The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remarks

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1. Introduction.

While issues of justice are at the center of the international scholarly debate on contracts,¹ both black letter law and legal scholarship tend to disregard the doctrine of the just price as nothing more than a relic of the Middle Ages. In accordance with the approach adopted by the EU Directive on Unfair Terms in Consumer Contracts, the most recent model rules of European private law explicitly exclude price adequacy from the unfairness test provided by the provisions dealing with unfair contract terms.² Similarly, in the United States, sec. 79 of the Restatement (Second) of Contracts specifies that “if the requirement of consideration is met, there is no additional requirement of equivalence in the value exchanged.” Legal scholars substantiate this approach with various arguments. In his seminal paper on Vetragsfunktion und Vertragsfreiheit, German law professor Ludwig Raiser identifies the flaw of the just price doctrine in the contradiction between its implicit claim to measure the objective value of

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² STUDY GROUP ON A EUROPEAN CIVIL CODE - RESEARCH GROUP ON EC PRIVATE LAW, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Sellier, Munich, 2009, sec. II. - 9:406(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.”
goods and the dynamics of modern free markets. Following a long standing tradition, other writers consider the notion of equality in exchange to be at odds with freedom of contract: because the free will of the parties is the best judge of their interests, anything freely agreed upon is just by definition. As the French philosopher Alfred Fouillée famously puts it, “qui dit contractuel, dit juste.” A concise synthesis of the latest developments is rendered by Italian law professor Natalino Irti: “prices are neither just nor unjust. Rather, the justice of the price lies in the lawfulness of its formation.”

Reality, however, reveals a more complex picture. Empirical economic research shows that concerns of price fairness commonly motivate the behavior of firms and individuals. Likewise, it is widely recognized that, while freedom of contract alone ostensibly informs court decisions, judges in fact attempt to uphold substantive standards of justice. Even in positive law, freedom of contract is far from the only determinant of contract price. Usury laws, the remedies provided for gross disparity by contract law in Continental Europe, and the doctrine of unconscionability in North American common law are clear signs of a persisting principle of equality in exchange which can be traced back to the doctrine of the just price. From a different perspective, recent events illustrate the possible shortcomings of absolute private autonomy. Even if it is often neglected for obvious political reasons, the 2008 financial crisis has demonstrated how unfettered freedom of contract in bank executives’ compensation arrangements may result in excessive risk-taking and, as a consequence, in negative externalities with dramatic effects for third parties.

This paper aims to discuss the possibility of applying the insights provided by the doctrine of the just price to the current debate about contractual justice. Sections 2 and 3 summarize the theory of the just price and respond to the objections that are traditionally raised against it. Just price doctrine and an alternative approach based on procedural justice are discussed in Section 4. Section 5 identifies the role that the theory of the just price could play in contemporary contract law and suggests a general standard of proportionality in exchange as a constraint on the full application of freedom of contract. Some consequences of the suggested approach, with reference to specific hard cases, are sketched in Section 6. Section 7 concludes.

4 A. FOUILLEE, La science sociale contemporaine, Hachette, Paris, 1880, 410.
5 N. IRTI, Persona e mercato, in Riv. dir. civ., 1995, 1, 289, 292.
2. The doctrine of the just price

2.1. The Aristotelian-Thomistic Origin

Even though both Roman law\(^{10}\) and the Talmudic literature\(^{11}\) dealt with the issue of price adequacy, the doctrine of the just price traces its lineage to Aristotle’s *Nicomachean Ethics* and to Thomas Aquinas’ *Summa Theologiae*. In the framework of Aristotle’s virtue ethics, Aquinas identifies equality as the requisite for commutative justice in mutual dealings. The doctrine of the just price is concisely outlined with reference to the sale contract. After recognizing that “buying and selling seem to be established for the common advantage of both parties”, Aquinas contends that:

“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. Therefore if either the price exceeds the quantity of the thing’s worth, or, conversely, the thing exceeds 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.”\(^{12}\)

While the *Summa Theologiae* does not articulate what exactly comprises a just price,\(^ {13}\) in his commentary on Aristotle’s *Nicomachean Ethics* Aquinas explains that the value of things “has a reference to human need.” Since things are evaluated “according as man stands in need of them for his own use,” the “one standard which truly measures all things is demand (indigentia)”\(^{14}\) and demand is conventionally measured by money. Therefore, according to the majority of scholars, “the normal measure of something’s value [is] the price it would currently fetch in the market (secundum communem forum), i.e., in deals between any willing sellers and buyers in the same locality and time frame.”\(^ {15}\)

Aquinas clarifies his approach with two important qualifications. Openly distinguishing between ethics and law, he limits the scope of the theory of the just price as a legal doctrine. Since “human law is given to the people among whom there are many lacking virtue, and it is not given to the virtuous alone,” it “suffices for it to prohibit whatever is destructive of human intercourse, while it treats other matters as though they were lawful, not by approving of them, but by not punishing them.”\(^ {16}\) Aquinas also recognizes the need for a flexible application of his doctrine: “the just price of things is not fixed


\(^{14}\) Erh., v. 9, n. 4 [1981].


\(^{16}\) Summa Theol. II-II, q. 77, a. 1 ad 1.
with mathematical precision, but depends on a kind of estimate, so that a slight addition or subtraction would not seem to destroy the equality of justice.”

2.2. The Later Scholastics Developments

Writing as a philosopher and a theologian, Aquinas was not concerned with formulating a comprehensive legal doctrine. While he made reference to Roman law, mentioning for example the rule on gross disparity (*laesio enormis*, C. 4.44.2) while discussing the lawfulness of selling things for more than their worth, he did not attempt to synthesize it with his theoretical framework. Neither did medieval jurists, even though traces of Aristotelian ideas may be found in Baldus’ commentary on the Roman doctrine of *laesio enormis*, where he notes that an unjust price violates the principle of equality. As described in detail in the well-known book by James Gordley, *The Philosophical Origins of Modern Contract Doctrine*, a synthesis of Roman law and Aristotelian-Thomistic moral philosophy was achieved in the XVI century by the later Scholastics.

In addition to affirming the principles of commutative justice and equality in exchange, Dominican Domingo de Soto (1494-1560) and Jesuits Luis de Molina (1535-1600), Leonardus Lessius (1554-1623), and Juan de Lugo (1583-1660) identified the just price with either the current market price or with the price set by public authorities. In Lessius’ words, “the just price is either that which is fixed by the public authority in consideration of the common good or that which is determined by the estimation of the community (*communi hominum aestimatione*).” According to these writers, such an estimation depends on the features of the goods exchanged, the cost of production, the mode of selling, and the supply of money. A detailed taxonomy of the circumstances “causing the estimation of the goods to rise or fall” is provided again by Lessius:

> “some of these circumstances relate to the commodities themselves: their scarcity or abundance, the common need for them and their subjective utility. Next, there are circumstances pertaining to the seller: his labor, the expenses, the risks, and the damages he incurs in obtaining, transporting, and storing the goods. Furthermore, the mode of selling plays a role, namely whether the commodities are offered spontaneously or sold on demand. A final factor concerns the buyers, whether they are few or many, and whether there is lack or abundance of money.”

Compared with modern and contemporary views, this approach shows two original features which are important to note. First, it bases price justice on a substantive standard. As de Soto puts it, “the justice of the price does not depend in any way on the person, but it is assessed *per se*, absolutely.” Second, in gauging the equality of an exchange, the approach developed by the later

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17 Summa Theol. II-II, q. 77, a. 1 ad 1.
18 Summa Theol. II-II, q. 77, a. 1 ad 1.
19 Commentaria to C. 4.44.2, nn. 18 and 48.
22 De iustitia et jure, lib. 2, cap. 21, dub. 2, § 8.
Scholastics takes into account both objective and subjective elements. Despite explicit and sophisticated references to cost of production and utility to the buyer, this approach cannot be considered a theory of value in the modern sense, since its architects did not intend to formulate an economic theory on the worth of goods and services. Luigi Pasinetti’s clarification regarding the economic thought of ancient and medieval philosophers can be extended to later Scholastics: they were trying to state standards of ethical and legal behavior and thus “it was not contradictory for them to try to set out [m]any separate arguments, provided that they all helped [t]o achieve the final effect.”

In other words, the later Scholastics’ focus was human judgment of price justice, not the equilibrium between supply and demand. From this perspective, Murray Rothbard’s reference to the Scholastics as “proto-Austrian” is clearly an overstatement. Lessius’ comment on utility marks the difference:

“It is not allowed to sell a good dearer on account of the subjective utility or necessity that drives on to buy your good (as it is the depraved practice of many utterly immoral merchants). The reason thereof is that no one is allowed to sell to another precisely that which belongs to that other person. Now, the subjective utility is that which the good offers to the buyer, not to the seller. It comes forth from a circumstance of which the seller is not the cause.”

By the same token, the “estimation of the community” which determines the just price cannot be equated to the dynamics of a perfectly competitive market, as some historians of economic thought are wont to argue. As Norwegian economist Odd Langholm notes, the frame of reference for the analysis of later Scholastics was, rather, “a moral universe that obliged any buyer or seller to act for the common good and agree to terms of exchange accordingly, regardless of the advantage granted him by the forces of the market.”

A clear example of this approach is again provided by Lessius. After recalling the maxim of Roman law that “the prices of goods are defined neither by affection nor by private advantage but rather in common” (D. 35.2.63: *pretia rerum non ex affectione nec utilitate singulorum, sed communiter funguntur*), Lessius argues that “private judgment is fallible and easily perverted by love of

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27 De iustitia et jure, libr. 2, cap. 21, dub. 2, § 31.


gain, whereas a common judgment is less subject to error.\textsuperscript{30} As more recently observed, common estimation “is not merely an impersonal force driven by the egotistical individual’s interests, but a communal and prudent process” where moral responsibility “plays an outstanding role in preventing economic compulsion.”\textsuperscript{31}

3. Criticism of the doctrine of the just price. Some replies.

3.1. The Modern Attack against the Doctrine of the Just Price

The first explicit attack against the doctrine of the just price comes from Christian Thomasius (1655-1728) in \textit{De aequitate cerebrina}, a book published in 1706 criticizing the Roman law on gross disparity.\textsuperscript{32} Thomasius’s main argument is twofold. First, he identifies the fallacy of the just price doctrine in the belief that “the prices of things originate from a natural comparison between them and are nearly an intrinsic quality thereof.”\textsuperscript{33} Then, after claiming that “human eagerness (\textit{cupiditas}) drives the price of things”, Thomasius states that “in contracts the prices of things depend only upon the agreement of the parties” and - as far as they act “in the state of natural freedom” - “no just price exists prior to an agreement.”\textsuperscript{34}

Thomasius’ arguments, however, are hardly original. In keeping with his radical dismissal of Aristotelian virtues theory and emphasis on self-interest and free will, Thomas Hobbes (1588-1679) had already suggested a similar approach in a famous remark in his \textit{Leviathan}, published in 1651: “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.”\textsuperscript{35} The same argument was put forward in his earlier \textit{De cive} (1642) as a critique of the Aristotelian conception of justice:

“But what is all this to Justice? For neither, if I sell my goods for as much as I can get for them, do I injure the buyer, who sought, and desired them of me? Neither if I divide more of what is mine to him who deserves less, so long as I give the other what I have agreed for, do I wrong to either?”\textsuperscript{36}

In rejecting the theory of the just price, both Hobbes and Thomasius start from the same philosophical assumptions. In the aftermath of the modern dismissal of metaphysics, discourse on moral philosophy began to exclude the problem of identifying the \textit{telos} or “end” of man and the notion that the virtues are a necessary means of helping him reach that end.\textsuperscript{37} In this changed context,
contracts are simply the means to reconcile conflicting self-interests according to the respective wills of the contracting parties.

3.2. A Rejoinder

Fostered by the new philosophical paradigm of modernity, the two objections raised by Thomasius against the doctrine of the just price swiftly became a commonplace in the emerging market economy. In the first English treatise on contracts, John Powell states that “it is the consent of parties alone, that fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value.” Similarly, in a renowned handbook on German commercial law, Carl Gareis argues that “the value of goods are one amount here and one amount there, one amount for the seller and another for the buyer”, further claiming that “a price must be considered just” when “it is agreed upon by the parties.” An analogous point was raised in the discussion prior to the enactment of the French code civil as noted by Berlier before the Conseil d’Etat, “things do not in general have a true price, a just price; they are worth less to one person, more to another; the degree of luxury, the utility, the varying situations of the parties, there are plenty of reasons for different evaluations: but the price is known only by the agreement itself; it establishes the price, and the price should not be sought elsewhere.” These arguments are still common today. With express reference to “Aristotle’s approach to economic problems”, Ludwig von Mises criticizes those for whom “value was considered as objective, as an intrinsic quality inherent in things.” Meanwhile, the comment to sec. 79 of the United States Restatement (Second) of Contracts explains that “valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions.”

The criticism that the doctrine of the just price regards value as an intrinsic property of things is, however, groundless. Indeed, the later Scholastics themselves explicitly reject the concept of an intrinsic value of goods. In accordance with Aquinas’ statement that “articles are not valued according to the dignity of their nature”, but “are priced according as man stands in need of them for his own use,” de Soto affirms that “the prices of things have to be evaluated not according to their nature, but to the extent they serve human use.” Molina and de Lugo also categorically dismiss the correspondence between economic value and intrinsic worth. According to the former, “the just price does not originate from the nature of things … but depends on how far they are serviceable for human use.” Similarly, de Lugo identifies the cause of price fluctuation not as “the intrinsic and substantial perfection of things”, but as their “benefit to human use” (utilitas in ordine ad usum humanos) and

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38 J. Powell, Essay Upon the Law of Contracts and Agreements, P. Byrne, J. Moore, Dublin,1790, 229. As noted by A. Simpson, The Horowitz Thesis and the History of Contracts, in 46 U. Chi. L. Rev. (1979), 592 ff., elsewhere in his treatise Powell expresses a more benign personal view, writing that “inadequacy of price, abstracted from all other considerations, seems of itself … to furnish no ground on which a court can set aside, or rather relieve a party to a contract.” Powell, at 152 (emphasis in the original).
42 Eth., v. 9, n. 4 [981].
43 De iustitia et iure, lib. 6, q. 2, art. 3.
44 De iustitia et iure, II, disp. 348, n. 2.
“valuation” (aestimatio) by the community.45

The argument based on private autonomy is much more serious, as it marks a crucial aspect of the modern break with the Aristotelian tradition and is a cornerstone of the emerging free market economy. The claim that the just price coincides with the price agreed upon by the contracting parties is rooted in the philosophical developments which followed Descartes’ critical philosophy and English empiricism. By reducing the scope of reason to logical deduction and immediate sense experience, both approaches denied the possibility of a rational normative judgment. As a consequence, the only way to find a foundation for making a choice was either claiming that choosing in accord with one’s inclination is normatively good, as utilitarianism did, or identifying some other normative criterion, which Kant and Hegel recognized in the free and autonomous choice. Under both approaches, will and freedom to choose are central.46 From a political and economic perspective, reducing the just price to any result of a free agreement complements the classical liberal argument which sees the market as the optimal coordination mechanism for allocating resources and advocates a diminishing government role in the economy.47 Therefore, “subjecting the reasonableness or equivalence of the relationship between the price and the goods or services to any control by the courts or administrative authorities would be ‘anathema to the fundamental tenets of a free market economy’.”48 As Judge Easterbrook wrote in the opinion rendered a few years ago in a controversial case, “competitive processes are imperfect but remain superior to a ‘just price’ system administered by the judiciary.”49

Using exclusively free will as a normative criterion, however, can have negative consequences. Both moral philosophy50 and economic theory51 provide many examples of the negative externalities resulting from unfettered economic activity. Similarly, some free agreements are patently difficult to justify, such as those resulting in economic compulsion52 or haphazard distribution of wealth53. Freedom of contract as sole determinant of justice also neglects to consider both the possibility of unequal relationships and the behaviour of people in real-world situations. Max Weber’s seminal Wirtschaft und Gesellschaft famously highlights the role played by power in economic relationships and the consequent distortions of the free market mechanism.54 In more recent terms, “for those with limited

45 De iustitia et iure, II, disp. 26, sec. 4, n. 42.
46 J. GORDLEY, Foundations, supra note 8, at 16 f.
49 Jones v. Harris Associates, 527 F.3d 627, 634 (7th Cir. 2008).
53 J. GORDLEY, Equality, supra note 8, at 1617 ff.; for the insightful perception of the idea of an objectively correct price “of goods with full emotional force for Americans only in the law of insider trading: the view that it was fundamentally wrong for one contract partner to get the better of another by selling high or buying low,” J. WHITMAN, The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidences, in 105 Yale L.J. (1996), 1841, 1858; in more general terms, see also D. LEWINSOHN-ZAMIR, The Objectivity of Well-Being and the Objectives of Property Law, in 78 NYU L. Rev. (2003), 1669 ss.
54 M. WEBER, Wirtschaft und Gesellschaft, Mohr, Tübingen, 1922.
alternatives, the free market is not all that free.”  

From a different perspective, empirical economic research offers evidence that economic agents tend to moderate their free choices by reference to some further normative criteria.  

Identifying those criteria may help not only to resolve the inconsistencies in the free will model, but also to elaborate an idea of normative judgement more correspondent with reality.

4. Just price doctrine and procedural fairness.

According to a common line of reasoning, the flaws of a model of contractual justice based solely on free will can be corrected by identifying a set of conditions under which freedom of contract could be effective. Such a view asserts that the task of the law is to remove the obstacles that inhibit equality between parties, thus assuring an “appropriate initial status quo,” which is traditionally identified with John Rawls’ “principle of justice chosen behind the veil of ignorance.”  

Here, a standard of procedural fairness replaces one of substantive fairness.

A recent example of this approach can be found in the Draft Common Frame of Reference (“DCFR”) prepared by the Study Group on a European Civil Code and by the Research Group on EC Private Law. Having determined that “justice is hard to define, impossible to measure and subjective at the edges,” the DCFR identifies several principles of contractual justice - such as “not allowing people to rely on their own unlawful, dishonest, or unreasonable conduct” and prohibiting parties from “taking undue advantage” - as means to guarantee a genuine freedom to contract. By the same token, the DCFR addresses price justice only from a procedural perspective: while “the adequacy of the price to be paid” is excluded from the unfairness test, except when the contract terms are not “drafted in plain and intelligible language” [sec. 9:406(2)], an extensive set of remedies is provided for situations that may lead to unjust prices, among which are reliance on incorrect information given by a party (sec. 7:204), fraud (sec. 7:205), coercion or threats (sec. 7:206), and unfair exploitation of contractual power (sec. 7:207).

Even though, as demonstrated by the provisions in the DCFR, such an approach often seems to reach the same outcomes as one based on the doctrine of the just price, a model grounded in

56 D. Kahneman, J. Knetsch, R. Thaler, supra note 6; B. Frey, W. Pommerehne, supra note 6.
58 STUDY GROUP ON A EUROPEAN CIVIL CODE - RESEARCH GROUP ON EC PRIVATE LAW, supra note 2. To be sure, at no. 24 of the Intern Outline Edition the authors of the DCFR explicitly declared that “the DCFR is particularly concerned to promote what Aristotel termed ‘corrective’ justice’. This notion is fundamental to contract.” However, that statement - which was deleted in the final Outline Edition - is at odds with the rejection of the principle of equality in exchange (supra note 2) and appears to be mostly aimed at clarifying - as no. 24 proceeds - that “the DCFR is less concerned with issues of ‘distributive justice’.” Thus, it is unclear to what extent the authors of the DCFR intend to rely on Aristotelian notions of justice.
59 STUDY GROUP ON A EUROPEAN CIVIL CODE - RESEARCH GROUP ON EC PRIVATE LAW, supra note 2, respectively at nos. 40, 42, and 43.
substantive justice is more complete. Any system of social control, including a procedure aimed at assuring the justice of transactions, needs to be legitimated, and this legitimization can only be found in a substantive value of the system. Explicitly recognizing the specific substantive value that legitimates such a system, therefore, allows for more transparency and control, while also being more effective in practice, particularly in borderline cases where transparency and control are most needed. Naturally, the need for a substantive value does not imply *per se* that such a value be equality in exchange, as suggested by just price theory. However, several arguments show the reasonableness of adopting precisely this suggestion.

Empirical economic research offers evidence that firms and individuals are commonly motivated by concerns of price fairness. In a famous article, Kahneman, Knetsch and Thaler discussed what they called “a principle of dual entitlement”. Using market prices, posted prices and the history of previous transactions as “reference transactions”, they found that a substantial majority of the population studied thinks that

“transactors have an entitlement to the terms of the reference transaction and firms are entitled to their reference profit. A firm is not allowed to increase its profits by arbitrarily violating the entitlement of its transactors to the reference price, rent or wage. When the reference profit of a firm is threatened, however, it may set out new terms that protect its profits at transactors’ expenses.”

Further research has confirmed their conclusions.

From a contractual justice standpoint, while the aforementioned convergence between outcomes of procedural fairness and of substantive fairness does exist, its cause appears to be inverted: it is not the removal of inequality that brings about substantive justice, but rather people’s desire for substantive justice that results in the use of legal remedies to eliminate inequality. As many scholars have pointed out, the traditional legal doctrines of fraud, misrepresentation, duress, undue influence and mistake “have frequently been used to police the fairness of transactions between parties of unequal bargaining power.” By the same token, it is commonly recognized that, “notwithstanding the rhetoric of private autonomy, the courts’ actual practice reflects a solid commitment to values of equivalence, fairness and substantive justice in contracts,” even though “the extreme reluctance of courts to acknowledge openly that they are trying to ensure that a contract operates as a fair exchange ... often obscures what is actually going on.”

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Finally, in positive law substantive price justice is much more pervasive than might be expected. Oft-cited cases such as usury laws, the remedies provided by the Unidroit principles for cases where “the contract or an individual term of it, at the time of the conclusion of the contract, gave the other party an excessive advantage” [artt. 3.2.7(1) and 3.2.8 Unidroit Principles of International Commercial Contracts 2010], and the doctrine of substantive unconscionability in common law can be supplemented by further examples. Under Scandinavian law “a contract may be modified or set aside, in whole or in part, if it would be unreasonable or contrary to principles of fair contract” [art. 36(1) Scandinavian Contract Act], thus even allowing control of the price.67 Similarly, the recent Italian Act for Liberalizations provides that contracts regarding food products “should respect principles of transparency, fairness, proportionality and equality in exchange” [art. 62(1) Act January 24, 2012, n. 1] and the regulation implementing this provision expressly voids contracts where the price is “patently below the average cost of production” [art. 4(2)(c) Ministerial Decree October 19, 2012].

5. Towards a role for the just price doctrine in contemporary contract law.

A model of contract justice based on substantive price fairness requires the clarification of two issues: the relationship between this model and the market mechanism for price formation, and the role played by the law in ensuring price adequacy.

While just price theory suggests that prices should be evaluated according to a normative criterion beyond the mere outcome of the economic process, the market price can nonetheless be considered a good proxy for the just price. Normal market conditions embody many of the factors affecting the moral judgment of price justice: as German philosopher Peter Koslowski has noted, “the conditions of the market price formation, the market process and price formation by competition are themselves constitutive criteria of the assessment of the just price”. For this reason, “the assumption can be made initially, until the contrary is proven, that the market price is just.”68 Consequently, the legal requirement of a just price does not replace the market mechanism but rather works as a normative criterion to evaluate whether the individual price conforms to the generally established market price. Where objects are unique or markets are so evidently imperfect so as to make the market price indeterminable, the evaluation of price justice resorts to the specific criteria developed by the later Scholastics: features of the goods exchanged, the cost of production, the mode of selling, and the supply of money.

Such a relationship between the just price and the market price illustrates that the proposed approach works as an external constraint to freedom of contract, not as a paternalistic dictation of the price to the parties. Per Koslowski’s salient observation, “just price theory does not formulate positive norms, but negative norms of price formation, economic and social minimum requirements that the subjectivized price system must be able to satisfy.”69 Moreover, while from a purely ethical perspective the model could lead to a case-by-case evaluation of price justice, albeit one conforming to market price, as a legal doctrine the insights of the later Scholastics are limited by the specific goals of the law and by the need for efficacy in its adjudication. Recalling the aforementioned distinction between law

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68 P. KOSLOWSKI, supra note 50, at 188.
69 P. KOSLOWSKI, supra note 50, at 221.
and ethics by Aquinas and his note that it “suffices” for the law “to prohibit whatever is destructive for human intercourse,” it is therefore easily understandable why a long-standing tradition - from the Roman doctrine of laesio enormis to the 2010 Unidroit Principles - limits judicial intervention on free agreements to cases of gross disparity. These are the cases with a high risk of negative externalities in which legal intervention is worth the cost. Placing the burden of proof on the party who claims the injustice of the price further reduces the likelihood of excessive intervention.

These qualifications address the traditional objection that protective legal measures - in this case, the possibility of establishing the just price as a matter of law - will be priced ex-ante and thus parties “will pay for protections that many of them would rather waive for a discount.” Because limiting the legal intervention to cases of gross disparity which the affected party is able to prove leaves little room for opportunistic behavior, all that remains to be priced ex-ante is the protection against the exploitation of contractual power. This very same mechanism might, however, become a competitive advantage for “virtuous” players. All other things being equal, compliance with the requirements of price justice enhances reputation and lowers legal risks, thus enabling lower prices and a competitive advantage. From a different perspective, the traditional objection overlooks the capacity of the law to shape societal values. Once this feature is taken into account, an approach based on just price theory appears more beneficial than others. The harsh model sketched by Justice Thomas asserting that

“no other participant in a market owes a duty to protect those who knowingly enter a market but who do not understand it, are imprudent, or who miscalculate; indeed, it is likely that a person who is imprudent or foolish or who miscalculates in any market will be ruthlessly exploited by those who understand the market”

is probably socially less desirable than a model which promotes equality in exchange. Empirical economic research corroborates this conclusion.

A final remark should be devoted to the objection that determining whether a price is grossly unjust is extremely difficult. Antitrust analysis has often characterized the effort to distinguish between competitive prices and unfairly high prices as a “daunting, if not impossible, task.” Rare case law

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73 Sphere Drake Insurance Ltd v Euro International Underwriting Ltd [2003] EWHC 1636 (Comm).
applying EU provisions on excessive pricing - currently, art. 102(2)(a) Treaty on the Functioning of European Union - seems to confirm the point. Recent studies show, however, that the difficulty may be overstated. Indeed, while it may be arduous to identify an ubiquitous test, viable solutions may be offered by profitability analysis (i.e.: scrutinizing the firm’s return on capital to determine whether its profits diverge from its normal, expected return on capital in a competitive market),77 price-cost margin analysis, and price comparison performed geographically or historically (i.e.: considering the prices charged by other transactors in similar markets or the prices charged by the transactor over time).78 Given the possible shortcomings of those tests, increased reliability might emerge from aggregating the results reached by applying different benchmarks.79

6. A few examples.

Hard cases on contractual justice have been proposed since antiquity. Augustine of Ippo mentions the “case where a manuscript was offered to a man for purchase, who perceived that the vendor was ignorant of its value, and was therefore asking something very small.”80 Lessius addresses the problem of “buy[ing] a precious good as if it were a cheap one.”81 An example similar to Augustine’s, involving a painting, is more recently offered by Italian law professor Vincenzo Roppo in order to highlight the key differences in the various conceptions of contractual justice among European legal systems.82 The problem of the grossly underpriced good is typically approached according to notions of procedural justice, inquiring whether the buyer is obliged to make a disclosure to the seller.83 But the tenets of the just price doctrine suggest an easier solution. The same reasons that justify legal intervention in the case of defective goods also apply here, where the problem is reversed. In both cases, in Lessius’ terms, “the contract does not preserve equality,” and in the case at hand “the seller does not intend to make a donation with respect to the sum exceeding the just price. Quite the reverse, he wants to sell the good completely and get a just price in exchange for it.”84 The just price in this case can be determined by integrating the views of the late Scholastics with the insights of contemporary scholarship distinguishing between information resulting from a deliberate search and information

79 OECD POLICY ROUNDTABLES, supra note 77, 12.
80 De Trinitate, 13, 3, 6.
81 De iustitia et jure, libr. 2, cap. 21, dub. 11, § 84.
82 V. ROPPO, Giustizia contrattuale e libertà economiche: verso una revisione della teoria del contratto?, in Riv. crit. dir. priv., 2007, 609.
84 De iustitia et jure, libr. 2, cap. 21, dub. 11, § 84. The example mentioned in the text could actually be characterized as a case of mistake; however, both common and civil law tend to exclude from the list of legally relevant mistakes an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement: see H. BEALE, Mistake and Non-Disclosure of Facts, Oxford University Press, Oxford, 2012, 88; R. ZIMMERMANN, S. WHITTAKER, supra note 83, at 234.
acquired casually\textsuperscript{85}. Because the expert buyer recognizes the value of the manuscript by virtue of his deliberately acquired expertise, the cost of producing this expertise should be taken into consideration when calculating the just price. Therefore, while a price adjustment should be applied, this adjustment should be such as to give a distribution of the value added by the buyer’s expertise which compensates him for the costs borne.

Executive remuneration in financial institutions is a much more recent and controversial issue. Traditionally, this problem has been addressed by allowing freedom of contract in arm’s length negotiations between informed parties and providing various procedural checks to manage possible agency problems and conflicts of interest. Mechanisms of risk management, corporate governance safeguards, and the imposition of fiduciary duties on directors are common legal strategies employed to this end\textsuperscript{86}. However, the fact that negotiations are not generally conducted at arm’s length\textsuperscript{87}, the data on U.S. CEO annual compensation before and after the financial crisis\textsuperscript{88}, and the recent EU decision to cap bankers’ bonuses\textsuperscript{89} cast some doubts on the effectiveness of these legal strategies. In 2011 the average annual compensation of CEOs in the 350 largest publically owned U.S. firms was more than 200 times the annual compensation of a private-sector production worker\textsuperscript{90}. Faced with this fact, the just price doctrine questions whether the Emperor is actually wearing any clothes: is the CEO’s compensation proportionate to the activity they perform? Apart from the related issue of distributive justice, is there equality in exchange between the CEO’s remuneration and the services he provides? Under any standard of comparison (e.g.: physical effort; contribution to the firm; amount of required ability, skill or training; difficulty, stress, risk or unpleasantness; degree of responsibility or importance), it is difficult to adequately explain why CEOs deserve to make 200 times what average workers make\textsuperscript{91}. Nor can it be effectively argued that this difference is justified to attract, retain, or motivate executives. Although increased pay does serve these purposes, it is difficult to explain the extra money paid to CEOs when their compensation is compared with the pay for jobs meeting many of the aforementioned criteria of comparison (e.g.: university presidents or military generals, who are paid 21 times less)\textsuperscript{92}. Such compensation is similarly difficult to justify when put in the perspective of firm wealth maximization: it is highly unlikely that paying an American CEO the 2011 national average of about 11 million USD, instead of, say, 1 million results in a marginal gain for his company.\textsuperscript{93} To the contrary, an approach based on equality in exchange could offer a simpler and more balanced solution,

\textsuperscript{90} I. Mishel, N. Sabadish, supra note 88, at 2.
\textsuperscript{92} J. Moriarty, supra note 91, at 269.
\textsuperscript{93} J. Moriarty, supra note 91, at 271.
reducing the inclination to take excessive risks - and thus cause negative externalities - which in the real world of finance is often positively correlated to the current compensation packages.  

Italian law on the bank-client relationship offers a further example of the utility of the just price theory. Under a thorny provision, the bank has the right to unilaterally modify the interest rate charged on open ended credit contracts with “reasonable ground” [art. 118(1) d. lgs. September 1, 1993, n. 385]. Legal scholarship has extensively discussed the conditions under which the requirement of a reasonable ground would be met. An approach based on the just price theory helps to shed light on the issue. The nominal interest rate charged by the bank to the client depends on the cost incurred by the former to borrow money, on the creditworthiness of the latter, and on inflation. Assuming that the original agreed interest rate was equitable and did not take into consideration the risk of changes in those factors, the right of the bank to unilaterally modify the interest rate with reasonable ground can be understood as a means to restore equality in exchange when a significant modification of the factors affecting the interest rate occurs. Either allowing the bank to unilaterally modify an agreement for any reason whatsoever, or prohibiting any change in the contract regardless of a change in the factors affecting the interest rate would be at odds with the principle of equality in exchange. For the same reason, the principle of equality in exchange would require a modification when such a change is in favor of the bank. A judicious application of the doctrine regarding the frustration of contract’s fundamental purpose could help to this end.

7. Conclusions.

“I see us free, therefore, to return to some of the most sure and certain principles of religion and traditional virtues – that avarice is a vice, that the exaction of usury is a misdemeanour. [We] shall once more value ends above means and prefer the good to the useful.” John Maynard Keynes’ prediction in his Economic Possibilities for our Grandchildren is followed by an immediate note of caution: “the time for all this is not yet”. For “at least another hundred years” only “avarice and usury and precaution” can “lead us out of the tunnel of economic necessity into daylight.”

As this paper has tried to demonstrate, the doctrine of the just price takes a different approach. Even in a context which is not yet - and may never be - out of the tunnel of economic necessity, the

99 J. KEYNES, supra note 98, at 372.
just price theory suggests that ends already have the capacity to shape means and, more specifically, the content of contracts. Once again, contract law shows it capability of reflecting “the fundamental tension of the man-as-he-is into man-as-he-could-be-if-he-realized-his telos”\textsuperscript{100}. Many aspects of this topic require further discussion. The relationship between private and public enforcement of the legal requirement of equality in exchange\textsuperscript{101}, and the impact on social justice of legal norms based on commutative justice\textsuperscript{102} are some of the most delicate issues. Recent developments in virtue jurisprudence reflecting an attempt to break free of the dichotomy between the consequentialism of law and economics and the deontology of rights-theories\textsuperscript{103} confirm, nonetheless, that this is a path worth following.