Deep Irony -- The Law of the Gift

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Richard Hyland, Gifts: A Study in Comparative Law (Oxford University Press 2009).

A cursory perusal of Richard Hyland's *Gifts: A Study in Comparative Law* (2009) ((This article is abridged from a much lengthier review published by the author in 44 **Real Prop. Prob. & Tr. J**. 823 (2010).)) reveals a massive work of such erudition that the twenty years Hyland admits he devoted to it seems neither surprising nor, indeed, unreasonable. *Gifts* not only manages to do yeoman's work for the practicing attorney—providing six chapters that survey the essential aspects of the substantive law of gifts in three common law and five civil law jurisdictions—but this work is likely to change the terms of future discussion about the gift among comparativists and other scholars in the humanities and social sciences. Demanding though this work is, however, the material remains thoroughly accessible. Written in prose that is a model of concise lucidity, the work will engage someone who picks it up and reads a section or two. But the book is ultimately a page-turner and anyone who absorbs one section is likely to succumb to its richness and turn to the beginning, reading the book as it ultimately demands to be read—from cover to cover.

The bulk of the work consists of six chapters that survey the law in the common law jurisdictions of England, the United States, and India, as well as the civil law jurisdictions of Germany, Italy, Spain, France, and Belgium. In addition, Hyland frequently gilds the lily with Roman, medieval, and early modern antecedents, especially where the law encompasses exception layered upon exception, only explicable—Hyland argues—as the excrescence of centuries of legislative tweaking.

Notwithstanding the richness of these chapters on the substantive law, however, it is Hyland's first chapter—"The Context of Gift Law"—that lends intellectual force to the substantive material and ultimately makes the work compelling. Whether in the common law or the various civil law regimes examined in this ambitious work, the law of gifts, Hyland points out, is little more than a litany of case-specific judgments that "boil down" to a maze of rules and exceptions. The incoherence, indeed the irony, that permeates the substantive law invites application of a sophisticated comparativist methodology to render the law intelligible. Rising to the challenge, Hyland takes up the mantel of Marchel Mauss. The ground-breaking 1924 monograph, *Essai sur le don* (translated as *The Gift* (1954)), maintained that the gift is parasitic upon numerous social institutions. Embracing Mauss, Hyland assembles massive research to argue that gift giving is above all a social practice that, like language, emanates from the social bedrock fully formed. Born independently of the law and flourishing outside of it, gift giving is not easily subsumed within any legal rubric.

But Hyland goes further. By his reckoning, not only does the practice of gift giving have little need of the law, but the law that is ultimately brought to bear on it—the private law—is ill-suited to the subject. The private law is devised to facilitate market-related activities with the prototypical transaction being an explicit, rationally self-interested quid pro quo, cognized in a contract. Unsurprisingly, then, the private law subsumes the gift as an afterthought, defined maladroitly, usually by reference to the contract—often as that social interaction that fails to qualify as a contract (for example, under the common law, where a gift is a transfer that lacks consideration).

Western gift law can then be understood only as a critique of gift giving. The law can offer only the

perspective of individual self-interest on activities embedded in the web of social custom. For anyone interested in the law of gifts, all that can be said is that, for any Western legal regime, the gift serves as a Rorschach test with respect to certain fundamental values: "The way each system chooses to order gift giving, and especially the extent to which it favors or restricts the process, speaks to that system's understanding of gratuitous action and its vision of social relationship."

Hyland leaves the reader hanging in one significant respect, however — that is, in whether gift giving ultimately serves the common good. In the final analysis, Hyland's interest in the gift is in its role—both as a challenge and an opportunity— vis-à-vis the private law. His hope is that insight into the law of gifts will propel the private law forward, into an era in which it will transcend its role as the primary vehicle by which the normative foundations of the market are secured. What is missing in a work that is otherwise a masterpiece of comparative law scholarship, however, is a clear articulation of the role of the gift, beyond serving as a midwife in the freeing of the private law. Indeed, this book contains more than an undercurrent of an idea that the gift must always confound the law. What Hyland does not address is whether a practice that gives voice to personal predilections, validates the idiosyncratic, and lends legitimacy to private orderings must always push back against all but the most libertarian legal order.

In the face of this extraordinary scholarly and erudite book, however, such concerns are mere afterthoughts emanating from the penumbra of the work. What Hyland makes very clear is that neither the true value of the gift nor the essential attributes of different types of gifts can be discerned until we disencumber the gift from the shackles of quid-pro-quo jurisprudence. At this stage in the development of what Hyland terms "the collective fabric of justification," however, we only can congratulate him on twenty years well spent and thank him for the judicious application of his time and talent.

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