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ARTICLES

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STATURE AND STATUS OF A PROMISE UNDER SEAL AS A LEGAL FORMALITY*

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I. INTRODUCTION

Common sense dictates that if a person desires to make a legally enforceable promise, the law should provide a means for accomplishing that end. However, our modern contract law may not be so accommodating. We do not submit to the ideal of *pacta sunt servanda* (promises must be kept), and our society chooses not to enforce all promises. Because promises are not per se legally enforceable in our society, the preeminent question is what types of promises should the law enforce.[1] Some fact or factor must surround a promise to make it legally enforceable.[2] At least five theories of contractual obligations (bargain, reliance, will, efficiency, and fairness) have been advanced for explaining which promises merit legal enforcement.[3] However, these theories will not enforce

1. Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982) ("A promise, as such, is not legally enforceable. The first great question of contract law, therefore, is what kinds of promises should be enforced.").

2. The mere fact that one man promises something to another creates no legal duty and makes no legal remedy available in case of non-performance. To be enforceable, the promise must be accompanied by some other factor . . . . The question now to be discussed is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?

1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 110, at 490 (1963).

3. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). Barnett explains that the core concerns of contract are will, reliance, bargain, efficiency, and fairness, and that consent theory provides a requisite framework to specify when one of those concerns should give way to another.

The legal literature is overflowing with articles explaining why contracts are enforced. The following are some recent representative samplings.

all promises for which the promisors intended to be legally bound.

Donative promises illustrate this problem. Gratuitous promises, unbargained for or unrelied on, generally are not legally

P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193 (1978). Atiyah attacks the contractual paradigm of the exchange of bare promises and puts reliance and benefits received at the core of contract enforceability.

F.H. Buckley, *Paradox Lost*, 72 MINN. L. REV. 775 (1988). Buckley's focus is on the relation of promises to legally enforceable contractual obligations and his framework is utilitarian. Buckley defends the proposition that legal obligations arising out of promises are justified by the utility of the institution of promise-keeping.

Melvin A. Eisenberg, *The Bargain Principle and Its Limit*, 95 HARV. L. REV. 741 (1982). Like Atiyah, Eisenberg attacks the "bargain principle" that (in the absence of defective consent) bargain promises should be enforced to their full extent. He postulates that two values (fairness and efficiency) support the bargain principle for contracts made in a perfectly competitive market where one party has performed. However, when markets are not perfectly competitive, the agreed price may not be ideal in terms of fairness and efficiency, and society may not want to enforce all such bargains. Thus, the bargain principle must be supplemented with a new paradigm, unconscionability. Eisenberg concludes by explaining that the questions of when contracts are enforceable and what remedy should lie for breach are in fact at their essence the same question. Limiting the bargain principle to those cases where its justifications (fairness and efficiency) support the principle involves administrative costs, but failure to do so entails justice costs.

Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U.L. REV. 303 (1983). Rather than consent and promise, Farber points to economics and efficiency resource allocation theories as the bases of contractual obligation. He analyzes both contractual freedom and its limits by reference to microeconomic models that delve into limited rationality, imperfect information and transaction costs.

Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980). Another law and economics approach examining current legal doctrines concerning contract enforceability through the prism of the economic analysis of promising.

Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983). Unlike some of the preceding authors who focus on a quite small number of values served by contract enforceability, Macneil investigates the social matrix required for the entire spectrum of contracting (from discrete exchanges to long-term contractual relations), and the numerous values reflected in the norms internal to contracting and in external social responses to contracting, including, inter alia, the law's response. For Macneil, changes in the direction of social and economic smallness are necessary for the preservation of robust contractual relations.

For a more thorough listing of at least 19 theories and approaches to contract issues, see Eric M. Holmes, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323, 325-30 (1987).

Notwithstanding the value and contribution of such writings, there is one approach that is not given serious consideration—the formal method of creating a promissory obligation. Current contract scholarship ignores the formal style of instituting enforceable contractual rights and duties. One purpose of this Article is to fill that hiatus.

enforceable.[4] Scholars continue to probe for felicitous approaches to make gift promises binding when this fulfills the promisor's intent.[5] Other promises that may not be legally enforceable include promises: To modify an obligation, to keep an offer open, to release a debt, to pay for past favors, to convey land, to assume the obligations of another, promises made within the family, and promises by bailees.[6]

The formal method is one means to underwrite the legal enforceability of promises. For example, the formality of a promise under seal is an efficient, trustworthy method of channeling a person's deliberate intent to be legally obligated. With the exception of the consent theory, the problem with theories such as bargain, reliance, efficiency, and fairness is that they do not provide an adequate theoretical justification for formal promises. As a result, current legal scholars ignore the formal approach. As Randy Barnett observes: "Formal contracts ought to be an 'easy' case of contractual enforcement, but prevailing theories that require bargained-for consideration, induced reliance, or even economic 'efficiency' would have a hard time explaining why."[7] The promissory basis of contract gives us that theory.[8] Although we ultimately may discard it, the formal method merits our serious consideration, especially when promisors intend to be legally obligated.

At early common law, form took precedence over substance. Thus, a promise was not binding unless surrounded by certain formalities.[9] Modern contract law continues to recognize the validity and legal enforceability of certain promises based on their formal characteristics. There are five acknowledged categories of legally binding formal contracts: recognizances, negotiable instruments, negotiable documents, letters of credit, and contracts under seal.[10] This Article considers only promises under seal.[11]

Historically, promises were enforced solely on form if they complied with three formalities: A sufficient writing, a seal, and

4. *See* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUDIES 411 (1977). The classic explanation comes from SAMUEL WILLISTON, CONTRACTS § 112, at 232-34 (1920), involving a gratuitous (politically incorrect) promise of an overcoat to a tramp. "The most significant class of promises unenforceable for lack of consideration is made up of purely gratuitous (or gift) promises—promises for which there has been no exchange at all." E. ALLAN FARNSWORTH, CONTRACTS 49 (2d ed. 1990).

The advent of "promissory estoppel" is often explained as arising to permit legal enforceability of gift promises. *See, e.g.*, Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 133 (1991) ("Originally conceived as a vehicle for enforcing donative promises, section 90 now is often used to enforce commercial promises.").

5. One contracts casebook investigates alternative legal devices whereby a lawyer may accomplish Aunt Tillie's (a client) gratuitous wish to confer a future benefit on her nephew Charley. CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 81-92 (1987). For purposes of this Article, it is interesting to note that in addition to an executed gift, a testamentary gift, and a gift in trust, the authors consider two types of formal contracts—a promissory note and a promise under seal. Regarding the latter, they conclude: "Despite a few recent statutory attempts to create a comparable device, there is today no generally available equivalent to the old English seal for use in creating binding gratuitous obligations." *Id.* at 82. Other casebook examples include WILLIAM MCGOVERN & LARRY LAWRENCE, CONTRACTS AND SALES 27-32 (1986), and ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW AND THEORY 120-24 (1988).

Other contract casebooks evaluate the "civil law" systems of Germany and France wherein gratuitous promises are made binding after compliance with strict formalities requiring that the promise be executed before a notary (two notaries or a notary and two witnesses in France). *See, e.g.*, ROBERT W. HAMILTON, ET AL., CASES AND MATERIALS ON CONTRACTS 166-68 (2d. ed. 1980). The civil-law approach is evaluated and perhaps unconvincingly dismissed in Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 13-18 (1979).

Another approach emphasizes the moral obligation of keeping promises and respect for individual autonomy and trust:

> Allowing people to *make* gifts (let us assume freely, deliberately, reasonably) serves social utility by serving individual liberty . . . [T]here simply are no grounds for not extending that conclusion to *promises* to make gifts. I make a gift because it pleases me to do so. I promise to make a gift because I cannot or will not make a present transfer, but still wish to give you a (morally and legally) secure expectation.

CHARLES FRIED, CONTRACT AS PROMISE 37 (1981).

6. *See, e.g.*, FRIED, *supra* note 5, at 28; Barnett, *supra* note 3, at 288.

7. Barnett, *supra* note 3, at 311.

8. *See* Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045 (1992); Yorio & Thel, *supra* note 4. "In a consent theory, by contrast, there need be no underlying bargain or demonstrable reliance for such a commitment to be properly enforced." Barnett, *supra* note 3, at 311-12. "The desiderata underlying the use of formalities will retain their relevance as long as [persons] make promises to one another." Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 822-23 (1941).

9. *See* Harold D. Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608 (1910).

10. RESTATEMENT (SECOND) OF CONTRACTS § 6 (1981). The *Restatement* provides the special rules governing only contracts under seal (in Chapter 4). The other categories of formal contracts are left to other sources of law, such as the Uniform Commercial Code. The *Restatement* eschews the use of the phrase "formal contracts" because other contracts not enumerated in section 6 are subject to legal formalities like the statute of frauds. RESTATEMENT (SECOND) OF CONTRACTS § 6 cmt. a (1981).

Arguably, a stipulation (promise or agreement regarding a pending judicial proceeding) may be classified properly as a sixth type of formal contract. Stipulations are enforced without regard to consideration and are subject to formalities (must be in writing or made in open court). *See* RESTATEMENT (SECOND) OF CONTRACTS § 94 (1981).

11. A discussion of all five classes of formal contracts can be found in 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS (forthcoming 1994).

delivery.[12] Promises under seal were an awesome, special formality—a mystical solemnity of the ceremonial melting of hot wax, a signet ring that personified the promisor, and a writing that reified legal obligation. Everyone understood that this promissory form embodied legal responsibility. The special form of a sealed writing felicitously served the functions of a legal formality. Anyone who desired to make a legally enforceable promise could do so.[13] As a court in 1878 stated: "If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality?"[14]

However, form becomes irrelevant when it ceases to serve its function. This is the situation today with promises under seal.[15] This Article discusses the historical erosion of the requirements of form for promises under seal and assesses the present stature and status of seals as a legal formality. This erosion is evident in three movements: (1) A liberal metamorphosis of the seal's form from impressed hot wax, to paper stickers, to scrolls and scrawls, to pad-form printed words such as "L.S." or "Seal";[16] (2) a piecemeal attenuation of the delivery requirement to allow sundry kinds of symbolic delivery, delivery to third persons, and enforcement of various conditions of the transferor (such as postponing legal effect until some future time);[17] and (3) a recognition of the seal's erosion or

12. For recent comprehensive discussion on contracts under seal, consult JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 293-303 (3d ed. 1987).

13. Given that unrelied-upon donative promises are normally unenforceable, the question arises whether the law should recognize some special form through which a promisor with special intent to be legally bound could achieve that objective. "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 [person] should not be able to make himself liable if he wishes to do so."

Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 659 (1982). The common-law ceremony of sealing a promise efficaciously answers our serious promisor, and arguably could do so today.

14. Aller v. Aller, 40 N.J.L. 446, 451 (1878).

15. *See, e.g.*, JOHN P. DAWSON, ET AL., CASES AND COMMENT ON CONTRACTS 188-92 (5th ed. 1987).

16. An immoderate example is a case where a testator used the words "in witness whereof I have hereunto set my hand and seal" and made an ink dash between one-sixteenth and one-eighth of an inch after the signature. The court held such sufficient to constitute a seal. Appeal of Hacker, 15 A. 500 (Pa. 1888).

17. For a thorough-going discussion of these substantive changes, see 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 244-250 (forthcoming 1994). As Lon Fuller observes: "If language sometimes loses valuable distinctions by being too tolerant, the law has lost valuable institutions, like the seal, by being too liberal in interpreting them." Fuller, *supra* note 8, at 803.

loss of formalism by state legislatures[18] and some courts,[19] and the ascent of unconcerted, diverse statutory schemes abolishing, limiting, or divining substitutes for the seal.

As a result, the exact stature and status of a promise under seal today is uncertain. On the one hand, one may conclude that promises under seal are merely an historical, medieval oddity of no modern significance to contract law. "[T]he trend away from the seal as an anachronistic relic and the narrow, episodic nature of the statutory exceptions leaves the doctrine of consideration as very much the norm."[20] Seals are seen as irrelevant. After all, the Uniform Commercial Code has "wiped out . . . every effect of the seal."[21] Some contracts casebooks either eliminate any coverage of seals[22] or reduce its coverage to a few pages.[23]

18. In 1941, for instance, the New York Law Revision Commission, in recommending legislation depriving the seal of all legal effect, observed:

> The seal has degenerated into a L.S. or other scrawl which, in modern practice, is frequently printed L.S. upon a printed form. To the average man it conveys no meaning, and frequently the parties to instruments upon which it appears have no idea of its legal effects . . . . Whatever the historical origin of the seal, the modern justification of its use has been based on the assurance of solemnity and deliberateness arising from the presence of a seal on a promise in writing . . . . With the relaxing of the rules as to the nature of the seal, . . . the solemn effect of the act of sealing was much impaired. It is highly doubtful today whether the presence of the seal on the paper or even the addition of the seal to a writing actually implies greater deliberateness than the signing of the writing by itself. It is quite certain that most lawmen and many lawyers have little or no idea of the exact effect of the presence of the seal.

REPORT OF THE NEW YORK LAW REVISION COMMISSION 359-60, 375-76 (1941).

19. *See, e.g.*, Hartford-Connecticut Trust Co. v. Devine, 116 A. 239 (Conn. 1922) (court recognized the common-law rule enforcing contracts under seal was not tenable given the modern dilution of the seal and held the rule should no longer be strictly applied).

20. FRIED, *supra* note 5, at 28-29.

21. *See* U.C.C. § 2-203 cmt. 1 (1992).

22. Some examples of contracts casebooks having no coverage of contracts under seal include: JOHN D. CALAMARI, ET AL., CASES AND PROBLEMS ON CONTRACTS (2d ed. 1989); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS AND MATERIALS ON CONTRACTS (1987); and DAVID H. VERNON, CONTRACTS: THEORY AND PRACTICE (2d ed. 1991).

23. *See, e.g.*, MICHAEL L. CLOSEN, ET AL., CONTRACTS 152-53 (1992) (1 page); JOHN P. DAWSON, ET AL., CASES AND COMMENT ON CONTRACTS 188-92 (1987) (4 pages); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 41-42 (3d ed. 1980) (2 pages); ROBERT W. HAMILTON, ET AL., CASES AND MATERIALS ON CONTRACTS 162-67 (2d ed. 1992) (5 pages); CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 81-82 (1987) (1 page); WILLIAM MCGOVERN & LARY LAWRENCE, CONTRACTS AND SALES: CASES AND PROBLEMS 27-30 (1986) (4 pages); IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELA-

Contract students and lawyers thus justifiably consider seals immaterial, reduced in their studies to the ash-heap of history. Even the *Second Restatement of Contracts* asserts that "the seal has come to seem archaic."[24] On the other hand, the *Second Restatement*, section 95(1)(a), restates the common-law rule: "In the absence of statute a promise is binding without consideration if it is in writing and sealed . . . ."[25] As this Article will demonstrate, seals continue to retain their efficacy albeit in a more limited role in most jurisdictions. Perhaps the death of seals is greatly exaggerated. Perhaps not. We must not draw facile conclusions. Accordingly, Ian Macneil cautions his contracts students:

> By now you are not naive enough to think that the effect of a history [of the seal] could ever be swept away cleanly by the legal system. You will not, therefore, be surprised to learn that the law of the seal remains considerably complicated. Various jurisdictions have gone varying lengths in 'abolishing' the seal. But even within one jurisdiction the law may be tricky, and, however obsolescent the concept may be, the lawyer who forgets such things as the differences in statutes of limitations for sealed and unsealed contracts may harvest real trouble.[26]

This Article first discusses the function of formalities and the history of seals. It then provides an exact statement of the present stature and status of promises under seal. Finally, this Article proffers and evaluates alternate responses to this statement:

> Where the requirements of a seal have been relaxed to the point of meaninglessness, there is no longer any justification for giving the sealed contract a special effect in the law. The consequence

TIONS 580-81 (2d ed. 1978) (2 pages); JOHN E. MURRAY, JR., CONTRACTS: CASES AND MATERIALS 207-12 (1991) (6 pages); CURTIS R. REITZ, CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW 314 (1975) (1 page); ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION 245 (1988) (1 page); ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW AND THEORY 122-24 (1988) (2 pages); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 169-70 (2d ed. 1992) (2 pages).

There are two notable exceptions: LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 10-19, app. D (5th ed. 1990) (9 pages) and FREIDRICH KESSLER, ET AL., CONTRACTS: CASES AND MATERIALS 721-52 (3d ed. 1986) (31 pages).

24. RESTATEMENT (SECOND) OF CONTRACTS, ch. 4, Topic 3, Introductory Note (1981).

25. As a restatement of the common law, the rule of § 95, as it indicates, applies only in those states where the common law regarding seals has not been displaced by statutes affecting the seal's legal effect. *Id.* § 95.

26. IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 581 (2d ed. 1978).

> of this history, however, is that in most states there is no longer available any legal device which can be employed with the certainty that it will bind a promisor to a donative promise. Accordingly, the question arises whether the legislature should adopt or the courts should recognize some substitute formality.[27]

II. THE FUNCTION OF FORMALITIES AND THE HISTORY OF SEALS

Our society is in constant evolution. To secure the safety and comfort attainable by living and acting in a large group, individuals pursue uniformity of conduct. In its earliest stages, these uniformities, often described as "folkways," are unconscious in character. Once conscious of this uniformity, people accept it as necessary and beneficial, and in differing ways penalize nonconformity. The resulting system of opinion and conduct is often described as "mores." In time, society expresses "mores" in the form of rules of morality and rules of law that constantly evolve and change.

One of the most important aspects of all legal systems is the group of rules governing the performance and enforcement of promises. The law of torts, the law of crimes, and the law of contracts demonstrate society's need to foresee and rely on the conduct of others. Promises reasonably lead others to expect predictable types of conduct from the promisor. Consequently, the survival and comfort of any group of individuals requires the keeping of promises under most circumstances. The ideal of keeping promises is an integral part of the folkways and mores of humankind.[28]

In the vast majority of cases, promises are kept and performed without thought of breach or necessity of enforcement. The possibility of losing the confidence of others sufficiently ensures performance. However, society's mores do not require that all promises be kept.[29] Similarly, modern rules of contract law do not enforce all promises. As a consequence, one must know when society's en-

27. LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 18 (5th ed. 1990).

28. Many societies deem the exchange of promises to be morally and legally binding. *See generally* Joseph M. Perillo, *Exchange, Contract and Law in the Stone Age*, 31 ARIZ. L. REV. 17 (1989).

29. But a compilation of old Irish law thought to date to 438 A.D. contains this surprising statement: "There are three periods at which the world dies: the period of plague, of a general war, of the dissolution of verbal contracts." Introduction to Senchus Mor 51 (photo. reprint 1483) (Engl. trans. 1865).

forcement power will be applied and what operative factors will induce enforcement in order to rely with assurance and safety on promises. These factors are many and complex, and change with time and place. Mastering knowledge of these factors is not a simple matter.

One vital factor is the form in which a promise is made and expressed. In the early stages of a legal system, the form of the promise outweighs all other factors.[30] The formalities of required procedure loom large in the eyes of the ignorant and inexperienced. However, relative importance of formalities diminishes over time. Nonetheless, formalities continue to play a useful role and render a worthwhile service.

In any legal system, formalities reflect societal custom, convention, and expectation, thereby advancing several purposes and policies. Legal formalities, such as a formal promise under seal, facilitate in varying degrees at least seven functions: ceremonial, evidentiary security, cautionary, deterrent, channeling or earmarking, clarification and certainty, and economic efficiency.[31] Perhaps the most significant function of a promise under seal is ceremonial. Impressive ceremonies, such as royal coronations, presidential inaugurations, wedding ceremonies, and signet rings impressed in hot wax visibly demonstrate the serious nature of certain promises. Ceremonial formality is interwoven into the fabric of our society, providing security, stability, and certainty in the future. As one commentator stated:

> Ceremonies are the channels that the stream of social life creates by its ceaseless flow through the sands of human circumstance. Psychologically, they are habits; socially, they are customary ways of doing things; and ethically, they are what Jellinek has called the normative power of the actual, that is, they control what we do by creating a standard of respectability or a pattern

30. *See infra* note 37.

31. Lon Fuller in his classic article is duly credited for explaining three functions of legal formalities: evidentiary, cautionary, and channeling. *See* Fuller, *supra* note 8, at 779, 800-01. A fourth function, clarification, is explained in Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 43-69 (1974). Deterrence, a fifth function, is identified and implicitly distinguished from cautionary, in Arthur T. von Mehren, *Civil-Law Analogues to Considerations: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1016-17 (1959). That legal formalities such as the seal are appropriately efficient under economic theory (sixth function) is offered by Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUDIES 411, 419-20 (1977).

> to which we feel bound to conform.[32]

Furthermore, in terms of evidentiary security, formalities provide authoritative proof of the existence and content of the promise in the event of a controversy. For instance, sealed writings, attestations, and official certifications demonstrate trustworthy evidence independent of the biased recollection of witnesses.

Formalities also caution us. They require deliberation; they prevent rash and impulsive actions. In earlier centuries, promisors who feared ghosts were asked to swear by the ghosts of their ancestors. Those who feared and worshipped an omnipotent Deity pledged their faith, called God to witness, or made the sign of the cross. Even today, children contemplate sanction when they say, "Cross my heart and hope to die." The affixing of a seal required time to heat and place the wax on a writing and then impress the wax with one's seal. This process, by its nature, gave the promisor an opportunity to contemplate the serious consequences of his pledge.

Formalities not only warn the promisor that he is making a deal (a wakening of legal consciousness),[33] they also serve other policies of deterrence. For example, formalities deter legal enforcement of importune and socially undesirable agreements. Formalities underwrite our societal unwillingness to give legal sanction to transactions perceived as suspect or of marginal value. Formal promises assure that our legal machinery is used to enforce deliberative intent.

As a straightforward, external test of validity, legal formalities also serve a channeling or earmarking function. To determine the

32. MORRIS R. COHEN, THE BASIS OF CONTRACT 553, 582-83 (1933).

33. At Roman law the stipulation was a similar formal act. The stipulation was a contract imposed on one who answered a formal question (*Spondesne?* "Do you pledge your word?) with *Spondeo* ("I do pledge it.").

> As soon as the little word "spondesne" was heard in the course of a conversation, it announced to the Roman that what had been until then a non-legal, friendly talk, was about to take on the nature of a business transaction; it was the signal of a legal act. One who had given assurances, in the course of a casual conversation, must have been dumbfounded as soon as the other party began to take him at his word and wanted to settle the matter legally (for such is the meaning of the Latin word, *stipulari.*). With the word "spondesne" he was called upon to explain himself concerning the nature of his assurances, and to picture himself the purport, the scope, the consequences of the stipulation that he was asking from him.

R. IHERING, 3 L'ESPRIT DU DROIT ROMAIN (THE SPIRIT OF THE LAW) 190 (de Meulenaere trans., 3d ed. 1887). Regarding the stipulation in American law as a possible formal contract, *see supra* note 10.

validity of a promise, one need only verify that the prescribed formalities were fulfilled. For example, one can determine if a check is a valid negotiable instrument by simply verifying that its form comports with the requisites of a negotiable instrument prescribed by section 3-104 of the Uniform Commercial Code. The formality of a sealed promise provides "a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expressions of intention."[34] A legal formality provides the channel for a person desiring to make a legally enforceable promise. For example, a seal on a writing channels the promisor's intentions into a legally enforceable expression by providing an external, objective test of enforceability and a visible sign of authenticity.

Formalities further promote policies of clarification and certainty. When parties reduce their transaction to writing (a contract under seal must be in writing), they are more apt to clarify details not contained in their oral negotiations and agreements. In addition to clarification, formalities subserve fiscal and regulatory ends, educate parties concerning the full extent of their obligations, provide public notice of the transaction, and assist management efficiency in an organizational setting.

Finally, formalities promote economic efficiency. The policies of channeling, clarification, and certainty underscore notions of efficiency. Likewise, abstraction (the idea that a formality remains a constant, undisturbed by the context of its use) promotes economic efficiency. A formality abstracts a transaction from the circumstances surrounding it and has the same legal effect regardless of motivations, practices, or other contextual matters. In its original form, the seal functioned as an abstraction in that extra-formal matters (including even fraud and mistake) were without effect on the sealed promise. If the prescribed formalities of a writing, a seal, and delivery were met, the promise was enforceable. From the standpoint of efficiency, formalities are "economically appropriate."[35]

Legal formalities were the basis of the earliest method for making a valid contract. Early common law acknowledged three formal contracts that survive in the twentieth century: contracts

34. Fuller, *supra* note 8, at 801.

35. *See Posner, supra* note 31.

under seal, recognizances, and negotiable instruments.[36] The *Second Restatement of Contracts* adds negotiable documents and letters of credit.[37]

Many lawyers consider negotiable instruments and documents as well as letters of credit to be the most important formal contracts. Although often not considered contracts, recognizances have significance in both their traditional and more current form as a bond.[38] Notwithstanding the fact that many states have limited or modified the effect of a seal,[39] contracts under seal remain vital in both historical and functional contexts.

In the early stages of English law, the King's courts did not bind parties to an agreement unless the terms of the agreement were put into a written document accompanied by certain formalities.[40] This document, which required a seal to make it formal, is the English covenant and was established as binding before the end of Edward I's reign.[41] The earliest covenants touched the land and were regarded as grants rather than promises. Consequently, the law considered the sealed instrument as not merely evidence of an obligation but as the obligation itself. Such instruments, even if paid or performed, remained binding unless obliterated or canceled.[42] Thus, to transfer property, a writing with a seal was essen-

36. The first *Restatement of Contracts* reflects the common-law view: "Formal contracts are (a) Contracts under seal, (b) Recognizances, (c) Negotiable instruments." RESTATEMENT (FIRST) OF CONTRACTS § 7 (1932).

37. "The following types of contracts are subject in some respects to special rules that depend on their formal characteristics and differ from those governing contracts in general: (a) Contracts under seal, (b) Recognizances, (c) Negotiable instruments and documents, (d) Letters of credit." RESTATEMENT (SECOND) OF CONTRACTS § 6 (1981).

38. *See* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 256 (forthcoming 1994).

39. State statutory changes affecting contracts under seal are set forth and evaluated in the next section, part III of this Article.

40. *See* JAMES B. AMES, LECTURES ON LEGAL HISTORY, 98-99, 104-06 (1913); Frederick E. Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24 (1915); Harold D. Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608 (1910); Frederick Pollock, *Contracts in Early English Law*, 6 HARV. L. REV. 389 (1893).

41. See *supra* note 40.

42. The specialty (obligation) was perceived as the contract in itself, and the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. "If one loses his obligation, he loses his duty." AMES, *supra* note 40, at 99. Conversely, unless canceled or destroyed, the obligation could be enforced again against a maker who may have paid already. Ames, *supra* note 40 at 109. The *Second Restatement* notes:

> In the early law a contract under seal was treated as a grant rather than a promise, and the document was treated as the obligation rather than as evidence of it. It is still sometimes said that whether a document is under seal is to be deter-

tial. "Deed" and "specialty" were both transfers under seal. Although "covenant" more appropriately applies to promises (as opposed to transfers) under seal, the action of covenant at common law came to be used to enforce "formal" contracts made under seal. These promises under seal were called deeds, specialties, or covenants.

For a promise under seal to be enforceable at early common law, three essential formalities had to be met. First, the writing had to denote the parties and state a suitably definite promise. Second, the promisor had to seal the writing. Third, the writing had to be delivered to the obligee. Blackstone asserts that a contract under seal at common law had to be written on paper or parchment,[43] but any relatively permanent surface would seem sufficient. Because one function of the seal was to authenticate an instrument without an illiterate promisor's signature, the seal became an effective substitute for the illiterate's inability to sign. Although contracts under seal today are universally signed, they do not require a signature.[44] Authentication of the writing was fulfilled not by a signature but by the formalities of sealing and delivery.

For some period in its history, a seal appears to have consisted of a bit of wax or other adhesive substance, attached to the parchment or paper on which the promise or terms of agreement were written.[45] The adhesive was melted or otherwise softened and pressed firmly on the document so that it would stick there, at the same time impressing some significant form of motto or device into the adhesive. In the following statement, Lord Coke asserted that

mined from the document itself, without recourse to extrinsic circumstances. But a document which bears a seal does not establish its own authenticity. RESTATEMENT (SECOND) OF CONTRACTS § 96 cmt. b (1981).

43. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 297 (1769).

44. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 245 (forthcoming 1994) (signature as part of a sealed instrument).

45. 2 Rolle Abr. 21, D. pl. 2, cites Co. Litt. 35b to the effect that the writing must be on paper or parchment, reasoning that a writing on wood, leather or cloth would be easily vitiated or corrupted. This reasoning is unconvincing. A parchment is a skin-like leather, and paper is usually made of wood pulp or rags. A seal engraved on steel or other metal would be quite durable. Ostensibly, the law in medieval times was that an instrument ceased to be operative as a sealed instrument if the seal fell off or was eaten off by mice. *See* Y.B. 3 Hen. 5, 7, 20. But this ceased to be the law long ago. Michael v. Stockworth & Andrews, Gouldsb. 83 (1588) (debt on an obligation sustained even though mice had caused the seal to fall off).

For a history of the seal and sealing, consult 7 JOHN HENRY WIGMORE, EVIDENCE § 2161 (Chardbourn rev. 1978).

the seal had to consist of wax: "Sigillum est cera impressa, quia cera sine impressione non est silligum."[46] Although this statement begs the question, we should not overlook the fact that Coke's statement may have been true. Indeed, Coke had so great an influence over English law that by merely stating this in Latin he could make it true for a century or more.

Coke's chief emphasis, however, lies in his assertion that the wax must bear an impression. Very often, the obligor made this impression by pressing on the softened wax with a signet ring. This left a comparatively durable device when the wax hardened.[47] The device might be the coat of arms or shield of the obligor. It might be other things as well. For example, the old lexicographer reports that the king could give efficacy to the wax by biting it with his "foretooth."[48] Possibly a very bold person, in the time of Edward III, would have attempted to follow the royal example. Today, however, this method is not likely to be utilized.

46. 3 SIR EDWARD COKE'S INSTITUTES 169 (1628); Warren v. Lynch, 5 Johns. 239 (N.Y. 1810) (translates to: "Impressed wax is the signature and, without the impression of wax, there is no signature.").

47. Genesis 18 & 38, and Ester, VII, 8 & 10 (sealing with signet ring was practiced in early Biblical times); *see also Seals*, 1 AM. L. REV. 638 (1866) (establishing that essential characteristic of early seal was impression rather than substance on which impression was made).

48. The following is from DEED (Defined in Termes de la Ley at 149-52), translated in the first American edition from the London edition of 1721, and quoted in 1A CORBIN ON CONTRACTS § 240 n.2.

> [At the time of the Norman conquest] they used to engrave in their seals their own pictures and counterfeits, covered with a long coat over their armours. But after this, the gentlemen of the better sort took up the fashion, and because they were not all warriors, they made seals engraven with their several coats or shields of arms, for difference sake, as the author reports. At length about the time of Edward III seals became very common; so that not only such as bear arms used to seal, but other men also fashioned to themselves signets of their own devices, some taking the letters of their own names, some flowers, some knots and flourishes, some birds and beasts, and some other things, as we now yet daily see used.
>
> Some other manners of sealings besides these have been heard of among us; as namely, that of King Edward III, by which he gave to Norman the Hunter,
>
> The hope and the hop town,
> With all the bounds upside down:
> And in witness that it was sooth,
> He bit the wax with his fore tooth.
>
> . . . I, William, King, give to thee Plowden Royden, my hop and hop lands, with all the bounds up and down, from heaven to earth, from earth to hell for thee and thine to dwell, from me and mine, to thee and thine, for a bow and a broad arrow, when I come to hunt upon yarrow. In witness that this is sooth, I bit this wax with my tooth, in the presence of Magge, Maud, and Margery, and my third son Henry.

Customs come and customs go. Sealing with wax came in; sealing with wax has gone out. Watering-down of formalities commenced. Only a few centuries ago, writing itself was a mystery to the common citizen. The preparation of a written parchment, dropping of melted wax, impression of a noble device by means of a costly ring of gold and precious stones, and the solemn act of delivery to the obligee: all represented the sanctity of the promise under seal. It is no wonder that both church and state lent their enforcing sanctions to so formidable an array of acts.[49] Formalities such as these were once very important. However, the fact that formalities now meet with disrespect and ridicule shows the extent to which custom changes with time.

In early American history, the art of writing became known to all, but coats of arms and signet rings were rare. Common citizens acquired title to land and executed deeds of conveyance. Documentary forms were printed with blank spaces for names, places, and descriptions. A dotted line providing the place for signature was followed by the word "seal" or the letters "L.S." (locus sigilli), which indicated where to drop and impress the wax.[50] However, wax often was not attached. Instead, many grantors put a scrawl around the word "seal" or the printed letters "L.S." Should such documents be denied their intended effect simply for lack of "cera impressa?" Indeed, cases held that these documents were not sealed instruments, although sometimes only to ensure that the plaintiff might prevail. One could not use "assumpsit" to enforce a sealed contract. Thus, to sustain plaintiff's assumpsit action, a court might hold that the document bearing no wax was not "under seal."[51]

49. Not only the law courts but also the ecclesiastical courts enforced promises under seal.

> The conspicuous sacerdotal role in the crowning of kings, who then [14th Century] claimed that they ruled by divine right, was characteristic of Christianity's dominion of medieval Europe. Proclamations from the Holy Sea—called bulls because of the *bulla*, a leaden seal which made them official—were recognized in royal courts. So were canon (ecclesiastical) law and the rulings of the Curia, the Church's central bureaucracy in Rome.

WILLIAM MANCHESTER, A WORLD LIT ONLY BY FIRE 19 (1992).

50. Loraw v. Nissley, 27 A. 242 (1893) ("L.S." held sufficient even though there was no witnessing clause that referred to seal).

51. Warren v. Lynch, 5 Johns. 238 (N.Y. 1810). *But see* Andrews v. Herriot, 4 Cow. 508 (N.Y. 1825) (action of "covenant" would not lie on such instrument).

The law of New York regarding sealed instruments (both statutory and judicial) has had a very checkered career. *See* Frederick E. Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24 (1915); William J. Lloyd, *Consideration and the Seal in New York*, 46 COLUM. L. REV. 1 (1946). Later, by statute, New York provided that the presence of absence of a seal on a document had no legal effect. *See* N.Y. CIV. PRAC. L. & R. § 213 (Consol.); N.Y. GEN. CONSTR. LAW § 44-a (Consol. 1961) (replacing C.P.A. § 342).

Regarding statutory modifications to the form of a seal or the effect of a contract under seal, see *infra* notes 200-20 and accompanying text.

The law of the forum (and not the law of the state of execution) determines matters of remedy and procedure. If that law regards an instrument bearing the word "seal" in parentheses as not "under seal," the statute of limitations applicable to unsealed contracts applies. This is true even if the state of execution regards the contract as "under seal" and therefore allows a longer period of limitations.[52] Substantive law, rather than the law of remedy or procedure, determines whether what is on the face of an instrument makes it an instrument "under seal."[53] Ostensibly, the forum court should always make the instrument legally effective in accordance with the intention of the parties. If the laws of the relevant states vary, the court should apply the law of the state that will give effect to the intent of the parties.

In response, state legislatures passed statutes that provided that a pen scrawl, the word "seal," or the letters "L.S.," were effective as a seal.[54] Even without the aid of legislation, some courts independently recognized the validity of certain documents such as deeds of conveyance or sealed contracts executed in this manner.[55]

52. Bank of United States v. Donnally, 33 U.S. (8 Pet.) 361 (1834); Alropa Corp. v. Rossee, 86 F.2d 118 (5th Cir. 1936); Burns Mtge. Co. v. Hardy, 19 F. Supp. 827 (D.C.N.H. 1937); Alropa Corp. v. Britton, 188 A. 722 (Me. 1936); President & Directors of Georgetown College v. Madden, 505 F. Supp. 577, 584 (D.C.Md. 1980 (applying Maryland law)), *aff'd in part and dismissed in part*, 660 F.2d 91 (4th Cir. 1981); Freedom Finance Co. v. Steeples, 356 A.2d 444, 446 (N.J. Super. 1976); Coral Gables v. Christopher, 189 A. 147 (Vt. 1937).

53. A statute of limitations affects "remedy" and not "substance"; but it is clear that in many respects the attachment of a seal to an instrument affects its legal operation and effect. For example, in many states the word "seal," printed or written, is sufficient to make the instrument a sealed instrument, one that is enforceable without any consideration for the promises contained in it. Such an instrument is enforceable in other states not recognizing such a use of the word "seal." For that purpose at least, if the instrument is "under seal" where executed and to be performed, it is so everywhere. It has not been so held in determining the form of remedy granted or the length of time within which it will be granted. Consistency is not found in the cases attempting to draw the doubtful boundary line between substantive law and remedial law.

54. A list of statutory modifications of the form of the seal is located in an introductory note to RESTATEMENT (SECOND) OF CONTRACTS § 94 (1981). For an exhaustive list, see *infra* notes 200-20 and accompanying text.

55. Federal Reserve Bank v. Kalin, 81 F.2d 1003 (4th Cir. 1936) (under North Carolina law, use of word "seal" in parentheses is sufficient sealing if there is intention of maker

In executing a formal contract, parties must follow local custom and law. Generally, a court will hold a document to be under seal if it appears on its face that the parties so intended. Accepted forms of seal include: wax, a gummed wafer,[56] an impression in the paper itself,[57] the word "seal,"[58] the letters "L.S." (signifying "locus sigilli"),[59] or any mark intended to be a seal (often called a

to adopt it as seal); Avery v. Kane Gas Light & Heating Co., 403 F. Supp. 14 (W.D. Pa. 1975) (printed word "seal" as personal or corporate seal); Loraw v. Nissley, 27 A. 242 (Pa. 1893); Hacker's Appeal, 15 A. 500 (Pa. 1888). In Alexander v. Jameson, 5 Binn. 238, 244 (Pa. 1812), Brackenridge, J., wrote:

> Illi robur et aes triplex. He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal . . . . How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact the circumflex is usually made by the scrivener drawing the instrument, and the word 'seal' inscribed within it.

56. These wafers vary in size, are generally red in color, and may have a perfectly plain surface. In the case of corporations, the red wafer and the paper beneath it are often given an impression bearing the corporate name and the word "seal." The wafer may bear other devices; it was held that an ordinary revenue stamp may be affixed as a seal. Van Bokkelen v. Taylor, 62 N.Y. 105 (1875). In Morad v. Silva, 117 N.E.2d 290 (Mass. 1954), the court said that under Massachusetts law "the agreement by reason of the recital that it was under seal was in legal effect a sealed instrument."

57. Pierce v. Indseth, 106 U.S. 546 (1882); Pillow v. Roberts, 51 U.S. 472 (1851).

58. Federal Reserve Bank v. Kalin, 81 F.2d 1003 (4th Cir. 1936); Avery v. Kane Gas Light & Heating Co., 403 F. Supp. 14 (W.D. Pa. 1975); General Petro. Corp. v. Seaboard Terminals Corp., 23 F. Supp. 137 (D.C. Md. 1938); Jeffrey v. Underwood, 1 Ark. 108 (1838); Carlile v. People, 59 P. 48 (Colo. 1899); Grand Lodge Knights of Pythias of Florida v. State Bank, 84 So. 528 (Fla. 1920) (corporate seal); Campbell v. McLaurin Inv. Co., 77 So. 277 (Fla. 1917) ("seal"); Cross v. Robinson Point Lumber Co., 46 So. 6 (Fla. 1908); Comerford v. Cobb, 2 Fla. 418 (1849); Jackson v. Security Mut. Life Ins. Co., 84 N.E. 198 (Ill. 1908); Quincy Horse Ry. & Carrying Co. v. Omer, 109 Ill. App. 238 (1903); Brown v. Jordhal, 19 N.W. 650 (Minn. 1884); Pierce v. Lacy, 23 Miss. 193 (1851); O'Keefe v. French, 268 N.Y.S. 102 (1933), *appeal denied*, 191 N.E. 517 (N.Y. 1934); McGowan v. Beach, 86 S.E.2d 763 (N.C. 1955); Allsbrook v. Walston, 193 S.E. 151 (N.C. 1937) (absence of proof of contrary intention); McClamroch Marble & Tile Co. v. Bristow, 77 S.E. 923 (S.C. 1913); Cook v. Cooper, 38 S.E. 218 (S.C. 1900) (written word "seal" with no scrawl around it); Philip v. Stearns, 105 N.W. 467 (S.D. 1905); Whitley v. Davis' Lessee, 31 Tenn. 333 (1851); English v. Helms, 4 Tex. 228 (1849); *In Re* Schultz's Estate, 30 N.W. 714 (Wis. 1948).

The word "seal" was held not sufficient in the following cases: Alropa Corp. v. Britton, 188 A. 722 (Me. 1936); Manning v. Perkins, 29 A. 1114 (Me. 1894); Bates v. Boston & N.Y.C.R. Co., 92 Mass. 251 (1865) (corporate seal printed on document insufficient); Coral Gables v. Christopher, 189 A. 147, 109 A.L.R. 474 (Vt. 1937); *cf.* Woodman v. York & C. R.R. Co., 50 Me. 549 (1861).

59. President & Dirs. of Georgetown College v. Madden, 505 F. Supp. 577, 584 (D.C. Md. 1980), *aff'd in part and dismissed in part*, 660 F.2d 91 (4th Cir. 1981); Langley v. Owens, 42 So. 457 (Fla. 1906); Fon Du Lac Citizens Loan & Invest. Co. v. Webb, 1 N.W.2d 772 (Wis. 1942).

60. United States v. Stephenson's Ex'rs, 27 F. Cas. 1305 (D. Ill. 1839); Anderson & Ridge v. Wilburn, 8 Ark. 155 (1847); Harden v. Webster, Parmellee & Co., 29 Ga. 427 (1859); Eames v. Preston, 20 Ill. 389 (1858); Line v. Line, 86 A. 1032 (Md. 1913); Thompson v. Poe, 61 So. 656 (1913); Parks v. Duke, 2 M'Cord (SCL) 380 (1823); Whitley v. Davis' Lessee, 31 Tenn. 333 (1851); Jones & Temple v. Logwood, 1 Va. (1 Wash.) 42 (1791).

A mere pen and ink dash after the signature may be held to be effective as a seal, Hacker's Appeal, 15 A. 500 (Pa. 1888), or a series of dashes following the signature, Hawkinberry v. Metz, 114 S.E. 240 (W. Va. 1922) (series of five hyphens following grant's signature held to be statutory seal).

61. Laws of 1892, Ch. 677, § 13.

62. Alabama, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, West Virginia, and Wisconsin have statutes that create or validate newer forms of the seal or substitutes for the seal. *See infra* notes 200-20 and accompanying text for a consideration of these statutes.

63. RESTATEMENT OF CONTRACTS § 96 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 96 (1981).

scroll or scrawl).[60]

With the decline of illiteracy came the custom of using one's signature to authenticate a document. By the turn of the century, the formality of the impressed wax seal was relaxed to include any written symbol intended by the promisor to serve as a seal. For instance, an 1892 federal statute provided that a private seal could consist of a wafer, wax, or similar adhesive, paper or similar substance affixed by mucilage, the word "seal" or the letters "L.S."[61] Other states further eroded the common law (by statute or case law) by allowing such things as the mere recital of sealing or scrawl of the pen.

These statutory modifications of the form of the seal are not uniform.[62] If no wax or wafer is used, some statutes require an express recital that the document is a sealed instrument. Others recognize substitutes such as "seal," "L.S.," or a scroll only if the parties intend them to represent a seal (extrinsic evidence is permitted to prove intent). Furthermore, both the *First* and *Second Restatements of Contracts* state that seals can consist of any substance affixed to a document, an impression, or any mark, word, symbol, scrawl or sign intended to operate as a seal.[63] With this relaxation of form, the significance of the seal has substantially declined. The advent of mass-produced forms containing a printed "seal" evidences this decline.

When the accepted form of the seal expanded to include

printed "seals" and "L.S.," sealed contracts no longer fulfilled the purposes or functions of a legal formality. The ceremonial, deterrent, and cautionary functions are absent when forms with preprinted "seals" are used. The channeling function is also absent because a standardized "seal" has little special or individual meaning to the signer. Finally, the preprinted seal loses its evidentiary function because it provides no trustworthy evidence of the existence and terms of the contract. Arguably, most signers pay little or no attention to the printed "seal" or "L.S." on the documents they sign.

Another dilution of the formality of the seal was the gradual modification of the rules for delivery. Signing and sealing alone are not sufficient to make the promise under seal operative. The final operative act is "delivery," which occurs when the promisor puts the sealed writing into the possession of the promisee or promisee's agent.[64] Because the sealed writing reified the promise and was the only source of the obligation, transfer of possession was the sole requirement of this delivery. The promissory obligation ceased to exist if the sealed writing was lost or destroyed and could not be delivered.

The requirement of an "intent" to deliver weakened one's ability to make a valid promise simply by delivery of possession. It was reasoned that transfer of possession of the writing could occur without an intent to deliver (e.g., when a sealed writing is given to another only for inspection). It logically followed that in addition to a transfer of possession, an intent to deliver was required for a valid delivery.[65] Modern cases eliminated the formality of physical delivery, holding that intent was the only requirement for valid delivery. Even if the promisor retained possession of the writing, the delivery requirement was satisfied when the promisor manifested intent that the writing be operative.[66] If the formal sealed writing was the exclusive embodiment of the obligation, then matters extrinsic to the writing should be irrelevant. However, when the

64. *See generally* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 244 (forthcoming 1994) (discusses what constitutes delivery of a sealed instrument).

65. *Id; see also* Arthur L. Corbin, *Delivery of Written Contracts*, 36 YALE L.J. 443 (1927).

66. *See, e.g.*, Maciaszek v. Maciaszek, 173 N.E.2d 476 (Ill. 1961); McMahon v. Dorsey, 91 N.W.2d 893 (Mich. 1958). "In England and in some States a manifestation of intention that a document take effect immediately is the equivalent of delivery." RESTATEMENT (SECOND) OF CONTRACTS § 102 cmt. b (1981).

promisor's intent replaced the formal act of transferring possession as the quintessential element of delivery, compliance with legal formalities seemed unnecessary. Restrictions or conditions intended by the promisor, such as delaying all legal effect until some future event occurs, should control instead of the writing. Hence, the law recognized the notion of conditional delivery. The majority rule today is that the promisor can "deliver" a sealed contract even though the rights and duties created in the writing are subject to an extrinsically expressed condition.[67] The legal formality of sealing and delivery became trivial when compared with the dominant purpose of enforcing the promisor's intent.

> Then if it was intent, not acts, that counted, why insist on the ancient formalities; was it really necessary to heat up wax and stick it on a piece of paper? Why not use another piece of paper on which a mark of some kind had already been made and stick it on with adhesive? Or why was it not enough for the signer merely to recite in the document that he considered it to be under seal?[68]

By accepting substitutes, the formal contract under seal ceased to function as a legal formality. When form does not operate as form, it becomes irrelevant. The time was ripe to eliminate the formal path to promissory obligation. The stage was set for legislative intervention. Nonetheless, there was a lingering notion that some formal substitute would preserve the power of formality. Many perceived a signed writing to be a sufficient formality substitute.

III. PRESENT STATUS OF SEALS: STATUTORY CHANGES AFFECTING SEALED PROMISES

The great majority of American jurisdictions have changed the common law of sealed instruments in important respects through legislative action. This Article attempts to review the assorted and diverse state statutes (or the lack thereof). In enacting these statutes, some legislatures knew little of common-law history and did not understand the existing legal rules regarding formal and informal contracts. Believing it unjust to bind promisors by the empty "formality" of a seal, legislatures magnified the importance of the doctrine of consideration. Some states even abolished private seals,

67. *See* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 250-251 (forthcoming 1994).

68. JOHN P. DAWSON, ET AL., CASES AND COMMENT ON CONTRACTS 190 (5th ed. 1987).

making them wholly inoperative.[69] Rather than abolishing seals, other states provided that a seal is only presumptive evidence of consideration on executory instruments, leaving unchanged the effect of the seal on executed instruments.[70] A third group of states abolished the distinction between sealed and unsealed instruments, providing that any written promise is rebuttably presumed to be supported by consideration.[71] Variations exist within these groups. Furthermore, some states have adopted miscellaneous statutes, the most important of which affect limitations on one's ability to bring a contract action.[72] Other statutes recognize or validate newer forms of seals or substitutes for the seal.[73]

In an attempt to inject some uniformity in statutory construction among these statutes, the *Second Restatement of Contracts* states: "A promise (to be subject to the statute) must be either in a writing to which both parties have manifested their assent or in a signed and delivered written document."[74] These provisions mirror the functions of a legal formality such as a contract under seal at early common law. However, problems and concerns arise when no formality exists for validating contracts without consideration. The seal served, and should continue to serve, the functions of a legal formality. When the seal is abolished or its effect delimited, some other formalistic device seems necessary to permit parties to bind themselves without consideration when they so intend.

For instance, Article 2 of the Uniform Commercial Code (UCC) makes "seals inoperative."[75] That is, affixing a seal to a writing evidencing a contract for the sale of goods (or to an offer to buy or sell goods) does not make the writing a sealed contract, and the law of sealed instruments does not apply.[76] Despite abolishing the effect of seals, the UCC drafters recognized the necessity for legal formalities in some cases. They enacted statutory substitutes

69. *See infra* part III.A.

70. *See infra* part III.C.

71. *See infra* part III.D.

72. *See infra* part III.H.

73. *See infra* part III.G.

74. RESTATEMENT (SECOND) OF CONTRACTS § 95(2) (1981) (applies when a statute provides that a written contract or instrument is binding without consideration, or authorizes the absence of consideration to be raised as an affirmative defense).

75. U.C.C. § 2-203 (1992).

76. The UCC "makes it clear that every effect of the seal which relates to 'sealed instruments' as such is wiped out insofar as contracts for sale are concerned." U.C.C. § 2-203 cmt. 1 (1992). A seal, however, may have the effect of a signature. *Id.* at cmt. 2.

to perform one or more of its functions, especially the function of sustaining a transaction without consideration.[77] If the status and efficacy of the seal has been abolished or delimited to an easily rebuttable presumption by state statute, some other formal device serving the function of a seal seems appropriate and, in some cases, necessary.

A. *Statutes Abolishing Seals or the Distinction Between Sealed and Unsealed Contracts*

Louisiana and Puerto Rico never adopted the seal. Twenty-five states and the U.S. Virgin Islands have passed statutes purporting to abolish private seals and make them wholly inoperative. Some of these statutes also abolish corporate seals. These statutes vary in their wording from a simple "[p]rivate seals are abolished"[78] to more elaborate statements to that effect. Some of the statutes indirectly eliminate seals by abolishing all common-law distinctions between sealed and unsealed contracts. The effect is the same. Notwithstanding the language used, a written promise under seal pursuant to any of the following statutes has the same legal operation as a written promise not under seal.[79] The following jurisdictions have such statutes:

Alaska—Seal abolished but retained if used;[80]
Arizona—Private and corporate seals abolished;[81]
Arkansas—Distinction abolished;[82]

77. *See, e.g.*, U.C.C. §§ 1-107, 2-205, 2-209, 3-408 (1992). Formalities such as contracts under seal are "economically appropriate," and the abolition of seals is said to be "a mysterious development from the standpoint of efficiency." *See* Posner, *supra* note 31, at 419-20.

78. *E.g.*, MINN. STAT. ANN. § 358.01 (West 1991).

79. *See, e.g.*, IND. CODE ANN. § 34-1-16-3 (West 1986).

80. ALASKA STAT. § 09.25.130 (1989). Alaska (as well as the U.S. Virgin Islands) curiously abolishes seals and simultaneously retains their common-law effect: "Private seals and scrolls as a substitute for seals are abolished. They are not required to an instrument, but when used their effect remains unchanged." *Id.*

81. Unless otherwise specifically required by law, no private or corporate seal or scroll is necessary to establish the validity of any contract, bond, conveyance or other instrument of writing, nor shall the addition or omission of any private or corporate seal or scroll in any way affect any such instrument heretofore or hereafter made.

ARIZ. REV. STAT. ANN. § 1-202 (1989).

82. Unless otherwise prescribed by law, no distinction shall exist between sealed and unsealed instruments concerning contracts between individuals executed since the adoption of the Constitution of 1868, provided that the statutes of limi-

California—Distinction abolished;[83]
Illinois—Seal abolished;[84]
Indiana—Distinction abolished;[85]
Iowa—Seal abolished;[86]
Kansas—Private (but not corporate) seal abolished;[87]
Kentucky—Distinction abolished;[88]
Minnesota—Private seals abolished;[89]
Mississippi—Private seals abolished;[90]
Missouri—Private seals abolished;[91]
Montana—Distinction abolished;[92]
Nebraska—Private seals abolished;[93]
New York—Seal abolished;[94]
North Dakota—Distinction abolished;[95]

tation with regard to sealed and unsealed instruments in force at that time continue to apply to all instruments afterward executed and until altered or repealed. ARK. CONST. SCHED. § 1.

83. CAL. CIV. CODE § 1629 (West 1989).

84. ILL. ANN. STAT. ch. 29, ¶ 1 (Smith Hurd 1969). The 1951 Illinois Laws at 1297 and 1299 abolished the use of private seals on written contracts, deeds, mortgages or other written instruments or documents "heretofore required by law to be sealed," and amended the law entitled "Seals and Real Estate Contracts Act" by deleting the reference therein to seals.

85. IND. CODE ANN. § 34-1-16-3 (West 1986). As will be discussed in part B of this section, eight states have abrogated the necessity of a seal on a deed. Indiana has this type of statute making seals unnecessary to give validity to real property deeds. IND. CODE ANN. § 32-2-5-1 (West 1980). But Indiana has gone further than those other states by stating that there shall be no difference in evidence between sealed and unsealed writings; that unsealed writings shall have the same effect as if sealed; that a sealed writing other than a conveyance may be altered by a writing not under seal; and that an agreement in writing to compromise or settle a debt is binding notwithstanding the absence of a seal. IND. CODE ANN. § 34-1-16-3 (West 1986). "An instrument otherwise negotiable is within IC 26-1-3 [U.C.C. Article 3—Commercial Paper] even though it is under a seal." IND. CODE ANN. § 26-1-3-113 (West 1983).

86. IOWA CODE ANN. § 537A.1 (West 1983).

87. KAN. STAT. ANN. § 16-106 (1988).

88. KY. REV. STAT. ANN. §§ 371.020-030 (1987).

89. MINN. STAT. ANN. § 358.01 (West 1991).

90. MISS. CODE ANN. §§ 75-19-1 to 75-19-7 (1991).

91. The use of private seals in written contracts, conveyances of real estate, and all other instruments of writing heretofore required by law to be sealed (except seals of corporations), is hereby abolished, but the addition of a private seal to any such instrument shall not in any manner affect its force, validity or character, or in any way change the construction thereof.
MO. REV. STAT. § 431.010 (1992).

92. MONT. CODE ANN. §§ 1-4-204 to 1-4-206 (1991).

93. NEB. REV. STAT. § 76-212 (1990).

94. N.Y. GEN. CONSTR. LAW § 44-A (Consol. Supp. 1993).

95. N.D. CENT. CODE § 9-06-11 (1987).

Ohio—Private seals abolished;[96]
Oklahoma—Distinction abolished;[97]
Oregon—Distinction abolished unless another statute provides otherwise;[98]
South Dakota—Questionable that distinction abolished;[99]
Tennessee—Private and corporate seal abolished;[100]
Texas—Private seals abolished;[101]
Utah—Seal abolished;[102]
Washington—Seal abolished but imports consideration;[103]
Wyoming—Distinction abolished;[104]
Virgin Islands—Private seals abolished but effective if used.[105]

Although the number may be misleading, the foregoing twenty-six statutes most likely extirpate in toto the common-law seal doctrine. California's statutory history illustrates this point. In 1872, California enacted the following: "All distinctions be-

96. OHIO REV. CODE ANN. § 5.11 (1990).

97. OKLA. STAT. ANN. tit. 15, § 139 (West 1983).

98. The presence or absence of a seal, corporate or otherwise, shall have no effect upon the validity, enforceability or character of any written instrument except where specifically otherwise provided by statute. A writing under seal may be modified or discharged by writing not under seal or by a valid oral agreement.
OR. REV. STAT. § 42.115 (1991).

99. South Dakota requires by statute "sufficient cause or consideration" as an essential element to the existence of a contract. S.D. CODIFIED LAWS ANN. § 53-1-2(4) (1990). Moreover, § 53-6-3 provides that a "written instrument is presumptive evidence of a consideration," and § 53-6-4 makes want of consideration for a written instrument a defense. These statutes may abolish the distinction between sealed and unsealed instruments, except for the state's statute of limitations. In Hefflemen v. Pennington County, 52 N.W. 851 (S.D. 1892), the court noted that § 53-6-3 puts all contracts, whether sealed or unsealed, on a parity regarding the question of consideration.

100. "The use of seals in or upon written contracts or other instruments of writing, whether of persons or of corporations, is abolished, and the absence of such seal therefrom, or its addition thereto, shall not affect its character or validity or legal effect in any respect." TENN. CODE ANN. § 47-50-101 (1988).

101. TEX. REV. CIV. STAT. ANN. art. 27 (West 1969).

102. UTAH CODE ANN. § 104-48-4 (1933) (repealed 1951). That the seal has been legislatively abolished in Utah is seriously questioned in Comment, *The Status of the Common-Law Seal Doctrine in Utah*, 3 UTAH L. REV. 73 (1952).

103. WASH. REV. CODE ANN. § 64.04.090 (West 1966).

104. WYO. STAT. §§ 34-2-125, 34-2-126 (1990). It "shall not be necessary to use private seals on any instrument in this state." WYO. STAT. § 34-2-125. "There shall be no difference in evidence between sealed and unsealed writings and every writing not sealed shall have the same force and effect that it would have if sealed." WYO. STAT. § 34-2-126.

105. V.I. CODE ANN. tit. 5, § 31(a)(c) (1967).

tween sealed and unsealed instruments are hereby abolished."[106] In 1874, California enacted another statute to operate in conjunction with the 1872 statute: "There shall be no difference hereafter, in this state, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged by a writing not under seal."[107] California cases construing these statutes conclusively hold that the common-law seal doctrine is completely abolished.[108]

However, this conclusion is not so easily drawn in other states, such as South Dakota and Utah. Still other states, for example Michigan, could be added to the list.[109] Although the seal has not been abolished in Hawaii, its status is unclear. Because Hawaii has no statute abolishing or limiting the effect of seals, by negative implication seals retain their common-law effect. However, Hawaiian courts have left open the question of lack of consideration as a defense to a contract under seal.[110] As noted above, Alaska and the U.S. Virgin Islands abolish private seals and scrolls but validate the common-law effect when seals are used. Oregon abolishes the distinction between sealed and unsealed contracts unless another statute provides otherwise. To date, no Oregon statute provides otherwise.

A Washington statute appears to completely abolish seals. It provides: "The use of private seals upon all deeds, mortgages, leases, bonds, and other instruments, or contracts in writing is hereby abolished, and the addition of a private seal to any such instrument or contract in writing hereafter made, shall not affect its validity or legality in any respect."[111] Notwithstanding this clear language, the Washington Supreme Court has held that a seal still imports consideration as it did at common law.[112] Of course, the

106. CAL. CIV. CODE § 1629 (West 1985).

107. CAL. CIV. PROC. CODE § 1932 (West 1983).

108. Houk v. Williams Brothers, 137 P.2d 737 (Cal. Ct. App. 1943); Pacific Imp. Co. v. Jones, 128 P. 404 (Cal. 1912); Cal. Safe Deposit & Trust Co. v. Sierra Valleys R. Co., 112 P. 274 (Cal. 1911); Kennedy Estate, 62 P. 64 (Cal. 1900); Hoag v. Howard, 55 Cal. 564 (1880).

109. MICH. COMP. LAWS ANN. § 600.1401 (West 1981) makes seals unnecessary on deeds. MICH. COMP. LAWS ANN. § 600.2139 (West 1986) makes seals only a rebuttable presumption of a sufficient consideration. These statutes may abolish the distinction between sealed and unsealed instruments. *See* McKinney v. Miller, 19 Mich. 142 (1869).

110. Ortez v. Bargas, 29 Haw. 548 (1927).

111. WASH. REV. CODE ANN. § 64.04.090 (West 1966).

112. In Monro v. National Surety Co., 92 P. 280 (Wash. 1907), defense of lack of consideration to an action on an indemnity bond executed under seal was rejected:

seal at common law predated the doctrine of consideration and was binding without regard to consideration. Despite efforts by state lawmakers, confusion continues to exist regarding the status of seals. This confusion is due in part to piecemeal legislative attempts to address the decline and deterioration of the ceremony and formality of sealing.

B. Statutes Abrogating the Necessity of Seals on Property Conveyances

Although states such as North Carolina[113] continue to require a seal on a deed conveying real property, twelve states have either abrogated the seal or made it unnecessary on deeds and other property conveyances. These states are: Alabama;[114] Colorado;[115] Illinois;[116] Indiana;[117] Michigan;[118] Maine;[119] Nevada;[120] Penn-

> [T]he common-law rule that a seal imports a consideration still obtains in this state, notwithstanding the statute abolishing the use of private seals. . . . The seal imports a consideration . . . because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause.

Id. at 281.

113. Garrison v. Blakeney, 246 S.E.2d 144, *cert. denied*, 248 S.E.2d 251 (N.C. 1978), *criticized in* Joel S. Jenkins, Jr., Comment, *The Seal in North Carolina and the Need for Reform*, 15 WAKE FOREST L. REV. 251 (1979). Presence of word "seal" was sufficient to qualify contract for the sale of land as a sealed instrument. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990) (applying North Carolina law).

114. "A seal is not necessary to convey the legal title to land to enable the grantee to bring a civil action." ALA. CODE § 35-4-21 (1991).

115. "It is not necessary to the proper execution of any conveyance affecting real property that the same be executed under the seal of the grantor, nor that any seal or scroll or other mark be set opposite the name of the grantor." COLO. REV. STAT. § 38-30-125 (1982).

116. ILL. ANN. STAT. ch. 29, ¶ 0.01 (Smith-Hurd 1969). This act entitled "Seals and Real Estate Contracts Act" was amended in 1951 by deleting all references to land. 1951 ILL. LAWS at p. 1297.

117. IND. CODE ANN. § 32-2-5-1 (West 1980). *See also supra* note 85.

118. MICH. COMP. LAWS § 565.241 (1988).

119. ME. REV. STAT. ANN. tit. 33 § 352 (West 1988).

120. NEV. REV. STAT. ANN. § 52.315 (Michie 1986) (seal unnecessary on any written instrument).

sylvania;[121] Rhode Island;[122] Texas;[123] West Virginia;[124] and Wyoming.[125]

C. *Statutes Reducing Seals to a Presumption of Consideration*

Eight states provide that the seal is only presumptive evidence of consideration for executory instruments. The following states preserve the seal's validity but limit its operation to an evidentiary rebuttable presumption: Alabama;[126] Connecticut (presumption created by case law);[127] Florida;[128] Hawaii (doubtful but question of presumption opened by case law);[129] Michigan;[130] New Jersey;[131]

121. PA. STAT. ANN. tit. 21, § 10 (1955) (deeds effective without seal).

122. Seal not required in conveyances of land deeds, and word covenant "used in any deed or instrument to which no seal is affixed, shall have the same effect as though a seal had been affixed thereto." R.I. GEN. LAWS § 34-11-2 (1984).

123. "No private seal or scroll shall be required in this State on any written instrument except such as are made by corporations." TEX. REV. CIV. STAT. ANN. art. 27 (West 1969).

124. W. VA. CODE §§ 36-3-1 through 36-3-3 (1985). These sections have eliminated the necessity for seals in land conveyances (deeds, trust deeds, and mortgages). Johnson v. Junior Pocahantas Coal Co., 234 S.E.2d 309 (W. Va. 1977).

125. WYO. STAT. § 34-2-125 (1977) (seal unnecessary on any instrument).

126. ALA. CODE § 6-5-287 (1975). Sealed contracts differ from ordinary written contracts in that consideration is presumed for the former but not the latter. Hodge v. Joy, 92 So. 171 (Ala. 1921). *But see* Counts v. Harlan, 78 Ala. 551 (1885) (common-law rule of sanctity of the seal is obsolete, and sealed instrument has the same status as a non-negotiable simple contract).

127. When the form of the seal was modified or watered down to a printed "seal" or "L.S." by the 1918 CONN. GEN. STAT. § 5742 (now CONN. GEN. STAT. ANN. § 52-179 (West 1991)), the common-law rule that a seal imports a consideration and precludes any inquiry into such consideration was in turn modified. *See* Hartford-Connecticut Trust Co. v. Divine, 116 A. 239 (Conn. 1922).

128. FLA. STAT. ANN. § 68.06 (West 1985). "All bonds, notes, covenants, deeds, bills of exchange and other written instruments not under seal have the same force and effect (so far as rules of pleading and evidence are concerned) as bonds and instruments under seal." *Id.* Case law infers from that statute that "the presence of a seal raises a presumption of consideration that will shift the burden of proof of lack of consideration to the defendant unless he denies such consideration by answer under oath." Florida Nat'l Bank & Trust Co. of Miami v. Brown, 47 So.2d 748 (Fla. 1950).

129. The issue of lack of consideration is an open question in Hawaii. *See* Ortez v. Bargas, 29 Haw. 548 (1927).

130. MICH. COMP. LAWS ANN. § 600.2139 (West 1986). "In any action upon a sealed instrument, and where a counterclaim is founded on any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed." *Id.*

131. In any claim upon a sealed instrument, a party may plead and set up, in defense thereto, fraud in the consideration of the contract upon which recovery is sought, or want or failure of consideration, as if the instrument were not sealed. In such cases, the seal shall be only presumptive evidence of sufficient consideration, which presumption may be rebutted as if the instrument were not sealed. N.J. STAT. ANN. § 2A:82-3 (West 1976).

Washington (seal abolished but by case law seal imports consideration);[132] and Wisconsin.[133]

Such statutes only change evidentiary rules and are not intended to abolish all distinctions between simple contracts and specialties (contracts under seal).[134] The burden of going forward with evidence to show the absence of consideration is on the defendant. If the defendant fails to meet this burden, the promise is enforced, even if the plaintiff neither alleges nor offers proof of a consideration.[135] These statutes may apply only to executory promises, generally leaving the effect of the seal on executed instruments unchanged.[136]

The main purpose of these statutes is to make sealed promises unenforceable if no consideration exists.[137] However, these statutes do not expressly state this purpose. Instead of limiting the legal effect of seals, these statutes give new and additional effects to them. The drafters of these statutes mistakenly believed (just as

132. *See supra* note 112.

133. WIS. STAT. ANN. § 891.27 (West 1986). "A seal upon an executory instrument shall be received as only presumptive evidence of a sufficient consideration." *Id.*; *see* St. Norbert College Found., Inc. v. McCormick, 26 N.W.2d 776 (Wis. 1978) (consideration presumed for contract under seal).

134. Aller v. Aller, 40 N.J.L. 446 (1878).

135. For an application of a statutory provision that a seal on an executory instrument is only presumptive evidence of consideration, see the following cases: Hodge v. Joy, 92 So. 171 (Ala. 1921); Andrews v. DeLorm, 283 P. 393 (Cal. Ct. App. 1929); Hartford-Connecticut Trust Co. v. Divine, 116 A. 239 (Conn. 1922); First Nat'l Bank v. Doschades, 279 P. 416 (Idaho 1929); Axe v. Tolbert, 146 N.W. 418 (Mich. 1914); Danby Tp. v. Beebe, 110 N.W. 1066 (Mich. 1907); Smith v. Ohio Millers' Mut. Fire Ins. Co., 49 S.W.2d 42 (Mo. 1932); Weinberg v. Weinberg, 177 A. 844 (N.J. Eq. 1935); Campbell v. Tompkins, 32 N.J.Eq. 170 (1880), *aff'd*, 33 N.J.Eq. 362 (1881); *Re* Commonwealth Trust Co., 54 A.2d 649 (Pa. 1947); Wright v. Robert & St. John Motor Co., 58 S.W.2d 67 (Tex. 1933); Gates v. Herr, 172 P. 912 (Wash. 1918); Hoffman v. Wasau Concrete Co., 207 N.W.2d 80 (Wis. 1973); John A. Tolman & Co. v. Peterson, 175 N.W.916 (Wis. 1920).

Under the former Negotiable Instruments Law, which provided that a seal shall not prevent negotiability, it is generally held that a sealed note is not enforceable as between the original parties if absence of consideration is proved. *Ex parte* First Nat'l Bank of Ozark, 102 So. 371 (Ala. 1924); Cracowaner v. Carlton Nat'l Bank, 124 So. 275 (Fla. 1929); Citizens Bank v. Hall, 177 S.E. 496 (Ga. 1934); Citizens Nat'l Bank v. Curtis, 138 A. 261 (Md. 1927). *Contra* Balliet v. Fetter, 171 A. 466 (Pa. 1934).

136. *See* Stiebel v. Grosberg, 95 N.E. 692 (N.Y. 1911); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 284 (1981).

137. However, the contrary was held in Cochran v. Taylor, 7 N.E.2d 89 (N.Y. 1937), *criticized by* William J. Lloyd, *Consideration and the Seal in New York—An Unsatisfactory Legislative Program*, 46 COLUM. L. REV. 1, 10 (1946).

many judges have) that at common law promises under seal were enforceable because the seal "imports" a consideration or is "conclusive evidence" of a consideration. Therefore, to lessen the importance and effect of the seal, the drafters proclaimed that the seal should only be "presumptive evidence" of a consideration. Such statutes give a new evidentiary effect to seals without depriving them of their common-law function of making gratuitous promises enforceable.[138]

Following this reasoning, a New Jersey court held that the applicable statute did not invalidate a sealed instrument without consideration if the parties intended it to be operative without any consideration.[139] A later New Jersey statute further provided that in actions upon a sealed instrument the defendant may prove lack of consideration as if the instrument were not sealed.[140]

It is apparent that different kinds of statutes may engender different results. For instance, if a jurisdiction has not overruled the common-law rule that a sealed instrument may only be modified or rescinded by an instrument under seal,[141] a statute abolishing the

138. But such statutes generally would be held to make a gratuitous sealed promise unenforceable if the lack of consideration is properly alleged and proved. *See* Township of Danby v. Beebe, 110 N.W. 1066 (Mich. 1907); Hobbs v. Brush Electric Light Co., 42 N.W. 965 (Mich. 1889); Smith v. Ohio Millers M.F. Ins. Co., 40 S.W.2d 42 (Mo. 1932); Peterson v. New York, 87 N.E. 772 (N.Y. 1909); Williams v. Whittell, 74 N.Y.S. 820 (1902); Anthony v. Harrison, 14 Hun. 198 (1878), *aff'd*, 74 N.Y. 613 (1879); Hebig v. Bonsness, 277 N.W. 634 (Wis. 1938).

139. Aller v. Aller, 40 N.J.L. 446 (1878). Judgment was given enforcing a father's gratuitous promise under seal to pay his daughter $312 as a gift.

140. The relevant portions of this statute were:

> In an action upon a sealed instrument . . . a party may plead and set up in defense thereto . . . want or failure of consideration, as if the instrument were not sealed.
>
> In such cases the seal shall be only presumptive evidence of consideration, which presumption may be rebutted as if the instrument were not sealed.

N.J. REV. STAT. § 2:98-4 (1937) (compare current statutory language in *supra* note 131). In United & Globe Rubber Mfg. Co. v. Conard, 78 A. 203 (N.J. 1910), the court properly applied this statute, holding that a partial failure of consideration (nonperformance of promise that was part of consideration given) did not operate as a defense if it did not go to the essence and constitute nonperformance of a condition of the defendant's duty. But in Zirk v. Nohr, 21 A.2d 766 (N.J. 1941) (per curiam), the Court of Errors and Appeals answered the argument that "the agreement is unenforceable because [it is] without consideration" by merely stating: "It is not essential in order to make a promise under seal operative as a sealed contract that consideration be given for the promise." The opinion cites the *Conard* case, which neither says nor holds any such thing. The legislature seems to have provided that a seal shall raise a presumption of consideration that can be rebutted, and that "want of consideration" can be "set up in defense as if the instrument were not sealed." Beware of a "per curiam" opinion, even though concurred in by fourteen judges.

141. *See* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 252 (forthcoming 1994).

effect of a seal would obliterate this rule. However, a statute in the same jurisdiction that modifies the effect of a seal by providing that it is presumptive evidence of consideration would have no direct effect on this rule. The same analysis would apply in jurisdictions adhering to the common-law rule that an undisclosed principal may not sue or be sued upon a sealed instrument.[142]

D. Statutes Elevating Written Contracts to a Presumption of Consideration[143]

At common law, a contract was not considered a specialty by the mere fact that it was in writing and signed by the promisor. Writing differs from word of mouth and may properly be described as "form." However, a written contract is not a "formal" contract in the sense that its form operates to make it enforceable without consideration.[144] The statute of frauds declares that certain kinds of contracts are not enforceable unless evidenced by a written and signed note or memorandum accompanied by either a seal or consideration.[145]

But the effect of reducing an agreement to writing without a seal was seen as a device, albeit a palliative one, for making simple, informal promises binding without consideration. States that abolished seals or the distinction between sealed and unsealed contracts felt the need for other formalities to validate contracts. Written contracts satisfied this need. These states presumed consideration for written promises rather than developing a general requirement for formalistic validation devices, such as the Uniform Written Ob-

142. *See id.* A similar analysis is applicable to the rules retained in some jurisdictions that a third party beneficiary may not sue on a sealed instrument and that an agent's authority to execute a sealed instrument must be granted by a sealed instrument. *Id.*

143. The matters discussed here were covered in § 257, entitled *Contracts in Writing—Effect of Reducing an Agreement to Writing Without a Seal*, in volume 1 the former edition of *Corbin on Contracts*.

144. So held in the leading case of Rann v. Hughes, 7 T.R. 350 (H.L. 1778), overruling earlier cases that seemed to hold otherwise. *See* 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 31 (1963).

145. Other statutes, with specifically limited coverage, may be found in most of the states that provide that certain contracts shall not be enforceable unless executed in the form of a signed writing. Examples are new promises made without consideration ratifying a contract made in infancy or renewing an obligation barred by statute of limitations.

A set of New York statutes, enacted on the recommendation of the 1941 New York Law Revision Commission and set forth in N.Y. GEN. OBLIG. LAW §§ 5-1101 to 5-1115, 15-303 (McKinney 1989), eliminate the necessity of consideration for particular kinds of promises if made in writing and signed.

ligations Act.[146] Unlike the common law of seals, presumptions do not bind parties to written promises. Proving lack of consideration renders the written promise a legal nullity. On the other hand, these statutes can have a substantive effect (for example, the promisor is dead and suit is brought against the legal representative) when it is difficult to rebut the presumption.[147] Some states, however, have restricted the scope of the statute by holding that the phrase "written instrument is presumptive evidence of a consideration" means a formal document; an ordinary written letter containing a promise is not a formal document.[148] Notwithstanding, the following fifteen states have made written contracts presumptive evidence of consideration: Alabama;[149] Arizona;[150] California;[151] Idaho;[152] Iowa;[153] Kansas;[154] Kentucky;[155] Missouri;[156] Montana;[157] Nevada;[158] North Dakota;[159] Oklahoma;[160] South Dakota;[161] Tennessee;[162] and Texas.[163]

146. *See infra* text accompanying footnotes 178-81.

147. E.g., when suit is brought against the legal representative of a deceased promisor.

148. *See* Foltz v. First Trust & Sav. Bank, 194 P.2d 135 (Cal. Dist. Ct. App. 1948); Weisbrod v. Weisbrod, 81 P.2d 633 (Cal. Dist. Ct. App. 1938).

149. ALA. CODE § 12-21-112 (1975) (written contract is evidence of sufficient consideration).

150. ARIZ. REV. STAT. ANN. § 44-121 (1987) ("Every contract in writing imports a consideration.").

151. CAL. CIV. CODE §§ 1614, 1615 (West 1982) (presumption of consideration if written).

152. IDAHO CODE § 29.103 (1980) ("A written instrument is presumptive evidence of consideration").

153. IOWA CODE § 537A.2 (West Ann. (1987) (all signed written contracts "shall import a consideration").

154. KAN. STAT. ANN. § 16-107 (1988) (signed written contracts "shall import a consideration").

155. KY. REV. STAT. ANN. §§ 371.020, 371.030 (Michie/Bobbs-Merrill 1987) (presumption).

156. MO. ANN. STAT. § 431.020 (Vernon 1982) (instruments of writing "import" consideration; limited to negotiable instruments).

157. MONT. CODE ANN. §§ 1-4-202 to 1-4-206 (1991).

158. NEV. REV. STAT. ANN. § 52.315 (Michie 1986).

159. N.D. CENT. CODE § 9-05-10 (1987) ("A written instrument is presumptive evidence of a consideration"); N.D. CENT. CODE § 9-05-11 (burden of proving want of consideration).

160. OKLA. STAT. tit. 12, § 114 (1988) ("A written instrument is presumptive evidence of a consideration."); OKLA. STAT. tit. 12, § 115 (burden of proving want of consideration).

E. Statutes Where Writing Substitutes for Seals

In the eighteenth century, Lord Mansfield, unquestionably one of the greatest judges in the history of Anglo-American law, proposed radical changes for the legal enforceability of written contracts. In the celebrated case *Philans & Rose v. Van Mierop*,[164] he set forth two revolutionary propositions. First, if a promise is expressed in writing, it is enforceable without consideration.[165] Second, no consideration is required in a commercial transaction.[166] Although these two iconoclastic propositions were swiftly overruled,[167] twentieth-century state legislation has resurrected them. Legislatures enacted these statutes in response to laws abolishing seals as well as to reaffirm Mansfield's two propositions.[168] Although these miscellaneous state statutes cannot be conveniently stereotyped,[169] for the purposes of this Article they are grouped

161. S.D. CODIFIED LAWS ANN. § 53-6-3 (1990) ("A written instrument is presumptive evidence of a consideration.").

162. TENN. CODE ANN. § 47-50-103 (1988) (written contracts "are prima facie evidence of a consideration"); TENN. CODE ANN. § 47-50-104 (failure of consideration is defense).

163. Writing "imports" consideration. In 1911, TEX. REV. CIV. STAT. ANN. art. 7093 provided: "Every contract in writing hereafter made shall be held to import a consideration in the same manner and as fully as sealed instruments have heretofore done." This article was superseded by art. 27 (TEX. REV. CIV. STAT. ANN. art. 27 (West 1969)), which does not contain this language. Notwithstanding, case law continues the older statutory law. Now it is said that art. 27 itself creates a presumption in that written contracts "import" consideration. *See, e.g.*, Maykus v. Texas Bank & Trust Co. of Dallas, 550 S.W.2d 396 (Tex. Civ. App. 1977); *see also* Cortez v. National Bank of Commerce of Brownsville, 578 S.W.2d 476 (Tex. Civ. App. 1979).

164. 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765). The court sought to "modernize" the doctrine of consideration. A concurring judge noted that:

> [Consideration was] requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty . . . [I]t was intended as a guard against rash inconsiderate declarations: but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding . . . . [The promise] being, in this case, reduced into writing, is a sufficient guard against surprize; and therefore the rule of nudum pactum does not apply in the present case.

3 Burr. at 1670-71, 97 Eng. Rep. at 1038-39. From this statement one gleans the idea that the writing itself fulfills many of the functions of a legal formality, especially the cautionary, evidentiary, channeling, and deterrent policies.

165. 3 Burr. at 1670-71, 97 Eng. Rep. at 1038-39.

166. *Id.*

167. Rann v. Hughes, 7 T.R. 350, 101 Eng. Rep. 1014 n. (Ex. 1778).

168. 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

169. Under the heading *Consideration Not Required in Certain Commercial and Writ-*

into three classes: states making written contracts the equivalent of sealed instruments;[170] states adopting the Model Written Obligations Act;[171] and states providing that certain types of promises are legally valid and enforceable without the requirement of consideration.[172]

In reaction to the apparent need for a formal device to validate informal contracts, the legislatures of Mississippi[173] and New Mexico[174] elevated all written contracts to the level of sealed instruments. In addition, based on a former statute and current case law, Texas might also be included in this category.[175]

These statutory attempts to substitute the common-law doctrine of seals with the formality of a writing are rightfully criticized. Although in a concrete case the rebuttable presumption of consideration conferred on written promises can have significant impact,[176] making a written promise presumptive evidence of consideration is not that useful because consideration, when challenged, must be proven. If the presumption is deemed conclusive, it is subject to the same legitimate criticism that originally promoted legislative action.[177] The most innovative legislative option

ten Contracts, most of these statutes are collected, discussed, and evaluated in JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 261-70 (3d ed. 1987).

170. *See* MISS. CODE ANN. § 75-19-3 (1972); N.M. STAT. ANN. § 38-7-2 (Michie 1978); TEX. REV. CIV. CODE ANN. art. 27 (West 1911).

171. *See* 33 PURDON'S STATUTES ANN. §§ 6-8 (1967).

172. *See infra* Part III.F.

173. Any instrument of writing made and delivered by a private person without a seal or scroll, or other semblance or representation of a seal, shall be operative according to the intent of the maker, as expressed in the writing, in the same manner as to full extent as if the seal of the maker were thereto affixed.

MISS. CODE ANN. § 75-19-3 (1972).

174. N.M. STAT. ANN. § 38-7-2 (Michie 1978) ("Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done.").

175. The 1911 Texas statute that continues to be recognized by case law is a mirror image of the New Mexico statute cited in the previous footnote. Perhaps the key word is "imports," which may mean the equivalent of a seal. If so, those state statutes using "imports" consideration (Alabama, Arizona, Iowa, Kansas and Missouri) arguably might be construed like the New Mexico statute to make all written contracts the equivalent of sealed contracts. As has been suggested, the notion that the seal "imports consideration" is historically incorrect because the seal antedates consideration. Even though the import language is historically untidy, the intent of the word appears to equate writings with seals.

176. *But see* Patterson v. Chapman, 176 P. 37 (Cal. 1918) (testator's unsealed written promise to pay amount after death was held to create present obligation to pay, therefore consideration is presumed; it was not a voluntary gift for which promisee must prove consideration and testamentary in character).

177. E. D. Grigsby, *Private Seals Abolished*, 40 ILL. B.J. 383 (1952); Paul R. Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849 (1941); R. Thomas Nelson, Jr., *Status of the Common-Law Seal in Florida*, 1 U. FLA. L. REV. 385 (1948).

for states abolishing seals or the distinction between sealed and unsealed contracts was the Uniform (now Model) Written Obligations Act.[178] Only Pennsylvania (in 1927) and Utah (in 1929) adopted this act, and Utah quickly repealed it in 1933.[179]

The primary purpose of this act was to create a method for binding a gratuitous promisor. This would be especially useful in states that had abolished seals and thereby destroyed the ancient common-law method. Surprisingly, Pennsylvania is the only state that currently has this act in its statutes. Pursuant to this act, a signed written promise or release is enforceable without consideration if it contains an express statement that the signer intends to be legally bound.[180] Presumably, this act provides an effective, modern substitute for the seal.

The need for such a method is apparent. The availability of a power to bind is not contrary to public interest. Arguably, claims based on sufficient consideration or detrimental reliance on a gratu-

178. *See generally* Charles B. Blackmar, *Contracts—Proposals for Legislation Abrogating the Requirement of Consideration in Whole or in Part*, 46 MICH. L. REV. 58 (1947); E.D. Grigsby, *Private Seals Abolished*, 40 ILL. B.J. 383 (1952); William J. Lloyd, *Consideration and the Seal in New York—An Unsatisfactory Legislative Program*, 46 COLUM. L. REV. 1 (1946); R. Thomas Nelson, *Status of the Common-Law Seal in Florida*, 1 U. FLA. L. REV. 385 (1948); Comment, *An Analysis of Recent Illinois Legislation Concerning Seals*, 1 DEPAUL L. REV. 250 (1952); Note, *Present Status of the Sealed Obligation*, 34 ILL. L. REV. 457 (1936); Donald B. Holbrook, Comment, *Status of the Common-Law Seal Doctrine in Utah*, 3 UTAH L. REV. 73 (1952); Joel S. Jenkins, Jr., Note, *The Seal in North Carolina and the Need for Reform*, 15 WAKE FOREST L. REV. 251 (1979).

179. *See generally* Donald B. Holbrook, Comment, *Status of the Common-Law Seal Doctrine in Utah*, 3 UTAH L. REV. 73 (1952).

180. The Act as adopted in Pennsylvania is as follows: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or 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." PA. STAT. ANN. tit. 33, § 6 (1967).

The Act was applied in Gilmore v. Kessler, 22 Pa. D. 274 (1935). In Gershman v. Metropolitan Life Ins. Co., 176 A.2d 435 (Pa. 1962), a man, in contemplation of divorce, promised his wife that he would make their children the sole beneficiaries of his life insurance. The promise was in a written letter that contained the words "Approved by," followed by the man's signature. The court said: "[W]e fail to see how the simple approval . . . involved herein . . . can be considered an 'additional express statement' . . . to be legally bound." The wife's forbearance to contest the divorce was held to be unlawful consideration. Subsequent cases appear more readily to infer an intent to be bound from the use of legalistic language. *See, e.g.*, Paul Revere Protective Life Ins. Co. v. Weis, 535 F. Supp. 379 (E.D. Pa. 1981), *aff'd*, 707 F.2d 1403 (3d Cir. 1982); Fasco, A.G. v. Mondernage, Inc., 311 F. Supp. 161 (W.D. Pa. 1970).

itous promise should have priority over claims based solely on a formal writing. This problem requires separate analysis. A court can give priority to claims based on consideration without wholly invalidating claims based on formal writings. This is a complex problem with which the Model Written Obligations Act does not (but should) attempt to deal.

Moreover, the requirement that the writing contain the statement that "the signer intends to be legally bound" was supposed to impress upon the signer the legal significance of the signing. But that does not seem to fulfill the ceremonial and cautionary functions of a legal formality. A useful amendment to the Act would require that the special words be in the promisor's own handwriting. This requirement is similar to the formality of handwritten signatures on holographic wills. In any event, the wording of the proposed Model Written Obligations Act can be improved.[181]

Finally, some state legislation based primarily on the Uniform Commercial Code makes specified types of promises enforceable without consideration. In-depth discussion and evaluation of these statutes is beyond the scope of this Article. Nevertheless, they are introduced in the next section to provide a complete overview of all relevant legislative attempts to provide substitutes for promises under seal. Note that at the end of this Article there is a "Model Enforceable Promises Act" that is responsive to most of the deficiencies of the Model Written Obligations Act.

F. Statutes Making Certain Promises Enforceable Without Consideration

1. Consideration Not Required for Contract Modifications

The Uniform Commercial Code in section 2-209(1) provides: "An agreement modifying a contract within this Article needs no consideration to be binding."[182] A writing is required only in two situations: 1) If the contract as modified is within the Statute of Frauds;[183] or 2) if the original contract by its terms excludes modification or rescission by mutual consent except by a signed writing[184] (the typical no-oral-modification clause). There are state statutes that differ from UCC § 2-209 in only one respect: modifications without consideration require a writing to be legally effective.[185] The history of such legislation suggests that the writing alone, without any seal, serves the evidentiary and cautionary policies of a legal formality.[186] The law requires a writing to guarantee that the modification was a circumspect, deliberate act.[187] Considering the prevalence of pre-printed form contracts, it is questionable whether a mere writing fulfills the cautionary function once provided by sealed writings.

2. Firm or Irrevocable Offers in a Signed Writing

Certain state statutes make signed written promises without consideration irrevocable.[188] For instance, the "firm offer" section of the Uniform Commercial Code provides: "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time . . . ."[189] Similarly, notwithstanding the absence of consideration, a New York statute gives legal effect to a signed writing in which the offeror states that the offer is irrevocable.[190]

181. *See generally* Edwin M. Perkins & M.T. Van Hecke, *Contracts—Statutory Modifications of Consideration*, 9 N.C. L. REV. 196 (1931); William F. Reeve, *The Uniform Written Obligations Act*, 76 U. PA. L. REV. 580 (1928); Sherman Steele, *The Uniform Written Obligations Act—A Criticism*, 21 ILL. L. REV. 185 (1926); Note, *Contracts Without Consideration, The Seal and the Uniform Written Obligations Act*, 3 U. CHI. L. REV. 312 (1936).

182. U.C.C. § 2-209(1) (1992).

183. U.C.C. § 2-209(3) (1992).

184. U.C.C. § 2-209(2) (1992).

185. *See, e.g.*, MICH. COMP. L. ANN. § 566.1 (West 1967); N.Y. GEN. OBL. LAW § 5-1103 (McKinney 1989) (effective in 1936). Compare such statutes in the next section of this Article with MASS. GEN. LAWS ANN. ch. 4, § 9A (West 1986), which provides that an instrument reciting that it is a sealed instrument will be treated as a sealed instrument.

186. Without undertaking to enforce all promises and agreements, the common law might conceivably establish a more comprehensive basis or theory for the enforcement of deliberate promises intentionally made when they are of a character ordinarily relied upon by men in their economic or business dealings. The necessary deliberation, certainty and security could be insured by evidentiary and formal requirements.

SECOND ANNUAL REPORT OF THE [N.Y.] LAW REVISION COMMISSION 67, 172 (1936).

187. Unlike the Statute of Frauds, a written memorandum of the modification is insufficient. The modification itself must be in writing. *Cf.* DFI Communications, Inc. v. Greenberg, 363 N.E.2d 312 (N.Y. 1977).

188. For a critical comment concerning the need for such statutes, see Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

189. U.C.C. § 2-205 (1992).

190. Except as otherwise provided in section 2-205 of the Uniform Commercial Code . . . , when an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period

3. *Written Releases*

At common law, unless a release was under seal, it was generally ineffectual in the absence of consideration.[191] Certain state statutes dispense with the consideration requirement and validate written releases.[192] Section 3-107 of the UCC provides that "any claim of right arising out of alleged breach can be discharged in whole or in part by a written waiver or renunciation signed and delivered by the aggrieved party."[193] Other state statutes provide that a writing is a substitute for consideration in discharging a debt.[194] Consequently, the writing itself is effective, as was a sealed release at common law. For example, section 15-303 of the New York General Obligations Law provides: "A written instrument which purports to be a total or partial release of any particular claim . . . shall not be invalid because of the absence of consideration or of a seal."

4. *Written Guarantees of Pre-Existing Debts*

In the sense of a reciprocal bargained-for exchange, at common law past events did not constitute present consideration for a subsequent promise relating to those past events.[195] For example, a promise by a third party to guarantee payment of an existing debt requires new consideration to be enforceable. In reaction to the common-law rule, some states enacted laws specifically designed to allow recovery on a previous moral obligation created by benefits

or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable, it shall be construed to state that the offer is irrevocable for a reasonable time.

N.Y. GEN. OBLIG. LAW § 5-1109 (McKinney 1989).

191. E. ALLAN FARNSWORTH, CONTRACTS 306 (1990). Customarily, a release was made under seal. Statutes abolishing or eliminating the effect of a seal may not apply to releases under seal. *See supra* part III.A. (discussion of these statutes).

192. For a discussion of these statutes in the context of accord and satisfaction, see CALAMARI & PERILLO, *supra* note 169, at 267-68.

193. U.C.C. § 3-107 (1992). Because the word "renunciation" is a word of art customarily used regarding an oral release, this U.C.C. section ostensibly concerns a contractual discharge by way of release.

194. *See* CAL. CIV. CODE § 1524 (West 1982) ("part performance . . . expressly accepted . . . in writing, in satisfaction"); MONT. CODE ANN. § 28-1-1403 (1991) (identical to California); N.Y. GEN. OBLIG. LAW § 15-303 (McKinney 1990); TENN. CODE ANN. § 24-7-107 (1980) ("settlements in writing . . . for the composition of debts").

195. The modern acceptance of moral obligation as a validation device could validate such unbargained-for promises today. *See generally* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS Ch. 9 *Past Consideration and Moral Obligation* (forthcoming 1994).

conferred upon the promisor or a third person.[196] These laws are rarely applied and are effectively preempted by UCC section 3-408. The UCC provides that no consideration is needed to validate commercial paper governed by Article 3 if the instrument (which by definition must be in writing) is given for an antecedent indebtedness.[197] Additionally, the UCC does not require consideration to validate an indorsement guaranteeing payment of another's past debt.[198]

G. *Statutes Modifying the Form of Seals*

The following twenty-one state statutes create or validate newer forms of the seal or substitutes for the seal:[199] Alabama;[200] Colorado;[201] Connecticut;[202] Florida;[203] Georgia;[204] Idaho;[205] Illinois;[206] Massachusetts;[207] Michigan;[208] Mississippi;[209] Montana;[210]

196. This result can be reached under the Model Written Obligations Act. New York passed such a "past consideration" law in the N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 1989) (enacted in 1941 and since amended). The statute is analyzed in JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 268-69 (3d ed. 1987).

197. U.C.C. § 3-408 (1992).

198. U.C.C. § 3-408 cmt. 2 (1992).

199. See Part II of this Article for the history of the erosion of the form of the seal.

200. ALA. CODE § 35-4-22 (1991) ("All writings which import on their face to be under seal are to be taken as sealed instruments and have the same effect as if the seal of the parties was affixed thereto.").

201. COLO. REV. STAT. § 38-30-118 (1982) (scroll sufficient as seal).

202. CONN. GEN. STAT. ANN. § 52-179 (West 1991) (printed word "seal" or letters "L.S.").

203. FLA. STAT. ANN. §§ 695.07, 695.08 (West 1991) (scrawl or scroll, printed or written).

204. GA. CODE ANN. § 1-3-3(17) (Harrison 1982) (except official seals, scrawl, or any other mark intended as seal); GA. CODE ANN. § 9-3-23 ("No instrument shall be considered under seal unless so recited in the body of the instrument.").

205. IDAHO CODE § 29-107 (1980) (corporate seal; "impression or other material" upon the paper).

206. ILL. ANN. STAT. ch. 29, ¶ 1 (Smith-Hurd 1969) (scrawl has effect of seal).

207. MASS. GEN. LAWS ANN. ch. 4, § 9A (West 1986) (recital of sealing).

208. MICH. COMP. LAWS ANN. § 600-2139 (West 1986) (any device affixed to writing is valid as seal); MICH. COMP. LAWS ANN. § 565.39 (West 1986) ("A scroll or device used as a seal upon any deed of conveyance or other instrument" is valid as seal).

209. MISS. CODE ANN. § 75-19-3 (1991) (any instrument of writing without seal shall be operative in same manner and to full extent as if there was seal affixed).

210. MONT. CODE ANN. § 1-4-202 (1991) (seal can be made by "stamp or impression" or "by scroll of a pen, or by writing the word 'seal' against the signature of the writer").

New Jersey;[211] New Mexico;[212] Pennsylvania;[213] Rhode Island;[214] South Carolina;[215] South Dakota;[216] Vermont;[217] Virginia;[218] West Virginia;[219] and Wisconsin.[220]

H. State Statutes of Limitations

The common law required that an action on a sealed instrument be pleaded under the writ of covenant rather than assumpsit. In most jurisdictions, the distinction between these writs is of historic interest only. However, in states retaining the seal's common-law effect, modern cases are often concerned with the applicable statute of limitations. Because a sealed writing demonstrates a permanent and presumptively deliberate manifestation of the promisor's intent to be bound, some jurisdictions allow an action on a written contract or instrument under seal to enjoy a longer statute of limitations.[221] In these states, the outcome in a case may depend on whether a promise is under seal, thereby activating the longer

211. N.J. STAT. ANN. § 1:1-2.1 (West 1992) ("scroll or other device").

212. N.M. STAT. ANN. § 38-7-2 (Michie 1978) ("Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done.").

213. PA. STAT. ANN. tit. 33, § 6 (1967) (Model Written Obligations Act; "additional express statement . . . that the signer intends to be legally bound").

214. R.I. GEN. LAWS § 34-11-2 (1984) (word "covenant" used in any deed or instrument to which no seal is affixed shall have same effect as though seal had been affixed).

215. S.C. CODE ANN. § 19-1-160 (Law Co-op 1985) ("[W]henever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.").

216. S.D. CODIFIED LAWS ANN. § 2-14-3 (1992) (word "seal" written or printed, except on promissory note).

217. VT. STAT. ANN. tit. 1, § 133 (1985) (official seals "include an impression of the official made upon paper alone or by means of a wafer or wax affixed thereto"); VT. STAT. ANN. tit. 1, § 134 (private seals of person or corporation "shall consist of an impression as provided in section 133 of this title or of a wafer, wax or other adhesive substance affixed thereto or of a paper or other similar substance affixed thereto or the word 'seal' or the letters 'L.S.' opposite the signature").

218. VA. CODE ANN. § 11-3 (Michie 1989) ("scroll by way of a seal," "writing in its body says 'this deed', or 'this indenture,' or other words importing a sealed instrument, or recognizes a seal, shall be of the same force as if it were actually sealed").

This section does not change the distinction between sealed and unsealed instruments. Covington Virginian, Inc. v. Woods, 29 S.E.2d 406 (Va. 1944).

219. W. VA. CODE § 2-2-6 (1990) ("scroll by way of a seal").

220. WIS. STAT. ANN. § 990.01(37) (West 1985) (seal "includes the word 'seal,' the letters 'L.S.' and a scroll or other device intended to represent a seal, if any is affixed in the proper place for a seal, as well as an impression of a seal on the instrument").

221. *See, e.g.*, Solomon v. Birger, 477 N.E.2d 137 (Mass. App. Ct. 1985).

period of limitations.[222] Moreover, in states that have (or may have) abolished the seal or the distinction between sealed and unsealed writings, the applicable statute of limitations is a concern.

The table below provides a complete list of state statutes of limitations, with notations for each type of contract (sealed, written, or oral).

Alabama	10 years	Contract or Writing Under Seal (ALA. CODE § 6-2-3 (1991))
Alaska	10 years	Sealed Instrument (ALASKA STAT. § 09.10.040 (1992))
Arizona	6 years	Written Contract (ARIZ. REV. STAT. ANN. § 12-548 (1992))[223]
Arkansas	5 years	Writings Under Seal (ARK. CODE ANN. § 16-56-111(6) (Michie 1987))
California	4 years	Written Contracts (CAL. CIV. PROC. CODE § 337 (West 1982))
	2 years	Oral Contracts (CAL. CIV. PROC. CODE § 339 (West 1982))
Colorado	3 years	All Contracts (COLO. REV. STAT. § 13-80-101(a) (1982))
Connecticut	15 years	Sealed Contracts (CONN. GEN. STAT. ANN. § 52-573 (West 1991))[224]
	6 years	Simple or Implied Contracts (CONN. GEN. STAT. ANN. § 52-576(a) (West 1991))
Delaware	20 years	Common-Law Presumption of Payment After 20 Years[225]

222. Crane v. Pringle, 378 So. 2d 721 (Ala. 1979) (10 years); Telefair Fin. Co. v. Williams, 323 S.E.2d 689 (Ga. 1984) (20 years); Warfield v. Baltimore Gas & Elec. Co., 512 A.2d 1044 (Md. 1986) (12 years); Biggers v. Evangelist, 321 S.E.2d 524 (N.C. 1984) (10 years).

223. The Arizona statute was adopted from TEX. REV. CIV. STAT. ANN. art. 27 (West 1969).

224. The statute of limitations for contracts under seal was abolished.

225. Delaware adopts the common-law rule that a contract under seal is actionable

District of Columbia	12 years	Sealed Contracts (D.C. CODE ANN. § 12-301(6) (1989))
Florida	5 years	Written Contracts (FLA. STAT. ANN. § 95.11(2)(b) (West 1969))
	4 years	Oral Contracts (FLA. STAT. ANN. § 95.11(3)(k) (West 1969))
Georgia	20 years	Contracts Under Seal (GA. CODE ANN. § 9-3-23 (Harrison 1982))
Hawaii	6 years	All Contracts (HAW. REV. STAT. § 657-1(1) (1983))
Idaho	5 years	Written Contracts (IDAHO CODE § 5-216 (1980))
	4 years	Oral Contracts (IDAHO CODE § 5-217 (1980))
Illinois	10 years	Written Contracts (ILL. ANN. STAT. ch. 110, ¶ 13-206 (Smith-Hurd 1969))
	5 years	Unwritten Contracts (ILL. ANN. STAT. ch. 110, ¶ 13-205) (Smith-Hurd 1969))
Indiana	10 years	Written Contracts Other Than Payment of Money (IND. CODE ANN. § 31-1-2-2(6) (Burns 1993)) [20-yrs. pre-September 1, 1982]
	6 years	Written Contract for Payment of Money (IND. CODE ANN. § 3-1-2-2(5) (Burns 1993)) [10 yrs. pre-September 1, 1982]
	4 years	Unwritten Contracts (IND. CODE ANN. § 34-1-2-1 (Burns 1993))
	2 years	Unwritten Employment Contract (IND. CODE ANN. § 34-1-2-1.5 (Burns 1993))

for 20 years. Di Biase v. A.& D., Inc., 351 A.2d 865 (Del. Super. Ct. 1976); Garber v. Whittaker, 2 A.2d 85 (Del. Ch. 1938). The 3-year statute of limitations applicable to assumpsit actions, DEL. CODE ANN. tit. 10, § 8106 (1975), does not apply to contracts under seal. Leiter v. Carpenter, 22 A.2d 393 (Del. Ch. 1941).

Iowa	10 years	Written Contract (IOWA CODE ANN. § 614.1(5) (West 1950))
	5 years	Unwritten Contract (IOWA CODE ANN. § 614.1(4) (West 1950))
Kansas	5 years	Written Contract (KAN. STAT. ANN. § 60-511 (1983))
	3 years	Unwritten Contract (KAN. STAT. ANN. § 60-512 (1983))
Kentucky	15 years	Written Contract, Bond and Recognizance (KY. REV. STAT. ANN. § 413.090 (Michie/Bobbs-Merrill 1992))
	5 years	Unwritten Contract (KY. REV. STAT. ANN. § 413.120 (Michie/Bobbs-Merrill 1992))
Louisiana	10 years	Civil Law Prescription (LA. CIVIL CODE ANN. § 3499 (West 1993))
Maine	20 years	Contracts Under Seal (ME. REV. STAT. ANN. tit. 14, § 751 (West 1964))
Maryland	12 years	Contracts Under Seal and Other Specialties (MD. CTS. & JUD. PROC. CODE ANN. § 5-102 (1989))
Massachusetts	20 years	Contracts Under Seal (MASS. GEN. LAWS ANN. ch. 260, § 1 (West 1986))
Michigan	10 years	Public Office Bonds, Deeds and Mortgages (MICH. COMP. LAWS ANN. § 600.5807(2)(4) (West 1986))
	6 years	All Contracts Generally (MICH. COMP. LAWS ANN. § 600.5807(8) (West 1986))
	4 years	Surety Bond (MICH. COMP. LAWS ANN. § 600.5807(2) (West 1986))

Minnesota	6 years	All Contracts (MINN. STAT. ANN. § 541-05(1) (West 1988))
Mississippi	6 years	Written Contracts (MISS. CODE ANN. § 15-1-49 (1991))
	3 years	Unwritten Contracts (MISS. CODE ANN. § 15-1-29 (1991))
Missouri	10 years	Action Upon Writing Whether Sealed or Unsealed (MO. ANN. STAT. § 516.110(1) (Vernon 1952))
Montana	8 years	Written Contracts (MONT. CODE ANN. § 27-2-202(1) (1991))
	5 years	Unwritten Contracts (MONT. CODE ANN. § 27-2-202(2) (1991))
Nebraska	5 years	Written Contracts (NEB. REV. STAT. § 25-205(1) (1989))
	4 years	Unwritten Contracts (NEB. REV. STAT. § 25-206 (1989))
Nevada	6 years	Written Contracts (NEV. REV. STAT. ANN. § 11.190-(1)(a) (Michie 1986))
	4 years	Unwritten Contracts (NEV. REV. STAT. ANN.§ 11.190(2)(c) (Michie 1986))
New Hampshire	20 years	Contracts Under Seal (N.H. STAT. REV. ANN. § 508:5 (1983))
New Jersey	16 years	Sealed Instruments (N.J. STAT. ANN. § 2A:14-4 (West 1992))
New Mexico	6 years	Written Contracts (N.M. STAT. ANN. § 37-1-3(A) (Michie 1978))
	4 years	Unwritten Contracts (N.M. STAT. ANN. § 37-1-4 (Michie 1978))
New York	6 years	All Contracts (N.Y. CIV. PRAC. L. & R. § 213(2) (McKinney 1990))

	6 years	Sealed Instruments (N.Y. CIV. PRAC. L. & R. § 213(3) (McKinney 1990))
North Carolina	10 years	Sealed Instrument (N.C. GEN. STAT. § 1-47(2) (1992))
North Dakota	6 years	All Contracts (N.D. CENT. CODE § 28-01-16(1) (1974))
Ohio	15 years	All Specialties and Contracts (OHIO REV. CODE ANN. § 2306.06 (Baldwin 1991))
Oklahoma	5 years	All Contracts (OKLA. STAT. ANN. tit. 12, § 95(1) (West 1988))
Oregon	6 years	All Contracts (OR. REV. STAT. § 12.080 (1990))
	10 years	Sealed Contracts pre-August 13, 1965 (OR. REV. STAT. § 12.070 (1990))
Pennsylvania	20 years	Sealed Instruments until June 27, 1998 (PA. STAT. ANN. tit. 42, § 5529 (1987))
	6 years	All Contracts after June 27, 1988 (PA. STAT. ANN. tit. 42, § 5529 (1987))
Puerto Rico	None	None
Rhode Island	20 years	Contracts Under Seal (R.I. GEN. LAWS § 9-1-17 (1984))
South Carolina	20 years	Sealed Instrument (S.C. CODE ANN. § 15-3-520(2) (Law Co-op 1985))
	6 years	Sealed Note, Personal Bond and All Other Contracts (S.C. CODE ANN. § 15-3-530 (Law Co-op 1985))
South Dakota	20 years	Sealed Instrument Except Real Estate Mortgage (S.D. CODIFIED LAWS ANN. § 15-2-6(2) (1992))
	15 years	Conclusive Presumption of Payment of Real Estate Mortgage (S.D. CODIFIED LAWS ANN. § 15-2-28 (1992))
Tennessee	6 years	Sealed and Unsealed Contracts (TN. CODE ANN. § 28-3-109(3) (1980))

Texas	4 years	All Contracts (TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 1969))
Utah	6 years	Written Contracts (UTAH CODE ANN. § 78-12-23(2) (1992))
	4 years	Unwritten Contracts (UTAH CODE ANN. § 78-12-25(1) (1992))
Vermont	8 years	Specialties (VT. STAT. ANN. tit. 12, § 507 (1985))
Virginia	5 years	All Contracts, Sealed or Unsealed (VA. CODE ANN. § 8.01-246(2) (Michie 1989))
U.S. Virgin Islands	20 years	Sealed Instrument (V.I. CODE ANN. tit. 5, § 31(1)(c) (1967))
Washington	6 years	Written Contracts (WASH. REV. CODE ANN. § 4.16.040 (West 1988))
	3 years	Unwritten Contracts (WASH. REV. CODE ANN. § 4.16.080(3) (West 1988))
West Virginia	10 years	All Sealed and Unsealed Contracts (W. Va. Code § 55-2-6 (1990))
Wisconsin	6 years	All Contracts (WIS. STAT. ANN. §§ 893.43, 893.61 (West 1985))
Wyoming	10 years	Specialty or Any Written Contract (WYO. STAT. § 1-3-105(a)(ii) (1977))
	8 years	Unwritten Contracts (WYO. STAT. § 1-3-105(a)(ii)(A) (1977))

An exact summary of these statutes is difficult. The Restatement (Second) of Contracts indicates that contracts under seal "are clearly recognized in the statutes of limitations of twenty American jurisdictions, and the seal seems to be recognized in five states where there is no special period of limitations."[226] As an update to the Restatement, twenty-two American jurisdictions presently acknowledge contracts under seal in their statutes of limitations (Alabama, Alaska, Arkansas,[227] Colorado, Delaware, District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virgin Islands, Virginia, West Virginia, and Wisconsin). As previously discussed, the state of Washington, and perhaps Hawaii, Michigan, Oregon, South Dakota, and Utah, might be added to this list.[228] Thus, one could infer that contracts under seal are alive and vital in twenty-seven American jurisdictions. Such an inference illustrates the problem of precisely stating the current status of promises under seal.

226. RESTATEMENT (SECOND) OF CONTRACTS, § 94, Statutory Note (1981).

IV. SUMMARY, CONCLUSION, AND SUGGESTED LEGISLATION—MODEL ENFORCEABLE PROMISES ACT

As this Article demonstrates, the law of seals and statutory substitutes is complex. Furthermore, the law of seals is not dead, but is alive, and apparently vital in at least half of our jurisdictions. This Article has attempted to present and explain the stature and status of the law of promises under seal. The dilemma is what should be done with the law of contracts under seal today. Over a half-century ago, Samuel Williston, similarly perplexed, posed the issue:

> Of course, contracts under seal are in their fullest sense abolished in a large number of jurisdictions, presumably a majority of the United States. That makes it a difficult question, what we are going to do in the way of restatement; but they are still of sufficient importance in some jurisdictions, at least to make it seem desirable to restate the law on the subject and simply call attention to the fact that the law on these formal contracts has ceased to be important in some jurisdictions. Of course, in many jurisdictions although certain characteristics of formal contracts are abolished, certain characteristics remain. Therefore we cannot simply dismiss the whole subject even in most of the jurisdictions where seals no longer have their common law force.[229]

Initially, it seems necessary to dispel as much confusion as possible by stating the exact statutory status of promises under seal. Roughly speaking, we can draw a broad negative conclusion (about

227. Although Arkansas has abolished the distinction between sealed and unsealed contracts in Ark. Const. Sched. § 1, the statute of limitations expressly applies to both.

228. *See supra* part III.A.

229. Proceedings, The American Law Institute, 4th Annual Meeting, 1926, p. 119.

one-half of our jurisdictions have abolished the seal) or a positive one (about one-half of our jurisdictions legally recognize a promise under seal). However, a more precise conclusion is possible.

Seals are not recognized in one state (Louisiana) and one territory (Puerto Rico). The status of seals is unclear in Hawaii.[230] On the other hand, Pennsylvania has adopted the Model Written Obligations Act,[231] and Mississippi, New Mexico, and perhaps Texas make written contracts comparable to sealed contracts.[232] Fifteen states (Alabama, Arizona, California, Idaho, Iowa, Kansas, Kentucky, Missouri, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas) make written contracts presumptive evidence of consideration.[233] Arguably, eight states (Alabama, Connecticut, Florida, Hawaii, Michigan, New Jersey, Washington, and Wisconsin) preserve the seal's validity but limit its operation to an evidentiary rebuttable presumption of consideration.[234] Finally, twenty-five states (Alaska, Arizona, Arkansas, California, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming) and the U.S. Virgin Islands have statutes apparently abolishing private seals and making them wholly inoperative.[235]

Consequently, it is commonly viewed that seals have been abolished in approximately half of the American jurisdictions. However, that notion is inaccurate for at least four reasons. First, in seven of the twenty-six jurisdictions purporting to abolish seals (Alaska, Michigan, Oregon, South Dakota, Utah, U.S. Virgin Islands, and Washington), it is questionable that their statutes completely abolish the common-law doctrine of seals.[236] Second, twelve of the twenty-six jurisdictions (Arizona, California, Iowa, Kansas, Kentucky, Missouri, Montana, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas) statutorily elevate written contracts to a presumption of consideration.[237] Third, two of the

230. *See supra* note 110.
231. *See supra* note 180.
232. *See supra* part III.E.
233. *See supra* part III.D.
234. *See supra* part III.C.
235. *See supra* part III.A.
236. *See supra* part III.A.
237. *See supra* part III.D.

twenty-six jurisdictions (Mississippi and possibly Texas[238]) make written contracts the equivalent of sealed contracts. Fourth, New York has a series of statutes that eliminate the necessity of consideration for particular types of promises if made in writing and signed.[239]

One can make a broad conclusion from the morass of state legislation concerning promises under seal: in virtually all states, there is a shared conviction that some formality should exist for validating promises. The problem is that unharmonious, piecemeal state statutes fail to provide a legitimate legal formality for validating promises. At one time, writings under seal efficaciously supplied that formality. However, seals ceased to function as form and should now be jettisoned.[240] Common sense dictates that if one seriously desires to make a legally enforceable promise, the law should provide a means to accomplish that end. As this Article has shown, too much confusion exists among the various jurisdictions in providing, limiting, or denying that means. If the seal is not reinstituted to its former status as a viable legal formality, then a uniform legislative approach providing a similar valid legal formality merits serious consideration. This Article suggests that this legislation be entitled the Model Enforceable Promises Act (MEPA).

Any legislation must provide procedures that fulfill all the functions of a legal formality: ceremonial, evidentiary security, cautionary, deterrent, channeling, clarification and certainty, and economic efficiency.[241] One should understand that a signed writing, even with the words "with intent to be legally bound" (as required by the Model Written Obligations Act[242]), is not a valid legal formality. There is nothing sacrosanct, ceremonial, evidentiary, or cautionary about a signed writing today given our varied capacity to reproduce and alter writings and our pervasive use of standardized forms.

Thus, primary focus should not be on the form per se, but on its execution. Four issues in particular should be addressed. First, the writing should ceremoniously personify the signer, as did the

238. *See supra* note 173-75 and accompanying text.
239. *See supra* notes 145, 186-187, 190, 194, 196. The New York statutes are analyzed in JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 263-69 (3d ed. 1987).
240. *See supra* part II.
241. *See supra* part II.
242. *See supra* note 180.

signet ring or the king's foretooth "cera impressa."[243] Possible methods to accomplish this include a recorded voice print or a videotape. Considering economic efficiency, a thumbprint impressed on the signed writing suitably personifies the signer.[244] Second, to ratify the functions of caution and deterrence, prior to signing and impressing the thumbprint, the signer should write a statement such as: "I intend all promises in this writing to be legally enforceable." Third, to provide evidentiary security and certainty, and to deter alteration of the writing, the promisor should sign and impress a thumbprint on each page of the writing. Fourth, this Act provides, inter alia, a method for property owners to transfer property to another (e.g., like the execution of a will). So by analogy, and to enhance all the functions of a legal formality, the foregoing execution should comply with the formalities required by the jurisdiction for the execution of a written will, such as requiring at least two impartial witnesses, one of whom is a notary public.

There are other issues to consider in addition to the execution of the writing. One such issue is when the written promise becomes effective and when the promisse's rights vest. Unlike a will, which is ambulatory and can be revoked until death, the written promise (as was true of sealed instruments) should be effective on delivery and rights should vest in the promisee at that time. To avoid problems with intent to deliver, constructive and symbolic delivery, and delivery in escrow or to third parties, a clear delivery requirement should exist. Arguably, physical delivery to the promisee provides a clear rule for issues of effectiveness and vesting. Note that the mailbox or dispatch rule would then be inapplicable.

Another problematic issue is the promisee's priority rights regarding third-party claims and rights if the subject matter of the written promise is property. At a minimum, conflicts may exist between state real property priority law and the state's version of UCC Article 9 concerning a party with a security interest in personal property. A consideration of state laws regarding priority rules for property rights and interests is beyond the scope of this Article. However, these laws merit serious consideration by each state considering adoption of this Article's proposed legislation. For instance, regarding UCC Article 9 security interests, the rule

243. *See supra* note 48.

244. The author's first-year contracts class divined this idea.

should depend on whether that interest vests prior to or after the delivery of the written promise. Additionally, if the proposed Act requires recording of the written promise, recording should control the timing of priority rules. Perhaps the promisee should take subject to any prior Article 9 filed security interest but not be personally responsible for the underlying debt. Likewise, the promisee's rights should be superior to any subsequently recorded Article 9 or real property interest. Perhaps the promisee's interest should be absolute regarding subsequently arising interests. The following model act suggests one approach to priority issues.

Regarding the functions of evidentiary security, clarification, and certainty, a recording requirement (analogous to real property deeds) for intangible, in personam rights created by the writing should be evaluated. The writing itself could be recorded or put in permanent form on a disk that is centrally stored (e.g., with the secretary of state) or with other designated repositories, such as banks or clerks of civil courts.

These and other issues will arise if thoughtful deliberation is applied to legislation such as this Article's Model Enforceable Promises Act. If promise is the basis of legally enforceable promissory obligations,[245] then it is fitting that a dialectic about the necessity and structure of a legal formality for enforcing promises should commence.

To assist that deliberation, the following is an example of one potential legislative approach.

MODEL ENFORCEABLE PROMISES ACT (MEPA)

1) A written promise [or release[246]] hereafter made, executed, and signed by the person promising (promisor) as provided by this Act, shall be valid and legally enforceable without regard to the absence of consideration or of a seal.

2) In the presence of two witnesses, one of whom is a notary public, the promisor shall

245. *See, e.g.*, Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045 (1992); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

246. The Model Written Obligations Act included both written promises and releases. *See supra* note 168. However, many states currently have statutes dispensing with the consideration requirement and validating written releases. *See supra* notes 178-81. It seems preferable to omit releases from this model act and leave the matter of releases to other state statutory law. It is mentioned here just to make the reader aware of this issue.

a) prior to signing write, or in the presence of the witness direct another to write,[247] the following words on the last page of the writing: "I intend all promises in this writing to be valid and legally enforceable."; and

b) sign, or in the presence of the witnesses direct another to sign, every page of the writing; and

c) personify the writing by impressing a thumbprint or similar personal attribute[248] on every page of the writing.

3) A written promise that satisfies all the formalities of subsection (2) shall be recorded in the office of the Secretary of State in accordance with the procedures followed by the Secretary of State for recording documents. [The Act may provide different or alternate methods of recording as well as priority rules.]

4) A written promise shall be effective and all rights stated therein shall vest in the promisee when the written promise is recorded pursuant to subsection (3). If the writing is so recorded, the promisee's rights are superior to all claims and rights of third persons arising under applicable state statutory law. In the absence of applicable state statutory law, the promisee's rights (if recorded as provided by this Act) are absolute and not subject to any claims or rights of third persons. If the written promise is not recorded as provided by this Act, the promisee's rights as stated in the writing are subject to the applicable common law and state statutes concerning the validity and enforceability of contract rights including claims and rights of third persons, but in no instance shall the promisee be liable for any debt or obligation of the promisor.

5) A written promise that satisfies subsections (2) and (3) shall conclusively establish a valid and legally enforceable promise. If subsections (2) and (3) are not completely satisfied, extrinsic evidence of a promisor's intent to create a valid and legally enforceable promise is inadmissible in any action to enforce the promise.

247. If the promisor cannot write, then the promisor should be afforded the opportunity to have another write at the promisor's direction. If the promisor's directive is made in the presence of the witnesses, the reasons for requiring formalities will still be fulfilled.

248. Recognition of personal attributes other than a thumbprint is done to provide an opportunity for a person without thumbs to create legally enforceable promises.

THE EMERGENCE OF DECONTEXTUALIZATION IN THE EQUAL PROTECTION JURISPRUDENCE OF THE UNITED STATES SUPREME COURT

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I. INTRODUCTION

It should not come as news to anyone that the United States is still a "house divided."[1] One group, predominately white and relatively affluent, enjoys the prerogatives of heightened expectations and accomplishments. The other group, predominately nonwhite and relatively unaffluent, suffers from the existence of reduced or nonexistent expectations and accomplishments. Our nation was divided into these sometimes warring camps from the start, and it continues to be divided today.

Notwithstanding our nation's recent advance in race relations, we are still at a crossroads. A great debate continues concerning how and on what terms we will live together. One road leads to a new ideology of equality and tolerance; the other leads to a resurgence of an old ideology of inequality and intolerance. We must gather the strength to make an historic choice between these two ideologies as we enter the new millennium.

While many individual and collective decisions will be necessary to begin and sustain this journey, the United States Supreme Court inevitably will play a major role in shaping its course. The Court recently has adopted a paradigm regarding remedial racial discrimination measures that will strongly and adversely affect the course and substance of the dialogue between these two ideologies within our "divided house." The paradigm of race neutrality, and

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1. As Abraham Lincoln stated in his speech of June 18, 1858 at Springfield, Illinois: "A house divided against itself cannot stand." *See* CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 2 (Paul M. Angle ed. 1958) (quoting from scripture, Mark 3:25).