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Donative Promises\*

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The law of contract is for the most part the law of promises. Therefore, the first great question of contract law—usually subsumed under the heading of consideration—is, what kinds of promises should the law enforce.<sup>1</sup> Donative promises—that is, promises to confer a benefit by gift<sup>2</sup>—present in an easily accessible way many of the important and difficult issues that unfold from this question. The purpose of this article is to consider such promises both in their own right and as a point of departure for a reexamination, which I begin here, of the first principles of contract law.

Three propositions are of central importance to this article and should therefore be stated at the outset. First, the issue of consideration is often merely a screen for complex issues of damages. Accord-

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† Professor of Law, University of California, Berkeley. I am indebted and grateful to the many colleagues and friends who gave much valuable help by reading and commenting on earlier drafts of this article. Several persons provided me with special help on various civil-law issues, and I specifically thank in this connection James Gordley, Herbert Wiedemann, Hartmut Dietrich, Klaus M. Kubel, Shael Herman, Phillipe Malherbe, Thomas Schwerdtfeger, and Christine Windbichler.

<sup>1</sup> See 1A A. CORBIN, CONTRACTS § 210 (1963).

<sup>2</sup> I exclude from this category promises to fulfill a preexisting but not legally binding obligation, which raise somewhat different issues, partly because they normally involve problems of unjust enrichment and do not involve a transaction or gift. See generally Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 821-22 (1941); Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971). I also exclude promises made in a commercial context in which no exchange seems evident but the promisor clearly is not motivated by an intent to confer a gift on the promisee—for example, promises to hold an offer open for a fixed time, or promises readjusting an ongoing business transaction.

ingly, the question, what *kinds* of promises should the law enforce, is tightly linked with the question, to what *extent* shall a certain kind of promise be enforced. In the case of donative promises, the major relevant damage measures are expectation (the amount required to put the promisee in the position he would have been in had the promise been kept) and reliance (the costs incurred by the promisee as a result of the promise).<sup>3</sup>

Second, contract rules must reflect considerations of administrability, particularly information costs, as well as considerations of substance. An otherwise preferable rule may therefore be rejected if its application turns on facts that cannot be readily, reliably, and suitably determined in the relevant forum.

Third, in analyzing the enforceability of donative promises, the critical distinctions are whether or not the promise is formal—that is, cast in a form to which special significance is attached—and whether or not the promisee has incurred a significant cost in reliance on the promise by changing his position or forgoing an opportunity. Part I of this article will consider donative promises that are unrelieved upon and informal; Part II will consider donative promises that are unrelieved upon but formal; and Part III will consider donative promises that are relieved upon.<sup>4</sup>

### I. INFORMAL AND UNRELIED-UPON DONATIVE PROMISES

The question, what promises should the law enforce, must not be confused with its cousin, what kinds of promises should people keep. Withholding legal enforcement from a promise does not license its breach. A promise-breaker may lose business, friends, or self-respect, and the prospect of such losses may be more of an impetus to performance than the prospect of money damages. Correspondingly, the fact that a promise should be kept affects but does not control the issue of enforceability: for reasons of policy the law may refuse to enforce promises that for reasons of morality should not be broken. All of this is particularly well illustrated by the informal and unrelieved-upon donative promise. As a matter of everyday

<sup>3</sup> The fountainhead for both the terminology and the mode of analysis is Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 *YALE L.J.* 52, 373 (1936-1937).

A third important measure, restitution (the amount of material input to the promisor from the promisee) is usually not important in the donative-promise context.

<sup>4</sup> The interplay between reliance and formality obviously produces a fourth category—promises that are both formal and relieved upon. This category will not be considered separately, since I conclude in Part III that reliance should make a donative promise enforceable without regard to form.

morals, a person who breaks such a promise without sufficient excuse is deemed to have wronged the promisee. Nevertheless, such promises are generally not enforced at common law.<sup>5</sup> Both substantive and administrative reasons may explain this apparently puzzling result.

To begin with, the state (speaking through the courts) may fairly take the position that its compulsory processes will not be made available to redress every hurt, but only to remedy injuries that reach a certain intensity, to prevent unjust enrichment, or to further some independent social policy, such as promotion of the economy.<sup>6</sup> The injury that results from the breach of an informal and unrelieved-upon donative promise, however, is likely to be relatively slight. By hypothesis, the promisee has incurred no significant costs. It is true that his expectation may have been defeated, but lost expectation—a special form of disappointment—is among the least intense of injuries, and the psychological state aroused by a donative promise is often closer to hope than to anticipation. “Seeing is believing” might well be the motto of donative promisees.<sup>7</sup>

Furthermore, since the promisee has incurred no significant costs, the promisor will normally not have been materially enriched

<sup>5</sup> See, e.g., *Rask v. Norman*, 141 Minn. 198, 169 N.W. 704 (1918) (promise by decedent's business associate to protect widow's interest held unenforceable); *Dougherty v. Salt*, 227 N.Y. 200, 125 N.E. 94 (1919) (promise of gift held unenforceable); *Oetting v. Sparks*, 109 Ohio St. 94, 143 N.E. 184 (1923) (donative promise of subrogation to rights of a mortgagee held unenforceable).

Gifts made by delivery of possession or by a sealed writing are normally not reversible, and under the majority view a written unsealed conveyance has the same effect. See R. BROWN, *THE LAW OF PERSONAL PROPERTY* §§ 7.2, 7.10 (3d ed. W. Raushenbush 1975). Under cover of this rule, the courts may occasionally enforce a written donative promise by treating it as a conveyance. See *Faith Lutheran Retirement Home v. Veis*, 156 Mont. 38, 473 P.2d 503 (1970); Note, *Gifts Effected by Written Instrument: Faith Lutheran Retirement Home v. Veis*, 35 MONT. L. REV. 132 (1974). Similarly, under the law of trusts a person can effectively declare himself trustee of a thing on another's behalf, and under cover of this rule the courts may occasionally enforce a donative promise by treating it as a declaration of trust. See R. BROWN, *supra*, § 7.21.

<sup>6</sup> See Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 852-53 (1941); Willis, *Rationale of the Law of Contracts*, 11 IND. L.J. 227, 230 (1936).

<sup>7</sup> The argument based on the insecurity of a donative promisee's expectation turns partly on the assumption that this insecurity is not itself a product of the legal rule. My judgment is that most donative promisees do not know whether a donative promise is legally enforceable. Rather, the low intensity of their expectations principally derives from their understanding that such promises are often not kept and that legal enforcement—whether or not available—is financially and emotionally impracticable; from the difficulty of determining whether a given donative promise is made with the intent requisite to impose an obligation, see text and notes at notes 11-12 *infra*; and from the knowledge that any obligation is subject to important kinds of excuses, see text and notes at notes 12-13, 46-49 *infra*.

at the promisee's expense. Of course, the promise may have raised the promisor's status with the promisee or with some sector of the community, but legal intervention based solely on unjust enrichment must normally involve something more than undue gratification. In any event, if the promisor breaks his promise without a valid excuse, he will probably suffer a reduction in status that equals or exceeds his original gain.

Finally, it is far from clear that any independent social interests are implicated by such promises. It has been said that "from an economic point of view contracts involving an exchange of values tend to promote an increase in the public wealth. A gift, on the other hand, is a sterile transmission . . . ."<sup>8</sup> This is probably an oversimplification: gifts have a wealth-redistribution effect, and taken as a class probably redistribute wealth to persons who have more utility for money than the donors—a phenomenon that certainly affects the composition, and may affect the extent, of aggregate demand.<sup>9</sup> Even assuming, however, that the redistribution of wealth is an appropriate goal of contract law, the enforcement of donative promises would be a relatively trivial instrument for achieving that end.

These substantive considerations are reinforced by the administrative problems that would be raised by attempts to enforce informal unrelayed-upon donative promises. Initially, this type of promise raises serious problems of proof. Since such a promise is, by hypothesis, both informal and gratuitous, it would be too easy (or so it may be thought) for a plaintiff falsely to convince a jury that a promise

<sup>8</sup> C. BUFNOIR, PROPRIÉTÉ ET CONTRAT 487 (1900).

It is noteworthy that donative promises to charitable institutions, which arguably do involve a strong state interest in a society that stresses the promotion of general welfare through decentralized private institutions, are enforced on a fairly regular basis. While enforcement in these cases is usually rationalized on either a bargain or a reliance theory, often these theories are made to apply only by straining or distorting the transaction at hand. See *Jordan v. Mount Sinai Hosp.*, 276 So. 2d 102, 108 (Fla. Dist. Ct. App. 1973) ("To ascribe consideration where there is none, or to adopt any other theory which affords charities a different legal rationale . . . is to approve fiction"), *aff'd*, 290 So. 2d 484 (Fla. 1974); 1A A. CORBIN, *supra* note 1, § 198; 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 116 (3d ed. W. Jaeger ed. 1957) [hereinafter cited as WILLISTON (3d ed.)]. But there are signs of a disposition to enforce such promises squarely as a matter of social policy. See *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609 (Iowa 1974); *More Game Birds in America, Inc. v. Boettger*, 125 N.J.L. 97, 14 A.2d 778 (1940); 8 CREIGHTON L. REV. 848 (1975). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) & Comment (Tent. Drafts Nos. 1-7, rev. ed. 1973) (reliance presumed) [hereinafter cited without cross-reference as RESTATEMENT (SECOND)]; N.S. REV. STAT. ch. 257 (1967) (written subscriptions in aid of undertakings "of public utility" enforceable without consideration).

<sup>9</sup> A redistribution is also not sterile in that it may enhance the utilities of both donor and donee. See Hochman & Rodgers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542, 542-43 (1969).

was made, despite the lack of either objective proof or corroborating circumstances.<sup>10</sup> Moreover, in a context that involves neither formality nor explicit reciprocity, it may often be difficult to distinguish a promise from a statement of present intent.<sup>11</sup> Indeed, the speaker himself may hardly understand "just what he means or (which is perhaps even more important) what he is understood to mean."<sup>12</sup>

Furthermore, if one is to come under a legal obligation simply by virtue of having exercised his will, it might at least be required that the will has probably been exercised in a deliberative manner. But since actors involved in a donative transaction are often emotionally involved, and since the donative promisor tends to look mainly to the interests of the promisee, an informal donative promise is more likely to be uncalculated than deliberative. Indeed, such promises may raise a problem akin to capacity, because they are frequently made in highly emotional states brought on by surges of gratitude, impulses of display, or other intense but transient feelings. (One reason that donative promises often fail to arouse a secure expectation is that the promisee realizes the promisor may back off when a sober self returns.) In theory, the law could deal with this problem by examining for deliberation on an individual basis. In practice, however, an inquiry into so subjective an element seems unlikely to produce reliable results.

Finally, the obligation created by a donative promise may be excused by acts of the promisee amounting to *ingratitude*, or by personal circumstances of the promisor that render keeping the promise *improvident*. If Uncle promises to give Nephew \$20,000 in two years, and Nephew later wrecks Uncle's living room in an angry rage, no one, not even Nephew, is likely to expect Uncle to remain obliged. The same result may follow if Uncle suffers a serious financial setback, and is barely able to take care of the needs of his immediate family; or if Uncle's wealth remains constant, but his personal obligations significantly increase in an unexpected manner, as through marriage, the birth of children, or illness; or perhaps even if Uncle's wealth and personal obligations both remain con-

<sup>10</sup> This problem may take on special dimensions where the promisor has died and suit is brought against his estate, although the difficulties in this case are mitigated by the dead man's statutes, which would normally require the plaintiff to prove his case through third-party testimony. See L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 407 (3d ed. 1972).

<sup>11</sup> See Fuller, *supra* note 2, at 815; Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941).

<sup>12</sup> Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (pt. 1), 21 ILL. L. REV. 341, 348 (1926).

stant, but, due to miscalculation, execution of the gift would jeopardize his ability to maintain his immediate family in a proper manner.<sup>13</sup> The potential availability of these excuses further explains the insecurity of a donative promisee's expectation.<sup>14</sup> More to the point, what constitutes ingratitude and improvidence is very difficult to determine, particularly in the context of the intimate relationships that often give rise to donative promises, and this difficulty would add substantially to the problem of administration.<sup>15</sup> Thus, despite occasional protests that the law should put its weight behind all promises that are seriously made,<sup>16</sup> there seems to be widespread agreement that informal unrelieved-upon donative promises should not be legally enforced.<sup>17</sup>

<sup>13</sup> See *Davis & Co. v. Morgan*, 117 Ga. 504, 508, 43 S.E. 732, 733 (1903) (dictum) (enforcing donative promises might bring such obligations "into competition with the absolute duties to wife and children . . . and make the law an instrument by which a man could be forced to be generous before he was just"); M. RADER, *ETHICS AND THE HUMAN COMMUNITY* 170-71 (1964); H. SIDGWICK, *THE METHODS OF ETHICS* 305-11 (7th ed. 1907); Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 12, 16-17 (1942); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 943 (1958); *The Uniform Written Obligations Act—A Criticism*, 21 ILL. L. REV. 185, 187 (1926); text and notes at notes 46-51 *infra*.

<sup>14</sup> See Patterson, *supra* note 13, at 943.

<sup>15</sup> Another criterion for determining whether a given type of promise should be enforceable is whether official regulation is suitable to govern the kind of conduct involved. Arguably, this criterion presents a further reason for refusing to enforce donative promises, since these promises are frequently made in intimate relationships, and law may be regarded as too blunt an instrument to regulate such relationships. The problem with this argument is that it cuts too far. As will be shown in Parts II and III, formal donative promises might well be made enforceable, and relied-upon donative promises should normally be made enforceable—intimate context or not. While these two cases could be distinguished on the ground that formality disengages a transaction from its context, and reliance involves an injury sufficiently intense to override the objection of unsuitability, those distinctions seem too delicate to bear much weight. Furthermore, the unsuitability objection is equally applicable to bargained-for promises that are made in intimate relationships, but in this context, the response of the law is not to deny enforcement to all such bargains; rather the law singles out for special treatment those bargains that govern the ongoing conduct of an intimate relationship, see, e.g., *Miller v. Miller*, 78 Iowa 177, 35 N.W. 464 (1887), *on rehearing*, 78 Iowa 177, 42 N.W. 641 (1889) (contract regulating marital relations not enforceable). To the extent the unsuitability objection has weight in the donative-promise context, the same treatment might be afforded.

It might be added that the operation of intimacy in the donative-promise context is far from simple. For example, strong intimacy between promisor and promisee makes it more likely that the promise will arouse a firm expectation (a reason for enforcement), but less likely that the promise will be broken without excuse, less likely that the promisee would resort to law even if a legal remedy were available, and more likely that the promisee will have other ways of assuring performance (reasons for nonenforcement).

<sup>16</sup> See, e.g., Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1251-53 (1936).

<sup>17</sup> It might be argued that a rule which made all donative promises enforceable would lead potential donative promisors to be more cautious about making promises than they are

under a nonenforcement regime, and would therefore have the advantage of reducing the number of disappointed promisees. Such an argument would have to rest on the assumptions that potential donative promisors (1) usually know contract law, and (2) often make donative promises that they would not make if such promises were enforceable. These assumptions seem questionable. Furthermore, even under a regime of general nonenforcement, relied-upon donative promises ought to be enforceable. See Part III *infra*. Since reliance is a contingency over which the promisor has little control, a person who knows the law, and will not make a donative promise if it is normally enforceable, will usually not make a donative promise even if it were unenforceable unless relied upon. Finally, many donative transfers are probably made only because the transfer has been promised and the transferor regards himself as morally obliged to keep his promise. Therefore, if a rule making all donative promises enforceable did result in fewer donative promises, it might also result in fewer donative transfers.

It might also be argued that since the promisor has derived satisfaction from a donative promise, it is fair to enforce the promise against him. This argument, however, assumes its own conclusion: Why should the promisor's pleasure, without more, put him under a legal obligation? That aside, the satisfaction a promisor derives from his promise may be considerably less than the economic value of the promised performance. A distinction must be drawn between a present transfer and a promise to give. If A makes a present transfer to B of \$1000, it can normally be assumed that the satisfaction A derives from the transfer equals or exceeds the value to him of \$1000. If, however, A merely promises to give B \$1000 in one year, it can normally be assumed only that A believes the value he presently expects \$1000 will have for him in one year will not exceed the sum of (1) the satisfaction he derives at present from making the promise, (2) the satisfaction he expects at present to derive over the year from having made the promise, and (3) the satisfaction he expects at present to derive in one year from making the transfer. Therefore, there is no assurance that the satisfaction derived merely from making a donative promise will equal the value of the promised performance. Moreover, because an informal donative promise is likely to be uncalculated, the promisor's solution of the satisfaction equation may be seriously askew even when the promise is made; and because the promisor's satisfaction during the time following the promise is peculiarly susceptible to changed circumstances, the equation will often turn out wrong even if it originally seems to be in balance.

In *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977), Professor Richard Posner argues, as part of his general thesis that "the law . . . follows economics," *id.* at 411, that "it is economical for society to recognize a promise as legally enforceable" if the utility of the promise to the promisor, measured principally by size and length of performance, outweighs the social cost of enforcement, measured principally by size of performance and likelihood of error in determining whether a promise was really made. This formula is implemented by the proposition that "the case for legal enforcement of gratuitous promises will generally be stronger the larger the promised transfer." *Id.* at 415. Professor Posner does not, however, take issue with the common-law rule that informal unrelieved-upon donative promises will not be enforced. Quite the contrary, since his stated purpose in developing criteria for enforcement of donative promises is to "test . . . the theory that . . . judge-made law . . . has been shaped by a concern with achieving efficiency." *Id.* at 416. To this end, he attempts, by use of his criteria, to provide an explanation of the legal rules governing donative promises. While the analysis is interesting, the criteria employed are too restricted, and accordingly are not sufficient to the explanatory task. For example, an attempted use of the criteria to explain the effect of preexisting moral obligation is built solely on the rule of enforcement embodied in *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1935), *cert. denied*, 232 Ala. 374, 168 So. 199 (1936). Posner, *supra*, at 419. This case, however, represents only one of two conflicting rules. The abolition of the seal's binding effect is admitted to be "mysterious" in terms of the criteria, and said to be explicable, if at all, principally on the basis of another theory—that legislatures place less emphasis on efficiency than courts. *Id.* at 420. Finally, the principal attempt at explaining nonenforcement of unrelieved-upon donative promises is that "[p]erhaps . . . the [courts have] . . . an empirical hunch that gratuitous promises tend both to involve small stakes and to be made in family settings where there are economically superior alternatives to legal enforcement." *Id.* at 417.

## II. FORMAL DONATIVE PROMISES

The problem of legal enforceability is much more severe where the issue is whether to enforce donative promises cast in a form that carries special significance. If our concern is that donative promises are easy to counterfeit and often lightly made, separate treatment might well be afforded to promises whose form minimizes problems of proof and demonstrates deliberation. If our concern is that donative promises often give rise to an expectation that is relatively thin, separate treatment might well be afforded to promises whose form is likely to arouse an expectation that is more secure. Moreover, if evidentiary security and deliberation can be assured, there may be reasons of social policy for enforcing donative promises cast in a form that shows a specific intent to be legally bound. "It is something," said Williston, "that a person ought to be able . . . if he wishes to do it . . . to create a legal obligation to make a gift. Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so."<sup>18</sup> For example, a promisor may want to ensure performance by his estate if he dies without having completed performance; to derive the satisfaction of having made an effective disposition; to protect his present aspirations against defeat by a less worthy future self; or to permit the promisee to make reliable plans on the basis of the promise. Accordingly, a legal system might plausibly choose to enlarge a donative promisor's choice-set by providing an artificial facility, or by recognizing some "natural" formality—that is, a promissory form that is popularly understood to carry legal significance<sup>19</sup>—through which a promisor can deliberately bind himself in a legally enforceable manner.

At common law, a donative promisor could bind himself legally through a seal.<sup>20</sup> In its origin, the seal was a natural formality that

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The argument based on size is questionable on both the merits and the facts, since it is not clear that donative promises involve smaller average stakes than bargains when consumer transactions are taken into account—or, for that matter, smaller average stakes than libel or trespass as a class. In any event, the doctrine of de minimis and the transaction costs of litigation would adequately screen out promises involving small stakes without the need for any special contract-law rules. The argument based on context oversimplifies the effect of an intimate setting, see note 15 *supra*, and fails to explain why relied-upon donative promises, which are typically made in the very same family setting, are legally enforceable, see Part III *infra*.

<sup>18</sup> HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 194 (1925) [hereinafter cited as HANDBOOK].

<sup>19</sup> Cf. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 45-46 (1974) (function of rituals in contract law).

<sup>20</sup> The governing rule was sometimes expressed by the statement that a seal "raises a presumption of" or "imports" consideration. Under developed English law the presumption

ensured both deliberation and proof, involving a writing, a ritual of hot wax, and a physical object that personified its owner. Later, however, the elements of ritual and personification dropped away, and the seal not only ceased to be a natural formality but became an empty device whose legal consequences were not widely understood. Eventually most state legislatures abolished the distinction between sealed and unsealed promises,<sup>21</sup> abolished the use of a seal in contracts,<sup>22</sup> or otherwise limited the seal's effect,<sup>23</sup> and no effective substitute for the seal has arisen.<sup>24</sup> "Nominal considera-

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was not rebuttable. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 419-20 (3d ed. 1923); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 634 (5th ed. 1956). Probably the same held true in most states prior to modern statutory developments. See *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937); 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 217 (rev. ed. S. Williston & G. Thompson eds. 1936) [hereinafter cited as WILLISTON (2d ed.)]. Some states, however, may have looked the other way. See HANDBOOK, *supra* note 18, at 196-97 (remarks of Mr. Williston); Note, *The Status of the Common-Law Seal in Florida*, 1 U. FLA. L. REV. 385, 391-93 (1948). Compare *Florida Nat'l Bank & Trust Co. v. Brown*, 47 So. 2d 748 (Fla. 1949) with *Wise v. Wise*, 134 Fla. 553, 184 So. 91 (1938) and *Bennett v. Senn*, 106 Fla. 446, 144 So. 840 (1932).

<sup>21</sup> E.g., CAL. CIV. CODE § 1629 (West 1973). On their face, statutes of this type could be interpreted to mean either that sealed instruments should be treated as if they were unsealed, or the other way around. The former reading is almost certainly the one intended, given the historical context and the likelihood that the kind of change the latter reading involves would be clearly signaled. For a listing of the statutes of various states, see RESTATEMENT (SECOND) at 227-31 (introductory note).

<sup>22</sup> E.g., IOWA CODE ANN. § 537A.1 (West Supp. 1979). This type of provision is often accompanied by a companion statute which provides that a written instrument, sealed or unsealed, shall be presumptive of, or shall import, consideration. See, e.g., CAL. CIV. CODE § 1614 (West 1954); IOWA CODE ANN. § 537A.2 (West Supp. 1979). On the interpretation of the latter kind of provision, see note 20 *supra*; text and notes at notes 30-32 *infra*.

<sup>23</sup> Statutes in this category frequently provide that the seal shall be only presumptive evidence of consideration. See, e.g., N.J. REV. STAT. § 2A:82-3 (1976). As with the common-law rule, a question can be raised whether the statutory presumption is rebuttable or conclusive. It hardly seems likely that conclusive effect was intended, partly because of the historical context, and partly because if the presumption were conclusive the statute would make no change in the common law, and would therefore be unnecessary. See generally 1A A. CORBIN, *supra* note 1, § 254; 1 WILLISTON (3d ed.), *supra* note 8, § 218; Note, *Contracts Without Consideration: the Seal and the Uniform Written Obligations Act*, 3 U. CHI. L. REV. 312, 314 (1936). Nevertheless, in *Aller v. Aller*, 40 N.J.L. 446 (1878), the New Jersey court held that a statute which provided "that in every action upon a sealed instrument . . . the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed," *id.* at 449, did not change the common-law rule that a donative promise under seal was enforceable. "[The statute] does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties." *Id.* at 452. This holding was approved in *United & Globe Rubber Mfg. Cos. v. Conard*, 80 N.J.L. 286, 78 A. 203 (1910), and *Zirk v. Nohr*, 127 N.J.L. 217, 21 A.2d 766 (1941) (per curiam). See also *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937).

<sup>24</sup> In about one-third of the states there is no statute or decision depriving the seal of its binding effect. RESTATEMENT (SECOND) at 227 (introductory note). Few if any of these states have statutes that explicitly validate the common-law rule, but most do have statutory provisions that recognize a distinction between sealed and unsealed instruments for some

tion"—that is, putting a nonbargain promise into the form of a fictitious bargain—could perhaps have been recognized as a substitute natural formality,<sup>25</sup> and at one time it seemed that this form might suffice to make a donative promise enforceable, but today there is no assurance that the device will serve that purpose.<sup>26</sup> Going one step further, in *Hill v. Corbett*,<sup>27</sup> which involved a commercial rather than a donative setting, it was argued that writing was form enough, and that the court should "repudiate the legal fictions involved in the doctrine of consideration and . . . enforce contracts which are earnestly and soberly negotiated by parties in good faith and are solemnly formalized in writing by signatures and acknowledgements."<sup>28</sup> The court "decline[d] the invitation, not for lack of reasons to support it, but because it should be addressed to the legislature."<sup>29</sup>

This response does not seem unreasonable in a state whose

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purposes, usually the statute of limitations. See, e.g., ME. REV. STAT. ANN. tit. 14, § 751 (West 1964). It is conceivable that in the absence of explicit statutory validation, a modern court would not regard itself as bound by the common-law rule governing enforceability. See *Hartford-Connecticut Trust Co. v. Divine*, 97 Conn. 193, 116 A. 239 (1922). Cf. *Ortez v. Bargas*, 29 Hawaii 548 (1927) (instrument is sealed only if it bears actual wax seal, and even if sealed, it may be attacked for lack of consideration). Alternatively, a court might reinterpret the common-law rule to mean only that a seal creates a rebuttable presumption of consideration.

State-by-state analyses of the seal's present status can be found in RESTATEMENT (SECOND) at 227-31 (introductory note), and 1 WILLISTON (3d ed.), *supra* note 8, § 219A.

<sup>25</sup> See Fuller, *supra* note 2, at 820. Cf. Hamson, *The Reform of Consideration*, 54 LAW Q. REV. 233, 242-43 (1938) ("The most uneducated layman today understands that if he makes a bargain he is binding himself in a way in which he does not conceive that he is binding himself if he gratuitously promises to do the same thing. . . . Where the promise is gratuitous, the fact that the promisor has been willing to take pains to state his promise in the form of a bargain or in that special way in which we term a deed is equally conclusive of the intention of that promisor to assume a special obligation with reference to the promise so stated.").

<sup>26</sup> See RESTATEMENT (SECOND) § 75, Comment b, Illustrations 4, 5. Illustration 5 reads:

A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for \$1000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay \$1000.

*Id.*, Illustration 5.

<sup>27</sup> 33 Wash. 2d 219, 204 P.2d 845 (1949).

<sup>28</sup> *Id.* at 222, 204 P.2d at 847.

<sup>29</sup> *Id.* The Washington statute provided that "The use of private seals upon all . . . contracts in writing . . . is hereby abolished, and the addition of a private seal to any such . . . contract . . . shall not affect its validity or legality in any respect." WASH. REV. CODE ANN. § 64.04.090 (West 1966). Washington cases decided after the enactment of a predecessor statute which was identically worded in pertinent part, 1887-1888 Wash. Laws ch. 97, had held that a seal constituted at least presumptive evidence of consideration. See *Gates v. Herr*, 102 Wash. 131, 172 P. 912 (1918); *Monro v. National Sur. Co.*, 47 Wash. 488, 92 P. 280 (1907); *Considine v. Gallagher*, 31 Wash. 669, 72 P. 469 (1903).

legislature has nullified the effect given to the seal at common law. Since sealed promises are necessarily in writing, it is arguably a premise of such legislation that writing alone should not make a promise enforceable. But the larger question remains whether the legislature should adopt or the courts should recognize some substitute formality. A number of legislatures have gone part way toward this end by adopting statutes that make a written instrument "presumptive evidence" of consideration.<sup>30</sup> Presumably, the presumption is rebuttable rather than conclusive,<sup>31</sup> but even so these statutes can have a substantive effect, since it may sometimes be difficult to rebut the presumption, particularly where the promisor has died and suit is brought against his legal representative.<sup>32</sup> One or two legislatures have gone further and made all written promises legally enforceable. Thus a Mississippi statute provides that "[a]ny instrument of writing made and delivered by a private person without a seal . . . shall be operative according to the intent of the maker, as expressed in the writing, in the same manner and [to as] full extent as if the seal of the maker were thereto affixed."<sup>33</sup> The Model Written Obligations Act,<sup>34</sup> drafted by Professor Williston and in force in Pennsylvania,<sup>35</sup> is somewhat more restrictive as to form. It makes a written and signed promise "not . . . unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."

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<sup>30</sup> See, e.g., CAL. CIV. CODE § 1614 (West 1954). The scope of this provision was limited in *Weisbrod v. Weisbrod*, 27 Cal. App. 2d 712, 81 P.2d 633 (1938) and *Foltz v. First Trust & Sav. Bank*, 86 Cal. App. 2d 59, 194 P.2d 135 (1948). These cases held that the term "written instrument," as used in the statute, means a formal document, and does not include an ordinary letter.

UCC section 3-307 has a comparable effect on promissory notes. Under that section, when the signature on a note is admitted or established, its holder can recover "unless the defendant establishes a defense." Furthermore, if the note is negotiated to a holder in due course, a consideration defense would be unavailable to the promisor in a suit against him by the holder. UCC §§ 3-305, 3-408.

<sup>31</sup> See 9 N.C. L. REV. 196 (1931). Cf. note 23 *supra* (interpretation of statutes making the seal presumptive evidence of consideration).

<sup>32</sup> See *Patterson v. Chapman*, 179 Cal. 203, 176 P. 37 (1918); *In re Estate of Thomson*, 165 Cal. 290, 131 P. 1045 (1913).

<sup>33</sup> MISS. CODE ANN. § 75-19-3 (1972). See also N.M. STAT. ANN. § 20-2-8 (1970) ("Every contract in writing . . . shall import a consideration in the same manner and as fully as sealed instruments have heretofore done."). Hints on interpreting this statute can be gleaned from *Flores v. Baca*, 25 N.M. 424, 184 P. 532 (1919) and *Rael v. Cisneros*, 82 N.M. 705, 487 P.2d 133 (1971).

<sup>34</sup> 9C UNIFORM LAWS ANN. 378 (Thompson 1957). This Act was originally designated as a Uniform Act. It was redesignated as a Model Act in 1943. *Id.* at 377.

<sup>35</sup> PA. STAT. ANN. tit. 33, § 6 (Purdon 1967). In Pennsylvania, a seal probably also serves to make a promise enforceable. See RESTATEMENT (SECOND), at 227 (introductory note).

According to its draftsman, "[t]he method prescribed by the Act has the advantage . . . of bringing home to the promisor the fact that he is doing something of legal significance."<sup>36</sup> Critics have questioned this conclusion on the ground that the express statement required by the Act can be contained in a phrase buried in a printed form that the promisor may not read.<sup>37</sup> Accordingly, some commentators have proposed that the Act be amended to require the language expressing the critical intent to be in the promisor's handwriting,<sup>38</sup> patterning the formality in this respect after the holographic will recognized by statute in some jurisdictions.<sup>39</sup> Still others, while sharing Williston's basic premise that an individual should be enabled to obligate himself legally if he so desires, have expressed a preference for the more rigorous forms required under German and French law.<sup>40</sup> Under the German Civil Code, a donative promise is normally enforceable to its full extent only if it is in writing and authenticated by a notary.<sup>41</sup> Under French law a donative promise is normally enforceable to its full extent only if it is executed in writing before two notaries, or a notary and two witnesses, and formally accepted by the promisee, or is cast in the form known as disguised donation (a transaction that falsely appears to be something other than a gift, such as a pretended bargain or the acknowledgment of a nonexistent debt).<sup>42</sup> A major aim of these formalities,

<sup>36</sup> 1 WILLISTON (2d ed.), *supra* note 20, § 219A, at 664.

<sup>37</sup> See, e.g., 29 COLUM. L. REV. 206, 208 (1929).

<sup>38</sup> See, e.g., *id.* at 208.

<sup>39</sup> See T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 355-62 (2d ed. 1953).

<sup>40</sup> See, e.g., Keyes, *Cause and Consideration in California—A Re-Appraisal*, 47 CALIF. L. REV. 74, 86-87 (1959).

<sup>41</sup> BÜRGERLICHES GESETZBUCH art. 518 (I. Forrester, S. Goren & H. Ilgrim trans. 1975) [hereinafter cited without cross-reference as GERMAN CIVIL CODE]. Article 516(1) provides that "[a] disposition whereby a person out of his own property confers a benefit on another is a gift, if both parties agree that the disposition is made gratuitously." *Id.* art. 516(1) (emphasis added). A promise to render services gratuitously therefore does not fall within article 516(1), see Riegert, *The West German Civil Code, its Origin and its Contract Provisions*, 45 TUL. L. REV. 48, 82 & n.193 (1970), and may fall within article 662, which provides that "[b]y the acceptance of a mandate the mandator binds himself gratuitously to take care of some matter for the mandator entrusted to him by the latter." Accordingly, such a promise may be enforceable under German law without regard to form. See generally J. DAWSON, *GIFTS AND PROMISES* (1980).

<sup>42</sup> See FRENCH CIVIL CODE arts. 931-933 (J. Crabb trans. 1977) [hereinafter cited without cross-reference as FRENCH CIVIL CODE]; 10 C. AUBRY & C. RAU, *DROIT CIVIL FRANCAIS* § 659 (6th ed. P. Esmein ed. 1954, C. Lazarus trans. 1969); 2 M. PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* Nos. 142-143 (11th ed. M. Planiol & G. Ripert eds. 1939, La. State Law Inst. trans. 1959); 3 *id.* Nos. 2503, 2525-2527, 2552-2555; 2 G. RIPERT & J. BOULANGER, *TRAITÉ DE DROIT CIVIL* Nos. 383-385 (1957); 4 *id.* Nos. 3244, 3263-3268, 3348-3366 (1959); A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 974-80 (2d ed. 1977); Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L. REV. 825, 833-35 (1941); von Mehren, *The*

like the intended effect of the Written Obligations Act, is to bring home to the promisor that he is entering into a transaction with legal implications. In the case of notarial authentication, this is accomplished by involving a specifically legal figure: the French notary has traditionally combined the roles of official, family counselor, and legal specialist in the drafting of personal instruments such as conveyances and wills;<sup>43</sup> the German notary plays similar roles.<sup>44</sup> In the case of a disguised donation, the legal implications of the promisor's acts are brought home by the fact that he "must so arrange the contract containing the gift as to give it the appearance of an onerous judicial act. The donor is thus clearly aware of the scope of his obligation."<sup>45</sup>

Such formalities certainly address the problems of deliberative intent and evidentiary security. Form alone, however, cannot meet the problems of improvidence and ingratitude. Accordingly, the

*French Civil Code and Contract: A Comparative Analysis of Consideration and Form*, 15 LA. L. REV. 687, 696 n.21 (1955). (G. Ripert and J. Boulanger's *TRAITÉ DE DROIT CIVIL* is the successor to the eleventh edition of M. Planiol. Since the latter has been translated into English while the former has not, I will cite both works wherever they are comparable). Certain types of donative promises are enforceable under French law even though they are neither in notarial form nor cast as disguised donations. These include a promise cast in the form known as *bon pour*, consisting of a simple promissory note that is either entirely hand written by the promisor or contains a statement in his hand that the note is good or approved for the relevant amount (compare the status of a promissory note under the UCC, see note 30 *supra*); a promise to render services; and certain donative promises that are intended to bring an advantage to the promisor as well as to the promisee (a category that has a very uncertain ambit, but is occasionally invoked by French courts to excuse a lack of proper formality in promises made to charitable or civic institutions). See FRENCH CIVIL CODE art. 1326; 10 C. AUBRY & C. RAU, *supra*, §§ 644, 659; 2 M. PLANIOL, *supra*, Nos. 1154-1161; 3 *id.* Nos. 2505, 2554-2555; 2 G. RIPERT & J. BOULANGER, *supra*, Nos. 418-425 (1957); 4 *id.* Nos. 3238, 3244-3247, 3363 (1959). The *bon pour* must by its nature be in writing. Promises in the second and third categories must also normally be in writing under article 1341 of the French Civil Code, which requires a writing for the enforcement of any promise involving more than 50 francs (approximately \$10), subject to certain exceptions. See 2 M. PLANIOL, *supra*, Nos. 1103-1125; 1 G. RIPERT & J. BOULANGER, *supra*, Nos. 794-798 (1956); A. VON MEHREN & J. GORDLEY, *supra*, at 908-37.

Louisiana's Civil Code generally follows the French Civil Code. See, e.g., LA. CIV. CODE ANN. arts. 1536 (notarial form required for donative transactions involving immovable property or incorporeal things), 1540 (donee's acceptance required), 1559-1564 (revocation for ingratitude) (West). See generally 10 LOUISIANA CIVIL LAW TREATISE—SUCCESSIONS AND DONATIONS §§ 161-180, 192, 198-199 (L. Oppenheim ed. 1973).

<sup>43</sup> See F. LAWSON, A. ANTON & L. BROWN, AMOS & WALTON'S INTRODUCTION TO FRENCH LAW 24-25 (3d ed. 1967); R. DAVID, *FRENCH LAW—ITS STRUCTURE, SOURCES, AND METHODOLOGY* 65 (1972).

<sup>44</sup> See GERMAN CIVIL CODE arts. 313, 873, 925(1) (conveyances of land); *id.* arts. 2231, 2232, 2276 (wills and contracts of inheritance); 1 E. COHN, *MANUAL OF GERMAN LAW* 46 (2d ed. 1968).

<sup>45</sup> 4 G. RIPERT & J. BOULANGER, *supra* note 42, No. 3351 (1959), translated in A. VON MEHREN & J. GORDLEY, *supra* note 42, at 974.

French and German Civil Codes do not stop their treatment of donative promises at the formal level, but instead go on to provide extensive treatment of circumstances arising after the promise has been made. For example, under article 519 of the German Civil Code, "[a] donor is entitled to refuse fulfillment of a promise made gratuitously insofar as, having regard to his other obligations, he is not in a position to fulfill the promise without endangering his own reasonable maintenance or the fulfillment of obligations imposed upon him by law to furnish maintenance to others."<sup>46</sup> Under article 530(1), a donative promise may be revoked "if the donee, by any serious misconduct towards the donor or a close relative of the donor shows himself guilty of gross ingratitude."<sup>47</sup> Under the French Civil Code, a donative promise made by a person with no living descendants is normally revoked by operation of law upon the birth of a child,<sup>48</sup> and a donative promise can be revoked on the ground of ingratitude involving such matters as serious cruelty, wrongs, or injuries (*séances, délits ou injures grave*).<sup>49</sup> Both Codes carry this

<sup>46</sup> GERMAN CIVIL CODE art. 519.

<sup>47</sup> *Id.* art. 530(1). The following cases illustrate the operation of article 530: In Judgment of Jan. 17, 1910, Reichsgericht [RG], [1910] JURISTISCHE WOCHENSCHRIFT [JW] 148, the court held that adultery by one spouse outweighed the plaintiff's own offenses and therefore constituted gross ingratitude. In Judgment of Aug. 4, 1938, RG, 158 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 141, the court held that a daughter was guilty of gross ingratitude on the grounds that her husband had been guilty of serious misconduct toward her mother and stepfather (among other things, he had insulted and struck her mother, forcibly ejected the parents from the house, and left them in the rain) and she had taken no steps to separate the struggling parties, calm her husband down, apologize, or attempt a reconciliation. In Judgment of Jan. 30, 1970, Bundesgerichtshof [BGH], [1970] JURISTISCHE RUNDschau [JR] 263, the court held that a daughter was ungrateful on the ground that she had voluntarily confirmed to the police her husband's denunciation of her parents for pandering (by tolerating the adultery of the donee's own daughter, who lived with them) and the pandering charges were dropped by the prosecutor for lack of evidence. In Judgment of Apr. 19, 1961, BGH, 35 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 103, the court left open the possibility that a mistress-fiancee was probably ungrateful to her lover because she had talked about their private affairs in the plant he operated and published a one-sided description of the dissolution of their engagement.

Under article 532, "[t]he right to revoke is barred if the donor has forgiven the donee, or if a year has elapsed since the time at which the person entitled to revoke had knowledge of the occurrence of the facts giving him such right. . . ." GERMAN CIVIL CODE art. 532.

<sup>48</sup> FRENCH CIVIL CODE arts. 960-966. See generally 11 C. AUBRY & C. RAU, *supra* note 42, § 709; 3 M. PLANIOL, *supra* note 42, Nos. 2657-2675; 4 G. RIPERT & J. BOULANGER, *supra* note 42, Nos. 3644-3660 (1959).

<sup>49</sup> FRENCH CIVIL CODE arts. 953, 955. Examples include the infidelity of a spouse, Judgment of Oct. 19, 1927, Cass. req., [1927] Recueil Sirey (S. Jur.) I 382, and a serious libel in open court against the donor, Judgment of Aug. 4, 1873, Cour de cassation, [1874] Recueil Dalloz [D.P.] I 198. *But cf.* Judgment of July 20, 1936, Cass. civ., [1936] Recueil Dalloz [D.H.] 441 (the infidelity of a lover not sufficient); Judgment of July 12, 1881, Cour d'appel, Lyons, [1881] S. Jur. II 242 (ingratitude not shown by a son's filing of a nonmeritorious

approach to its logical conclusion by making even completed gifts revocable under comparable circumstances,<sup>50</sup> and both Codes place substantial limits on the power of an individual to disenfranchise his immediate family by either gift or will.<sup>51</sup>

As these rules suggest, our legal system could not appropriately follow the lead of the civil law by making donative promises enforceable on the basis of their form—as through recognition of nominal consideration—unless we were also prepared to follow the civil law by developing and administering a body of rules dealing with the problems of improvidence and ingratitude.<sup>52</sup> Certainly such an enterprise is possible. It may be questioned, however, whether the game would be worth the candle. An inquiry into improvidence involves the measurement of wealth, lifestyle, dependents' needs, and even personal utilities. An inquiry into ingratitude involves the measurement of a maelstrom, since many or most donative promises arise in an intimate context in which emotions, motives, and

petition for a judicial declaration of his father's disability). See generally FRENCH CIVIL CODE arts. 956-959; 11 C. AUBRY & C. RAU, *supra* note 42, § 708; 3 M. PLANIOL, *supra* note 42, Nos. 2637-2656; 4 G. RIPERT & J. BOULANGER, *supra* note 42, Nos. 3621-3640 (1959).

<sup>50</sup> See FRENCH CIVIL CODE arts. 953, 955, 960; GERMAN CIVIL CODE arts. 528, 530. This treatment, however, requires a host of subsidiary rules. For example, under article 529 of the German Civil Code, return of the gift by reason of the donor's impoverishment is barred "if the donor has brought about his poverty wilfully or by gross negligence, or if at the time of his poverty ten years have elapsed since the delivery of the object given. . . . The same rule applies if the donee, having regard to his other obligations, is not in a position to return the gift without endangering his own maintenance suitable to his station in life, or the fulfillment of the duties imposed upon him by law to furnish maintenance to others." *Id.* art. 529. Under article 534, "[g]ifts which are made in compliance with a moral duty or for the sake of common decency are not subject to recall or revocation," *id.* art. 531—a provision which apparently does not apply to a refusal to fulfill a promise under article 519. Similarly, under the French Civil Code, if a gift has been disposed of before revocation for ingratitude; the third party's rights are preserved but the donee must restore the value of the gift; it has been encumbered, the third party's rights are preserved but the donor must be indemnified; if it has been improved, the donor must account to the donee for the value of the improvement. See FRENCH CIVIL CODE art. 958; 11 C. AUBRY & C. RAU, *supra* note 42, § 708(8); 3 M. PLANIOL, *supra* note 42, Nos. 2652-2656; 4 G. RIPERT & J. BOULANGER, *supra* note 42, Nos. 3636-3640 (1959).

<sup>51</sup> Under the French Civil Code, a substantial portion of an individual's estate is reserved to lineal heirs and cannot be disposed of by gift. See FRENCH CIVIL CODE arts. 913-930; 11 C. AUBRY & C. RAU, *supra* note 42, §§ 677-690; 3 M. PLANIOL, *supra* note 42, Nos. 3046-3140; 4 G. RIPERT & J. BOULANGER, *supra* note 42, Nos. 2663-2771 (1959). Under the German Civil Code, lineal descendants, spouses, and parents are entitled to a designated portion of a decedent's estate. Gifts made within ten years of death do not diminish the portion to which a lineal descendant, spouse, or parent is entitled, and in some cases the recipient of such a gift may be liable to either return it or pay the allocable deficiency. See GERMAN CIVIL CODE arts. 2303, 2325, 2329.

<sup>52</sup> I use the term "civil law" as a shorthand expression for those elements that are common to French and German law. Other European civil codes are generally modeled on those of France and Germany.

cues are invariably complex and highly interrelated.<sup>53</sup> Perhaps the civil-law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common-law courts, which have traditionally been oriented toward inquiry into acts rather than into personal characteristics.<sup>54</sup>

<sup>53</sup> "I slapped him because of what he said about my brother." "I said that about her brother because of the way he talked to my daughter." "I talked to his daughter that way because of what she did to my son." "I did that to his son because . . ." Cf. Judgment of Jan. 23, 1967, BGH, [1967-I] NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1081 (behavior of appellee during litigation must be evaluated in context of the circumstances); Judgment of Mar. 27, 1916, RG, [1916] JW 833 (son's harsh words about father had to be seen in context of father's provocation); Judgment of Oct. 30, 1907, RG, [1907] JW 744 (in determining whether donee's actions constitute gross ingratitude, it is relevant whether he acts under the subjective impression that donor has committed serious provocation).

<sup>54</sup> See Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 643-44, 644 n.20 (1976). See generally Fuller, *Two Principles of Human Association*, in NOMOS XI: VOLUNTARY ASSOCIATIONS 3, 17-19 (J. Pennock & J. Chapman eds. 1969); Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 34-35 (1969); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 328-31 (1971).

Mention should be made here of an argument in Posner, *supra* note 17. This article begins by pointing out that utilities may be interdependent, that is, an increase in B's utility may itself increase A's utility. Building on this point, Professor Posner argues that "a gratuitous promise, to the extent it actually commits the promisor to the promised course of action (an essential qualification), creates utility for the promisor over and above the utility to him of the promised performance . . . by increasing the present value [to the promisee] of an uncertain future stream of transfer payments." *Id.* at 412. So stated, this argument is somewhat confusing, since every gratuitous promise "actually commits the promisor." Apparently, therefore, Posner is using the term "actually" as a surrogate for "legally." Posner gives two illustrations to support this argument, involving a promisor, A, and a promisee, B. In the first illustration, A is certain to keep his promise but this fact is not known to B:

If A can make a binding promise to continue the payments in accordance with his intention, B will revalue the gift [upward] at its true present worth. . . .

. . . [B]ut how is he [A] to convince B that the statement is correct? One way of making his statement credible is for A to make it costly for himself to lie; embodying the statement in a promise that is legally enforceable does this.

*Id.* at 412-13. In the second illustration, A is fickle and B assesses A's fickleness accurately: But A may . . . want to make a gift having a present value that is larger than it would be if B's future receipts had to be discounted by the probability that A would actually [perform]. A will balance the utility to him of making a larger (in present-value terms) gift now against the disutility of losing the freedom to change his mind in the future. He may decide that the utility of the larger gift now is greater, in which event it will be in his self-interest to make a promise that commits him irrevocably.

*Id.* at 413. Posner then states that "[t]he analysis . . . may seem to imply that all promises, whether compensated or 'gratuitous,' should be enforced," *id.* at 414 (a position he rejects on the ground that it "ignores the costs to the legal system of enforcing promises," *id.*). Based on the illustrations, however, the analysis does not really give rise to this implication, since the illustrations make little sense unless it is assumed that A has a choice between an "ordinary" promise, involving a commitment but not enforceability, and a legally binding promise, involving both. The analysis does serve to provide a further rationale for the proposition that the law should provide a facility by which a promisor can deliberately put himself

In this regard, it is striking to compare the common-law rule that a donative promise is ordinarily unenforceable with the rule that a completed gift is ordinarily irrevocable even for ingratitude or gross improvidence.<sup>55</sup> At first glance, the two rules may seem inconsistent: in the former case, the common law appears solicitous only of the donor; in the latter, only of the donee. The apparent contradiction disappears when examined in light of the criteria underlying the rules. In each case the common law takes into account evidentiary security and the likelihood of deliberation. Donative promises will not be enforced, partly because they often lack both. Completed gifts will not be reversed, partly because physical delivery normally insures both.<sup>56</sup> In each case, too, the common law refuses to inquire into improvidence or ingratitude: donative promises will not be enforced, partly because enforcement would involve just this kind of inquiry. Completed gifts will not be reversed, partly for the same reason.

Of course, the result of the common-law regime is that some promises that should be kept—those made with the requisite intention and excused by neither improvidence nor ingratitude—are not enforced, just as some completed gifts that should be returned are

under a legal obligation—but like other such rationales, it remains subject to the problems of ingratitude and improvidence.

Furthermore, the analysis rests on a point of psychology that appears less than universal: if A makes a donative promise to B, A will often expect (however wrongly) that a grateful B has complete confidence that A will keep his promise. Correspondingly, B, whatever his actual uncertainty, will often find it in his self-interest to manifest only the complete confidence A takes for granted. Therefore, while B may indeed value A's promise much more highly if it is legally enforceable than if it is not, A is often unlikely to know this. Accordingly, A's dependent utility will not necessarily be increased by an increase in the value B places on A's promise.

<sup>55</sup> See, e.g., *Amado v. Aguirre*, 63 Ariz. 213, 161 P.2d 117 (1945) (improvidence); *Chandler v. Hardgrove*, 124 N.J. Eq. 516, 2 A.2d 661 (1938) (same); Annot., 160 A.L.R. 1133 (1946) (same). In practice, the severity of this rule is modified by rules relating to capacity and to overreaching by the dominant party in a relationship of trust. See, e.g., *Richmond v. First Nat'l Bank*, 189 Iowa 704, 179 N.W. 59 (1920); *Simpson v. League*, 110 Md. 286, 72 A. 1109 (1909); *Croker v. Clegg*, 123 N.J. Eq. 332, 197 A. 13 (1938).

The common law does usually permit revocation of completed gifts where the gift is made in the expectation of imminent death by a donor who then recovers, or where the gift is made in connection with an engagement that is broken by the donee without good cause or by mutual consent. See, e.g., *R. Brown*, *supra* note 5, § 7.13, at 122, §§ 7.15-20; Note, *Gifts: Recovery of Engagement Gifts: California Civil Code Section 1590*, 38 CALIF. L. REV. 529 (1950); 18 MINN. L. REV. 478 (1934); Annot., 46 A.L.R.3d 578 (1972). Cf. *Gaden v. Gaden*, 29 N.Y.2d 80, 272 N.E.2d 471 (1971) (fault no longer relevant in engagement cases). In both types of case, the theory permitting revocation is that the gift is made subject to an implied condition. That theory might also be applied to justify revocation for ingratitude. See *Stoljar, A Rationale of Gifts and Favours*, 19 MOD. L. REV. 237, 251 (1956).

<sup>56</sup> See *Mechem*, *supra* note 12, at 348-49.

permitted to be kept. In contrast, a regime like that of the civil law appears more closely tailored to the morality of donation. The question is whether the social and economic gains of recognizing a formality that will make donative promises enforceable are worth the social and economic costs. The answer seems to be that—except perhaps for categories recognized as involving some special social utility, such as formal promises to charitable institutions<sup>57</sup>—the advantages and disadvantages of an enforcement regime are in rough balance. If the common-law rules cannot be defended as preferable, the arguments for change cannot be regarded as compelling.

### III. RELIED-UPON DONATIVE PROMISES

We have seen in Parts I and II that a donative promise will not be rendered enforceable simply because it has aroused an expectation in the promisee. The question then arises, to what extent will reliance by the promisee make such a promise enforceable. This question presents problems of some difficulty. Obviously, reliance works a qualitative change in the nature of the promisee's injury: a relying promisee has suffered not merely disappointment, but an actual diminution of his estate. The effect of reliance on the remaining criteria for enforceability, however, is one of degree rather than kind. Reliance may provide some evidence that a promise was actually made, but it seldom provides full evidentiary security, because the kind of reliance involved in a donative context—making a purchase, taking a trip—is often consistent with either the existence or the nonexistence of a promise. The prospect of reliance may have a sobering effect on the promisor, but since the motive is

<sup>57</sup> See note 8 *supra*. These promises are also much less likely to give rise to an excuse of ingratitude than are promises made in an intimate context.

Special treatment might also be justified where the promisor dies and his legal representative refuses to keep a formal promise the promisor had never himself revoked. See Hays, *supra* note 6, at 861-62; Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 790 (1941). In such cases, enforcement of the promise is the only method for carrying out the promisor's intentions, and issues of ingratitude or improvidence are again less likely to arise. Problems of improvidence are not, however, completely absent. Cf. Oetting v. Sparks, 109 Ohio St. 94, 143 N.E. 184 (1923) (decendent gave birth after having made a donative promise to next-of-kin). Furthermore, if the promise is not to be performed until the promisor's death, it may be deemed an invalid testamentary disposition under the rules governing wills, see, e.g., American Univ. v. Conover, 115 N.J.L. 468, 180 A. 830 (1935); McCarthy v. Pieret, 281 N.Y. 407, 24 N.E.2d 102 (1939). But see T. ATKINSON, *supra* note 39, at 194-96; Gulliver & Tilson, *supra* note 11, at 28-32, while if the promise could have been performed during the promisor's lifetime, its nonperformance puts into question whether the promisor had changed his mind despite the absence of a specific retraction. Elimination of these two categories would leave open only those cases, probably few in number, where performance was begun and continued during the promisor's lifetime but not completed at the time of death.

donative rather than calculating, a significant danger remains that the promise was made without sufficient deliberation. Finally, reliance does not eliminate the possibility of improvidence or ingratitude.

These problems may help explain why, for a long period of time, many courts would not enforce relied-upon donative promises as such,<sup>58</sup> but instead provided relief only when the underlying transaction could be artificially construed as a bargain<sup>59</sup> or could be put into one of several special categories (most prominently agency, bailments, charitable subscriptions, promises in contemplation of marriage, and promises to give land) in which enforcement was not conceptually predicated on reliance.<sup>60</sup> This uneven treatment did not, however, flow solely from practical problems. In significant part, it was also the product of a conceptual problem—specifically, the dogma that the category consideration is generally coextensive with the category bargain, and that a donative promise was therefore without consideration and unenforceable whether relied upon or not.

The conceptual barrier was bodily shouldered aside in 1932 when the *Restatement of Contracts*, authored principally by Williston, appeared on the scene. While adhering to the dogma in terms,<sup>61</sup> the *Restatement* nevertheless provided in its famous section 90 that "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Partly as a result of section 90, the principle that reliance may make a donative promise enforceable—customarily referred to as the principle of promissory estoppel—is now an accepted part of American contract law. This result is appropriate, considering the intensity of the promisee's injury and the somewhat reduced difficulties of administration where reliance occurs. The hard question is not whether a relied-upon donative promise should be enforced at all, but what limits should be placed on enforcement in light of the problems that reliance does not cure. Because of the pivotal role of section 90, a close study of that section

<sup>58</sup> See, e.g., Kirksey v. Kirksey, 8 Ala. 131 (1845); Brawn v. Lyford, 103 Me. 362, 69 A. 544 (1907); Thorne v. Deas, 4 Johns. 84 (N.Y. 1809). But see Steele v. Steele, 75 Md. 477, 23 A. 959 (1892); Devecon v. Shaw, 69 Md. 199, 14 A. 464 (1888).

<sup>59</sup> See, e.g., Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923).

<sup>60</sup> See Boyer, *Promissory Estoppel: Principle from Precedents* (pts. 1-2), 50 MICH. L. REV. 639, 873 (1952); Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908 (1937).

<sup>61</sup> See RESTATEMENT (FIRST) OF CONTRACTS § 75 (1932).

is a convenient way to approach both the problem of limits on enforcement, and the intimate relationship between issues of substance and of remedy, in the consideration area.

As originally adopted in *Restatement (First)*, section 90 limited enforcement to cases that met four requirements: "the promisor should have reasonably expected to induce action or forbearance"; the reliance must be "of a . . . substantial character"; the reliance must be "of a definite . . . character"; and "injustice" can be avoided "only by enforcement of the promise."<sup>62</sup> Each of these requirements is open to substantial question.

1. At first glance, the reasons for the introductory clause of section 90, which limits its scope to promises that the promisor should reasonably expect to induce reliance, may seem self-evident. Yet, the distinction implicitly drawn between (i) donative promises as a class, and (ii) donative promises upon which reliance can reasonably be expected, may seem spurious if we follow Corbin's definition of a promise as "an expression of intention that the [addressor] will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to [an addressee] that he may justly expect performance and may reasonably rely thereon."<sup>63</sup> Even if Corbin's definition is not accepted, the focus on whether the promisor should reasonably expect to induce the promisee's reliance seems unnecessary and probably undesirable. The problem in these cases is that one of two generally well-intentioned parties must bear a loss stemming from a promise that would be unenforceable but for the reliance. Under these circumstances, it would be hard to quarrel with a rule that the loss must be borne by the promisor, if, but only if, he was at fault. In a promissory context, however, fault can be defined in two different ways. Rule I: The promisor might be deemed legally at fault only if the promise was made in such a form, or under such circumstances, that reliance was reasonably to be expected.<sup>64</sup> Rule II: The promisor might be deemed legally at fault simply because he has broken a promise, so that the promisee could recover simply on a showing

<sup>62</sup> *Id.* § 90.

<sup>63</sup> 1 A. CORBIN, *supra* note 1, § 13.

<sup>64</sup> Cf. RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 61, §§ 227 & Comment, 230 & Comment (distinguishing, as standards of interpretation, between "[a] standard of reasonable expectation, which would attach to words . . . the meaning which the party employing them should reasonably have apprehended that they would convey to the other party," and "[a] standard of reasonable understanding, which would attach to words . . . the meaning which the person to whom [they] . . . are addressed might reasonably give to them," and adopting a variant of the former).

that his loss was actually caused by reliance on the promise.<sup>65</sup> Taken in isolation, Rule I (which is the rule embodied in section 90) seems more restrictive, particularly if it is interpreted to mean that the promisor will not be liable just because *some* kind of reliance was reasonably to be expected, but only if the reliance that actually occurred was reasonably to be expected.<sup>66</sup> But if a similar gloss is put on Rule II—that is, if a promisee's reliance is protected under Rule II only if it is reasonable—the results under the two rules would probably be identical in most cases. Indeed, even if that gloss is not put on Rule II, it would normally produce results identical to Rule I at the remedial level, under the principle of *Hadley v. Baxendale*<sup>67</sup> that contract damages are awarded only for losses that were reasonably foreseeable when the promise was made. Give the likelihood of identical results in most cases, Rule II seems preferable because it is cleaner, does not embody a questionable distinction between donative promises as a class and those donative promises upon which reliance can reasonably be expected, and properly focuses attention on the reasonableness of the innocent promisee's reliance rather than on the contours of the promise-breaker's expectation.<sup>68</sup>

2. The requirement that the reliance be "substantial" might be rationalized on the notion that trivial reliance on a donative promise should not give rise to a legal action. Trivial reliance would normally be screened out, however, even without special provision, by the transaction costs of a lawsuit and the doctrine of *de minimis*. Since the substantiality requirement was not applied to other enforceable promises, presumably the intent was to set a barrier in section 90 cases higher than triviality. But if a donative promisee's reliance is nontrivial and consists of action that the promisor should

<sup>65</sup> See Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 462 (1950).

<sup>66</sup> For example, in *American Handkerchief Corp. v. Frannat Realty Corp.*, 17 N.J. 12, 109 A.2d 793 (1954)—a nondonative case—Landlord promised that Tenant would have the right to extend an existing lease "in the event of a bona fide and approved sublease by Tenant" entered into during the lease's term. *Id.* at 15, 109 A.2d at 794. Tenant entered into a binding sublease without further consulting Landlord, and Landlord refused to grant the extension. Here some kind of reliance by Tenant (for example, the expense of advertising for a sublessee) may have reasonably been expected, but the court held for Landlord on the ground that it was not reasonably to be expected that Tenant would make a binding sublease without having first sought Landlord's approval.

<sup>67</sup> 9 Exch. 341 (1854). Cf. Fuller & Perdue, *supra* note 3, at 75-80, 84-88 (application of *Hadley v. Baxendale* to "essential" and "incidental" reliance in commercial contexts).

<sup>68</sup> In the next few passages, which analyze other requirements of section 90 of *Restatement (First)*, I will use that section's formulation (Rule I) so as to focus on the section's internal consistency. Substantively, a comparable analysis could be made using Rule II.