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Recommended Citation

Emily Fowler Hartigan, *Rose and Apple—Original Gifts?*, 44 Fla. L. Rev. 347 (1992).

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ROSE AND APPLE — ORIGINAL GIFTS?

Emily Fowler Hartigan

Carol Rose begins and ends her distinctive, wry commentary on gift and exchange with the idea that the only thing we really understand is larceny. Her presentation, by now characteristic of her scholarship, is delightfully grounded and lucid, with touches of humor to remind us of her realistic context. The argument proceeds through ostensible game-theoretic musings, with hints of puzzles which she later turns into conundrums. The pace is even, clear, and inhabited by examples from property law which invite the reader along. The end seems to echo the beginning: all we really understand is larceny.

By the end, the reader knows that something crucial about gifts has been said, but just what? Rose narrates something about how there had to be a gift at the outset, something homey and comforting, like her style. With some hesitation, I suggest that this is country-lawyering of the finest kind and that underneath Rose's down-to-earth, you-can't-fool-me style, she is a seemingly-tough-love advocate of the mushiest, most affirmative vision of life in law to come out of a closet passionate thinker in some time. When you look closely at her nuts and bolts, "this is how it is" presentation, you find the sort of movement which Robin West in a very different style comes out and names "love."¹ What would Don Donor and his nag think of that?

In *Giving, Trading, Thieving and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*,² the title gives the agenda of Rose's movement away. If you will follow Rose, you will find that she has changed your perspective. She has done so almost openly, but not quite. She does not really tell you that she is going to affirm that life as humans know it is not possible without trust. Rose does not warn you that she is addressing the very root of the American psyche and intellect in order to challenge the dominant vision of life as economically determined, market-driven, bleakly greedy. Instead she performs a contemporary version of the Platonic

*Adjunct Professor, University of Pennsylvania Law School. B.A., Swarthmore, 1968; Ph.D., 1975, J.D., 1978, University of Wisconsin; Resident, Pendle Hill Quaker Study Center. My deep thanks to Nancy Stara for the gift of true collegiality during the time this was written.

1. Robin West, *Love, Rage and Legal Theory*, YALE J.L. & FEMINISM, Spring 1989, at 101.

2. Carol M. Rose, *Giving, Trading, Thieving and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992).

dialogue with Thrasymachus, or Kant's "transcendental" argument for the good. She begins by naming what we find most familiar — mistrust — and giving it its due. She talks about social relation in a way that disarms even the most cynical side of the reader. She then wends her way back to the beginning and finds there the necessity of what we doubt — that we trust and freely give to one another, and perhaps that itself is an original gift.

Rose reminds me of another character in the law, William Stringfellow.³ Stringfellow was a Harvard graduate who set up practice in Harlem, always wore his suit and bow tie, and preached a theology of law that was staggeringly prophetic. His wiry figure was familiar to the early members of the law and religion "movement" and to those who knew that the police had to come to his place on Block Island to arrest Daniel Berrigan. Stringfellow was famous for the old-time Biblical-repentance aspect of his prophecy: these are times of death and destruction, we are all subject to the powers and principalities, and justice is severe indeed. There was more than sufficient aura of grimness to Stringfellow to place him next to Jeremiah in the imagination. How could such an odd, ranting figure conjure up Rose's seemingly common-sense, plain-spoken reflections on property and economics?

The striking parallel is that Stringfellow's doom and gloom usually started his presentations, but the ending was always a tenderly modulated, faith-catching love of the gift of life. And Rose also makes the subversive suggestion that despite our deepest fears that we are all most essentially graspers in an abandoned universe, life is a gift of love.

How can you resist trusting her? She starts with adages like "don't look a gift horse in the mouth" and proceeds in her narrative to name characters memorably⁴ — this article has "Don Donor" — and to interpret humorous asides which locate the reader in an astute, amusing, accessible story. Rose keeps the reader oriented: talking about cultural skepticism about gifts, she remarks that death is the ultimate robber.⁵ No transcendental nonsense here. Then she dances among the terms, turning exchange into gift into larceny and back into . . . well, finally, gift.

3. See, e.g., WILLIAM STRINGFELLOW, *THE POLITICS OF SPIRITUALITY* (1984).

4. "Mom" and "George" of "let George do it" cooperative fame, were legend in my property classes, which I start with her *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *YALE J.L. & HUMAN.* 37 (1989).

5. Rose, *supra* note 2, at 303.

Just past midpoint in the article, she has the reader where she wants her. . . . “the completed gift turns into exchange when it is good, and larceny when it is bad.”⁶ But in the previous sentence, she has warned us that “gift itself is an unstable category,⁷ and the vision Rose offers is also unstable. It depends on how we take it, how we dwell in it, whether we can stand the thought that life is gift. Along the way, Rose helps by *reminding* us of this. She explores doctrines of property and case law to suggest that what the texture of American law reveals is less repudiation of gift than fear of larceny. Thus her ending, that we know larceny, may be read not as her ironic sign-off, but as a reminder that we dwell on larceny because it is the “hell we know” rather than what we truly want. She has already insinuated her vision of what we want in her chronicles of what we mean by larceny and gift, turning and turning the categories, always with a distinct positive spin.

This spinning is Rose’s performance, I think, of a turning beyond the hermeneutics of suspicion. Rather than a lot of theory about the stance, including the Freudian second-guessing which almost all contemporary discourse suffers from, Rose simply announces the worst and begins with larceny. She proceeds through the tangible areas of property and contract law associated with gift and exchange, relentlessly persuing the aspects of those legal areas that affirm the movement of freedom that gift entails. Mirroring our own suspicions, she questions the motives of first gift, then exchange, to see if either is guilty of larceny. We know larceny. We know injustice, but it is justice after which we aspire. We are familiar with evil, and profoundly unsure if there is a good. (Richard Rorty tells us good is not only indescribable, but not worth talking about.⁸) So she tells us that she understands larceny, but she is doing so in order to draw out, to demonstrate, gift. Something triggered all this, something which intended all this as gift. You may see why I find her reminiscent of Stringfellow, a theologian.

After a number of moves into donative intent and contractual dealings, Rose begins to bring her persistent question back through the text: how did exchange systems get started? Each time she raises this question, she uses a different vantage to unravel a line of reasoning back to the start and finds “once again” that “somebody, sometime,

6. *Id.* at 308.

7. *Id.*

8. See RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989).

has to make something like a gift."⁹ Once that is done, she finds graciousness, heightened sensibility, and generosity under eighteenth century theories of political economy which meld into today's theories. She then enters one final loop. Who enforces this seemingly vision of commerce? Leviathan. She raises the old argument: it is all force in the end. But "Leviathan rests on an initial act of giving too"¹⁰

She has followed game theory to its logical conclusions and found something contrary to the logic of exchange. She breaks the circuits of short-term self-interest calculation, and reveals the underlying relational realm of ongoing trust which, as her footnotes reveal, Stewart Macaulay has been describing for some years.¹¹

In the end, she tells us that "giving is a reasonable thing to do."¹² This is her final, wonderful joke, after footnoting the "necessity of 'irrational' passions for various economic and other endeavors."¹³ Another, considerably more startling way of putting her message is this: *love is reasonable*. After all, economic theory, game theory, legal theory, and property and contract law have in her rendition, told us this. Each story, in Rose's deft handling, grounds out in "some deep level" at which it all depends on giving. None of our stories works without gift.¹⁴

Not surprisingly, some of the most interesting contemporary literary theory uses gift to upset the "domestic economy of equivalence and exchange"¹⁵ and shake free a non-circuitous (yet circular in the rich sense) vision of human relationship. Rose upsets the common preconceptions that rationalistic systems such as game and economic theories are contrary to gift. This is, to use the deconstructive term, to reveal the "supplement" or the hidden side of dominant viewpoint. Her stories disrupt our public cynicism, but not by direct assault.

9. Rose, *supra* note 2, at 313.

10. *Id.* at 315.

11. *Id.* at 310 n.44, 316 n.65.

12. *Id.* at 317.

13. *Id.* at 316 n.66.

14. I am moved to note (very carefully) the parallel between Rose's plainspoken retelling of these stories and her late colleague Arthur Leff's rendition of all the standard theories of legal obligation and their inadequacy — his conclusion was that none of our legal stories work without God. Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

15. J. Hillis Miller, *Parable and Performative in the Gospels and in Modern Literature*, in HUMANIZING AMERICA'S ICONIC BOOK 57, 65 (Gene M. Tucker & Douglas A. Knight eds., 1982).

Instead, she fashions a subtle double movement which is “homey” indeed. This turning home is reminiscent of the parable, that mainstay of Jewish, Christian, and Islamic religious thought.¹⁶

The other doubling in Rose’s text is akin to what philosopher Paul Ricoeur calls “second naivete.” In his essay, *The Symbol Gives Rise to the Thought*,¹⁷ Ricoeur finds that the symbol makes a “gift” of thought: “After the gift, positing.”¹⁸ However, this revisitation of original symbols is not the same as its first instance. We cannot erase the suspicion. It will circle back, again and again. Rose tells us at the outset, “there is no denying Doris Donee’s suspicion. . . .”¹⁹ Once we have been told to beware of Greeks bearing gifts, we are always forewarned. *What Rose refuses to do is to leave us in suspicion.* As Ricoeur puts it, “Beyond the desert of criticism, we wish to be called again.”²⁰ We will never hear the call in the situation of primitive naivete again, but Ricoeur suggests that through and then beyond criticism, we can aim at a second naivete, a second “gift of meaning.”²¹

Thus the stakes in this country lawyer’s tale are no less than the meaning of the good, a quest Rorty and the “smart” guys gave up as uninteresting. Ricoeur calls it the re-creation of language. It is the project visible in law and literature, named in James Boyd White’s *When Words Lose Their Meaning*.²² It is the reclamation of human life as trustworthy and valuable. In Ricoeur’s venture, the aspiration is a return to the sacred, to what Plato calls the Good, and to a renewed hope of finding that evil is not the most profound explanatory category. Ricoeur wrote about the myths of evil in 1967 and found an impasse between the choice for an ultimately tragic view of life and its inversion.²³ Ricoeur frames the inversion of the tragic view as the identity, the equation of “fate” and “gift.”²⁴ To move from that impasse

16. See MARTIN BUBER, *TALES OF THE HASIDIM* (1948); JOHN DOMINIC CROSSAN, *RAID ON THE ARTICULATE: COMIC ESCHATOLOGY IN JESUS AND BORGES* 99-115 (1976); ALICE G. KELSEY, *ONCE THE HODJA* (1943); SAMUEL TENENBAUM, *THE WISE MEN OF CHELM* (1965).

17. PAUL RICOEUR, *THE SYMBOLISM OF EVIL* 347 (Emerson Buchanan trans., 1967).

18. *Id.* at 349.

19. Rose, *supra* note 2, at 295.

20. RICOEUR, *supra* note 17, at 349.

21. *Id.* at 351.

22. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

23. For Ricoeur, the inversion is Christology, but he sets his reflection in sufficiently universalist terms that it is philosophically available to other traditions. RICOEUR, *supra* note 17, at 329.

24. *Id.*

required a "*Poetics of freedom*"²⁵ which he said was at that time not yet in our power.

Although I am not sure if Rose's poetics are more like Ogden Nash or Edward Lear (with a dash of Dorothy Parker, but much nicer), I think her essay is an instance of such freeing poetry. With a radically American lack of pretentiousness, she winds through tales and doctrines punctuated with wait-a-minute-here questions. She establishes a narrative rhythm and yarnspinning pace that carry the motif of gift, the theme of trust, because they give mistrust its due. There is a balance which makes the weaving and unweaving of her four-box grids almost deceptively fluid and persuasive. Although there are some places where I would take issue,²⁶ I could sit and listen for hours. Of course, I know from her prior articles what her underlying movement is, but this time she takes the story one step further. She has gone from relationality to cooperation to gift. I can hardly wait for her further poetics and her next liberating story.

In her writing, Rose may be demonstrating something crucial about feminism. Although her essay taps Annette Baier's placement of trust at the center of contemporary politics,²⁷ the essay is not as overtly feminist as some of Rose's earlier work.²⁸ Her portrait of the system of private property in *Property as Storytelling* names the cooperative mode as characteristically feminine (although she allows George the cooperative male to surface).²⁹ If this current revival of the foundational role of gift does reflect the second naivete Ricoeur names, then it may partially suggest the *nature* of that first gift. The return to origins, mythical, historical, and imaginative (much less game-theoretic), taps a realm French feminist H el ene Cixous recalls as "close to the savage heart."³⁰ This aspect of the human, Cixous reminds us, has always been repressed. It is "still close to sources, springs, to myth and to beginnings" of historical and literary movements.³¹ Both sort

25. *Id.*

26. The main problem with legislative self-binding I would name as political accountability rather than flexibility. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). But see Rose, *supra* note 2, at 306 nn.27-28 and accompanying text.

27. See Annette Baier, *Trust and Antitrust*, ETHICS, Jan. 1986, at 96.

28. See, e.g., Rose, *supra* note 4.

29. See *id.* at 52.

30. H EL ENE CIXOUS, *Writing and the Law*, in READINGS: THE POETICS OF BLANCHOT, JOYCE, KAFKA, KLEIST, LISPECTOR, AND TSVETAYEVA 1, 3 (Verena A. Conley ed. & trans., 1991).

31. *Id.*

of movements, Cixous muses, become institutionalized, and thus organized to repress and hide their own origins. The origin, however, "always deals with some kind of femininity."³² To what original feminine might Carol Rose lead us? It could be the recovered matriarchal societies visible in Riane Eisler's *The Chalice and the Blade*,³³ the psychoanalytic mother of object relations,³⁴ the goddesses of pre-Grecoan civilization which authors like Aeschylus have obscured,³⁵ or even the feminine aspect of an immanent deity whose transcendent, paternal aspect had to yield to the cry "God is dead" before S/He could become visible. However, it might be something else.³⁶ Perhaps it will be some version of the felicity of Eve's reaching for that apple that is hidden in our mainstream traditions (in mine as the theory of *felix culpa*, the "happy fall" of Eve and Adam) which allows us to seize the gift of life.³⁷ Somehow, I feel certain that it will be a credible yet enchanting story, suggesting that Rose has been, thank heavens, insufficiently institutionalized.

32. *Id.*

33. RIANE EISLER, *THE CHALICE AND THE BLADE* (1987).

34. JESSICA BENJAMIN, *THE BONDS OF LOVE* (1988).

35. See JEAN SHINODA BOLEN, *GODDESSES IN EVERYWOMAN* (1984); HELEN M. LUKE, *WOMAN, EARTH AND SPIRIT: THE FEMININE IN SYMBOL AND MYTH* (1985).

36. See EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* (Alphonso Lingus trans., 1981).

37. DENISE LARDNER CARMODY, *SEIZING THE APPLE* (1984); LAWRENCE KUSHNER, *GOD WAS IN THIS PLACE & I, I DID NOT KNOW* (1991).