South Carolina Law Review

Volume 60 | Issue 3 Article 6

Spring 2009

Learning from Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice

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LEARNING FROM OUR HISTORY: EVALUATING THE MODERN HOUSING FINANCE MARKET IN LIGHT OF ANCIENT PRINCIPLES OF JUSTICE

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"Those who cannot remember the past are condemned to repeat it."[1]

I. INTRODUCTION

Since the time I accepted the invitation to participate in this symposium, the subprime mortgage crisis has exploded into a systemic financial crisis. Analysts and pundits alike seem on a quest to outdo each other in using dramatic phrases to describe the mortgage crisis's historic proportions. The causes of a crisis so large must have a multiplicity of causes lying in the realms of bank regulation and supervision, the operation and regulation of the securitization market, and the derivatives and insurance markets. Yet, the root and spark of the various financial reverberations initiated in the home mortgage finance market. My presentation will focus on this central cause to look for an explanation of what went wrong. In a general sense, Saint Thomas Aquinas predicted the systemic freezing of the financial system, which we are currently witnessing, when he predicted that in a society where unjust exchange transactions dominate,

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1. 1 GEORGE SANTAYANA, THE LIFE OF REASON; OR THE PHASES OF HUMAN PROGRESS 284 (Dover 1980) (1905) (emphasis added).

eventually all exchanges will cease.[2] I will argue that a major reason for this financial winter we are witnessing is that the market for buying housing has been systemically violating core principles of justice. Although other factors certainly contributed to its breadth and expansion, unjust financial transactions are the root of the problem.

For some time now, at various levels of American society, people have been recognizing a problem with our system of financing home ownership. This very symposium confirms that. Members of Congress have introduced bills proposing that bankruptcy judges be empowered to revise mortgage loans.[3] Prominent academics are proposing new regulation of the mortgage market.[4] But amid this activity, there lacks a comprehensive normative measure for evaluating the system as a whole. This deficiency does not necessarily mean that all of the proposed reforms lack merit. Yet, the ongoing discussions are in need of an articulation of a normative yardstick with which to evaluate these proposals as well as the system they attempt to reform. We need to ask more fundamental questions than whether regulations should require a few more items of disclosure. Is it just for someone to make a profit from lending a homebuyer the money to buy necessary shelter? How do we even begin to evaluate the justice of such a system?

This Article looks to history for answers. It turns to the natural law economic philosophy of Aristotle as developed by the scholastics. Building on certain Roman law concepts, scholastic writers developed two key economic theories to evaluate the justice or injustice of voluntary transactions—usury theory[5] and just price theory.[6] This Article does not attempt to argue definitively for the correctness of these theories in all their applications. Instead, the Article demonstrates what judgments these theories allow us to form about the essence of the current housing finance system. After presenting the aspects of these

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2. 1 ST. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS bk. V, lect. IX, at 423 (C.I. Litzinger trans., Henry Regnery Co. 1964) (c. 1271) [hereinafter AQUINAS, COMMENTARY] (arguing that without just exchange, no exchange will happen and that exchange is needed for society).

3. *See* H.R. 3778, 110th Cong. § 2 (2007); S. 2133, 110th Cong. § 2 (2007); H.R. 3609, 110th Cong. § 2 (2007). After months of political wrangling and lobbying, this concept did not survive in the housing legislation passed by Congress. *See* Lori Montgomery, *Senate Approves Housing Package*, WASH. POST, Apr. 11, 2008, at D1. However, some consumer groups are still advocating the idea of allowing bankruptcy modification of home mortgages. *See* Pam Dawkins, *As Banking Chairman, Dodd Concentrates on Solutions to Subprime Woes*, ADVOCATE (Stamford, Conn.), Apr. 24, 2008, at 1.

4. *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 98–100 (2008) (proposing the creation of the "Financial Product Safety Commission").

5. *See infra* Part III.

6. *See infra* Part IV.

theories that are relevant to the acquisition of housing, the Article views the residential mortgage system through the lens they provide.

Part II presents a brief overview of some factual economic data about the home mortgage market with an emphasis on the subprime sector. Part III presents the essence of the scholastic usury theory as it relates to consumer credit. Part IV examines essential elements of the just price theory and in particular its application to credit sales. Part V suggests some normative evaluation of the mortgage system described in Part II from the perspective of these theories. Finally, Part VI proposes some tentative conclusions.

II. THE MORTGAGE MARKET AND THE SUBPRIME CRISIS

A home mortgage is a financial transaction whereby a person borrows funds from a bank or other financial institution that the person uses to finance the purchase of a residence.[7] The borrower usually repays the amount borrowed over time on an amortization schedule which allows for constant monthly payment amounts.[8] The borrower grants a mortgage on the property guarantying repayment of principal plus interest.[9] Usually, the lender charges fees at the origination of the loan to cover costs of origination.[10]

Subprime mortgages are generally described as loans to borrowers with credit impairments.[11] Common credit impairments include a Fair Isaac Corporation (FICO) credit score below 620, a lack of credit history, or a high debt-to-income ratio.[12] Borrowers with these credit impairments have an increased risk of default, so they generally do not qualify for a prime mortgage.[13] Many popular types of subprime mortgages give the borrower a low interest rate at origination that continues for the first two or three years, and then the rate resets to an adjustable rate, consisting of an index rate plus a margin percentage.[14] The reset rate can increase the borrower's interest rate by as much as five percentage points.[15]

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7. *See* JOSEPH R. BAGBY, INST. FOR BUS. PLANNING, REAL ESTATE FINANCING DESK BOOK 24 (1975).

8. *See id.* at 28.

9. *See id.* at 24.

10. *See id.* at 31.

11. *See* FREDERICK T. FURLONG & JOHN KRAINER, FED. RES. BANK OF S.F., THE SUBPRIME MORTGAGE MARKET: NATIONAL AND TWELFTH DISTRICT DEVELOPMENTS 6 (2008), *available at* http://www.frbsf.org/publications/federalreserve/annual/2007/2007annualreport.pdf.

12. Edward J. Kirk, *The "Subprime Mortgage Crisis": An Overview of the Crisis and Potential Exposure*, RLI EXECUTIVE PRODUCTS GROUP, Sep. 2007, at 1, http://www.rli-epg.com/articles/Subprime-Mortgage-Crisis.pdf.

13. *See id.* at 1–2.

14. Sheila C. Bair, Op-Ed., *Fix Rates to Save Loans*, N. Y. TIMES, Oct. 19, 2007, at A25.

15. *See id.*

This class of mortgage is also characterized by interest rates that are higher than prime mortgage interest rates.[16] Upon origination, the interest rates of a subprime mortgage are on average 2% higher than prime mortgage interest rates.[17] From 1995 to 1998, the subprime origination interest rates were between 9% and 10%.[18] Between 1999 and 2000, subprime interest rates rose to around 11%.[19] After peaking in 2000, they started to decline, leveling off at around 7.5% in 2004.[20]

From 1994 to 2005, the aggregate amount of all subprime mortgage originations grew from $35 billion to $665 billion.[21] In 1994 the subprime mortgage market comprised less than 5% of the overall mortgage market.[22] As of 2006, the subprime mortgage market made up 23% of the total mortgage market.[23]

Several theories exist that try to explain the current crisis in the mortgage market. Most of the theories contain two common variables: the common structure of subprime mortgages and declining home prices.[24] While home prices continued to rise, borrowers were able to sell or refinance their homes before the lower origination rates became adjustable.[25] When home prices started to decrease in 2007, borrowers were unable to sell or refinance their homes before the teaser rates expired and their interest rate substantially increased.[26] As a result of the decreased home prices and resetting interest rates, many borrowers defaulted on their loans and were forced into foreclosure.[27]

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16. *See* Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, 88 FED. RES. BANK ST. LOUIS REV. 31, 33 fig.1 (2006), *available at* http://research.stlouisfed.org/publications/review/06/01/JanFeb2006Review.pdf.

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 7 (2006), http://www.responsiblelending.org/pdfs/FC-paper-12-19-new-cover-1.pdf.

22. *See id.* & fig.1.

23. *See id.*

24. *See, e.g.*, Bair, *supra* note 14 (describing how the two variables impact a fixed rate theory); Kirk, *supra* note 12, at 4 (discussing industry trends and economic and financial factors that "combined to create the current crisis").

25. Bair, *supra* note 14.

26. *See* Kirk, *supra* note 12, at 4.

27. *See id.*

III. THE SCHOLASTIC THEORY OF USURY

In my recent article[28] I present a detailed history of the scholastic theory of usury and its development, refinement, and eventual distortion. For purposes of the present discussion, I will present only a summary of the main principles of what I call the objectivist approach to usury theory.

The scholastic theory is rooted in a fundamental distinction between investing capital in a business or wealth-producing assets and lending money to fund consumption.[29] As the classical economist Henry Somerville explained:

> Now the Canonists never quarrelled with payments for the use of capital, they raised no objection to true profit, the reward of risk, ability and enterprise, but they disputed the identification of the lending of money with the investment of capital and denied the justice of interest as a reward for saving without investment.
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> . . . .
>
> The Canonist principle was that sharing in trade risks made an investor a partner, a co-owner of capital, not simply a money-lender, and gave a title to profit.[30]

According to the natural law theory of usury, someone who lends money for the purpose of consumption, as opposed to investment in a business venture, should be entitled merely to compensation for loss incurred in making the loan ("interest" in the original Roman law meaning of the word).[31] The charging of "usury" in the scholastic sense (and used in this Article as distinguished from modern usury statutes) is the exaction of the payment of a gain above compensation for loss.[32] The charging of usury is impermissible.[33]

The two main arguments supporting this prohibition on charging a profit on money loans have roots in notions of commutative and distributive justice.

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28. Brian M. McCall, *Unprofitable Lending: Modern Credit Regulation and the Lost Theory of Usury*, 30 CARDOZO L. REV. 549 (2008).

29. *See, e.g.*, Peter John Olivi, *On Usury and Credit*, *in* 4 READINGS IN WESTERN CIVILIZATION: MEDIEVAL EUROPE 318 (Julius Kirshner & Karl F. Morrison eds., 1986) (distinguishing between handing over money to someone "to be spent on his own personal needs" and to an "average merchant engaged in legitimate enterprise").

30. Henry Somerville, *Interest and Usury in a New Light*, 41 ECON. J. 646, 648 (1931).

31. *See* JOHN T. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY 105–06 (1957).

32. Pope Benedict XIV, Vix Pervenit, ¶ 3.I–II (Nov. 1, 1745), *available at* http://www.ewtn.com/library/ENCYC/B14VIXPE.htm ("The nature of . . . usury has its proper place and origin in a loan contract. This financial contract between consenting parties demands, by its very nature, that one return to another only as much as he has received. . . . [A]ny gain which exceeds the amount [the lender] gave is illicit and usurious.").

33. *See* McCall, *supra* note 28, at 550.

Charging more than the amount loaned (plus compensation for loss) is a violation of commutative justice, which requires equality in voluntary exchange transactions.[34] Aristotle argued that commutative justice required equality in all exchange transactions between individuals in society.[35] Aristotle was not unconcerned with the distribution of wealth among people,[36] but the principle of equality in exchange held that particular transactions between individuals—voluntary or involuntary—were not a principled method to achieve redistribution. James Gordley has explained that equality in exchange is not meant to achieve a just distribution of wealth—the achievement of which involves principles of distributive, not commutative, justice—but is meant to "avoid random redistributions" of wealth through "the system of exchange."[37] To charge a profit in addition to the return of money lent plus compensation for loss is an unjust exchange.[38] The lender charges both for the money itself (in requiring the return of the money) and for its use (the usury charged). To charge for the use of something which is consumed in use is to charge twice for the same thing. As Aquinas explains:

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34. *See* Jaques Melitz, *Some Further Reassessment of the Scholastic Doctrine of Usury*, 24 KYKLOS 473, 476 (1971) ("[T]he usury doctrine, dating mainly to 1150–1350, appeals not to authority and charity, but to 'natural law', therefore to reason and commutative justice."). Two quotations from Saint Thomas Aquinas can serve as a definition of commutative justice: "In the first place there is the order of one part to another, to which corresponds the order of one private individual to another. This order is directed by commutative justice, which is concerned about the mutual dealings between two persons." 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, Q. 61, art. 1, at 1452 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947) (1265–74) [hereinafter AQUINAS, SUMMA THEOLOGICA]. Further,

> [I]n commutations something is paid to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other.

Id. art. 2, at 1453.

35. *See* ARISTOTLE, THE NICOMACHEAN ETHICS bk. E, ch. 7, 1131b25–1132a25, at 84–85 (Hippocrates G. Apostle trans., D. Reidel 1975) (350 B.C.).

36. *See id.*, ch. 5, 1130b30–33, at 82, ch.9, 1134a1–4, at 89 (stating that justice involves both equality in individual exchange and a proportionate (not necessarily equal) distribution of wealth among all in society).

37. James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1616 (1981). This equality in exchange does not mean that one party cannot use the thing received in exchange to make a profit, but this is not a gain from the exchange itself.

38. *See* NOONAN, *supra* note 31, at 106–07 ("Interest is never thought of as payment on a loan; it is the 'difference' to be made up to a party injured by the failure of another to execute his obligations. The common distinction between *usura* and *interessee, id est non lucrum, sed vitatio damni.* Interest is purely compensatory. It is accidentally and extrinsically associated with a loan. . . . The early recognition of interest is thus strictly limited to individual cases where the writers have seen that the lender has actually suffered damage." (quoting St. Raymond of Pennaforte, *Summa casuum conscientiae*, 2:7:2 (Verona, 1744) (c. 1236))).

> To take usury for money lent is unjust in itself, because this is to sell what does not exist, and this evidently leads to inequality which is contrary to justice.
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> In order to make this evident, we must observe that there are certain things the use of which consists in their consumption: thus we consume wine when we use it for drink, and we consume wheat when we use it for food. Wherefore in such like things the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing, is granted the thing itself; and for this reason, to lend things of this kind is to transfer the ownership. Accordingly if a man wanted to sell wine separately from the use of the wine, he would be selling the same thing twice, or he would be selling what does not exist, wherefore he would evidently commit a sin of injustice. In like manner he commits an injustice who lends wine or wheat, and asks for double payment, viz. one, the return of the thing in equal measure, the other, the price of the use, which is called usury.[39]

In addition to violating principles of commutative justice, the charging of usury involves undesirable redistributions of wealth contrary to distributive justice.[40] Allowing the charging of usury for a consumptive loan establishes a principle of distribution based on surplus and need.[41] Those in need, the borrowers, redistribute their future wealth to those with excess wealth, the lenders. This system requires a redistribution of wealth (in the form of the usury paid) from those with more need to those with less. Scholastic usury theory challenges such a principle of redistribution.

Saint Bernardine of Sienna, in refuting the claim that despite such harmful redistributive effects some people need to borrow at usury, explained how no person needs to borrow at usury because it only makes the needy worse off.[42] Defenders of the usurers suggested that the really needy poor and those who need money for a short time due to a temporary emergency, such as illness or crop failure, benefit from borrowing at usury.[43] Saint Bernardine responded that the first group, the needy poor, require social charity, or in modern language, public assistance.[44] If they were really needy, they could not afford to pay the

39. AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 78, art. 1, at 1518.

40. Aquinas also provides a definition of distributive justice: "[T]here is the order of the whole towards the parts, to which corresponds the order of that which belongs to the community in relation to each single person. This order is directed by distributive justice, which distributes common goods proportionately." *Id.* Q. 61, art. 1, at 1452.

41. *See* NOONAN, *supra* note 31, at 73–74.

42. *See id.*

43. *See id.* at 74.

44. *See id.*

cost of the goods and services they require plus the additional amount of usury.[45] The payment of usury only exacerbates their poverty by transferring what little future wealth they may earn to the usurer. The second group, the temporarily needy, is similar.[46] They become gradually impoverished and the usurer, taking advantage of their temporary need, transfers wealth from the needy to the wealthy.[47] This group would be better off liquidating assets, foregoing consumption, or having recourse to public assistance.[48] Those who borrow at usury for needed consumption (i.e., food and shelter) are transferring what little wealth they have to those wealthier than themselves. This is an unjust redistribution, as it takes from those in need and enriches those with excess wealth. This is inherent in usury: one who is not in need of the money lent would not pay usuries to acquire it and would instead use existing wealth. Beyond the wealth transfers from the very poor to the wealthy, a credit system based on usury eventually demotes those in a moderate socioeconomic sphere to a lower one.[49] In addition to making the very poor even less wealthy, borrowing at usury to maintain consumption needs also reduces the middle class to a lower state, or even poverty.[50] Because usury involves paying more than the value of money received, it always involves a wealth transfer to the usurer. In this vein, Ben Jonson once quipped that usurers were "base rogues that undo young gentlemen."[51] Not only does usury make the poor poorer, but also the number of the poor increases over time as the numbers of the moderately wealthy decline. Pope Innocent IV argued that redistribution of wealth on this principle is harmful for society as a whole. Usury results in individual and societal decline of wealth.[52] The borrower at usury transfers a portion of his future wealth to the usurer.[53] The society suffers as usury diverts investment away from productive activities, such as farming, because the wealthy invest their money in usurious loans where the money is put to nonproductive uses.[54]

Thus, the scholastic theory of credit considers lending money for the purchase of nonproductive assets to be subject to a different set of legal norms than investment in businesses and productive assets (which this Article does not discuss). Consumer lending that requires borrowers to put their lenders in a

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45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See* NORMAN JONES, GOD AND THE MONEYLENDERS: USURY AND LAW IN EARLY MODERN ENGLAND 45 (1989).
50. *See id.*
51. *Id.* (internal quotation marks omitted).
52. INNOCENT IV, COMMENTARIA APPARATUS IN V LIBROS DECRETALIUM, V:19, *De usura*, ante c.1 (Minerva GmbH 1968) (1570).
53. *Id.*
54. *Id.*

better position for having made the loans (i.e., paying a gain or usury) is unjust. It violates commutative justice by requiring borrowers to repay more than they received. Also, it produces wealth redistribution from those in need to those with surplus. Finally, usurious lending for consumption diverts wealth from productive investments. The theory rejects a financial system premised upon the notion that borrowing at usury is a just method for people to obtain the things they require to sustain life.

The prohibition of the payment of usury does not mean that a lender cannot require compensation for loss. A lender may legitimately ask its borrower to indemnify it for costs associated with making the loan: travel costs to obtain the money to lend, accounting costs, or expenses incurred to comply with the legal formalities of making a loan.[55] A lender may also require compensation for a borrower's failure to return the money when promised as long as the delay is real and the compensation is moderate and reasonable.[56] This concept of compensation for loss lies at the origin of the word interest. In Roman law, the term *quod interest* referred to "that which is the difference" or loss occasioned.[57] Interest, in its original sense, is never payment for the use of money; it represents the difference a borrower must make up to a lender injured by making a loan or the amount a delinquent borrower must pay to a lender for failing to honor its obligations.[58] Roman law made a distinction between *usura* and *interessee*: "*id est non lucrum, sed vitatio damni*."[59] This fundamentally different understanding of interest from the modern use of the term is what led one English writer to exclaim: "Usury and trewe interest be things as contrary as falshod is to truth."[60]

Thus, the scholastic theory allows a consumer lender to charge for costs and losses incurred in making the loan, but the lender may not charge an amount in excess of actual or reasonably estimated future loss. Lest one argue that such a system is impossible to implement, the Italian institution of the *mons pietatis* (which survives to this day in Mexico as the Mexican Bank of Pity)[61] is proof of the practical application of these principles. In general, this institution provided

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55. BERNARD W. DEMPSEY, INTEREST AND USURY 173 (1948).

56. *See id.* at 175; *see also* NOONAN, *supra* note 31, at 107–09 ("The need to have a check upon a contumacious debtor was recognized by the canonists, though the canon law was silent on the question.").

57. *See* NOONAN, *supra* note 31, at 106.

58. *See id.*

59. St. Raymond of Pennaforte, *Summa casuum conscientiae*, 2:7:2, *quoted in* NOONAN, *supra* note 31, at 106. This author translates the phrase as, "It is not monetary gain but the avoidance of financial loss."

60. Constant J. Mews & Ibrahim Abraham, *Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective*, 72 J. BUS. ETHICS 1, 2 (2007) (internal quotation marks omitted).

61. *See* McCall, *supra* note 28, at 595 n.235.

loans to those in need who had an item of property to pledge.[62] The bank was permitted to charge borrowers a fee to cover its costs of operation and no more.[63]

Thus, the objectivist approach to scholastic usury theory maintains a fundamental legal and moral difference between investment of capital in business and lending money to obtain items for personal consumption. As to the latter, it is unjust to require the return of more money than lent as this is an unjust exchange. A lender who suffers a loss occasioned by the transaction itself or the borrower's breach of duty can require equalization of this loss in the payment of interest. To ask more than this constitutes an unjust transfer of wealth.

IV. THE JUST PRICE THEORY AND CREDIT SALES

The second major aspect of scholastic natural law theory that provides a useful framework for evaluating the mortgage finance crisis is the just price theory. As with usury, the just price theory has roots in commutative justice. As early as Aristotle, philosophers recognized the necessity of the exchange of goods. A house builder needs shoes and a shoemaker needs a house.[64] As the exchange should be mutually beneficial to each party—each needs what the other is to exchange—one party should not bear a disproportionate share of the costs.[65] If unequal exchanges were to occur, they would serve as random instances of wealth redistribution; if wealth is to be redistributed, a normative scheme not dependent upon individual transactions should do the redistribution.[66]

An apparent contradiction existed in the philosophy of Aristotle (as well as Plato). Although recognizing the need for the exchange of goods as necessary to society, Aristotle was skeptical of tradesmen—those engaged in retail exchange—and banned them from his ideal community.[67] The just price theory

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62. *See id.* at 593.

63. *See id.* at 595 (citing CAROL BRESNAHAN MENNING, CHARITY AND STATE IN LATE RENAISSANCE ITALY: THE MONTE DI PIETÀ OF FLORENCE 60–61 (1993)).

64. *See* AQUINAS, COMMENTARY, *supra* note 2, lect. VIII, at 421; ARISTOTLE, *supra* note 35, ch. 8, at 1133a7–26, at 87.

65. AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, at 1513 ("Now whatever is established for the common advantage, should not be more of a burden to one party than to another . . . .").

66. *See* Gordley, *supra* note 37, at 1591.

67. DIANA WOOD, MEDIEVAL ECONOMIC THOUGHT 111 (2002) (citing THE POLITICS OF ARISTOTLE bk. VII, ch. IX, 1328b, at 353 (Ernest Barker trans., Clarendon Press 1948) (c. 335–22 B.C.)); *see also* THE POLITICS OF ARISTOTLE, *supra*, bk. I, ch. VIII, 1256a–b, 1257a–b, at 22–32 ("We can thus see that retail trade [which buys from others to sell at a profit] is not naturally a part of the art of acquisition. If that were the case, it would only be necessary to practice exchange to

can be seen as a reconciliation of the apparently contradictory acceptance of exchange transactions but wariness of those who facilitate them. Aristotle argued that exchange is necessary for society but exchange is not possible unless equality is maintained in an exchange.[68] It was those tradesmen who sold in violation of the just price theory who were to be restrained and whose actions gave rise to the skepticism.

Based on Aristotelian theories of justice as the mean, advocates of the just price theory assert that voluntary exchanges need to be proportional in value. No person should profit from another's loss.[69] Regarding exchanges, justice is found in an equal exchange, but injustice is found in an unequal one because the mean is not maintained.[70] Yet, equality does not require that identical items be exchanged; this would defeat the idea of exchange. A proportionality of value needs to be maintained. So if a shoemaker were to exchange with a homebuilder, the shoemaker would not exchange one shoe for one house but rather the number of shoes that equate to the value of the house.[71] Since a homebuilder will not necessarily need so many shoes, money was invented to serve as a method for achieving this proportion.[72] With the invention of money, parties can express value in prices quantified in a standardized manner. Thus, a just price is a price that equals the value of the thing being purchased.[73]

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the extent that sufficed for the needs of both parties [and not to the extent of the making of profit by one of the parties at the expense of the other].").

68. *See* AQUINAS, COMMENTARY, *supra* note 2; ARISTOTLE, *supra* note 35, ch. 8, 1133a21–25, at 87 ("If this [reciprocal equality] were not so, there will be neither exchange nor association."); WOOD, *supra* note 67, at 71.

69. *See* DIG. 50.17.206 (Pomponius, Various Readings 9) (Alan Watson trans., rev. ed. 1998) ("By the law of nature it is fair that no one become richer by the loss and injury of another.").

70. ARISTOTLE, *supra* note 35, ch. 6, 1131b4–1132a7, at 83–84.

71. *See id.* ch. 8, 1133a19–1133a25, at 87.

72. *See id.* 1133b8–1133b28, at 88–89.

73. It is important to note that equality in exchange is entirely distinct from the communist notion of equality of wealth. Commutative justice does not require equalized wealth but that exchanges between individuals not be unequal. Thus, to use the above example, a shoemaker may increase wealth by investing more labor in the production of more shoes and exchanging them for their just value for other items of production or wealth. The shoemaker's overall wealth may increase due to increased labor, but it is not at the expense of those with whom the shoemaker transacts; they receive shoes in exchange for equivalent value that they transfer. *See* 1 EWART LEWIS, MEDIEVAL POLITICAL IDEAS 135 (1954) (quoting JOHN FORTESCUE, *De Natura Legis Naturae*, *in* 1 THE WORKS OF SIR JOHN FORTESCUE 214–15 (Thomas Fortescue ed., London 1869)). Discussing the origin of private property by commenting on Genesis 3:17–19, Fortescue explains that the investment in labor (sweat) is a licit and just way to acquire property or wealth:

> [T]here was granted to man property in the things which he *by his own sweat* could obtain. . . . For since the bread which man would *acquire in sweat would be his own*, and since no one could eat bread without the sweat of his own countenance, every man

Saint Thomas Aquinas provides one of the most concise statements of the normative requirement of paying a just price:

> Now whatever is established for the common advantage, should not be more of a burden to one party than to another, and consequently all contracts between them should observe equality of thing and thing. Again, the quality of a thing that comes into human use is measured by the price given for it, for which purpose money was invented, as stated in *Ethic*. V. 5. Therefore if either the price exceed the quantity of the thing's worth, or, conversely, the thing exceed the price, there is no longer the equality of justice: and consequently, to sell a thing for more than its worth, or to buy it for less than its worth, is in itself unjust and unlawful.[74]

This simple normative principle—no one should pay more or less than a thing is worth—raises at least three questions that are necessary to apply the norm to real exchanges. First, what is something worth? Second, should all unjust exchanges be corrected? And third, what if the sale occasions a loss beyond the value of the thing sold to the seller? I will address each question in turn.

Value is determined by the relation that a thing bears to the satisfaction of a human need.[75] Therefore, the just price is the common estimation of the satisfaction of human needs achieved by a particular thing.[76] The common estimation may or may not be the prevailing market price where market price means the maximum price which a market will bear.[77] If the market price corresponds to the general estimation of the value of human need satisfaction, then the two will be identical. What is significant about common estimation is that it is common.[78] A particular or unique need or desire of a buyer or a community is not a legitimate factor in determining the just price.[79] The fact

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> who did not sweat was forbidden to eat the bread which another had acquired by his sweat. . . . And thus the inheritable ownership of things first broke forth.

Id. (emphasis added) (first alteration in original).

74. AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, at 1513.

75. AQUINAS, COMMENTARY, *supra* note 2.

76. *See* NOONAN, *supra* note 31, at 82–83 (quoting DIG. 35.2.63 (Paul, Lex Julia et Papia 2)).

77. *See id.* at 85, 87–88.

78. *See id.* at 88.

79. *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, at 1514 ("Yet if the one man derive a great advantage by becoming possessed of the other man's property . . . the latter ought not to raise the price, because the advantage accruing to the buyer, is not due to the seller, but to a circumstance affecting the buyer."); *see also* DIG. 35.2.63 (Paul, Lex Julia et Papia 2) (Alan Watson trans., rev. ed. 1998) ("Things acquire their value from their general usefulness not

that a buyer is starving and without food does not entitle the seller to ask a price above the common price for such food.

Yet, how does one know the common estimation of value or price? In Roman law (and later European law rooted in Roman law), there were two possible methods: the price could be fixed *ex ante* by the legitimate governmental authority (as the government does with utility company prices in modern times) or a good man (*ad abitrium boni viri*, or what we would call an expert) could determine it in an *ex post* proceeding.[80]

Given the difficulty of determining an exact just price in the absence of a fixed legal price, when should the law require rectification of an *ex ante* incorrect assessment of the just price by contracting parties as determined *ex post* by an expert? Saint Thomas Aquinas argued that a sale at any variation from the just price violates the normative principle of equality in exchange[81] but that the law only requires restitution for knowingly contracting at an unjust price[82] or when the error was without knowledge ("*absque fraude*") but the variation from the just price is great ("*nimius excessus*").[83] The limitation of a legal remedy only to cases of intentionally contracting at variance to the just price or an unintentional great difference does not mean abandonment of the more rigorous normative principle.[84] Yet, the recognition that the just price can

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from the particular approach or utility of individuals."); *id.* 9.2.33 (Paul, Plautius 2) (stating the same concept).

80. *See* John W. Baldwin, *The Medieval Theories of the Just Price*, TRANSACTION AM. PHIL. SOC'Y, July 1959, at 5, 49.

81. *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, at 1514.

82. *Id.* (using the word "deceit" (*fraus*), a term that requires acting with knowledge); *see also* Huguccio, *Summa*, to *Causa* X, q. 2, c. 2, *Hoc ius*, Paris Bibl. Nat. Lat. 15396, fol. 159[va], *quoted in* Baldwin, *supra* note 80, at 56 n.118 ("[C]redo tamen nec ecclesiam nec aliquem hominem ex scientia certa debere plus accipere quam res valeat, presertim si plus offertur per licitationem."). I translate Huguccio's phrase as: "I believe, nevertheless, neither a church nor any man, with certain knowledge, ought to accept more than a thing is worth, especially if more is offered in the bidding."

83. AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, Reply Obj. 1, at 1514 ("Accordingly, if without employing deceit the seller disposes of his goods for more than their worth, or the buyer obtain them for less than their worth, the law looks upon this as licit, and provides no punishment for so doing, unless the excess be too great . . . .").

84. *Id.* ("On the other hand, the Divine law leaves nothing unpunished that is contrary to virtue. Hence, according to the Divine law, it is reckoned unlawful if the equality of justice be not observed in buying and selling . . . ."). Yet, even under the divine law, which represents the normative principle embodied in the legal requirement to make restitution, the necessary imprecision in knowing the exact just price necessitates restitution only if the variation is notable. *See id.* ("[H]e who has received more than he ought must make compensation to him that has suffered loss if the loss be considerable [*notabile damnum*]. I add this condition, because the just price of things is not fixed with mathematical precision [*punctaliter determinatum*], but depends on a kind of estimate [*aestimatione*], so that a slight addition or subtraction would not seem to destroy the equality of justice.").

change over time[85] and can only be estimated[86] necessitates that the force of law should correct only intentional or notable variations.[87] Thus, for example, Roman law only required restitution to one who sold land for less than one half of the just price.[88] The post-Roman period of Western law saw the gradual expansion of this remedy to a wider range of transactions than the original Roman remedy, yet it never corrected all deviations from the just price.[89]

The recognition that the just price could change over time led to the development of a corollary theory to address situations when a buyer pays for a purchase at a different time than the creation of the contract (in modern terms, a credit sale). The theory of *venditio sub dubio* allowed a seller of goods to charge more than the current just price if time separated payment from delivery and there was legitimate doubt as to the just price of the goods at the applicable future time.[90] Under the theory, a seller must meet two conditions to licitly charge more than the current just price: there must be a real doubt that the current just price will remain the same at the time of payment and the agreed price must not clearly be in excess of a reasonable estimate of the future just price.[91] A price clearly in excess of the expected just price constitutes disguised

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85. DIG. 35.2.63.2 (Paul, Lex Julia et Papia 2) ("Sometimes place or time brings a variation [*uarietatem*] in value; oil will not be equally valued at Rome and in Spain nor given the same assessment [*aestimabitur*] in periods of lasting scarcity as when there are crops . . . ."); *see also* AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 3, Reply Obj. 4, at 1516 (discussing whether a merchant with knowledge that merchants with a greater supply of the goods sold are about to arrive in a location needs to disclose the likely downward price effect).

86. *See supra* note 84.

87. For a discussion of why human law must be in accord with divine law but need not always strictly enforce the principles of justice in all cases see 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, Q. 96, art. 2, at 1018 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947) (1265–74) ("Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike.").

88. Code Just. 4.44.2 (Diocletian & Maximian 285); *id.* 4.44.8 (Diocletian & Maximian 293).

89. *See* Baldwin, *supra* note 80, at 22–27.

90. *See* Gregory IX, *Naviganti*, *in* 4 READINGS IN WESTERN CIVILIZATION: MEDIEVAL EUROPE 317 (Julius Kirshner & Karl F. Morrison eds., 1986) ("[S]omeone who pays ten shillings in order that the equivalent measures of grain, wine, or oil will be handed over to him at some other time shall not be considered a usurer, even if they then turn out to be worth more, so long as there is a reasonable doubt whether they were going to be worth more or less at the time of settlement. By reason of the same doubt even someone is excused who sells cloth, wine, oil, or other goods so that after a certain amount of time he gets back more for them than they are worth at the time of the sale . . . ."); *see* INNOCENT IV, *supra* note 52, at *In Civitate*.

91. *See* Gregory IX, *Decretales*, V:19:6, *In civitate*, in *Corpus juris canonici*, *cited in* NOONAN, *supra* note 31, at 90.

usury for a loan.[92] Many who considered the issue recognized that although certain credit sales at higher prices could be licit, the risk of evasion of usury and just price normative principles was great; they therefore counseled caution.[93]

The final question related to just price I consider in the current analysis is whether a seller can charge more due to added cost or expense suffered in the sale. As with usury, a consensus emerged that a seller need not suffer un-indemnified loss for actual added expense occasioned by the sale. The seller can add such compensation to the just price.[94] For example, a merchant could charge for the cost and expense of storing or transporting the goods.[95]

Just price theory holds that normatively nobody should sell something for more than its common estimation of value plus costs of sale. Under the theory, a particular need or desire of the buyer for the good is an illegitimate factor in determining price. The exact just price can vary over time and unless fixed by law can only be arrived at by estimation. This doubt and variability of price restricts those cases where the law can correct errors to notable variations or unreasonable estimates of future prices in credit sales. Finally, adding an amount to indemnify a seller for costs of sale is a just addition to the price.

V. FINANCING OF RESIDENTIAL REAL ESTATE THROUGH THE USURY AND JUST PRICE LENSES

The system for obtaining housing in America is rooted in the idea of borrowing. Over the twentieth century, the ideas of home and borrowing became inseparable. As of 2005, 67% of residential properties in America were subject to a mortgage-backed loan.[96] By comparison, in 1920 only 39.7% of

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92. *See id.*

93. RAYMOND DE ROOVER, SAN BERNARDINO OF SIENA AND SANT'ANTONINO OF FLORENCE: THE TWO GREAT THINKERS OF THE MIDDLE AGES 29–30 (1967).

94. *See, e.g.*, AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, at 1514 ("In such a case [where the seller suffers a special loss upon selling], the just price will depend not only on the thing sold, but on the loss which the sale brings on the seller. And thus it will be lawful to sell a thing for more than it is worth in itself, though the price paid be not more than it is worth to the owner.").

95. *See id.* art. 4, Reply Obj. 2, at 1517 (explaining that a person can sell a thing for more than the person paid for it when the just price of the good changes in the interim or where the seller incurs labor or expense, such as "danger . . . in transferring the thing from one place to another" or "having it carried by another"); *see also* Baldwin, *supra* note 80, at 15, 39–40 (discussing theologically approved reasons for profiting from the sale of goods).

96. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005, at 156 tbl.3-15 (2006), *available at* http://www.census.gov/prod/2006pubs/h150-05.pdf.

homes in the U.S. had mortgages,[97] and in 1940 only 45.3% were mortgaged.[98] Usury theory asks the question: Is this financial system, where over two thirds of homeowners utilize a loan to obtain shelter, a just paradigm for people to acquire necessary shelter? Since borrowers use the loaned funds to obtain a non-wealth-producing asset, this question needs to be answered in light of the principles governing consumer loans. The discussion does not consider the financing of the construction or operation of commercial or agricultural properties.

Evaluation of the justice of the system depends upon the details of the transactions. If lenders are charging no more than the return of the money lent plus compensation for costs, then it is just.[99] If the lenders are exacting a gain above such amount merely for the use of money, then it is unjust.[100] It is common practice for the mortgage lender to charge origination fees to cover the cost of making the loan.[101] A detailed analysis of mortgage interest rates to determine the extent to which they exceed any actual unreimbursed costs after origination is beyond the scope of this Article. Yet I doubt anyone could seriously argue that the mortgage industry operates as a not-for-profit enterprise. Assuming lenders charge all of the cash costs of mortgage transactions (legal and documentary fees) to borrowers and using the federal funds rate as a quantification of the lenders' cost of funds,[102] we are left with the question of whether the spread over the federal funds rate represents merely a reimbursement of internal costs of carrying the transaction (e.g., accounting and monitoring costs). Given an average federal funds rate of 3.44% from 2000 to 2007[103] and an average 30-year, fixed rate home mortgage interest rate of 6.48%[104] (8.48% for subprime at origination[105]), that leaves 3.04% as a charge

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97. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, MORTGAGES ON HOMES 41 tbl.6 (1923), *available at* http://www2.census.gov/prod2/decennial/documents/00551139no2ch2.pdf.

98. 1 BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, at 23 tbl.20 (1943), *available at* http://www2.census.gov/prod2/decennial/documents/36911485v1p1ch1.pdf.

99. *See supra* note 31 and accompanying text.

100. *See supra* notes 32–34, 38 and accompanying text.

101. Chomsisengphet & Pennington-Cross, *supra* note 16, at 32.

102. In fact, using the federal funds rate may overestimate the costs of capital given that fractional reserve banking allows a bank to lend a multiple of the funds it has on deposit. Banks can thus spread the cost of funds over multiple transactions.

103. *See* Federal Reserve Statistical Release - Historical Data, http://www.federalreserve.gov/releases/h15/data.htm (locate "Federal funds (effective)" under "Instruments"; then follow "Annual" hyperlink) (last visited Mar. 1, 2009).

104. Freddie Mac: Weekly Mortgage Market Surveys, http://www.freddiemac.com/pmms/pmms30.htm (last visited Mar. 1, 2009).

105. This figure is extrapolated from the fact that subprime rates at origination (excluding future increases) are on average 2 percentage points higher than the interest rates on prime rate mortgages. *See supra* note 17 and accompanying text.

for these costs (5.04% for subprime). On a $100,000 loan, this equals an average of $3,040 for such costs ($5,040 for subprime) over the first year alone.

Further, a few recent studies indicate that a significant percentage of those borrowing in the subprime segment of the market are paying fees and interest rates above those offered by other lenders. A study conducted by a community interest group of an industry participant, Citibank, found that at least 40% of those who obtained high interest rate, subprime mortgages would have qualified for prime rate loans.[106] A Freddie Mac and Fannie Mae estimate, finding that between 35% and 50% of subprime borrowers could have qualified for lower rate loans, confirms this analysis.[107] A study conducted for the *Wall Street Journal* showed that from 2000 to 2006, 55% of subprime mortgages went to borrowers with credit scores that would have qualified them for lower cost mortgages.[108] Although these studies do not prove that all borrowers are paying more than cost compensation, they at least suggest that a significant portion of them are paying more than other lenders are charging; this strongly suggests the payment of usury in the scholastic sense of the term.

The just price theory presents an opportunity to consider the mortgage market from another perspective. Although our culture has become accustomed to calling the mortgagor of a property the owner, to what extent does one really "own" a house subject to a mortgage? Ownership is "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others."[109] Yet, one who has acquired a home subject to a mortgage does not possess the right to do these things absolutely; the right is contingent upon repayment of the loan supported by the mortgage plus required fees. If one doubts the restriction on ownership, consider the result of attempting to convey the property without discharging the mortgage. The rights of the home owner can better be described as contingent ownership, or "[o]wnership in which title is imperfect but is capable of becoming perfect on the fulfillment of some condition."[110]

Economically, a mortgage-financed home purchase is a credit sale of property by the mortgagee. In essence, the bank purchases the property and then agrees to resell it to the borrower over time at an increased price (the amount of the mortgage plus interest). The fact that a lender requires its borrower to pay some of the purchase price quickly (by only financing 80% or 90% of the price)

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106. *See* Lew Sichelman, *Community Group Claims CitiFinancial Still Predatory*, ORIGINATION NEWS, Jan. 2002, at 25.

107. *See* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 730 n.73 (2006).

108. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

109. BLACK'S LAW DICTIONARY 1138 (8th ed. 2004).

110. *Id.*

does not alter this re-characterization. Although the bank does not take record legal ownership in our current legal system, economically it is no different.[111] The lender is entitled to enforce the sale of the property to the borrower at a predetermined price that varies depending on the exact time of completion of the purchase (or, in current legal terms, at maturity or prepayment) regardless of the real value of the house at the time of repayment. If the borrower does not pay by the time required, the lender has a right to use the force of law to remove all indices of ownership from the borrower (i.e., cancel the sale).

Re-characterized in this way, just price law and its corollary of *venditio sub dubio*[112] can be used to evaluate the normative justice of the standard terms of such transactions. First, there must be genuine doubt that the current price of the residential property will be the same at the time of repayment.[113] Second, the total price (meaning the total amount paid by the borrower to the lender, including fees, interest, charges, and points) must not be so great as to clearly exceed a reasonable estimate of the value of the property at the time of payment plus the costs of entering into the transaction (legal and documentary fees).[114] A simple example will illustrate the analysis. *A* agrees to buy a home from *B* for $100,000 and obtains from *C* a 100% mortgage at the following rates, amortized over the following periods. In each case, *C* charges a 1% origination fee and excludes reimbursement of transaction costs, assuming that *C* only passes through the actual cash cost and thus receives no net benefit from these payments.

Table 1. Equivalent Percentage Increase of Total Payments Above Original Home Price for 6% and 10% Fixed Interest Rates and 15 and 30 Year Amortization Periods.

Annual Fixed Interest Rate	Years of Amortization	Total Payments to Lender	Equivalent Percentage Increase of Total Payments Over Original Price of the Home
6%	30	$216,850	116.85%
6%	15	$152,890	52.89%
10%	30	$316,930	216.93%
10%	15	$194,425	94.43%

111. Such a re-characterization of the legal form of a mortgage into its economic reality is similar to the re-characterization of certain transactions which in form appear to be leases into a secured sale. *See* U.C.C. §§ 1-203, 9-109(a)(1) (2001).

112. *See supra* notes 90–93 and accompanying text.

113. *See supra* notes 90–91 and accompanying text.

114. *See supra* note 91 and accompanying text.

The final column in Table 1 shows the rate of increase in the just price of the property over the life of the payments on the credit sale.[115] The just price theory then asks whether such percentage increases in the price of the property are reasonable. These percentages dwarf the historical rate of increase of housing prices. U.S. home prices increased a total of only 10% from 1975 to 1995.[116] From 1995 to 2004, housing prices appreciated at a more rapid annual rate of 3.6% (still significantly below annual interest rates), or cumulatively around 40% for the entire 30-year period.[117] Following further rapid appreciation, the current decline in housing prices seems to have begun a decrease in prices of 1.3% over the course of 2007.[118] Such simple calculations generally suggest that lenders price some mortgages at a level in excess of what just price theory would consider just in a case of a credit sale.

VI. CONCLUSION

The scholastic theories of usury and just price present some fundamental criticisms of the system our country has developed over the past century for the acquisition of housing. The system assumes that in order to acquire housing people should transfer a portion of their future wealth to the class of our society holding excess wealth.[119] Instead of investing this excess wealth in production of new wealth, firms lend the money out at what appears to be usury so that Americans can possess a non-wealth-producing asset: a home. Although we cannot conclude that every mortgage involves a violation of commutative justice by exceeding the compensation to the lender for costs and an unjust wealth redistribution, it appears likely that many mortgages do. The principles of usury theory present a framework for considering the regulation of mortgage rates. As consumption loans, the charges involved should be measured by their relation to compensation for cost rather than by their relation to pure profit for the use of the money.

Just price theory offers an opportunity for thinking about home mortgages in a new light. Considered as purchases by the lender and a delayed credit sale to the borrower, just price theory asks if the price (total payments made by borrower to lender) can be justified.[120] Again, although the details need more

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115. This assumes the original $100,000 was the just price at the starting point.

116. Charles Himmelberg, Christopher Mayer & Todd Sinai, *Assessing High Housing Prices: Bubbles, Fundamentals and Misperceptions*, J. ECON. PERSP., Fall 2005, at 67, 67.

117. *Id.*

118. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T HOUS. & URBAN DEV., U.S. HOUSING MARKET CONDITIONS: 1ST QUARTER 2008, at 70 tbl.9 (2008), *available at* http://www.huduser.org/periodicals/ushmc/spring08/ushmc_q108.pdf.

119. *See supra* notes 52–54 and accompanying text.

120. *See supra* notes 90–95 and accompanying text.

analysis, this idea presents a normative paradigm of evaluation. Do the amounts charged bear a reasonable relation to the just prices of residential property over time?

Even if we have not had time to find all the answers to these questions, I hope this Article suggests a consistent and coherent theory for asking and evaluating these questions. Regardless of whether the financial bailout of the banking system was prudentially necessary to stabilize the larger economy, a solution that merely saves the financial institutions that engaged in unjust transactions will not bring a long term solution to our nation's financial problems. As Saint Thomas Aquinas commented, exchange and commerce are necessary for a community, but the economy they support can only achieve long term stability if the individual transactions supporting it are just and equitable.[121] Importantly, Aquinas further noted that human law does not always prohibit all that the natural law forbids.[122] Yet we cannot escape the consequences of transgressing this higher law, which leaves "nothing unpunished."[123] Unjust exchanges require restitution, not merely financial bailouts and future regulation. But even the higher law recognizes that there is a matter of prudence and degree in evaluating the injustice of particular transactions, and due to the estimation necessary in assessing value and costs,[124] a "slight addition" does not render the transaction unjust.[125] Thus, with this caveat in mind, we cannot conclude that all mortgages have transgressed commutative justice. As did Roman law before us, we need to select a line of demarcation between slight variation and considerable. Human law then needs to provide for restitution to those unjustly treated and to restructure the regulatory system in light of the principles of usury and just price principles. Only when the method for home acquisition is returned to these historical principles of justice and just exchanges again dominate will our financial markets achieve endurable stability.

121. AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q. 77, art. 1, Reply Obj. 1, at 1514.
122. *Id.*
123. *Id.*
124. *See supra* notes 85–87 and accompanying text.
125. AQUINAS, SUMMA THEOLOGICA, *supra* note 34, Q.77, art. 1, Reply Obj. 1, at 1514.