchange of goods.

If the argument is correct, then the medieval strategy involved a Kuhnian-like paradigm shift for contract theory, for it entailed an acknowledgement that price normativity is not an exceptional feature of only certain kinds of contracts involving only certain kinds of persons, but rather a general feature of contractual exchange. Thus, disputes concerning just pricing that were regarded heretofore as disagreements about whether prices can be subject to normative standards—as seems to have been the case among Classical Roman jurists, according to whom Roman law required no such standard—now, from the new standpoint provided by the Scholastic doctrine of the just price, can be seen as disputes between alternative normative standards of fair pricing.

I shall come back to this idea later on in the thesis.[90] For now, and just to illustrate the extent to which our understanding of contractual practices has been shaped by the Scholastic doctrine of the just price, consider what happened with legal remedies against *laesio enormis* after the moral, metaphysical, and theological framework upon which medieval jurisprudence was built was explicitly rejected, and new theoretical frameworks for understanding the law—and contract law in particular—were developed. While the rise of the will theories of contract in the nineteenth century—stressing the autonomy of the will and the parties' consent as the only source of contractual obligations—led to a rejection of the Scholastic doctrine of the just price, it did not lead to the *complete* abolition of the doctrine of *laesio enormis*.[91] Instead, will theorists proposed a consent-based reinterpretation of it. The

[90] See especially chapters 2 and 3.

[91] For a brief yet instructive overview of the abolition of laesio enormis in the nineteenth century and its subsequent revival, see Zimmermann (n 7) 267–270; Gordley, Jiang and von Mehren (n 18) 193-198; For a more detailed account, with special emphasis on Spanish Law, see Valmaña Valmaña (n 46).

remedy against *laesio enormis* was no longer explained as the institutionalisation of a substantive moral principle—commutative justice—underlying contract law, but rather as an exceptional remedy for cases in which price disparity was so extreme that it could reasonably be assumed that one of the parties did not *really* or *fully* consent to the contract price. An extreme disparity of value constituted evidence of an underlying defect in consent—mistake, duress, fraud, etc.—but no longer an injustice in itself.[92]

This consent-based reinterpretation of *laesio enormis* is, to be sure, a departure from the Scholastic tradition, and an endorsement of a typically Hobbesian account of justice, one in which the human will is the sole source of normativity and in which there is no such thing as non-elective obligations. The nineteenth-century approach to price fairness, therefore, looks much more familiar to the contemporary reader than the Scholastic idea of an *objectively just* price, and it is undoubtedly closer to the more radical rejection of price normativity present in modern legal and economic scholarship.[93] However, because their legal systems included remedies against inequality of exchange, will theorists were unable to propose a full-blown rejection of price normativity, even though that rejection was perhaps the most natural conclusion to follow from their premises. Instead, they had to put forward their own standard of price normativity, even if, as one would expect, this standard amounted to nothing more than the claim that the just price is whatever price the parties have agreed upon in the contract.

Later in the thesis I shall deal with this consent-based reinterpretation of price normativity in more depth.[94] What now needs to be noted is that the Scholastic doctrine of the just price allows us to understand will theories of contract in a new light, namely, as offering an *alternative* conception of fair pricing, and not as rejecting price normativity *tout court*. This allows us to find common ground between Scholastic theory and will theories of contract and therefore to assess such theories based on how well their proposed standards of fair pricing—commutative justice and consent, respectively—fare in relation to rival standards, and also to ask broader questions concerning the relationship between commutative justice, on the one hand, and

[92] As noted above, the common law debate regarding the primacy of procedural or substantive elements of the unconscionability doctrine mirrors this discussion.
[93] Cf RG Collingwood, 'Economics as a Philosophical Science' (1926) 36 International Journal of Ethics 162; Ludwig von Mises, *Human Action: A Treatise on Economics.* (third revised edition, 1966); Friedrich A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge 1993). I deal with this more radical rejection of price normativity in Chapter 2.
[94] See Chapters 2, section 2.3; Chapter 3, section 3; and Chapter 6.

consent, on the other, that were not readily asked neither by Scholastics nor by will theorists of contract.

Thus, the Scholastic doctrine of the just price *reshaped* the normative landscape of contract in a way that was not open from within what Reinhard Zimmermann called the "liberalistic (rather than paternalistic) spirit of Roman Law."[95] By articulating their doctrine of equality in exchange and the just price, and therefore developing in a certain direction their own legal, philosophical, and theological traditions—Roman Law, Aristotle, and Christian theology, respectively—, medieval jurists implicitly answered in the affirmative a question concerning the very possibility of price normativity. In doing so, they *changed* the normative structure of contract in a way that, although embedded in their own understanding of the just price and of *laesio enormis*, also reached beyond the particularities of their own tradition.

### *2.2. Reply to Objections*

The way in which I have reformulated consent-based theories as just-price theories is open to the objection that, in doing so, I am effectively distorting these theories. Not only that, but I would be giving Scholastics an unfair advantage from the outset by allowing their belief in the possibility of just prices to dictate the terms of the debate. It would make much more sense, so the objection would go, to take consent-based theories for what they really are, namely, a first step towards a full-blown rejection of the very idea of the just price. Nineteenth-century jurists' acceptance of *laesio enormis* is best understood as a *modus vivendi* that does not commit them to any more than to acknowledge that their own legal systems are shaped by a false belief on price normativity. To propose consent as the source of that normativity is nothing but a veiled way of *denying* that there is such a thing as price normativity.

The objection fails to acknowledge that lacking a standard of price fairness is not an external, but an *internal* problem for will theories of contract—it is a problem stemming from the theory's own *explananda,* namely, how to make sense of legal remedies against inequality in exchange. The solution to *that* problem, from the standpoint of consent theory, was to appeal to consent as providing precisely such a standard of price fairness. To simply reject price normativity was not an option. Moreover, even conceding that the reluctant acceptance of *laesio enormis* by will

[95] Zimmermann (n 7) 255.

theorists was nothing more than acceptance as a *modus vivendi*, the mere fact that the rejection of the *iustum pretium* had not been followed by a rejection of *laesio enormis*, and that therefore will theorists had been forced to reconstruct *laesio enormis* as evidence of an underlying defect in consent, shows how significant the medieval achievement actually is for understanding contract law. The historical defeat of the Scholastic idea of substantively just prices can also be seen, somewhat paradoxically, as the mark of its victory. For then it became clear, even in the eyes of their critics, that albeit not the specific standard of fairness conceived by Scholastics, a standard of price fairness was needed in order to make sense of contract law.

Another objection is based on the ideological nature of the medieval interpretation of Roman Law. Indeed, it is all too easy for contemporary scholars to dismiss medieval interpretations of Roman law because they were too ideologically driven. The medieval interpretation of C.4.44.2 and C.4.44.8 would provide the perfect example of this, for only someone with a very specific religious or political agenda could reach the conclusion that those texts were intended to provide some general legal remedy against unfair pricing. What this would reveal, therefore, is that medieval jurists, in their religious and moralistic zeal, intended to impose their preconceived theological conception of justice upon contractual practices, and found in the two aforementioned Roman texts the perfect excuse to invent a moralising doctrine of the 'just price' that would put contracts—and the market—within the realm of morality, and therefore, within the jurisdiction of the Roman Catholic Church as the self-appointed guardian of that morality.

Moreover, as an explanation of the reasons motivating the Roman provisions against *laesio enormis,* the medieval explanation would be highly problematic. Contrast the medieval explanation of these Roman texts with another very plausible explanation for the introduction of these texts into Roman law. This second explanation is connected to the material conditions of the Roman Empire towards the end of the third century. This century was marked by profound changes in the agricultural world, which caused economic stagnation based on a shortage of agricultural labour—over-taxation was not leaving the peasantry with enough food to survive—all of which led to increasingly higher levels of price inflation.[96] Presumably, these circumstances had made price determination extremely difficult for landowners, and many might have

[96] See Bergh (n 44) 41.R and the literature cited therein.

found themselves in the unpleasant situation of selling their lands at prices which turned out to be far below their market value at the time. Therefore, it is all too likely that these texts were meant as a protection for upper-class landowners from financial instability, and not as a way to incorporate any substantive standard of just pricing whatsoever, least of all to challenge in any meaningful way the pervasively "liberalistic (rather than paternalistic) spirit of [Classical] Roman Law".[97]

Therefore—so the objection goes—our understanding of the law would gain much by getting rid of medieval interpretations of Roman Law and focusing instead on what liberal scholarship has to offer in order to make sense of our contractual practices. If the objection is correct, then the idea of a just price has never done anything to increase our understanding of contract law. In fact, by effectively mixing legal considerations with religious and moral ideology, it has done quite the opposite.

Responding to this objection will allow us to clarify the sense in which the medieval explanation of *laesio enormis* as a legal implication of a broader standard of contractual justice can plausibly be considered *revolutionary*—and the sense in which it clearly is not. Moreover, it will allow us to clarify the sense in which it can be deemed a *plausible* explanation at all—and the sense in which it is clearly not. If the claim that the Scholastic interpretation of *laesio enormis* is revolutionary is conceived as a claim about the *motivations* of Roman judges, then the proposed interpretation seems to be downright false, especially considering the socio-economic conditions mentioned in the above paragraph: if the motivation for introducing the provisions contained in C.4.44.8 and C.4.44.2 was to come to the aid of upper-class landowners, then the *iustum pretium* and *laesio enormis* appear to be more reactionary than revolutionary. And if one believes, with Dworkin, that a satisfying explanation of the law should not only *fit* the *explananda*, but must also include a *motivational* component—*i.e.*, an account of how the law came to have the features it now possesses—, then the medieval explanation of *laesio enormis* is highly implausible and, therefore, would not count as a satisfying explanation of *laesio enormis*.[98]

I concede that my reconstruction of the reasoning of the Scholastics does not include a motivational component in the Dworkinian sense. In fact, the proposed

[97] Zimmermann (n 7) 255.

[98] For the idea that a satisfying explanation of the law must include a motivational component, see Ronald Dworkin, 'Is Wealth a Value?' (1980) 9 The Journal of Legal Studies 191, 219–220; Nicholas J McBride, *The Humanity of Private Law. Part I: Explanation* (Hart Publishing 2018) 27.

explanation is *not* a *historical* account of the motivations of judges, nor of how contract law came to have the features it possesses. True, it is in virtue of the historical development of Scholasticism that it is possible to reconstruct the normative justification of *laesio enormis* as I have done it. But that does not mean that this is an *historical* account of the justification of *laesio enormis*. In what sense, then, is the medieval explanation—or rather, my own reconstruction of it—a satisfying explanation of *laesio enormis*? In the sense that it is an explanation of the normative significance of the doctrine, a significance that can only be seen under certain philosophical presuppositions such as the ones present in the Aristotelian idea of commutative justice. In the same way as, for instance, the Marshallian idea of social rights is a *normative* idea made plausible only after the recognition that formal equality via civil and political rights was not enough, and that social inequality is a real hurdle to a civilised life between equal citizens[99],the Scholastic account of *laesio enormis* is a *normative* account that is made *plausible* by a certain set of presuppositions present in the Aristotelian idea of equality in exchange without which such an account would not be intelligible.

To be sure, if Dworkin is correct in that a satisfying explanation of the law must include a motivational component in the sense that he describes, then lacking such a component would be a serious flaw on (my reconstruction of) the Scholastic's account of the rule of *laesio enormis*. But there are reasons to believe that Dworkin and those who follow him on this—as Nicholas J. McBride in his *The Humanity of Private Law*[100]—are wrong. The inclusion of a motivational component as a requirement for a satisfying explanation of the law is problematic, for it does something more than just adding another success condition to the explanation. What it does is to *change* the original *explananda.* Indeed, it is one thing to explain the *features* of the law, and quite another to explain *how those features came to be* features of the law, *i.e*., what it is that motivated judges to give contract law the features that it has. These constitute two different sets of *explananda*, requiring two different explanations. Suggesting, as Dworkin and those who follow him on this seem to do, that the theories that don't include in their explanation this motivational component are *worse* explanations than those that do is to assume that they are all explanations of the same thing: that they

[99] TH Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto Press 1992).
[100] McBride (n 98) 27.

are concerned with the same *explananda*. But if the motivational component indeed changes the *explananda*, then it is hardly an argument against 'fit-without-motivation' theories that they are not concerned with explaining the motivations of judges. One could rightly reply that explaining how the judges who created the law were led to give it these features instead of others is simply not a part of what one wants to explain. For it is not just a matter of saying that a theory that explains '(A + B)' is *better* than one that just explains 'A' or 'B'. The best explanation for 'A', and the best explanation for 'B', are not necessarily the best explanation for '(A + B)'.

### *2.3. Some further thoughts on the revolutionary nature of the Scholastic doctrine of the just price*

I have claimed above that the introduction of the Scholastic doctrine of the just price into the law of contracts is revolutionary because it tends towards its expansion from some contracts to all contracts. This is possible, I argued, because the scope of commutative justice is coextensive with that of contractual practices. However, this tendency towards expansion to the whole field of contractual exchange is not the only reason that makes the appeal to commutative justice as a standard for just pricing revolutionary. The appeal to commutative justice is also revolutionary because it allows legal officials to appeal to certain kinds of reasons the law of contracts is typically insensitive to, namely, reasons concerning *substantive*—rather than merely formal—equality. I elaborate in what follows.

The appeal to equality of thing and thing separates the Scholastic account of commutative justice from contemporary versions of corrective justice that stress formal equality of persons rather than substantive equality between things.[101] The upshot of stressing that the just price is the price that keeps equality of *things* is that the normative standard embedded in remedies against *laesio enormis*—the standard against which prices ought to conform to in order to be just prices—is a *substantive* normative standard, different from consent and purely formal justice. This standard is *substantive* in the sense that it requires the parties (and judges) to ask normative questions about the *content or substance* of *what* the parties have agreed upon, as opposed to merely asking *whether* the parties have actually agreed on a price or would

[101] Weinrib (n 86) 82: '[O]ne might describe corrective justice (...) as the point of view from which noumenal selves see each other. that is, as the ordering of immediate interactions that self-determining agents would recognize as expressive of their natures.' See also Ernest Joseph Weinrib, *Corrective Justice* (Oxford University Press 2012) 130, and passim.

hypothetically agree upon such a price.[102]

The standard of just pricing embedded within the Scholastic tradition is also substantive in the sense that it points even beyond commutative justice and its appeal to equality between things. In this sense, it is interesting to note that right after identifying equality of value between things as a substantive standard of price fairness, Aquinas points out that special circumstances can justify a deviation from that standard:

> Secondly we may speak of buying and selling, considered as accidentally tending to the advantage of one party, and to the disadvantage of the other: for instance, when a man has great need of a certain thing, while another man will suffer if he be without it. In such a case the just price will depend not only on the thing sold, but on the loss which the sale brings on the seller. And thus it will be lawful to sell a thing for more than it is worth in itself, though the price paid be not more than it is worth to the owner. Yet if the one man derive a great advantage by becoming possessed of the other man's property, and the seller be not at a loss through being without that thing, the latter ought not to raise the price, because the advantage accruing to the buyer, is not due to the seller, but to a circumstance affecting the buyer. Now no man should sell what is not his, though he may charge for the loss he suffers.
> On the other hand if a man find that he derives great advantage from something he has bought, he may, of his own accord, pay the seller something over and above: and this pertains to his honesty[103]

These remarks by Aquinas—allowing for deviations from commutative justice in cases where keeping equality in exchange would create a substantive imbalance between the parties—highlight the fact that the determination of the just price can sometimes depend not only on achieving substantive equality between things: it also depends on the concrete needs and wants of both buyers and sellers. This is in line with the idea that the determination of the just price belongs to the virtue of practical wisdom (*prudentia*), a practical virtue according to which the virtuous person judges and acts according to what is right given her concrete circumstances. To calculate the just price, therefore, the parties ought to take into account, amongst other things, the circumstances surrounding the contract—circumstances which cannot but include the relative substantive inequalities between the parties. In other words: Aquinas claims that, although the just price ought to keep equality of value between things, it must also take into account any substantive inequality between the parties—inequality of

[102] For the latter view, see generally Peter Benson, *Justice in Transactions: A Theory of Contract Law* (The Belknap Press of Harvard University Press 2019) I deal with some elements of Benson's approach to commutative justice in Chapter 6 of the thesis.
[103]Aquinas*, Summa Theologiae* II-II q 77 a 1 in c.

wealth, power, knowledge, needs, etc—, and that these inequalities may count as reasons that can outweigh the duty of keeping equality of value between things for a particular transaction. This feature of the just price—which could be called context-sensitivity—points towards the possibility of identifying other values beyond commutative justice as reasons to deviate from the substantive equality between things required by commutative justice. To put it somewhat differently: the virtue of commutative justice would require the virtuous agent to take substantive (in)equalities between the parties—*distributive* (in)justice—into account in order to calculate the just price of a particular transaction.

The idea that the determination of the just price must consider the concrete needs and wants of both buyer and seller is not, therefore, an innocent addition to the idea of the just price as the price that keeps equality of value between things exchanged. In fact, it turns that very idea on its head. The context-sensitive nature of the just price is a tacit recognition of the fact that what matters in the end is not the substantive equality between *things* exchanged, but the *substantive equality between the parties* involved in the exchange.

Both the appeal to substantive equality between things, as well as the possibility of a context-sensitive approach to the just price—which is, as I said, already present in the Scholastic tradition, albeit obscured by its emphasis on commutative justice as the proper standard of justice in pricing—reinforce its *revolutionary* nature, for to accept the remedy against *laesio enormis* as part of the law entails the legal recognition of a certain kind of reasons the law—and especially the law of contracts—is typically insensitive to, namely, reasons based on *substantive* (as opposed to merely *formal*) justice.

The substantive and proto-egalitarian insight contained in the context-sensitive nature of the just price and the corresponding recognition that there is more to just prices than keeping commutative justice shall pave the way for future developments of just price theory (more on this later on in the thesis).

## 3. Concluding Remarks

In Otto Preminger's famous movie adaptation of Robert Traver's *Anatomy of A Murder* (1959), the judge orders the jury to disregard the comments of the defence. The defendant takes his lawyer, Paul Biegler, aside and asks him: 'How can a jury

disregard what it has already heard?' Biegler's answer, is, of course, that *they can't*.

This chapter suggests that something similar has happened with the idea of the just price: although nineteenth-century jurists and their contemporary successors have insisted over and over again that the idea of a just price is a meaningless medieval relic, they simply *can't* disregard it. While the specific Scholastic answer to the questions posed by price normativity has been abandoned, the questions posed by the theory have not. If the argument in this chapter is correct, then price normativity and the reshaping of the normative structure of contract produced by its incorporation to the law has become part of the *explananda* of the law of contracts and, therefore, needs an adequate explanation.

Section 1 of this chapter motivated the claim that private law remedies against inequality in exchange—in particular *laesio enormis* and price unconscionability—are unintelligible without resorting to some standard of price normativity. These remedies are still part of many legal systems and constitute the *explananda* of just price theory. I have also acknowledged that there are many other instances of price normativity in the law, some of which suggest an expansion from commutative to distributive justice concerns over price normativity.

In Section 2, I suggested that explaining the original *explananda* is interesting and relevant not only in and of itself, but also because of its potentially revolutionary implications. By reconstructing the medieval strategy to expand *laesio enormis* as a generalised remedy in contract law, I attempted to show that the idea of the just price reshaped the normative structure of contract law, and that this reshaping has potentially revolutionary implications for contract law. First, because there are reasons to believe that, once price normativity is recognised as a feature of *some* price-related practices, it tends towards its expansion to *all* price-related practices. Second, because it allows legal officials, judges and parties to appeal to reasons based on substantive justice that are typically excluded from the law of contracts.

This chapter did not deal more than in passing with redistributive schemes based on the idea of the just price nor with the broader expansion of price normativity from contract law to public law or to any other legal field. This latter stage in the unfolding of price normativity, involving a shift from commutative to distributive justice

as a ground for just pricing will be dealt with later on in the thesis.[104] In any case, this would be the second stage in the unfolding of price normativity. The first, perhaps less controversial, but far more significant step was to acknowledge price normativity as a general feature of the normative structure of contractual exchange. This first revolutionary step was the most important achievement of the Scholastic doctrine of the just price and paved the way for later developments.

The Scholastic doctrine of the just price started a silent revolution in contract law. But revolutions—even legal revolutions—can be stopped. To assess whether there are good reasons to stop the revolution—that is, to dismiss the inquiry about just prices altogether—will be the task of the next chapter.

[104] See especially chapters 3 (section 3 on the 'Distributive Justice Conception of the Just Price') and 5.

# Chapter 2: Addressing Scepticism

The previous chapter showed that deep seated private law rules and institutions have been shaped by a concern for the fact that certain goods are bought or sold for more or less than their just price, *i.e.*, the price they ought to possess. But what *ought* the price of a thing to be? Is this even a meaningful question? There are several reasons for being sceptic about the very idea of a just price. Indeed, some scholars have argued that the doctrine of the just price is grounded upon the "inveterate fallacy"[1] of thinking that value is an objective quality of things, a claim that would rest on discredited metaphysical assumptions. Others have claimed that the very idea of a just price is a "contradiction in terms"[2], and that the question of what a person *ought* to get in return for her goods is a question "absolutely devoid of meaning."[3] Moreover, the dominant approach to economic value among contemporary economists is that it is impossible, by definition, to sell something for more than its worth, because the value of a thing is determined by the price at which the parties have agreed to transact.[4] If this is the case, how can we make sense of legal institutions concerned with buying or selling something for *more* than its worth? Should we discard these legal schemes as medieval relics and abandon just price theory altogether? How strong are these and other objections against the concept of the just price?

Addressing these objections is the first step to get just price theory off the ground. If these objections against the very idea of a just price are sound, then those private law institutions whose intelligibility depends upon establishing a certain criterion to distinguish between just and unjust prices, however pervasive across jurisdictions and however enduring throughout the centuries, are indeed unintelligible. In this chapter, I shall argue that this is not the case and that, despite these objections, there are reasons to take just price theory—and, by implication, institutional arrangements relying upon or contributing to establish standards of fair pricing—seriously.

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[1] Ludwig Mises, *Human Action: A Treatise on Economics.* (third revised edition, 1966) 203.
[2] RG Collingwood, 'Economics as a Philosophical Science' (1926) 36 International Journal of Ethics 162, 174.
[3] ibid; Quoted with approval in Friedrich A von Hayek, *The Constitution of Liberty* (Routledge 1990) 442.
[4] This account of economic value is shared even by scholars working on theories of exploitation. See Alan Wertheimer, *Exploitation* (Princeton University Press 1996); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol 4 (New York 1988); Hillel Steiner, 'A Liberal Theory of Exploitation' (1984) 94 Ethics 225; Hillel Steiner, 'Exploitation, Intentionality and Injustice' (2018) 34 Economics & Philosophy 369.

This chapter deals with a number of objections which I take to be those most likely to raise scepticism over the very idea of a just price. In dealing with these objections, I intend to give support to two different but related claims: First, that these objections fail to provide good reasons to dismiss price normativity altogether. Second, that some of these objections are best understood as providing alternative *conceptions* of the just price—alternative, that is, to the Scholastic conception of the just price based on commutative justice—rather than full blown rejections of it. To claim that some of these objections are, in reality, alternative conceptions of the just price entails a vindication of the kind of inquiry that the Scholastic doctrine of the just price represents, but also a partial restatement and revision of that same tradition in more pluralistic terms. In other words, I would like to suggest that there is more to just price theory than a concern for commutative justice. Indeed, as I shall later argue, other justificatory values apart from commutative justice such as efficiency, autonomy or distributive justice can play a role in justifying prices, as well as in deciding which normative standard contract law should adopt as a remedy to price disparity. An adequate restatement of just price theory, therefore, would involve (1) rejecting the value monism implicit in the standard account of the Scholastic doctrine of the just price, in which commutative justice is seen as the sole normative reason able to justify prices, (2) discarding the full blown rejection of price normativity that has become a pervasive feature of contemporary contract theory and economic price analysis, and finally (3) endorsing a value-pluralist approach to price justification. While the arguments presented in this chapter do provide reasons for claim (1), they deal especially with claim (2). To account for the benefits of a value-pluralist approach to price justification—claim (3)—will be the of object of Part Two of the present thesis.

This chapter is structured into four sections. The first three sections deal with different kinds of objections against just price theory. Section 1 deals with an objection that I have termed as the 'Argument from Bad Metaphysics'. According to this objection, the idea of the just price only makes sense if one assumes certain metaphysical beliefs about value that are now universally discredited. I argue that this is a fallacious argument.

Section 2 (*Prices Without Values? Collingwood Revisited*) deals with an objection that I have called the 'Argument from Value-Free Economics.' According to this argument, the recognition of economics as a value-neutral science entails a rejection of the value-laden approach to prices that just price theory represents. My

specific target in this section is the claim—famously made by R. G. Collingwood—that the very idea of the just price is a "contradiction in terms"[5]. Following the current consensus among philosophers of science about the value-laden nature of economic discourse—*i.e.*, that the normative assumptions that unite positive and normative economics imply that price discourse in economics is normatively biased towards efficiency and higher outputs—I propose a reinterpretation of Collingwood's scepticism. I suggest that Collingwood's position is best described as an argument for an alternative conception of the just price based on the justness of underlying institutional arrangements—the just price, according to this conception, would be the price that can be fetched under just institutional arrangements regarding exchange—and against the identification of the just price with the market price. Recognising the normative assumptions of price discourse in economics brings to the fore that prices are *institutional facts* as opposed to brute or natural facts. The implications of this view for the normative justification of market prices will be further developed in later chapters.[6] To our present purposes, the lesson to be learned from this objection is that the institutional nature of prices makes price normativity dependent upon the kind of value or values that the political community wants to see realised in its institutional arrangements. This means that price normativity need not be synonym with value monism in price justification. Indeed, efficiency is one justificatory value among others, that sometimes must give way to other values such as commutative justice, distributive justice, or autonomy. This also shows that the emphasis on commutative justice as the sole *locus* of price normativity—usually considered one of the main features of Scholastic just price theory— is a limited and therefore partially inadequate account of price justification.

Section 3 (*The Argument from Consent: Consent, Marginal Utility, and Autonomy*) engages critically with what I term the 'Argument from Consent', as well as with a similar argument from economic theory, which I term the 'Marginalist Objection' to just price theory. According to this objection—famously made by Hobbes— "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."[7] To deal with this

[5] Collingwood (n 2) 174.
[6] Chapters 3 and 5.
[7] Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1688* (Edwin Curley ed, Hackett Publishing Company 1994) Part I, Chapter XV [14] [74-76] 94.

objection, I first suggest that if just price theory is to move forward, then we should move away from contemporary debates that link the Scholastic doctrine of the just price with the 'labour theory of value/marginalism' debate. Secondly, I argue that this objection is, again, best understood as an alternative version of price justification, one linking consent to justice.

Section 4 illustrates one of the main points of the chapter—namely, that many objections against just price theory are, in fact, best understood as alternative conceptions of just price theory—by briefly discussing the passage in which Hayek claims that we should abandon "the futile medieval search for the just price".[8] The rest of the section summarises the main conclusions from the preceding sections.

## 1. The Argument from Bad Metaphysics

I shall start with the 'Argument from Bad Metaphysics.' Enlightenment thinkers such as Thomasius[9] and Barbeyrac[10] held that just price theory is committed to the claim that economic value is an 'intrinsic quality' of things. Thomasius, for instance, claimed that for Scholastics "the prices of things originate from a natural comparison between them and are nearly an intrinsic quality thereof."[11]

The idea that just price theory entails a highly implausible metaphysical belief on economic value as an intrinsic property of things underlies many contemporary rejections of it among economists. Perhaps the best illustration of this view is in the works of the Austrian economist Ludwig von Mises. In his influential *Human Action: A Treatise on Economics*, Mises claims that, for Aristotle, "value was considered as objective, as an intrinsic quality inherent in things."[12] He further adds that "this fallacy frustrated Aristotle's approach to economic problems and, for almost two thousand years, the reasoning of all those for whom Aristotle's opinions were authoritative."[13]

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[8] Friedrich A von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge 1993) 237.
[9] C Thomasius, *De aequitate cerebrina* II § 14, printed as Dissertatio LXXIII in his *Dissertationum Academicorum varii imprimis iuridici argumenti* III 43.
[10] J Barbeyrac, *Le Droit de la nature et des gens, ou système general des principles le plus importants de la morale, de la jurisprudence, et de la politique par le baron de Pufendorf, traduit du latin par Jean Barbeyrac, … avec des notes du traducteur; et une préface, qui sert d'introduction à tout l'ouvrage* (1734) notes 1 and 2 to III v 9.
[11] *De aequitate cerebrina*, II § 14. As translated in Andrea Perrone, 'The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks' (2014) 122 Rivista Internazionale di Scienze Sociali 217, 6.
[12] Mises (n 1) 203.
[13] ibid 203–204.

What does it mean to claim that the just price would be an 'objective' or 'intrinsic quality' which inheres in things, and why would that sole fact entail that the search for just prices is doomed to failure? One possible interpretation is that having 'intrinsic value' would mean that a thing's economic value ought to reflect its *ontological* value, quite apart from its usefulness to satisfying human needs or wants or to any other consideration besides its ontological dignity. Thus, for instance, just price theorists would be committed to the idea that the economic value of living creatures ought to be higher than the value of inanimate objects because living creatures are ontologically superior to inanimate objects. It would follow from this that, in a just exchange involving mice and diamonds, the price of mice ought to be set higher than the price of diamonds.

While it is certainly true that Scholastics believed in ontological hierarchies and degrees of ontological perfection, and that a theory of just prices grounded upon such metaphysical beliefs seems highly implausible, the truth is that nobody in the history of economic thought has ever defended such a claim, and it is very unlikely that someone will in the future. In other words, this version of the objection commits the *straw-man fallacy*: the informal fallacy based on giving the appearance of refuting the opponent's argument by refuting a different argument, or a weaker version of the same argument. In this case, the fallacy consists in attempting to refute just price theory by refuting the claim that economic value reflects ontological value. While that claim is certainly false, it is one that no just price theorist has ever defended. The distinction between a thing's ontological value and its economic value is old and it has been present in philosophical discourse at least since Plato's *Euthydemus*, in which Socrates asserts that "it is the rare thing, Euthydemus, which is the precious one, and water is cheapest, even though, as Pindar said, it is the best."[14] The same distinction was made by Augustine, Thomas Aquinas, Scotus, Covarrubias, Molina, Soto, Lugo, Antoninus of Florence, Bernardine of Siena, and, in fact, "by everyone"[15] that dealt with the just price within the Scholastic tradition. It has even been said that late Scholastics "seem to have enjoyed pointing out that the just price of goods did not correspond to their intrinsic worth or usefulness."[16]

[14] Plato, Euthydemus, 304b, in Plato, *Complete Works* (Hackett Publishing 1997) 743.
[15] Bernard W Dempsey, 'Just Price in a Functional Economy' (1935) 25 The American Economic Review 471, 475.
[16] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 95.

Here is another possible interpretation of the same objection: for just price theory, what accounts for a thing's price is an attribute inherent to a thing's substance—an 'accident' in Aristotelian terminology, such as a thing's colour, weight, etc.—, its *essence*—the kind of thing it is: if it is a cat, its 'catness', if it is a dog, its 'dogness', etc.—,or, if not its essence, then at least an essential quality of that same thing—a 'necessary accident' or 'property' in Aristotelian terms, such as its being 'rational', or 'sentient', etc. But since the metaphysical categories of substance, attributes, essence, etc. are grounded upon discredited Aristotelian metaphysics, then just price theory must be false. Although some version of this argument is very likely to be at the core of the sceptical attitude towards just price theory, it is difficult to find an explicit statement of it. The fact that Aristotelian essentialism was wrong is nowadays taken to be uncontroversial and it is usually left implicit in much that is written about legal philosophy.[17] However, it has also been explicitly taken as a reason to reject explanations of modern contract law grounded upon Aristotelian categories. A good case in point is Dennis Patterson's reply to James Gordley's claim that we need to return to Aristotle to make sense of modern contract doctrine. Patterson objects to Gordley's overall approach to contract theory in these terms:

> You seem to regret the fact that contemporary contract theorists have failed to generate a metaphysical theory like Aristotle's; one that will provide an answer to the philosopher's demand for "a new and correct theory of contracts." ([James Gordley, *The Philosophical Origins of Modern Contract Doctrine*] p. 222) If nostalgia is indeed the sentiment, then the nostalgia is problematic, if not misplaced. *Aristotle was wrong about essences: you do not deny that.* But *if Aristotle was wrong about essences, then he never had a correct theory of contract*. If he never had a correct theory of contract, *then our nostalgia is for an illusory object*. If the object (a metaphysically correct theory of contract) of our nostalgia is illusory, that suggests our nostalgia itself might be equally devoid of content.[18] (emphasis added)

Is nostalgia over just prices equally misplaced? Can we apply the same argument to just price theory and claim that *if Aristotle was wrong about essences, then the search for a correct theory of just prices is illusory*? The answer is clearly no. First, because, as a point of logic, it is simply not the case that if a certain philosophy

[17] Even those who think that private law theory should return to Aristotle (such as James Gordley) are hesitant to defend Aristotelian essentialism. To what extent Aristotelian metaphysics needs to be defended from their critics does not concern us here. For a contemporary defence of essentialism, see David S Oderberg, *Real Essentialism* (Routledge 2007).

[18] Dennis Patterson, 'The Philosophical Origins of Modern Contract Doctrine: An Open Letter to Professor James Gordley' (1991) 1991 Wisconsin Law Review 1432, 1435.

*x* entails a certain theory *y*, then the rejection of *x* entails the rejection of *y*. Indeed, one way to reconstruct the argument would be this:

(1) If Aristotle was right about essences, then it is possible to have a correct theory of the just price
(2) It is not the case that Aristotle was right about essences
Therefore,
(3) It is impossible to have a correct theory of the just price

As stated, the argument commits the fallacy of *denying the antecedent* (the formal fallacy according to which the consequent of a conditional must be false because the antecedent of that same conditional is false). Since denying the antecedent is a formal fallacy, it would be uncharitable to reconstruct the argument in this way if there is another plausible version of the argument that is not formally invalid. Patterson (or someone else trying to apply his original argument about contract to the doctrine of the just price) could reply that this is not the most charitable reconstruction of his argument.

Perhaps the following would be a better reconstruction:

(1) If Aristotle was wrong about essences, then a correct theory of the just price is impossible
(2) Aristotle was wrong about essences
Therefore,
(3) A correct theory of the just price is impossible

This argument is formally valid, but premise (1) is false. It is not the case that a correct theory of the just price is possible only if Aristotelian essentialism obtains, not even for the Scholastic doctrine of the just price. Indeed, at least according to Aquinas' view—which I take to be the most representative author of the Scholastic tradition[19]—it is not the essence or substance of a thing that accounts for its price, but rather its usefulness to the purpose for which it has been bought or sold.[20] A defect in a thing's substance, quantity, or quality does mean lowering its price[21], but only inasmuch as

[19] In his *Price and Value in the Aristotelian tradition*, Odd Langholm identifies five main theories of value within the scholastic tradition, all stemming from the context given by Robert Grosseteste's *Translatio Lincolniensis*, the first complete Latin translation of Aristotle's *Nichomachean Ethics*. However, Aquinas' treatment of value, though it formed a branch in itself, influenced everyone within the scholastic tradition, including those who took a different approach to value. See Odd Langholm, *Price and Value in the Aristotelian Tradition: A Study in Scholastic Economic Sources* (Universitetsforlaget 1979) 18 and passim.
[20] Aquinas*, Summa Theologiae*, II-II q 7 a. 2 *ad tertium*.
[21] Ibid. in c.

that defect is connected with the specific use for which the thing is being sold, giving occasion, therefore, of loss to the buyer.[22] So if the buyer wants a horse, then she cannot blame the seller for giving her a lame horse and not a fleet one, unless she specifically asked for a racing horse.[23] But if she bought a racehorse and received a lame one, then the seller must compensate for the defect by modifying the price, because the lacking quality is significant for the purposes of the buyer. Thus, the individual characteristics of things exchanged—their substance, quantity, and quality—are considered in the price but only as means to achieve the particular ends of the parties, not in themselves.

The remarks above concerning economic value being grounded upon a thing's *usefulness* to the particular ends of the parties allow us to distinguish *economic* value from *intrinsic* value. Indeed, they show that the economic value of a thing can depend on *non-intrinsic* (relational) properties of the thing, while still being properties *of* that thing. To illustrate this point further, let me borrow an example from Rabinowicz and Rønnow-Rasmussen: Princess Diana's dress.[24] This dress is valuable because it belonged to Princess Diana: the value of the dress comes from the importance of something other than the dress' intrinsic properties. Indeed, the same dress would have the same intrinsic features regardless of who wore it, and yet it would have little value if worn by someone else. The value of Princess Diana's dress depends on the *non-intrinsic* (relational) property of it having belonged to Princess Diana. However, having belonged to Princess Diana is still a property *of* that dress.

Now, someone might want to take the *Argument from Bad Metaphysics* one step further. A just-price sceptic might want to claim that, regardless of whether Aristotelian essentialism is true or not, it is likely that just price theory *cannot avoid* a commitment to highly implausible metaphysical beliefs about value.[25] Indeed, if there is such a thing as a just price, then the just price theorist must account for the kind of entity that just prices are, and once he or she has done so, then he or she must establish an account of just prices that does not presuppose any implausible metaphysical beliefs about value. The relationship between economic and moral value is one of the major problems in value theory, and the excessively modest metaphysical

[22] Ibid. *ad tertium*.
[23] Aquinas, *Summa Theologiae*, II-II q 77 a 3 in c.
[24] Wlodek Rabinowicz and Toni Rønnow-Rasmussen, 'A Distinction in Value: Intrinsic and for Its Own Sake' (2000) 100 Proceedings of the Aristotelian Society 33, 41.
[25] I am grateful to Ismael Martínez-Torres for pressing me on this point.

approach to value suggested here seems to dodge this important philosophical issue entirely.

I concede that this objection is quite right. How to relate moral and economic value is an incredibly difficult problem, and unless we can settle this issue, any theory of the just price will be incomplete.[26] However, I believe that it is not the case that we cannot advance theories of the just price unless we settle meta-ethical debates about value, and I see no problem, therefore, in simply bracketing out the metaphysical debate about economic value. In fact, we do this regarding other notions all the time. We discuss, for instance, ideas of responsibility, justice, rights, etc. without first having to settle the longstanding debate over the existence of free will or the truth of determinism. To my view, there is nothing wrong with this bracketing strategy. As P. F. Strawson famously—albeit controversially—argued, the rationality of our moral practices does not depend on the truth or falsity of determinism.[27] For the same reasons, the rationality of just price theory does not depend on the truth or falsity of moral realism, Aristotelian essentialism, or any other meta-ethical view.

Moreover, the point of replying to the argument from Bad Metaphysics is *not* to show that just price theory makes no assumptions regarding moral values (it is, after all, *just* price theory), but rather that *it does not presuppose a metaphysical account of economic value*. I admit that grounding economic value on the intrinsic properties of a thing is a rather implausible account of economic value, one that leads to absurd consequences (such as the one pointed out above concerning the possibility that mice would be worth more than diamonds), but I deny that this account of economic value is necessary for just price theory. Instead, I have suggested that a relational account of value—one based on a thing's usefulness—would suffice.

To be sure, the just-price sceptic might find that a relational account of economic value—as opposed to an intrinsic or ontological account—also entails highly implausible metaphysical assumptions. However, I fail to see why this would be the case. The burden of proof lies, I think, on the side of the sceptic.

In sum: the argument from *bad metaphysics* is fallacious. Although responding to it allows us to see that just price theory need not be grounded in Aristotelian essentialism in order to be successful, if we want to move the discussion over price

[26] On the relationship between economic and moral value, see generally Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1995).
[27] PF Strawson, *Freedom and Resentment and Other Essays* (Routledge 2008) 19.

normativity forward, we must move beyond this argument and start looking elsewhere.

## 2. Prices Without Values? Collingwood Revisited[28]

One of the most influential and explicit rejections of just price theory comes from what can be termed as the 'Argument from Value-Free Economics.' According to this argument, the problem with the idea of the just price would not be its dubious metaphysical commitments, but rather the kind of inquiry that just price theory represents: a *normative* inquiry into *economic* activity. Just price theory would be a theoretical endeavour that fails to distinguish between the descriptive and the normative, between propositions of *fact* about prices, on the one hand, and our *value* judgements or normative attitudes towards those prices, on the other.

British philosopher R. G. Collingwood dismissed the very idea of a just price precisely on these grounds. He believed that the scientific nature of economics logically entails a rejection of price normativity. From this the conclusion would follow:

> It is, therefore, impossible for prices to be fixed by any reference to the idea of justice or any other moral conception. A just price, a just wage, a just rate of interest, is a contradiction in terms. The question what a person ought to get in return for his goods and labor is a question absolutely devoid of meaning. The only valid questions are what he can get in return for his goods or labor, and whether he ought to sell them at all.[29]

Surprisingly, he also believed that the demand for just prices or just wages was a *rational demand*, worthy of careful consideration:

> As soon as any moral motive is imported into an economic question the question *ceases to be an economic one*, and the price, or wage, or interest becomes a gift. But *the demand for a just price or a just wage is not a mere confusion of thought*. (...)
> The demand for a just wage, a wage *fixed by legal or moral, rather than by economic, standards*, *is a rational demand and deserving of respectful attention* if it is based on the belief that special circumstances, which *ought not to exist*, induce certain wage-earners to accept a lower wage than that which they would accept if these circumstances were removed. If such circumstances exist, *they ought to be removed*, for instance by legislation; and since this legislation would raise some people's wages, the wages as so raised might be loosely described as wages fixed by law. But they would really be fixed not by law but by supply and demand in a market where law insured fair bargaining. In a word, the demand is reasonable so far as it is a demand, not for legislation directly

[28] This section reproduces, with some modifications, some of the arguments in Joaquín Reyes, 'Beyond Commutative Justice: Contract Law, Justice, and Just Prices' (2021) 7 Latin American Legal Studies 143.
[29] Collingwood (n 2) 174.

> controlling wages—that is an impossibility, since *a wage fixed by any but economic considerations ceases to be a wage*—but for legislation amending the condition of society.[30]

How can Collingwood believe that the very idea of a just price is a "contradiction in terms"[31] and, *at the same time*, claim that the demand for a just price is a "rational demand"[32]? How can the demand for something "absolutely devoid of meaning"[33] also deserve "respectful attention"[34]? If Collingwood's claim that prices fixed by any normative standard is contradictory or otherwise meaningless is to be taken literally—as Hayek did—[35], then the claim seems to be unsupported by Collingwood's own arguments.

The truth seems to be that Collingwood did not really believe that the idea of the just price was contradictory, although he *believed* that he did. Paraphrasing G. A. Cohen on Marx, one could say that *Collingwood mistakenly thought that Collingwood believed that prices cannot be unjust*, because he was confused about the nature of economics—and hence of prices.[36]

The reason for this confusion is that Collingwood was unclear as to whether economic facts (prices, wages, rates of interests, etc.) can be partially fixed by normative considerations. Indeed, Collingwood's argument is ambiguous regarding these two claims:

(1) Economic facts are *necessarily* fixed by economic reasons, and

(2) Economic facts are *exclusively* fixed by economic reasons.[37]

This ambiguity is what allows him to claim that a *just* price is a contradiction in terms (because prices are fixed *exclusively* by economic reasons), but, at the same

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[30] ibid 175–176 (my emphasis).
[31] ibid 174.
[32] ibid 175.
[33] ibid 174.
[34] ibid 175.
[35] Hayek (n 8) 243, n29 (332-333). "The prices which must be paid in a market economy for different kinds of labour and other factors of production if individual efforts are to match, although they will be affected by effort, diligence, skill, need, etc., cannot conform to any one of these magnitudes; and considerations of justice just *do not make sense* with respect to the determination of a magnitude which does not depend on anyone's will or desire, but on circumstances which nobody knows in their totality." (243, emphasis added). "One of the few modern philosophers to see this clearly and speak out plainly was R. G. Collingwood." (note 29, 332)
[36] GA Cohen, 'Review of Karl Marx' (1983) 92 Mind 440, 444: '*Marx mistakenly thought that Marx did not believe that capitalism was unjust*, because he was confused about justice.'
[37] Collingwood (n 2) 174: 'It is, therefore, impossible for prices to be fixed by any reference to the idea of justice or any other moral conception.'; ibid 176: 'as soon as any moral motive is imported into an economic question the question ceases to be an economic one.'

time, concede that a demand for prices fixed "by supply and demand in a market where law insured fair bargaining"[38] is nonetheless a rational demand (because prices are *necessarily* fixed by economic reasons, but not *exclusively*: prices partially fixed by normative reasons would still be prices so long as they are *also* fixed by economic reasons). The only thing that Collingwood categorically denies—because it is entailed by both (1) and (2)—is the idea of a price fixed exclusively by non-economic reasons.

Both claims are likely to be false, but only (2) is incompatible with the introduction of normative standards allowing legal officials to distinguish between just and unjust prices. Indeed, the law cannot ensure *fair* bargaining without introducing moral considerations into the determination of economic facts. Laws protecting fair bargaining regulate the market according to moral and justice-based reasons, making it the case that the prices in those markets are fixed, at least in part, by legal and moral considerations.

If Collingwood admits—as he explicitly does—that prices are sensitive to normative considerations introduced by the rules and institutions that regulate market transactions, and therefore recognises that economic facts are not entirely devoid of normative elements—in other words: if we take Collingwood's claim to be that prices are *necessarily* but *not exclusively* fixed by economic reasons—then a less polemic and, I think, more charitable reading of Collingwood's argument comes to surface, one that shows that his views on just prices are quite more sensible than what his now famous remarks would make it appear (and indeed more consistent with his final thoughts on the matter, as expressed in his *The New Leviathan,* published a year before his death).[39] In what follows, I would like to suggest that Collingwood's rejection of the very idea of a just price is best understood as a rejection of one particular *conception* of the just price—namely, one according to which the just price is the price fixed by supply and demand—and an endorsement of a different conception of the just price according to which the just-making features embedded in prices are not grounded upon the laws of the market, but on the *background conditions of exchange*.

What reasons does Collingwood have to believe claim (2), *i.e.*, that prices are

[38] Collingwood (n 2) 176.

[39] RG Collingwood, *The New Leviathan or Man, Society, Civilization and Barbarism* (Clarendon Press 1942) 323 (38.65): 'The conception of a just price is logically dependent upon the conception of free will as exercised in economic transaction or exchanges.'; ibid 324 (38.74): 'The existence of the contrast between rich and poor is an offence against the ideal of civility; for it involves the constant use of one kind of force by the rich in all their dealings with the poor; economic force; the force whose essence it is to compel the poor to accept or give unjust prices in all their dealings with the rich.'

fixed *exclusively* by economic considerations? As many of his contemporaries, Collingwood believed that prices cannot be unjust because he believed this to be logically entailed by the value-free nature of economic discourse.[40] According to this view, the entanglement of the descriptive and the normative that would be at the core of the idea of a just price would distort our understanding of prices. Prices would be *facts* about the world, facts fixed by the laws of supply and demand, and price analysis would be, therefore, the study of those economic facts. If this is correct, then prices are neither just nor unjust, because *facts* are neither just nor unjust.

The picture of economics as a value-neutral discipline, however, is not accurate.[41] The current consensus among philosophers of social science is that a purely descriptive economic theory of human action without value assumptions is impossible. Amartya Sen has dedicated a life's work to this idea, and Hilary Putman's *The Collapse of the Fact/Value Dichotomy* has given further analytical support to the idea that when it comes to propositional discourse in economics, facts and values cannot be sharply separated.[42] As Russel Hardin has stated, there is no such thing as a "rational choice without substantive values."[43] Not even in economics.[44]

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[40] See Mises (n 1) 203: '[Economics] is a theoretical science and as such abstains from any judgment of value.'; Hayek (n 8) 231 (claiming that the concept of justice is inapplicable to the spontaneous order of the market); ibid 237–238; Lionel Robbins, *An Essay on the Nature & Significance of Economic Science.* (Second edition, revised and extended, 1949) vii: '[judgements of value] are beyond the scope of positive science.'; ibid 148: 'Economics deals with ascertainable facts; ethics with valuations and obligations. The two fields of enquiry are not on the same plane of discourse. Between the generalisations of positive and normative studies there is a logical gulf fixed which no ingenuity can disguise and no juxtaposition in space or time bridge over.'

[41] On the connections between the descriptive and the normative in economics, see Daniel M Hausman, 'The Bond between Positive and Normative Economics' (2018) Vol. 128 Revue d'economie politique 191; Daniel Hausman, *The Inexact and Separate Science of Economics* (Cambridge University Press 1992); Daniel M Hausman, Michael S McPherson and Debra Satz, *Economic Analysis, Moral Philosophy, and Public Policy* (third edition, Cambridge University Press 2016); Russell Hardin, 'The Normative Core of Rational Choice Theory' in Uskali Mäki (ed), *The Economic World View: Studies in the Ontology of Economics* (Cambridge University Press).

[42] Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press 2002).

[43] Hardin (n 41) 57.

[44] These authors have further developed an insight first articulated by ordinary language philosophers such as J. L. Austin in the 1950s and 1960s, and then taken one step further by Quine. Ordinary language philosophers had pointed out to hybrid cases in which the terms we use in ordinary language are not straightforwardly factual nor evaluative (*e.g.* 'dainty', 'dumpy', or 'cruel'). Quine's defence of belief holism—the idea that our beliefs constitute a web where every belief is tied to all others—allowed him to break the sharp analytic/synthetic distinction—and the fact/value distinction with it. The upshot of Quine's approach is that there is simply no way to distinguish accurately between evaluative and descriptive claims. This idea deepens the significance of Austin's findings, for terms like 'dainty', 'dumpy' or 'cruel' would not be simply exceptional cases of terms with hybrid meaning. Since terms are holistically linked to both evaluative and factual components, then it should not be so difficult to find more cases in which the descriptive and the normative are constitutively entangled. Analyses of categories of race and gender in the social and biomedical science are important examples of this kind

Be that as it may, the main point is that claim (2) does not follow from pointing out that prices are economic facts. For even if prices are economic facts—facts fixed by economic considerations—economic facts are facts of the wrong kind for the purposes of claim (2). For (2) to obtain, economic facts should be similar to brute or *natural* facts, since these are the kind of facts that cannot be fixed by moral considerations. However, it seems odd to think of economic facts—and hence of prices—in this way. In what follows, I elaborate on this claim by suggesting that prices—quantities representing the exchange value of a good—are best conceived as a kind of social fact, namely: *institutional* facts.

The price of a good is not simply something that just so happens to be the case regardless of the will of any individual. In this sense, prices are different from purely natural facts such as storms or floods in that their existence does not depend on our having any beliefs or other propositional attitudes towards them. *Social* kinds, on the contrary, are partially constituted by the beliefs and propositional attitudes of those who engage with them. Let me illustrate this point with the following examples borrowed from MacIntyre[45]:

> *Brain Lesion and Particle Theory*. Suppose that there is a widespread disease that causes localised brain lesions resulting in the loss of all our beliefs and concepts about atoms and molecules, thus leaving no trace of such concepts and beliefs in our language or practices.

In this case, there is no doubt that atoms and molecules would still exist after the loss of our concepts and beliefs. As MacIntyre notes, "nothing that is now true in particle theory would then be false."[46] But now consider the following situation:

> *Brain Lesion and Prices*. Suppose that there is a widespread disease that causes localised brain lesions resulting in the loss of all our beliefs and concepts about money and prices[47], thus leaving no trace of such concepts and beliefs in our language or practices.

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of entanglement. From this perspective, the response to the critics of just price theory would be, therefore, that economic analysis of prices should also be added to the list of hybrid categories such as race and gender.

[45] Alasdair MacIntyre, 'Social Science Methodology as the Ideology of Bureaucratic Authority' in MJ Falco (ed), *Through the Looking Glass: Epistemology and the Conduct of Enquiry* (University Press of America 1979); Alasdair MacIntyre, *The MacIntyre Reader* (Kelvin Knight ed, Notre Dame Press 1998) 57.

[46] MacIntyre, *The MacIntyre Reader* (n 45) 57.

[47] Without prices there would be no money, but the opposite is not necessarily true. Without money there would be barter, and, arguably, prices.

In this case, the outcome is clear: there would be no such thing as prices and money after the loss of our beliefs about them. The reason is that prices are not brute or natural facts. They do not belong to the same category as atoms and molecules. The reason for this is also clear: the existence of money and prices depends upon our beliefs and attitudes towards them.[48]

But there is something else. At least in complex and civilised societies such as ours, prices are not simply fixed by isolated individuals, not even by groups of individuals, according to their own purposes and whims.[49] Prices are the product of *institutional arrangements concerning prices*. The complex web of legal rules and institutions that regulate prices is what we call the *price system*. Without the price system, there would be no such thing as quantities of money representing exchange value. Indeed, the existence of prices in a society requires a common medium of exchange (money), private ownership, contracts, and other facts generated by social and legal contexts. Like money[50], taxes, and private ownership[51], prices are creatures of the law. Indeed, prices are one of the most—if not *the* most[52]—paradigmatic case of *institutional* facts, *i.e.*, facts generated by institutional contexts.

In Searle's terminology, prices are facts regulated by *constitutive* rules, rather than merely *regulative* rules. Regulative rules regulate pre-existing forms of behaviour, whereas constitutive rules do not merely regulate, "they create or define new forms of

[48] This holds true for the kind, but not necessarily for each individual token. See John R Searle, *The Construction of Social Reality* (Penguin Books 1995) 32: 'a single dollar bill might fall from the printing presses into the cracks of the floor and never be used or thought of as money at all, but it would still be money. In such a case a particular token instance would be money, even though no one ever thought it was money or thought about it or used it at all. Similarly, there might be a counterfeit dollar bill in circulation even if no one ever knew that it was counterfeit, not even the counterfeiter. In such a case everyone who used that particular token would think it was money even though it was not in fact money. About particular tokens it is possible for people to be systematically mistaken'; Muhammad Ali Khalidi, 'Three Kinds of Social Kinds' (2015) 90 Philosophy and Phenomenological Research 96, 98.

[49] Hayek believed that this fact alone makes it the case that justice is not applicable to market prices, because there is nobody that can be made responsible for them. See Hayek (n 14) 231ff; However, this is a clear non-sequitur. On the compatibility between Hayek's insights about market prices and substantive conceptions of justice, see especially Theodore A Burczak, *Socialism After Hayek* (The University of Michigan Press 2006); See also Fernando Atria, 'Socialismo Hayekiano' [2010] Estudios Públicos 49.

[50] Christine Desan, 'Money as a Legal Institution' in David Fox and Wolfgang Ernst (eds), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* (Oxford University Press 2016); Andreas Rahmatian, 'Money as a Legally Enforceable Debt' (2018) 29 European Business Law Review 205.

[51] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002).

[52] When Elizabeth Anscombe introduced the distinction between brute facts and institutional facts, she used the price of potatoes in a contract sale to illustrate the point. GEM Anscombe, 'On Brute Facts' (1958) 18 Analysis 69, 69.

behavior"[53]. They have the form "X counts as Y in context C."[54] Searle explains:

> Where the rule is purely regulative, behavior which is in accordance with the rule could be given the same description or specification (the same answer to the question "What did he do?") whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist.[55]

The rules of exchange are constitutive rules. They do not simply acknowledge and regulate pre-existing prices. Quite the opposite: they provide pre-institutional facts about exchange with a new meaning. Thus, it is only when we consider the background social and legal context provided by rules regulating exchange that the brute fact of 'A giving two metal coins to B' transforms into (*i.e*., can be understood as) 'A *buying* a quarter of potatoes from B' or, to use a slightly different terminology, 'A *paying the price* of a quarter of potatoes to B.'[56]

If constitutive rules define what counts as the price of *x*, then the identification of certain facts and not others as the price of *x* depends upon the institutionally embedded normative commitments that shape the market system. Institutions are themselves shaped by the normative commitments of a given political community. Thus, a market system exclusively biased towards higher outputs will tend to identify the fact that people want *x*, whatever *x* is, as a reason to put a price on *x*, and the fact that people are willing to pay as much as £100 for *x* as a reason to count £100 as the price of *x*. By contrast, a market not exclusively concerned with higher outputs will count facts other than buyer's willingness or ability to pay as relevant to identify the price of a good. For instance, a normative commitment to satisfying basic needs would make it the case that the price of prescription drugs will not be so affected by how much people are willing to pay for them. Therefore, the identification of the price of drug *x* as £10 will be insensitive to the fact that some people are willing to pay £100 for *x*.

Once the institutional nature of prices is recognised and Collingwood's mistake

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[53] John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969) 33.
[54] ibid 35.
[55] ibid.
[56] On institutional facts, see especially Anscombe (n 52) 69; See also Searle (n 53); Neil MacCormick, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Reidel 1986) 49–76; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 11–74.

about the purely descriptive nature of price discourse is therefore corrected, we can now safely discard claim (2)—namely, that economic facts are fixed *exclusively* by economic reasons—and reformulate Collingwood's original rejection of the very idea of the just price in terms that fit this recognition. *Pace* his own rhetoric, it is now clear that the point of Collingwood's claim cannot be that the idea of a just price is unintelligible. His point is that prices fixed *exclusively* by supply and demand are neither just nor unjust because supply and demand cannot function as a proxy for justice.[57]

Collingwood is of course correct about this. Prices fixed *exclusively* by supply and demand consist in an aggregate of prices over an arbitrary timespan that lacks any normative pull. Indeed, these prices can be—and usually are—*the final result of an extended series of unjust prices*. To illustrate this, consider the following example:

> *Housing Prices.* I buy a house in Edinburgh under extortionate circumstances and pay double the ongoing market price. Those extortionate circumstances that forced me to pay that price replicate all over Edinburgh for 6 months. By the end of the period the market price for my house is equivalent to the price I paid for it.[58]

*Housing Prices* illustrates a familiar experience that also reveals the problematic nature of taking the law of supply and demand as a normative standard. If the price I paid for my house was unjust, then it must be the case that all prices that led to the new market price in *Housing Prices* were also unjust. But if the law of supply and demand accounts for justice, then the new market price, the sum of a series of unjust prices, would be nonetheless just. This is a very peculiar result that leaves too many questions unanswered. The most important, as Walsh and Lynch rightly point out, is this: "how can a series of unjust pricing practices, when summed, give rise to a just price?"[59]

Another problem for taking ongoing market prices as a standard of justice lies in the indeterminate and malleable nature of market prices. Now, one may think that the laws of supply and demand are sufficient to determine what counts as the market

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[57] Cf Joseph Heath, 'On the Very Idea of a Just Wage' (2018) 11 Erasmus Journal for Philosophy and Economics 1, 31: 'The market has one job to do, and it does that job very well. Producing "just" wages, however, is not that job.' .

[58] With slight modifications, the example is taken from Adrian Walsh and Tony Lynch, *The Morality of Money: An Exploration in Analytic Philosophy* (Palgrave Macmillan 2008) 135.

[59] ibid.

price of a given commodity. But this is not the case. Consider, for instance, the appropriate timespan to determine the market price. How far back in time should we go to calculate the market price of a given commodity? One month, 6 months, one year, a decade? The choice of timespan is a decision that will considerably affect what counts as the market price (and therefore as the just price), and yet the laws of supply and demand do not provide any normative guidance to choose between different periods of time.[60] The same applies to the identification of the *relevant market* for a given commodity. Economic goods can receive many different and even incompatible descriptions. A house, for instance, can be both a consumption good and a financial asset. This makes it the case that goods can belong to more than one market at the same time. Moreover, they can even belong to different markets depending on the level of generality of a given description (a bottle of Laphroaig can belong to the market of 'whiskies', or to the market of 'single malt whiskies', or 'Islay single malt whiskies', or 'Islay single malt whiskies sold in Scotland', etc.). Our preferred description will considerably affect what the relevant market for an item should be. The specification of the relevant market is a decision that precedes what counts as supply and demand and for which the laws of supply and demand provide no guidance.

Finally, there are problems associated with the very idea of *demand*.[61] 'Demand' is an umbrella term that implies the conceptual identity between two quite different notions: wants ('preferences') and needs. As David Wiggins has noted, professional economists typically conceptualise needs as a special kind of wants, namely, a want for which one is unwilling to pay.[62] However, needs are not a type of want. The difference lies in the fact that wants, like preferences or desires, depend exclusively on subjective states, whereas needs also depend on an objective state in the world, namely, whatever it is necessary for someone or something to flourish. Wiggins explains it thus:

> If I want to have *x* and *x* = *y*, then I do not necessarily want to have *y*. If I want to eat an oyster, and that oyster is the oyster that will consign me to oblivion, it doesn't follow that I want to eat the oyster that will consign me to oblivion. But with needs it is different. I can only need to have *x* if anything identical with *x* is something that I need. Unlike 'desire' or 'want' then, 'need' is not evidently an

[60] ibid.
[61] For this paragraph, see David Wiggins, 'Claims of Need', *Needs, Values, Truth* (Third edition, Oxford University Press 1987) passim, but especially 5-9, 25-26.; Scott Meikle, *Aristotle's Economic Thought* (Oxford University Press 1995) 119-121.; See also Daryl Koehn and Barry Wilbratte, 'A Defense of a Thomistic Concept of the Just Price' (2012) 22 Business Ethics Quarterly 501, 506.
[62] Wiggins (n 61) 5.

> intentional verb. What I need depends not on thought or the workings of my mind (or not only on these) but on the way the world is. Again, if one wants something because it is F, one believes or suspects that it is F. But if one needs something because it is F, it must really be F, whether or not one believes that it is.[63]

Unlike wants, then, needs depend on an objective state in the world. That objective state consists in whatever it is necessary for someone or something to flourish.[64] The concept of demand does not have this necessary connection with flourishing.

Moreover, 'demand'—as the term is used in the expression 'the laws of supply and demand'—means demand which registers in the market: *effective* demand. Effective demand means demand backed by money: needs and want that are not backed by money do not count as demand. This is yet another reason not to take the idea of a price fixed exclusively by supply and demand as a normatively adequate standard of just prices. Thus understood, the market price "exclude[s] marginalized community members whose resources are insufficient to afford them a place on the demand curve, thus preventing them from having a say in what the prevailing price [*i.e*., the market price] should be."[65]

It should also be clear by now that there is also something to be said for Collingwood's claim that the demand for a just price is a demand for the removal of unjust background conditions of exchange. For it is, among other things, a demand for *just institutional arrangements regarding prices*. The adequate functioning of the price system is of great importance to society as a whole. If prices are too high or too low for certain goods, the whole society is affected. Price calculation, therefore, is not something that can be left entirely to one individual. I cannot do as I please with prices, because prices also 'belong' to the community, as it were, and the community will make certain decisions about what is the right price to pay for a certain item. To some extent, I buy and sell as a representative of the community, and not as an isolated individual. This is why the law of contracts exists in the first place. Thus, for example, under what conditions, if any, *accesio*, *traditio*, or *usucapio* count as a valid form of

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[63] ibid 6.
[64] GEM Anscombe, 'Modern Moral Philosophy' (1958) 33 Philosophy 1, 7: 'To say that an organism needs that environment is not to say, e.g. that you want it to have that environment, but that it won´t flourish unless it has it.'
[65] Koehn and Wilbratte (n 61) 506.

acquisition of property rights, whether certain kind of goods are susceptible of private ownership at all, or what a property right actually entails, all define in a very specific manner the underlying conditions under which goods *ought* to be exchanged.[66]

Later on in the thesis I shall further develop the idea that the just price is the price that can be fetched under just institutional arrangements.[67] What I would like to note here is that the recognition that Collingwood is correct in understanding the just price as the price that stems from just background conditions of exchange entails another parallel recognition on the side of just price theory. For it is a recognition that it is at least conceptually *possible* to talk of just prices *without* invoking equality in exchange or commutative justice as a moral standard. In other words: if there are no pre-institutional prices, it follows that there are no *pre-institutionally just* prices either.[68] As the Scholastic theologian Domingo Bañez (1654) would put it, "there is no just price by natural law, only by positive law."[69]

The upshot of this recognition is that, in order to move just price theory forward, the original Scholastic doctrine of the just price needs to be partially modified and complemented by a more pluralistic approach to price justification, one that can accommodate the fact that some prices can be normatively justified by criteria other than commutative justice (more on this later on in the thesis). In sum: although Collingwood's objection fails as an objection against just price theory, it succeeds in illustrating one way in which price justification can be separated from concerns over equality in exchange (*i.e.*, over commutative justice).

One final thought: the institutional nature of prices also has implications for claim (1)—namely, that economic facts are *necessarily* fixed by economic reasons. The implication is that this claim seems to hold true only if we stipulate an *ad-hoc* definition of wages and prices, one that does not track the way in which we use these concepts in ordinary language. Let me illustrate this point with an example:

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[66] Cf. Claudio Michelon, 'Virtuous Circularity: Positive Law and Particular Justice' (2014) 27 Ratio Juris 271; Claudio Michelon, 'What Has Private Law Ever Done for Justice?' (2018) 22 Edinburgh Law Review 329.

[67] See especially Chapters 3 and 5.

[68] In a similar vein, Andrew Lang, 'Market Anti-Naturalisms' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017) 326: ' ´To the extent that the market values of assets are a function of the legal order constituting the market (...) the question whether the market value is the "right" one (...) becomes indistinguishable from the question of whether the legal order on which the market rests is normatively justifiable.'

[69] D Bañez, *Decisiones de Iustitia et Iure, tomus quartus* (1654) II-II 77 1 272: "Nullum est pretium iustum lege naturali, sed solum lege positiva".

> *Fixed Prices*. P lives in a country where prices are fixed by Wise Communist, one of the elders of the country who is thought to have a divine gift that gives him epistemic access to the value of everything. Wise Communist fixed the price of a quarter of potatoes at £2. P goes to a shop to buy a quarter of potatoes. The grocer tells P that the price for a quarter of potatoes is £2. P pays £2 for the quarter of potatoes.

Collingwood must claim that Wise Communist did not fix the price of a quarter of potatoes, that the grocer did not tell P the price for a quarter of potatoes, and that P did not pay a price for those potatoes. This seems counterintuitive. There is nothing that contradicts our common usage of the word 'price' in saying that P paid a *price* for those potatoes. To be sure, Collingwood could simply bite the bullet and go against our linguistic conventions about the way we use the word 'price'. However, I find this too big a bullet to bite. I see no other motivation to deny that P paid the price of those potatoes other than clinging on to a definitional point about prices being necessarily fixed by supply and demand. It seems to me that Collingwood's position would be like the position of someone who believes that all swans are white and that, after being shown a black swan, denies that black swans are proper swans.

Note that this objection collapses if one affirms that a price fixed exclusively by non-economic considerations is the *wrong* price to pay, or that the price that P paid was *unjust*. But that is not Collingwood's claim. His claim is that such a price *ceases to be a price.* However, if we reinterpret his position regarding just prices in the way suggested above—namely, as endorsing the claim that the just price is the price fetched under just background conditions of exchange—then the problem with the *Fixed Price* example is that those prices would be unjust—at least according to Collingwood—because they are generated by unjust institutional arrangements—arrangements that, in Collingwood's terms, do not ensure fair bargaining. To claim that fixed prices are unjust is compatible with the claim that there is no necessary connection between economic facts and economic reasons. An institutional approach to prices allows us to separate claims about economic facts from claims about the reasons justifying those facts.

## 3. The Argument from Consent: Consent, Marginal Utility, and Autonomy

Compare Collingwood's famous remarks on the just price as a contradiction in terms with the following extract from Martin Luther's writings:

> Among themselves the merchants have a common rule which is their chief maxim and the basis of all their sharp practices, where they say: "I am free to sell my goods as dear as I can." (…) What else does it mean but this: I care nothing for my neighbour; so long as I have my profit and satisfy my greed, of what concern is it to me if it injures my neighbour in ten ways at once? (…) On such a basis trade can be nothing but robbing and stealing the property of others. (…) Observe that this and like abominations are the inevitable consequences when the rule is that I may sell my goods as dear as I can. The rule ought to be, not, "I may sell my wares as dear as I can or will", but, "I may sell my wares as dear as I ought, or as is right and fair." For our selling ought not to be an act freely within your own power and discretion without law or limit, as though you were a god and beholden to no one."[70]

These words, written in the early days of the Reformation (1524), mark a striking contrast to Collingwood's dismissal of the just price in the early twentieth century (1926), and not only because one is denying what the other affirms. Equally striking is the different reception they had among their contemporaries. While Collingwood's views on the just price were met with praise[71], Martin Luther's fairly orthodox views on justice in exchange were received by his contemporaries with cold indifference. Indeed, these views seem to have had no significant impact on the worldview of the Reformers.[72] Not even John Calvin, who certainly knew Roman Law very well and must have known therefore the doctrines of *laesio enormis* and the concept of *iustum pretium*, makes mention of the doctrine.[73] Why was this so?

One plausible explanation lies in the increasing influence of the new frame of mind brought about by the Reformation. It was merely a matter of time until the

[70] 'On Trade and Usury' in Martin Luther, *Selected Writings*, vol 3 (1523-1526) (Theodore G Tappert ed, Fortress Press 2007) 71 at 88–89.
[71] Hayek (n 8) 332: 'One of the few modern philosophers to see this clearly [i.e., that considerations of justice do not make sense regarding prices] was R. G. Collingwood.'
[72] But see Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 162–163 (arguing that Luther's views are no different in result from Calvinist theories); For a good overview of Lutheran legal philosophy, see Harold J Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press (Belknap Press) 2003) 71–99.
[73] As noted by Mark R Reiff, *Exploitation & Economic Justice in the Liberal Capitalist State* (Oxford University Press 2013) 64.

unfolding of the logic contained in the new theological doctrine of *sola fides*—works having no effect on eternal salvation—found its way into economic life and contract law.[74] The upshot of the protestant logic into contract was a radical emphasis on subjective and individual elements (the keeping of promises and freedom of contract) over objective standards of justice.[75] To put it briefly: For Scholastics, contractual justice was a matter of finding, agreeing, and keeping *just terms* of contract. For the new protestant paradigm of contract, contractual justice was a matter of "*keeping* contracts, whatever their terms."[76] Within a consent-based framework of contract, it is easy to see why the concept of the just price was thought of as not having any normative role to play.

The most influential consent-based account of contractual obligations, with its consequent rejection of the Scholastic doctrine of the just price, is Hobbes' account of justice as consent. According to Hobbes, "the definition of INJUSTICE is no other than *the not performance of covenant*. And whatsoever is not unjust, is *just.*"[77] Further, Hobbes claimed that "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."[78]

Hobbes's idea of the just value is a paradigmatic example of the liberal rejection of non-elective obligations, which would crystallise in private law during the nineteenth century with the so-called 'will theories' of contract.[79] Samuel Williston suggested that a similar phenomenon arose in economic theory, where Smith, Ricardo, Bentham, and John Stuart Mill "successively insisted on freedom of bargaining as the fundamental

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[74] On the connections between Protestantism and the market, Max Weber's The Protestant Ethics and the 'Spirit' of Capitalism is a tour de force. Max Weber, *The Protestant Ethic and the "Spirit of Capitalism and Other Writings* (Peter Baehr and Gordon C Wells trs, Penguin Books 1905); On the differences between Catholicism and Protestantism in relation to capitalism, see the equally insightful Amintore Fanfani, *Catholicism, Protestantism, and Capitalism* (Sheed & Ward 1935) 205: '[Unlike Catholicism] Protestantism encouraged capitalism inasmuch as it denied the relation between earthly action and eternal recompense.'; But see Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (n 186) 162: 'Contrary to the widely accepted Weberian social theory, the Protestant ethic, both Lutheran and Calvinist, was essentially the same in these matters as the Roman Catholic.'

[75] On the influence of Theology in Contract Law, the most complete study is Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Martinus Nijhoff Publishers 2013); See also Gordley (n 16).

[76] Odd Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power* (Cambridge University Press 1998) 99.

[77] Hobbes (n 7) Part I, Chapter XV [2] [129-131] 89.

[78] ibid Part I, Chapter XV [14] [74-76] 94.

[79] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979) passim; Gordley (n 16) 161.

and indispensable requisite of progress".[80]

Consent theory is a reductionist theory. It downplays the role that most legal systems give to private law remedies against inequality in exchange and explains price disparity as *nothing more than* an indication of an underlying defect in consent—defect that would explain, in turn, the need for a remedy. In other words, consent theory tends to dismiss the *explananda* of just price theory—the legal rules and institutions shaped by a concern for just prices—as irrelevant. It tends to explain the *explananda away*.

However, the motivations for explaining the *explananda* as nothing more than an indication of consent are, at least *prima facie*, unclear. The argument in Chapter 1 suggested that there are at least *pro tanto* reasons to take these legal rules and institutions in their own terms, *i.e.*, as rules and institutions that introduced a substantive standard of justice into the law of contracts. Moreover, mere consent does not seem to explain neither the way in which courts deal with cases of gross disparity—judges do not seem to decide cases based on whether the parties have *really* agreed to the price in the contract, but rather on whether the price agreed to in the contract is justified according to some normative standard[81]—nor does it explain the reason for having a specific remedy against price disparity apart from the traditional remedies against defects in contractual consent, such as error, misrepresentation, fraud (*dolus*), force or fear (*metus*). The very fact that remedies against inequality in exchange are so pervasive in most legal systems is a reason to believe that our legal institutions are trying to capture a specific kind of injustice that is not sufficiently captured by framing disparity in exchange as a mere problem of consent. Framing price disparity as a problem of consent seems to be an attempt to reduce every contractual injustice to one single pattern – lack of consent. But this is done at the price of effectively distorting both the meaning of remedies against price disparity in the law, and the traditional remedies against defect in contractual consent, which are now expanded to cope with new situations beyond their original scope of application.[82]

Nevertheless, if what consent theorists claim is true, then we have reasons to

[80] Samuel Williston, 'Freedom of Contract' (1921) 6 Cornell Law Review 365, 366; See also Gordley (n 16) 161 ff.
[81] On this, see James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1645.
[82] Hart makes a similar point to explain the recasting of different legal rules in order to make them fit with the 'command' theory of law. HLA Hart, *The Concept of Law* (third edition, Oxford University Press 2012): 'the uniformity imposed on the rules by this transformation of them conceals the way in which the rules operate, and the manner in which the players use them in guiding purposive activities, and so obscures the function in the co-operative, though competitive, social enterprise which is the game.'

explain the *explananda* in terms of consent, and to dismiss the idea that institutions concerned with just pricing are trying to incorporate a substantive standard of justice to the law of contracts different from consent. The relevant question, therefore, is this: Is it possible to establish a connection between just prices and consented prices? What arguments can we give to think that *consented* prices are also *just*?

Alan Wertheimer provides a plausible reconstruction of the argument from consent. His reconstruction is helpful to our purposes, since it allows us to explain the relationship between consent, the economic debate over the sources of value, and the role of autonomy in price justification. Wertheimer's reconstruction of the argument from consent goes like this:

(1) A transaction is unfair only when B receives less value from the transaction than B ought to receive by some benchmark.
(2) The same good can have different values to different persons or at different times.
(3) A good's value to the parties of the transaction is indicated by the price at which they are prepared to transact.
(4) If B voluntarily consents to pay (or give) X for a good, this indicates that B is receiving adequate compensation for what she gives up.[83]

In his own assessment of this argument, Wertheimer accepts claim (1), and sees claim (2) as "obviously true."[84] I would not want to deny that each of these claims seems unproblematic taken on its own nor that they can both be true at the same time. However, since (2) touches upon the idea that value is subjective and variable and (1) appeals to an objective benchmark against which to judge whether someone has received more or less than she ought to receive, one may wonder how the two claims can possibly hang together. If the same good can have different values to different persons, it may seem impossible, by definition, to provide an objective benchmark against which to judge whether that good is being bought or sold for more or less than its just price. If this is the case, then the very idea of a just price would make little sense. But is this true? Is the *subjectivity* of value incompatible with affirming an *objective* normative standard for prices?

The answer is no. Affirming that value is subjective only entails taking a position on the debate about the *sources* of value—it is a plausible answer to the question 'Where does economic value come from?'—whereas affirming the possibility of an

[83] Wertheimer (n 4) 250.
[84] ibid.

objective standard of fair pricing is a *normative* claim, one that affirms that prices can be subject to normative standards that do not depend on the subjective valuations of the parties—it is not a response to the question about the sources of value, but rather to the question 'What justifies prices?'. It is perfectly possible, for instance, to claim both (1) that the economic value of a certain prescription drug is represented by the price of £20 because that price best represents the relative scarcity of a product at a given time, and to claim that (2) the price of £20 is *unjustified* from a normative perspective because it is a price that takes advantage of the needs of the buyer, thus violating the requirements of commutative justice. To be sure, if the rules regulating exchange were meant to identify, say, labour and costs of production instead of relative scarcity then certainly some prices would be very different from what they are now. But the question about price justification would still need to be answered. Indeed, there is nothing preventing the price that reflects the costs of production of prescription drugs from being exploitative or otherwise unjust.

Moreover, it is impossible to talk of an unjust price without *first* identifying that very price which is taken to be unjust by some normative standard. The sources-of-value debate in economics is a debate over the criteria for identifying *what* is the price of a thing. The just-price debate is a debate over the possibility of evaluating those prices thus identified according to a normative standard. Claiming that the sources of economic value are subjective does not entail claiming that the normative standard to evaluate economic value should also be subjective.

Nevertheless, many critics and indeed proponents of the Scholastic doctrine of the just price have claimed the opposite. They have conceived of the just-price debate as a debate about the sources of economic value. Why have they done so? What is the motivation to affirm that the *subjectivity* of value is incompatible with the *objectivity* of a normative standard?

To understand what motivates this (in my view, spurious) link between these two debates, we must take a brief detour into the history of economic thought, the debate over the sources of value in economics and what I shall term the 'Marginalist Objection' to just price theory. Although this objection has a history different from that of consent theory, and it was raised as the result of certain developments in value theory in economics, the *structure* of the marginalist objection to just price theory is identical to the argument from consent. After this brief detour, I shall come back to evaluate claims (3) and (4) of Wertheimer's argument.

As noted in the first section of this chapter, Mises believed that the idea of a just price was based on the "inveterate fallacy"[85] of considering value as an "objective"[86] quality of things. There I proposed two possible interpretations of this claim. However, there is yet another plausible interpretation, one that takes Mises' argument against the *objectivity* of the just price as an argument against the *objective* theory of economic value. Take, for instance, his explanation of why theories of economic value that preceded his own have failed. According to Mises,

> [t]he philosophy of universalism has from time immemorial blocked access to a satisfactory grasp of praxeological [*i.e.* economic] problems, and contemporary universalists are utterly incapable of finding an approach to them. (...) They ask, for instance: Why is the value of "gold" higher than that of "iron"? Thus they never find solutions, but antinomies and paradoxes only. The best-known instance is *the value-paradox which frustrated even the work of the classical economists*.[87]

The value-paradox is the apparent contradiction between the use value of a good and its exchange value. The 'paradox' is usually attributed to Adam Smith, who noted that things having great use value frequently have little exchange value and vice versa.[88] Smith explained the inverse relationship between the two kinds of value with water and diamonds, the former having the highest use-value but little exchange value, and the latter having little use-value but the highest exchange-value.[89] This inverse relationship between both kinds of value was known from then onwards as the 'water-diamond paradox', or simply the 'value-paradox', as Mises called it.

Three separate Schools of economic thought—the English School of William Stanley Jevons, the Swiss-French School of Léon Walras, and the Austrian School of Carl Menger (to which Mises and Hayek belonged)—simultaneously achieved "what A. Smith, Ricardo, and Marx had believed to be impossible, namely, that exchange value can be explained in terms of use value."[90] This achievement is called the 'Marginalist Revolution' in economics.

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[85] Mises (n 1) 203.
[86] ibid.
[87] ibid 44–45 (my emphasis).
[88] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol 1 (RH Campbell and AS Skinner eds, Liberty Fund 1976) I.iv. 13 (42) 44: 'The things which have the greatest value in use have frequently little or no value in exchange; and, on the contrary, those which have the greatest value in exchange have frequently little or no value in use.'
[89] ibid 44–45: 'Nothing is more useful than water: but it will purchase scarce anything; scarce anything can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange.'
[90] Joseph A Schumpeter, *History of Economic Analysis* (George Allen & Unwind Ltd 1954) 911–912.

Marginalists claimed to have resolved the paradox without resorting to two different kinds of value. The key out of the paradox was in the distinction between *total* and *marginal* utility. Thus, although the total utility of water is higher than the total utility of diamonds, the utility of each additional unit of water—its *marginal* utility—is less than the utility of each additional unit of diamonds.[91]

Mises believed that the concept of the just price entailed a rejection of marginal utility as the sole source of economic value. If, according to just price theory, prices can fail to track the *real* value of a thing, then it must be the case that the just value is determined by factors other than the *subjective* valuations of concrete individuals, and that we must have access, therefore, to these other factors determining the ideal price of a thing. Alas, Mises claims, we do not, for those other factors do not exist in real transactions. As Mises puts it,

> In dealing with prices economics does not ask what things are in the eyes of other people, but only what they are in the meaning of those intent upon getting them. For it deals with real prices, paid and received in real transactions, not with prices as they would be if men were different from what they really are.[92]

According to Mises, therefore, *if marginalism is true*—and he believed this is indeed the case—*then just price theory must be false*. This is what I call the 'Marginalist Objection' to just price theory. Interestingly, many advocates of the Scholastic doctrine of the just price have agreed to this, claiming that just price theory is grounded on objective theories of economic value, in particular the labour-theory of value in its Ricardian or Marxist version. This view, which links Aristotle and the Scholastics with the labour theory of value, was the dominant view during the early and middle twentieth-century.[93] Thus, Richard Tawney famously claimed that "[t]he true descendant of the doctrines of Aquinas is the labor theory of value. The last of the Schoolmen was Karl Marx."[94] Briefly put, these scholars claimed the contrapositive

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[91] While the term 'marginal' has been consistently used in economics as a proxy for 'additional'—the *marginal* utility of a glass of water is the *additional* utility extracted from drinking it—'utility', on the other hand, has switched from meaning 'pleasure' to 'preference satisfaction'. In effect, most contemporary schools of economics have moved from the old Benthamite cardinal utility—the quantifiable expected pleasure one can extract from each additional unit of a good—towards some model of ordinal utility—a consumer's ranking of preferences, which cannot be quantitively measured.

[92] Mises (n 1) 93.

[93] See, for example: Richard Tawney, *Religion and the Rise of Capitalism* (John Murray, Albemarle Street, W 1926); Selma Hagenauer, *Das 'Justum Pretium' Bei Thomas von Aquino : Ein Beitrag Zur Geschichte Der Objektiven Werttheorie /* (W Kohlhammer, 1931); Rudolph Kaulla, *Theory of the Just Price: A Historical and Critical Study of the Problem of Economic Value* (Robert D Hogg tr, George Allen & Unwind Ltd; W W Norton & Co, Inc 1940).

[94] Tawney (n 93) 36.

of Mises' claim, the logically equivalent proposition that *if just price theory is true*—and they believed this to be the case—*then marginalism is false.*

Since most contemporary scholars now regard the labour theory of value as false, those who defend the Scholastic doctrine of the just price now tend to agree with the marginalists. Most scholars concerned with the Scholastic doctrine of the just price now claim that for Scholastics value was subjectively determined:

> [The texts of the Scholastic Doctors are] clear and unambiguous. (...) The Doctors found no objective way to establish the level of the just price, since utility is more closely related to the mood and preference of the consumer (*complacibilitas*) than to the inherent capacity of the good to satisfy human wants (*virtuositas*). For this reason the Scholastic utility theory of value must be understood as a subjective one. In effect, the Schoolmen were the forerunners of the late-nineteenth-century economists who "discovered" the subjective theory of value.[95]

One should be careful in taking this debate about the Scholastic doctrine of the just price at face value. As Wim Decock has rightly pointed out, it would be extremely naïve to assess these contemporary endeavours without referring to "the great twentieth century ideological stalemate between sympathizers of Marx and free market advocates."[96] Indeed, that Scholastics *had to be* either proto-Marxists or proto-marginalists sounds almost too good to be true. The motivations behind such a move, and indeed its academic credentials, are far from clear. Moreover, and leaving aside for a moment the ideologically-driven nature of this debate, there are good reasons to believe that subjective and objective theories of value are *not* fundamentally opposed to each other. The founders of marginalism themselves claimed that the price of reproducible goods moved towards the cost of labour once *change over time* is factored in. Subjective utility—the state of affairs given by supply and demand—is indeed what gives value to a certain good, but only when that good is considered *at a snapshot in time*. As the works of economic scholars such as Maurice Dobbs and Kevin Carson have shown, the radical opposition between marginalism and objective theories of value, typically taken for granted in these debates, disappears once the

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[95] Alejandro A Chafuen, *Christians for Freedom: Late-Scholastic Economics* (Ignatius Press 1986) 103; See also Alejandro A Chafuen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (Lexington Books 2003) 85; Cf Decock (n 75) 521–522; For further references, see ibid 520 (n1714). As a historical matter, Chafuen's claim about the Scholastic theory of value is too simplistic. In truth, textual evidence can be produced in support of both sides of the debate. For a balanced presentation of both sides of the debate, see Barry J Gordon, 'Aristotle and the Development of Value Theory' (1964) 78 The Quarterly Journal of Economics 115 (for Aristotle); and especially Langholm (n 19).

[96] Decock (n 75) 520.

nuances of both positions are considered.[97]

Be that as it may, if the just price is effectively determined by the subjective valuations of individuals—as these contemporary defenders of Scholastic just price theory claim—then we are back to Hobbes: "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."[98] We have come, therefore, full circle, and we are back again to the argument from consent.

To recall, Wertheimer's reconstruction of the argument is this:

(1) A transaction is unfair only when B receives less value from the transaction than B ought to receive by some benchmark.
(2) The same good can have different values to different persons or at different times.
(3) A good's value to the parties of the transaction is indicated by the price at which they are prepared to transact.
(4) If B voluntarily consents to pay (or give) X for a good, this indicates that B is receiving adequate compensation for what she gives up.[99]

I have already analysed claims (1) and (2) and, hopefully, the compatibility between the two claims looks unproblematic. Claim (3) also seems true as a description of the outcome of the parties' bargaining process. As Wertheimer notes, this premise, as it stands, "simply establishes that the parties have their reservation prices for the good in question."[100] The reservation price for the buyer is the highest price that she is willing to pay for the good. For the seller, it is the lowest price that she is willing to receive. The value of the good for the parties, therefore, will be represented by the price at which they have consented to. The problem with the argument, however, lies in (4), which does not seem to follow from (3). Wertheimer hits the nail on the head: "[Claim (3)] does not show that any price *within* the bargaining range established by their reservation prices is fair. So even if (3) is true, it hardly follows that (4) is true."[101] In other words: (4) obtains only if there is a necessary connection between the range of prices which the parties can *consent* to (each party's bargaining range) and *justice* in pricing (adequate compensation for what each party gives up).

[97] On this, see Maurice Dobb, *Theories of Value and Distribution Since Adam Smith: Ideology and Economic Theory* (Cambridge University Press 1973); For a especially helpful summary of the debate, focusing on the differences and nuances of both positions, see Kevin Carson, *Studies in Mutualist Political Economy* (BookSurge Publishing 2007) 13–55.
[98] Hobbes (n 7) Part I, Chapter XV [14] [74-76] 94.
[99] Wertheimer (n 4) 250.
[100] ibid.
[101] ibid.

The challenge that lies at the core of any consent theory of justice is to find a necessary link between justice and consent. How can we move from consent to justice?

A strong candidate for ascertaining a connection between justice and consent is the value of *autonomy*. I shall analyse whether autonomy can indeed provide the necessary link between justice and consent later in the thesis.[102] What I would like to note for present purposes is that far from being a rejection of the concept of the just price, the argument from consent involves an alternative *conception* of justice in pricing, one based on the link between justice and consent. Indeed, Hobbes did *not* say that there is no such thing as a just price. Rather, he claimed that the just price was the price the contracting parties are willing to consent to, "that which they be contented to give."[103] Consent theory is a theory of *justice*, and the conception of prices stemming from it is a conception of what a price *ought* to be. According to this conception of the just price, the just price consists in whatever price the parties have agreed upon in exchange.

## 4. Hayekian Just Pricing (and Concluding Remarks)

I would like to end this chapter with a brief note on Friedrich Hayek, another author that has famously rejected the idea of a just price.

Hayek famously claimed that the abandonment of "the futile medieval search for the just price"[104] was a necessary condition for economic growth. For Hayek, the market order could only develop

> when a thousand years of vain efforts to discover substantively just prices or wages were abandoned and the late schoolmen recognized them to be empty formulae and taught instead that the prices determined by just conduct of the parties in the market, i. e., the competitive prices arrived at without fraud, monopoly and violence, were all that justice required.[105]

Hayek thought of his own argument as a rejection of the concept of the just price, but he was actually proposing—and conflating—not one nor two, but three alternative conceptions of the just price. The first is the conception of the just price based on consent ("prices arrived at without fraud or violence"). The second is the just

[102] Chapters 3 and 6.
[103] Ibid.
[104] Hayek (n 8) 237.
[105] ibid.

price as the price obtained by the just conduct of the parties ("prices determined by the just conduct of the parties… is all that justice required"). The third is the just price as the competitive market price ("competitive prices arrived at without…monopoly").

To be sure, Hayek identifies the competitive market price with the price obtained by the just conduct of the parties, and the requisites for a 'just conduct' in Hayek's account are both minimal (absence of fraud and violence) and related to consent, so there is a sense in which he can still claim to be endorsing only this version of the consent theory. However, there is no necessary connection between competitive prices and the just conduct of the parties, nor for that matter between any of those two criteria and consent. In fact, it is possible to think of consented prices which are not competitive, and of competitive prices which are not consented by the parties.

Hayek's inconsistent views on just pricing—claiming to endorse an outright rejection of the very idea of a just price, on the one hand, while in reality affirming three possible versions of just price theory, on the other—are symptomatic of the status of just price theory in contemporary scholarship. One of the aims of this chapter has been to show this inconsistency. If the preceding considerations have shown anything is that, despite the harsh rhetoric against the idea of a just price—"a contradiction in terms"[106], "a question absolutely devoid of meaning"[107], based on an "inveterate fallacy"[108], a "futile medieval search"[109], "a frozen and lifeless relic of an earlier age"[110], "a nebulous concept invented by pious monks who knew nothing of business or economics and were blissfully unaware of market mechanisms"[111]—many modern objections to just price theory can be understood as offering alternative *conceptions* of the just price rather than providing grounds for rejecting the very *concept* of just prices altogether. Framing the debate over just prices in this way, avoiding the temptation of taking contemporary anti-scholastic rhetoric too seriously, might contribute to addressing the strengths and limitations of the different sides in the

[106] Collingwood (n 2) 174; Hayek (n 3) 442.
[107] Collingwood (n 2) 174.
[108] Mises (n 1) 203–204.
[109] Hayek (n 8) 238.
[110] Jacob Viner, *Religious Thought and Economic Society: Four Chapters of an Unfinished Work* (Jacques Melitz and Donald Winch eds, Duke University Press 1978) 12 The phrase is directed to Scholastic economic thought as a whole.
[111] Raymond de Roover, 'The Concept of the Just Price: Theory and Economic Policy' (1958) 18 The Journal of Economic History 418, 418 The author thus characterises the view of modern economists regarding the doctrine of the just price.

debate within a common framework of meaning, in which each side might have something to contribute to our understanding of what a just price is.

Section 1 of this chapter focused on the 'Argument from Bad Metaphysics' (the idea that just price theory is inseparably linked to a discredited Aristotelian essentialism) and showed that, however reconstructed, the argument is fallacious and provides no ground to dismiss the possibility of price normativity.

Section 2 addressed Collingwood's famous objection against the very idea of a just price. I termed his argument the 'Argument from Value-Free Economics.' After observing that Collingwood's objection rests on a misconception about the purely descriptive nature of economic discourse, I attempted to reconstruct his argument against the very idea of a just price as an argument against the identification of justice in pricing with supply and demand and in favour of an institutional approach to justice in pricing, according to which the just price is the price that stems from just institutional arrangements. Since institutions can be shaped by different normative commitments, an institutional approach allows us to adopt a more pluralistic approach to price justification, one that entails a partial reform to the Scholastic approach to just price theory and its commitment to commutative justice as the sole source of price justification. This pluralist approach will be further pursued in the following chapter.

Section 3 dealt with the 'Argument from Consent' (the argument according to which the just price is nothing but the price at which the parties decide to transact) and with the structurally similar version of this argument in economics, *i.e.*, the 'Marginalist Objection' to just prices. As with the previous argument, I attempted to show that the argument from consent does not give us reasons to dismiss the idea of just prices altogether. Quite the opposite: it provides us with an alternative conception of justice in pricing, one that links justice and consent. I also argued, however, that the link between justice and consent is problematic, and that we need a further premise linking consent to justice. I suggested the possibility that the value of autonomy may serve as the missing premise linking consent to justice. The next chapter will also discuss the possibility of grounding a theory of the just price on the value of autonomy.

# Chapter 3: Mapping Justification

The first chapter of the thesis (*Explanandum*) drew attention to the way in which our intuitions about price fairness have been institutionalised in the law, mainly in the form of private law remedies against inequality in exchange, but also beyond the confines of private law. The main claim of the first chapter was that those rules and institutions are unintelligible without a normative standard against which to judge prices, *i. e.*, a normative standard that allows legal officials to distinguish just from unjust prices. The concept of a just price is therefore needed to make sense of deep-seated institutions in the law. The second chapter (*Addressing Scepticism*) dealt with some common objections against the very idea of a just price, motivating the claim that most of these objections are best understood as alternative conceptions of the just price rather than proper rejections of the concept. Thus, Collingwood's rejection of the very idea of a just price was reassessed and reinterpreted both as a rejection of a specific conception of the just price—namely, the just price as the market price (the price fixed by supply and demand)—and as an endorsement of a different conception of the just price: the just price as the price that can be fetched under just background conditions of exchange. In turn, consent-based rejections of the just price were reinterpreted as an endorsement of the conception according to which the just price is the price consented by the contracting parties.

The present chapter (*Mapping Justification*) maps these conceptions of the just price and their underlying normative commitments as a first step to integrate them within a more robust account of price justification.[1] To do this, the first section of this chapter *(The Grounds of Price Justification*) shows that alternative conceptions of the just price are individuated according to different values that ground each conception. These different values serve as *grounds* of price justification. The grounds of price justification identified in this section are *efficiency*, *distributive justice,* and *autonomy*. The second, third, and fourth sections are devoted to these three grounds and the corresponding conceptions of the just price individuated by them. I term these alternative conceptions of the just price as the 'Efficiency Conception' (the 'EC'), the 'Distributive Justice Conception' (the 'DJC'), and the 'Autonomy Conception' (the 'AC'),

[1] This 'more robust account' consists in the virtue-based approach to price justification that I develop in Part Two of the present thesis, especially in Chapter 4.

respectively.

To discuss every possible account of efficiency, distributive justice, and autonomy and their normative implications for a theory of just price would be a daunting task which, I am afraid, would have very limited chances of success. Instead, I have decided to evaluate specific versions of these grounds of price justification. As will become apparent in what follows, my treatment of each of these values revolves around one fundamental premise, namely, that inegalitarian patterns of wealth distribution affect justice in pricing by systematically benefitting the rich at the expense of the poor. For this reason, I argue that efficiency-based and autonomy-based conceptions of the just price should be specified in a way that involves, as a success condition, an equal distribution of wealth. The demand for an equal distribution of wealth is also at the centre of the specific version of distributive justice that I explore as a just-making feature of prices, which I call 'distributive egalitarianism'.

The final section concludes by offering two challenges to the conceptions reviewed here. The first challenge concerns the relationship and compatibility between the commitment to an equal distribution of wealth, on the one hand, and the price system, which seems to have a built-in bias towards keeping *inequality* of wealth, on the other. The second challenge concerns the AC and the authorisation for injustice that autonomy seems to provide. This chapter does not provide an answer to these challenges. That is the task of the second part of the thesis, which is an attempt to overcome these challenges by incorporating some insights from a virtue-based approach to justification into the conceptions of the just price reviewed here, and thus develop these conceptions further.

Since the second part of the thesis will deal with the conceptions offered here, the present chapter lays the groundwork for the account of price justification that I will offer in Part Two of the thesis *(A Virtue-Based Approach to Price Justification*).

## 1. The Grounds of Price Justification

The concept of the just price is a normative concept. A normative concept is a concept that identifies a value which is shareable among participants of a social practice. However, although normative concepts are shareable among practitioners, there can be differences in their criteria of application of that concept. As Ronald Dworkin puts it,

> people participate in social practices in which they treat certain concepts as identifying a value or disvalue but disagree about how that value should be characterized or identified. The concept of justice and other moral concepts work in that way for us.[2]

If the concept of justice is a normative concept, then, *mutatis mutandis*, the concept of the *just* price is also a normative concept. The concept of the just price identifies a value—justice—which is shareable despite different criteria of application of the concept. Dworkin famously referred to the different criteria of application of a concept as "conceptions".[3] To claim that there are alternative criteria of application of the *concept* of the just price is to claim that there are alternative *conceptions* of the just price.[4]

Alternative conceptions of the just price arise from disagreements about the *grounds* of price justification. The grounds of price justification are the values that underlie each conception and serve as the justificatory reasons that allow us to identify a given price as the *just* price of a certain good. Thus, for instance, if a given price manifests the value of autonomy, and autonomy is a ground for price justification, then, according to an autonomy-based conception of the just price, that price would be normatively justified: it is the *just* price to pay for that good according to that conception.

In Chapter 2 *(Addressing Scepticism)* I suggested that some common objections to the very idea of the just price were best understood as alternative conceptions of

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[2] Ronald Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press 2011) 160.

[3] Ronald Dworkin, *Taking Rights Seriously* (Second edition, Bloomsbury 1977) 167: 'Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind.'; See also Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) 70: 'People by and large agree about the most general and abstract propositions about courtesy [or similar concepts], which form the trunk of the tree, but they disagree about more concrete refinements or subinterpretations of these abstract propositions, about the branches of the tree.'; See further Ronald Dworkin, *Justice in Robes* (The Belknap Press of Harvard University Press 2006) 10–11; Dworkin, *Justice for Hedgehogs* (n 2) 158–170.

[4] To be sure, this claim was already implicit in the claim—made in Chapter 2—that we should treat arguments rejecting the concept of the just price as arguments for or against particular conceptions of the just price. Indeed, this claim is true only if it is *possible* to have different conceptions of the just price, *i.e.*, only if the concept of the just price is a normative concept in the sense here described. Chapter 2 showed that alternative conceptions of the just price that are different from the Scholastic doctrine of the just price are not only possible, but that they already exist in the literature, albeit usually in the form of self-styled rejections of the very idea of price normativity.

the just price. We can make the values grounding each of those alternative conceptions explicit and individuate them in the following way:

(i) *Efficiency Conception: The just price as the market price*: To claim that the just price is the price fixed by supply and demand is to claim that the value of *efficiency*, either by itself or by instrumentally serving some other value (for instance, autonomy) has the ability to make prices *just*. This is the conception of the just price that, according to my own reading of Collingwood, he was rejecting.

(ii) *Distributive Justice Conception: The just price as the price that can be fetched under just background conditions of exchange*: To claim that the just price is the price that can be fetched under just background conditions of exchange is to accept some version of *distributive justice* as the underlying value justifying prices. This is the conception of the just price that, in my own reading, Collingwood endorsed.

(iii) *Autonomy Conception: The just price as the price at which the parties have consented*: To claim that the just price is the price consented by the parties is to accept that consent or some value associated with consent, such as autonomy, has the ability to justify prices. This is the conception of the just price that, according to my reading, Hobbes and Hayek endorsed.

*Efficiency*, *distributive justice*, and *autonomy* constitute three alternative grounds of price justification. Although these are not the only values capable of justifying prices, I believe that, with the sole exception of commutative justice, this list sufficiently captures those values that are most likely to be put forward as justification for prices in contemporary scholarship.[5]

Before proceeding to discuss these conceptions of the just price, a few points are in order. First, it does not follow from the fact that a price is just that one always *ought* to pay the just price, nor does it follow from the fact that a price is *unjust* that one ought *not* to pay it. There are certain contexts in which what one *ought* to do, all things considered, is precisely to pay an unjust price. Think, for example, of situations

[5] In Chapter 1 I described the Scholastic doctrine of the *iustum pretium* as a conception of the just price grounded on the value of commutative justice. In Section 2 of Chapter 1 I also suggested that there is another reading of the Scholastic tradition more in line with a pluralistic approach to value justification. I leave aside this issue for now. Commutative justice will be further discussed in Chapter 6, where, following Peter Benson, I propose a link between commutative justice and the value of autonomy.

involving a moral dilemma which is resolvable only with a moral remainder.[6] These are situations in which it is impossible to act well (all available and meaningful choices are bad choices), but in which it is nonetheless clear what one ought to do.[7] One example of such situation is given by Aristotle: "suppose, for example, that a tyrant gave one orders to do something shameful, when he had one's parents and children in his power, and they would be kept alive if one did as ordered, but put to death if not."[8] Suppose that what the tyrant is asking you to do is to sell your house at an unjust price. There is certainly a moral dilemma here, but one that is nonetheless resolvable: the moral intuition of most people would be, I think, that one ought to sell at an unjust price in order to save one's parents and children.

A second point, closely connected to the first, is that contexts in which one is justified in selling at an unjust price do not necessarily make the price any less unjust. As Rosalind Hursthouse has noted, one should be careful not to conflate *action guidance* with *action assessment*.[9] Action guidance is what allows one to decide that 'one ought to do *x*', whereas action assessment is what allows one to claim that although one ought to do *x*, *x* is nevertheless a *bad* action. Thus, when an agent faces a tragic dilemma, the constraints imposed by the context make it the case that even the best possible action will fail to be a good action. This means that, sometimes, even the best possible price to pay for a thing will be nevertheless unjust. It is important to bear this in mind when evaluating the implications of the claim that unjust institutional arrangements systematically produce unjust prices: it does not necessarily follow from this that one ought *not* to pay those prices.

A third and final point.[10] Since these alternative conceptions of the just price are grounded upon competing values, one might be tempted to conclude that they must also be *competing* conceptions of the just price. This inference, however, would not be warranted: alternative conceptions of the just price can certainly be competing conceptions, but this is not necessarily the case. Even if we assume that efficiency, autonomy, and distributive justice are conflicting values that can clash—an

[6] The idea of a 'moral remainder' was introduced by Bernard Williams in Bernard Williams, 'Ethical Consistency', *Problems of the Self*, vol Supplementary Volumes (Cambridge University Press 1973).
[7] On resolvable moral dilemmas, see Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press 1999) 43–62.
[8] Aristotle, *Nichomachean Ethics* (Christopher Rowe tr, Oxford University Press 2002) Book III, 1, 1110a5 [123].
[9] Hursthouse (n 7) 10.
[10] This final point anticipates some of the insights to be explored in Part Two of the thesis, where I explore a pluralist account of price justification.

assumption that scholars unconvinced by value pluralism are prone to reject[11]—the truth is that these alternative conceptions of the just price are not necessarily competing conceptions if they provide justification either for different objects or for different aspects of the same object. Indeed, some of these grounds for price justification may work better if we conceive prices as the product of mutual bargaining within the context of contractual negotiations, while others may work better if prices are perceived and conceptualised as products of the price system as a whole. Therefore, it is perfectly possible that some or even all of these conceptions are true at the same time.

Moreover—and this is the second reason why I think that these are not necessarily competing conceptions—the conceptions of the just price that I will review below are not best understood as accounts of what a just price *is*.[12] These conceptions, even if successful, are best conceived as *partial* accounts of the just price. Each conception is grounded upon different values that are manifested when we say that a price is just, but prices may fail to be just for more than one reason. A price may be unjust because it fails to manifest the autonomy of the parties, because it tracks inegalitarian patterns of wealth distribution, because it is inefficient, or perhaps due to all, some or none of these reasons. It may even be the case that a price is unjust for some other reason unrelated to any of these grounds of price justification. Therefore, these conceptions of the just price are not to be thought of as conceptions of what a just price *is* or what it *consists in*, as if they were meant to identify all the necessary and sufficient conditions to count a given price as just. Rather, they are attempts at finding *typical* conditions for the presence of values (efficiency, autonomy, distributive justice) associated with justice in pricing. [13]

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[11] Famously, Dworkin. See Dworkin, *Justice in Robes* (n 3) 105–116.

[12] For a similar point but in a different context, see David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159, 187.

[13] *Typical* conditions can be *typically necessary* or *typically sufficient*. Depending on whether we take each grounding value as a necessary or a sufficient condition for just pricing, and whether we conceive each value as either jointly or independently necessary or sufficient, we can describe each conception as the conception of the just price according to which a price is justified *if* it manifests the corresponding value(s) (grounding value as a sufficient condition), or as the conception according to which a price is just *only if* it manifests the corresponding value(s) (the grounding value(s) as a necessary condition).There is also a third alternative: that the grounding value is both a necessary and a sufficient condition. These different alternatives could be stated thus:

1) *Necessary Conception*: For every *x*, if *x* is a just price, then *x* manifests efficiency and/or autonomy and/or distributive justice.
2) *Necessary and Sufficient Conception*: For every *x*, *x* is a just price if and only if *x* manifests efficiency and/or autonomy and/or distributive justice.
3) *(Jointly and/or Independently) Sufficient Conception*: For every *x*, if *x* is a price that manifests

With these clarifications and qualifications in mind, I shall evaluate these alternative conceptions of the just price in the sections that follow.

## 2. Efficiency

I have previously argued against taking market prices—*i.e.*, prices fixed exclusively by supply and demand—as a normative standard of fair pricing. The argument in Chapter 2 suggested that market prices lack normative force, and that it is therefore a mistake to identify the just price with the market price. I illustrated this point with an example borrowed, with slight modifications, from Walsh and Lynch, which I reproduce here for the sake of clarity:

> *Housing Prices.* I buy a house in Edinburgh under extortionate circumstances and pay double the ongoing market price. Those extortionate circumstances that forced me to pay that price replicate all over Edinburgh for 6 months. By the end of the period the market price for my house is equivalent to the price I paid for it.[14]

In this case, the new market price is the final result of an extended series of unjust prices. But if the price I paid for my house under extortionate circumstances was unjust, then it must be the case that all prices that led to the new market price paid under the same circumstances were also unjust. But if market prices are just, then the new market price must be just regardless of being an aggregate of unjust prices. This result is counterintuitive. We would need, therefore, to find an explanation for the phenomenon of creating a just market price from a series of unjust prices. However, such an explanation seems extremely unlikely, if not outright impossible.[15] We can call the idea that a just market price would consist in an aggregate of unjust individual prices the *Just Market Price Paradox*.

The *Just Market Price Paradox* illustrates the counterintuitive results of the idea of taking market prices as just prices. But now we must explore one attempt to dispel the paradox, namely, that what accounts for this normative failure is that the new

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efficiency and/or autonomy and/or distributive justice, then *x* is just.

I note these distinctions here for the sake of precision, but they are of practically no consequence to the argument that follows.

[14] Adrian Walsh and Tony Lynch, *The Morality of Money: An Exploration in Analytic Philosophy* (Palgrave Macmillan 2008) 135.

[15] ibid.

market price in *Housing Prices* is unjust only if it consists in an aggregate of *inefficient* prices. In other words, we must explore the possibility that the value of *efficiency* can serve as a ground for price justification and, therefore, as a way out of *the Just Market Price Paradox*. I call the view according to which efficiency serves as a just-making feature of prices the 'Efficiency Conception' ('EC') of the just price.

There are at least two ways to understand the EC, depending on whether one takes an *economic* or a *contract-law* (bilateral) perspective of efficiency. The economic perspective of efficiency focuses on the efficiency of the price of a certain commodity in the market and not within the context of a bilateral exchange, whereas the contract law perspective of efficiency focuses on the price of a given commodity within the context of a bilateral exchange. The economic understanding of efficiency is based on the allocative properties of market prices, as well as on the epistemic benefits of the price mechanism as a system of decentralised decision making.[16] From an economic perspective, the market price manifests the value of efficiency because it is both *allocatively* Pareto-efficient (it allocates scarce resources to their best employment more efficiently than any alternative) and *epistemically* efficient (it conveys information about the relative scarcity of a commodity more efficiently than any alternative).[17] Allocative and epistemic efficiency are two different features of market prices, but they are inextricably linked: a price that tracks relative scarcity conveys information that is necessary to direct goods and labour to their best employment.[18] By contrast, a price does not manifest the value of efficiency—and it would be, therefore, an unjust price,

[16] General equilibrium theorists tend to emphasise the welfare properties of market prices rather than their epistemic benefits, whereas critics of general equilibrium tend to emphasise their epistemic advantages. The welfare advantages of the market are explained by the so-called 'Two Fundamental Welfare Theorems' in welfare economics, according to which (i) an economy under general competitive equilibrium leads to a Pareto-efficient allocation of resources, and (ii) any Pareto-efficient allocation of resources is attainable by general competitive equilibrium, given the price mechanism leading to redistribution. The canonical statement of these theorems is given by Kenneth J Arrow, 'An Extension of the Basic Theorems of Classical Welfare Economics' in Jerzy Neyman (ed), *Proceedings of the Second Berkeley Symposium on Mathematical Statistics and Probability* (University of California Press 1951); Gerard Debreu, *Theory of Value. An Axiomatic Analysis of Economic Equilbrium* (Yale University Press 1959) 90–97. For a critique of general equilibrium theory that tends to emphasise the epistemic benefits of market prices see Friedrich A von Hayek, 'The Use of Knowledge in Society' (1945) 35 The American Economic Review 519; Friedrich A von Hayek, 'The Meaning of Competition', *Individualism and Economic Order* (University of Chicago Press 1948); Friedrich A von Hayek, 'Competition as a Discovery Procedure' (2002) 5 The Quarterly Journal of Austrian Economics 9.

[17] Any allocation of resources is said to be Pareto-efficient or Pareto-optimal when it is impossible to reallocate resources in order to make at least one individual better off without making at least one individual worse off. Thus, a Pareto-improvement is possible whenever an individual can be made better off without making anyone worse off.

[18] Joseph Heath, 'On the Very Idea of a Just Wage' (2018) 11 Erasmus Journal for Philosophy and Economics 1, 27.

according to this view—when it does not reflect relative scarcity and, therefore, creates an inefficient allocation of scarce resources.[19]

The contract law or bilateral view of efficiency is different. From a contract law perspective, a price is efficient when it is the result of an efficient allocation of contractual risks and burdens.[20] The allocation of contractual risks and burdens is efficient, in turn, when contractual risks and burdens are borne by the party who can bear them at least cost. The price in a contract is justified, therefore, when it adequately—*i.e.*, efficiently and, therefore, depending on the exact formulation of the EC, justly or potentially justly—compensates for the risks and burdens borne by each party in a contract.[21] The contract-law perspective of efficiency focuses on the bilateral relationship between the parties, and it draws its normative appeal from the idea that there should be equality between what each contracting party gives, including the corresponding risks and burdens she bears, and what each party receives. In other words, it draws its normative appeal from the idea of preserving equality between things exchanged—*i.e.*, from commutative justice.[22] Since I deal with commutative justice elsewhere, in what follows I shall refer to efficiency understood from an economic perspective, and not from a contract-law perspective.[23]

My claim is that the EC is an attractive conception of the just price—that it is

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[19] For a recent defence of this idea, see Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press 2018) (arguing that a radical expansion of fully competitive markets and the liberation of the price mechanism from traditional institutional limits would lead to more efficient outcomes, which would in turn lead to a more just society); For another defence of efficiency as a justification for the price mechanism, see Heath (n 18).

[20] See James Gordley, 'Contract Law in the Aristotelian Tradition' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (2001) 323: "Risks and burdens should be placed on the party who can bear them at least cost. The price then should be adjusted to compensate him for bearing them. As we have seen, the contract will be unfair if the party who can bear a risk at least cost succeeds in shifting it to the other party since the party shifting the risk would prefer to bear it himself if he had to compensate the other party fairly."

[21] The need for compensation after allocation is a consequence of choosing Kaldor-Hicks efficiency rather than Pareto-efficiency as the normative criterion for efficiency. Unlike a Pareto-improvement, a Kaldor-Hicks improvement is compatible with making individuals worse off, provided those that are made better off could *hypothetically* compensate those that are made worse off. Most economic analyses of law have now switched from Pareto-efficiency to Kaldor-Hicks efficiency because, among other things, Pareto optimality is impractical: most policy decisions tend to make at least one individual worse off. In contrast, Kaldor-Hicks improvements are compatible with individuals being made worse off provided that compensation is at least hypothetically feasible (compensation could in fact not happen and that would still count as a Kaldor-Hicks improvement). While every Pareto improvement is also a Kaldor-Hicks improvement, not every Kaldor-Hicks improvement counts as a Pareto improvement. For a concise but clear analysis of both efficiency criteria, with a focus on the economic analysis of law, see Klaus Mathis, *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*, vol 84 (Deborah Shannon tr, Springer 2009) 31–50.

[22] Gordley (n 20).

[23] For further remarks on the contract-law perspective of efficiency in relation to the just price, see Chapter 5, section 2. On commutative justice, see also Chapters 1 and 6.

the case that market prices can be deemed at least potentially just if they are efficient—only if it is feasible to disentangle the unfair distributive outcomes of the price system from its epistemic benefits. More precisely, I shall argue that the EC is normatively attractive only if (i) the negative distributive effects produced by market prices can be either eliminated or reduced to a minimum and (ii) their ability to track relative scarcity can be disaggregated from background injustices in wealth distribution.[24]

I shall say more about this later on, but first let me explain how the economic view of efficiency could be thought of as serving a justificatory function for market prices. I have explained the 'Just Market Prices Paradox' with the example in *Housing Prices* to motivate the view that ongoing market prices have no normative pull. Now, one possible reply to that view of market prices would be to claim that a market price which is the product of extortionate circumstances fails to track the relative scarcity of a good, and, therefore, it is economically inefficient. Prices fetched under extortionate circumstances would be inefficient prices because they reflect non-scarcity-related facts such as background inequalities among market participants. If this is the case, then *Housing Prices* would fail to establish that market prices cannot provide an adequate normative standard of fair pricing. It would only establish that *inefficient* market prices fail to provide such a normative standard.

The EC claims that, under non-extortionate circumstances, market prices are efficient because they are the result of an efficient system of resource allocation. A system of decentralised decision-making such as the market has clear epistemic advantages over a system of centralised planning.[25] In a decentralised system, prices are *epistemically efficient*: they can communicate information about the relative scarcity of a product faster and more accurately than any other alternative. Epistemic efficiency, in turn, contributes to achieving *allocative efficiency*, which helps to reduce

[24] As it will become clear later, I think condition (ii) is one of the main problems with Posner and Weyl's proposal of "radical markets" in Posner and Weyl (n 19). Thus, unless a massive redistribution of wealth precedes the radical political and economic reforms that the authors propose, then individuals or companies with massive amounts of wealth could buy whatever they want, leaving those with less behind. I do not think that a massive redistribution of wealth is necessarily incompatible with the proposal of radical markets, but the authors of the book are conspicuously silent about wealth redistribution. For a similar point, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 230–231.

[25] Ludwig Mises, *Socialism: An Economic and Sociological Analysis* (J Kahane tr, Second edition, Liberty Fund 1932); Hayek, 'The Use of Knowledge in Society' (n 16); See generally David Ramsay Steele, *From Marx to Mises: Post-Capitalist Society and the Challenge of Economic Calculation* (Open Court 1992).

the inevitable mismatch between production and consumption in society, *i.e.*, between *goods-that-need-to-be-produced*, on the one hand, and *goods-that-people-would-like-to-consume*, on the other, as well as between supply and demand of labour, *i.e.*, between *work-that-needs-to-be-done* and *work-that-people-would-like-to-do*.[26] When market prices reflect relative scarcity, they help in producing this match "more ruthlessly than any other system, largely because of the 'hard budget' constraint that firms face, which serves as a check on sentimentality."[27] It is the ability to direct goods and labour to their best employment which makes market prices that reflect relative scarcity efficient and hence just (or at least what makes market prices satisfy a necessary condition to be just).

The EC concedes that market prices are aggregate prices, that the market price in *Housing Prices* reflects the point at which supply and demand intersect at a given time, that the price paid under extortionate circumstances is unjust, and that the new market price in *Housing Price*s should also be deemed unjust. However, it denies that market prices lack any normative pull by introducing a distinction between efficient and inefficient market prices. Prices that manifest the value of efficiency would be, therefore, just (or at least, they would satisfy a typical condition for prices to be just).

There are different ways to challenge the EC. Some writers have focused on the inadequacy of the whole conceptual apparatus of mainstream economics, including the concepts of relative scarcity, demand, preferences, etc. all of which are essential to make sense of the economic idea of efficiency.[28] Others have stressed the lack of normative appeal of economic criteria for efficiency. For instance, some critics of Pareto-efficiency, such as Amartya Sen and Philip Pettit, have highlighted the fact that economic efficiency is insensitive to individual traits of character. This makes it the case that certain allocative results that are Pareto-efficient are nonetheless morally unacceptable. Consider, for instance, the Pareto-efficient allocation of two apples between two individuals, Greedy and Nice, where Greedy always prefers to have more than anyone else, and Nice always prefers others to have more than what she has. According to the Pareto criterion, giving two apples to Greedy and zero to

[26] Heath (n 18) 30.
[27] ibid.
[28]This kind of critique is very popular among heterodox approaches to economic theory. On this, see Frederich S Lee, *Microeconomic Theory: A Heterodox Approach* (Tae-Hee Jo ed, Routledge 2018) 1–2: 'The objects of study of mainstream economics, such as preferences-utility, marginal products, demand curves, rationality, relative scarcity, and homogeneous agents, are ill-defined, have no real world existence, and, where relevant, are non-quantifiable and non-measurable.'

Nice would be a Pareto-efficient allocation of the apples.[29] Other scholars have criticised the account of practical reason and well-being presupposed by the Pareto criterion. For instance, Alasdair MacIntyre has argued that the economic understanding of efficiency stops at the level of preference satisfaction, leaving little room for a critical evaluation of the reasons underlying one's own preferences and desires.[30]

While I am not unsympathetic to some of these critiques of economic efficiency, for the present purposes, however, I advance a critique of a different sort. I would like to put into question the alleged epistemic and allocative benefits of ongoing market prices. Regarding the epistemic benefits of market prices, I deny that market prices efficiently reflect relative scarcity. I would like to suggest that what market prices actually do is to *present themselves* as exclusively reflecting relative scarcity. In reality, however, they also reflect non-scarcity-related factors. This fact has a direct impact on the ability of the price mechanism to allocate resources according to their best employment, thus also undercutting the allocative effects of the market. Moreover, I argue that even if prices did reflect relative scarcity, allocating resources on the basis of such prices, when the underlying distribution of resources is unequal, is *unfair* to those with less background wealth. The argument relies on the fact that background wealth inequality has a direct effect on each discrete price that leads to the market price. This is because background wealth has a direct effect on the reservation prices of both buyers and sellers. When there is inequality in the distribution of resources, justifying market prices on the grounds of efficiency simply naturalises those

[29] On this, see Amartya K Sen, *Choice, Welfare and Measurement* (MIT Press 1982) 54–73; Philip Pettit, 'The Virtual Reality of Homo Economicus' in Uskali Mäki (ed), *The Economic Worldview: Studies in the Ontology of Economics* (Cambridge University Press 2001).

[30] Alasdair MacIntyre, *Ethics in the Conflicts of Modernity: An Essay on Desire, Practical Reasoning, and Narrative* (Cambridge University Press 2016) 183–189; see also ibid 77: 'To maximize utility was on an earlier utilitarian view to maximize pleasure and to minimize pain. More recently the thought has been that to maximize utility is to maximize preference satisfaction. Neither formulation pays regard to the fact that what we are each of us pleased or pained by and what we each of us prefer depend in key part upon our prior moral formation, upon how far we are just, courageous and temperate, and therefore disposed to act rightly. How we conceive utility thus depends on our prior formation and commitments, so that it cannot provide a standard independent of them. To propose utility maximization as such as the measure of right action must therefore be a mistake. What, then, are we in fact doing when we make decisions on the basis of cost-benefit analyses as we often do? The answer is that we are always working with some highly determinate and contestable conception of what is to count as a cost and what as a benefit in this or that type of case and with some prior determination of whose costs and whose benefits are to be counted, whose costs and whose benefits ignored. It is evaluations already made or presupposed that allow us to find application for the notion of utility in our decision making. The notion of utility maximization as a freestanding notion that by itself provides guidance for action is a philosophical fiction.'

inegalitarian patterns of wealth distribution. If this is true, then those with more background wealth—the 'rich'—can effectively impose their prices on those with less—the 'poor'. This makes the EC normatively unattractive unless it is preceded by a massive redistribution of wealth. In sum: (1) I *deny* that ongoing market prices are epistemically and allocatively efficient, and, even if they were, (2) I claim that manifesting the value of efficiency is not enough to consider a price just when the background conditions of exchange reproduce inegalitarian patterns of wealth distribution. Or, to put it in positive terms, I argue that the EC is normatively attractive only if and only when background conditions of wealth equality obtain.

Let me start with the epistemic benefits of market prices. The EC rests on an empirical claim about the normal functioning of the price system, namely, that prices typically convey information about the relative scarcity of a given commodity unless impeded by some extraordinary circumstances. However, empirical evidence about the actual functioning of the price system does not support such a claim. As recent empirical research suggests, market prices are typically unable to disentangle information about scarcity-related factors from non-scarcity related ones.[31] Studies in behavioural economics have shown that ongoing market prices track all kinds of non-scarcity-related information, including cognitive biases of buyers and sellers such as loss aversion (the tendency to prefer avoiding losses to acquiring equivalent gains) and the 'endowment effect' (the tendency to place a higher value on a good that one owns than on an identical good that one does not own).[32] Moreover, anthropological studies on market exchanges among different types of groups also support this claim, noting that market prices are best understood as "ciphers for a complex entanglement of actors, relations, ideologies, things, and environments."[33] Since the epistemic benefits of market prices depend on their ability to track relative scarcity, the fact that

[31] Another way to make the same point would be to say that relative scarcity is determined by non-scarcity related factors.

[32] On this, see Daniel Kahneman, Jack L Knetsch and Richard H Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' (1990) 98 Journal of Political Economy 1325; Based on these cognitive biases and other findings, Daniel Kahneman and Amos Tversky developed an alternative to the classical 'expected utility' theory of rational choice: the so-called "prospect theory" of choice, which earned Daniel Kahneman the Nobel Memorial Prize in Economics in 2002. For the prospect theory of choice, see Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982); Daniel Kahneman and Amos Tversky (eds), *Choices, Values, and Frames* (Cambridge University Press 2000); Thomas Gilovich, Dale Griffin and Daniel Kahneman (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press 2002).

[33] Peter Luetchford and Giovanni Orlando (eds), *The Politics and Ethics of the Just Price: Ethnographies of Market Exchange*, vol 39 (Emerald Publishing 2019) 2.

information about relative scarcity is inseparable from non-scarcity-related factors poses a real problem for the EC.

Despite their inability to track exclusively scarcity-related factors, prices are nonetheless *perceived* by market agents as communicating information about the relative scarcity of market goods and nothing else. Market prices are perceived by market agents as bits of typically reliable information about supply and demand of market goods, but not as bits of reliable information about non-scarcity related factors such as, for instance, the working conditions under which goods are produced.[34] This effectively conceals from view the background conditions of exchange, including any underlying injustices in the chain of production and distribution. A real-life example might help to bring out this point: In 2014, British Primark customers found stitched messages sewn into the clothes they had bought: 'Forced to work exhausting hours', 'Degrading sweatshop conditions' etc.[35] Although these messages were apparently a hoax carried out within the UK; they brought to light the fact that not only do we typically ignore the working conditions under which many of these products are produced when we are buying them, but also that we don't even think about those conditions when we're buying these goods when the price does not seem 'suspicious', that is, when the price that we are offered corresponds to what we think the ongoing market price for that kind of good is. As market agents, we usually operate under epistemic conditions that *exclude* paying attention to the spheres of production and distribution, and, therefore, to the fact that many products we buy are produced under degrading conditions that, in non-market contexts, most of us would characterise as unjust or even extremely unjust.[36] Under typical market conditions, therefore, the epistemic

[34] Cf Lisa Herzog, 'The Epistemic Division of Labour in Markets: Knowledge, Global Trade and the Preconditions of Morally Responsible Agency' (2020) Economics & Philosophy 1.

[35] Susanna Rustin, 'This Cry for Help on a Primark Label Can't Be Ignored | Susanna Rustin' *The Guardian* (25 June 2014) <https://www.theguardian.com/commentisfree/2014/jun/25/primark-label-swansea-textile-industry-rana-plaza> accessed 2 March 2020; 'Primark Claims "cry for Help Labels" Are a Hoax Carried out in the UK' (*The Independent*, 28 June 2014) <http://www.independent.co.uk/news/uk/home-news/primark-claims-cry-for-help-labels-are-a-hoax-carried-out-in-the-uk-following-investigation-9569990.html> accessed 2 March 2020.

[36] Readers familiar with Marx's theory of exploitation may be reminded of Marx's claim that in order to understand the sale of and purchase of labour power as a commodity we should leave the sphere of circulation of goods—the market—and focus instead on the sphere of production: "Here we shall see, not only how capital produces, but how capital is itself produced." Karl Marx, *Capital: A Critique of Political Economy*, vol 1 (Ben Fowkes tr, Fourth edition, Penguin Books (in association with New Left Review) 1890) 279–280. I agree with the idea of not taking the market in isolation and looking into the whole process of production of commodities, but not with Marx's almost exclusive focus on the private ownership of capital. *Pace* Marx, it does not matter from the perspective of wealth distribution whether capital hires labour or labour hires capital. An economic model in which propertyless producers rent the means of production from capitalists yields the same distributive results as a model in which workers

benefits of market prices are not so salient as the EC considers them to be. Since the market price is a price that both *reflects* and *conceals* the background conditions of exchange, the EC facilitates the naturalisation of underlying injustices in the chain of production and distribution. Under unjust background conditions of exchange, to reflect the relative scarcity of a given good is simply to efficiently reflect and conceal injustice.[37] If prices are not epistemically efficient, then their allocative benefits are also put into question, for this would mean that resources are not allocated to their best employment, but to the employment that is more consistent with the combination of information about scarcity-related and non-scarcity-related factors that prices do, in fact, communicate.

Now, let us suppose that some ideal circumstances exist in which prices are indeed epistemically efficient, such as those imagined by Eric Posner and E. Weyl in their book *Radical Markets*.[38] Posner and Weyl propose to eliminate private property rights and replace them with contingent (temporal) use rights, and that each person records the value of her assets in a public register which will be the basis for a wealth tax. If people increase the value of their assets, then they would have to pay more taxes, but if they undervalue them, then they expose their assets to being acquired by others who can make unilateral offers for those assets, unilateral offers that would effectively remove those assets from one's resource pool: if one refuses to sell, that would count as theft ( unlike our current legal arrangements, in the world imagined by the authors *price trumps consent*: unilateral offers are binding even without one's consent). Suppose further that not only such institutional arrangements are feasible, but that prices that stem from such arrangements indeed manifest the value of efficiency. Would that be enough to consider them just? To answer this question, we would have to look at the allocative effects of market prices, that is, at their alleged

rent their labour to capitalists. On this, see Paul Samuelson, 'Wages and Interest: A Modern Dissection of Marxian Economic Models' (1957) 47 The American Economic Review 884; John Roemer, *Free to Loose: An Introduction to Marxist Economic Philosophy* (Harvard University Press 1988) 90–107; John E Roemer, *Egalitarian Perspectives: Essays in Philosophical Economics* (Cambridge University Press 1994) 37; Theodore A Burczak, *Socialism After Hayek* (The University of Michigan Press 2006) 105–107.

[37] The efficiency theorist may insist on the claim that market prices *always* reflect relative scarcity by relying on a definitional point: that relative scarcity conceptually depends on supply and demand. The argument would be that, since by definition market prices are those that track supply and demand, market prices *always* track relative scarcity. If they do not, then they are not market prices (cf RG Collingwood, 'Economics as a Philosophical Science' (1926) 36 International Journal of Ethics 162, 175–176. Heath (n 236) 27–28). But this is simply to concede that market prices are not efficient in any normatively meaningful sense.

[38] Posner and Weyl (n 19).

ability to direct goods and labour to their best employment. If it is true that epistemic efficiency leads to allocative efficiency, then we would have a strong reason to consider efficient prices as just, or at least as justice apt, in the sense that such prices would be necessary for a just allocation of resources in society.

I think there is something to say for the claim that, although ongoing market prices do not manifest the value of efficiency, they would be at least *pro tanto* just if they actually did. However, there is one worry that efficiency advocates should be aware of, namely, that the allocative effects of efficient market prices seem to systematically benefit those with more background wealth. If this is the case, then institutional arrangements leading to efficient prices would not cease to be questionable from the standpoint of justice. In other words, if allocative efficiency naturalises and reinforces inegalitarian patterns of wealth distribution in society then the fact that prices manifest the value of efficiency does not seem to be enough reason to consider them even *pro tanto* just.

To see this, let me focus on a factor that market prices are bound to reflect, even in institutional arrangements such as those imagined by Posner and Weyl: concentration of wealth.[39] Concentration of wealth is necessarily reflected on market prices because background wealth has a direct impact on the reservation prices of both buyers and sellers—the highest price the buyer is able to offer and the lowest price the seller is able to receive. The upshot of wealth inequality for market prices, therefore, is that those with more background wealth have more *power* to set prices than those with less background wealth. Indeed, as Adam Smith noted, wealth *is* power, and concentration of wealth is therefore concentration of power—power to impose one's will on those who cannot afford doing otherwise:

> Wealth, as Mr. Hobbes says, is power. (…) The power which that possession immediately and directly conveys to him, is the power of purchasing; a certain command over (…) the produce of other men's labour, which it enables him to purchase or command. The exchangeable power of every thing must always be precisely equal to the extent of this power which it conveys to its owner.[40]

If background wealth has an impact on reservation prices, then the price system works in such a way that those who have more background wealth ('the rich' for short)

[39] 'Wealth' is not used here as accountants and economists use it. By wealth I mean to include both *stock and flow*, that is, the accountant's concept of wealth (stock) *plus* income (flow).
[40] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol 1 (RH Campbell and AS Skinner eds, Liberty Fund 1976) I.v.3 (45) 48.

are at liberty to impose their will—their willed *prices*—on those who have less ('the poor' for short) without the poor being able to do much about it. It is an aggregation of these prices—the prices imposed to the poor by the rich—what constitutes the market price of a given commodity. As Posner and Weyl remind us, the market operates as an auction writ large: it allocates resources in such a way that the person who can offer *more* money for a certain commodity can have it, even if other person wants it or needs it more.[41] If the background distribution of wealth makes it the case that some people can habitually offer more money for goods than the rest, then those people effectively possess control—decentralised control, but control nonetheless—over the allocation of resources in society, and usually more and better goods will be allocated to those in control, and less and worse goods to everyone else. If this is true, then to claim that market prices are just because they are efficient (or at least that this is a necessary condition for the justification of prices) simply covers under a shroud of legitimacy the fact that ongoing market prices systematically benefit the rich. Thus, the kind of allocative efficiency that market prices possess would seem to be normatively unattractive in a society with inegalitarian patterns of wealth distribution. Market-price allocation under conditions of background inequality of wealth would systematically advantage those with more background wealth and disadvantage those with less.

In sum, the alleged epistemic and allocative properties of market prices do not seem to translate into benefits under inegalitarian patterns of wealth distribution. If efficient market prices track background wealth inequality through each party's reservation prices, then market price efficiency is normatively unappealing under conditions of background inequality of wealth. This means that efficiency is *conditionally valuable*: it is valuable or normatively attractive *only if equality of wealth obtains*. However, if a massive redistribution of wealth in society is a necessary condition for efficiency to be valuable, then the EC would hold true only if a particular version of the Distributive Justice conception of the Just Price—a version according to which a price is just only if it stems from egalitarian distributive principles—is also true.

[41] Posner and Weyl (n 19).The auction-writ-large character of the market mechanism is widely acknowledged. See, for instance, Hillel Steiner, 'A Liberal Theory of Exploitation' (1984) 94 Ethics 225; Heath (n 18).It is also at the centre of Dworkin's argument for resource egalitarianism. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000). A large part of Dworkin's argument relies on a thought experiment involving survivors of a shipwreck in an uninhabited island, where they distribute all their resources equally using a mechanism similar to that of a competitive market. For a critique of the way Dworkin understands the auction mechanism, see Joseph Heath, 'Dworkin's Auction' (2004) 3 Politics, Philosophy & Economics 313.

To this conception I now turn.

## 3. Distributive Justice

The Distributive Justice Conception of the Just Price ('DJC') is the conception according to which the just price is the price that results from just background conditions of exchange. Background conditions of exchange are just when they are organised around certain principles of justice. The principles of justice that regulate background conditions of exchange are typically called principles of distributive justice because they distribute burdens and benefits across members of a society. Thus, as its name suggests, for the DJC the underlying justificatory value that prices ought to manifest in order to be just is the value of *distributive justice*.

There can be as many versions of the DJC as there are theories of distributive justice. The preceding discussion on the Efficiency Conception of the just price (the 'EC') ended with the suggestion that because prices necessarily reflect background wealth inequality via each party's reservation prices, the value of efficiency can serve as a normative criterion for price justification only if the parties transact under conditions of wealth equality. This suggests that distributive principles that aim at achieving an *equal distribution of wealth* among individuals, so that neither party can use their background wealth to impose prices upon the other, can provide an acceptable normative justification for prices. In what follows, I would like to explore the implications for price justification of this particular reading of distributive justice—which I call, for short, 'distributive egalitarianism.'

Distributive egalitarianism is the name for a class *of egalitarian distributive principles* that aim at achieving equality of wealth among members of a given society.[42] I elaborate in what follows by elucidating what is excluded from this description.

First, distributive egalitarianism is a class of principles of *distributive* justice, namely, *egalitarian* distributive principles. Principles of distributive justice are criteria for normative judgments concerning the distribution of goods among a given set of individuals. Some of these distributive principles are egalitarian—such as distributive

[42] For the following paragraphs, see Iwao Hirose, *Egalitarianism* (Routledge 2015) 1–15, and passim. For a recent theory of the just price based on distributive justice, see Robert C. Hockett and Roy Kreitner, 'Just Prices' (2018) 27 (3) Cornell Journal of Law and Public Policy 771. Although the authors do not make explicit the distributive principles that would make it the case that we are in the presence of "just social arrangements" (p. 771), they seem to endorse some version of distributive egalitarianism.

egalitarianism—but some of them are not. For instance, the normative ideal of classical utilitarianism ('the greatest happiness for the greatest number') is not egalitarian in any meaningful sense, for although it assigns *equal weight* to the happiness of each individual, it is not concerned with the equal *distribution* of happiness, only with its maximisation. Neither is Nozick's libertarian theory of distributive justice, for which the distributive requirements of equality are generally overridden by the moral demands of self-ownership and liberty (I am controversially assuming, of course, that Nozick's account qualifies as a theory of distributive justice).[43] Aristotle's theory of distributive justice according to geometrical proportionality in Book V of the *Nichomachean Ethics* is also an example of a non-egalitarian distributive principle. Aristotelian distributive justice does not aim at equality, but rather at achieving a fair distribution of goods according to the relative strength of each individual's claim to those goods (the relative strength of each person's claim depends, for Aristotle, on the relative strength of each person's *merit*).[44] The distributional outcome of these distributive principles will not be therefore a strictly *equal* distribution of goods, since people with stronger claims will get more and people with weaker claims will get less. Indeed, while Aristotle does link human flourishing to the possession of sufficient external goods, for him there is no distributive injustice in a state of affairs where some people are better positioned than others to flourish: inegalitarian states of affairs are not a problem for Aristotle's understanding of distributive justice.[45] Rather, for Aristotle, equality is not for everyone: it is only for those who are equals. As long as all those who are equals are treated equally, it is perfectly just according to Aristotelian principles of distributive justice for those who

[43] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

[44] Some have even suggested that Aristotle's theory of distributive justice forbids redistribution to the poor, because there is no merit in being poor. See generally Fleischacker, *A Short History of Distributive Justice* (Harvard University Press 2004). Medieval canonists and theologians, however, promoted redistributive measures which are incompatible with Fleischacker's claim that a concern for the poor as a matter of justice is a modern idea. Moreover, it is difficult not to see echoes of the Scholastic idea of a '*family wage' as an upper* limit on profits in contemporary proposals for a *maximum wage.* The history of public utility laws and the underlying idea that some goods and services are so basic and necessary for living a decent life that they ought not to be left unregulated, is also very closely connected to the Scholastic idea of the just price. On the medieval idea of a family wage as an upper limit on profits, see Odd Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power* (Cambridge University Press 1998) 125; For a contemporary proposal of the idea of a maximum wage, see Sam Pizzigati, *The Case for a Maximum Wage* (Polity Press 2018); On the connections between just price theory and public utilities, see William Boyd, 'Just Price, Public Utility, and the Long History of Economic Regulation in America' (2018) 35 Yale Journal on Regulation 59.

[45] See, for instance, *Nichomachean Ethics* 1099a31-1099b8, 1101a14-16, 1153b14-21; *Rhetoric* 1360b20-30.

are unequal to be given unequal opportunities to flourish.[46] The conclusion follows: a price system organised around utilitarian, libertarian, or Aristotelian principles of distributive justice would be compatible with inegalitarian patterns of wealth distribution, and therefore with a price system the outcome of which would be prices imposed to the poor by the rich. A conception of the just price based on any of these distributive principles, therefore, would face similar difficulties to those faced by the EC.[47]

Second, distributive egalitarianism is a class of *egalitarian* principles of justice, namely, *distributive* egalitarian principles. Not every distributive principle is egalitarian, and not every egalitarianism is concerned with distributive principles. Indeed, not every kind of egalitarianism is *distributive* egalitarianism, because not every kind of egalitarianism aims at an equal distribution of wealth. *Legal egalitarianism*—equality before the law—claims that no person should have special privileges in society: everyone should be subject to the same laws. *Democratic egalitarianism* aims at political equality. It seeks to secure political liberties so that everyone can participate in democratic government on equal standing.[48] Democratic egalitarianism is the political upshot of the broader theory of *relational egalitarianism*, which claims that the point of equality is to treat each other as equals.[49] While these versions of egalitarianism have many distributive implications, they are not forms of *distributive* egalitarianism. These versions of egalitarianism aim at equality between persons or groups in society. They do not aim at an equal distribution of wealth among those persons. For these theories, an unequal distribution of goods is permitted provided

[46] Pol 1280a10-15. The tensions between Aristotle's approach to justice and virtue ethics, as well as the possibility of a 'critical virtue ethics', has been noted and discussed by Lisa Tessman, *Burdened Virtues: Virtue Ethics for Liberatory Struggles* (Oxford University Press 2005) 35–36, and passim.

[47] What about Marx's well-known slogan in the *Critique of the Gotha Program*, "From each according to his ability, to each according to his needs"? To be perfectly honest, I do not know how to evaluate that slogan. I tend to think that it sounds akin to Aristotle's theory of distributive justice, because the relative strength of each person's claim will depend on their needs, and needs are different for each person, so the distribution will not aim at equality as such, but at the satisfaction of needs. However, it all depends on the precise definition of 'needs', and a reading along more egalitarian lines also sounds plausible. I would imagine that an egalitarian interpretation of the slogan would be similar to G. A. Cohen's version of luck egalitarianism.

[48] Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press 1996); Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2010); Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287; Norman Daniels, 'Democratic Equality: Rawls's Complex Egalitarianism' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (Cambridge University Press 2003); Samuel Scheffler, 'What Is Egalitarianism?' (2003) 31 Philosophy & Public Affairs 5.

[49] Anderson (n 48); Kasper Lippert-Rasmussen, *Relational Egalitarianism: Living as Equals* (Cambridge University Press 2018) 1–20, and passim.

that legal, democratic, or relational equality is achievable by other means. This is quite clear for *legal egalitarianism*, whose distributive implications are indeed very thin: they amount to securing *formal* equality (equal rights, liberties and equal treatment for everyone under the law), and achieving formal equality is consistent with wealth inequality. As Anatole France famously put it, "the law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."[50] Relational egalitarianism is more difficult to assess, and I cannot do so properly within the limits of this dissertation. While relational egalitarianism does not aim at equality of wealth as such, it seems perfectly compatible with it. Relational egalitarianism can be specified in such a way so as to make wealth equality a success condition for treating each other as equals. If this is the case, then relational egalitarianism would entail distributive egalitarianism.[51]

Unlike these theories, egalitarian distributive theories endorse an equal distribution of a morally relevant factor among individuals. The relevant factor to be equalised among individuals—the answer to the 'Equality of What?' question—is called the *equalisandum*. There are many possible accounts of the *equalisandum*. For some writers—most notably, Rawls and Dworkin—the *equalisandum* is an objective good or a list of objective goods (rights, liberties, income, wealth, land, money etc.).[52] The view that takes an objective approach to the *equalisandum* is sometimes called *resource egalitarianism*. Others believe that the *equalisandum* is a subjective a mental state (pleasure, desire or preference satisfaction). What needs to be equalised, according to the subjective or mental-state account of the *equalisandum*, is not the objective goods themselves, but what people derive from the consumption of these objective goods.[53] A third group of scholars holds a mixed account of the *equalisandum* which includes both an objective and a subjective component, and for which the equality that matters is equality of '*real freedom'*. This is the case of Sen and Nussbaum's capability approach, in which the *equalisandum* is the capability to

[50] Anatole France, *The Red Lily* (Frederic Chapman tr, John Lane 1910) Book I, chapter 7.
[51] For a persuasive attempt at reconciliation between what I call distributive egalitarianism and relational egalitarianism, see Lippert-Rasmussen (n 49).
[52] John Rawls, *A Theory of Justice* (Revised edition, Harvard University Press (Belknap Press) 1971) 78-81.; John Rawls, *Justice as Fairness: A Restatement* (Penguin 2001) 58–61; Ronald Dworkin, 'What Is Equality? Part 1: Equality of Welfare' (1981) 10 Philosophy & Public Affairs 185; Ronald Dworkin, 'What Is Equality? Part 2: Equality of Resources' (1981) 10 Philosophy & Public Affairs 283.
[53] Fred Feldman, *Pleasure and the Good Life* (Clarendon Press 2004); Roger Crisp, *Reasons and the Good* (Clarendon Press 2006).

function properly as a human being.[54]

Since wealth is an objective good, distributive egalitarianism fits easily within resource egalitarianism and its objective approach to the *equalisandum*. A purely subjective approach to the *equalisandum* seems to be compatible with a division between rich and poor provided that the poor have pleasurable mental states. This implication would make a subjective approach incompatible with distributive egalitarianism. This implication, however, can be challenged. One way to challenge it is by defining pleasure or mental states as necessarily linked to at least *some* objective goods, but at the risk (or even cost) of making the subjective approach collapse into a mixed account of the *equalisandum*. As for the mixed account of the *equalisandum*, it is unclear whether Sen's and Nussbaum's capability approach is compatible with resource egalitarianism. To the extent that it is, distributive egalitarianism can be compatible with the capability approach. For what it is worth, Dworkin, one of the leading proponents of the objective approach, deemed the capability approach an unstable compromise between the objective and the subjective approach.[55] I shall not attempt to settle the debate over the correct account of the *equalisandum* here. What I would like to note, however, is that *any* of these accounts of the *equalisandum* can do the justificatory work required of the DJC *provided that the outcome is an equal distribution of wealth*.

Let me summarise the key points of the analysis so far. As I explained when reviewing the EC, the reason distributive egalitarianism is relevant for theories of the just price is that unless equality of wealth obtains, the contracting parties with more background wealth will have the power to impose prices over those with less wealth. Thus, unless a massive redistribution of wealth precedes institutional arrangements concerned with achieving efficient economic outcomes—or unless we can imagine a world in which wealth does not confer power over others[56]—the market price of a given good will reflect those inegalitarian patterns of wealth distribution and cannot therefore serve as a normative standard of just pricing. I have explained what distributive egalitarianism is by identifying what is excluded from it. Thus, I have briefly mentioned

[54] Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (The Belknap Press of Harvard University Press 2006) 155–216; Amartya K Sen, 'Inequality of What?', *The Tanner Lectures on Human Values* (University of Utah Press 1980); Sen, *Choice, Welfare and Measurement* (n 29) 353–369; Amartya K Sen, *Inequality Reexamined* (Harvard University Press 1992).
[55] See Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (n 41) 285–303.
[56] For the latter possibility, see Roemer, *Egalitarian Perspectives: Essays in Philosophical Economics* (n 254) 40; Nicholas Vrousalis, 'How Exploiters Dominate' (2019) 0 Review of Social Economy 1, 5, 27.

three popular theories of distributive justice (utilitarianism, Nozick's libertarianism, and Aristotelian distributive justice) whose distributive principles are clearly not egalitarian. I have also mentioned forms of egalitarianism (legal egalitarianism and relational egalitarianism) that are not strictly concerned with distributive principles—and therefore are different from distributive egalitarianism.

Now it is time to review some distributive principles or sets of principles whose egalitarian status is more difficult to assess. A case in point is Derek Parfit's *prioritarianism*. Another example is *sufficientarianism*—sometimes called "utilitarianism with a floor".[57] In what follows, I evaluate these two theories. I argue that *prioritarianism* is not a central but a *peripheral* case of distributive egalitarianism.[58] This means that it is egalitarian enough to justify prices since it leads eventually to the same distributive outcome and it is therefore an acceptable ground for price justification. *Sufficientarianism*, on the other hand, is compatible with wealth inequality above the level of sufficiency and it is therefore incompatible with distributive egalitarianism (I will say more about this later).

Let me start with Parfit's *prioritarianism*. Prioritarianism claims that we should give priority to benefitting those who are worse off, and more benefits the more worse off those people are.[59] According to Parfit, prioritarianism possesses two basic features: *non-relationality* and *the law of diminishing moral goodness*. According to *non-relationality*, each person's well-being is determined in absolute levels, independently of the well-being of others. The upshot of this feature is that equality in and of itself does not play any role whatsoever in a person's well-being. *Non-relationality* is a feature that prioritarianism shares with utilitarianism, and it is meant to pose a challenge for what Parfit calls *telic egalitarianism* (the idea that equality is a good-making feature of distributive outcomes).[60] To see why this is a challenge to telic egalitarianism, suppose the following two scenarios:

S1= (5, 5)
S2= (5, 6)

[57] Hirose (n 42) 113, 112–135.
[58] On the distinction between central and peripheral cases, see John Finnis, *Natural Law and Natural Rights* (second edition, Oxford University Press 1980) 9–11.
[59] Derek Parfit, 'Equality or Priority?' (University of Kansas 1995); Derek Parfit, 'Equality and Priority' (1997) 10 Ratio 202; Derek Parfit, 'Another Defence of the Priority View' (2012) 24 Utilitas 399.
[60] Derek Parfit, 'Equality or Priority?' in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Macmillan 2000) 84.

Each number represents the amount of wellbeing a given person has in that scenario. *Non-relationality* leads us to the conclusion that S2 is preferable to S1, because one person is better off in S2 than in S1. However, according to Parfit, those who believe that equality is a good-making feature of distributional outcomes, must be committed to preferring S1 over S2. But bringing S2 down to the level of S1 seems counterintuitive, since in S1 nobody is better off and one person is worse off than in S2. Egalitarianism would have the absurd implication of judging an outcome better in one respect than another outcome even when that outcome is *better for no one*. Parfit famously referred to this as the 'levelling down objection'.[61] Some philosophers take the levelling-down objection very seriously and it is on that basis that many have come to prefer other distributive principles such as prioritarianism or sufficientarianism to distributive egalitarianism.[62]

Any version of the DJC that is committed to distributive egalitarianism, and hence to the idea that wealth equality is what makes prices just, is vulnerable to the levelling down objection. I shall not deal with this objection in any depth because others have already done so.[63] Here I will just note some of the main strategies available in the literature to confront this issue. Some philosophers, for instance, have downplayed its importance by noting that egalitarians are only committed to the claim that equality makes the outcome better *in one respect*. An *equal* distribution of wellbeing is merely *pro tanto* good. Nothing prevents egalitarianism to reach the conclusion that, in an all-things-considered judgment about different states of affairs, the goodness of equality can be outweighed by the badness of reduced wellbeing.[64] Others have claimed that prioritarianism is no less vulnerable to the objection than egalitarianism because the notion of "being better in this or that respect" is broad enough to include it.[65] Another response to the objection is to claim that although equality is valuable for its own sake, and therefore that it does make the outcome better in one respect, it is nonetheless *conditionally* valuable: it is valuable for its own sake *only if it benefits someone*. This

[61] Parfit, 'Equality or Priority?' (n 59).
[62] Cf Richard J Arneson, 'Luck Egalitarianism and Prioritarianism' (2000) 110 Ethics 339; Roger Crisp, 'Equality, Priority, and Compassion' (2003) 113 Ethics 745; Yitzhak Benbaji, 'The Doctrine of Sufficiency: A Defence' (2005) 17 Utilitas 310; Yitzhak Benbaji, 'Sufficiency or Priority?' (2006) 14 European Journal of Philosophy 327.
[63] For a balanced assessment of the levelling down objection and responses to it in the literature, see Hirose (n 42) 67–76.
[64] Larry S Temkin, 'Equality, Priority, and the Levelling Down Objection' in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Macmillan 2000).
[65] Campbell Brown, 'Giving Up Levelling Down' (2003) 19 Economics & Philosophy 111.

means that levelling down does not make the outcome better in any respect, because the condition of benefiting someone is not satisfied.[66]

It is easy to interpret prioritarianism as an alternative to distributive egalitarianism. However, in what follows I would like to substantiate a different claim, namely, that although Parfit's prioritarianism is not a central case of distributive egalitarianism (because it does not aim at equality of wealth), it is nonetheless a *peripheral* case of distributive egalitarianism. The reason is that prioritarianism eventually achieves the same distributive outcome as distributive egalitarianism, and this is sufficient for a version of the DJC based on an equal distribution of wealth.

To see this, we must focus on the second feature of prioritarianism. Parfit called it *the law of diminishing moral goodness*. This is how Parfit explains it:

> If benefits go to people who are better off, these benefits matter less. Just as *resources* have diminishing marginal *utility*, so *utility* has diminishing marginal *moral importance*. (…) Whenever we transfer resources to people who are worse off, the resulting benefits will not merely be, in themselves greater. They will also, on the moral scale, matter more. There are thus *two* ways in which the outcome will be better.[67]

If we transfer benefits to the worse off until the marginal utility of the additional benefits is exhausted, then we will have achieved equality *as a consequence* of prioritarian distributive principles*, even if the aim of prioritarianism is not equality*. Prioritarianism is not strictly speaking an egalitarian distributive principle because it does not aim directly at equality. Nevertheless, as Hirose aptly observes, prioritarianism has "a built-in bias towards equality."[68] This is good news for the DJC in terms of its ecumenical appeal, because Parfit's prioritarianism has become very popular among political philosophers. But there is even better news for the DJC, for there is a sense in which Parfit's law of diminishing moral goodness is nothing but the appropriate normative corollary of neoclassical economics.

Neoclassical economics is usually associated with the goal of utility maximisation rather than with wealth equality, but this need not be so. Parfit's law of diminishing moral goodness is a reminder of a path not taken among neoclassical economists, namely, that of associating an increase in marginal utility with wealth

[66] Andrew Mason, 'Egalitarianism and the Levelling down Objection' (2001) 61 Analysis 246.
[67] Parfit, 'Equality or Priority?' (n 60) 105–106 (italics in the original). Hirose quotes the same passage, but with a wrong reference in Hirose (n 42) 88.
[68] Hirose (n 42) 8.

redistribution. This path was first explored by Arthur Cecil Pigou. In his *The Economics of Welfare* (1920), Pigou noted that the idea of marginal utility can have very profound redistributive implications. In effect, if the law of diminishing marginal utility is correct—that is, if the marginal utility of a given good decreases with the consumption of each additional unit—then the marginal utility of *wealth* also decreases by each additional unit. If this is the case, then the marginal utility of an extra dollar is much greater for someone with a very low income than for, say, Amazon's CEO Jeff Bezos. Wealth redistribution, therefore, increases utility maximisation *and* promotes economic equality.[69] The upshot of this is that *even if our aim is not equality but utility maximisation, we should redistribute wealth from the rich to the poor*. Alas, this conclusion did not last long among neoclassical economists. As Hilary Putnam puts it, the influential British economist Lionel Robbins "persuaded the entire economic profession that *interpersonal comparisons of utility are "'meaningless'*[70]."[71] If interpersonal comparisons of utility are impossible, then we cannot really know if Jeff Bezos extracts more or less utility from a dollar than any other person. Parfit's prioritarianism challenges this conclusion. When thought of as a normative standard for assessing just economic outcomes, Parfit's prioritarianism helps in bringing neoclassical economics closer to egalitarianism.

Finally, I would like to address whether *sufficientarianism* is compatible with a version of the DJC based on equality of wealth. Sufficientarianism claims that we should give priority to benefitting those who are below a certain threshold—the sufficiency level—and give no priority to benefits above the sufficiency level.[72] Many philosophers are attracted to some version of *sufficientarianism*.[73] Harry Frankfurt put forward a popular version of sufficientarianism—and perhaps the first explicit statement of it. According to Frankfurt,

> What is important from the point of view of morality is not that everyone should have the same, but that each should have enough. If everyone had enough, it

[69] Arthur Cecil Pigou, *The Economics of Welfare* (Third edition, Macmillan 1920).
[70] Lionel Robbins, 'Interpersonal Comparisons of Utility' (1938) 48 Economic Journal 635.
[71] Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press 2002) 53.
[72] For this description of sufficientarianism, see Paula Casal, 'Why Sufficiency Is Not Enough' (2007) 117 Ethics 296.
[73] Harry Frankfurt, 'Equality as a Moral Ideal' (1987) 98 Ethics 21; Harry Frankfurt, 'Equality and Respect' (1997) 64 Social Research 3; Harry Frankfurt, 'The Moral Irrelevance of Equality' (2000) 14 Public Affairs Quarterly 87; Crisp (n 62); Benbaji, 'The Doctrine of Sufficiency' (n 62); Benbaji, 'Sufficiency or Priority?' (n 62).

would be of no moral consequence whether one had more than others.[74]

Unlike utilitarianism, sufficientarianism is not concerned with maximising total or average wellbeing. It is merely concerned with getting as much people as possible above the sufficiency level. Unlike proritarianism, sufficientarianism gives equal weight to benefits above the sufficiency level. To see the difference between these three distributive principles, and to highlight how different distributive principles might stem from conflicting moral intuitions regarding the best distribution of wealth all-things-considered, suppose that the sufficiency level is 5 and consider the following scenarios:

S3 = (5,5,6)
S4= (9, 9, 4)
S5= (5,5,5)

Sufficientarianism aims at getting everyone above the sufficiency level, so it is indifferent between S3 and S5, but it considers both to be strictly better than S4 (in S4, there is one person below the sufficiency level). Utilitarianism focuses on either total or average wellbeing. In any case, it would judge S4 to be strictly better than S3 and S5, and S3 strictly better than S5. Distributive egalitarianism (in Parfit's version, leaving aside the responses to the levelling down objection) focuses on equality, so it would judge S5 to be strictly better than S3 and S4, and S3 strictly better than S4. Prioritarianism would judge S3 to be strictly better than S4 and S5, and S5 to be strictly better than S4.

If inegalitarian patterns of wealth distribution are an obstacle to the justification of prices according to distributive principles, then sufficientarianism, being compatible with large inequalities among those above the sufficiency level, is not an adequate distributive principle for the task of justifying prices. Indeed, the rich would still have the power to impose their prices on the poor—or at least on the 'not so rich', if we hesitate to call those who live above the sufficiency line 'poor'. This does not mean, to be sure, that sufficientarian principles are wrong, nor does it mean that a conception of the just price based on sufficientarianism is necessarily unsound (perhaps I should

[74] Frankfurt, 'Equality as a Moral Ideal' (n 73) 21. For a slightly different formulation of sufficientarianism, see Crisp (n 62) 758: 'The Compassion Principle. Absolute priority is to be given to benefits to those below the threshold at which compassion enters. Below the threshold, benefitting people matters more the worse off those people are, the more of those people there are, and the greater the size of the benefit in question. Above the threshold, or in cases concerning only trivial benefits below the threshold, no priority is to be given.'

stress the conditional nature of the claim above: *if* inegalitarian patterns of wealth distribution are an obstacle to the justification of prices, etc.). It does mean, however, that such a conception would not take wealth inequality as a serious obstacle for justice in pricing.

Let me conclude this examination of the DJC by stressing the scope and limits of the preceding analysis. At the risk of being unduly repetitive: I have attempted to describe a view of the DJC according to which equality of wealth is a necessary (or, at least, a normal or typical) condition for just prices. I have focused on this view because the analysis from the previous section suggested that efficiency is not enough for just prices unless equality of wealth obtains. I argued that the reason for this is that the reservation prices of each party are affected by each party's background wealth, and wealth is a power-conferring attribute. Therefore, unless both parties have an equal or sufficiently equal amount of wealth, the rich will have the *power* to impose their prices on the poor. To be sure, the version of the DJC based on distributive egalitarianism does not conceive equality of wealth as a sufficient condition for justice in pricing. It is a necessary or at least *typical* condition for just prices.

A related point concerns the implications of the DJC based on distributive egalitarianism to the justification of our day-to-day prices. If an equal distribution of wealth is a necessary condition for price justification, and if we live—as we certainly do—in societies in which wealth is unequally distributed, it follows that very few (if any) of the prices that we pay and receive are just. This may seem too harsh an assessment of our current price system, and the fact that the prices at which we buy and sell are less than fully just may be a depressing thought, especially because we buy and sell all the time. Nevertheless, and depressing as it may be, the fact that we are constantly buying and selling at less than fully just prices seems plausible, and it is an advantage of a theory of price justification that it is able to diagnose such state of affairs, instead of simply denying it as too harsh and depressing to be true. Recognising the structural injustice in our price system could be the first step towards reform, and even if reform is not feasible for whatever reason, the fact that we live buying and selling at unjust prices seems to be something worth knowing. I do think, however, that we should not overstate the worry about buying and selling at unjust prices. Indeed, while our current price system may indeed produce prices that are typically unjust, it is also true that, in any plausible theory of justice, justice is a matter of *degree*. Prices may be less than fully just, but it does not follow from this that they are not the best prices available.

Recall the distinction between action guidance and action assessment that I draw in the first section of this chapter: even if prices are unjust, it may still be the case that we ought to buy and sell at unjust prices, especially if our options are either buying and selling at unjust prices or not buying or selling at all. What to do in these cases depends on our assessment regarding how much injustice is *too much* injustice.[75]

I would also like to stress that the emphasis on an account of the DJC based on equality of wealth does not mean in any way that this is the *only* account of the DJC capable of capturing a necessary condition for just prices. Indeed, if the problem with an unequal distribution of wealth is that it confers power over others, then there are reasons to believe that the unequal distribution of *any* morally relevant attribute (education, health, social status, race, gender, etc.) can also make prices unjust. In this sense, distributive egalitarianism may be underinclusive, and this possibility is indeed a weak spot for a theory based exclusively on wealth. Nevertheless, I think that there are independent reasons that justify a focus on inequality of wealth rather than on other power imbalances. The first reason is that the notion of reservation prices creates a causal link between background wealth and prices that may not be so easily discovered with respect to other power-conferring attributes.[76] A second reason concerns the fact that wealth inequalities can be quantitatively measured—and hence redistributed and *equalised*—in a way that other power inequalities cannot. In fact, the only way to *redistribute* power imbalances created by other traits such as race, gender, etc. seems to be to conceive such traits as aspects of wealth, or at least to measure them in terms of their impact on wealth. 'Whiteness' or 'maleness' cannot be distributed in the same way as wealth. One cannot put an end to white or male privilege by equalising whiteness or maleness. What can be done is to redistribute entitlements (rights, liberties, powers and/or immunities) associated with those traits in an equal manner. In contrast, wealth can be distributed equally, because the entitlements

[75] Someone might be tempted to think that any amount of injustice is already too much injustice. That may be a nice ideal to live by, but there are certain decisions in which injustice seems to follow inevitably. Think, for instance, of the phenomenon of agent-regret when a person makes a 'right choice' that is nevertheless less than ideal: the regret that one would feel when choosing not to save an innocent bystander—say, for dramatic effect, your neighbour's disabled child—in order to save your own children from peril. The idea that 'any injustice is too much injustice' tends to downplay the moral significance of moral dilemmas and the feelings of regret even among those who make the right choice.

[76] I would not want to deny that those causal links do exist. In fact, I am quite certain that they do exist. I am merely pointing out the fact that it is hard to pinpoint how exactly inequalities in education, white privilege, male privilege, and other similar power imbalances express themselves through the price mechanism, whereas the idea of reservation prices allows for a much more direct causal link between prices and background wealth.

associated with wealth are not something different from wealth: they *constitute* it. Like prices and money—and unlike, perhaps, whiteness or maleness—wealth is an *institutional* fact.[77] It consists in a bundle of rights, power, liberties, and immunities. The upshot of this is that power-conferring traits different from wealth are perhaps best conceived as grounding claims for *recognition* rather than for *redistribution.* To classify these traits as grounds for recognition instead of redistribution does not mean that they could not be conceptualised and included as part of a theory of price justification. It does mean, however, that their place within a conception of the just price based on *distributive* justice is not so straightforward as the place of wealth within such a conception (which is not to say that it has *no* place within such a conception, nor is it to say that recognition has no distributive implications).[78]

Which brings me to a final point: While inequality of wealth is an injustice relating to distributive justice, the reason that makes wealth inequality important for prices is that those inequalities translate into inequalities of *power* between the parties, with one party having the power to impose certain prices upon the other. Although this certainly tracks a distributive injustice, power disparities also manifest themselves as a problem regarding consent's ability to manifest autonomy, and the ability of consented prices to manifest the autonomy of the parties. The relationship between just pricing, consent and autonomy will be the topic of the next section.

## 4. Autonomy

In Chapter 2 I examined Wertheimer's reconstruction of the conception of the just price according to which the just price is whatever price the parties have consented to in exchange. To recall, Wertheimer's reconstruction of the argument is this:

(1) A transaction is unfair only when B receives less value from the transaction than B ought to receive by some benchmark.
(2) The same good can have different values to different persons or at different times.
(3) A good's value to the parties of the transaction is indicated by the price at

[77] See my discussion of institutional facts in Chapter 2, Section 2 above.
[78] This is certainly not to deny that perhaps the concept of *recognition* can accommodate a modified version of distributive egalitarianism, and perhaps a theory of just prices based on recognition can encompass and subsume claims for wealth redistribution within it. The relationship between recognition and redistribution is contested, and I cannot settle the issue here. For an insightful examination of the relation between claims for recognition and claims for redistribution, see Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Joel Golb, James Ingram and Christiane Wilke trs, Verso 2003). For insightful discussion, see also James Tully, 'Struggles over Recognition and Distribution' (2000) 7 Constellations 469.

which they are prepared to transact.
(4) If B voluntarily consents to pay (or give) X for a good, this indicates that B is receiving adequate compensation for what she gives up.[79]

I also previously noted that claim (4) obtains only if there is a necessary connection between the range of prices to which the parties can *consent* (each party's bargaining range) and *justice* in pricing (adequate compensation for what each party gives up), and that a strong candidate for ascertaining a connection between justice and consent is the value of *autonomy*. The conception of the just price according to which a price is just only if it manifests the value of autonomy is what I call the Autonomy Conception of the Just Price (the 'AC'). In what follows, I shall develop this conception of the just price by evaluating the role that consent and autonomy play in price justification.

As with the previous conceptions of the just price, there can be as many versions of the AC as there are accounts of autonomy. In what follows, I shall understand the value of autonomy as the value of having control over one's life. First, I will distinguish this account of autonomy from other kinds of autonomy that I am not concerned with. Then, I will attempt to substantiate the claim that, when the reproduction of a restricted set of available options reflects background conditions of wealth inequality consent cannot serve as the ultimate benchmark for justice in pricing. If this is the case, then it is simply not enough for deeming a price just to simply note that it has been consented by both parties—as Hobbes did when he claimed that "the just value is that which [the contracting parties] be contented to give"[80] or as Hayek suggested when he claimed that prices arrived at "without fraud, monopoly and violence [is] all that justice require[s]"[81]—as if the mere act of consenting to a given price would settle the matter without having to inquire into the background conditions upon which consent was given. Drawing from the previous analysis on the EC and the DJC, I will further suggest that consented prices manifest one particularly relevant kind of autonomy—which I term, following Enoch, "autonomy-as-nonalienation"[82]—only if the background conditions of consent include equal distribution of wealth among the

[79] Alan Wertheimer, *Exploitation* (Princeton University Press 1996) 250.
[80] Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1688* (Edwin Curley ed, Hackett Publishing Company 1994) Part I, Chapter XV [14] [74-76] 94.
[81] Friedrich A von (Friedrich August) Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge 1993) 237.
[82] David Enoch, 'Hypothetical Consent and the Value(s) of Autonomy' (2017) 128 Ethics 6; Enoch (n 12).

contracting parties. In other words, consented prices manifest autonomy only if they also manifest a commitment to distributive egalitarianism.

This section is divided into two subsections dealing with the normative significance of autonomy and consent, respectively.

### *4.1. Why Autonomy Matters*

The first task ahead of us is to elucidate why autonomy is of value. My starting point will be the assumption that autonomy consists in having control over one's lifestyle. Being autonomous means to take an active part in one's life, to make one's own decisions, to control one's destiny. An autonomous life is one in which one gets to be, at least partially, the *author* of one's life.[83] Autonomy is of value, therefore, because having control over one's lifestyle is valuable: an autonomous life seems to be, other things equal, a *better* life than a non-autonomous life, one in which someone participates passively, letting things simply 'happen' to her instead of taking an active role in the way her life is going by making her own decisions. Of course, autonomy is much more complex than this brief sketch, and I will complicate things shortly by distinguishing between two autonomy-related values associated with having control over one's life (values which—following David Enoch—I will call *autonomy-as-sovereignity* and *autonomy-as-non-alienation*).[84] For now, however, this brief account of the value of autonomy suffices to distinguish it from other kinds of autonomy that will not be discussed here.[85]

First, the kind of autonomy sketched above has nothing to do with the (allegedly) liberal ideal of autarkic individuals isolated from each other, nor with the idea that social relationships are an obstacle to a fully independent life. By most (if not all) accounts of autonomy, social relationships are essential for living a good and autonomous life, and there is nothing in the value of autonomy as sketched above that involves *absolute* independence from social relationships.[86]

Second, the kind of autonomy I am concerned with is different and conceptually independent from the Kantian understanding of an autonomous life as a life of moral

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[83] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 369.
[84] Enoch (n 82); Enoch (n 12).
[85] I will be closely following the exposition in Enoch (n 235) 163–165.
[86] Cf ibid 164: "the idea that this [i.e., utter independence] is what liberals are after when they value autonomy seems to me to be a characteristic more of caricatures of liberalism than of the real thing." Dworkin made a similar point when defending Rawls' liberalism from Mark Tushnet's critiques, inter alia. See Dworkin, *Law's Empire* (n 3) 440-441.

self-legislation.[87] The notion that there is value in being the author of one's life has no necessary connection with the Kantian idea of autonomy as being subject only to moral laws that one legislates for oneself. To be sure, the Kantian understanding of autonomy might be ultimately correct. However, for the purposes of the following discussion, I will assume that autonomy does not require being subject only to moral laws that can pass as self-legislation.

A third and possibly related point. There is a tendency in the literature about autonomy to connect discussions about autonomy with metaphysical discussions over determinism and free will.[88] This tendency manifests itself in the treatment of questions regarding autonomy as questions about voluntariness (I cast some further doubts regarding this connection below). I would like to disentangle my present treatment of autonomy from these debates. Therefore, I will proceed in what follows under the assumption that bracketing the metaphysical debate over determinism and free will and discussing autonomy without settling those debates is a reasonable strategy: I take for granted P. F. Strawson's claim that the rationality of our moral practices does not depend on the truth or falsity of determinism.[89] Therefore, the subsequent discussion proceeds in the understanding that living an autonomous life would still be valuable even if free will (and, therefore, voluntariness) is an illusion.

With these clarifications in mind, it is time to complicate our picture of autonomy as control over one's lifestyle a bit more. The first complication comes from the fact that promoting an autonomous life is compatible with the agent losing control over particular actions, even over particular aspects of her life over prolonged periods of time, provided that this is done for the sake of retaining or promoting the value of having control over one's life as a whole. Because of this, some writers talk of autonomy as a *global* rather than as a local concept. According to this notion, autonomy is a feature that evaluates a whole life rather than fragments or localised portions of it.[90] In what follows, I would like to expand on this distinction and suggest that there is something distinctively valuable about local autonomy which is not

[87] I would not want to take issue on whether the Kantian idea of autonomy is conceptually or empirically feasible or even plausible. For the claim that Kant's understanding of autonomy as equivalent to being subject only to legislation that one legislates is conceptually and empirically problematic, see Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 36.
[88] Cf Sarah Buss and Andrea Westlund, 'Personal Autonomy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2018, Metaphysics Research Lab, Stanford University 2018) <https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/> accessed 29 May 2020.
[89] On this, see PF Strawson, *Freedom and Resentment and Other Essays* (Routledge 2008) 19.
[90] Cf Dworkin, *The Theory and Practice of Autonomy* (n 317) 15–16.

completely reducible to the value of global autonomy.

To understand the global and local aspects of autonomy, one must distinguish between an agent's first-order preferences (related to local autonomy) and her second-order preferences (related to global autonomy). First-order preferences are motivational reasons (desires, habits, wishes, intentions, needs, etc.) that motivate the agent to perform a certain action: the need to eat, the intention to read, the desire to smoke, etc. But apart from having first-order preferences, moral agents also have the ability to reflect upon and adopt attitudes towards their first-order preferences.[91] An agent may not only desire to smoke (first-order preference), but also *desire not to have the desire to smoke*. The latter is a second-order preference: a preference *about* a preference or set of preferences. Second-order preferences are motivational reasons (desires, habits, wishes, intentions, needs, etc.) that motivate the agent to become the kind of person she would like to be. Second-order preferences manifest to the agent as *reasons to flourish* as a human being. Second-order preferences can also motivate particular actions, like first-order preferences—that is, second-order preferences can also constitute first-order preferences of their own. In the previous example, the second-order preference of desiring not to have the desire to smoke can also act as a first-order preference motivating the decision not to smoke. But the reason they are second-order preferences is that, unlike first-order preferences, second-order preferences always manifest an agent's values or deep commitments, something that first-order preferences do not (at least, not always).[92]

Questions about the promotion or hindrance of autonomy regarding first-order preferences—*local* autonomy—are sometimes put in terms of the voluntariness of actions. In this view, questions about local autonomy are questions about how global autonomy—autonomy regarding second-order preferences—is manifested through first-order preferences.[93] Thus, local autonomy would be nothing but the manifestation of global autonomy at the local level. This view of local autonomy is problematic for two reasons. First, because there are cases in which global autonomy is not easy to

[91] ibid 15: 'To consider only the promotion or hindrance of first-order desires - which is what we focus upon in considering the voluntariness of action - is to ignore a crucial feature of persons, their ability to reflect upon and adopt attitudes toward their first-order desires, wishes, intentions.'
[92] To talk of one's deepest commitments and motivations as 'preferences' does not seem to do justice to the kind of reasons that 'deep preferences' offer. Perhaps the word 'moral principle' would be a better choice to describe preferences about the kind of person one would want to be. However, I stick to the term 'preference' to mark the contrast with first-order preferences and also to follow common usage.
[93] Cf Dworkin, *The Theory and Practice of Autonomy* (n 87) 12–15.

identify because it is not clear what should count as an agent's 'deep commitment' or second-order preference. Indeed, it is possible to think that some of our second-order preferences are a form of (or stem from) self-deception (for instance, can the state of 'being addicted to drugs' be counted as a fully voluntary state, even if someone tells us that this is in fact what they really want? More generally, can someone *really* want to live a non-autonomous life?).[94] When this happens, the appeal to global autonomy does nothing to help us in assessing whether a particular action is autonomous at the local level. But even if the identification problem is somehow solved, a second and more pressing problem arises, namely, that actions motivated *exclusively* by concerns over local autonomy would not be able to manifest autonomy at all, because local autonomy would not really exist as a value independent from global autonomy. Thus, evaluating first-order preferences in terms of the value of second-order preferences would always justify paternalistic interventions when first-order preferences are not backed by global autonomy. To illustrate this, consider the following example:

> *Paternalistic Friend*. Joseph, Margarita's friend, hides Margarita's pack of cigarettes from her without asking for her consent. He knows that Margarita desires to smoke, but he also knows that Margarita has a second-order preference not to smoke (a desire not to have the desire to smoke). When Margarita finds out that Joseph has hidden her cigarettes from her, she gets very angry at him.

If we focus exclusively on Margarita's second-order preferences, then anger would seem to be an irrational emotional response to the situation. The ability of motivational reasons and actions to manifest the agent's values or deep commitments is what David Enoch calls *autonomy-as-nonalienation*, which is manifested at the level of global autonomy. Now, from the standpoint of global autonomy, Margarita seems to have no reason for complaint. After all, she prefers to be a non-smoking person, and Joseph's action of taking away Margarita's cigarettes is not an attack on Margarita's ability to shape her life according to her values or deep commitments. If instead of hiding her cigarettes, Joseph had bought a pack of cigarettes as a gift for Margarita, then that would probably count as an attack on her autonomy because it would show an utter disregard, or at least indifference, for Margarita's values or deep commitments.

[94] On this, see Enoch (n 12).

If we conceive local autonomy merely as global autonomy manifested at the local level, then Margarita should not be angry. In fact, the proper emotional response for Margarita should be of gratitude towards her friend: Margarita should thank Joseph for helping her overcome her addiction and harmonising her first-order preferences with her deep commitments.

However, this does not seem quite right. Joseph's actions do seem to be at least *pro tanto* an attack on Margarita's autonomy. Because of Joseph's actions, Margarita has lost control over her local autonomy, and she could rightly reply to Joseph something along the lines of 'I know I said didn't want to smoke anymore, but this is *my* choice to make, and I should have the final word in the matter. You have disrespected my autonomy by hiding my cigarettes without my consent (so can I please have them back now?)'.

In the example, Joseph acts without asking for Margarita's consent. If we focus on global autonomy, consent seems irrelevant because the value of manifesting local autonomy is obscured by analysing local autonomy in terms of voluntariness and global autonomy. True, Margarita has a second-order preference not to smoke. And yet, her indignation towards Joseph's action seems justified. Why? Because although the alignment between first-order and second-order preferences is of value (what Enoch calls autonomy-as-nonalienation), the fact that Joseph should have asked for Margarita's consent before hiding her cigarettes implies that autonomy-as-nonalienation is not the only kind of autonomy that is of value at the local level. There is another kind of autonomy that plays a justificatory role at the local level which is obscured when we analyse local autonomy purely in terms of global autonomy, namely, the kind of autonomy that consists in the value of having power to settle matters authoritatively by oneself: the value of what David Enoch calls *autonomy-as-sovereignty.*

As David Enoch puts it, autonomy understood as sovereignty is manifested in one's actions "if you have the last word regarding the relevant matters, if it's a matter of your choice."[95] While autonomy-as-sovereignty is manifested through particular actions at the local level, it can also be manifested at the *global* level. This can make it clash, sometimes superficially, sometimes in a structural way, with autonomy-as-sovereignty at the *local* level. Let me illustrate this conflict between local and global

[95] ibid 162; See also Enoch (n 82) passim.

autonomy vis-à-vis sovereignty by expanding on the smoking example. Suppose that Margarita now grants Joseph the power to decide over her cigarettes. Margarita manifests autonomy-as-nonalienation by letting go sovereignty at the local level for the sake of her deep commitment not to smoke. But she also manifests autonomy-as-sovereignty: she has the final say on the matter at the global level, and she has manifested that autonomy by delegating her power to decide at the local level to her friend Joseph.

Consider the classic example of Ulysses and the sirens. Ulysses is tied to his ship and commands his men to refuse all later orders to release him so as not to be lured by the sirens. Ulysses ceases control over his actions for the sake of his deep commitment not to act upon his first-order desires, because acting upon those desires would make the sirens lure him onto the rocks. In surrendering control over his actions, he promotes his commitments to a more autonomous, nonalienated, life. But he also manifests global autonomy-as-sovereignty: he has the final word in the matter of sacrificing his local autonomy.[96]

Autonomy-as-nonalienation and autonomy-as-sovereignty can both be manifested through consent. In what follows, I will explore the relation between consented prices and these two kinds of autonomy.[97]

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[96] The case of Ulysses is a case of losing temporary control over one's actions. But sometimes people choose to forego control over their actions for a whole life. Would this count as promoting autonomy? There is a leading case in English law that deals with this issue from the standpoint of the private law doctrine of undue influence. In *Allcard v. Skinner*, the complainant was a young novice nun who entered a convent taking vows of obedience to the Mother Superior (the defendant) and giving her all her worldly possessions. The complainant later regretted this decision and alleged undue influence: she claimed that she had placed trust and confidence in the defendant in a way that affected her decision to give her control over all of her assets. The court found that the complainant had not entered into this relation due to infirmity or incapacity and that the relation had been freely and rationally wanted by both parties. See Allcard v. Skinner, 178-180, 184 (per Lindley, L.J.); 189-190 (per Bowen, L.J.) Cited and discussed in Peter Benson, *Justice in Transactions: A Theory of Contract Law* (The Belknap Press of Harvard University Press 2019) 193–194.
The decision of the court seems to acknowledge that even a person who enters into a religious order involving a perpetual vow of obedience to a superior does not cease to live a morally responsible life, one in which she is accountable for her own actions. From the standpoint of the value of autonomy, we might say that she has autonomously chosen—in the sense of autonomy-as-sovereignty—not to live an *autonomous* life: she has chosen to live a life in which she has no control over her own destiny. The decision of the nun may be motivated by the desire to live a life devoted to intellectual and mystical contemplation, perhaps to live the life that Aristotle claimed in Book X of the *Nichomachean Ethics* was the highest possible way of life for a person: to live the life of the gods. For this kind of life, the life that is in accordance with her deepest commitments, a nun can be willing to sacrifice autonomy-as-sovereignty at the local level. Thus, even the decision of entering into a religious order can manifest global autonomy-as-sovereignty, and when it is shaped by the agent's deepest commitments it can also manifest autonomy-as-nonalienation.

[97] Autonomy-as-sovereignty will be discussed further in Chapter 6.

### *4.2. Why Consent Matters*

The starting point for the AC is that consent *matters.*[98] This seems a good starting point for a theory of just prices, especially (albeit not exclusively) for a theory of just *contractual* prices—i.e., prices arrived at through bargaining. Indeed, the moral significance of consent is undeniable. As Heidi Hurd aptly puts it, consent operates a sort of "moral magic": "it turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party."[99] According to the AC, it can also turn consented prices into *just* prices (or at least into prices that satisfy a necessary or normal condition for just prices). This is the reason that justifies treating the price at which the parties have decided to transact as the benchmark for distinguishing just from unjust pricing.

Consent, however, is a complex starting point. The fact that I have given my consent to *x* does not necessarily mean that *x* is justified. Situations where victims of oppression give their consent to their own oppression are not unheard of: slaves consenting to slavery, women to patriarchy, black people to white privilege, workers to exploitative labour conditions, the poor to poverty etc. Yet consent from both parties to an injustice—even when it entails wholehearted consent from the victim—does not seem to render slavery, patriarchy, white privilege, exploitation, poverty, etc. any less unjust. The "moral magic" of consent does not seem to work here.[100] Quite the contrary: consent to oppression can be an indication of how deeply entrenched those oppressive circumstances are in society, as well as in the mind of the oppressed.[101]

The AC contends that the normative force of consent for price justification depends upon its ability to manifest the value of autonomy. In other words, that consented prices matter because *autonomy* matters.[102] If there is a reasonable range of prices within the reservation prices of both parties, and the parties can agree on a price that is morally acceptable to both, then the consented price manifests the autonomy of both parties. Therefore, the consented price would be a just price (or, at least, a price that satisfies a necessary or typical condition to be just). If the buyer voluntarily consents to pay this mutually morally acceptable price for a good, then the

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[98] For this and the following paragraphs, I am closely following the exposition in Enoch (n 12) 159–167.
[99] Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121, 122.
[100] Hurd (n 99).
[101] On the relationship between autonomy and oppression, see generally Natalie Stoljar, 'Autonomy and Adaptive Preference Formation' in Andrea Veltman and Mark Piper (eds), *Autonomy, Oppression, and Gender* (Oxford University Press); Enoch (n 12).
[102] On this, see Enoch (n 12) 161–167.

consented price would count as adequate compensation for what the seller is giving up. To respect this price is justified because it would entail respecting the autonomy of the parties.

However, consent's ability to manifest autonomy depends largely upon the background conditions upon which consent is given.[103] Indeed, consent can be more or less autonomous depending on whether a reasonable range of morally acceptable options is available.[104] Whenever the weaker party consents to a price that she would have not consented had it not been for the existence of background conditions of inequality, then her consent is at least *pro tanto* suspicious. If the degree of autonomy of each party manifests itself in consenting to a price within the range of reservation prices that each party can offer or receive, then a change in the reservation prices will affect the price at which they are prepared to transact. If background conditions of inequality can affect the set of available options of the parties (via each party's reservation prices), then any change in those background conditions involves a change in the set of available options—the reservation prices—of each party. Unequal background conditions will also affect the ability of the consent of the weaker party to manifest autonomy by creating more options for one of the contracting parties and less for the other. Since one extremely important background condition is wealth, let me connect this point with the previous discussion regarding distributive egalitarianism and the effect of an inegalitarian distribution of wealth in price justification. As noted in previous sections, wealth is a power-conferring feature for the one who possesses it. Wealth inequalities, therefore, amount to inequalities of *power*. More power means a larger set of feasible options. If wealth is power, and more power means more options, then an inegalitarian distribution of wealth creates an imbalance in the set of available options of the parties. Since an agent's autonomy depends on the range of meaningful options that she has, then whenever there is an unequal distribution of wealth, there will also be an unequal distribution of autonomy.

An unequal distribution of autonomy is not only an attack on distributive justice. It is also an attack on autonomy itself. The *autonomy surplus* of one of the parties (her larger set of feasible options) creates an *autonomy deficit* (a smaller set of feasible options) on the other. This is because having a larger set of feasible options is not

[103] A point made by ibid 160.
[104] On the idea that autonomy is valuable only if there is a number of morally acceptable options available, see Raz (n 83) 378–381.

merely to have *more* options: it is to have more options—and hence more power—*than others*. The higher degree of freedom (or power) that one of the parties enjoys (the more options it possesses) impinges upon the affected party's ability to manifest her autonomy through consent. Moreover, autonomy surpluses also create autonomy deficits on third parties who would have otherwise consented to the transaction had it not been for the background conditions of inequality. The wealthiest sellers and the wealthiest buyers crowd out of market exchange the rest of sellers and buyers who are simply not wealthy enough to compete with those benefited from an unequal distribution of wealth. A larger set of feasible options for some entails a more restricted set of available options for the rest.

The AC explains the problematic nature of consent under conditions of inequality in terms of an autonomy deficit. This is a deficit in *autonomy-as-nonalienation*: the problem with consent under background conditions of inequality seems to be that it is given in response to a set of options that one does not necessarily endorse. The agent's consent to a given price manifests a preference which is not necessarily aligned with the agent's deep commitments. Consent under conditions of inequality fails to manifest the agent's values or deep commitments because it is consenting to something that the agent would not have consented to had it not been for the unequal conditions upon which the exchange took place. In these cases, consent does not entail *endorsement* of the preferred option. As Enoch puts it,

> there's a fairly clear intuitive sense in which a preference that coheres with my deep commitments—those that are fairly stable over time, that serve to give structure to my life, that are expressions of what I find valuable and important in my life, and so on—is more fully autonomous than a preference that doesn't. (…) [I]f one has a preference or a desire that one doesn't endorse, or indeed that one wants not to have or that one wants not to lead one to action, then that preference—and acting on it—may not be autonomous. At the very least, it will not be as autonomous as acting on a preference or a desire that resonates throughout one's hierarchy of higher-order desires.[105]

The fact that consent without endorsement does not manifest autonomy-as-nonalienation makes consent less autonomous, but it does not necessarily make it any less voluntary. This separates the AC as I have developed it here from consent-based conceptions of just exchanges that frame injustice in exchange as a problem with consent itself—as if consent to a suboptimal option—in this case, to a suboptimal

[105] Enoch (n 12) 180.

price—involved some form of *involuntariness*. A good case in point is Michael Sandel's "fairness objection" to market exchange. Sandel objects to buying and selling under conditions of inequality or economic necessity by drawing on the ideal of consent under fair background conditions. When these conditions are not present, Sandel concludes that exchanges are unjust because they are not fully voluntary. According to Sandel,

> market exchanges are not always as voluntary as market enthusiasts suggest. A peasant may agree to sell his kidney or cornea to feed his starving family, but his agreement may not really be voluntary. He may be unfairly coerced, in effect, by the necessities of his situation.[106]

Sandel frames the question of consent without endorsement in terms of voluntariness: market exchange may be unjust because consent "may not really be voluntary."[107] I would not want to deny that some form of coercion may be involved in market exchange under conditions of inequality. But I would like to stress the importance of distinguishing between *consent-without-endorsement* and *consent-that-is-not-really-voluntary*. The distinction is relevant because consent without endorsement can still manifest *autonomy-as-sovereignty* even if it fails to manifest nonalienation. However, the value of sovereignty is obscured when the matter is framed as a defect in voluntariness. If consent is deemed as not really voluntary, then to that extent there is no agency involved and, therefore, no sovereignty associated to it. Moreover, the implications of framing consent without endorsement as involuntary consent may be damaging for victims of injustice. To associate a deficit in autonomy-as-nonalienation with lack of voluntariness obscures the value of autonomy-as-sovereignty, and by doing so conveys a *denial of agency* to the victim of injustice, with the legal and economic implications that such a denial entails. If this claim is taken seriously, then a person whose consent lacks voluntariness never *really* consents to a contractual exchange. This leads to the unpleasant conclusion that, under a social arrangement that systematically reproduces conditions of oppression, exchanges that are beneficial to the oppressed may be deemed invalid for lack of consent. The oppressed would not be able to celebrate valid contracts. This does not necessarily benefit victims of injustice. Parties that consent to bad options usually do so in order

[106] Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus & Giroux 2012) 111.
[107] ibid.

to improve their oppressive conditions.[108] If I am desperate enough to sell my cornea or kidney to help my starving family, then removing even this option from my set of feasible options would only add insult to injury. Unless the denial of voluntariness is coupled with the provision of a better alternative for the victim of injustice, then to question the voluntariness of the victim's action may not only deprive her of recognition of her autonomy-as-sovereignty and her power to have the final word in the matter, but it may also harm the victim by removing the welfare benefits, however imperfect, of her own choice. Autonomy-as-sovereignty—the value of having the final word in the matter—may be sufficient reason to take the agent's consent seriously, even when the preference upon which consent is based is not aligned with her deep commitments.[109]

To take the agent's consent seriously does not mean to transform consented prices into just prices. Unlike autonomy-as-nonalienation—which counts as a just-making feature of prices when manifested through consent—autonomy-as-sovereignty counts only as an *authorisation* for buying or selling at a given price or range of prices. It operates as a moral licence to engage in what Nozick called "capitalist acts between consenting adults."[110] It makes it morally permissible for the parties to consent to a price that may be, from the standpoint of distributive justice, efficiency, or even from autonomy-as-nonalienation, less than ideal.

The value of autonomy-as-sovereignty highlights an aspect of price justification that is somewhat obscured by focusing on distributive justice, which is that the *locus* of price justification is not only the institutional level, but also the bilateral relationship of the parties—the *private* sphere. Autonomy creates a sphere of interaction in which the parties are permitted to engage in actions which are sub-optimal from the standpoint of distributive justice.

While the argument developed here suggests that autonomy-as-nonalienation

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[108] Michael Munger has coined the term 'euvoluntary exchange' to mean a truly voluntary exchange that benefits both parties to the transaction. Since euvoluntary exchanges are beneficial to both parties by definition, the present critique does not apply to such exchanges. On euvoluntary exchanges, see Michael C Munger, 'Euvoluntary or Not, Exchange Is Just' (2011) 28 Social Philosophy and Policy 192; Ricardo Andrés Guzmán and Michael C Munger, 'Euvoluntariness and Just Market Exchange: Moral Dilemmas from Locke's Venditio' (2014) 158 Public Choice 39.

[109] What if the agent is deeply and honestly committed to be treated unjustly? Preferences can be shaped by injustice and the agent can adapt her preferences to the situation. This is known in the literature as 'adaptive preferences'. I cannot pursue this topic here. However, I agree with Enoch who argues that, when consent is the result of preferences formed by false beliefs, and those false beliefs are in turn formed in response to an unjustified restriction in the agent's set of available options, then adaptive preferences are typically unable to manifest autonomy. See Enoch (n 12).

[110] Nozick (n 43) 163.

requires an egalitarian distribution of resources between the parties in a contract, this is not so with autonomy-as-sovereignty: unlike autonomy-as-nonalienation, autonomy-as-sovereignty involves an *authorisation for injustice*. This possibility creates a tension between the normative demands of distributive justice, on the one hand, and the normative demands of autonomy-as-sovereignty, on the other. To solve this problem will be one of the tasks of the next part of the thesis.[111]

## 5. Concluding Remarks

The conceptions of the just price sketched above face different types of challenges. In what follows I would like to point to two of them. These challenges will be analysed in more depth in the next part of the thesis, but it may be useful to conclude this chapter by showing how these challenges stem from the way in which price justification has been conceptualised so far.

In this chapter I have claimed that, if inegalitarian patterns of wealth distribution systematically benefit the rich at the expense of the poor, then those benefitted from wealth inequality have the power to impose their prices over the rest, and the prices that the rich impose over the poor cannot be meaningfully called just prices. I therefore concluded that prices tracking background inequality are therefore unjust, and that market prices obtained under conditions of inegalitarian wealth distribution are unable to serve as a normative standard for just pricing. For these reasons, the conception of the just price according to which a price is justified because it is efficient (the 'EC') is normatively attractive only if conditions of equality of wealth obtain. For the same reasons, the conception of the just price according to which the value that justifies prices is distributive justice (the 'DJC') is normatively attractive only if some version of distributive egalitarianism obtains, that is, only if those prices are the product of institutional arrangements that can be deemed just according to distributive principles that aim at securing equality of wealth, or at least tend towards equality of wealth (as it was the case in Parfit's *prioritarianism*). The same reasons apply to the conception of the just price according to which a price is justified because it was autonomously chosen by the parties (the 'AC'). Since wealth is power-conferring, wealth inequalities between the parties in a contract make it the case that one of the parties has the power

[111] See Chapter 6 below.

to control or dominate the other by imposing a price. Therefore, the AC is also committed to some form of distributive egalitarianism: prices that reflect inegalitarian patterns of wealth distribution are unable to manifest autonomy-as-nonalienation.

The first salient issue that stems from this discussion is the following. If a theory of the just price involves a demand for institutional arrangements that secure or aim at conditions of wealth equality, then the very existence of a price system—and hence of market prices and price-related institutions—must be compatible with distributive egalitarianism. However, market mechanisms typically upset patterns of wealth distribution, and, as we have already shown, under normal circumstances, ongoing market prices typically allocate wealth in a way that severely compromises the ideal of wealth equality. The question that needs to be confronted is therefore this: 'Is the existence of market prices compatible with distributive egalitarianism? Is *distributive egalitarianism* at all feasible given the existence of the market?' This issue will be addressed in Chapter 5.

My treatment of the value of autonomy-as-sovereignty and the subsequent creation of a permission to engage in "capitalist acts between consenting adults"[112] also poses a challenge for just price theory. The challenge is this: autonomy understood as sovereignty involves an authorisation to consent to prices that are suboptimal from the standpoint of justice (and also to prices which are suboptimal from the standpoint of efficiency, autonomy-as-nonalienation, and indeed suboptimal from any other standpoint). If that is the case, then how can we meaningfully call those prices that manifest autonomy as sovereignty 'just'? How to adjudicate between the demands of distributive egalitarianism, on the one hand, and the demands of autonomy in the private sphere (which seems to entail an authorisation for injustice), on the other? This issue will be addressed in Chapter 6.

To meet these challenges, I shall propose a virtue-based approach to price justification, one that should allow us to tackle these issues while keeping the insights from the different conceptions reviewed here. This will be the main purpose of the second part of the present thesis.

Finally, since this is the final chapter of Part One, and before proceeding to Part Two, I would like to offer a brief summary of the main claims offered in this part of the thesis:

[112] Nozick (n 43) 73.

(1) Private law remedies against inequality in exchange—in particular *laesio enormis* and price unconscionability—are unintelligible without resorting to some standard of price normativity. These remedies are still part of many legal systems and constitute the *explananda* of just price theory. (Chapter 1, Section 1)

(2) There are many other instances of price normativity in the law, some of which suggest an expansion from commutative to distributive justice concerns over price normativity. (Chapter 1, Section 1)

(3) To explain the *explananda* of just price theory is interesting and relevant not only in and of itself, but also because of its potentially revolutionary implications. These implications are deemed revolutionary for two reasons. First, because once price normativity is recognised as a feature of *some* price-related practices, it tends towards its expansion to *all* price-related practices. Second, because it allows judges and parties to appeal to reasons based on substantive justice that are typically excluded from the law of contracts. (Chapter 1, Section 2)

(4) Some common objections to the very idea of the just price are best understood as alternative conceptions of the just price. (Chapter 2, *passim*)

(5) The 'Argument from Bad Metaphysics' (the idea that just price theory is inseparably linked to a discredited Aristotelian essentialism), however reconstructed, is fallacious and provides no ground to dismiss the possibility of price normativity. (Chapter 2, Section 1)

(6) Collingwood's famous objection against the very idea of a just price (the 'Argument from Value-Free Economics') rests on a misconception about the purely descriptive nature of economic discourse. Once this misconception is corrected, Collingwood's argument can be reconstructed as an argument against the identification of justice in pricing with the price fixed by supply and demand and in favour of an institutional approach to justice in pricing, according to which the just price is the price that stems from just institutional arrangements. Since institutions can be shaped by different normative commitments, an institutional approach allows us to adopt a more pluralistic approach to price justification, one that entails a partial reform of the Scholastic doctrine of the just price and its commitment to commutative justice as the sole source of price justification (Chapter 2, Section 2)

(7) The ‘Argument from Consent’ (the argument according to which the just price is nothing but the price at which the parties decide to transact) does not give us reasons to dismiss the idea of just prices altogether. Quite the opposite: it provides us with an alternative conception of justice in pricing, one that links justice and consent. (Chapter 2, Section 3)

(8) The ‘Marginalist Objection’ to just price theory (the argument according to which just price theory entails the rejection of value marginalism) fails as an objection against just price theory because questions about justice in pricing are separate from questions over the sources of economic value. (Chapter 2, Section 3)

(9) Alternative conceptions of the just price arise from disagreements about the grounds of price justification. The grounds of price justification are the values that underlie each conception and serve as the justificatory reasons that allow us to identify a given price as the *just* price of a certain good. (Chapter 3, Section 1)

(10) *Efficiency*, *distributive justice*, and *autonomy* constitute three alternative grounds of justice and underlie three alternative conceptions of the just price (the Efficiency Conception or ‘EC’, the Distributive Justice Conception’ or ‘DJC’, and the ‘Autonomy Conception’ or ‘AC’). (Chapter 3, *passim*)

(11) If inegalitarian patterns of wealth distribution systematically benefit the rich at the expense of the poor, then those benefitted from wealth inequality have the power to impose their prices over the rest, and the prices that the rich impose over the poor cannot be meaningfully called just prices. Therefore, prices tracking background inequality are unjust, and market prices obtained under conditions of inegalitarian wealth distribution are unable to serve as a normative standard for just pricing. (Chapter 3, passim)

(12) From (11), it follows that the conception of the just price according to which a price is justified because it is efficient (the ‘EC’) is normatively attractive only if conditions of equality of wealth obtain. (Chapter 3, Section 2)

(13) For the same reason, the conception of the just price according to which the value that justifies prices is distributive justice (the ‘DJC’) is normatively attractive only if some version of distributive egalitarianism obtains, that is, if the underlying distributive principles of institutions aim at securing equality

of wealth, or at least tend towards equality of wealth (as it is the case with Parfit's *prioritarianism*). (Chapter 3, Section 3)

(14) The same reasons apply to the conception of the just price according to which a price is justified because it was autonomously chosen by the parties (the 'AC'). Since wealth is power-conferring, wealth inequalities between the parties in a contract make it the case that one of the parties has the power to dominate the other by imposing a price. Therefore, the AC is also committed to some form of distributive egalitarianism: prices that reflect inegalitarian patterns of wealth distribution are unable to manifest autonomy-as-nonalienation. (Chapter 3, Section 4)

# Part Two: A Virtue-Based Approach to Price Justification

Part One ended with two challenges to be met by conceptions of the just price. The first challenge concerned the compatibility between the price system and distributive egalitarianism. If the very existence of a price system generates inequalities, this poses a problem for a theory of the just price committed to the ideal of wealth equality. The second challenge put pressure on the idea that the value of autonomy-as-sovereignty could serve as a justification for prices. This is because price sovereignty—having the final word on setting the prices one wants to buy or sell to—would entail an authorisation for injustice. The following three chapters constitute an attempt to meet these challenges by incorporating some insights from a virtue-based approach to justification to the already reviewed conceptions of the just price.

To make a virtue-based approach to price justification plausible one must assume that virtue plays a relevant role in price-related activities. To this end, the next chapter (*Chapter 4: Price, Virtue, and Institutions*) presents a MacIntyre-inspired account of practices and institutions, one in which virtue appears as a necessary condition for the subsistence of price-related practices. According to MacIntyre, virtue allows practices to resist the necessary but nonetheless corrupting effect of institutions. If the MacIntyrean account of the relationship between virtue, practices and institutions is plausible—and I will not argue here for more than its plausibility—then a virtue-based approach to price justification is also plausible.

This chapter also introduces the main features of a virtue-based approach to price justification that will help us in meeting the aforementioned challenges for just price theory. These features are *value-pluralism* (including motivational pluralism) and *context-sensitivity.* The first of these features will figure prominently in my answer to the allegedly inegalitarian nature of the price system, whereas context-sensitivity will play a significant role in identifying the role of autonomy-as-sovereignty in price justification.

Chapter 5 (*Distributive Justice, Efficiency, and the Price System*) deals with the relationship between distributive egalitarianism and the price system. As noted above, the first challenge to be met by conceptions of the just price concerns the relationship between market prices and distributive justice, and the potential incompatibility between just price theory and distributive egalitarianism. In a nutshell, the challenge is this: if prices are typically just only if the price system manifests a commitment to wealth equality, but, at the same time, the very existence of the price system contributes to wealth inequality, then a system of prices that manifests a commitment to wealth equality seems to be unfeasible. Distributive egalitarianism could only be perfectly achieved in a society in which there is no price system at all. Therefore, it would seem to be the case that distributive egalitarianism demands something much more radical than mere just prices. A commitment to distributive egalitarianism would entail a demand not for just prices, but for the abolition of the price system altogether. In this chapter I address two related objections to the idea that a price system manifesting a commitment to wealth equality is not a feasible alternative, which I call the *Epistemic Objection* (an egalitarian price system would fail to convey accurate information about relative scarcity) and the *Incentives Objectio*n (an egalitarian price system would fail to provide enough incentives to work). After reviewing a few alternative replies, I argue that, despite the undeniable empirical hurdles that the application of such a system would have to overcome, a virtue-based approach to price justification allows us to claim that there is no conceptual incompatibility between the price system and distributive egalitarianism. As will become clear, the feature of *value pluralism* (and motivational pluralism) will play a significant role in the argument. Towards the end of this chapter, I also discuss the role of private law in the reshaping of the price system according to the ideal of wealth equality.

The final chapter (*Chapter 6: Autonomy, Commutative Justice, and the Private Sphere*) deals with the place of autonomy-as-sovereignty in price justification. As noted in Chapter 3, the private sphere seems to give priority to autonomy-as-sovereignty over other values that shape the price system such as efficiency or distributive justice. But it seems counterintuitive for a price to be deemed just merely because it manifests the value of autonomy-as-sovereignty.

The reason is that autonomy-as-sovereignty involves an authorisation for injustice. This chapter attempts to rescue autonomy-as-sovereignty as a value able to justify prices by connecting autonomy understood as sovereignty not with distributive justice, but with a certain conception of *commutative* justice. I argue that the fact that these prices are seen as the product of a relational context imposes a constraint on autonomy: it is not any kind of autonomy-as-sovereignty that matters for consented prices, but only *reasonable* autonomy, that is, autonomy in connection with a certain form of reciprocity. In contrast, when prices are considered as a product of non-relational contexts such as the price system, their ability to manifest distributive justice and/or efficiency is typically more salient for their justification than their ability to manifest autonomy-as-sovereignty. I further argue that autonomy-as-sovereignty *can* trump concerns over distributive justice or efficiency *only if and when* contractual relationships are nested in another non-contractual relationship. This is the normative context in which claims of price justification based on the value autonomy-as-sovereignty can be successful. Therefore, prices stemming from contracts consisting in one-off exchanges or which do not help in constituting further non-contractual relationship are unable to be justified by appealing to autonomy-as-sovereignty.

Finally, a few words regarding the proposed approach to price justification. As will become apparent in what follows, a virtue-based approach to price justification is fundamentally different from the conceptions of the just price reviewed in Part One of the thesis. This is the reason I do not call the proposed approach a ‘conception’ of the just price. Conceptions of the just price—such as the ones reviewed in Chapter 3—are concerned with identifying a value or cluster of values that prices ought to manifest to be deemed just. A virtue-based approach to price justification is not engaged in the same task. The main task of the proposed approach is to identify normative contexts in which a plurality of values can be meaningfully applied. In this sense, a virtue-based approach to price justification is a normative framework that complements the value-based conceptions of the just price reviewed in Chapter 3.

Now, this complementary role of the proposed approach is possible only if the conceptions of the just price are conceived as *partial* accounts of the just price, and not as conceptions of what a just price *is* or what it *consists in*, as if they were

meant to identify all the necessary and sufficient conditions to count a given price as just. I made this point in Chapter 3, but it is worth stressing it here as well.[1] A monist approach to value is incompatible with the value-pluralism of a virtue-based approach to price justification. Therefore, the proposed approach serves as a complement to these conceptions provided that they are not taken to be conceptions that identify necessary and sufficient conditions for justice in pricing. A virtue-based approach to price justification sees all previous conceptions as attempts at finding *typical* conditions for the presence of values (efficiency, autonomy, distributive justice) associated with justice in pricing, values that may be normatively salient in some contexts and not in others. To identify those contexts in which different values apply is, to repeat, one of the tasks of a virtue-based approach to price justification.

With these considerations in mind, we can now start discussing the place of virtue in price justification.

[1] Chapter 3, introduction.

# Chapter 4: Price, Virtue, and Institutions

This chapter argues for the need to take virtue into account when dealing with price justification. The need for considering virtue stems from the inherent tension that results from the institutionalisation of practices. This tension exists because, as MacIntyre argues, institutions are both necessary for and corruptive of practices. Virtue is a necessary feature in the justification of price-related practices because it provides a safeguard against the corruptive effects of institutions on these practices, thus keeping the tension between practices and institutions in check—or so this chapter suggests.[1]

The present chapter has three sections. The first section explains the concepts of practices and institutions and why virtue is a necessary safeguard for the sustenance of practices across time. Here I do not attempt to argue conclusively for the claim that virtue is necessary for practices and institutions in any strong sense. I certainly do not attempt to demonstrate it to be true. I only argue for it to the extent that I attempt to present an attractive picture of such a claim, one that has intuitive appeal and does not entail any obvious contradictions or clearly implausible claims.

The second section focuses on the concept of virtue and its role in price justification. In this section I propose a normative framework to think about price justification which complements the conceptions of the just price reviewed in the previous chapter. This section also expands on why this normative framework is fundamentally different from the conceptions of the just price previously reviewed in this thesis.

The third and final section concludes by suggesting that a virtue-based approach to price justification satisfies the conditions that MacIntyre identifies as necessary for a theory to count as rational progress. Thus, the proposed approach, while building upon the insights from previous conceptions, would also provide us with a better account of the *telos* of the enquiry regarding just prices than those earlier conceptions.

Before proceeding to the first section, a few clarifications are in order. The first

[1] To be sure, virtue alone cannot sustain practices across time: just institutional arrangements regulating practices are also needed. Virtue and just institutions are, therefore, necessary conditions for the existence and sustenance of practices across time.

is a point of terminology. Throughout this and the following chapters I use the expression ‘price-related practices’ to refer to activities that could be specified as a practice in the sense MacIntyre defines it and in which actions related to pricing—buying, selling, or, more broadly, price-taking and price-setting—take place. By using this expression, I do not mean to suggest either that there is such a thing as a stand-alone practice constituted by price-related activities (‘price-setting as a practice’) or that ‘the market’ constitutes such a practice, nor do I mean to suggest that a price-related practice is some sort of meta-practice which is independent from first-order practices. Since it is impossible to simply buy or sell (one always buys or sells *something*), price-related activities are always nested in some other practice. Thus, for instance, buying a chess set is a price-related activity belonging to the practice of chess. Chess is, therefore, a price-related practice insofar as price-related activities (buying chess sets and chess books, paying a subscription to the chess club, etc) can be understood as part of the practice of chess. The same applies to every other practice.

A related point concerns the relationship between practices and institutions. I shall explain these concepts and the mutual relationship between practices and institutions later, but I should note from the outset that it is not part of my argument that there is a one-to-one correspondence between practices and institutions. The argument takes for granted that institutions and their rules—such as (the rules regulating) universities, hospitals, chess clubs, etc.—can be constitutive of more than one single practice, and that institutionalised practices—such as philosophy, medicine, chess, etc.—can, in turn, be constituted by reference to more than a single set of institutional rules. The justification of price-related practices involves the need for a set of just institutional rules that include not only the justice of those rules directly regulating prices—the ‘price system’—but also the justice of other rules that go beyond the price system—v.gr. the ‘tax system’ (I shall say more about the necessity of a just tax system for price justification in the next chapter).

Finally, I would like to make explicit the reasons for focusing on MacIntyre’s account of practices and institutions. The main reason is simply that, in order to make a virtue-based approach to price justification credible, one must assume that virtue indeed plays a role in the normative justification of our practices. MacIntyre’s account of practices and institutions, which is explicitly

virtue-based, makes this assumption look plausible. To be sure, virtue arguably plays a justificatory role in many other accounts of practices and institutions. However, this commitment is often left implicit. By making such a commitment explicit, MacIntyre's account helps in making a virtue-based approach to price justification plausible.

To be sure, MacIntyre's framework is not perfect. As I shall explicitly acknowledge later, MacIntyre's definition of practices is unclear. Indeed, one might be forgiven for suggesting that, upon reflection, any action repeated across time and persons could count as a practice in MacIntyre's sense (more on this later). However, I do not see this as a fatal flaw for his account. Indeed, whatever the flaws in his conceptualization of practices, the distinction between practices and institutions does seem to capture the fairly intuitive idea that there is some sort of insurmountable conflict between opposite sources of normativity at the social level. MacIntyre explains this conflict with the introduction of a distinction between internal and external goods which in turn allows for the distinction between two social forms (practices and institutions) that need each other and yet are in constant tension with one another. However, if one were inclined to dismiss MacIntyre's distinction between practices and institutions due to its lack of conceptual clarity, a case could be made for replacing it with some other distinction that is more carefully developed. One possible candidate could be Habermas' famous distinction between system and life-world. Where MacIntyre sees a division between the domain concerned with the pursuit of internal goods (practices) and the domain of the pursuit of external goods (institutions), Habermas draws a distinction between the domain of communicative action (lifeworld) and the domain of instrumental action (system). I would have no objection to using a Habermasian-inspired account for price justification, or indeed, any other account, provided that it allows space for virtue as a necessary feature of price justification.[2]

I am also aware that the broader political implications of MacIntyre's distinction are unclear.[3] MacIntyre has been labelled a communitarian, and

[2] On Habermas and virtue, see, for instance, Leland L Glenna, 'Redeeming Labor: Making Explicit the Virtue Theory in Habermas's Discourse Ethics' (2008) 34 Critical Sociology 767.
[3] I thank Matías Petersen for many insightful conversations on this issue, and for directing me to most of the secondary literature on MacIntyre cited here.

although he has explicitly rejected this label, the alleged corruptive effects of (liberal) institutions on pre-modern practices did lead him to endorse a distinctively pre-modern, illiberal conception of the political, one in which local communities are bound by shared ends, and where people would simply assume and fulfil socially given roles.[4] While this idea of the political has strong communitarian and conservative undertones—as the appropriation of MacIntyre's thought among reactionary and conservative Christian thinkers shows—[5] MacIntyre has expressly distanced himself from these labels.[6] If there is indeed a suitable label for his political philosophy, it is probably that of a Marxist-inspired (and extremely pessimistic form of[7]) 'revolutionary Aristotelianism.'[8]

Be that as it may, I would like to distance the present analysis from these interpretations of MacIntyre's political thought. Although I tend to agree with Paul Blackledge in that "it is idiosyncratic to say the least to label as a revolutionary someone who dismisses any attempt to overthrow the existing order"[9], and also with Daniel Bell in that "[MacIntyre's] pre-modern Gemeinschaft conception of an all-encompassing community that members unreflectively endorse seemed

[4] This is, at least, one reading that suggests itself from the argument developed in Alasdair C MacIntyre, *After Virtue: A Study in Moral Theory* (Third edition., Bloomsbury 1981).

[5] The best illustration of this tendency is Rod Dreher's reactionary pamphlet: Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (Sentinel 2017); MacIntyre's influence can also be found in the works of Patrick Deneen. See Patrick J Deneen, *Why Liberalism Failed:* (Yale University Press 2018).

[6] Alasdair MacIntyre, 'I'm Not a Communitarian, But...' (1991) 1 The Responsive Community 91, 91: In spite of rumors to the contrary, I am not and never have been a communitarian.". Alasdair MacIntyre, "Common Goods, Frequent Evils", keynote at *The Common Good as Common Project,* Notre Dame, March 26-28, 2017: "Let me make one thing clear, the so-called Benedict Option movement, insofar as it is inspired by anything to do with me is inspired by one sentence only. And people who have put it forward have apparently read nothing but that one sentence. That is a sentence in which I suggest that we have been waiting for a new St. Benedict. (…) When I said we need a new St. Benedict, I was suggesting we need a new kind of engagement with the social order, not any kind of withdrawal from it. I should add by the way it's also the case that by and large the people who have put forward this [the Benedict Movement] appear to have conservative views politically, and I'm well known for holding that conservatism and liberalism are mirror images of each other; one should have nothing to do with either of them. I mean, the moment you think of yourself as a liberal or a conservative you're done for. It is as simple as that." The full video of the conference can be found here (the transcribed passage starts at 1:08:08): https://www.youtube.com/watch?time_continue=4088&v=9nx0Kvb5U04&feature=emb_logo

[7] Alasdair MacIntyre, *The MacIntyre Reader* (Kelvin Knight ed, Notre Dame Press 1998) 235: '[N]ot only have I never offered remedies for the condition of liberal modernity, it has been part of my case that there are no remedies.'

[8] On this, see Kelvin Knight, 'Revolutionary Aristotelianism' in Paul Blackledge and Kelvin Knight (eds), *Virtue and Politics: Alasdair MacIntyre's Revolutionary Aristotelianism* (University of Notre Dame Press 2011).

[9] Paul Blackledge, 'Alasdair MacIntyre: Social Practices, Marxism and Ethical Anti-Capitalism' (2009) 57 Political Studies 866, 869.

distinctly ill-suited for complex and conflict-ridden large-scale industrialized societies"[10], I do not think that MacIntyre's political philosophy necessarily follows from MacIntyre's account of the relationship between practices and institutions, but rather from the connection he draws between this relationship and his claims regarding the failure of the 'Enlightenment Project.' If this is indeed the case, then one can safely use the distinction without committing oneself to MacIntyre's anti-modern political project.[11]

With these clarifications in mind, we can now proceed to explain the role of virtue in MacIntyre's account of practices and institutions.

## 1. The Need for Virtue: The Inherent Tension Between Practices and Institutions

### *1.1. Practices*

What is a practice? MacIntyre describes it thus:

> By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.[12]

MacIntyre connects the concept of a practice to the concepts of virtue and internal goods.

The first important concept for the definition of a practice is virtue. A virtue is an acquired disposition to act in conformity to reasons that promote human flourishing. As MacIntyre puts it, virtues are "human powers to achieve

[10] Daniel Bell, 'Communitarianism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/fall2020/entries/communitarianism/> accessed 24 February 2021.

[11] I am not alone in thinking that the distinction between practices and institutions can be used independently from MacIntyre's philosophy. For an explicitly MacIntyrean approach to practices and institutions which is independent from his overall philosophical and political commitments, see, for instance, Russell Keat, *Cultural Goods and the Limits of the Market* (Palgrave Macmillan 2000).

[12] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 226.

excellence."[13]

MacIntyre claims that virtues are necessary for the existence of practices: without virtue, no practice can survive the corrupting effect of institutions. I shall say more about virtue later on. For now, I would just like to point out that this position entails a departure from the mainstream liberal view according to which a well-functioning society, that is, one with an adequate institutional design, can survive even if we assume that everyone is self-interested or selfish (more on this in the next chapter).[14]

I would also like to distinguish the claim that virtues are necessary for practices from the different claim—also endorsed by MacIntyre—that practices are necessary for virtue. Indeed, MacIntyre claims that the concept of virtue "*always* requires for its application the acceptance [of] some prior account of certain features of social and moral life in terms of which it has to be defined and explained"[15] and that practices constitute the "arena in which the virtues are exhibited and in terms of which they are to receive their primary, if incomplete, definition."[16] The feasibility of the proposed approach to price justification does not depend on whether this further claim holds true. The proposed approach would still be plausible even if some virtues—such as justice or generosity towards strangers—were to be defined without appealing to a practice and only appealing to a grasp of our common humanity.[17]

The second important concept for the definition of a practice is the concept of *internal goods*. These internal goods are "the good[s] towards which those who participate in [a practice] move."[18] As I shall explain below, these goods are internal to the practice because they allow us to *make sense* of the practice—they make the practice intelligible for those who engage in it. MacIntyre explains

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[13] ibid.

[14] For a helpful historical account of the mainstream view, see Samuel Bowles, *The Moral Economy: Why Good Incentives Are No Substitutes for Good Citizens* (Yale University Press 2016) 9–39.

[15] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 217. (emphasis added)

[16] ibid 218.

[17] For scepticism about the claim that virtue always requires a practice, see Anton Leist, 'Troubling Oneself with Ends' in Kelvin Knight and Paul Blackledge (eds), *Virtue and Politics: Alasdair MacIntyre's Revolutionary Aristotelianism* (University of Notre Dame Press 2011) 214: 'If the chance bystander (not a neighbour, fellow citizen, or police officer) witnesses a crime in the street and thinks about helping the victim, there is no practice save general morality or humanity to guide him in either springing into action or shirking it.'

[18] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Duckworth 1988) 31.

what he means by a practice by listing several examples and distinguishing practices from what one might call purely technical activities:

> Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music. (…) Thus the range of practices is wide: arts, sciences, games, politics in the Aristotelian sense, the making and sustaining of family life, all fall under the concept.[19]

Admittedly, MacIntyre is not as clear as one would wish in drawing the distinction between practices and techniques.[20] Indeed, there is no clear reason why bricklaying and planting turnips are not practices, but architecture and farming are. As Roberts and Wood aptly put it,

> MacIntyre tells us that bricklaying is not a practice, but architecture is; planting turnips is not a practice, but farming is. We can imagine him saying that slide preparation and pathology microscopy are not practices, but medical research is; reading is not a practice, but historical research is. But it is not clear that bricklaying and turnip planting are excluded by his formulated definition of "practice". Both are coherent, modestly complex, and socially established in a broad sense; they have standards of excellence and aim at such internal goods as well-made walls and first-rate turnips.[21]

Thus, few technical activities seem to be excluded from MacIntyre's definition of a practice. However, the point seems to be—and I will take it to be—that techniques involve actions and skills concerned with relatively simple ends. They consist in actions or sets of actions the performance of which is intelligible despite the absence of a wider framework within which those actions or sets of actions are integrated. Thus, to make sense of bricklaying one only needs to understand a very simple and straightforward end: building a wall by laying bricks. By contrast, to make sense of a practice—to make a practice intelligible—one

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[19] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 218.

[20] MacIntyre has explicitly acknowledged this. See Alasdair MacIntyre, 'A Partial Response to My Critics' in John Horton and Susan Mendus (eds), *After MacIntyre: Critical Perspectives on the Work of Alasdair MacIntyre* (Polity Press 1994) 284: '[the idea of a practice] may have been obscured by my lack of attention to productive crafts such as farming and fishing, architecture and building.'; Kelvin Knight, 'Revolutionary Aristotelianism' in Paul Blackledge and Kelvin Knight (eds), *Virtue and Politics: Alasdair MacIntyre's Revolutionary Aristotelianism* (University of Notre Dame Press 2011) 22.

[21] Robert C Roberts and W Jay Wood, *Intellectual Virtues: An Essay in Regulative Epistemology* (Clarendon Press 2007) 118.

needs to account for a *multifaceted and complex end*: the internal good of the practice. This end enables those who engage in a highly complex form of human activity to understand their discrete actions or sets of actions as belonging to a single and coherent activity, *i. e.*, to a single and coherent *practice*. Since the internal good of a practice is a complex good involving many interconnected goods, it makes no difference to speak of a single 'internal good' or of a plurality of 'internal goods'. The use of the singular noun 'good' emphasises the unity between the internal goods of the practice, whereas the plural noun 'goods' emphasises the complexity of goods involved in the internal good of the practice.

Here is an example. Suppose that the end of architecture is to plan, design and construct building and non-building structures. This end is a complex good that allows us to define the practice of architecture. Participants in the practice achieve such end by performing a number of different activities the particular ends of which are not necessarily connected to the end of architecture. Some of these activities presuppose the mastery of a certain skill ('reading', 'bricklaying', etc.) while others presuppose little or no skill whatsoever ('eating', 'sleeping', etc). Although the performance of neither of these activities is necessarily connected to the practice of architecture, it is by reference to the internal goods of the practice, as recognised and identified by those who are engaged in it, that it is possible to identify and recognise some of these actions or sets of actions—'reading a book', 'building a wall', 'taking the bus', 'buying a pencil', 'taking notes', etc.—as actions or sets of actions belonging to the practice of 'planning, designing and constructing building and non-building structures' and, therefore, as belonging to the coherent and complex form of socially established cooperative human activity known as architecture.

According to MacIntyre, the internal goods of a practice can only be possessed by engaging in a particular practice and can only be identified and recognised by those with the relevant experience—*i.e.*, by virtuous practitioners.[22] A virtuous practitioner is someone who has acquired the relevant moral powers—intellectual and moral virtues—that allow her to learn and deal intelligently with experience in order to act for the right reasons in the right

[22] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 218: "Those who lack the relevant experience are incompetent thereby as judges of internal goods."

context.[23] A virtuous practitioner *qua* practitioner is also motivated by the internal goods of the practice and by external goods insofar as the pursuit of the latter is subordinated to the pursuit of the former.

The upshot of this view for a virtue-based approach to justification is that actions ought to be seen as justified, that is, as conforming to the internal good of the practice *from the standpoint of those who engage in the practice.*

The perspective of those who engage in the practice matters because they have privileged epistemic access to the goods of the practice and the particular conditions under which the practice is able to flourish. In other words, they have the required epistemic skills to recognise a particular action *as an action that falls under the practice*, as well as to judge the conformity of that action to the requirements of the practice. However, this does not mean that the normative standard for justifying actions falling under the practice is completely subjective, for it is not the epistemic skills of those who engage in the practice as such that do the justificatory work for actions falling under the practice, but the goods of the practice themselves and the particular conditions under which the practice is able to flourish.[24] To be sure, adopting the standpoint of those who engage in the practice as the relevant perspective—and therefore adopting those who engage in the practice as our background class of relevant subjects—has a profound impact on what counts as a justified action, since what looks like an objective condition for the justification of an action from the standpoint of those who engage in the price can sometimes be perceived as a purely subjective condition by groups outside the practice. But *subjective* preferences are not necessarily

[23] This description of virtue is inspired by the work of Julia Annas, *Intelligent Virtue* (Oxford University Press 2011). Virtue so understood also includes an emotional component, for it requires that the agent educates herself to form her feelings so that they can go along with the right reasons. Cf. Alasdair C MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Duckworth 1999) 122: "It is sometimes said that our affections are not ours to command. But, while in particular situations this may be true—I cannot here and now decide by an act of will to feel such and such—we can of course (…) cultivate and train our dispositions to feel, just as we can train our dispositions to act and indeed our dispositions to act from and with a certain kind of affectionate regard. When we are so required, not to act from inclination is always a sign of moral inadequacy, of a failure to act as our duty requires."

[24] Note that this does not mean—and ought not to mean—that privileged practitioners are morally entitled to impose their own criteria of justification upon other practitioners. In fact, marginalised groups subject to systematic oppression can (and *pro tanto* ought to) be considered epistemically privileged when it comes to questions regarding the justification of a practice. Philosophers call this 'Standpoint Theory'. On this, with a special emphasis on feminist theory, see Alison Wylie, 'Why Standpoint Matters' in Robert Figueroa and Sandra G Harding (eds), *Science and Other Cultures: Issues in Philosophies of Science and Technology* (Routledge 2003) passim.

*arbitrary* preferences. Thus, for instance, the practice of celebrating Easter for a Christian community may seem like participating in a metaphysical event of cosmic proportions to those who participate in it, while appearing as supercherie and glorified nonsense to those outside the relevant community. But this does not mean that the justification of actions concerning the celebration of Easter are arbitrary conditions that depend solely on the subjective preferences of the practitioners. For it is still the case that practitioners ought to behave as the practice—and not their own individual preferences—requires. The criteria of justification for actions falling under the practice are imposed by the practice itself to *all* those who engage in it, including those whose preferences are important in constituting those criteria of justification.

So far I have discussed virtue and internal goods and how these two elements are necessary for the existence and sustenance of practices. However, practices cannot survive solely on the basis of virtue and internal goods. For a practice to survive, practitioners need goods other than the internal goods of the practice, *i.e.*, they need *external* goods. These goods are called external goods because, although necessary for the sustaining of the practice, they are *external* to the ends of the practice.

External goods such as money, power, and status are instrumental to the achievement of the internal goods of a practice, but unlike the latter, they are not necessarily connected to any specific practice. If an architect decides to give up architecture and pursue her philosophical interests instead because she estimates that being appointed Professor of Philosophy and holding a prestigious chair at a renowned university would bring her a better social status than the one she currently possesses as an architect, then she would be pursuing a good (in this case, status) external to the practices of both architecture and philosophy, and indeed external to any other practice as well.[25] The action of shifting from the pursuit of architecture to philosophy would be neither justified nor unjustified from the standpoint of either architecture or philosophy, because it would not count as an action belonging to either practice.

Another difference between internal and external goods is that external goods are *private* goods: they "are always some individual's property. Moreover,

[25] Knight (n 8) 26.

characteristically they are such that the more someone has of them, the less there are for other people."[26] External goods are "objects of competition in which there must be losers as well as winners."[27] Internal goods, on the other hand, are *common* goods: "internal goods are indeed the outcome of competition to excel, but it is characteristic of them that their achievement is a good for the whole community who participate in the practice."[28]

The pursuit and achievement of external goods is in ineradicable tension with the pursuit and achievement of the internal goods of a practice. If those who engage in a practice attach more importance to external goods than to the internal goods of the practice, subordinating therefore the pursuit and achievement of the latter to the former, their behaviour will end up having a corrupting effect in the practice. Nevertheless, external goods are *genuine* goods. As MacIntyre notes, "not only are they characteristic objects of human desire, whose allocation is what gives point to the virtues of justice and of generosity, but no one can despise them altogether without certain hypocrisy."[29] This is why actions pursuing external goods are not *necessarily* at odds with the internal goods of the practice.

Not only are external goods *genuine* goods, but also, and more importantly to our present purposes, under typical conditions they are *necessary* for the achievement of the internal goods of a practice. However, since they are external to the practice, the achievement of external goods cannot be part of the normal functioning of a practice. The achievement of external goods is the object of *institutions*.

### *1.2. The Corrupting Effects of Institutions*[30]

The distinction between practices and institutions is parallel to—and dependent upon—the distinction between the *internal* goods of a practice and *external* goods. Institutions—formal organisations and their rules—are involved in acquiring external goods. Since money, power, and status are normally

[26] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 222.
[27] ibid.
[28] ibid: 'So when Turner transformed the seascape in painting or W. G. Grace advanced the art of batting in cricket in a quite new way their achievement enriched the whole relevant community'.
[29] ibid 228.
[30] The title follows MacIntyre's terminology. However, a more adequate title for the argument developed here could be "The Corruptive Effects of *Institutionalisation*". See note 39 infra.

necessary for the achievement of internal goods, institutions are essential to the constitution and development of practices: "no practices can survive for any length of time unsustained by institutions."[31] The concept of institution is central to a theory of practices because it explains the social reproduction of practices*, i. e.*, how practices can be reproduced and transmitted through the behaviour of different individuals across time and generations.[32]

Institutions, however, are a mixed blessing. Practices need institutions, but since external goods have the potential to corrupt the achievement of internal goods, institutions can always exert a corrupting influence over the practice. This tension between practices and institutions is, therefore, "ineradicable."[33] MacIntyre explains the distinction and the relationship between practices and institutions in a passage that is worth quoting at length:

> Practices must not be confused with institutions. Chess, physics and medicine are practices; chess clubs, laboratories, universities and hospitals are institutions. Institutions are characteristically and necessarily concerned with (…) external goods. They are involved in acquiring money and other material goods; they are structured in terms of power and status, and they distribute money, power and status as rewards. Nor could they do otherwise if they are to sustain not only themselves, but also the practices of which they are the bearers. For no practices can survive for any length of time unsustained by institutions. Indeed so intimate is the relationship of practices to institutions—and consequently of the goods external to the goods internal to the practices in question—that institutions and practices characteristically form a single causal order in which the ideals and the creativity of the practice are always vulnerable to the acquisitiveness of the institution, in which the cooperative care for common goods of the practice is always vulnerable to the competitiveness of the institution.[34]

If institutions are both essential for and corruptive of practices, then it is necessary to safeguard practices against the ineradicable "corrupting power"[35] of institutions. I would like to suggest that there are two main safeguards against the corrupting power of institutions. The first is the internal structure of the institution: what we might call its *constitution*. The second safeguard is *virtue*. I

[31] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 222.
[32] Knight (n 8) 25.
[33] ibid 26.
[34] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 226.
[35] ibid.

elaborate in what follows.

The first safeguard against institutions must be the institution itself: its internal structure or constitution. Institutions reduce uncertainty and provide a stable structure to human interaction, creating the incentive structure that will allow participants in the practice to take advantage of the opportunities provided within a given institutional framework.[36] If the sustaining of a practice is desirable, then rules regulating the practice ought to create the proper incentive structure, one that makes the performance of actions in accordance with the internal goods of the practice more likely than the performance of actions that subordinate those internal goods to external goods such as money, power, or status. To create such an incentive structure, the production, acquisition, distribution, and enjoyment of external goods ought to be subordinated to the achievement of the internal goods of the practice, *i.e.*, to the standards of excellence identified and recognised by those who engage in the practice.

Now, the fact that the distribution of external goods needs to be subordinated to the achievement of internal goods does not entail that external goods ought to be allocated to individuals according to their *personal* excellence or merit in achieving those goods. It does not follow from what has been said that competent practitioners ought to get more money, power, and status than those who are less competent. The only claim about distribution that follows from this subordination criteria is the more general claim that *external goods ought to be allocated in the way that best contributes to the achievement of the internal goods of the practice*. There is nothing preventing an egalitarian distribution of resources within the practice.[37]

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[36] Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990). North's analysis is focused on the incentive structure in the economy, but the same point can be made, via analogy, in relation to other forms of human interaction.

[37] How these goods should be distributed to particular individuals will depend on many different considerations, including, to be sure, the nature of the practice itself, but also other circumstances related to the specific context in which the practice is developed. A good distribution of external goods might entail, for instance, giving equal money to all participants in the practice, more power and status to some, and less power and status to others. For instance, the institutions regulating the practice of scientific research could be structured in a way that provides equal basic resources—equal *money*—to all participants in the practice. Equal money would also entail equal access to research funds regardless of the content of the project, so that every research group gets the same resources to pursue successful (and unsuccessful) research projects insofar as these projects satisfy certain criteria of excellence identified and exhibited by those who engage in the practice. By the same token, the practice might give more institutional *power*—power to impose duties on other participants, or even power to change the rules of the practice or to decide whether and how they are to be applied in a concrete case, etc.—to some participants than to

The second safeguard against the corrupting power of institutions is *virtue*. MacIntyre defines virtue as *"an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods*."[38] Virtues are fundamental to the sustaining of practices because no matter how well designed the institution, its rules can always be abused by those willing to give priority to their individual interests on external goods over the internal goods of the practice. This abuse of institutional rules need not be *illegal*: it can happen even respecting all the formal rules of an institution, as when large corporations *avoid* paying taxes (legal) without *evading* them (illegal). A corporation that legally avoids taxes at the expense of the needs of the community is one that puts external goods over the internal goods of the practice without breaking any institutional rules. More to the point: individuals who take advantage of the needs of others by asking for unfair prices, but within the constraints imposed by contract law—such as the store selling their snow shovels at ten times the normal price right after a snowstorm, or indeed any sale made within the constraints imposed by remedies against *laesio enormis*—could be legally exploiting their fellow citizens. If such actions become generalised within a certain institution and those who engage in the practice typically take advantage of others by authorised institutional means, the practice would not survive for long unless a significant group of practitioners can resist the institutionalised corruption of the practice. If these practitioners are successful in proposing and effecting institutional reforms to counteract the decline of the practice, their success will nevertheless depend upon the reception that these proposals have among the rest of the practitioners. If the rest of the practitioners are still willing and able to resist the corrupting forces of the institutions and to pursue the internal goods of the practice, then the practice might still survive even in non-ideal circumstances. But if they are unwilling or unable to resist, the practice will

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others, and more *status* to some participants than to others. This could be done so that the efforts and outstanding skills of senior researchers and/or those who excel in their field by the quality of their scientific work is taken into account by younger researchers, while skilful researchers can enjoy the social recognition they deserve. Skilful researchers, therefore, could rightfully enjoy the higher status that comes from having a socially recognised knowledge that confers to their opinions at least some sort of (non-binding) authority for the rest of those who engage in the practice, even if they lack institutional power.

[38] MacIntyre, *After Virtue: A Study in Moral Theory* (n 4) 222 (original italics).

be corrupted, perhaps beyond repair. Therefore, if the practice is deemed desirable, individuals who engage in the practice should act in pursuit of external goods *only* when this is necessary to achieve the internal goods of the practice. The function of *virtue* is, therefore, essential to the proposed account of practices. For without virtues "practices could not resist the corrupting power of institutions."[39]

## 2. The Benefits of Virtue: The Implications of Virtue for Price Justification

The need for virtue to play a role in our account of practices and institutions gives further support to the idea that prices are the product of choice and power, which is indeed one of the insights at the core of just price theory. This also explains our sentiments of frustration and anger when we confront prices that seem excessive for certain goods or services: we tend to react with anger when our sense of justice is offended. Indeed, anger only springs where there are reasons to believe that certain conditions could be changed and yet remain unchanged.[40] If virtue is necessary for the sustenance of practices, then it is possible to claim space for a virtue-based approach to price justification.

A virtue-based approach to price justification is not, properly speaking, a conception of the just price, for it is not *value-based*: it does not attempt to insulate a value or cluster of values that prices ought to manifest in order to be just. Rather than concentrating on a specific account of a certain value or values, the proposed approach focuses on *how we deal with value, whatever that value may be*.

The features of a virtue-based approach to price justification that I will explore in what follows stem from this fundamental difference that separates a virtue-based approach from the previous conceptions of the just price. The features that

[39] ibid 226. Paraphrasing MacIntyre—and to complement the point made in the text, as well as to tackle certain ambiguity in my own exposition of this point—one could say that without virtues practices could not resist the corrupting power not only of *institutions*, but also of *institutionalisation*. Indeed, resisting the institutionalised constraints against internal goods imposed by, say, contract law, is not to resist the corrupting power an institution in MacIntyre's sense (that is, an organization concerned with the achievement of external goods). I thank Neil Walker for clarification on this point.

[40] As insightfully noted by Hannah Arendt, *On Violence* (Harvest Book 1970).

I shall explore are (i) *value-pluralism* and (ii) *context-sensitivity*.

### *2.1. Value pluralism*

A virtue-based approach to price justification embraces value pluralism. This means that efficiency, distributive justice, autonomy-as-nonalienation, autonomy-as-sovereignty, and many other values, can all serve as justificatory reasons for prices in different contexts. In this sense, a virtue-based approach entails an endorsement of *all* value-based conceptions of price justification reviewed in earlier chapters while at the same time a rejection of a monist understanding of any of them. A monist understanding of price justification would be one which prioritises a certain value in the justification of prices, that is, one in which there is a certain value or cluster of values that prices especially or exclusively serve: efficiency, distributive justice, autonomy, etc. By contrast, a virtue-based approach is not concerned with selecting and prioritising values for price justification, but rather with "how we are to engage with value, whatever that value may be."[41]

Value-pluralism also entails what might be called *incentive-pluralism*: since agents are motivated by different values, the incentive structure of institutions—especially, in this case, price-related institutions—ought to take into consideration value-based motivation instead of simply assuming self-interest as the sole source of motivation in the market. While assuming self-interest can be in many cases a sensible approach when designing institutions, sometimes it can also have the undesirable effect of crowding out moral motivation. The significance of this insight for price justification will become especially clear in the next chapter when discussing the alleged incompatibility between the price system and distributive justice.

### *2.2. Context-sensitivity*

The second distinctive feature of the proposed approach is its *context-sensitivity*.

[41] John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 13: 'Many themes of private law, and many associated puzzles, concern how we are to engage with value, whatever that value may be. (...) If the value of my relationships is all instrumental, why should I care about my relationships? What makes it my task to put things right when I damage something valuable of yours? Why would you want to hold on to the value you already have, when you could do much better by letting go? It hardly matters which particular value or values we are talking about when we raise these questions; the puzzles remain the same.'

This feature also separates virtue-based from value-based approaches to price justification. A value-based approach to justification—such as those reviewed in Chapter 3—identifies a certain value and applies it to any subject, including, of course, price justification. The meaning and role of these values in the justification of the subject is fixed *before* considering the relevant context to which it applies. Thus, for instance, the previous chapter defined the values of efficiency, distributive justice, and autonomy in general terms and then asked whether and how prices can manifest these values. By contrast, a virtue-based approach to justification identifies something as valuable only *after* identifying the relevant context in which that value is meant to be applied. The mark of the virtuous person is that she knows what to do and what values to apply in a given situation because she has the appropriate intellectual skills to identify the proper normative context in which it is relevant to act upon those reasons. Thus, rather than identifying values that would apply to a given context, a virtue-based approach focuses in identifying the relevant normative contexts in which those values can be meaningfully applied. The weight one ought to give to certain values in the justification of prices will depend upon the normative context in which prices are perceived and conceptualised by the relevant actors.

Which normative contexts are relevant for price justification? I would like to suggest that there are two normatively relevant contexts in which prices are perceived and conceptualised. The first is the context of contract, in which prices are perceived and conceptualised as representations of exchange value within a bilateral relationship between the parties. The second relevant context is the market, in which prices are perceived and conceptualised as the product of systemic institutional arrangements, *i.e.*, as stemming from the price system.

I would like to stress the significance, for just price theory, of distinguishing between these two normative contexts. The values that justify prices conceived within the normative context of the price system are not necessarily the values that justify prices within the normative context of contract. When the context of contract is more normatively salient than the market context, then the relationship between the parties in a contract can take precedence over the demands of distributive justice. This creates space for the value of autonomy-as-sovereignty to play a role in price justification. As I shall argue in Chapter Six, autonomy understood as sovereignty *can* in some cases trump concerns over distributive

justice and efficiency, namely, when there is a special, non-contractual, relationship between the parties in which the contractual relationship is nested, and which is so valuable in and of itself that the parties can think of themselves as engaged in a certain activity which is more valuable than the price-related practice to which their activity typically belongs. This claim will be further developed in the final chapter of the thesis.

## 3. The Virtue of Virtue (Concluding Remarks)

This chapter has argued for the need to take virtue into account when dealing with price justification. The features of a virtue-based approach to price justification reviewed here (value-pluralism and context-sensitivity) will prove useful for meeting the challenges for just price theory stemming from the previously reviewed conceptions of the just price. Indeed, the implications of value pluralism for price justification will be of use to deal with the first challenge (*Chapter 5: Distributive Justice, Efficiency, and the Price System*), whereas context-sensitivity will help us in dealing with the second challenge concerning the value of autonomy-as-sovereignty viz-a-viz distributive justice (*Chapter 6: Autonomy, Commutative Justice, and the Private Sphere*).

To conclude this chapter in MacIntyrean fashion, I would like to suggest that the fact that these features allow us to meet these challenges while keeping the main insights of previous conceptions of the just price is an indication that this approach constitutes theoretical progress compared to previous conceptions. In effect, a virtue-based approach to price justification satisfies the four characteristics that MacIntyre identifies as crucial for a thesis to be deemed superior to rival conceptions of rational enquiry.[42] To be sure, this is not a complete argument for such a thesis, but only a sketch of how that argument might look like. A complete argument in defence of this thesis would have to include a much more robust historical account of the way in which the idea of the just price has developed as a tradition of enquiry.

As I stated earlier, I believe that a virtue-based approach to price justification satisfies the four MacIntyrean conditions to count as rational progress:

[42] MacIntyre, *Whose Justice? Which Rationality?* (n 18) 79–81.

First, the proposed approach *presupposes the findings of earlier conceptions*.[43] Since the proposed approach is an approach based on how we deal with values justifying prices and not with those values themselves, it presupposes the insights from value-based conceptions such as those based on distributive justice, autonomy, and efficiency. Moreover, as it will be shown in the next chapters, the proposed approach provides us with a point of view from which it is possible to rescue some of those conceptions from certain objections in a way that would not have been possible from a purely value-based standpoint.

Secondly, a virtue-based approach to price justification *provides an explanation for unresolved and (from the point of view of earlier stages of enquiry) unresolvable disagreement between earlier conceptions*.[44] If the proposed approach to price justification is to count as rational progress, it should be able to explain both why disagreement between rival conceptions of the just price occurred and why such disagreement was, with the resources available to those conceptions, unresolved and unresolvable.[45] From the standpoint of a virtue-based approach to price justification we can now see that the explanation for such a disagreement lies in what all value-based theories have in common, namely, *value-monism*: the idea that there is one and only one single value able to justify prices. This was the problem with the standard understanding of the Scholastic doctrine of the just price (based on commutative justice as the sole source of price justification[46]), and also the problem of contemporary autonomy-based, efficiency-based, or distributive-justice-based conceptions of the just price, and indeed of any other conception of the just price that is based on a monist understanding of value. Value-monism makes earlier conceptions blind to each other, that is, insensitive to the insights stemming from alternative conceptions of the just price. By contrast, a virtue-based approach embraces value-pluralism in a way that was not open to those earlier conceptions.

Third, the proposed approach *provides a more adequate account of the good of the enquiry*.[47] A more adequate account is not merely a more detailed or

[43] ibid 79.
[44] ibid 80.
[45] ibid.
[46] But see the remarks concerning the possibility of a context-sensitive and value-pluralist reading of the Scholastic tradition in Chapter 1, Section 2.3.
[47] MacIntyre, *Whose Justice? Which Rationality?* (n 18) 80.

richer description of the good of the enquiry, but also "one which enables the enquiry to be better directed."[48] A virtue-based approach to price justification does precisely that: it allows us to examine in retrospective earlier conceptions of the just price in a way that better directs that enquiry towards its goal. Thus, from the perspective of a virtue-based approach to price justification, we can now see that what allowed us to conceptualise earlier rejections of the Scholastic doctrine of the just price based on commutative justice not as proper rejections of the *concept* of a just price, but rather as alternative *conceptions* of the just price, was precisely an implicit commitment to value-pluralism and context sensitivity. This understanding allowed communication between different conceptions in a way that was impossible if those theories were conceived as mutually exclusive accounts of the relationship between justice and prices. Moreover, the features of value-pluralism and context-sensitivity will also help us to better direct the enquiry towards the overcoming of certain hurdles that did not even appear as objections to just price theory from the standpoint of earlier conceptions of the just price. Indeed, the Scholastic doctrine of the just price was blind to concerns over autonomy-as-sovereignty and the authorisation of distributive injustice that it entails. It was equally blind to concerns over the reproduction of inegalitarian patterns of wealth distribution through the price system. For Scholastics, the doctrine of the just price was simply the doctrine according to which a price must keep the requirements of commutative justice (equality of value between things exchanged). The challenges for just price theory that I have identified in the previous chapter are made intelligible *qua* challenges for just price theory precisely because conceptions of the just price alternative to that of the Scholastics are now seen, from this new perspective, not as rival conceptions, but as integral parts of the same tradition of enquiry.

Which brings me to the fourth characteristic identified by MacIntyre to describe an enquiry as exhibiting rational progress. In order for the proposed approach to qualify nor merely as directionless movement, but as proper *progress* towards a goal, the proposed approach *must provide the enquiry with an account of its own telos*.[49] The proposed approach should give us a sense of "what it

[48] ibid.
[49] ibid.

would be to have completed the enquiry."[50] The proposed approach to price justification allows us both to identify what the previous *telos* of the enquiry was, as well as providing an account of its new *telos*. From the new standpoint provided by a virtue-based approach to price justification, the need to rescue previous conceptions from their own shortcomings involves the overcoming of a previous understanding of the *telos* of the enquiry for a just price—namely that of finding *the* value able to justify prices—and the adoption a new conceptualisation of that shared telos.

What could that new conceptualisation of the *telos* made possible by a virtue-based approach to price justification be? I believe that the Scholastic doctrine of the just price was not far from the mark when it identified the goal of just pricing as that of achieving equality in exchange. However, from a virtue-based perspective, we can now see that equality in exchange has a different meaning than the mere search for arithmetical equality between things exchanged required by commutative justice. The search for a just price is also the search for the conditions under which we are able to *treat each other as equals in exchange*.[51] For the Scholastic doctrine of the just price, those conditions amounted to keeping equality of value between things exchanged—the requirements of commutative justice. However, the subsequent rejections of the doctrine of the just price can be seen, from the new standpoint, as attempts to show that commutative justice is neither a necessary nor a sufficient condition to treat each other as equals in exchange: if, for instance, commutative justice allows us to dismiss autonomously consented prices, or if commutative justice is construed in a way that disconnects it from inegalitarian patterns of wealth distribution (distributive justice), or if it is pursued disregarding how resources are allocated to their best employment (efficiency), etc. then prices manifesting commutative justice might nevertheless fall short as proper manifestations of what it is to treat each other as equals in exchange.

A virtue-based approach to price justification also allows us to see why egalitarian conceptions of distributive justice are so important for a theory of the just price. The reason is that substantive equality is not merely a *condition* for the

[50] ibid.
[51] In a similar vein James Bernard Murphy, 'Equality in Exchange' (2002) 47 American Journal of Jurisprudence 85.

achievement of just prices. It is also part of the *goal* or *telos* that makes the enquiry intelligible.

If a conception of the just price based on distributive justice is unfeasible because the very idea of a price system involves inequality, then the whole enquiry is at danger of becoming unintelligible, for whenever prices are part of the equation, to treat each other as equals would be impossible. To rescue conceptions of the just price based on distributive justice from such an objection is therefore to rescue the whole enquiry from unintelligibility. This is the task ahead of us in the next chapter.

# Chapter 5: Distributive Justice, Efficiency, and the Price System

The discussion of the Distributive Justice Conception of the just price (the 'DJC') in Chapter 3 explored the view according to which a price system is just only if it manifests the value of distributive egalitarianism. According to this view, prices are just only if they are the product of a price system that secures or at least aims at equality of wealth among market participants. Thus, price-related institutional arrangements that do not aim at promoting or preserving wealth equality, even if every person in society lives above the threshold of poverty, would not be fit to secure just prices.[1] In Chapter 3 I also claimed that although wealth inequality is a direct attack on prices' ability to manifest distributive egalitarianism, it also impinges upon their ability to manifest other values such as efficiency (because efficiency would reflect and conceal inegalitarian patterns of wealth distribution, thus naturalising injustice) and autonomy (because inequality creates an autonomy surplus on one contracting party and an autonomy deficit on the other, involving therefore a power imbalance which is incompatible with justice). Therefore, I concluded that the ideal of wealth equality or distributive egalitarianism was present as a condition of all conceptions of the just price reviewed in chapter 3.

Now, to create a price system that preserves or at least aims at wealth equality is easier said than done. There seems to be no empirical evidence suggesting that such a system is indeed feasible. Furthermore, there seems to be at least some empirical evidence for the claim that a price system cannot function properly without actively promoting wealth *inequality*. In effect, the failure of the economic socialist experiments of Cuba, the Soviet Union and the Eastern Bloc is frequently used as evidence for the claim that a price system that is not committed to the idea of maximising one's income level above the level of everyone else would not be able to function properly when put into practice. Thus, the very existence of a price system—and hence of market prices and price-related institutions—would seem to be incompatible with distributive egalitarianism. If this is correct, then a theory of the just price including wealth equality as a condition for justice in pricing would be a perhaps

[1] See the discussion on sufficientarianism ('utilitarianism with a floor') in Chapter 3, Section 3.

noble but utterly impractical illusion.[2]

While this is an empirical point, it is nevertheless also normatively significant if it is conjoined with some readings of 'ought' implies 'can', according to which the unfeasibility of application of a principle involves the defeat of the principle itself. It would follow from these two premises, therefore, that the unfeasibility of application of egalitarian principles of distributive justice within the price system would involve the defeat of theories of the just price relying upon distributive egalitarianism.[3] Therefore, unless it is shown that a price system that preserves wealth equality is feasible given certain conditions, then it would be absurd to endorse wealth equality as a normative commitment that ought to be manifested through the price system. In what follows, I shall argue that there is no such incompatibility and that it is at least possible (i.e., potentially *feasible*) to conceive a price system that preserves wealth equality. This argument is developed in the first and main section of this chapter (*The Feasibility of a Just Price System*).

The second section (*From Potential Feasibility to Actual Feasibility? Private Law, Distributive Justice, and the Price System*) complements the first by discussing the distributive effects of certain private law institutions and how certain private law rules and institutions shaped by a concern for just prices—such as *laesio enormis*, reviewed in Chapter 1 of this dissertation—can contribute to moving from *potential* feasibility to *actual* feasibility.

The final section concludes by suggesting some implications of the proposed virtue-based approach to our understanding of private law.

Before proceeding, one final point of clarification. When I talk of an 'egalitarian price system' I do not mean to suggest that the price system can achieve wealth equality on its own, nor that the primary function of such a system would be to equalise wealth. Many other institutional arrangements apart from the price system must work

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[2] For a detailed exposition of these reasons, see Joseph H Carens, *Equality, Moral Incentives, and the Market: An Essay in Utopian Politico-Economic Theory* (The University of Chicago Press 1981) 12–17, 23-93.

[3] The argument can be formulated thus:

(1) The unfeasibility of application of a principle involves the defeat of the principle. ('ought' implies 'can')

(2) The application of egalitarian principles of distributive justice within the price system is unfeasible (the empirical premise)

Therefore,

(3) Any theory of just prices that involves application of an egalitarian principle of justice within the price system is defeated by the principle's infeasibility of application.

together in order to achieve wealth equality. Thus, for instance, the tax system is certainly much more important for achieving wealth equality than the price system. An egalitarian price system is a system that reflects and, only when possible, promotes wealth equality. Since the price system cannot bring about wealth equality on its own, an egalitarian price system is impossible to achieve without a tax system committed to wealth equality. Therefore, an egalitarian price system requires, as a necessary (or at least normal or typical) condition, an egalitarian tax system.

## 1. The Feasibility of a Just Price System

There are two distinct but mutually supportive arguments for the alleged unfeasibility of application of a price system committed to wealth equality. The first argument concerns the very nature of the price system—that is, the very function prices are supposed to fulfil within a society. According to this argument, egalitarian price systems could not communicate information about the relative scarcity of goods and would be, therefore, unable to work properly as price systems. Call this the *Epistemic Objection*. The second argument concerns the price system's incentive structure—that is, the incentives it gives to market agents for acting upon the information given by a well-functioning price system. According to this objection, an egalitarian price system would be severely inefficient due to the lack of economic incentives to work: without the promise of a wage differential, people would simply not work as hard as under an inegalitarian price system. I call this the *Incentives Objection*. I shall deal with these objections separately in what follows.

### *1.1. The Epistemic Objection*

The *Epistemic Objection* focuses on the epistemic function of market prices. As I noted in Chapter 3, one of the main functions of prices in a well-functioning price system is to communicate information about the relative scarcity of a given good. According to the objection, it would be impossible to fulfil this epistemic function without allowing for wealth inequalities among market participants. To understand the real force of the objection, one must be reminded that this function of market prices holds true not only for consumption goods, but also for wages—the price of labour. Now suppose that we design a price system committed to wealth equality and we equalise wages so that

everyone earns the same as everyone else. In such a case, the resulting equalised wages would no longer reflect the relative scarcity of each kind of labour: regardless of their levels of supply and demand, the price for different kinds of labour would always be identical. This lack of information regarding the relative scarcity of each kind of labour would be bound to create significant inefficiencies in the system. We would have no information about how to allocate resources in a way that maximises economic output: producers would not be able to know what kind of resources are needed, nor how much labour would be necessary to produce them. The inefficiencies in production would, in turn, create inefficiencies in resource allocation: demand for consumption would not match the goods supplied by production. Economic chaos in the name of equality would quickly ensue.

The epistemic deficits of a price system that does not track relative scarcity were forcefully stressed by Hayek:

> If [people] are to be able to judge what they ought to do, they must be given some readily intelligible yardstick by which to measure the social importance of the different occupations. Even with the best will in the world it would be impossible for anyone intelligently to choose between various alternatives if the advantages they offered him stood in no relation to their usefulness to society. To know whether as the result of a change a man ought to leave a trade and an environment which he has come to like, and exchange it for another, it is necessary that the changed relative value of these occupations to society should find expression in the remunerations they offer.[4]

Given these considerations, it seems clear that a system in which wages are equalised by *fiat* would be unfeasible. An egalitarian price system would be, by definition, insensitive to changes in supply and demand, and, consequently, it would be so severely inefficient that one might wonder if there would be any reason at all for having a price system in the first place.

I believe the best reply to this objection is simply to concede the point. If a price system does not track relative scarcity, then indeed one of the main reasons for having a price system disappears. Note, however, that this does not entail that a price system is not feasible within a society with egalitarian institutional arrangements. It only entails that a price system in which prices are equalised *by fiat* or otherwise fixed without taking relative scarcity into account is unfeasible. But this is not the only way to design a price system that preserves wealth equality (more on this later on). The only

[4] Friedrich A von (Friedrich August) Hayek, *The Road to Serfdom* (Routledge 1944) 129.

conclusion that follows from this, therefore, is that any price system, egalitarian or otherwise, must be able to track relative scarcity, and that a feasible egalitarian price system cannot afford the luxury of equalising prices *by fiat*. An egalitarian price system must reflect differences in the relative scarcity of different goods, and these differences must be reflected in different price rates and different wage rates or else we would lack information that is necessary to have an efficient system. If prices do not track relative scarcity—or, as Hayek puts it, if they do not "measure the social importance of the different occupations"[5]—then the price system cannot be said to be functioning properly. This holds true also for inegalitarian or otherwise unjust price systems.

Before proceeding to analyse the second (and, in my view, much more pressing) objection against an egalitarian price system, I would like to note that conceding the motivating thought behind the Epistemic Objection, as I have, does not entail conceding a somewhat pervasive use of the *Epistemic Objection* in political discourse which tends to blow the force of the objection out of proportion in order to oppose any form of state intervention—and therefore, any sort of institutional reform—in the ongoing price system.[6] One can safely discard the political use of the argument if one takes into account that, as I observed in Chapter 3, it is not the case that existing price systems track relative scarcity, or, at least, that relative scarcity is not the *only* thing that prices are tracking within such systems. As I stressed throughout Chapter 3, our current market prices typically track wealth inequality and other power imbalances along with relative scarcity in a way that makes it difficult to separate these factors from each other. Thus, if anything, an egalitarian price system would have a *pro tanto* epistemic advantage compared to our current price system, for it would not track inequalities of wealth. Thus, the political argument can be turned on its head: for market prices to fulfil their epistemic function, radical change is required. The political use of the argument (no change to the current price system) is inconsistent with its motivating premise (the epistemic benefits of market prices).

### *1.2. The Incentives Objection*

Let me now turn to the *Incentives Objection*. This second argument against the

[5] ibid.
[6] Hayek's *The Road to Serfdom* may be the clearest expression of such a blown-out-of-proportion political use. Cf Hayek, *The Road to Serfdom* (n 4).

feasibility of an egalitarian price system focuses on the incentives that the market system is supposed to provide to individuals to act upon the information given by market prices. According to this argument, even if prices were to track relative scarcity and were not, therefore, equalised by *fiat*, an egalitarian price system would fail to provide incentives for labour and production, leading to a society with less available resources to distribute among citizens. To see the force of the argument, let me modify the situation imagined for the *Epistemic Objection* and now suppose that different wage rates are indeed permitted, that prices and wage rates reflect the relative scarcity of goods and labour, but that there is a tax system in place which is used to equalise income available for individual consumption. In our imagined scenario, while pre-tax income would depend on the wage rates earned by each individual, those different individual earnings would be distributed equally among every member of society afterwards. Thus, pre-tax income would be indeed different for each individual, but post-tax income (the actual income available for individual consumption) would be equal for all. Prices in this system would be able to manifest both the value of efficiency (because they track relative scarcity and therefore communicate information to allocate resources to their best employment) and distributive justice (because they would secure or at least not impinge upon wealth equality).

The problem with this system—and this is the important point of the *Incentives Objection*—would be that the elimination of post-tax wage differentials would have also eliminated the incentive to work, and a more efficient production of wealth with it. This creates a problem for an egalitarian price system, for the epistemic benefits of market prices would only be achieved at the expense of allowing post-tax wage differentials and, therefore, inequality of wealth.

Why are economic incentives incompatible with wealth equality? Because they are, by definition, incentives to receive a larger share of resources, upsetting therefore the ideal of equal distribution of wealth to which an egalitarian society aims at. Therefore, the incentives structure embedded within the price system would not conform to the normative ideal of distributive egalitarianism. The price system—even an egalitarian price system—would be, therefore, inherently at odds with wealth equality.

We can state the challenge against the feasibility of an egalitarian price system as a dilemma: either prices are equalised by fiat, in which case the price system would be so severely inefficient that there is no reason for having it in the first place, or they

are not, in which case the price system itself would promote inequality of outcome. In both cases, an egalitarian price system would be unfeasible.

I believe the solution to the *Incentives Objection*—and, therefore, to the previously mentioned dilemma—lies within a virtue-based approach to price justification. However, before expanding on my own answer to the problem, let me review some other lines of reply one could take.[7]

The first line of reply can be called the *Marxist Reply*. The *Marxist Reply* is pretty straightforward: it consists in eliminating the inequalities created by economic incentives embedded in price mechanisms by eliminating the price mechanism altogether. Any other solution—including advocating for a mechanism of *just* prices—would reproduce and perpetuate structural injustice.

To the Marxist, advocating for an egalitarian price system and for just prices is merely a conservative half measure.[8] In his address entitled *Wages, Price, and Profit* (1865) Marx explicitly warned against what he perceived as the danger of conservative reformism embedded within the demand of the working class for fair wages:

> [The working class] ought not to forget that they are fighting with effects, but not with the causes of those effects; that they are retarding the downward movement, but not changing its direction; that they are applying palliatives, not curing the malady. They ought, therefore, not to be exclusively absorbed in these unavoidable guerrilla fights incessantly springing up from the never-ceasing encroachments of capital or changes in the market. (…) Instead of the *conservative* motto, "*A fair day's wage for a fair day's work*" they ought to inscribe on their banner the *revolutionary* watchword, "*Abolition of the wages system!"*[9]

The *Marxist Reply* brings to the fore the possibility that the search for a just price entails an unstable and normatively unattractive compromise between distributive justice and efficiency. The underlying idea behind this rejection of a system

[7] The relationship between equality and incentives has been extensively discussed in the literature, usually against the background of Rawls' political philosophy and his defence of the difference principle—namely, that inequalities are justified when they benefit the worse off. However, the idea that inequalities are justified when they benefit the worse off is not exclusive to Rawls' difference principle. It also figures prominently in authors with very few egalitarian credentials such as Hayek. See Hayek, *The Constitution of Liberty* (n 114) 39–48.

[8] Needless to say, I am using the term 'Marxist' only to denote those who affirm the elimination of the price system as the only solution to the Incentives Objection. I would not want to deny the possibility of some idiosyncratic 'Marxist' theory of the just price built upon different grounds (such as, for instance, some account of Marx's labour-theory of value as the benchmark for just value).

[9] Karl Marx, 'Wages, Price and Profit', *Marx and Engels: Selected Works in One Volume* (Lawrence and Wishart 1968) 225–226. For an insightful comment on this passage, and on Marxism's attitude towards social reform, see Gerald A Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press 2000) 71–72, 58–78.

of just prices is that, normatively speaking, whenever we are forced to choose between market efficiency and distributive justice, we should always choose the latter. According to the *Marxist Reply*, the dilemma between distributive egalitarianism and efficiency is, in fact, inescapable.

The *Marxist Reply* to the *Incentives Objection* is fundamentally flawed, and this for two reasons. First, because, contrary to the Marxist suggestion, wealth equality would be impossible to achieve without the price mechanism. In a society where people value different things for different reasons, not only economic coordination, but economic equality itself depends upon a shared metric of value. Market prices provide this shared metric. Without market prices and the commensuration of value they make possible, wealth equality would be utterly unintelligible.[10]

Secondly, the *Marxist Reply* fails to take the *Epistemic Objection* seriously enough. In effect, it downplays the importance of the epistemic benefits of markets for coordination. There is now widespread consensus among economic scholars that Ludwig von Mises' argument about the inefficiency of what he calls 'socialism'—more precisely, about the inefficient resource allocation that necessarily follows from the epistemic failures of a system in which the factors of production have no market prices[11]—was indeed correct, and that the outcome of the 1920s-1940s debate over what in economic theory is called the 'economic calculation problem'—the problem for central planners of calculating prices without information given by market prices of the factors of production—suggests that centralised planning cannot provide market agents with enough information to allocate resources to their best use.[12] The failure of the economic socialist experiments of Cuba, China, the Soviet Union and the Eastern Bloc—and, we might add, the failure of price control policies in Venezuela—seems to have brought some empirical confirmation to this claim.[13]

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[10] As recently noted by Hanoch Dagan and others, 'The Law of the Market' (2020) 83 Law and Contemporary Problems 18, xvi; This view was famously defended by Ronald Dworkin. See generally Ronald Dworkin, 'What Is Equality? Part 2: Equality of Resources' (1981) 10 Philosophy & Public Affairs 283.

[11] Ludwig Mises, *Socialism: An Economic and Sociological Analysis* (J Kahane tr, Second edition, Liberty Fund 1932).

[12] On the economic calculation problem, see generally David Ramsay Steele, *From Marx to Mises: Post-Capitalist Society and the Challenge of Economic Calculation* (Open Court 1992).

[13] But see Carens (n 2) 166: 'The failure of a few preliminary attempts to rely on moral incentives could no more be decisive for the question of whether such incentives could ever be effective than the failure of a few preliminary attempts to fly could be decisive for the question of whether air travel was possible. The point is not that anything can happen. That kind of vague generalization would destroy the whole purpose of the inquiry. The point is rather that there is a significant body of theoretical literature in the social sciences which is based on empirical investigations but which attempts to draw general lessons

The failure of the *Marxist Reply* highlights the fact that while justice may be, as Rawls famously claimed, "the first virtue of social institutions"[14], it is certainly not the *sole* virtue of social institutions, nor is it a one-dimensional virtue. Prices can be unjust for reasons other than because they manifest distributive injustice. Indeed, certain failures to respect efficient allocation of resources can also constitute injustices. Moreover, it might be *unjust* to realise perfect distributive justice at the expense of efficiency. As the levelling down objection shows (see Chapter 3, Section 3), achieving equality without benefitting anyone might fulfil the requirements of wealth equality, but depressing everyone's condition would hardly be considered a just societal arrangement, even if motivated by principles of justice and wealth equality. Therefore, a just price system—that is, a system that generates just prices—must be sensitive to considerations that are not directly related to distributive justice and display virtues other than distributive justice such as, for instance, efficiency, as well as circumstances of fact that may affect the effective realisation of the principle. Justice alone ought not to dictate policy.[15]

A second line of reply to the *Incentives Objection,* which might be called the *Trade-Off Reply,* suggests itself from these remarks. Like the *Marxist Reply*, the *Trade-Off Reply* also bites the bullet: efficiency and distributive egalitarianism are indeed incompatible. Unlike the *Marxist Reply*, however, the *Trade-off Reply* claims that a trade-off between efficiency and distributive justice is a better solution than simply eliminating the price mechanism. This line of reply concedes that an efficient price mechanism will always produce inegalitarian outcomes and claims that the solution to the incentives problem is a matter of policy: we must decide whether we are willing to endorse a system of market prices that allocates resources to their best employment at the expense of a more egalitarian distribution of resources, or whether we are willing to sacrifice efficiency in order to get economic outcomes that maximise distributive justice. For most economists, the former option is normally preferable to the latter.[16] Due to their advantageous effects in society, the decision not to forego

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not limited to particular cases. (...) The Cuban and Chinese experiences clearly provide evidence about what social arrangements are possible in Cuba and China at this moment in history, but this evidence does not modify the theoretical literature in any significant way(...).'

[14] John Rawls, *A Theory of Justice* (Revised edition, Harvard University Press (Belknap Press) 1971) 3.

[15] For a similar point, see GA Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008) especially 302-307.

[16] I say 'normally' because there are indeed cases in which distributive justice trumps efficiency, even for efficiency-minded theorists. See, for instance Joseph Heath, 'On the Very Idea of a Just Wage'

potential increases in welfare despite their inegalitarian effects is one that, for efficiency-minded theorists, recommends itself.[17]

I have no objections to this line of reply as a matter of policy. In effect, policy making, and the design of rules regulating the price system, almost inevitably leads to trade-offs between equality and efficiency. However, just price theory is not *only*—and not even primarily—a matter of policy or of institutional design. It is fundamentally about the analytical and normative implications of justice when applied to prices and the price system, and there are indeed a few conceptual and normative points that one must bear in mind before accepting the trade-off solution as definitive or as the only sensible reply.

First, trade-offs are only necessary when circumstances make it the case that one must choose efficiency at the expense of distributive justice or vice versa, *i.e.*, when there is no better option available. But there is, in principle, a better option available, namely, one in which economic incentives are not necessary for incentivising the well-off, *i.e.*, one in which the well-off in society work as hard *without* asking for extra economic motivation. This would be the case, for instance, in a society in which labour is conceived as the satisfaction of one's duty towards society and where this duty alone—or some other similar virtuous motivation, such as, for instance, solidarity among fellow citizens or a different virtue that could track a deep concern for the wellbeing of others, conjoined with an equally deep commitment to material equality as a condition to seeing each other as equals—provides sufficient motivation to work even in the absence of further economic incentives.[18] Thus, the need for a trade-off only makes sense under one critical assumption, namely, that those in society who are benefitted from the ongoing distribution of resources are not willing to work as hard without economic incentives and, therefore, are unwilling to renounce

(2018) 11 Erasmus Journal for Philosophy and Economics 1, 27: 'Now there are very few countries in the world in which there is not *some* interference in labour markets motivated by concerns over distributive justice. Minimum wage legislation provides the least controversial example. The point is that these constitute *interferences* in the labour market. Left to its own devices, there is no reason to think that the labour market will tend to produce wages that are "fair" or "just". And to the extent that we do allow market forces free reign in this domain, it is not because we consider the outcomes to be satisfactory from the standpoint of distributive justice, it is that we regard them as desirable from the standpoint of efficiency.' (emphasis in the original)

[17] Heath (n 16).

[18] The case for the feasibility of a scheme in which equality and efficiency are satisfied has been argued, among others, by Carens (n 2); Joseph H Carens, 'Rights and Duties in an Egalitarian Society' (1986) 14 Political Theory 31; TM Wilkinson, *Freedom, Efficiency, and Equality* (Palgrave Macmillan UK 2000); Stuart White, *The Civic Minimum: On the Rights and Obligations of Economic Citizenship* (Oxford University Press 2003); Cohen, *Rescuing Justice and Equality* (n 15).

their wage differentials.[19]

A virtue-based approach to price justification allows us to reassess this assumption both in the sense of putting pressure on (i) the normative justification for accepting it and in the sense of (ii) reviewing its implications for the design of price-related institutions.

Let me start with dealing with the normative justification for allowing economic incentives in the price system. To be sure, it may be the case that, as a matter of fact, the well-off simply *will not work as hard* without economic incentives, and in that sense, this is a fact that needs to be dealt with by policy makers when establishing incentives to work. Indeed, it would be bad policy *not* to take it into account. But the normative point that a virtue-based approach to just pricing brings to the fore is that this fact is not a necessary condition that follows from the very nature of the price system. The lack of an *ethos* of commitment to distributive egalitarianism is simply a contingent fact of our current world. Moreover, it is the very behaviour of well-off people which makes this fact true, for it is certainly *possible* for them to work as hard as they currently do without economic incentives, and without, therefore, generating inequalities.[20] Whatever its merits, the point is that a price system focused on giving incentives to the well-off to work harder simply because they are not willing to work as hard without the promise of wage differentials cannot be said to be *equally just* as one in which the well-off do not require such incentives.[21]

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[19] This is the insight at the heart of G. A. Cohen's critique of Rawls' difference principle. See Cohen, *Rescuing Justice and Equality* (n 15) 27–86. Fernando Atria and Claudio Michelon have made a similar point, focusing on the fact that the difference principle not only naturalises self-interest or greed, but an inegalitarian motivational structure according to which agents would seek not only to possess *more* goods, but to possess *more goods than the rest*. The difference principle would rely, therefore, on *envy* rather than greed. See Fernando Atria and Claudio Michelon, 'Una Crítica al Principio de La Diferencia' in Agustín Squella (ed), *El Pensamiento Filosófico y Político de John Rawls* (EDEVAL 2007).

[20] Equality does not necessarily rule out fair compensation. If a job requires more time and/or effort than another job, then income differentials are not prohibited, but rather required for those jobs. Otherwise, those whose work is more difficult, risky, or costly would get less overall than those with a less demanding job. To be sure, introducing the idea of fair compensation according to a job's 'difficulty' is problematic: we do not seem to have a very good measure for evaluating how difficult a job is compared to another. One possible solution is to adopt time spent working as the normatively relevant factor. For a proposal along these lines, see Mathias Risse and Gabriel Wollner, *On Trade Justice: A Philosophical Plea for a New Global Deal* (Oxford University Press 2019) 209–210.

[21] Jan Narveson has nicely illustrated the normative concern behind the incentives argument for economic inequality with an imaginary dialogue between two people—Well-off and Worse-Off, which I take the liberty to reproduce in full:

> *Well-off*: "Look here, fellow citizen, I'll work hard and make both you and me better off, provided I get a bigger share than you."
>
> *Worse-off*: "Well, that's rather good; but I thought you were agreeing that justice requires equality?"
>
> *Well-off*: "Yes, but that's only a benchmark, you see. To do still better, both of us, you

Which brings me to the second point: a virtue-based perspective of practices and institutions also puts pressure on the claim that assuming that people will be motivated by economic incentives is always good as a matter of policy. If rules regulating the practice are supposed to create an incentive structure that makes the performance of actions in accordance with the internal goods of the practice more likely than the performance of actions that subordinate those internal goods to external goods[22], then economic incentives for the well-off might not be the best way to secure the internal goods of the practice. The assumption that wage differentials will incentivise the well off to work more is usually made on the basis that institutional design must assume the perspective of a self-interested individual. In effect, according to a very respectable line of political philosophers, economists, and jurists, including, among many others, authors such as Machiavelli[23], Mandeville[24], Hume[25], Smith[26],

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understand, may require differential incentive payments to people like me."
*Worse-off*: "Oh. Well, what makes them necessary?"
*Well-off*: "What makes them necessary is that I won't work as hard if I don't get more than you."
*Worse-off*: "Well, why not?"
*Well-off*: "I dunno… I guess that's just the way I'm built."
*Worse-off*: "Meaning, you don't really care all that much about justice, eh?"
*Well-off*: "Er, no, I guess not."
(Jan F Narveson, 'Rawls on Equal Distribution of Wealth' (1978) 7 Philosophia 281. Quoted with approval in Cohen, *Rescuing Justice and Equality* (n 15) 27.)

[22] As noted in Chapter 4, Section 1.2.

[23] Niccolò Machiavelli, *Discorsi Sopra La Prema Deca Di Tito Livio (1513-1517)* (Rizzoli 1984) 69–70: 'Anyone who would found a republic and order its laws must assume that all men are wicked [and] (...) never act well except through necessity (...). It is said that hunger and poverty make them industrious, laws make them good.'; Translation by Samuel Bowles in Samuel Bowles, *The Moral Economy: Why Good Incentives Are No Substitutes for Good Citizens* (Yale University Press 2016) 12.

[24] Bernard Mandeville, *The Fable of the Bees, or Private Vices, Publick Benefits (1714)* (Clarendon Press 1924) 24: '[This work contains] several discourses to demonstrate that human frailties (...) may be turn'd to the advantage of civil society, and made to supply the place of moral virtues (...) [with the result that] the worst of all the multitude did something for the common good.'

[25] David Hume, 'Of the Independency of Parliament' in Eugene F Miller (ed), *Essays: Moral, Political, and Literary (1777)* (Revised edition, Liberty Fund 1994) 42–43: 'Political writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest. By this interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to public good. (...) It is therefore a just political maxim, that every man must be supposed a knave: Though at the same time, it appears somewhat strange, that a maxim should be true in politics, which is false in fact.'

[26] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol 1 (RH Campbell and AS Skinner eds, Liberty Fund 1976) Book 4, chapter 2.: '[The businessman, the consumer, the farmer] intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.'

Bentham[27], John Stuart Mill[28], Francis Y. Edgeworth[29], Oliver Wendel Holmes Jr.[30], and (with some qualifications) Friedrich Hayek[31], institutional design must assume that *everyone* is self-interested.[32] According to this view, the purpose of institutional design is, as Bowles puts it, "harnessing knaves"[33], *i.e.*, making self-interest work for the public good. On this view, to assume that people will not be willing to work as hard without getting some economic reward out of it would always be good policy advice when designing the incentive structure of a price system.

While the assumption of universal self-interest can indeed be a sensible assumption to make in certain cases, it can quickly become problematic when conjoined with one further assumption, namely, that economic incentives and moral considerations are, as economists put it, *additively separable*—that is, that the effects of variations in one do not depend on variations on the other.[34] By making this assumption, policy makers can easily overlook the relevant synergies between economic motivation and ethical considerations. Empirical research has shown that additive separability does not always obtain, and this for two main reasons. First, because there are cases in which economic incentives often do not work as well as

[27] Jeremy Bentham, *The Works of Jeremy Bentham (1843)*, vol 8 (John Bowring ed, Russell and Russell 1962) 380: 'Make it each man's interest to observe (...) that conduct which it is his duty to observe.'
[28] John Stuart Mill, *Essays on Some Unsettled Questions of Political Economy* (John W Parker, West Strand 1844) 137–138: [Political economy] does not treat of the whole of man's nature (...). It is concerned with him solely as a being who desires to possess wealth (...). It predicts only such (...) phenomena (...) as take place in consequence of the pursuit of wealth. It makes entire abstraction of every other human passion or motive.".
[29] Francis Y Edgeworth, *Mathematical Physics: An Essay on the Application of Mathematics to the Moral Sciences* (Kegan-Paul & Co 1881) 16: 'The first principle of Economics is that every agent is actuated only by self-interest.'
[30] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 459–462: 'If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one who finds his reasons for conduct, whether inside the law or outside it in the vaguer sanctions of conscience (...). The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it--and nothing else.'
[31] Friedrich A von Hayek, *Individualism and Economic Order* (University of Chicago Press 1948) 11–12: 'Smith's chief concern was not so much with what man might occasionally achieve when he was at his best but that he should have as little opportunity as possible to do harm when he was at his worst. It would scarcely be too much to claim that the main merit of the individualism which he and his contemporaries advocated is that it is a system under which bad men can do least harm. It is a social system which does not depend for its functioning on our finding good men for running it, or on all men becoming better than they now are, but which makes use of men in all their given variety and complexity, sometimes good and sometimes bad, sometimes intelligent and more often stupid. Their aim was a system under which it should be possible to grant freedom to all, instead of restricting it, as their French contemporaries wished, to "the good and the wise".'
[32] I have borrowed many of the quotes above from Bowles (n 23) 9–39.
[33] ibid 16.
[34] For this paragraph I am following ibid passim, but especially 21-25.

intrinsic motivation—or, as MacIntyre would put it, motivation stemming from achieving the internal goods of the practice sometimes works better than motivation from external goods. But also, and more importantly for our present purposes, because sometimes the mere presence of economic incentives makes people act more self-interestedly than in their absence. When this happens, the assumption of self-interest typically becomes a self-fulfilling promise.

A virtue-based approach to just price theory can accommodate the fact that it is not necessary, and it might even be counterproductive, to always assume self-interest as a matter of policy, and that it is possible to conceive a society in which citizens sufficiently motivated by equality would not need economic incentives or the promise of a higher income in order to work as hard as they do under current institutional arrangements. The upshot of this view for the price system is that price-related institutional arrangements with a different incentive structure—one that does not rely so heavily on the assumption of self-interest—could help shape individual motivation towards a more egalitarian ethos. If that situation, however unlikely, indeed obtains, then in such a world we would not require any trade-offs between efficiency and justice. In such a world, the epistemic benefits of market prices would not clash with equality. When citizens are motivated by the virtue of justice, a just price system is indeed potentially feasible.

## 2. From Potential Feasibility to Actual Feasibility? Private Law, Distributive Justice, and the Price System

Potential feasibility of a just price system is enough to answer the *Incentives Objectio*n. But is there any way to make a just price system *actually* feasible? The demand for a just price system and wealth equality is compatible with many different institutional arrangements. I have already mentioned some of them in Chapter 1: the provision of basic goods by public utility[35], decommodification of certain goods—or, more broadly, leaving out of the market whole aspects of our life that for some reason ought not to

[35] William Boyd, 'Just Price, Public Utility, and the Long History of Economic Regulation in America' (2018) 35 Yale Journal on Regulation 59.

be for sale—[36], universal basic income schemes, etc.[37] Another alternative is to counter the negative redistributive outcomes of market design through progressive tax measures and other redistributive institutional arrangements aimed at tackling wealth inequality.[38] These alternatives have in common that they are *external* to the normal functioning of the price system. By this I mean that they either limit the *scope* of the market (decommodification) or its negative distributive *consequences* (taxes, universal basic income), but neither of them challenge the inegalitarian logic and the self-interested rationality embedded within a price system based solely on economic incentives. In other words: these are institutional measures that shape the market *at the margins, not at its core*.

There is a difference between these economic policies and the demands for institutional arrangements that suggest themselves from a virtue-based approach to just price theory, in which incentives ought to help in making actions motivated by the internal goods of the practice more likely than actions motivated by either acquisitiveness—that is, for a desire for more external goods—or envy—a desire for more external goods compared to other people. The alternative that suggests itself from a virtue-based approach to price justification is the reshaping of price-related practices and their underlying motivations by changing the institutions that regulate them. Indeed, one of the core insights of just price theory, one that is not only present in a virtue-based approach to price justification, but on the very account of prices as institutional facts, is that the price system is the contingent product of human choice. To assume otherwise would be to assume that market prices reflect an immanent market logic or some 'natural core' that cannot be modified by institutional contexts. But as I have already suggested when arguing against an essentialist understanding of just prices and highlighting their conceptualisation as institutional facts[39], there is no such thing as a pure abstract market logic independent from human choice. In effect,

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[36] Margaret Jane Radin, *Contested Commodities* (Harvard University Press 1996); Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press 2012); Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus & Giroux 2012); See also Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24 Social & Legal Studies 598.

[37] See Chapter 1, Section 1.3.

[38] On tax justice, see generally Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002); For the case for imposing a significant inheritance tax, see the excellent Daniel Halliday, *The Inheritance of Wealth: Justice, Equality, and the Right to Bequeath* (Oxford University Press 2018).

[39] See Chapter 2, Section 2.

markets operate through law, and there is not a single economic institution that is not, at the same time, a *legal* institution. Prices are no exception to this.[40] If this is true, then the relationship between wealth inequality and market prices is contingent upon a regrettably pervasive but by no means inevitable design. A theory of the just price which involves a commitment to wealth equality—either because it conceives wealth equality as a just-making feature of prices, or because wealth equality is a condition for another just-making feature to obtain, such as efficiency or autonomy-as-nonalienation[41]—ought to favour legal arrangements that help in designing market structures that are less prone to reflect and conceal inegalitarian patterns of wealth distribution.

While there are many legal arrangements that are relevant for the reshaping of the price system, perhaps none is more directly relevant for our purposes than private law—and particularly the laws that regulate voluntary transactions in private settings, *i.e.*, contract law. Since contract is one of the core legal institutions that makes markets possible, the rules regulating and shaping our contractual practices also shape markets.

Now, this claim has one important caveat that I should mention before analysing the role of private law in the reshaping of the price system. The caveat is this: the influence of background wealth in relative scarcity is more salient for certain types of economic goods than for others, and this is something that must be taken into account when designing price-related rules and institutions. The following table summarises the relationship between relative scarcity and background wealth for different types of economic goods, as well as the impact that an increase or decrease in consumer income levels on the demand and price of each kind of good:[42]

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[40] On this, see Rudolph Kaulla, *Theory of the Just Price: A Historical and Critical Study of the Problem of Economic Value* (Robert D Hogg tr, George Allen & Unwind Ltd; W W Norton & Co, Inc 1940) 73–95; John R (John Rogers) Commons, *Legal Foundations Of Capitalism* (Madison : University of Wisconsin Press 1968); On Common's idea of the just price as the reasonable price, see Yngve Ramstad, 'John R. Commons's Reasonable Value and the Problem of Just Price' (2001) 35 Journal of Economic Issues 253; For a recent study on market ordering through the law, see the introductory essay for a special issue on markets and the law in Law and Contemporary Problems: Hanoch Dagan and others, 'The Law of the Market' (2020) 83 Law and Contemporary Problems 18.

[41] One conception of the just price that does not involve a commitment to wealth equality is the one based on the value of autonomy-as-sovereignty. This conception is analysed in the next chapter.

[42] The table follows a fairly standard typology of market goods. Cf. Murray Milgate, 'Goods and Commodities' in Steven Durlauf and Lawrence Blume (eds), *The New Palgrave Dictionary of Economics* (2nd edn, Palgrave Macmillan 2008).

| **Type of goods** | **Relative scarcity sensitive to changes in background wealth?** | **Effect in demand and prices when consumer income level increases:** | **Effect in demand and prices when consumer income level decreases** |
|---|---|---|---|
| Basic goods (electricity, water, etc.) | No | Insignificant | Insignificant |
| Inferior goods ('cheap' goods: canned soups, cheap clothes, etc.) | Yes | Demand decreases and prices increase. | Demand increases and prices decrease. (except for *Giffen goods*: demand increases when prices increase) |
| Normal goods ('standard' mobile phones, organic bread, etc.) | Yes | Demand increases and prices decrease | Demand decreases and prices increase |
| Superior goods (caviar, wine, smoked salmon, etc.) | Yes | Demand increases and prices decrease, but demand increase exceeds the proportional income increase. | Demand decreases and prices increase, but demand decrease exceeds the proportional income decrease |
| Veblen goods (jewels, Swiss watches, expensive clothes, expensive wines, etc.) and positional goods (residential properties in a fancy neighbourhood, college degrees at prestigious universities, etc.) | Yes | Demand increases and prices increase | Demand decreases and prices decrease |

What I said above regarding the influence of background wealth in our

perception of relative scarcity holds true for *normal goods*, for which demand increases when consumer income levels increase: as explained in Chapter 3, the reservation prices of both buyers and sellers change in proportion to an income increase. It also holds true for *superior goods*, which are normal goods for which the demand increase exceeds the proportional income increase (typical examples of superior goods are wine, caviar, and smoked salmon). It also holds true for luxury goods and positional goods, for the value of *luxury goods*—also known as *Veblen* goods, such as jewels, Swiss watches and other items that reflect social status—is highly sensitive to the background wealth of the people who buy them: the quantity demanded increases as prices increase, and prices typically increase when consumer income levels increase.[43] The same goes for some (but not all[44]) *positional goods*, for which their economic value derives from their unequal distribution, *i.e.*, from the fact that only the 'haves' can access them while the 'have-nots' are left behind.[45] The value of certain positional goods(for instance, housing prices in an exclusive neighbourhood) is inseparable from the perceived value of those who buy them, and the 'value' of the buyer is measured in terms of their relative wealth (for instance, housing prices in an exclusive neighbourhood is defined precisely by exclusivity: the whole point of exclusive neighbourhoods is to exclude people who cannot afford to live there). However, the same relationship between prices and consumer income levels does not hold for *necessary or basic goods*. The relative scarcity of *basic goods* such as water, electricity, health and dental care, prescription drugs, etc. is much more connected to absolute or quasi-absolute limitations in supply such as availability of land or of natural raw materials than to consumer income levels. This makes the influence of background wealth of buyers and sellers less relevant to the relative scarcity of the product.[46] In other words, the demand for basic goods is independent of the income level of consumers, which is what makes some of these goods perfect candidates for provision by public utility—an institutional arrangement specially linked to the doctrine of the just price—[47] or for decommodification. This also explains why price gouging (raising the price on basic goods and services in the event of a natural disaster or

[43] Thorstein Veblen, *The Theory of the Leisure Class* (Martha Banta ed, Oxford University Press 1899).
[44] The value of some positional goods, such as a college degree from a prestigious university, is partially dependent upon social status, rather than background wealth.
[45] On this, see Fred Hirsch, *Social Limits to Growth* (Routledge & Kegan Paul 1977) 15–26.
[46] Cf ibid 19–23.
[47] On the connections between just price theory and public utilities, see Boyd (n 35). See also Chapter 1, Section 1.3 of this dissertation.

other crisis) usually raises questions of justice in pricing.[48] Finally, the demand for *inferior goods* (what we would call 'cheap' or lower-quality goods: a cheap car, cheap clothes, etc.) decreases when consumer income levels increase, although some of them—called *Giffen goods*—do not obey this pattern: for some basic goods such as bread, their demand increases along with their price.[49]

With this important caveat in mind, let me now come back to the role of private law in reshaping the price system. The design of an egalitarian price system would involve an expansion of the traditional role assigned to private law vis-à-vis distributive justice. According to the standard view of private law, concerns about distributive justice are thought to be peripheral at best, or completely absent at worst.[50] This is the case for both non-instrumentalist and instrumentalist approaches to private law. Thus, non-instrumentalist scholars such as Ernest Weinrib have argued that the election of a certain distributive pattern among alternatives involves the consideration of a goal which is political and, therefore, external to the sole normative concern of private law, namely, corrective justice.[51] Peter Benson has also advocated for a non-distributive, purely transactional account of contract law.[52] On the instrumentalist side, Alan Schwartz has argued that while wealth maximization is a neutral and apolitical goal, distributive decisions are inherently political and, therefore, best left to accountable branches rather than the judiciary (which is the branch that would have to make distributive decisions if private law took distributive justice as one of its goals).[53] This view is held even by contract law theorists advocating for just prices. James Gordley, for instance, has argued that the just price is the price that preserves the ongoing distribution of purchasing power. According to Gordley, contract law should not

[48] See, for instance, Alabama Code § 8-31-4 (2017), Florida State §501.160 (2017), Mississippi Code Ann. §75-24-25 (2008), Ohio Rev. Code Ann. §1345.01 (2009), California Penal Code § 396 and §396b. On price gouging in general, see the influential Matt Zwolinski, 'The Ethics of Price Gouging' (2008) 18 Business Ethics Quarterly 347.

[49] Alfred Marshall, *Principles of Economics* (Third edition, Macmillan 1895): 'As Mr. Giffen has pointed out, a rise in the price of bread makes so large a drain on the resources of the poorer labouring families and raises so much the marginal utility of money to them, that they are forced to curtail their consumption of meat and the more expensive farinaceous foods: and, bread being still the cheapest food which they can get and will take, they consume more, and not less of it.'

[50] For discussion, see Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 Michigan Law Review 138.

[51] Ernest Joseph Weinrib, *The Idea of Private Law* (Rev edition, Oxford University Press 1995) 211.

[52] Peter Benson, *Justice in Transactions: A Theory of Contract Law* (The Belknap Press of Harvard University Press 2019). In the next section I argue that Benson's approach allows us to rescue the value of autonomy-as-sovereignty in price justification.

[53] Alan Schwartz, 'Products Liability and Judicial Wealth Redistributions' 51 Indiana Law Journal 558, 564.

enforce redistribution of wealth through contractual means because that would imply changing the current distribution of wealth by means other than a collective decision.[54] In sum, the received wisdom regarding contract law suggests that redistribution through contract would be illegitimate because the redistribution of goods in society is a political decision, and therefore only accountable branches of government rather than the judiciary should be concerned with it. It would follow, therefore, that concerns over distributive justice are better left to the legislature or, in any case, to elected officials accountable to the public, and not to private law. In what follows, I take issue with this view.

The first step to get the argument off the ground is to note that courts make political and distributive decisions all the time, even when deciding private law cases. A decision not to upset the current distribution of resources—the *status quo*—is as political in nature as a decision to deviate from it.[55] This is certainly the case in public law litigation, where concerns over equality are sometimes at the core of judicial rulings that upset the *status quo*. The famous decision in *Brown v Board of Education* might be the best illustration of this phenomenon.[56] Now, suppose that the judges in *Brown* had decided that the 'separate-but-equal' standard was all that equality required. To claim that such a decision would have been apolitical seems implausible. An analogous argument can be made for distributive justice: court rulings that preserve the current distribution of resources are as political as those that upset it.

The relevant question, therefore, would seem to be not whether courts should be allowed to make political decisions, but whether courts should be allowed to make distributive judgments, or to be more precise, whether courts have strong reasons *not* to upset the current distribution of wealth. But the question would be, again, somewhat misleading. The fact is that courts *cannot avoid upsetting the ongoing distribution of wealth*. Distributive judgments in private litigation are inevitable because the application of private law rules and institutions has inescapable distributive effects. The first and more obvious effects are the effects that private law rules have on the overall direction of the economy by granting judicial protection of the right to property. As Robert Hale famously argued, the protection of property rights by courts affects

[54] James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press 2006) 404.
[55] For a similar point in the context of tort law, see Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007) 26.
[56] *Brown v Board of Education*, 349 US 483 (1954).

income distribution, including the *future* distribution of resources.[57] Additionally, private law rules systematically redistribute wealth, and often regressively. Moreover, and apart from its direct redistributive effects, there is also a *symbolic* or *expressive effect* of private law that tends to legitimise ongoing patterns of wealth distribution. In what follows, I illustrate the distributive effects of private law by focusing on the regressive distributive effects of certain core private law doctrines, both in tort law and contract law. Borrowing from the work of Tsachi Keren-Paz, I analyse the regressive distributive effects of the principle of *restitutio ad integrum* or full compensation in tort law and of the standard of care in tort liability. Then I focus on the need for a wealth-sensitive approach to private law rules and on the symbolic or expressive distributive effects of contractual remedies that include a concern for just prices, especially remedies against *laesio enormis*.

The *restitutio ad integrum* or full compensation rule (RAI) is one of the basic rules behind the awarding of damages in tort law. As the name suggests, RAI demands that the amount of compensation awarded to the successful plaintiff should put him or her in the position he or she would have been had the tortious action not been committed. The RAI is, by definition, a rule that restores and protects the distributive *status quo*, both directly and symbolically.[58]

The direct distributive effects of RAI are regressive in nature. Tsachi Keren-Paz provides four reasons in support of this claim.[59] First, the RAI provides an *incentive to risk the poor*. Since the poor have less to lose than the rich, it is cheaper to compensate them. This creates an incentive for tortfeasors to transfer risk to the poor.[60] Although tortfeasors cannot always choose their victims, sometimes they can, and when they do, RAI allows them to channel risk towards the disadvantaged, as the proliferation of locally undesirable land uses ('LULUs') in low-income neighborhoods shows.[61] Second, although the RAI demands full compensation, in practice tort law

[57] Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470; Morris R Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Quarterly 8; Keren-Paz (n 55) 25.
[58] Keren-Paz (n 55) 67; Richard L Abel, 'A Critique of Torts' (1989) 37 UCLA Law Review 785.
[59] Here I am heavily borrowing from Keren-Paz (n 55) 68–69.
[60] Richard Posner has also conceded this point. See Richard A Posner, 'Wealth Maximization and Tort Law: A Philosophical Inquiry' in David G Owens (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995) 110; Keren-Paz (n 55) 68.
[61] Denis J Brion, 'An Essay on LULU, NIMBY, and the Problem of Distributive Justice' (1988) 15 Boston College Environmental Affairs Law Review 437; Denis J Brion, *Essential Industry and the Nimby Phenomenon* (Quorum Books 1991).

*undercompensates victims*, especially those with severe injuries. As one would expect, the effects of undercompensating are more severe for the worst-off than the well-off.[62] Third, there is the problem of *regressive cross-subsidy* in liability (third-party) insurance.[63] Liability insurance exacerbates the regressive distribution of wealth caused by RAI because, since the identity of the victim is unknown to the insurer, this creates a regressive distribution of resources from poor victims and insured groups to rich victims. As Keren-Paz explains,

> neither the insurer nor the insured know in advance the identity of the victims of the insured activity. Therefore the insurer cannot calculate the expected liability of the individual insured. The insurer will collect a premium that is based on the expected loss of the *average* victim—rich and poor alike. It follows that the insured group (the potential tortfeasors) pay roughly equal premiums, while victims, because of RAI, receive different amounts that are a function of their pre-accident wealth. [64]

Finally, RAI *ignores the diminishing marginal utility of money*. The RAI concentrates full compensation in one person—the tortfeasor. This is a more regressive arrangement than a solidary system in which the costs of compensation are spread among a larger number of people.[65]

The symbolic or expressive effects of the RAI are also problematic. By taking the pre-accident distribution of resources as an adequate benchmark, the RAI is instrumental in its legitimisation. Restoring the parties to the *status quo* assumes the desirability of the original distribution of resources compared to the new distribution and sends the message that the *status quo* is a desirable status, one that is "natural, neutral, and unproblematic."[66] Moreover, the fact that the RAI involves different rates of compensation for identical injuries also sends an inegalitarian message, namely, that "the rich, the young and the healthy are worth more than the poor, the old and the sick."[67]

Another example of the regressive distributive effects of tort law rules is the

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[62] Keren-Paz (n 55) 68, n9, n10 and the literature cited therein.
[63] First-party insurance is not so affected by regressive cross-subsidy. As Keren-Paz notes, it is easier for the insurer to calculate the expected loss of the insured than it is to calculate the expected loss of the victim. ibid 69; George L Priest, 'The Current Insurance Crisis and Modern Tort Law' (1987) 96 The Yale Law Journal 1521.
[64] Keren-Paz (n 55) 69.
[65] ibid.
[66] ibid 67.
[67] Keren-Paz (n 55).

standard of care for tort liability.[68] The standard of care is an objective standard: it applies equally to rich and poor. This creates regressive results, for the poor usually find it harder to meet the required standard for lack of resources. Moreover, just like the RAI, an objective standard of care also provides an incentive for the rich to risk the poor. Given that the costs of damaging the poor are less than the costs of damaging the rich, the same activity can be considered negligent when it risks the rich, but not when it risks the poor. To assess whether someone has acted negligently, courts typically rely on cost-benefit analysis, comparing the costs of precaution (*i.e.*, the benefits of the potentially tortious activity) with the costs of potential accidents. If the costs of the activity outweigh its benefits, then the activity is negligent, and vice versa.[69] To illustrate how this creates an incentive to risk the poor, Keren-Paz gives the following example:

> J.R. has to decide where to build a refinery. The choices are Poortown and Richtown. A given safety device would cost $800,000 and would decrease the probability of an explosion by half (from 0.2 to 0.1). An explosion would cause damage of $7 million in Poortown, but $10 million in Richtown. (the difference in the expected loss is due to both the value of the property and future lost earnings.) The cost of prevention is $800,000; the savings in expected loss from installing the device are $700,000 in Poortown, but $1 million in Richtown.[70]

According to the cost-benefit formula, building the refinery in Richtown would be negligent, but it would be reasonable to build it in Poortown. The symbolic effects of such a standard of care are also problematic for the same reasons outlined in the RAI.

There are many ways to mitigate the regressive direct effects of tort law. Keren-Paz mentions some of them[71]: (1) the standardization of awards[72], (2) using a wealth-sensitive multiplier to assess damages[73], (3) judicial discretion to reduce damages based on background wealth[74], and (4) abolishing compensation for damages to property and relying exclusively on first-party insurance.[75]

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[68] Again, I am borrowing extensively from ibid 69–70, 85–132, especially 85-90, 105–110.
[69] This way of calculating negligence is known, in the US context, as the 'Hand Formula'. See *United States v Carrol Towing Co*., 159 F 2d 169, 173 (2d Cir 1947).
[70] Keren-Paz (n 55) 107.
[71] ibid 182.
[72] ibid 51–52.
[73] Tsachi Keren-Paz, 'Private Law Redistribution, Predictability and Liberty' (2005) 50 McGill Law Journal 327.
[74] Keren-Paz (n 55) 112–113, n53.
[75] See ibid 182, n10 and the literature cited therein.

While similar problems of regressive redistribution (and similar solutions) can apply for contractual remedies that intend to restore the contracting parties to the *status quo—i.e*., to the position they would have been had the contract been satisfactorily performed—it would seem to be the case that regressive redistribution is less salient a problem in contract than in tort liability because, within contractual settings, the parties can assess risks and negotiate in advance. In other words: they can *put a price on risk*. The ability of the parties to identify and negotiate risks and burdens *ex ante* would reduce the regressive effects of contractual remedies for breach of contract that seek to restore parties to their pre-breach position.[76]

However, the impact of background wealth on the reservation prices of the contracting parties casts some doubts on the ability of contractual prices to bypass regressive redistribution. Indeed, as explained in Chapter 3, background wealth is a power-conferring feature that allows the rich to impose their prices on the poor. Inegalitarian patterns of wealth distribution would still affect contractual (*ex ante*) risk allocation. In what follows, I suggest that contract law rules and institutions shaped by a concern for just prices can help in incorporating concerns over distributive egalitarianism into contract law. To do this, I propose a virtue-based reassessment of the standard of just pricing embedded in the remedy against *laesio enormis*.[77]

To recall, the remedy against *laesio enormis* allows the party who has either paid more or received less than (a certain proportion of) the just price to ask the other party for either the rescission of the contract or the difference between the price paid and the just price of the thing. As explained in previous chapters, one way of assessing the justness of a price in a contract is by focusing on their ability to manifest efficiency (the 'Efficiency Conception of the Just Price' or 'EC'). While the economic view of efficiency focuses on the market's ability to allocate resources to their best employment, from a contract law perspective a price is efficient when it is the result of an efficient allocation of contractual risks and burdens.[78] When the price in a contract

[76] This is, in fact, the position of Tsachi Keren-Paz. ibid 67. As will become apparent, I am less optimistic than Keren-Paz on this point.

[77] Although I focus here on *laesio enormis*, most of what follows could also apply to the doctrine of price unconscionability and to other rules incorporating standards of just pricing.

[78] See James Gordley, 'Contract Law in the Aristotelian Tradition' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (2001) 323: "Risks and burdens should be placed on the party who can bear them at least cost. The price then should be adjusted to compensate him for bearing them. As we have seen, the contract will be unfair if the party who can bear a risk at least cost succeeds in shifting it to the other party since the party shifting the risk would prefer to bear it himself if he had to compensate the other party fairly."

reflects an efficient allocation of risks—that is, when risks and burdens are allocated to the party that can bear them least costly—the price is deemed efficient and, according to the EC, just. The price in a contract would be just, therefore, when it adequately compensates for the risks and burdens borne by each party in a contract and, therefore, keeps equality of value between goods exchanged.[79]

Other interpretations of the just price appeal not to efficiency, but to the normative force of consent as the source of justice in pricing. From this perspective, *laesio enormis* serves as evidence of an underlying defect in consent (error or mistake, force, *dolus* or fraud) rather than as an injustice in itself. However, as explained in Chapter 2, far from being a negation of the idea of the just price, consent-based reinterpretations of *laesio enormis* rely on an alternative conception of justice in pricing, one in which a price is just when it is consented by the parties. Chapter 3 completed the analysis of this conception by showing that, although consent is a problematic starting point for a theory of justice, consented prices can be justified when they manifest the value of autonomy (the 'Autonomy Conception of the Just Price' or the 'AC').

Since inegalitarian patterns of wealth distribution have an impact on both efficiency (because prices reflect background wealth through reservation prices) and autonomy (because wealth inequality restricts the set of feasible options of one party while increasing the set of the other), neither the EC nor the AC work without taking distributive egalitarianism into account. But how can distributive egalitarianism be incorporated into a contractual setting? A virtue-based reading of the just price can help in achieving this goal.

As previously noted, from a virtue-based approach to price justification the determination of the just price is context-sensitive: the value or values a price ought to manifest depends on the normative context in which they are perceived and conceptualised. Context-sensitivity also entails that the price ought to reflect the concrete needs and wants of both buyers and sellers.[80] In this sense, the

[79] See James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587.

[80] As noted in Chapter 1, some passages from Aquinas' treatment of the just price seem to support a context-sensitive reading of the Scholastic doctrine of the just price. See *Summa Theologiae* II-II q 77 a 1 in c: "Secondly we may speak of buying and selling, considered as accidentally tending to the advantage of one party, and to the disadvantage of the other: for instance, when a man has great need of a certain thing, while another man will suffer if he be without it. In such a case the just price will depend not only on the thing sold, but on the loss which the sale brings on the seller. And thus it will be lawful to sell a thing for more than it is worth in itself, though the price paid be not more than it is worth to the owner. Yet if the one man derive a great advantage by becoming possessed of the other man's

determination of the just price involves the exercise of the virtue of practical wisdom (*prudentia*), according to which a person judges and acts according to what is right given her concrete circumstances. To calculate the just price, therefore, both parties as well as courts ought to take into account, amongst other things, the circumstances surrounding the contract, circumstances which certainly include not only the formal legal rights of each party, but also any *substantive* inequalities between the parties—inequalities of wealth, power, knowledge, needs, etc—that may count as reasons that outweigh keeping equality of value between things for a particular transaction. If this is the case, then contractual justice *requires* taking distributive justice—or distributive *injustice*—into account in order to calculate the just price of a particular transaction. Thus, a virtue-based reading of legal standards of fair pricing—such as the standard embedded within the remedy against *laesio enormis*—entails the legal recognition of a certain kind of reasons the law—and especially the law of contracts—is thought to be typically insensitive to, namely, reasons based on distributive justice and wealth equality.[81]

While I would not want to deny the direct distributive effects of remedies against *laesio enormis* and related doctrines, nor that they could make a difference in the ongoing distribution of resources, I would like to stress the *symbolic* effects of wealth-sensitive contractual remedies and the importance of naturalising an egalitarian motivational structure in contract law. The incorporation of distributive egalitarianism as a normative concern embedded within standards of price fairness in private law would send a powerful message to the parties in a contract, namely, that contract law does not take the pervasiveness of wealth inequality as a 'natural' or 'normal' state of

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property, and the seller be not at a loss through being without that thing, the latter ought not to raise the price, because the advantage accruing to the buyer, is not due to the seller, but to a circumstance affecting the buyer. Now no man should sell what is not his, though he may charge for the loss he suffers."

[81] Cf Chapter 1, Section 2.3. Granting courts the power to take wealth inequalities into account when deciding whether a price is unfair (and therefore whether the remedy against *laesio enormis* should be granted) does not entail a violation of property rights, but a specification of those same rights. Indeed, not only are legal regulations on property compatible with a regime of property rights: they are *constitutive* of that regime. An important insight from Hohfeld's analysis of juridical liberties is that, while a liberty entails the absence of a duty, it does not entail the absence of legal regulation. Quite the opposite: a liberty only exists within a certain juridical order that creates a "protective perimeter" for that liberty. See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710; Both articles have been reprinted in book format. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, third printing, Yale University Press 1964). For the idea of a 'protective perimeter', see H L A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 171.

affairs, but as a problematic feature of our current societal arrangements.

The symbolic effects of standards of fair pricing make the *location* of legal rules and institutions that apply such standards relevant. Civil law remedies against *laesio enormis*, the common law doctrine of unconscionability, the 'good faith principle' in contract law, prohibitions on price gouging, etc.—are typically treated as queer encroachments running against the logic of freedom of contract that pervades private law.[82] A reassessment of the normative structure of private law—one that includes concerns over wealth inequality and which is not focused exclusively on the protection of formal equality between the interacting parties—would recommend giving these and other rules and institutions a more prominent location in our legal systems.[83] Thus, for instance, if the remedy against *laesio enormis* is seen as operating at the margins of 'normal' contract law rules, and receiving application only in limited circumstances, then its symbolic effects will also be marginal. By contrast, if it is conceived as a generalised remedy that applies to all contracts and as a core doctrine that is at least as equally important as those primarily concerned with freedom of contract, then its symbolic effect will also be greater. Legal education and the way contract law is taught could certainly make a difference on the impact that remedies against *laesio enormis* and other rules shaped by a concern for just prices can have in our own understanding of what we owe to each other in our contractual relationships.[84]

To be sure, this is not to say that a relocation of rules in contract law is the most effective instrument against substantive inequality. Nor is it to say that recasting private law according to egalitarian principles is sufficient for achieving distributive egalitarianism. The point is that contract law ought not to be allowed to naturalise—and legitimise—inequality.

## 3. Concluding Remarks

The first section of this chapter showed that value pluralism (which entails motivational

[82] For a conceptual scheme providing an alternative to the traditional narrative of encroachment upon the private by the public, based on the idea of mutual recognition and forms of disrespect, see Claudio Michelon, 'The Public, the Private, and the Law' in Cormac Mac Amlaigh, Claudio Michelon and Neil Walker (eds), *After Public Law* (Oxford University Press 2013).
[83] Cf Keren-Paz (n 55); Pace Weinrib (n 51).
[84] The remarks above can be seen as a particular application of the more general idea of law's slow pedagogy. On the notion of slow pedagogy, see especially Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24 Social & Legal Studies 598, 607: '[W]hat we owe to each other is something we learn by living political lives.'

pluralism) allows us to claim that there is nothing conceptually odd about an egalitarian price system. Although the current motivational structure of the price system is at odds with distributive egalitarianism because it assumes that people will not work as hard without wage differentials, a virtue-based approach allows us to challenge this assumption by noting that this is merely a contingent feature of our current society, and that different institutional arrangements could, in principle, help in bringing about a different price system shaped by a more egalitarian ethos.

The second section developed some ways in which certain institutions of private law could help in moving from potential to actual feasibility. To end this chapter, I would like to suggest some implications of the proposed approach to our understanding of private law more generally.

The emphasis on a virtue-based approach to price justification, one that promotes context-sensitivity and value pluralism in price justification, entails an understanding of contract law and private transactions different from both the model of mutually disinterested parties bargaining to obtain preference satisfaction (roughly, the 'Law and Economics' model of private law[85]) and from the model of individuals protected from each other by a sphere of moral rights and duties, in which the role of private law is simply to reflect promissory morality ('Contract as Promise'[86]). This alternative approach might help in making sense of the emergence of several systems of legal rules governing private transactions that challenge the logic of free market and freedom of contract—*v.gr*. labour law, consumer law, antitrust law, etc. These legal fields are often seen as intrusions of the public sphere into the private and as independent from traditional contract law. However, the growing pervasiveness of 'public' encroachments into the private sphere might be an indication of the need for adopting an alternative narrative that better captures this feature of contemporary private law.[87] A theory of the just price which is sensitive to normative concerns beyond commutative justice might help in providing such a narrative, and in rethinking the so far peripheral place of such doctrines in our understanding of contract law. If (and as) price justification becomes increasingly recognised as part of the normative structure

[85] Cf Richard A Posner, *Economic Analysis of Law* (Ninth edition., Wolters Kluwer Law & Business 2014).
[86] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (second Edition, New York, NY: Oxford University Press 2015); Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708.
[87] For the need for a new narrative for private law, see Michelon (n 82) 96–100.

underlying our contractual practices—as part of the normative landscape of contract law—this may help in relocating contract rules according to more egalitarian principles, in a way that allows us to direct our attention to the pervasiveness of inequality in contractual transactions. This relocation of rules according to egalitarian principles and the institutional reshaping of private law that would take place could, in the long run, reshape the way in which we think about private transactions, much in the same way as labour laws, antitrust laws, consumer laws, etc. have shaped the way in which we think of workers, firms, and consumers.

# Chapter 6: Autonomy, Commutative Justice, and Contractual Prices

Consent-based accounts of the just price claim that what makes consented prices just is consent's ability to manifest autonomy. However, there are different kinds of autonomy. Borrowing from David Enoch, in Chapter 3 I distinguished between *autonomy-as-nonalienation* (the value of determining relevant choices according to your own values or deep commitments) and *autonomy-as-sovereignty* (the value of having the final, authoritative, word in the relevant matter).[1] In that chapter I also claimed that, since wealth inequalities create an autonomy-surplus on one of the parties in a contract (or, more generally, on a certain sector of society: the well-off or simply the "rich") and an autonomy-deficit on the other (the worst-off or the "poor"), an autonomy-based conception of the just price cannot be separated from concerns over distributive justice.

As I also noted in Chapter 3, the autonomy-deficit created by wealth inequality in consented prices is a deficit in *autonomy-as-nonalienation*: these are prices that have been consented in response to a set of options that the agent does not necessarily endorse, and which are not, therefore, necessarily aligned with the agent's deep commitments. Therefore, consented prices under conditions of wealth inequality do not necessarily manifest autonomy-as-nonalienation. However, the same reasoning does not seem to apply to autonomy-as-sovereignty.

The value of autonomy understood as sovereignty presents us with a challenge. Autonomy-as-sovereignty creates a sphere of non-intervention, a *private* sphere, in which the parties are permitted to engage in what Nozick famously called "capitalist acts between consenting adults."[2] If 'price sovereignty'—that is, having the final word when it comes to relevant price-related matters that require our consent—is valuable for individuals, then this would seem to authorise price-related actions which might be

[1] David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159, 162–163: 'You're autonomous in the sense of nonalienation vis-à-vis an action or a decision that concerns you to the extent that the relevant matter is determined by your values, or your deep commitments. If you are being subjected to coercive state policies that are based on principles that are inconsistent with the principles you believe in, this is an attack on your autonomy understood as nonalienation. You're autonomous in the sense of sovereignty if you have the last word regarding the relevant matter, if it's a matter of your choice. A paternalistic intervention is always at least prima facie an attack on your autonomy understood as sovereignty.' See also David Enoch, 'Hypothetical Consent and the Value(s) of Autonomy' (2017) 128 Ethics 6, 30–35.
[2] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 163.

sub-optimal from the standpoint of distributive justice, efficiency, or even autonomy-as-nonalienation. Thus, for instance, a person with a second-order preference not to smoke—a desire to desire not to smoke—can nevertheless consent to her first-order preference to smoke and pay the price for a pack of cigarettes (violating her own autonomy-as-nonalienation) in such a way that it transfers value from the worst-off to the well-off (violating distributive justice) and at a price rate that has nothing to do with the relative scarcity of cigarettes (violating efficiency). Therefore, the consented price would be suboptimal from the standpoint of every metric we have analysed and yet could still be justified as a price that manifests autonomy-as-sovereignty. This possibility creates a tension between the normative demands of distributive justice, efficiency, and autonomy-as-nonalienation, on the one hand, and the normative demands of autonomy-as-sovereignty, on the other. How can this tension be solved? And, more importantly, how can we stop autonomy-as-sovereignty from becoming a free-for-all wildcard when it comes to pricing? How do we keep the connection between autonomy and *justice* if the former justifies deviations from distributive justice for the sake of autonomy?

In what follows, I propose that the connection between autonomy and justice can be kept by connecting autonomy-as-sovereignty with the age-old idea of *commutative* justice. This link with commutative justice restricts the scope and content of autonomy-as-sovereignty, effectively stopping it from becoming a wide-ranging authorisation for any kind of price injustice. This argument is developed in Section 1 (*Reasonable Autonomy and Commutative Justice*), where I argue for such a link by relying on Peter Benson's account of commutative justice.

Section 2 *(Just Prices and Relational Contexts*) is an attempt to answer the question regarding how to adjudicate between the demands of autonomy-as-sovereignty and other normative concerns such as the demands of efficiency or distributive justice. In this section I shall argue that a virtue-based approach to price justification can help in answering this question by distinguishing between different relational contexts and identifying the normative context in which the value of autonomy-as-sovereignty can trump other values in price justification. My claim here is that autonomy-as-sovereignty can trump other normative contexts only if the contractual relationship is nested in another non-contractual relation.

Since this is the final chapter of Part II, and in order to stress the unity between the different chapters that compose this part of the thesis, the final section concludes

by providing a brief summary of the main conclusions of Chapters 4, 5, and 6.

## 1. Reasonable Autonomy and Commutative Justice

As a first step to get the argument off the ground, let me acknowledge right from the beginning that there is a sense in which autonomy-as-sovereignty is indeed an authorisation for injustice. The idea that autonomy understood as sovereignty is trying to capture is precisely that there is something valuable about having the final word in matters relevant to us which is independent from the value of making the right decision about those matters. It is the value of being able to say 'I was wrong, but at least it was *my* choice.' Being this the case, the important question for our purposes is whether autonomy understood as sovereignty can nevertheless be connected with justice in any way. In other words, given that autonomy-as-sovereignty is disconnected from concerns over distributive justice, one must ask whether an authorisation for injustice can be plausibly understood as a requirement not of distributive justice, but perhaps of a different *kind* of justice. If the argument that I shall put forward in what follows is correct, then the authorisation for injustice that autonomy-as-sovereignty entails can be understood as a requirement of commutative justice.

As I have noted throughout this dissertation, the idea of commutative justice was the normative framework under which the Scholastic doctrine of the just price theory was originally developed. While Aristotle himself seems to have thought that justice in transactions could not be understood within the framework of either distributive or corrective justice, medieval thinkers such as Albertus Magnus, Thomas Aquinas, Scotus, and the late Scholastics developed Aristotle's thought in a way that puts equality in exchange as the central case of corrective justice.

Aquinas treated the *iustum pretium* in the context given by his treatment of commutative justice as a virtue. Aquinas claimed that the virtue of justice is that by which we are inclined to give to others their due – that is, their right (*ius*). For a certain allocation of goods to be deemed just, Aquinas claimed that what is given must be equal to what is received. But as there are different kinds of equality, so there are different kinds of justice. Therefore, Aquinas distinguished between general justice – by which "all acts of virtue can pertain to justice, in so far as it directs man to the

common good"[3] – and justice as a specific virtue, which he calls particular justice. Since things can be given—or actions directed—either from the community to a particular person or from a particular person to another, there are two kinds of particular justice: distributive and commutative justice. Distributive justice for Aquinas is concerned with the distribution of goods among those who belong to the same community but, unlike egalitarian conception of distributive justice, distribution is not strictly equal, but according to each member's merits: equal but only for those who are equals, and unequal for those who are unequal.[4] Commutative justice, on the other hand, requires arithmetical equality between what is given and received in the mutual dealings between two persons.[5]

It is against the background of commutative justice's arithmetical equality, and not any notion of proportionality, that Aquinas asked in his *Summa Theologiae* whether it is lawful to sell a thing for more than it is worth. Aquinas and subsequent thinkers managed to bypass the complexities of Aristotle's treatment of justice in exchange by making equality in exchange—commutative justice—the central case of corrective justice.[6] This follows from Aquinas' previous explanation of the virtue of justice: there are simply no other kinds of justice other than those three categories previously identified. According to Aquinas, either goods move from a particular individual or group of individuals to society (general justice), from society to their members (distributive justice), or from, one particular individual to another (corrective justice).[7] Therefore, justice in exchange must be a case of corrective justice. Since exchanges are *mutual* dealings between two persons, Aquinas and the Scholastics called this

[3] Aquinas, *Summa Theologiae* II-II q 58 a 5 *in c.*

[4] Aristotle uses the formula 'A/B=C/D' (as A is to B, so C is to D) where A and B represent a share of goods and C and D represent a persons' worth: each person receives a share according to their merit. See Aristotle, *Nichomachaen Ethics* V 3 1131b1.

[5] The formula here is simply 'A=B'. *Nichomachean Ethics* V 4 1132b25. On this, see also Aquinas, Summa Theologiae II-II q. 58 a 5 in c, and II-II q 61 a 2 *in c*: "In commutations something is paid to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily." See also *Summa Theologiae* II-II q 77 a 1 in c.

[6] Unlike Aquinas, Aristotle distinguished between corrective justice (commutative justice in Aquinas' terminology) and a different kind of justice in exchange expressed in the formula A/B=D/C, where A and B represent buyer and seller, and D and C represent the goods exchanged. The order of the second ratio is inversed to signify that A does not get her own good back, but C's. Aristotle explained this ratio using the famously obscure example "as builder to shoemaker, so many shoes to a house." (*NE* V 5 1133a23-25). The obscurity of both the formula and Aristotle's explanation has led to almost every modern commentator of Aristotle to the conclusion that the whole passage in *Nichomachean Ethics* V, 5 is "something of a failure" (Scott Meikle, *Aristotle's Economic Thought* (Oxford University Press 1995) 131.

[7] Aquinas, *Summa Theologiae* II-II q 58 a 5.

kind of justice *commutative* justice.

Given this background, it is not surprising that the concept of the just price is usually invoked by contemporary scholars who believe that commutative justice (equality in exchange) as opposed to distributive justice (equality in distribution) is the normative framework underlying modern contract doctrine. Much more surprising, however, is connecting the Aristotelian-inspired idea of equivalence in exchange with the value of autonomy.

Aquinas and the Scholastics did not mention autonomy in their treatment of commutative justice. Moreover, an articulate account of the value of individual autonomy vis-à-vis commutative justice seems to be absent from the medieval mindset altogether. However, there is a case to be made for the claim that a certain conception of autonomy underpins commutative justice. Among contemporary scholars, the existence of a necessary connection between the value of autonomy in private transactions and commutative justice has been defended—in my view, persuasively—by Peter Benson. It is this link that I would like to explore in what follows.

Peter Benson has claimed that commutative justice is the underlying normative structure of contract law.[8] This account of commutative justice as the central case of corrective justice completes and further develops Ernest Weinrib's approach to private law, in which corrective justice provides a normative structure able to link plaintiff and defendant within one single integrated justification, one which is independent from matters pertaining to economics, morality, politics, etc. or indeed to any "rich and full notion of the good."[9]

Benson makes two main claims in relation to commutative justice, but I am only interested in the second of these claims. The first claim is that commutative justice is the normative structure that underpins what he calls the transactional conception of contract. Within this conception, the promise-for-consideration relationship constitutes the essence of contract law. According to Benson, the promise-for-consideration relation consists in two mutually related acts of transferring ownership between the

[8] See Peter Benson, *Justice in Transactions: A Theory of Contract Law* (The Belknap Press of Harvard University Press 2019).

[9] Ernest Joseph Weinrib, *The Idea of Private Law* (Rev edition, Oxford University Press 1995) 80"The object of Aristotle's ethics generally is to elucidate the excellences of character that mark proper human functioning. Corrective justice, where 'it makes no difference whether a worthy person has deprived an unworthy person or vice versa', obviously stands apart from Aristotle's general concerns. By ignoring considerations of worthiness, corrective justice abstracts from the considerations that pertain to Aristotle's rich and full notion of the good."

parties (a promise and a consideration for the promise), transfer which is prior to and independent of actual performance. Commutative justice is the normative structure underlying the transactional conception of contract which unifies—because it is implicit in—the main doctrines and institutions of contract law.[10] Since this is a descriptive claim about the normative structure of contract law, it is of no consequence to my thesis. The second claim is more interesting, because it concerns the moral justification for postulating commutative justice as an independent normative domain. According to Benson, commutative justice is a morally acceptable normative framework for contract because it stems from a certain conception of autonomy as *reasonable* autonomy.[11]

The fact that autonomy must be understood as reasonable autonomy entails that the kind of autonomy that grounds commutative justice cannot be autonomy-as-sovereignty understood as a licence to do as one pleases. Thus, the bilateral context of contract imposes a constraint on the value of autonomy-as-sovereignty. If the kind of sovereignty which is manifested through consented prices is to be linked with justice, then consent—and the autonomy it manifests—ought to be conceived not as a licence to do whatever one wants regardless of the wants and needs of others, but as an authorisation to do whatever one wants within the constraints imposed by the fact that one has entered into a contractual relationship with someone who also values her autonomy-as-sovereignty, someone with equal moral worth and at least *pro tanto* equal moral standing.[12] This rules out the possibility that unfair contractual terms could nonetheless manifest autonomy-as-sovereignty in the relevant sense.

To reconceptualise autonomy-as-sovereignty as reasonable autonomy is to

[10] Benson (n 8) 3"Contract law (…) can be reasonably understood as specifying a distinct normative conception that not only is drawn from its principles and doctrines but also constitutes their organizing idea, underpinning and explaining the whole of contract law as well as its various parts."

[11] ibid 366: '[V]iewing the parties and their transaction in this way can be rooted in a certain conception of their freedom and equality and involves attributing to them moral powers that express their rational and reasonable autonomy.'

[12] Moral worth is different from moral standing in that the former is unaffected by one's own behaviour, whereas one can lose one's moral standing if one behaves in ways which involve a breach in reciprocity. Suppose that after a heated discussion I hit you. Now suppose that the right thing to do for you was to turn the other cheek, but instead you hit me back. What I did by hitting you (and what you did by hitting me) was morally wrong because we are people with equal moral worth. But although the fact that I have hit you first did not make me lose my moral worth, it did make me lose my moral standing to complain against you hitting me. For the implications of losing one's moral standing to complain for understanding unconscionability and contract law, see Nicolas Cornell, 'A Complainant-Oriented Approach to Unconscionability and Contract Law' (2016) 164 University of Pennsylvania Law Review 1131.

view it from the perspective of the *reasonable* as opposed to the rational.[13] Peter Benson has explicitly applied this distinction to ground his own theory of commutative justice. Following Rawls, Benson provides a nice summary of the distinction between the reasonable and the rational:

> The reasonable is to be contrasted with the rational. The rational applies to persons (natural and corporate) who, taken each by himself or herself and from his or her own standpoint, are viewed as deliberating about and as seeking effectively to realize ends and interests of their own. The ends coming under the idea of the rational need not be selfish in any standard sense. But whatever the content of his or her chosen interests and ends, a person, qua rational, pursues them without necessarily according any independent validity to others' ends, which therefore do not give rise to moral claims that can subject the agent to moral constraints or obligations of any kind. By contrast, the reasonable specifies fair terms that appropriately apply to relations between persons who are each viewed as having equal and independent standing to press valid claims vis-à-vis each other. Reasonable persons propose and accept as principles only those that they think all can reasonably endorse in their capacity as mutually equal. They are also willing to limit the pursuit of their interests as required by fair principles, as long as they are assured that others will do the same. In these ways, the reasonable constrains the rational and can be specified in the form of binding obligations. It clearly embodies an idea of reciprocity.[14]

Unlike theories based on distributive justice or efficiency, a conception of the just price based on this particular understanding of commutative justice is *content-neutral*: within the constraints imposed by fair terms of cooperation and reciprocity, the just price is whatever the parties have consented to in a contract, even if it is inefficient, distributively unjust, or it is a price for something that, for whatever reason, goes against the agents' deep commitments.[15] The normative significance of consented prices stems not from its actual content, but from the fact that it allows the contracting parties to abstract from their particular needs and wants, serving as a common

[13] On the distinction between the reasonable and the rational, see John Rawls, *Justice as Fairness: A Restatement* (Penguin 2001) 6–8; John Rawls, *Political Liberalism* (Expanded edition, Columbia University Press 2005) 48–54; Benson (n 8) 15.

[14] Benson (n 8) 15.

[15] Contrast this content-neutral account of commutative justice and the just price with James Gordley's account, in which the just price must be kept to preserve the ongoing distribution of resources. Cfr. James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991); James Gordley, 'Contract Law in the Aristotelian Tradition' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (2001); James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press 2006); James Gordley and Hao Jiang, 'Contract as Voluntary Commutative Justice' (2020) 2020 Michigan State Law Review 725. I have reviewed and criticised Gordley's account of commutative justice elsewhere. See Joaquín Reyes, 'Beyond Commutative Justice: Contract Law, Justice, and Just Prices' (2021) 7 Latin American Legal Studies 143.

standpoint from which they can see each other as equals.

It is only through the mediation of exchange value—prices—that the parties can be seen as equals in legal contemplation. Benson is explicit:

> Exchange value always presupposes two qualitatively different usable things, but abstracts from these qualitative aspects and treats the objects as commensurable in purely quantitative terms: so much of *x* equals so much of *y*. (…) [A] judgment in terms of price has to do with exchange value and a relational judgment as between the two sides. (…) The price judgment, being relational and coming under the idea of the reasonable [as opposed to the idea of the rational involved in use value], is something that a properly constituted third party, such as a court, can appropriately assess.[16]

> Value is the dimension of abstract equality of the objects of a transfer paralleling the abstract equality of the parties who do the transfer. (…) Equivalence or the equality between thing and thing is thus the transactional sign of the equality of persons as owners. (…) Because this principle [*i.e.* the principle of equivalence in exchange] stipulates equality between thing and thing in transactions, it explicitly and fully expresses the idea of corrective or commutative justice: a requirement of arithmetic equality in and for transactions.[17]

Benson's account is a purely transactional, non-distributive, autonomy-based account of justice in pricing which is also content-neutral. However, as it is obvious from the above discussion and as Benson explicitly points out, *content-neutrality* does not entail *value-neutrality*. Indeed, commutatively just prices are prices that manifest each party's autonomy and, by doing so, they respect their dignity as equally autonomous persons:

> As participants in the promise-for-consideration relation, parties objectively view each other as promisors and promisees—as movers and receivers—of something that has value in legal contemplation. Because each of the parties contributes from his or her side exactly in the same way as the other, the interacting parties may be viewed in this respect in identical terms and as equals. Moreover, in this relation and vis-à-vis each other, they count as mutually separate and independent persons, each with something usable that is initially under his or her exclusive rightful control and that the party uses by giving it up in order to obtain the consideration provided in return. This use of one's thing as a means to obtaining another's is the thing's purchasing power.

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[16] Benson (n 8) 177.

[17] ibid 387–389. Cf Ernest Joseph Weinrib, *Corrective Justice* (Oxford University Press 2012) 130: "The notion of value fits into corrective justice in the following way. Corrective justice deals with interacting parties correlatively as doer and sufferer of an injustice. Inasmuch as it governs interaction, corrective justice applies to parties who impinge upon each other by acting on particular things in the world pursuant to their specific needs and wants. But inasmuch as it embraces the two parties as correlatively situated, corrective justice abstracts to a common standpoint from the particularity of these things and from the specificity of these needs and wants. Value is the economic notion that fulfils this abstracting function."

> Now, purchasing power, when generalized in relation to many other things, becomes a quantifiable potentiality that transcends any one transaction and yet at the same time can only be realized in and through particular transactions. And, supposing the existence of the market relations, this generalized purchasing power is potentially measured as the thing's price.[18]

By abstracting from the actual needs and wants of the parties as well as from any other consideration of fact, the conception of economic value that stems from Benson's account of commutative justice has the advantage of detaching the just price from concerns over distributive justice and efficiency, as well as from critiques associated to the lack of normative pull of ongoing market prices.[19] More importantly for our present purposes, this account of commutative justice and the relational conception of the just price it entails suffices to rescue autonomy-as-sovereignty as an important value for price justification. When linked to commutative justice, autonomy-as-sovereignty is a relational value, and as such it manifests itself in relational contexts.

However, this does not mean that autonomy as sovereignty can *always* outweigh other values in relational contexts, nor that prices within a relational context can only be justified when they manifest relational values. Non-relational values such as efficiency or distributive justice can trump autonomy even in relational contexts. Therefore, the question remains: how do we adjudicate between the demands of autonomy-as-sovereignty and distributive justice? In what follows, I argue that a virtue-based approach to price justification can help in providing an answer to this question by identifying the normative context in which the value of autonomy-as-sovereignty, understood as reasonable autonomy, can trump other values in price justification.

## 2. Just Prices and Relational Contexts

As previously mentioned in Chapter 4, there are two normatively relevant contexts in which prices are perceived and conceptualised: the relational context of contract and the non-relational context of the market.[20] Unlike the market context, the relational context of contract allows us to link the value of autonomy-as-sovereignty with commutative justice. However, for autonomy-as-sovereignty to trump concerns

[18] Benson (n 8) 181.
[19] For such a critique, see Chapter 2, Section 2 and especially Chapter 3, Section 2 above.
[20] Chapter 4, Section 2.2.

over distributive justice and efficiency, the relational context ought to be perceived by the relevant agents as normatively salient compared to the non-relational context of the market. As I shall explain in what follows, contractual relationships do not typically manifest this normative salience. But *sometimes* they do, and—if autonomy-as-sovereignty is indeed valuable, as I think it is—it is a *good* thing that they do, even if such prices deviate from the standards imposed by efficiency, distributive justice, or autonomy-as-nonalienation.

The moral intuition that underlies taking autonomy-as-sovereignty as a value able to justify prices is that there are certain cases in which prices paid for certain goods seem to be *just* prices even if they are otherwise inefficient (they do not allocate resources to their best employment) or distributively unjust (they involve a transfer of resources from the worst-off to the well-off). To illustrate this, here are two examples of situations where autonomy-as-sovereignty seems to make prices just, thus trumping other normative concerns such as efficiency or distributive justice:

> *Best Friends.* Peter and John are best friends. Peter's wife has recently died, and he has decided to sell the campervan in which he and his wife travelled and lived for more than twenty years. Peter puts the van on sale for £40.000, which corresponds exactly to the market price of the van. Peter has received some offers for the van, but he wants to sell it to John, his best friend, since he knows that John would enjoy it and take good care of it. John is interested in the van, and *even though John is financially in a better position than Peter*, he cannot afford the van at that price. The most John can offer for it is £20.000. Peter accepts John's price and so they reach an agreement.
>
> *Long-Term Contract.* Supplier and Buyer have worked together for more than ten years. This year, however, Buyer has communicated to Supplier that, due to financial difficulties, it can no longer afford to pay the usual price for the supplied goods. Although she would very much like to keep doing business with her, she cannot afford to do so under the present circumstances. Taking into consideration their long and successful commercial relationship, Supplier has decided to make an exception and reduce the price of the supplied goods for as long as Buyer needs, *even though the new reduced price fails to reflect the actual relative scarcity of the goods*.

*Best Friends* illustrates a case in which a price that does not track relative scarcity and which involves a transfer from the worst-off to the well-off seems to be nevertheless the just price to pay for a thing. *Long Term Contract* illustrates a case of an inefficient price that seems to be a just price without necessarily being a distributively just price.

What is it that makes these prices just? I would like to suggest that what makes them just is that they are prices paid within a certain *relational context*, one that allows for the value of autonomy-as-sovereignty—that is, the value of having the parties having the final word when it comes to setting a price in a way that respects the autonomy of both parties—to become more normatively salient than other normative considerations. I elaborate in what follows.

To get the argument off the ground, I would like to make a distinction between two kinds of relational contexts: (1) *loosely* relational contexts, and (2) *strictly* relational contexts.[21]

A normative context is *loosely relational* when it does not involve a special relationship with someone in particular. Although involving a relationship of justice—duties owed to others—duties arising from loosely relational contexts arise not from the normative salience of the relationship, but from the more general fact that there is someone—*anyone*—with whom we share a relational context and who deserves to be treated with dignity.[22] These are duties owed to *all*. For example, duties not to humiliate or manipulate each other are duties arising from loosely relational contexts: they are duties owed to all, and not only to those with whom we stand in a special relationship. Most duties arising from tort law—for example, the duty of care[23]—are relational only in this loose sense.

By contrast, a normative context is *strictly relational* when it involves a special relationship with someone, one "from which others must inevitably be left out."[24] What we owe to each other in strictly relational contexts is something that we owe not to all, but to *someone in particular*, and precisely *because* that particular someone stands in a special relationship with us. In other words: in strictly relational contexts, the relationship can stand as a reason both for the duty itself, and for the performance of

[21] The argument that follows is inspired by (and closely follows) John Gardner's distinction between loosely relational and strictly relational duties and his discussion of relational contracts. See John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 16, 20–57.
[22] On the concept of dignity and its juridical implications, see generally Jeremy Waldron, *Dignity, Rank, and Rights* (Mier Dan-Cohen ed, Oxford University Press 2015).
[23] Before *Donoghue v Stevenson* [1932] AC 562, the duty of care was plausibly conceived as a strictly relational duty: the relationship between the parties was given itself as the reason for the existence of the duty. However, the rationale behind *Donoghue v Stevenson* and the idea that the duty of care entails that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (Lord Atkins at 580) is that the duty of care exists because of the threat that my actions pose to others. This makes the duty of care only loosely relational: if I should treat *everyone* as my neighbour, then there is nothing special about being my actual neighbour. For insightful discussion on the duty of care, see Gardner (n 21) 46–52.
[24] Cf ibid 24.

actions conforming to the duty. So, to questions such as 'Why did you rent the flat to Peter and not to Mary?' or 'Why did you rescue her instead of him?' the fact that an answer such as 'Because Peter is my son' or 'Because she is my wife' can be successfully given as a reason for action that settles the matter at hand is an indication that we are in the presence of strictly relational duties.

To be sure, such an answer might *not* suffice to settle the matter. But when it does, that is, when an agent can *successfully* put forward the value of a special relationship as a reason for acting, then the value of that special relationship can ground a strictly relational duty—that is, a duty to be partial towards the person with whom I share a strictly relational context.[25] (I am aware that there is some ambiguity in the term 'successfully' here. I come back to this issue below).

It is in strictly relational normative contexts, therefore, where autonomy-as-sovereignty can be taken into consideration as a matter of justice in pricing. This is both because *consented* prices cannot exist outside strictly relational (contractual) contexts (consented prices are, by definition, contractual prices), and because within strictly relational contexts autonomy-as-sovereignty can be linked to commutative justice (thus becoming *reasonable* autonomy in the sense explained in Section 1).

Now, although contractual contexts involve a bilateral relationship in which prices can be perceived and conceptualised by the contracting parties as stemming from that bilateral context, it does not follow from this that contractual prices can be justified only by relational values.[26] There is no contradiction in justifying contractual prices based on their ability to manifest non-relational values such as efficiency or loosely relational values such as distributive justice. If this is the case, then the fact that we have rescued the value of autonomy-and-sovereignty as a relational value able to justify contractual prices does not immediately answer the question of how to adjudicate between relational and non-relational values in a strictly relational

[25] Some philosophers believe that, since morality is itself impartial, duties to be partial cannot exist. I agree with Gardner in that someone who believes that morality is impartial can nevertheless accept the existence of strictly relational duties: the value of friendship, for instance, involves some partiality at the level of implementation (you have your friends, I have mine), but the value of friendship in general is impersonal: it is valuable that you have strictly relational duties towards your friends and that I have strictly relational duties towards mine. For discussion, see ibid 37–41; Barbara Herman, 'Agency, Attachment, and Difference' (1991) 101 Ethics 775.

[26] This is where in my view authors such as Weinrib and Benson go wrong: while they successfully rescue the role of relational values in the justification of private law, they tend to stress the necessity of a relational justification for relational contexts. However, as I note in the text, there is nothing preventing non-relational values playing a justificatory role in relational contexts.

(contractual) context.

So the question still remains: When we are in the presence of prices that stem from strictly relational contexts, how can we adjudicate between the value of autonomy-as-sovereignty and other values?

As noted above, since strictly relational contexts are contexts in which someone *in particular* matters to us more than those excluded from such contexts, duties grounded in autonomy-as-sovereignty that arise from strictly relational contexts are *duties to be partial.*[27]

Now—and to dispel the previously noted ambiguity in my earlier use of the word 'successful'—, even though the appeal to autonomy-as-sovereignty can *successfully ground a duty to be partial*, this is not to say that conformity to such a duty can *successfully trump other reasons or duties* that would otherwise apply to that situation. Putting forward a special relationship as a reason for a duty to be partial may be unsuccessful because the appeal to it might be impertinent and may therefore fail to ground any duty at all (the reply 'Because he is my son' does not seem to ground any duty at all as a reply to the question 'Why did you give him better marks for his essay compared to the rest of the students?'), or it may be unsuccessful because, although the duty to be partial exists, it has been defeated by other normative considerations. To put it somewhat differently: the appeal to a special relationship can be said to be successful in at least two different ways: it can be successful in the sense that it successfully grounds a *pro tanto* duty to be partial, that is, a duty that can nonetheless be defeated by other normative considerations ('Yes, you have a duty towards your son, but…'), or it can be successful in the sense that it successfully grounds *an all-things-considered* duty to be partial, one that is able to trump any other normative consideration.

With this clarification in mind, let me further explain my claim regarding autonomy-as-sovereignty and strictly relational contexts. When appeals to autonomy-as-sovereignty in strictly relational contexts successfully ground a *pro tanto* duty to be partial, they are successful because there is value in special (contractual) relationships between autonomous persons. However, contractual duties arising from appeals to sovereignty must be balanced with other values. This means that they can be outweighed by other normative considerations such as efficiency or distributive justice.

[27] See note 25.

For autonomy-as-sovereignty to successfully ground not merely a *pro tanto*, but an *all-things-considered* duty to be partial, a further condition must be met, namely, that the circumstances make the special relationship between the parties *more normatively salient than other normative considerations*.

When does this happen? Which relational contexts are so normatively salient that they could justify giving more weight to autonomy-as-sovereignty than to other values? In what follows, I would like to suggest that this condition is met only *when contractual relationships are nested into a further, non-contractual, special relationship*. I elaborate in what follows.

I have already distinguished two kinds of relational contexts: loosely relational and strictly relational contexts. Now, strictly relational contexts are also of two kinds: *contractual* and *non-contractual*. This means that, although all contracts are, by definition, strictly relational contexts, not all strictly relational contexts are contractual. Examples of non-contractual relationships are legion: relationships between friends, spouses, parents and their children, long-term commercial relationships, etc. The upshot of this distinction for the present purposes is that non-contractual relationships usually carry a certain normative weight that we do not so easily attach to merely contractual relationships (as the expression '*merely* contractual relationships' indeed suggests). Thus, if there are any relational contexts in which the relationship itself *matters more* to the parties than other normative considerations—that is, in which the relationship is *more normatively salient* than those other considerations—it must be in strictly relational contexts of a non-contractual kind. It is in these contexts, therefore, where the parties can conceive themselves as having not only a *pro tanto* duty to be partial towards each other, but as having an *all-things-considered duty to be partial*.

Let me complicate things a bit further. Although contractual and non-contractual relational contexts are conceptually different, their existence is not mutually exclusive. Indeed, some non-contractual relationships cannot be brought about without a contract that helps to constitute them at the start of the relationship (such as marriage or commercial relationships). Now, in these cases it can sometimes happen that the relationship itself can 'grow', as it were, and detach itself from its contractual origins and turn into one of a purely non-contractual kind. But sometimes the same relationship can be contractual and non-contractual at the same time. Or, to put it somewhat differently and in more precise terms, a special relationship can be composed of more than one relational context. Perhaps the clearest example of a

relationship that is both contractual and non-contractual is that of a contractual relationship between friends, as when a friend sells a thing to another friend, or when employer and employee are also friends outside the workplace. In those cases, there is a contractual relationship nested within a non-contractual relational context.

Contracts nested within non-contractual relationships—such as a contract between friends—are not the norm, and in complex market societies we usually do not engage with the other contracting party beyond the minimum required to satisfy our contractual duties. Nevertheless, there is at least one kind of contract that can normally meet this threshold, namely, the so-called (and, to our purposes, aptly termed) *relational* contracts.

The idea of a relational contract is, of course, associated to Ian Macneil's relational theory of contract.[28] According to Macneil, every contract is part of a larger relational context, one that is partly constituted by the contract but that goes beyond the contract itself. [29] Thus, every contract would be doubly relational, for it would consist in a contractual relationship nested in another relational context of a non-contractual kind. If Macneil is correct, then every contract would meet the threshold stated above to ground all-things-considered duties to be partial, and, therefore, autonomy-as-sovereignty could in fact trump other normative concerns in *every* contract.

Macneil's view, however, is an extreme view of relational contracts. He is, of course, not alone in holding such an extreme view. Others have also expressed similar ideas, arguing that "relational contracts, as such, are not a special category of contract, because all or virtually all contracts are relational."[30] But one need not think that all or nearly all contracts are relational contracts to note that although many (if not most) contracts are not embedded within a non-contractual relational context, relational contracts extend to more than just contracts between friends. Contracts between suppliers and procurers, franchisors and franchisees, artists and managers, athletes and sponsors, authors and publishers, and many other commercial contracts involving

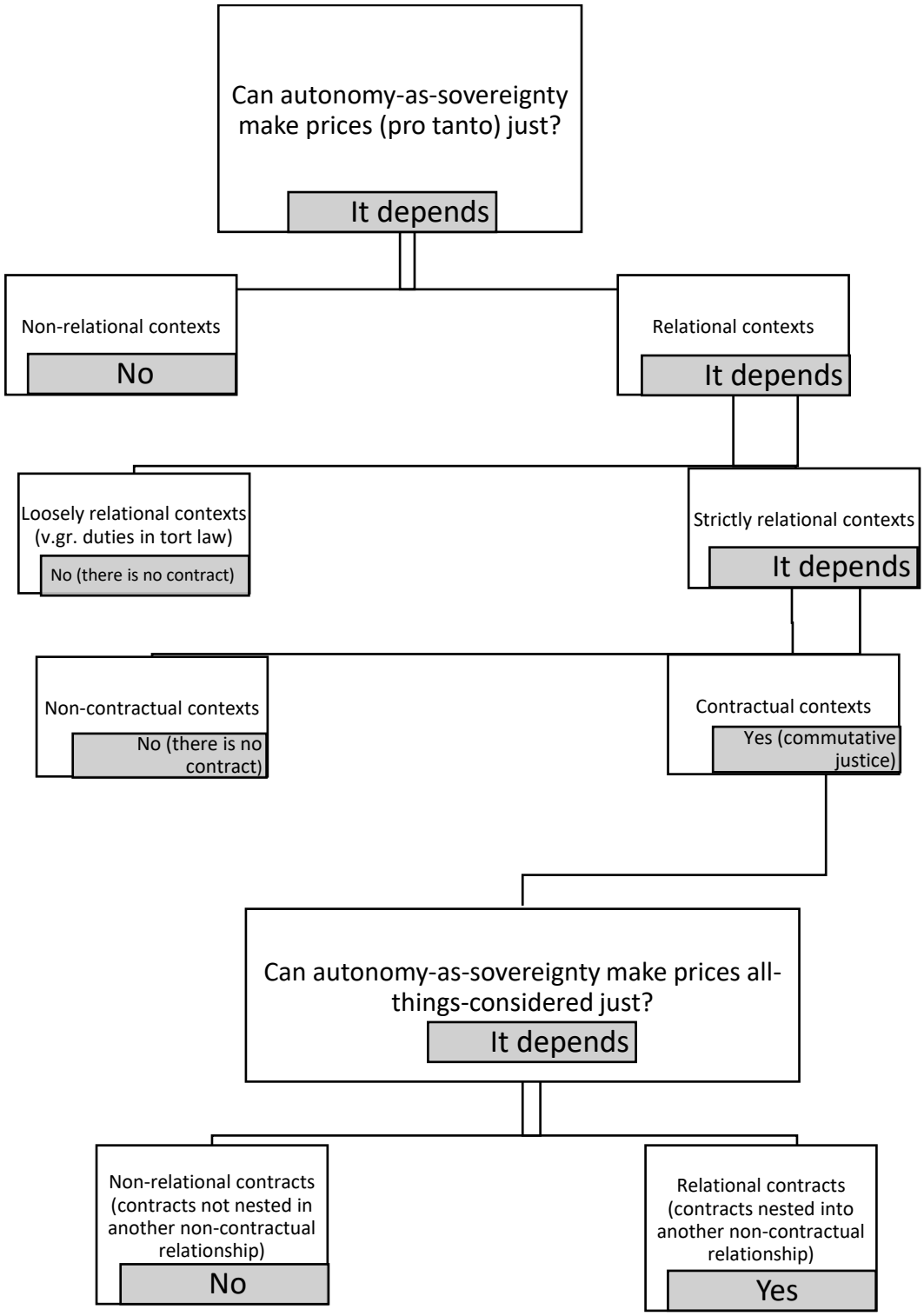
[28] Ian Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (David Campbell ed, Sweet & Maxwell - Thomson Reuters 2001).
[29] ibid 133–134: 'Discrete contract is one in which no relation exists between the parties apart from the simple exchange of goods. (...) Its paradigm is the transaction of neoclassical economics. But as will be seen, every contract, even such a theoretical transaction, involves relations apart from the exchange of goods itself. Thus every contract is necessarily partially a relational contract, that is, one involving relations other than a discrete exchange.'
[30] Melvin A Eisenberg, 'Why There Is No Law of Relational Contracts' (2000) 94 Northwestern University Law Review 805, 821.

long-term commitments between the parties are nested in non-contractual relationships. Long-term commercial relationships constitute what Aristotle termed an imperfect form of friendship, one that comes about not for the sake of the good, nor for the sake of pleasure, but because of the usefulness of the relationship to those in it. As Aristotle noted, this friendship for the sake of utility is the kind of friendship "characteristic of business types."[31]

To recapitulate. First, I distinguished between loosely relational and strictly relational contexts. Then I argued that strictly relational contexts can be contractual and non-contractual, and that it is only in contractual relational contexts where autonomy-as-sovereignty can be linked to commutative justice and, therefore, be construed as reasonable autonomy. The context of contract is, therefore, the *locus* where prices can manifest autonomy-as-sovereignty in a way that connects autonomy with justice, and where, therefore, appeals to autonomy-as-sovereignty have normative weight. In every contract, therefore, autonomy-as-sovereignty is a value able to ground *pro tanto* duties to be partial. However, and while this is the case for every contractual relationship, this does not mean that in every contractual relationship autonomy-as-sovereignty can trump other values that also play a role in price justification. Indeed, the opposite is the case: when autonomy-as-sovereignty clashes with other values such as efficiency or distributive justice, it is the latter that should typically prevail over the former and not viceversa. For autonomy-as-sovereignty to be able to trump even those values in price justification, one further condition must be satisfied, namely, that the relationship itself must be so valuable for those who participate in it that conforming to the normative requirements of the relationship can reasonably be seen as grounding an *all-things-considered duty to be partial* for the parties in a contract. Finally, the last step of the argument suggested that this condition is satisfied when we are in the presence of a relational contract, that is, a contract nested in another non-contractual relationship.

The following diagram summarises the role that autonomy-as-sovereignty plays in price justification for different types of normative contexts:

[31] Aristotle, *Nichomachean Ethics* (Christopher Rowe tr, Oxford University Press 2002) VIII 1158a20, 215.




Two final points of clarification. First, to what extent our contractual practices are nested in other non-contractual relational contexts—that is, whether every contract is relational (as Macneil himself thought) or very few of them are, or perhaps something in the middle—is a matter of debate, and my argument does not depend on taking a position on that debate. I do tend to agree, however, with the view that relational

contracts are not as pervasive as some scholars seem to think.[32]

The second point is that it is not part of my claim that autonomy-as-sovereignty *must* trump other normative concerns when we are in the presence of relational contracts. Whether this is the case or not would depend on a series of circumstances of fact the assessment of which—at least from a context-sensitive, virtue-based approach to justification—is impossible to make in the abstract. My claim is rather that autonomy-as-sovereignty *can* trump concerns over distributive justice or efficiency *only if and when* contractual relationships are nested in another non-contractual relationship. This is the normative context in which claims of price justification based on the value autonomy-as-sovereignty *can* be successful in grounding an all-things-considered duty, but 'can' does not imply 'ought'. Therefore, prices stemming from contracts consisting in one-off exchanges or which do not help in constituting further non-contractual relationship *cannot* be justified by appealing to autonomy-as-sovereignty. In one-off contracts, non-relational values such as efficiency or distributive justice should therefore prevail over autonomy-as-sovereignty.

## 3. Concluding Remarks

This chapter attempted to rescue autonomy-as-sovereignty from the objection that it provides an authorisation for injustice. The argument developed here consisted in linking autonomy-as-sovereignty with commutative justice and transform it therefore into *reasonable autonomy-as-sovereignty*. Once this was done, I used one of the two

[32] I tend to agree with Dori Kimel on this. See Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2003) 81, n50: 'I wish to distance myself from the view of those who tend to vastly exaggerate the scope of the phenomenon [i.e., relational contracts]. While Macneil's early observations about the "relational" aspects of certain classes of contract were greeted with often unwarranted scepticism, (...) some contemporary writers argue, often on the basis of the flimsiest of evidence, that most, or nearly all contracts are relational. (...) Looking around the room I could point out, however, that the computer on which these words are written, the apartment in which I live, the car I drove here this morning and the mobile phone that has just stopped ringing were all purchased through one-off, non-personal contractual transactions that cannot be said to be (or to have become) "relational" in any significant sense. That holds true even for the long-term aspects of some such contracts, such as the warranty and servicing agreement that came with the computer or the car, or the line-rental and billing agreement that comes with a mobile phone. The fact that the manufacturer's obligations in this respect are enshrined in formal, enforceable contract, (as opposed to the goodwill of the service department's personnel, or anyone's concern for their or their company's reputation, etc), far from being insignificant, remains the main source of confidence that they will be discharged, as anyone who has tried to deal personally with the service department of, say, Dell Computers, or the billing department of a mobile phone's service provider will know only too well. Multiply the number of such contracts that an average person enters by the number of average persons in any given jurisdiction, and the claim that most contracts are relational appears to be highly tenuous indeed.'

features of a virtue-based approach to price justification identified earlier (context-sensitivity) to distinguish between different relational contexts to further argue that autonomy-as-sovereignty can trump other values in price justification only if we are in the presence of a relational contract.

Since this is the final chapter of Part Two (and also, incidentally, the final chapter of the thesis), I would like to briefly summarise the main claims of Part Two of the thesis, just as I did with Part One in Chapter 3. Here they are:

(1) Virtue is necessary for the sustenance of price-related practices across time (Chapter 4, Section 1)

(2) A virtue-based approach to justification can, therefore, play an important role in price justification. In particular, two features of a virtue-based approach to justification (value-pluralism and context-sensitivity) can help us to overcome the challenges to previous conceptions of the just price. (Chapter 4, Section 2)

(3) A virtue-based approach to price justification represents rational progress compared to earlier conceptions of the just price. The *telos* of the enquiry is to identify the conditions under which we can achieve equality in exchange understood not as equality of value between things exchanged, but rather as treating each other as equals in exchange (Chapter 4, Section 3)

(4) The first challenge against earlier conceptions of the just price concerned the compatibility between distributive egalitarianism and the price system. Value pluralism (which entails motivational pluralism) allows us to claim that there is nothing conceptually odd about an egalitarian price system. Although the current motivational structure of the price system is at odds with distributive egalitarianism because it assumes that people will not work as hard without wage differentials, a virtue-based approach allows us to challenge this assumption by noting that this is merely a contingent feature of our current society, and that different institutional arrangements could, in principle, help in bringing about a different price system shaped by a more egalitarian ethos. (Chapter 5, Section 1)

(5) Private law can help in moving from potential to actual feasibility. This entails a sensitivity to the regressive distributive effects of private law rules, and it might involve a relocation of certain contractual rules and doctrines—such as remedies against *laesio enormis* or the doctrine of unconscionability—

that are usually conceptualised as operating at the margins of contract law. (Chapter 5, Section 2)

(6) The second challenge concerned the possibility of rescuing autonomy-as-sovereignty as a value able to justify prices. Following Peter Benson, I argued that autonomy-as-sovereignty can play a role in price justification provided that it is linked with commutative justice and, therefore, understood as *reasonable* autonomy. Since reasonable autonomy involves seeing autonomy linked to a certain form of reciprocity, the value of autonomy-as-sovereignty can play a role in price justification only if it is conceived as a relational value. (Chapter 6, Section 1)

(7) Linked to this second challenge is the question of how to adjudicate between different values in price justification. The feature of context-sensitivity can help us in answering this question by distinguishing two normative contexts in which prices are perceived and conceptualised: relational contexts (consented prices) and non-relational contexts (prices as the product of the market). (Chapters 4 and 6, passim)

(8) Relational contexts can be of two kinds: loosely relational and strictly relational. Strictly relational contexts, in turn, can also be of two kinds: contractual and non-contractual. Autonomy-as-sovereignty appears as a justificatory value for prices in contractual contexts, but it can (albeit not necessarily must) trump other normative concerns only if and when the contractual relationship is nested in another non-contractual relationship. This is the case of relational contracts. (Chapter 6, Section 2)

# Conclusion

The main aim of this thesis has been to provide a reassessment of the age-old idea that there is a just price of things. I have done so by endorsing what I call a virtue-based approach to price justification, one that is both value pluralist and context-sensitive. A virtue-based approach to price justification offers a way of dealing with the set of questions posed by the idea of the just price which is neither a rejection of their meaningfulness (the view I have called 'just price scepticism' in Chapter 2) nor a complete endorsement of the old 'Scholastic doctrine' of the just price based on commutative justice. The proposed approach involved the development of different conceptions of the just price based on different values—efficiency, distributive egalitarianism, autonomy-as-nonalienation, autonomy-as-sovereignty—and the incorporation of those conceptions into a wider normative framework—a virtue-based approach to price justification—that allows us to identify certain values as more normatively significant in some contexts than in others. When a price manifests one or more of the aforementioned values and it is perceived within the appropriate context—that is, in a context in which that value or those values are normatively significant—then the price so perceived is called just. This understanding of justice in pricing entails the recognition that the reasons justifying prices need not be justice-based reasons.

In what follows, I would like to put together the main conclusions from the present thesis. I have selected fourteen claims from Part One, and eight from Part Two.

*Conclusions from Part One*[1]*:*

(1) Private law remedies against inequality in exchange—in particular *laesio enormis* and price unconscionability—are unintelligible without resorting to some standard of price normativity. These remedies are still part of many legal systems and constitute the *explananda* of just price theory. (Chapter 1, Section 1)

(2) There are many other instances of price normativity in the law, some of which suggest an expansion from concerns over commutative justice to

[1] This reproduces the conclusions at the end Chapter 3. See Chapter 3, final section.

concerns over distributive justice. (Chapter 1, Section 1)

(3) To explain the *explananda* of just price theory is interesting and relevant not only in and of itself, but also because of its potentially revolutionary implications. This for two reasons. First, because once price normativity is recognised as a feature of *some* price-related practices, it tends towards its expansion to *all* price-related practices. Second, because it allows judges and parties to appeal to reasons based on substantive justice that are typically excluded from the law of contracts. (Chapter 1, Section 2)

(4) Some common objections to the very idea of the just price are best understood as alternative conceptions of the just price. (Chapter 2, passim)

(5) The 'Argument from Bad Metaphysics' (the idea that just price theory is inseparably linked to a discredited Aristotelian essentialism), however reconstructed, is fallacious and provides no ground to dismiss the possibility of price normativity. (Chapter 2, Section 1)

(6) Collingwood's famous objection against the very idea of a just price (the 'Argument from Value-Free Economics') rests on a misconception about the purely descriptive nature of economic discourse. Once this misconception is corrected, Collingwood's argument can be reconstructed as an argument against the identification of justice in pricing with the price fixed by supply and demand and in favour of an institutional approach to justice in pricing, according to which the just price is the price that stems from just institutional arrangements. Since institutions can be shaped by different normative commitments, an institutional approach allows us to adopt a more pluralistic approach to price justification, one that entails a partial reform to the Scholastic doctrine of the just price and its commitment to commutative justice as the sole source of price justification (Chapter 2, Section 2)

(7) The 'Argument from Consent' (the argument according to which the just price is nothing but the price at which the parties decide to transact) does not give us reasons to dismiss the idea of just prices altogether. Quite the opposite: it provides us with an alternative conception of justice in pricing, one that links justice and consent. (Chapter 2, Section 3)

(8) The 'Marginalist Objection' to just price theory (the argument according to which just price theory entails the rejection of value marginalism) fails as an objection against just price theory because questions about justice in pricing

are separate from questions over the sources of economic value. (Chapter 2, Section 3)

(9) Alternative conceptions of the just price arise from disagreements about the grounds of price justification. The grounds of price justification are the values that underlie each conception and serve as the justificatory reasons that allow us to identify a given price as the *just* price of a certain good. (Chapter 3, Section 1)

(10) *Efficiency*, *distributive justice*, and *autonomy* constitute three alternative grounds of justice and underlie three alternative conceptions of the just price (the Efficiency Conception or 'EC', the Distributive Justice Conception' or 'DJC', and the 'Autonomy Conception' or 'AC'). (Chapter 3, *passim*)

(11) If inegalitarian patterns of wealth distribution systematically benefit the rich at the expense of the poor, then those benefitted from wealth inequality have the power to impose their prices over the rest, and the prices that the rich impose over the poor cannot be meaningfully called just prices. Therefore, prices tracking background inequality are unjust, and market prices obtained under conditions of inegalitarian wealth distribution are unable to serve as a normative standard for just pricing. (Chapter 3, *passim*)

(12) From (11), it follows that the conception of the just price according to which a price is justified because it is efficient (the 'EC') is normatively attractive only if conditions of equality of wealth obtain. (Chapter 3, Section 2)

(13) For the same reasons, the conception of the just price according to which the value that justifies prices is distributive justice (the 'DJC') is normatively attractive only if some version of distributive egalitarianism obtains, that is, only if the underlying distributive principles aim at securing equality of wealth, or at least tend towards equality of wealth (as it is the case with Parfit's *prioritarianism*). (Chapter 3, Section 3)

(14) The same reasons apply to the conception of the just price according to which a price is justified because it has been autonomously chosen by the parties (the 'AC'). Since wealth is power-conferring, wealth inequalities between the parties in a contract make it the case that one of the parties has the power to dominate the other by imposing a price. Therefore, the AC is also committed to some form of distributive egalitarianism: prices that

reflect inegalitarian patterns of wealth distribution are unable to manifest autonomy-as-nonalienation. (Chapter 3, Section 4)

*Conclusions from Part Two*[2]*:*

(1) Virtue is necessary for the sustenance of price-related practices across time (Chapter 4, Section 1)

(2) A virtue-based approach to justification can, therefore, play an important role in price justification. In particular, two features of a virtue-based approach to justification (value-pluralism and context-sensitivity) can help us to overcome the challenges to previous conceptions of the just price. (Chapter 4, Section 2)

(3) A virtue-based approach to price justification represents rational progress compared to earlier conceptions of the just price. The telos of the enquiry is to identify the conditions under which we can achieve equality in exchange understood not as equality of value between things exchanged, but rather as treating each other as equals in exchange (Chapter 4, Section 3)

(4) The first challenge against earlier conceptions of the just price concerned the compatibility between distributive egalitarianism and the price system. Value pluralism (which entails motivational pluralism) allows us to claim that there is nothing conceptually odd about an egalitarian price system. Although the current motivational structure of the price system is at odds with distributive egalitarianism because it assumes that people will not work as hard without wage differentials, a virtue-based approach allows us to challenge this assumption by noting that this is merely a contingent feature of our current society, and that different institutional arrangements could, in principle, help in bringing about a different price system shaped by a more egalitarian ethos. (Chapter 5, Section 1)

(5) Private law can help in moving from potential to actual feasibility. This entails a sensitivity to the regressive distributive effects of private law rules, and it might involve a relocation of certain contractual rules and doctrines—such as remedies against *laesio enormis* or the doctrine of unconscionability—that are usually conceptualised as operating at the margins of contract law.

[2] Here I reproduce the conclusions in Chapter 6. See Chapter 6, final section.

(Chapter 5, Section 2)

(6) The second challenge concerned the possibility of rescuing autonomy-as-sovereignty as a value able to justify prices. Following Peter Benson, I argued that autonomy-as-sovereignty can play a role in price justification provided that it is linked with commutative justice and, therefore, understood as *reasonable* autonomy. Since reasonable autonomy involves linking autonomy to a certain form of reciprocity, the value of autonomy-as-sovereignty can play a role in price justification only if it is conceived as a relational value. (Chapter 6, Section 1)

(7) Linked to this second challenge is the question of how to adjudicate between different values in price justification. The feature of context-sensitivity can help us in answering this question by distinguishing two normative contexts in which prices are perceived and conceptualised: relational contexts (consented prices) and non-relational contexts (prices as the product of the market). (Chapters 4 and 6, *passim*)

(8) Relational contexts can be of two kinds: loosely relational and strictly relational. Strictly relational contexts, in turn, can also be of two kinds: contractual and non-contractual. Autonomy-as-sovereignty appears as a justificatory value for prices in contractual contexts, but it can (albeit not necessarily must) trump other normative concerns only if and when the contractual relationship is nested in another non-contractual relationship. This is the case of relational contracts. (Chapter 6, Section 2)

The main normative concern of just price theory has always been the search for equality in exchange. This was the main concern of the Scholastic doctrine of the just price, and it is also the main concern of the present thesis. A concern for equality in exchange is, in fact, what brings all the different claims about just pricing that I have put forward throughout this dissertation together. The argument developed in these pages suggests, however, that keeping equality in exchange has a ‘deeper meaning’ than the one envisaged by Aristotle and the medieval Scholastics, and that a theory of the just price that aims at keeping equality in exchange should do more than just show a concern for keeping equality of value between goods exchanged. If the arguments presented here are correct, then just price theory may benefit from a broader approach to equality in exchange, one that, while keeping the main insights

from the Scholastic doctrine of the just price and its concern with commutative justice, also incorporates concerns over efficiency, distributive justice, egalitarianism, autonomy, nonalienation, and individual sovereignty, as conditions for achieving equality in exchange—as conditions, that is, for treating each other as equals in exchange.

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