JUST PRICE AND FAIR VALUE – A Null Hypothesis Supported

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ABSTRACT
This paper seeks answers to the question of where did the idea of the fairness in fair value originate. It is possible that there is some inheritance of the moral approbation inherent in the medieval idea of the just price. However the context and assumptions of the two notions are so very different that the journey from just price to fair value over some eight centuries cannot be just assumed to be along one single unbroken line. This article summarises the process of dilution of the medieval idea of just price and the judicial development of the modern idea of fair value and discusses the extent to which the former can be shown, if at all, to have germinated or nurtured the early development of the latter. The conclusion is tentatively drawn that the two notions lack detectable interaction or association historically and the whiff of moral approbation that both enjoy is entirely coincidental.

KEYWORDS: Just Price, Fair Value, Scholastics, Positive Theology, Fair Market Value

1. INTRODUCTION

1.1 WHAT IS FAIR VALUE

Fair value is the basis on which commercial concerns of any size have to do their accounting. It replaced the previous basis which was historical cost. Essentially it involves valuing a firm's assets at their sales value in the most appropriate market. For example, a firm might have bought a building in 1970 for $2 million but a respected office of real estate surveyors certifies in writing that it is now saleable at $250 million. Under historical cost, the annual accounts carried the building at $2million, but under fair value it has to be shown at 250 million and the firm can take the 248 difference as profit available for dividends if it wishes. That such a valuation is reasonably called "fair" is not without its critics but the nomenclature has become almost universal in international business accounting reports and financial journalism.

1.2 WHY FAIR VALUE MATTERS

Fair value accounting was blamed for increasing the severity of the 2008 Global Financial crisis by many people. When real estate prices had been rising, firms were showing big capital gains on their annual accounts but once the toxicity of the US mortgage market was made manifest, values fell and fair values were restated at large capital losses and for a time fair value accounting was suspended in the US. Those who favour fair value accounting said it was reflecting economic reality in all its volatility and tendency to grow then burst any bubbles.(Wyatt 1991, Barth 1994, Barth and Landsman 1995, Barth et al 1996, FASB 1998, The Economis 2003, IMF 2008, J P Morgan 2008, Turner 2008, Tweedie 2008, Veron 2008, Laux and Leuz 2009, Young et al 2009). Those who opposed fair value, especially those in Europe and Britain, argued that historical cost accounting would prevent the amplitude and severity of the convulsions in the financial markets as seen in the GFC (Macve and Jackson 1991, Macve 1999, Bradbury 2000, Horton and Macve 2000, Barlev and Haddad 2003, Anagnostopoulos and Buckland 2005, Barlas 2008, Persaud 2008, Plantin et al 2008, Whittington 2008).

1.3 THE FAIRNESS OF FAIR VALUE

The word ‘fair’ is one of the most value laden in the English language. Its use implies moral, judicial and even political approval. In the accounting context, its opponents resent the appropriation of such approval by its sponsors within the US financial community. It is obvious that the kind of fairness affixed to fair value is not distributive. It must therefore be procedural. That is, the ‘fairness’ is the result of open, voluntary, unbiased contractual agreement; not the result of any claim that everyone is equally entitled to equal shares of anything.

1.4 FAIR VALUE LEVELS

Fair value had become the internationally standard way of accounting by the time of the publication in 2006 of IFRS7. The USA’s Financial Accounting Standards Board, FASB, had codified the principles of fair value accounting with the adoption of SFAS 157. The FASB Chair, Robert H Hertz, explained in 2007 why FASB had originally felt the need to codify fair value and he wanted also to assert the term long pre-dated FASB itself. In his words:-

The extent to which FASB requires or permits the use of fair value in the future is a different issue and addressed standard by standard when we look at a particular topic. Therefore, SFAS 157 is not introducing new fair value measurements-it’s just aimed at consistency, education, and providing a framework for what we mean. (Kranacher and Morris, 2007).

There are 3 ‘levels’ of fair value in the accounting standards, all equally fair, codified in FAS 157 as follows:-

Level 1 is actual market value where a willing seller sells to a willing buyer in an open, liquid and un-manipulated market.

Level 2 is derived market value from a transaction as similar as possible to the one being considered

Level 3 is the net present value of future net earnings calculated by generally accepted discounted cash flow techniques when neither level 1 nor level 2 valuations are available.

When FASB first used the term, fair value, it could point a long established usage for the phrase in the American Internal Revenue System. The IRS applies fair value judgments across its entire range of taxation activities. For example, Title 26, Subtitle A, Chapter 1, Subchapter O, Part IV, Sec. 1053 relates fair market value back to its level in March 2013. In section 5 we will see that the term was being used in English Law in the nineteenth century and in section 3 we will trace its judicial source a little further back.

The moral approbation inherent in the use of the word 'fair' can be compared to the moral approbation inherent in the use of the word 'just' in the medieval idea of the just price. In this paper the search is reported for evidence of any direct link, association or mimetic sequential connection between the two concepts. In the next two sections the origin and development of the just price idea are described.

2. THE JUST PRICE IDEA

2.1 CLASSICAL ORIGINS

In ancient (European) times, trade was regarded by mainstream religious commentators with distaste, since it fostered the deadly sins of avarice, gluttony, envy, anger, lust, sloth and pride. The market itself received some the opprobrium by way of causing corruption by way of a kind of passive trading.

Aristotle was the first to document his reflections on morality and markets. He had a concept of "justice in exchange". In his Ethics, Aristotle had discussed this as what has become known as commutative justice. The just exchange ratio of goods (i.e. their just price) should be in proportion to their "intrinsic worth" to men.

Roman law was much more flexible: it considered a price "just" simply if it was agreed to by the contracting parties -- the notion of intrinsic usefulness or worth was not a consideration. Cicero believed there was a ius natura (a natural law): perfectly rational men obeyed natural law which was founded on self-preservation and on equality (Windelband 1892, 176-7). *Thus, from the time of the Romans we begin to see the confounding of what is just with what is natural.*

2.2 THE MEDIEVAL SCHOOLMEN AKA SCHOLASTICS

In medieval Christendom, after the Greco-Roman classics were revived by the Islamic scholars, they were imported to the Western church by the Scholastic movement. The Scholastics began with Albertus Magnus, 1193-1280, who learned Aristotle and other classical literature from the Arabs and tried to reconcile the rediscovered reasoning faculty with traditional faith. St Thomas Aquinas was his main pupil. St Thomas Aquinas is the Scholastic to whom the invention of the notion of the just price is wrongly though widely attributed. For Aquinas, a price would be just if he parties freely agreed it – commutative justice.

The Scholastics attempted to reconcile Aristotle's notion with the Bible. They originally interpreted this as the "intrinsic worth" of goods (*bonitas intrinseca*) in terms of the order of appearance of things in the book of Genesis. This led to some problems -- to take one popular example, rats are of higher Biblical order than wheat, but are they really worth more? As such, the Scholastics (esp. Jean Buridan) broached the alternative idea that the intrinsic value of a good is more loosely connected to "human needs" and thus related to their "usefulness" to man. However, this seemed to undermine the idea that goods have "intrinsic worth". "Usefulness" is not quite a characteristic of a good itself but rather lies in the relationship between goods and people. Aristotle had argued that people's needs were different and thus the degree of usefulness varied and many of the Scholastics adopted this. This might justify why goods should be allowed to exchange at different prices in different places and times. Also, it might explain why wheat should be worth less than flour, even though one is derived from the other.

McIlroy (1997, 10) identifies Gratian's Decretum (qv as a facsimile 1150 text edited by A E Friedberg in 1879 through calbycanonlaw.wordpress.com/2009/09) as the first systematic work of medieval canon law and the "high water mark of Christian condemnation of trade." Profits arising from the expenditure of time, money and labour were *honestus questus* but those made without expenditure of any kind were *turpe lucrum* (Gratian C14, q4,c9), following St Augustine's concession in the sixth century AD that approved profits to merchants who had incurred transport costs.

Among the Schoolmen, as the Scholastics are alternatively known, some held that the just price was what was necessary to maintain social position, some that it was the cost of production, and some that it was anything between the minimum and maximum set by the legal authorities. Aquinas used it to convey a more modern notion of equal bargaining power and selling at or only very slightly above cost. The just price did not reconcile merchants and ministers. It indicated their conflict rather than their convergence. (McMahon 1991, 211-222).

2.3 WHAT AQUINAS ALLOWED

Competition was not a word used until the seventeenth century, and imperfect markets required just prices to protect people from avarice and gluttony (Wren 2000). Aquinas was comfortable with the idea of charging a higher price for an enhancement in quality or even for higher transport costs. (Aquinas 1273/1929, vol 10, p328). He also said merchants were not obliged to disclose defects in a product because "nothing prevents that which is defective in one respect from being useful in many others" (Aquinas 1273/1929 p325).

The generally accepted argument (both in Christendom and Islam) against usury was that the lender was receiving income for nothing, since nothing was actually traded. Aquinas later expanded his argument to oppose any unfair earnings made in trade, basing the argument on the Golden Rule. He held that it was immoral to gain financially without actually creating something. Aquinas believed that it was specifically immoral to raise prices because a particular buyer had an urgent need for what was being sold and so could be persuaded to pay a higher price because of local conditions:

If someone would be greatly helped by something belonging to someone else, and the seller not similarly harmed by losing it, the seller must not sell for a higher price: because the usefulness that goes to the buyer comes not from the seller, but from the buyer's needy condition: no one ought to sell something that doesn't belong to him.

(Aquinas1273/1929, in Summa Theologiae, 2-2, q. 77, art. 1)

Although Aquinas was willing to accept trading profit as a necessary evil, he insisted that the gains be regulated and kept within certain bounds, and be directed toward a public good:

...there is no reason why gain [from trading] may not be directed to some necessary or even honorable end; and so trading will be rendered lawful; as when a man uses moderate gains acquired in trade for the support of his household, or even to help the needy...(idem).

2.4 SCOTUS'S MINORITY VIEW

Duns Scotus, the Franciscan theologian and Aquinas's great rival, was disturbed by the unwillingness of Aquinas to commit to a precise idea of "intrinsic worth" and "just price". He came down on the side that argued that the just price of an object was its cost of production, i.e. the labour and expenses of the provider of the good (McIlroy 1997, 12). However, Scotus realized that this might imply waste: it is not unlikely for expenses to be exaggerated beyond what is necessary to produce the good, thus the "just price" might be artificially inflated. Scotus struggled with these questions and went on to make some quite modern reflections about the necessity of competition to determine just price, and thus the immorality of monopoly. Scotus held the just price should reflect not only production costs but also a normal profit and compensation for the risks involved.

2.5 SCHOLASTICS AND PROFITS

Another question that arose was that of what we now call arbitrage: should a merchant be allowed to profit from differentials in prices? The Scholastics replied with a qualified yes, provided the merchant is not motivated by pure gain and profit be only just enough to cover his labor expenses (sacrifices) of the merchant. They went on to argue that the trader, far from being a parasite, is performing a valuable service and increasing general welfare by meeting different needs

2.6 SUMMARY

In summary, the medieval Schoolmen's idea of the just price was more a specification of the idea's boundaries rather than of its central meaning. There is clearly an insistence on giving good value and refraining from what we now call profiteering, but there is no formula or golden rule by which we could recognize a price as being just. We can only recognize specific examples of an unjust price, so a just price is rather unsatisfactorily definable as a price which is not unjust..

3. THE SCHOOL OF SALAMANCA

3.1 INTRODUCTION

In the Renaissance era, theology was generally declining in the face of the rise of humanism, with scholasticism becoming nothing more than an empty and routine methodology Grice-Hutchinson 1952). Under Francisco de Vitoria, the University of Salamanca led a period of intense activity in theology, whose influence extended to European culture in general, but especially to other European universities. The term 'positive theology' is sometimes used to distinguish this new, more practical, theology from the earlier scholastic theology. Joseph Schumpeter (1954) argued that the School of Salamanca most deserve to be considered the founders of economics as a science. The School did not elaborate a complete doctrine of economics, but they established the first modern economic theories to address the new economic problems that had arisen with the end of the medieval order.

3.2 THE SALAMANCAN JUST PRICE

The main positive theology exponents were Francisco de Vitoria, Domingo de Soto, Martín de Azpilcueta, Tomás de Mercado, and Francisco Suárez, all scholars of natural law and of morality, and they sought the reconciliation of the teachings of Thomas Aquinas with the new economic order. The themes of study centred on man and his practical problems (morality, economics, jurisprudence, etc. The School was concerned with the just price required by commutative justice. The Salamancans saw value as being sourced in scarcity, in utility and in common estimation. Accordingly there were three just prices (Mele 1999):-

1. Ordinary price common social estimation manifested in competitive markets
2. Conventional price agreed between parties after maybe negotiating and mostly for luxuries and decorations
3. Legal price fixed by public authorities usually for necessities which de Soto said was desirable and in the public interest; but Azpilcueta in the mid sixteenth century stated openly that not all legal prices were just prices.

God, argued the Salamancans, wanted men across the world to engage in exchange and therefore get to know each other, so as to increase their sense of "brotherhood" -- a universalistic perspective that contrasts starkly to the "warfare" notion of trade later employed by the mercantilists.The most complete and methodical development of a Salamancan theory of value were Martín de Azpilcueta and Luis de Molina. Interested in the effect of precious metals arriving from the Americas, de Azpilcueta argued that in the countries where precious metals were scarce, prices were lower than in those where they were abundant. Precious metals, like any other mercantile good, gained at least some of their value from their scarcity. This scarcity theory of value was a precursor of the quantitative theory of money put forward slightly later by Jean Bodin. Luis de Molina developed a subjective theory of value and prices, which asserted that the usefulness of a good varied from person to person, so just prices would arise from mutual decisions in free commerce, barring the distorting effects of monopoly, fraud, or government intervention. Expressing this in today's terms, the Salamancans defended the free market idea, where the fair price of a good would be determined by supply and demand.

By the end of the fifteenth century, it was an accepted commercial principle that value and price should be determined by the community not by an individual (Grice Hutchinson,1952, 81/2). Nevertheless, the idea of a just price persisted into the 17th century. For example in Puritan era America, in Boston, 1639, John Winthrop kept a diary in which he described a sermon by contemporary Reverend John Cotton on the subject. In the sermon, the rules for trading were asserted as follows:-

1. A man may not sell above the current price, i.e., such a price as is usual in the time and place, and as another (who knows the worth of the commodity) would give for it, if he had occasion to use it: as that is called current money, which every man will take, etc.
2. When a man loseth in his commodity for want of skill, etc., he must look at it as his own fault or cross, and therefore must not lay it upon another.
3. Where a man loseth by casualty of sea, or, etc., it is a loss cast upon himself by providence, and he may not ease himself of it by casting it upon another; for so a man should seem to provide against all providences, etc., that he should never lose; but where there is a scarcity of the commodity, there men may raise their price; for now it is a hand of God upon the commodity, and not the person.
4. A man may not ask any more for his commodity than his selling price, as Ephron to Abraham, the land is worth thus much. (Winthrop 1853).

It can be seen that the old notion of the just price had moved very little and the market had still not been lifted off the moral low ground.

4. MARKETS AND THE LAW

4.1 INTRODUCTION

The origins of the market are obscure, but substantial documentary evidence survives from the eleventh century onward, when chartered markets and new towns were established across Western Europe. The expansion of the market system is important for business history because it created new opportunities for business growth. The only systematic literature review on market evolution in recent years has been Casson and Lee (2011) who show that successful markets were regulated-often by civic authorities-to maintain a reputation for reasonable prices and quality. What cannot be found in any document available through several university libraries and their databases is any evidence of a direct linkage between the words ‘just price’ and the words ‘fair value’ or ‘fair market value’. In the rest of this section we will describe two characteristics of medieval and renaissance era markets that could have facilitated such a link.

4. 2 MEDIEVAL MARKETS – FAIR SOMETIMES: FREE NEVER

Local authorities regulated the prices of bread and ale by reference to grain prices which were in turn affected by tariffs. Bargaining was normal in livestock markets but in most other markets were not allowed and fines were imposed for bargaining. William of Auxerre wrote that there were no rules for determining a just price and if there was doubt about its level, recourse should be had to a "good and wise man". (Baldwin 1959, p79)). The wise men tended to be public authorities such as the town bailiff or the mayor, who assumed, especially for food, that a just price required formal regulation and official vigilance (Baldwin 1959, p71). This medieval practice continued through the sixteenth century Thus the so called market price was for centuries a fixed, regulated and imposed price. The effect of this was to equate the idea of the just price with the practice of the market price, for there are many examples of merchants being fined, imprisoned or pilloried for trying to sell above the fixed market price described in Britnell (1991) from original documents. For example, in 1482, John John and Oliver van Cach were fined for coming to the market at Hythe to sell fish at a price not previously licenced by the bailiffs. There were laws against 'forestalling' which was the practice of intercepting goods on their way to market and buying them with a view to selling them later in the market at a higher price. This evolved into the capitalist era laws against market fixing, especially at auctions. However the anti-forestalling laws were designed and enforced more to protect guild members and burgesses than any notion of a public interest, In Hull, Grimsby and other places, these people were officially entitled to buy at cost price or take a share in the sellers' profits, sometimes by imposing on incoming merchants an entry fee to the market. Adam Smith wrote "The popular fear of engrossing and forestalling can be compared to the popular suspicions and terrors of witchcraft" (Smith 1892, 156).

The early markets, then, were closely regulated, and because of that, they have seemed trustworthy places to buy and sell, which is quite close to the idea of just and the idea of fair, but no empirical verification of any linkage can be found.

4.3 THE MARKET OVERT EXCEPTION AND ITS IMPLICATION

The market overt idea is an exception to the general rule that stolen goods cannot legally be However, where goods are openly sold in a shop or market, in the ordinary course of business of such shop or market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. The purpose of the market overt exception is to protect commercial transactions and to promote the integrity of the market.

The market overt exception protects innocent purchasers against the claims of their original owner. It has its roots in England, going back to Anglo-Saxon times. This ancient rule applied to sale from shops in the City of London and, outside the City of London, to sales from any open, public and legally constituted market, including fairs.

In older times where transportation was more limited, it would have been feasible for a person whose goods had been stolen to expect to find them being sold at a market nearby. However as transportation became more developed, "thieves can easily dispose of goods at the other end of the country" (Yap 2008).

The implication is that the market overt exception to the rule *nemo dat quod non habet* (nobody gives what they do not own) gives a special status to open markets as arbiters of fair values and fair dealings, and does so to such an extent that buyers of stolen goods in open markets take a legally valid title to those goods. To put it another way, open markets validly launder illegally acquired assets. Thus the roots of the moral and legal elevation of markets lie much further back than Adam Smith and the Industrial Revolution, and connect with the medieval Christian concept of places of sanctuary. Unfortunately, no evidence can be found that the moral elevation of markets overt ever crystallised into a generalisation about markets generally, or that any major contemporary writer or judge used the market overt notion to assert the fairness of either free or regulated types of market. We cannot look to the history of markets to find the origin of the idea of fair value, not on the available evidence so far, at any rate. Instead we have to trace back the origins of the concept to judicial pronouncements in the eighteenth century, as the next sections explain.

5. ENLIGHTENMENT AND NATURE

After the Reformation (from 1517, with Luther's 95 Theses, to 1648, with the Peace of Westphalia ending the last major European war of religion, the 30 Years War), the Enlightenment gathered momentum. Newton and his contemporaries in the Royal Society elevated Nature to position of primacy in explaining the world with God retired under Deism to being merely the creator of nature but not her nurse or guardian - God the Absent Father, so to speak. Rousseau in the mid eighteenth century elevated Nature still further in human and social affairs to not only an explicatory role but also a justificatory one. Hence his dictum that man is born free but everywhere he is in chains. This elevation of Nature was taken up in early political economy so as to place economic affairs in the realm of Newtonian physics where it could be understood to respond to Natural Laws which we should not interfere with, beginning with Francois Quesnay who founded the Physiocrats who asserted that natural laws produced prosperity and should not be impeded. (Sabine 1948, p479). The state's job was to enforce natural law. Liberty and equality were mutually reinforcing. Their motto was 'laisser faire, laisser passer' (Gide 1914, p25), and their aim was tariff abolition. Richard Cantillon (1964), writing about trade in the early eighteenth century, thought it would be impossible to establish prices without formal market places policed to reduce fraud and eliminate monopolies. Adam Smith, the main founder of modern economics, developed the Physiocrats' ideas. He believed that natural laws operated independently of human action and returning to a natural state after any such action. He was not a pure physiocrat, however, who saw good economics as entirely disembedded from politics and society, for he also said (Smith 1892, V chapter 1, p 560); "Civil government, so far as it is instituted for the security of property is in reality instituted for the defence of the rich against the poor, or those who have some property against those who have none at all". In the next generation, David Ricardo established a theory of exchange where price was determined by supply and demand with no individual price makers. *In such competitive conditions, the natural price would also be the fair or just price.*

6. CONTRACT LAW AND FAIR VALUE

6.1 INTRODUCTION

At the same time as the physiocrats, Smith and Ricardo were developing the economics of competitive markets, the Law (in English speaking countries) was moving from the medieval situation of the writ based action of assumpsit to the body of law now known as contract and sale of goods. Assumpsit was a writ to enforce a promise that had been allegedly breached. It was an action for a detriment incurred on the faith of the promise, which had been suffered by the person to whom the promise had been made. (de Cruz, 1986, 54)

6.2 EQUITY

In Astley v Reynolds (1731), the court held that where a party is forced to pay more than the market price of a loan in order to recover pledged goods, the court would enforce a writ of assumpsit to recover the excess. The Court of Chancery was the main court enforcing Equity and it was concerned to ensure agreements about price, payment, sale and purchase were equitable in the everyday sense of the word. (Wingfield 1988, 148). Contract law developed against a background of the common law notion of Equity whereby the Court of Chancery would prevent gross injustice from succeeding in civil cases by imposing then current ideas of fairness, free bargaining, information symmetry and the avoidance of unjust enrichment upon business sales and purchases, whether done privately or in public markets.

6.3 CHESTERFIELD'S CASE

A crucial milestone in the development of fair value is the 1750 case of the Earl of Chesterfield v Ranssen. In this case, Earl of Chesterfield and others (executors of John Spencer) v Sir Abraham Janssen (1750), John Spencer agreed to repay ten thousand pounds on a loan of only five thousand pounds. The question was whether it was voidable as being an unconscionable bargain and thus one which Equity would overturn. "It is unjust and unreasonable", said Spencer's Counsel, "and in that light a court of equity calls it a fraud; arising from avarice on one side and distress on the other" On the other side, Counsel pleaded: "Mr Spencer himself, in private, fixed on what he thought the fair price, and does, personally and by agents, propose these terms to any who would buy." Moreover, "the disproportion of the risk will not make it a bad contract; nor does this court consider bargains in in the nice scale of exact equality; nor adopting the rule of Roman law, by which if a bargain was one half under value, it was set aside." Judge Burnet and the Master of the Rolls affirmed the court's authority to set aside unconscionable bargains. The Lord Chancellor, Lord Hardwick, added in his *ratio decidendi* some words that set the scene for the precept of legally enforceable fair value. He said:-

"This court has undoubted jurisdiction to relieve against every species of fraud" He exemplified types of fraud including, "”It may be apparent from the intrinsic nature and subject of the bargain itself; such that no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other: which are unequitable and unconscionable bargains; and as such even the common law has taken notice.". Another kind of fraud is "an imposition and deceit on other persons not parties to the fraudulent agreement" as in fraudulent preference in bankruptcy and in marriage contract and succession cases where the families of the main parties had rights to litigate despite being outside the narrow privity of the contract. "It tends to public mischief by introducing an unworthy object for an unworthy consideration" "Particular persons in contracts shall not only transact bona fide between themselves, but shall not transact mala fide in respect of other persons, who stand in such a relation to either as to be affected by the contract or consequences of it; and as the rest of mankind beside the parties contracting are concerned, it is properly said to be governed on public utility." The author of the case notes adds, "But notwithstanding the favourable regard of some of the cases, the Courts of equity, with a most salutary regard for the protection of the pubic, have always refused to lay down any general rule marking the bounds of such bargains for expectancies as might be considered fair or otherwise". (The case is accessible through www.commonlii.org at Ven Supp 295 II 125)

Chesterfield's case codified the principle that a freely negotiated deal is a fair deal, so long as it does not harm the public interest or injure any third parties. It thus injected a concept of fairness into commercial transactions without anywhere mentioning the earlier idea of a just price.

6. 4 THE EMERGENCE OF FAIR VALUE IN THE COURTS OF ENGLAND

At first after Chesterfield, the courts did not strongly differentiate a promise from a contract and did not yet require material consideration to be an essential pre-requisite of contractual validity. Thus, Lord Mansfield said in Hawkes and Uxor (sic) v Saunders (1775) that where a "promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are sufficient consideration."

Moreover, Equity was quick to impute trusteeship responsibilities onto a contracting party who knew something the other party did not but that the court thought should have been shared. Thus in the 1788 case, Fox v Mackreth and Others, it was held that if there is a relationship between buyer and seller that obliges the buyer to make any disclosure that he fails to make, then equity regards him as a trustee for the seller and the vendor may rescind the contract and be compensated by return of the property or by payment of damages covering the gap between agreed price and full fair value of the land. The fair value may only become clear on a subsequent sale. This is one of the first cases in England to use the term “fair value”.

In Webb v Rorke (1806), Lord Redesdale LC mentions with approval the idea in the contested lease of a ‘full and fair rent’ ‘which might have been obtained from a solvent tenant upon a demise of said lands for 999 years “If the parties ‘were in a situation in which they could fairly discuss the value on equal terms’, then the result ‘might have been a very fair value’. Here fair value is explicitly tied to fair process, following Chesterfield.

In another early case, Kennedy v Lee [1817] the defendant had written a letter to the plaintiff offering to sell a nursery“at its fair value“ but the case did not involve any elaboration of the concept.

Thus the courts in the first phase of the Industrial Revolution in England applied a precept of fairness to the processes of buying, selling, renting and their attendant valuations. In the mature phase, in Victoria’s reign, the courts elaborated what they thought fair value was, and the principal cases are summarised below.

6.5 LEADING CASES ON FAIR VALUE AFTER VICTORIA’S ACCESSION

In Jegon v Vivian [1871] it was held that the fair market value of coal is fair market value of coal sold by other mines in the same district. The link between an idea of fair value and the reality of market value was stretched in Delves v Delves [1872], where it was held that a reserve price at an auction will be upheld if it can be shown to be fair value and that will be presumed if no impropriety is demonstrated.

An early clarification that willing agreement would constitute fair value when there was no reference market was established in Borland’s Trustee v Steel Brothers and Co Ltd [1900]. Farwell J said that since there was no established market for the shares, fair value is proven if willing agreement between buyers and seller is proven. Fair in the circumstances only needs to mean reasonably fair and that is demonstrated by willingness, or at worst, previous sales at a similar value between willing parties.

By 1919 the Delves presumption that auctions were fair was extended further when it was held in Rawlings v General Trading Co (1919) that any conspiracy by people to buy publicly owned goods at an auction below fair value would make the agreement unenforceable but only if the evidence very clearly demonstrates that the auction price was below fair value and that the seller was dissatisfied. Then in Cruikshank v Sutherland (1922) it was held that ‘fair value’ was to be applied when the documentation failed to specify any valuation method at all. Finally, by 1990 even the word ‘fair’ was held no longer necessary to be specified if there was a market. In Re Howie and others and Crawford’s Arbitration [1990] the arbitrator said fair market price of shares meant a pro rata share of the firm’s net assets, but Vinelott J in the Chancery Division of the High Court said the word fair was redundant and the market price was enough so long as there was a willing seller and willing buyer, and nobody was excluded from the bidding and there were no exceptional or freak circumstances to be taken into account. In other words, “market” inherently incorporates “fair.” Thus, market value had ascended to the dominant valuation position in the English courts just before the accounting standards specified the same priority.

6.7 FAIR VALUE IN ENGLISH STATUTES

Coming up to date we still do not really have the incorporation of fair value into statutes. For example, section 428 of England's Companies Act 1985 allows compulsory acquisition of dissenting minority shares in a takeover, although it does not define fair value for them or even mention the idea, but rather gives the court a wide discretion to make such order as it thinks fit. Scottish Co-operative Wholesale Society Ltd v Meyer [1959], however, decided that fair value was the price that would apply if the oppressive conduct had not occurred.

In conclusion it can be seen that after the Earl of Chesterfield's case, the English courts used the idea of fair value as part of their armory in quashing unconscionable bargains and attempts to exploit weakness, ignorance or innocent vulnerability by the unscrupulous. Thus the idea of value being fair was inextricably linked with the contract formation process itself being fair.

7. CONCLUSION

This paper has explored the development of the just price in medieval Europe and the development of the modern idea of fair value in English speaking jurisdictions. It has found no explicit link between them.

REFERENCES

Anagnostopoulos, Yiannis; and Buckland,Roger (2005), "Historical cost versus fair value accounting in banking: Implications for supervision, provisioning, financial reporting and market discipline", *Journal of Banking Regulation*, 6(2),109-127, February.

Aquinas, St T 1273/1929, *Summa Theologiae*, London: Burns, Oates andAshbourne.

Baldwin, J W, (1959), *Medieval Theories of the Just Price: Romanists, Canonists and Theologians in the 12th And 13th Centuries*, American Philosophical Society New Series XLIX.

Barlas, Stephen; (2008); " SEC Guidance on Fair Value Discounted", *Strategic Finance* 90 (5), pp. 24 and 50, November

Barlev, B. and Haddad, J. R. (2003) 'Fair value accounting and the management of the firm', *Critical Perspectives on Accounting*, 14, 383-415.

Barth, Mary E; (1994), "Fair value accounting: Evidence from investment securities and the market valuation of banks", *The Accounting Review*, 69(1), p1, January.

Barth, Mary E; William H Beaver, Wayne R Landsman.(1996) "Value-relevance of banks' fair value disclosures under SFAS No. 107 ", *The Accounting Review,* 71(4), 513-537, October.

Barth, M.E., and W.R. Landsman, (1995), "Fundamental Issues Related to Using Fair Value Accounting for Financial Reporting", *Accounting Horizons*, 9(4), 94-107, December.

Bradbury, Michael E; (2000), "Fair Value and Liabilities",*Australian Accounting Review*. 10(2) 19-25, July.

Britnell R H, (1991), "Price Setting In English Borough Markets 1349-1500", Canadian *Journal of History* 31(1) 1-15.

Cantillon R, (1755/2009) *Essai Sur La Nature De Commerce En General,* (Access viawww.cpm.ehime.ac.jp/AkmacHomePage/Akmac_Etext_Linb/Cantillon.html),

Casson, Mark; and Lee, John S, (2011) **"**The Origin and Development of Markets: A Business History Perspective", *Business History Review* 85(1), 9-37. Spring.

De Cruz, S P, (1986), "Assumpsit, Consideration and Third Party Rights", *Journal of Legal History* 7(1) 53-67, May.

Economist (2003), *Special Report: True and fair is not hard and fast - The future of accounts*,

367(8321) 61-63, April 26.
FASB, (1998), SFAS 133 *Accounting for Derivative Instruments and Hedging Activities***,** Washington FASB
Gide C, (1914) *Principles Of Political Economy*, 2nd US Edition, Translated by William, ,C and Vediz, A, London: Heath And Co.
Grice-Hutchinson, Marjorie, (1952) *The School of Salamanca - Readings In Spanish Monetary Theory 1544 - 1605*, Oxford: Clarendon Press.
Kranacher, Mary-Jo, and Morris, Tom, (2007), "An Exclusive Interview with FASB Chairman Robert H. Herz", *The CPA Journal* 77(11), p. 20-26, November 2007
Horton, Joanne; and Macve, Richard; (2000), "Fair value for financial instruments: How erasing theories is leading to unworkable accounting standards for performance reporting", *Australian Accounting Review* 11(2), 26-39.
IMF (2008). *Global financial stability report. Chapter 3: Fair value accounting and procyclicality*, New York: IMF, October.
Laux , Christian; and Leuz, Christian [sic]; (2009) "The crisis of fair-value accounting: Making sense of the recent debate", *Accounting, Organizations and Society* 34, 826–834.
Macve, R, and J. Jackson, (1991), *Marking to Market: Accounting for Marketable Securities in the Financial Services Industry***,** ICAEW, London.
Macve, R H., (1999), "One Step Forward, Two Steps Back - IAS 39", *Accountancy,*May, p. 89.
McIroy, David, (1997), Medieval Commercial Canon Law & Morality: Its Application to Today's World, *Law and Justice – Christian Law Review* 9 132/3.
Mele, Dominic, (1999), Early Business Ethics In Spain: The Salamanca School 1526 -1614, *Journal Of Business Ethics* 22(3) Part 2, 175189.
Morgan J P, (2008). "Shooting the messenger, TARP contemplates SEC suspension of fair value", *Global Equity Report*, September 29, 2008.
Persaud, A. (2008). Regulation, valuation and systemic liquidity. Banque de France, financial stability review – Special issue on valuation, no. 12, October 2008.
Plantin, G., Sapra, H., & Shin, H. S. (2008), "Marking-to-market: Panacea or Pandora's box*?" Journal of Accounting Research*, 46, 435–460.
Schumpeter, J A, (!954/1994), history of Economic Analysis, New York: Oxford U P.
Smith, Adam, (1892) *An Inquiry Into The Nature And Causes Of The Wealth Of Nations* IV Ch V, London: George Routledge And Sons Ltd.
Smith, Adam, (1976), *An Inquiry Into The Nature And Causes Of The Wealth Of Nations*, (Edited by R H Campbell, A S Skinner and W B Todd), Oxford:Oxford University Press, p534
Turner, L. (2008). "Banks want to shoot the messenger over fair value rules". *Financial Times*, October 2, p. 17.
Tweedie, Sir David, (2008), "Simple solution clearly needed in a complex world", *Financial Times.* March 20, p. 26.
Veron, N. (2008). "Fair value accounting is the wrong scapegoat for this crisis", *European Accounting Review*, 5, 63–69
Whittington, Geoffrey, (2008), "Fair Value and the IASB/FASB Conceptual Framework Project: An Alternative View", *Abacus* 4:*2,*1467-1481.
Windelband, W, (1892) *A History Of Philosophy*: vol1 Greek Roman and Medieval, translated from *Geschicte der Philosophie* by Tufts JH, New York: Harper and brothers.

Winthrop, John, (1853), *The History of New England from 1630 to 1649*, 1:377-82. (Boston: Harvard University Press).

Wyatt, A. (1991). "The SEC says: Mark to market!"*Accounting Horizons*, 5, 80–84.

Yap, Ji Lian, (2008) "Appraising the Market Overt Exception", *Journal of International Commercial Law and Technology 3(4),254-266.*

Young, Michael R; Miller, Paul B W; and Flegm, Eugene H; [sic] (2009);"The Role of Fair Value Accounting in the Subprime Mortgage Meltdown", *Journal of Accountancy*, 205(5), 34-39, May.

List of case references

Astley v Reynolds (1731, 2 Strange 916)

Borland's Trustee v Steel Brothers and co ltd [1900 B 1253, Chancery Div]

Cruikshank v Sutherland [1922] (All E R ; House of Lords)

Delves v Delves [1872 D 190,(Equity L R 20 Eq 77)]

Earl of Chesterfield V Sir Abraham Janssen, [(1753)High Court Of Chancery, 2Ves125, 1 White & Tud Lc 483]

Fox v Mackreth and others; Pitt and another v Same (1788) ([1775-1802] All E R 275)

Hawkes and Uxor v Saunders, [1782 98 Eng Rep KB 1091]

Kennedy v Lee [1817] ([1814-1823] All ER 181)

Jegon v Vivian [1871, Court of Appeal in Chancery L R 6 Ch App 742]

Rawlings v General trading Co ([1919 R 751, Court of Appeal)

Re Howie and others and Crawford's Arbitration [1990] (BCLC 686)

Scottish Co-operative Wholesale Society Ltd v Meyer [1959] A C 324 (H L) p364

Webb v Rorke (1806, Lord Chancellor's Court in Ireland, [1803-1813 All R 678])