

Winter 2017

## Contract, Power, and the Value of Donative Promises

Sabine Tsuruda

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Sabine Tsuruda, Contract, Power, and the Value of Donative Promises, 69 S. C. L. REV. 479 (2017).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [dillarda@mailbox.sc.edu](mailto:dillarda@mailbox.sc.edu).

**CONTRACT, POWER, AND THE VALUE OF DONATIVE PROMISES**

Sabine Tsuruda\*

I. INTRODUCTION.....	480
II. THE DONATIVE PROMISE PRINCIPLE.....	484
A. <i>Consideration</i> .....	485
1. <i>Reciprocity and Exchange</i> .....	487
2. <i>Naming Rights and Obligations to Use Donations for a Charitable Purpose</i> .....	488
B. <i>Promissory Estoppel</i> .....	490
1. <i>Inducing Reliance</i> .....	491
2. <i>Caretaking and Indigence</i> .....	496
3. <i>Enforcement Without Actual Reliance? Restatement 90(2)</i> .....	499
III. THE INEGALITARIAN CHARACTER OF THE DONATIVE PROMISE PRINCIPLE.....	501
A. <i>Perverse Legal Reasons to Succumb to Improper Influence</i> .....	501
B. <i>Reifying Social Inequality</i> .....	503
IV. REMEDYING THE INEGALITARIAN DEFECTS OF THE DONATIVE PROMISE PRINCIPLE.....	506
A. <i>Enforcing Donative Promises in the Absence of Reliance</i> .....	507
B. <i>Alternatives</i> .....	509
1. <i>Probable Reliance</i> .....	509
2. <i>Need-Based Enforcement</i> .....	510
3. <i>Default Enforcement</i> .....	512
C. <i>Implementation and Scope</i> .....	513
V. SUPPORTING THE MORAL VALUES OF DONATIVE PROMISES.....	515

---

\* Predoctoral Fellow in Law and Philosophy, UCLA School of Law. Ph.D. Candidate, UCLA Department of Philosophy. J.D., 2016, UCLA School of Law. I am grateful for help and comments on this topic from Jeremy Anderson, Aditi Bagchi, Lindsey Chambers, Hugh Collins, Nicolas Cornell, Hanoch Dagan, Jorah Dannenberg, James Edwards, Max Etchemendy, Barbara Herman, Martijn Hesselink, Katherine Kim, Lyn Tjon Soei Len, Gillian Lester, David Plunkett, Richard Re, Seana Shiffrin, Noah Zatz, the participants in the 2017 CSECL International Summer School on Contract Law and the Moral Limits of Markets, the 2016 Stanford Legal Philosophy Workshop, and the members of the UCLA Ethics Writing Seminar.

A. <i>Enforcement Need Not Obscure the Motives of Donative Promisors</i> .....	516
B. <i>Authenticity</i> .....	519
C. <i>Trust</i> .....	520
1. <i>Strategic Reliance</i> .....	521
2. <i>Contingency Plans</i> .....	523
VI. TOWARD A CONTRACT LAW FOR DONATIVE PROMISES.....	525
A. <i>Volunteer Work and the Heterogeneity of Donative Promises</i> .....	526
1. <i>Promisee Power</i> .....	526
2. <i>Inclusivity and Liability for Defects in Performance</i> .....	527
3. <i>Discrimination and Associational Freedom</i> .....	529
VII. CONCLUSION.....	531

## I. INTRODUCTION

If I promise to pay your tuition on the condition that you quit smoking and you accept, we have likely made a contract. Under U.S. law, a contract is described as a legally enforceable promise or set of promises,<sup>1</sup> and a promise is generally enforceable when it is made in exchange for valuable consideration,<sup>2</sup> such as money, goods, services, and promises to do or transfer something in the future, including a promise to abstain from smoking.<sup>3</sup> But if I just promise to pay your tuition, regardless of whether

---

1. “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981). In this paper, I assume that contractual (and moral) obligations to perform may sometimes arise merely from having made a promise. Compare CHARLES FRIED, CONTRACT AS PROMISE (2d ed. 2015) (arguing that contracts are legally enforceable promises), with P.S. ATIYAH, PROMISES, MORALS, AND LAW (1983) (arguing that a promise normally does not create an obligation to perform until the promisee relies on the promise).

2. Courts will generally not inquire as to the adequacy of consideration. See RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. LAW INST. 1981) (“If the requirement of consideration is met there is no additional requirement of (a) a gain or advantage to the promisor and loss to the promisee; (b) equivalence of values exchanged, or (c) mutuality of obligation.”). Even so, “gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance.” *Id.* § 208 cmt. c.

3. See *Talbott v. Stemmons’ Ex’r*, 12 S.W. 297, 298 (1889) (“The right to use and to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law.

you quit smoking, my promise likely does not create a contract. Promises to make gifts are—precisely because of their donative character—not supported by consideration.<sup>4</sup> Instead, donative promises are typically enforceable only when the promise reasonably and foreseeably induces the promisee to rely on the promise.<sup>5</sup> In this Article, I will refer to the principle that donative promises are typically unenforceable in the absence of reliance as the “donative promise principle.”<sup>6</sup>

This Article argues that the donative promise principle is an inegalitarian principle. Donative promises often are made against a background of social and economic inequality, and the promised gift is often something the promisee really needs, such as food or shelter.<sup>7</sup> The promised gift can accordingly function as an inducement to encourage the promisee to conform to promisor values and expectations. By making promissory estoppel the primary basis for enforcing donative promises, the donative promise principle gives the promisee a legal reason to rely on the promise, namely, the availability of enforcement.<sup>8</sup> Thus, when a promisor attempts to use the promise as a source of influence over the promisee—the promisor might encourage religious conversion<sup>9</sup> or conformity with gender stereotypes<sup>10</sup>—the promisee has a legal incentive to submit and thereby

---

The abandonment of its use may have saved him money, or contributed to his health; nevertheless the surrender of that right caused the promise [to pay the plaintiff \$500], and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to support the promise.”); 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:4 (4th ed. 2015) (“[A]bstaining from smoking and drinking, though in fact in the particular case a benefit to the promisee’s health, finances, and morals and of absolutely no tangible benefit to the promisor, is a legal detriment insofar as the promisee is concerned, and if it is requested as such by the promisor, it is sufficient consideration for his promise.”).

4. See *infra* Section II.A. For a critical view, see Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 298–99 (1992) (arguing that there may be no meaningful distinction between gifts and bargains).

5. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981). Even then, a judge may refuse to enforce the promise if enforcement is not required to avoid injustice.

6. Here I follow Melvin Eisenberg’s use of the term “donative promise principle.” See Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 822 (1997).

7. See *infra* Section II.B.1.

8. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

9. See *infra* notes 84–85 and accompanying text.

10. See *infra* text accompanying notes 77–81; cf. *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898) (holding that a grandfather’s promise of financial support was enforceable by

reasonably and foreseeably rely on the promise.<sup>11</sup> Such incentives not only risk reinforcing preexisting inequality but are also at odds with unconscionability, duress, and undue influence doctrines, which aim to remove legal incentives to engage in improperly induced courses of action.<sup>12</sup>

The donative promise principle is also inegalitarian with respect to the promises it leaves outside of contract's reach. Promissory estoppel typically requires that the plaintiff change her financial position in reliance on the promise.<sup>13</sup> Poverty can thus be a barrier to such reliance—the promisee may not have a job from which to take time off or money to invest in reliance on the gift. Caretakers who are promised financial support out of gratitude or recognition of their care may likewise fail to rely on such promises because they might have continued their caretaking anyway.<sup>14</sup> Yet the unlikelihood of detrimental reliance does not mean that caretaking and indigent promisees are any less in need of the promised gifts, nor are they less vulnerable to promisors' attempts at exploiting that need. By failing to reach such promises, the donative promise principle leaves such caretaking and poor promisees dependent on the whim and continued good will of promisors.

In contrast to the standard doctrinal position, this Article argues that donative promises should sometimes be enforceable in the absence of reliance. By dispensing with the requirement of actual reliance, such a regime could counteract the risk of improper promisor influence by eliminating legal reasons to conform to promisor influence. Enforcement in the absence of reliance would also vest legal power over performance in indigent and caretaking promisees. Such power would not only insulate such promisees from promisor exploitation but would also be valuable as a public rejection of their otherwise dependent status.

Commentators nevertheless worry that enforcement would obscure the moral and affective motives of the promisor, leaving it unclear whether the gift was ultimately given out of, for example, friendship, or from fear of

---

the granddaughter because the grandfather made the promise to encourage her to stop working and she quit her job in reliance on the promise).

11. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

12. *See infra* Section III.A.

13. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (AM. LAW INST. 1981).

14. *See, e.g.,* Dewein v. Estate of Dewein, 174 N.E.2d 875, 877 (Ill. App. Ct. 1961) (holding that a sister did not detrimentally rely on a promise by her brother to support her “for life” out of gratitude for taking care of their mother because the sister would have kept taking care of their mother regardless of the promise).

legal sanctions.<sup>15</sup> By undermining the communicative power of donative promises, enforcement would taint the gift-giving practice.<sup>16</sup> Yet the specter of enforcement need not obscure promisors' motives, at least not any more so than criminal sanctions might obscure people's motives for stopping their cars at crosswalks or taking care of their children. Indeed, I argue that contractual enforcement may actually enhance the authenticity of donative promissory relationships by mitigating the risk that the promised gift will be perceived as a carrot to conform to the promisor's wishes.

Enforcement could also support trust in donative promissory relationships.<sup>17</sup> The more a promisee relies on a promise, the more likely a promisor is to feel guilty for breaking the promise.<sup>18</sup> Accordingly, promisees will tend to strategically rely in anticipation of such "psychological lock-in" in a legal regime where promises are not enforced.<sup>19</sup> I argue that strategic reliance can be manipulative and that the existence of such a strategy may give a promisor reason to doubt the authenticity of the promisee. Strategic reasons to over-rely—and, indeed, to rely at all—may therefore compromise even the most well-intentioned of relationships. By obviating strategic reasons to rely, legal enforcement can enhance parties' power to autonomously shape their relationship and support the trust upon which promising depends.

Donative promises are, however, not homogeneous. Gift giving occurs within a variety of settings that may be characterized by different power dynamics and moral values, some of which may be ill-served by contract principles. To illustrate, I discuss one such case: promises to volunteer one's labor. While commentary on the donative promise principle focuses on

15. See, e.g., Eisenberg, *supra* note 6, at 848–49. While Eisenberg here aims to offer a moral argument against enforcing donative promises, see Eisenberg, *supra* note 6, at 840, in other works Eisenberg and other legal theorists dispute whether it would be unduly economically costly to administer enforcement of donative promises. Compare Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941) (arguing that enforcement of donative promises poses evidentiary problems), and Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 2–14 (1979) (discussing evidentiary challenges to enforcing informal and formal donative promises generally), with Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 51–54 (1992) (arguing to the contrary).

16. See, e.g., Eisenberg, *supra* note 6, at 848.

17. Rebecca Stone & Alexander Stremitzer, *Promises, Reliance, and Psychological Lock-In* (UCLA Sch. of Law, Law-Econ Research Paper No. 15–17, 2016).

18. See generally *id.* (examining whether promisees overinvest in order to make their promisors more willing to keep their promises in a legal regime that does not enforce promises).

19. *Id.* at 44.

promises of money and interpersonal caretaking,<sup>20</sup> volunteer work has received much less, if any, attention. This is regrettable because volunteer work is potentially a paradigm illustration of how contract can be a poor fit for donative promises. As principles for market labor, service and employment contract principles may compromise the associational and personal values of volunteer work. For example, duties of flawless performance under service contracts may undermine volunteer work's potential to be inclusive with respect to skill and ability.<sup>21</sup> Contract law more broadly may therefore need to be adjusted to accommodate donative promises.

This Article develops these arguments by inquiring how contract shapes power and social ties within donative promising practices.<sup>22</sup> Part II provides an overview of the scope and content of the donative promise principle and the character of the reliance it requires. Part III argues that the donative promise principle makes for an inegalitarian contract law. Part IV argues that enforcing donative promises independent of reliance could lessen inequality within the promissory relationship and among wealthy and poorer promisees. Part V argues that enforcement in the absence of reliance also serves promissory authenticity and trust. Part VI uses the underexamined case of volunteer work to illustrate how enforcement must also be calibrated to heterogeneity within donative promising.

## II. THE DONATIVE PROMISE PRINCIPLE

Under the donative promise principle, a promise to make a gift is typically not enforceable unless the promisee has detrimentally relied on that promise. This Part provides a doctrinal explanation of the content and scope of the donative promise principle. In Section A, I argue that donative promises are normally not enforceable under a consideration theory. Donative promises purport to be made from an affective or moral motive,

---

20. See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1989) (analyzing the formal and substantive differences between donative transfers and bargained-for exchanges).

21. Cf. Sabine Tsuruda, *Volunteer Work, Inclusivity, and Social Equality*, in THE PHILOSOPHICAL FOUNDATIONS OF LABOR LAW (Hugh Collins et al. eds., forthcoming) (arguing that volunteer work's skill-based inclusivity can provide a legal and moral basis for distinguishing volunteer work from employment for purposes of wage and hour law).

22. This methodology contrasts with the two dominant strategies for criticizing the donative promise principle: a public policy in favor of charitable giving, or alternatively, rejecting any meaningful distinction between bargains and gifts. See, e.g., Baron, *supra* note 20 (arguing that gifts are forms of exchanges and that the consideration doctrine devalues gifts by treating gifts differently than bargains).

such as friendship or civility, and are neither induced by nor conditioned on an exchange. Thus, under the donative promise principle, promissory estoppel is the primary legal theory for enforcing a donative promise. Charitable subscriptions, however, are sometimes enforced under a consideration theory, and hence constitute a significant but narrow exception. In Section B, I explain that donative promises can induce detrimental reliance either by empowering the promisee to pursue a new project or by influencing the promisee to conform to promisor values. I then address donative promises that tend to be unenforceable under a reliance theory, using promises to caretakers and poor promisees as paradigm examples.

### A. Consideration

A promise is typically legally enforceable when made in exchange for valuable consideration<sup>23</sup>—for some bargained-for good,<sup>24</sup> service, forbearance, or promise of later performance.<sup>25</sup> But part of what makes a

23. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

24. “To constitute consideration, a performance or return promise must be bargained for.” RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (AM. LAW INST. 1981).

25. See RESTATEMENT (SECOND) OF CONTRACTS §§ 71(3), 75 (AM. LAW INST. 1981). The extent to which the consideration doctrine should be the sole or even a primary basis for contract enforcement is controversial. For a moral argument in favor of the consideration doctrine playing such a role, see, for example, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (arguing that contract law concerns agreements to transfer legal entitlements, that the consent of a holder of a legal entitlement to be legally bound to transfer that entitlement is required for the transfer of that entitlement to be legally valid, and that the presence of bargained-for consideration can manifest such consent to be bound). For an argument that promissory morality, rather than the presence or absence of consideration, should guide enforcement in contract law, see FRIED, *supra* note 1, at 28–39 (“I conclude that the standard doctrine of consideration, which is illustrated by the preceding ten quite typical common law cases, does not pose a challenge to my conception of contract law as rooted in promise, for the simple reason that that doctrine is too internally inconsistent to offer an alternative at all.”). Lord Mansfield famously sought to abolish the doctrine of consideration in favor of a doctrine of “moral consideration”:

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.

Hawkes v. Saunders, 1 Cowp. 289, 98 Eng. Rep. R. 1091 (1782). For a discussion of the evolution of Lord Mansfield’s ideas on consideration, see generally Bernard L. Shientag, *Lord Mansfield Revisited—A Modern Assessment*, 10 FORDHAM L. REV. 345 (1941).



promise donative is that no such exchange induces the promise.<sup>26</sup> A foundation does not ask for payment as a condition of providing vaccines; a volunteer does not work for a wage.<sup>27</sup> Rather, donative promises are voluntary promises to transfer something—a good, service, money, real estate—from an affective or moral motive, such as love or civic duty.<sup>28</sup>

For example, in *Dougherty v. Salt*, an aunt gave a signed promissory note for \$3,000 to her eight-year-old nephew for “value received.”<sup>29</sup> The court held that the note was not sufficient evidence of consideration.<sup>30</sup> The aunt had given the plaintiff the note because “she loved [her nephew] very much” and “was going to take care of that child.”<sup>31</sup> Judge Cardozo explained that “[a] note so given is not made for ‘value received,’ however its maker may have labeled it.”<sup>32</sup> The court thus concluded that the note was an unenforceable promise of a gift.<sup>33</sup>

As *Dougherty* illustrates, people often use gift promises to express ongoing love and support and not to purchase something or induce any particular course of action as a condition of making the promise. Of course, a gift promise may not always be so well-intentioned. People may use donative promises to exercise improper influence over other people’s lives.<sup>34</sup>

26. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (AM. LAW INST. 1981) (“One of the functions of the doctrine of consideration is to deny enforcement to a promise to make a gift.”). This is in contrast to promises of gifts where the donee is a third-party beneficiary. Such promises are typically bargained for. For example, suppose A sells land to B in exchange for B giving C, A’s niece, one of B’s paintings. B’s promise to give the painting to C is bargained for insofar as B’s promise is the price for A’s land. *See id.* § 302 cmt. c. The painting may nonetheless be a gift from A to C, and hence, B’s promise to A is a promise to transfer a gift (ultimately from A) to C. I do not discuss such promises of gifts here, as such promises are not the target of the donative promise principle. By “donative promise,” I instead mean to refer to promises of gifts from the donor-promisor to the donee-promisee.

27. *See infra* note 38; cf. Eisenberg, *supra* note 6, at 842–44 (explaining that the reciprocity that may be expected by a donative promisor is unlike consideration, which is regarded by the promisor as a “requirement” for performance).

28. Cf. Eisenberg, *supra* note 6, at 842 (“[A] gift is a transfer that is made, or at least purports to be made, not for economic gain, but for affective reasons or to satisfy moral duties or aspirations, and which is not expressly conditioned on a reciprocal exchange, so that any later exchange that occurs is not, or at least does not purport to be, viewed by the parties as the price of the transfer.”). By “voluntary” I mean that the transfer is not already required as a matter of legal duty at the time the promise is made. Thus, paying one’s taxes out of civic duty does not count as a gift.

29. *Dougherty v. Salt*, 125 N.E. 94, 94 (N.Y. 1919).

30. *See id.* at 95.

31. *Id.* at 94.

32. *Id.* at 95 (“Nothing is consideration that is not regarded as such by both parties.”).

33. *See id.* at 95 (“The transaction thus revealed admits of one interpretation, and one only. The note was the voluntary and unenforceable [sic] promise of an executory gift.”).

34. *See infra* Section II.B.1.

But even in such cases, what makes the promise a donative promise is that the promise still purports to express affective motives and the promisor does not communicate to the promisee that performance requires the promisee's submission to influence.<sup>35</sup> A donative promise is thus unlikely to be enforceable under a theory of consideration.<sup>36</sup>

### 1. *Reciprocity and Exchange*

To be sure, a promisor may have a variety of expectations with respect to the promised gift and her relationship with the promisee. The foundation might reasonably expect the cooperation of the community; the volunteer might reasonably expect that the cost of the materials she uses be shared.<sup>37</sup> A donor might also hope that, should she ever fall on hard times, her community would help her as well. And of course, donative promisors might reasonably expect gratitude.<sup>38</sup> In each of these examples, it also seems plausible that those expectations might be known by—and perhaps even communicated to—the promisee.

But it does not follow that an expectation of cooperation, mutual support, or gratitude should be understood as the price for the promise.<sup>39</sup> A person may help a friend move into a new apartment, with rides to and from

35. *See, e.g., Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898) (holding that a grandfather made his granddaughter a donative promise that was not supported by consideration even though his clear and express intention was to “influence” her to quit her job).

36. Some courts have adopted a slightly stronger position and suggested that, as a definitional matter, gifts are not supported by consideration. *See, e.g., Bleick v. N.D. Dep’t of Human Servs.*, 861 N.W.2d 138, 143 (N.D. 2015) (explaining that “[a] gift is a voluntary transfer of property made without consideration”).

37. *Cf. Carlisle v. T & R Excavating, Inc.*, 704 N.E.2d 39 (Ohio Ct. App. 1997) (holding that a promise to perform services free of charge on the condition that the cost of materials was reimbursed was a gift promise not supported by consideration).

38. For a discussion of challenges that the ethics of ingratitude may pose to enforcing donative promises, see Eisenberg, *supra* note 15, at 13–15. For a discussion of moral challenges surrounding creating and discharging debts of gratitude, see generally Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 391 (2012).

39. *See Eisenberg, supra* note 6, at 842–44 (explaining that the reciprocity that may be expected by a donative promisor is unlike consideration, which is regarded by the promisor as a “requirement” for performance). I thus agree with Jane Baron that gifts are often not “one-sided transactions,” but reject her conclusion that we should assimilate gifts to exchanges and gift-giving practices to “non-commodity markets.” Baron, *supra* note 20, at 196–98; *cf. Rose, supra* note 4, at 309 (arguing that there is “leakage” between gifts and bargains). Even so, I am ultimately sympathetic to Baron’s position that the law’s differential treatment of gifts and exchanges may be unprincipled and may actually undermine the values of gift-giving practices. *See Baron, supra* note 20, at 200–02; *infra* Parts IV and V.

the airport, and the friend may in turn help out in similar ways. Such reciprocity is often a way of showing concern and taking an interest in a friend's life. If the friendship becomes one-sided, it may of course be reasonable for the help and support to slow or cease, yet that may be because the failure of reciprocity indicates a defect in their relationship, such as insensitivity or callous selfishness, rather than merely because someone has not upheld their end of a bargain.<sup>40</sup>

Expectations of reciprocity thus do not imply that donative promises are bargained for or mere elements in exchanges. On the contrary, reciprocity is often an expression of the freely offered and morally-motivated mutual support that enables a variety of relationships to flourish, such as friendships and communities. Assimilating expectations of cooperation, future help, and gratitude to exchange suggests a tit-for-tat conception of reciprocity that oversimplifies and impoverishes the moral richness of donative relationships and associational life more broadly.<sup>41</sup> A legal regime that aims to give effect to promisor intent, and that aims to leave space for a diverse associational life, should be wary of importing into the law too narrow a view of donative promising; gifts seem to be neither one-sided nor reducible to market-like exchanges.

## 2. *Naming Rights and Obligations to Use Donations for a Charitable Purpose*

There is one important qualification to the principle that gift promises are generally not supported by consideration. Courts have sometimes enforced charitable pledges to institutions on the theory that the pledges were supported by consideration, either in the form of naming rights or in the form of the institution's promise to use the donation for a charitable purpose.

For example, in *Allegheny College v. National Chautauqua City Bank of Jamestown*, the promisor made a charitable pledge to Allegheny College to

---

40. Such as when a buyer might rightfully reject defective goods. *See* U.C.C. § 2-601 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

41. It may certainly be true that some cultures engage in patterns of gift giving that have a more tit-for-tat structure common to the marketplace. *See* Baron, *supra* note 20, at 194–95. If some gift-giving practices resemble market exchanges in practically every way, I would not be opposed to enforcing promises within such practices under a theory of consideration. Unlike commentators who worry that contracts may commodify, *see infra* Section V.A., I ultimately argue that enforcement can support the affective and moral purposes of donative promises (when they have such purposes), and thus the idea that gifts may sometimes be similar to exchanges does not pose a problem for my position.

set up a memorial fund in the promisor's name.<sup>42</sup> The court held that in accepting the pledge, the college assumed a duty to create and maintain the fund, and that duty was a sufficient legal detriment to constitute consideration for the charitable pledge.<sup>43</sup>

Courts have also enforced charitable subscriptions on a consideration theory even when no specific purpose was requested by the promisor.<sup>44</sup> For example, in *In re Morton Shoe Co.*, the court held that the promisee's agreement to "apply the pledged amounts in accordance with the charitable purposes set forth in its charter . . . [was] sufficient consideration to support the [charitable pledge]."<sup>45</sup>

Cases like *Allegheny* and *Morton Shoe* illustrate that donative promises are sometimes enforced on a consideration theory where there is some evidence that the nonprofit institution agreed to certain terms as a condition for receiving the donation.<sup>46</sup> But this is a narrow phenomenon applying largely to charitable subscriptions, and courts and scholars alike have claimed that the exception is in fact a fiction used to facilitate public policy in favor of charitable subscriptions.<sup>47</sup> For example, William Drennan explains that

42. *Allegheny Coll. v. Nat'l Chautauqua City Bank of Jamestown*, 159 N.E. 173, 174 (N.Y. 1927).

43. *See id.*

44. *In re Morton Shoe Co.*, 40 B.R. 948, 951 (Bankr. D. Mass. 1984).

45. *Id.*; *cf. Ladies' Collegiate Inst. v. French*, 82 Mass. (16 Gray) 196, 201 (1860) ("It is held that by accepting such a subscription the promisee agrees on his part with the subscribers, that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon a well settled principle in respect to concurrent promises.").

46. *But see Mount Sinai Hosp. of Greater Miami, Inc. v. Jordan*, 290 So. 2d 484, 485, 486–87 (Fla. 1974) (holding that a charitable pledge made "[i]n consideration of and to induce the subscription of others," but without reference to a "specific purpose" for the funds was not enforceable in the case where the donor prematurely dies). Courts have been reluctant to treat actions by charities that were not part of any agreement involving the donation as consideration. *See, e.g., In re Bashas' Inc.*, 468 B.R. 381, 383 (D. Ariz. 2012) (holding that publicly honoring the promisor's charitable commitment was not consideration for the promisor's charitable pledge in part because the promisor did not agree to make the pledge "*in exchange for*" the acknowledgement).

47. *See, e.g., More Game Birds in Am. v. Boettger*, 14 A.2d 778, 780 (N.J. 1940) (explaining that in "cases where public and charitable interests are involved, the courts lean towards sustaining such contracts, sometimes on consideration which in a purely business contract might be regarded as questionable," thus suggesting that "public policy forms the basis upon which consideration is spelled out in order to impose liability on charitable subscriptions." (quoting *N.J. Orthopedic Hosp. & Dispensary v. Wright*, 95 N.J.L. 462, 464 (N.J. 1921))); *Jewish Fed'n of Cent. N.J. v. Barondess*, 560 A.2d 1353, 1354 (N.J. Super. Ct. Law Div. 1989) (finding that the statute of frauds is not a defense to enforcing a charitable

the charity's obligation could only be consideration if it provides a benefit to the donor or is a detriment to the charity. The charity cannot provide a private benefit to an individual donor without jeopardizing its tax-exempt status, and there is no detriment to the charity in receiving money to fulfill its charitable mission. Presumably, a charity would simply reject the contribution if a donor wanted the donation to go toward a specific project that the charity did not wish to undertake. Perhaps most important, the charity already has a preexisting duty to use all funds received for a charitable purpose.<sup>48</sup>

For my purposes here, not much turns on whether a charitable subscription is "disguised as a contract" when the subscription is enforced under a consideration theory.<sup>49</sup> The important doctrinal point is rather that some donative promises are, at least superficially, enforced on a consideration theory, but only narrowly and on uncertain grounds.

### B. *Promissory Estoppel*

Donative promises are typically not supported by consideration. Thus, if donative promises are enforced, they are more likely to be enforced on a theory of promissory estoppel.<sup>50</sup>

---

subscription because "[i]f a charitable subscription is disguised as a contract in order to effectuate a public policy, logic would dictate that the law should not then permit the institution of a contractual defense to undermine that policy"; see William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 PENN. ST. L. REV. 477, 487 (2015) (describing the application of the consideration doctrine to enforce charitable pledges as a "judicial concoction[]").

48. Drennan, *supra* note 47, at 488; cf. LORD, *supra* note 3, § 7:50 ("A gift is by definition not a bargain, and a promise to make a gift is not converted into a bargain by the donee's promise to accept the gift, or by its acceptance of all or part of gift.").

49. *Jewish Fed'n*, 560 A.2d at 1354.

50. See, e.g., *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898) (holding that a promissory note was a valid contract without consideration because the plaintiff had been induced to abandon her paid employment in reliance on the note); cf. *In re Morton Shoe Co.*, 40 B.R. 948, 950 (Bankr. D. Mass. 1984) ("I believe it is firmly established Massachusetts law that an action to enforce a charitable subscription is enforceable based on a consideration or reliance theory."). I use the terms "detrimental reliance," "reliance theory," and "promissory estoppel" interchangeably to refer to the contract enforcement theory that falls under these names. See generally RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (AM. LAW INST. 1981) ("Obligations and remedies based on reliance are not peculiar to the law of contracts. This Section is often referred to in terms of 'promissory estoppel,' a phrase suggesting an extension of the doctrine of estoppel.").

### 1. *Inducing Reliance*

In the context of donative promises, promissory estoppel demands a different orientation toward the power relations between donor-promisors and donee-promisees than a consideration theory. A consideration analysis of a donative promise tends to be focused on whether the formal requirements of consideration are met.<sup>51</sup> Of course, if that initial hurdle is passed, it may then be appropriate to investigate relative power as required by duress,<sup>52</sup> undue influence,<sup>53</sup> and unconscionability doctrines.<sup>54</sup> But since donative promises often fail to meet the requirements of consideration, a consideration analysis of a donative promise will tend to leave the power relations of the parties opaque.<sup>55</sup>

In contrast, a reliance analysis inquires into the power of the promise—and thus, of the promisor—to shape the activities and choices of the promisee.<sup>56</sup> Promissory estoppel generally requires showing that “the promisor should [have] reasonably expect[ed] to induce action or forbearance on the part of the promisee” in making the promise, that the promise in fact induce[d] such reliance, and that “injustice can be avoided only by enforcement of the promise.”<sup>57</sup> Hence, it is not enough that the

51. *See supra* Section II.A.

52. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 174–76 (AM. LAW INST. 1981) (explaining that duress by physical force prevents formation of a contract while duress by an improper threat that leaves the party with “no reasonable alternative” is voidable by that party).

53. *See generally id.* § 177(2) (explaining that a contract may be voided by a party whose “manifestation of assent [was] induced by undue influence by the other party . . .”).

54. *See generally id.* § 208 cmt. c (explaining that if a court finds a contract is unconscionable at the time of formation, a court may decline to enforce the contract in whole or in part, and that factors for determining unconscionable conduct include defects in the bargaining process and “gross disparity” in the values exchanged).

55. Orit Gan argues that contract law should be responsive to power dynamics and argues that promissory estoppel should be understood as a doctrine that helps to “guarantee[] the right to contract and access to contract” for promisees who are in “relations of power or trust that impact their ability to form a binding contract under the bargain theory.” Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER RACE & JUST. 47, 79, 82 (2013). I do not dispute Gan’s claim that promissory estoppel can have these empowering functions (indeed, as I argue, contract more broadly empowers the promisee). I instead depart from Gan with respect to the fit and adequacy of promissory estoppel for extending contractual rights to donee-promisees. As I argue, promissory estoppel may leave many donee-promisees vulnerable to improper promisor influence and actually creates perverse incentives to submit to promisors’ attempts at exercising such influence. *See infra* Part III.

56. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981) (discussing that the promise should induce the promisee’s actions).

57. *Id.*

promisee merely rely on the promise; making the promise must induce the promisee's reliance.<sup>58</sup>

For example, in *Harvey v. Dow*, the plaintiff's parents owned a large tract of land.<sup>59</sup> Growing up, the plaintiff and her brother had often discussed building their homes on the land—indeed this was a common topic of conversation within the family as a whole—and promises were made to leave the children “some land in the future.”<sup>60</sup> The plaintiff eventually financed and built a home on a portion of the land with the help and encouragement of her parents, but her parents ultimately refused to give her the deed to the land.<sup>61</sup> The court found that a specific promise to convey the land could be implied from the parents' conduct and concluded that it “would seem to be eminently reasonable and foreseeable” for the plaintiff to have built her home in reliance on that promise in light of the parents' support.<sup>62</sup> The court accordingly held that the parents had made a promise of land that supported the plaintiff's claim of promissory estoppel.<sup>63</sup>

The court's reasoning in *Harvey* suggests that the donative promise at issue induced reliance because it empowered the plaintiff to pursue an important life project. Not only did her parents' promise give her reason to believe that she would one day own some of the family land, but the supportive nature of the promissory relationship itself empowered her to act on that promise:

Against the backdrop of the parties' general understanding that [the plaintiff] would one day receive property as a gift or inheritance from her parents, she decided to build a new house on their land. [Her father] agreed to the location, obtained a building permit to allow construction at that site, and not only acquiesced in the house being built, but built a large portion of it himself.<sup>64</sup>

*Harvey* illustrates that donative promises are not always inert; they can facilitate going relationships of support that empower promisees to pursue

---

58. *Id.*

59. *Harvey v. Dow*, 962 A.2d 322, 323 (Me. 2008).

60. *Id.*

61. *See id.* at 324.

62. *Id.* at 327.

63. *Id.*

64. *Id.* at 325–26.

freely chosen projects they might not have been able to pursue on their own.<sup>65</sup>

The empowerment potential of the promise in *Harvey* depended on the parents having something of value to the plaintiff. If the parents had not had the land or if the plaintiff had been indifferent to the land, the parents would not have been able to make the promise, or the promise would not have had the potential to shape the plaintiff's life plans by encouraging her to build. To be sure, the plaintiff might have been induced to build even if she did not want the land. People are vulnerable to the feelings of their close associates.<sup>66</sup> If the plaintiff had felt that her parents would have been disappointed if she did not build, and her parents had in some way communicated that to her, the plaintiff might have felt pressure to build. But under these modified facts, the potential for the promise to reasonably and foreseeably induce reliance still lies in the parents' power over the plaintiff.<sup>67</sup> The centrality of the promisor's power in inducing reliance points to a second mode of inducement: improper influence.

In *Ricketts v. Scothorn*, the plaintiff earned \$10 per week in a store.<sup>68</sup> One day the plaintiff's grandfather visited the store and gave her a promissory note for \$2,000.<sup>69</sup> The grandfather told the plaintiff, "I have fixed out something that you have not got to work any more [sic] . . . [N]one of my grandchildren work, and you don't have to."<sup>70</sup> The plaintiff then embraced her grandfather and immediately resigned.<sup>71</sup> But over the course of the following year, the grandfather was only able to pay interest on the note.<sup>72</sup> After a year of unemployment, the plaintiff returned to work with

65. See *id.* at 323; cf. *Salsbury v. Nw. Bell Tel. Co.*, 221 N.W.2d 609, 613 (Iowa 1974) (stating that "[c]haritable subscriptions often serve the public interest by making possible projects which otherwise could never come about").

66. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. a (AM. LAW INST. 1981) (discussing when undue influence from family members, friends, clerics, and other people in special positions of trust can make a contract voidable).

67. Contract law is sensitive to the emotional power that promisors can exercise over promisees by virtue of being in a close relationship. For example, a contract may be voided by a party whose "manifestation of assent [was] induced by undue influence by the other party . . ." *Id.* § 177(2). The Restatement defines undue influence as "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." *Id.* § 177(1). Familial relations will often fall in the latter category. See *id.* at cmt. a.

68. *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898).

69. *Id.* at 365–66.

70. *Id.* at 366.

71. *Id.*

72. *Id.*



the help of her grandfather.<sup>73</sup> The court held that the promissory note, though not supported by consideration, was enforceable against the grandfather's estate because the grandfather had "intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due."<sup>74</sup>

There is a sense in which *Ricketts* is susceptible to being read as an example of inducement by empowerment, similar to the inducement in *Harvey*. The grandfather claimed that he gave the plaintiff the promissory note to effectuate her independence by eliminating her financial need to work.<sup>75</sup> Such a purpose might indicate that the promise induced the plaintiff's reliance by giving her the means to choose whether to work and thereby empowering her decision to resign.<sup>76</sup>

*Ricketts* is also open to an alternative reading. Recall that in executing the note, the grandfather did not merely want to place the choice of whether to work in the plaintiff's hands but to encourage her to quit.<sup>77</sup> Even if the plaintiff had liked her job, under such circumstances she might have reasonably felt pressure to quit. She may have wanted to please her grandfather out of love and a sense of gratitude, or defer to him out of respect. Or perhaps she simply felt pressure to conform to the values and wishes of an older and financially powerful authority figure within her family.<sup>78</sup> Under any of these hypotheses, the promise would have induced reliance, not by empowering the plaintiff, but rather by influencing the plaintiff to change her life in conformity with her grandfather's idea of how the plaintiff should live. Indeed, the court concluded that such influence was precisely his intention.<sup>79</sup>

73. *Id.*

74. *Id.* at 367.

75. *Id.* at 366.

76. Note that the promise may induce reliance by empowering that choice even if the promised gift was not transferred during the life of the grandfather. What matters is that, at the time of the plaintiff's choice to resign, she regarded the promise as a reason to believe she would not need to work anymore. *See id.* at 367 (explaining that the grandfather suggested that the plaintiff might not work by offering the sum, but the ultimate decision to act was the plaintiff's).

77. *See id.* (explaining that the grandfather "doubtless desired that she should give up her occupation").

78. The plaintiff might have also thought at the time that accepting her grandfather's note was a more secure financial option than her job and accordingly may have wanted to please him to ensure her good standing and his long-term support. *See id.* (explaining that the grandfather essentially suggested that "she might abandon her employment, and rely in the future upon the bounty which he promised").

79. *Id.*

These alternative hypotheses about the plaintiff's motives are speculative, but they help to explain the court's theory that the plaintiff was influenced rather than empowered to quit her job.<sup>80</sup> These alternative hypotheses also illustrate another face of donative promises: While donative promises may empower people to pursue freely chosen projects, donative promises can also have a disempowering effect on the promisor by offering a carrot—namely, the gift—to conform to the promisor's values. A donative promise may accordingly operate as a vehicle for manipulation and other forms of improper influence. While it is possible that the grandfather's promise empowered the plaintiff to choose to quit, it is also possible that the grandfather's promise was an effective means by which he pressured her to conform to a gendered and classist distaste for “working girl[s].”<sup>81</sup>

The risk that a donative promise will induce reliance through improper promisor influence is not limited to interpersonal promises or middle-class families. Donative promising practices occur against a background of social and economic inequality.<sup>82</sup> Indeed, it is precisely because there are people who need vaccines—or need the education, the food, or the shelter—but cannot secure them by purchase, through employment, or from the government that organizations like UNICEF and the Gates Foundation offer to provide them for free.<sup>83</sup> Under such conditions of need and inequality,

80. *Id.* An influence interpretation also comports with the often dependent social and economic status of nineteenth-century middle class women, and the law's likely role in reifying that status. See Mary Louise Fellows, *His to Give; His to Receive; Hers to Trust: A Response to Carol M. Rose*, 44 FLA. L. REV. 329, 334–36 (1992) (arguing that the court may have been mistaken about the plaintiff's motives in *Ricketts* and that the court's framing of her choice as one made under the influence of her grandfather may simply reflect gendered stereotypes about women's lack of agency). Although I do not dispute Fellows's interpretation of the facts, as a critical matter it may also be valuable to be open to the likely possibility that the plaintiff indeed was influenced and that gift promises may have (and perhaps have often had) a disempowering influence on certain donee-promisees.

81. *Ricketts*, 77 N.W. at 367. See Fellows, *supra* note 80, at 336 (“For some reason it bothered the grandfather that his granddaughter was working. It may have been because her working indicated publicly that he was not financially able to provide for his family . . .”).

82. Compare, for instance, Bill and Melinda Gates with the homeless residents of Washington State. While the Gates Foundation is often associated with philanthropy abroad, it also directs a substantial percentage of its resources to domestic philanthropy. See *2015 Annual Report*, GATES FOUNDATION, <http://www.gatesfoundation.org/Who-We-Are/Resources-and-Media/Annual-Reports/Annual-Report-2015> (last visited Nov. 8, 2017). For an overview of the Gates Foundation's domestic homelessness projects, see *Washington State Homelessness and Family Stability*, GATES FOUNDATION, <http://www.gatesfoundation.org/Who-We-Do/US-Program/Washington-State/Homelessness-and-Family-Stability> (last visited Nov. 8, 2017).

83. *Cf. Immunization*, UNICEF USA, <https://www.unicefusa.org/mission/survival/immunization> (last visited Nov. 8, 2017); *Vaccine Delivery*, GATES FOUNDATION,

donee-promisees are vulnerable to feeling pressure to conform to the values of charitable institutions.<sup>84</sup> Refugees may, for instance, feel pressure to adopt a religious charity's faith to access basic goods and shelter.<sup>85</sup> Donee-promisees might also reasonably feel pressure to tailor their self-presentation to potentially disempowering victim tropes.<sup>86</sup> In the international development context, there is evidence that some religious charities may be using their position of trust and the need of recipients to pressure religious conversion.<sup>87</sup> While U.S. contract law may not govern all such cases, they illustrate the potential for manipulation and improper influence in donative practices, and we can imagine like cases might happen domestically.<sup>88</sup>

## 2. *Caretaking and Indigence*

Donative promises can thus induce reliance by empowering the promisee to realize important life projects, but may also induce reliance by enabling the promisor to improperly influence the promisee to conform to the promisor's values.<sup>89</sup> In both cases, promissory estoppel affords some protection for promisees who substantially change their lives by acting on the reliance that donative promises invite. In *Harvey*, enforcement of the

<http://www.gatesfoundation.org/What-We-Do/Global-Development/Vaccine-Delivery> (last visited Nov. 8, 2017).

84. See, e.g., Josie Ensor, *The Muslim Refugees Converting to Christianity 'to Find Safety,'* TELEGRAPH (Jan. 30, 2017, 12:24 PM), <http://www.telegraph.co.uk/news/2017/01/30/muslim-refugees-converting-christianity-find-safety/> (finding that some refugees claim to have converted to Christianity to gain benefits from Christian charities).

85. *Id.*

86. For a discussion of how a variety of legal and nonlegal interventions may encourage self-presentation as a victim, see generally Jasmine Phillips, Comment, *Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642 (2015).

87. See, e.g., Saroj Jayasinghe, *Faith-Based NGOs and Healthcare in Poor Countries: A Preliminary Exploration of Ethical Issues*, 33 J. MED. ETHICS 623, 625 (2007) (arguing that NGOs that combine religious proselytizing with healthcare may "exploit the vulnerability of individuals and communities" by abusing or being insensitive to their "asymmetric power relationship" with aid recipients and explaining that similar concerns arise with respect to secular organizations that seek to advance a political message).

88. There is an emerging critical literature on the compatibility of charities with democracy. See, e.g., PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES (Rob Reich et al. eds., 2016); Rob Reich, *Repugnant to the Whole Idea of Democracy? On the Role of Foundations in Democratic Societies*, 49 POL. SCI. & POL. 466, 466-68 (2016) (discussing how private foundations have plutocratic elements that pose a challenge for justifying support for private foundations in a democratic society).

89. See *supra* Section II.B.1.

promise was predicated on the plaintiff's decision to build her dream home;<sup>90</sup> in *Ricketts*, enforcement was predicated on the plaintiff's decision to forgo valuable employment.<sup>91</sup> Once such promisees rely and thereby acquire a right to performance, the promisees are legally protected from subsequent attempts by the promisor to use the promise to covertly control the promisee, as the promisor no longer retains a general legal permission to unilaterally retract or worsen the terms of the promise.

Yet many donative promises do not have the facilitation of such investments and changes as their aim. For example, a brother may promise to financially support his sister while she cares for their elderly relative,<sup>92</sup> and a foundation may promise to administer free vaccinations to a poor neighborhood. In these cases, the promises aim to support a preexisting project—such as caretaking or maintaining a baseline of health—and, accordingly, the promisees might not take new financial risks in reliance on the promise. The sister may have been taking care of their relative for a long time and might continue to do so regardless of the donative promise, even at great personal financial costs. Similarly, the residents of the neighborhood might not have forgone other opportunities to get vaccinated (perhaps that was the only opportunity they had), and may not have otherwise relied, such as by taking time off work. Nevertheless, the promisees in these cases may still depend on the promised gift to meet their basic needs. In turn, such donative promises can empower promisees by freeing up time and energy to pursue projects apart from meeting basic needs—such as looking for work, taking care of children, or going back to school—but may also operate as vehicles for improper influence given the importance of the gift.

Donative promises of basic goods and financial support may thus facilitate relationships between promisors and promisees with power dynamics similar to those at work in *Harvey* and *Ricketts*,<sup>93</sup> even when the promises do not induce promisees to make costly or risky changes in their lives. Promissory estoppel, however, requires precisely such a change. Reliance is protected by promissory estoppel only when the promise induces the promisee to do something different than she would have done otherwise,<sup>94</sup> and that change in circumstances typically must be financially costly.<sup>95</sup>

90. See *Harvey v. Dow*, 962 A.2d 322, 325–36 (Me. 2008).

91. See *Ricketts v. Scothorn*, 77 N.W. 365, 366 (Neb. 1898).

92. See *Dewein v. Estate of Dewein*, 174 N.E.2d 875, 876 (Ill. App. Ct. 1961).

93. See *supra* Section II.B.1.

94. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (AM. LAW INST. 1981) (“[a promise to make a gift] is ordinarily enforced by virtue of the promisee’s reliance only if his conduct . . . involves a definite and substantial change of position which would not have

For example, in *Dewein v. Estate of Dewein*, a brother promised his sister to “take care of [her] for life” out of apparent gratitude for the many years of care his sister administered to their family.<sup>96</sup> The court held the promise unenforceable on a theory of promissory estoppel because the sister had not shown that “she had ever intended to act otherwise than the way she did.”<sup>97</sup>

Similarly, in *Ervin v. Ervin*, an ex-husband wrote to his ex-wife suggesting that he would pay for their son to attend college and that she had “nothing to be concerned about.”<sup>98</sup> The court held that even if the letter communicated a promise to pay for their son’s tuition, the ex-wife had not relied on the promise to her financial detriment.<sup>99</sup> The ex-wife had failed to show that she enrolled their son in college in reliance on the promise.<sup>100</sup> It was of no consequence to the court that “her income and expenses showed that she was unable to provide for the cost of the son’s education,” and thus would have, colloquially speaking, relied on the promised financial support to meet her basic needs and to actually cover the costs of her son’s education.<sup>101</sup> Just as the court in *Dewein* denied the promissory estoppel

occurred if the promise had not been made”). The Restatement qualifies this general principle by noting that sometimes “other policies” support a detrimental reliance claim. *Id.* Examples of such policies include the following: prohibitions on unjust enrichment (permitting the promisor to “reclaim the subject of the promised gift after the promisee has improved it”) and public policy in favor of charitable subscriptions and marriage settlements. *Id.* Some commentators dispute the requirement of actual reliance. Compare Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 167 (1991) (arguing that promissory estoppel does not require actual reliance), with Eisenberg, *supra* note 6, at 852–65 (arguing that actual reliance is required for promissory estoppel). I do not take any stand in this larger debate, but, as I argue, promissory estoppel claims to enforce *donative* promises in particular do seem to require actual and substantial reliance.

95. See Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 743–44 (citing *Atria v. Vanderbilt Univ.*, 142 F. App’x 246, 256–57 (6th Cir. 2005); *Calabro v. Calabro*, 15 S.W.3d 873, 879 (Tenn. Ct. App. 1999)).

96. *Dewein*, 174 N.E.2d at 875, 876.

97. *Id.* at 877 (“Surely, there can be no presumption or inference that after living with [her] mother for so many years, she was now about to desert her in the time of her greatest need, but was persuaded to stay ‘in reliance on promises made to her.’”); cf. Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1050 (1992) (“A promise motivated by a *past* favor or by some other sense of obligation is not covered by the doctrines of consideration and promissory estoppel, which screen for promises that are made with a view to influencing the promisee’s *future* behavior.”).

98. *Ervin v. Ervin*, 458 A.2d 342, 343 (R.I. 1983).

99. *Id.* at 345.

100. *Id.*

101. *Id.* To be sure, the ex-wife was “unemployed,” but this fact appears to play no role in the court’s reasoning. See *id.* The court did not, for instance, say that it would *not* be unjust to not enforce because she could have gotten a job. Cf. RESTATEMENT (SECOND) OF

claim because the plaintiff would have still cared for her parent,<sup>102</sup> so the court in *Ervin* found no detrimental reliance because the ex-wife continued supporting her son as she had always done, notwithstanding the breached promise.<sup>103</sup> *Ervin* and *Dewein* thus illustrate how the donative promise principle may leave many donative promises made in support of caretaking unenforceable.<sup>104</sup>

Because promissory estoppel typically requires showing that the promisee suffers a financial detriment in relying on the promise, it will also be unlikely that particularly poor donee-promisees will have enforceable contract rights to donative promises of basic goods.<sup>105</sup> It will, for example, be hard for a homeless person to detrimentally rely on a promise of shelter, since that person may have no other alternatives and no financial means to make investments in reliance on such a promise. It is difficult to rely when you have little to invest or to lose.

### 3. *Enforcement Without Actual Reliance?* Restatement 90(2)

Promissory estoppel is the primary basis for enforcement of donative promises, but under Section 90(2) of the Restatement (Second) of Contracts, a charitable subscription may be “binding” even “without proof that the promise induced action or forbearance.”<sup>106</sup> Instead, charitable subscriptions may be enforceable so long as, in making the subscription, “the promisor should reasonably expect to induce action or forbearance on the part of the promisee” and “injustice can be avoided only by enforcement of the promise.”<sup>107</sup>

On its face, Section 90(2) is a potentially revolutionary expansion of contract—the provision only requires a “probability of reliance,”<sup>108</sup> and thus,

CONTRACTS § 90(1) (AM. LAW INST. 1981) (explaining that promissory estoppel requires a showing that it would be unjust to not enforce the promise).

102. See *Dewein*, 174 N.E.2d at 877.

103. See *Ervin*, 458 A.2d at 345.

104. Compare *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993) (holding that a husband’s promise to leave his wife property in exchange for caring for him during his illness was not enforceable because the wife was already under a marital duty of support (citing CAL. CIV. CODE §§ 242, 5100, 5132)), with *Teason v. Miles*, 118 N.W.2d 475 (Mich. 1962) (enforcing a mother’s promise to leave her son a portion of her property in exchange for living on her farm and taking care of her). For a critical discussion of whether *Teason* can be distinguished on non-discriminatory grounds, see Fellows, *supra* note 80, at 341.

105. For a discussion of how contract law more broadly excludes historically marginalized and disempowered groups, see generally Gan, *supra* note 55, at 79–103.

106. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW INST. 1981).

107. *Id.* § 90(1)–(2).

108. *Id.* § 90 cmt. f.

if expanded to donative promises more broadly, might include the caretaking and indigent promisees that tend to be unable to enforce under a theory of promissory estoppel.<sup>109</sup> The Restatement's commentary on that provision, however, suggests that Section 90(2) may actually be more conservative.<sup>110</sup> The comments to Section 90 note that Section 90(2) is grounded in long-standing public policy favoring charitable subscriptions.<sup>111</sup> The comments also suggest that Section 90(2) is meant to replace the fiction of consideration historically used to enforce charitable subscriptions.<sup>112</sup> To date, only Iowa has expressly adopted Section 90(2).<sup>113</sup>

Consequently, Restatement Section 90(2) leaves intact the general principle that donative promises are usually not enforceable except under a theory of promissory reliance.

\* \* \*

In sum, under the donative promise principle, promises that induce the promisee to change her position in some financially detrimental way may be enforceable. Promises by donors to charitable institutions may also be enforceable under the consideration doctrine. As a practical matter, this leaves many of the donative promises made to caretakers and some of the most indigent members of society unenforceable. For the remainder of this Article, I discuss whether that should be so.

---

109. *But see infra* Section III.B.1.

110. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW INST. 1981).

111. *Id.*

112. *Id.* § 90 cmt. f; *see supra* Section II.A.2.

113. *See* P.H.C.C., Inc. v. Johnston, 340 N.W.2d 774 (Iowa 1983) (citing *Salsbury v. Nw. Bell Tel. Co.*, 221 N.W.2d 609, 613 (Iowa 1974) (“We believe public policy supports [enforcing charitable subscriptions without proof of actual reliance]. It is more logical to bind charitable subscriptions without requiring a showing of consideration or detrimental reliance.”)). For a case that has expressly rejected Section 90(2), *see*, for example, *Arrowsmith v. Mercantile-Safe Deposit & Tr. Co.*, 545 A.2d 674, 685 (Md. 1988) (“[T]his Court [will] not carve out an exception to the established law of contracts in order to give a privileged position to promises made to charities. That is what Restatement (Second) of Contracts § 90(2) does.”). While New Jersey and New York have expressed support for a public policy in favor of enforcing charitable subscriptions, neither state has adopted Restatement Section 90(2). *See* *Jewish Fed’n of Cent. N.J. v. Barondess*, 560 A.2d 1353 (N.J. 1989) (explaining that the “real basis for enforcing a charitable subscription is one of public policy” and noting without holding that charitable subscriptions may be “disguised as a contract” to effectuate that policy); *In re Field’s Estate*, 172 N.Y.S.2d 740 (1958) (explaining that courts tend to enforce charitable subscriptions because of the social value of the charitable institutions that depend on such subscriptions).

### III. THE INEGALITARIAN CHARACTER OF THE DONATIVE PROMISE PRINCIPLE

In this Part, I argue that the donative promise principle is an inegalitarian principle. In Section A, I explain that making promissory estoppel the primary basis for enforcing donative promises creates morally and doctrinally perverse legal reasons to submit to improper promisor influence. The donative promise principle is also inegalitarian with respect to the promises it leaves outside of contract's reach. In Section B, I argue that by leaving indigent and caretaking promises dependent on the whim of promisors for meeting basic needs, the principle reifies power imbalances between socially powerful promisors and historically disempowered promisees.

#### A. *Perverse Legal Reasons to Succumb to Improper Influence*

So far, I have been arguing that donative promises can induce promisees to rely by empowering promisees to pursue freely chosen projects, but also by offering a carrot to conform to promisor values or otherwise operating as a vehicle for promisor influence.<sup>114</sup> The promised good is often something really important to the promisee. And even when it is not, the promise may have been made in the context of a relationship of trust—such as family or religion—that leaves the promisee susceptible to manipulation or undue pressure from the promisor.<sup>115</sup> A donee-promisee may therefore face substantial pressure to rely on the donative promise because of her need for the promised good or the character of her relationship with donor-promisors.<sup>116</sup> By making detrimental reliance the basis for enforcement, promissory estoppel provides a new reason to rely: the acquisition of a legally enforceable right to the performance of the gift promise.

In fact, the more the promisee relies by making substantial and costly changes in her life, the greater the likelihood the promisee will secure a legal right in the gift.<sup>117</sup> Although reliance may vest in the promisee a contractual right in the performance of the promise, the court still retains the discretion to reduce the promisee's remedy in accordance with the extent of her

---

114. *See supra* Section II.B.1.

115. *See generally supra* note 67 (discussing contract law's sensitivity to promisors' potential emotional power over promisees).

116. *See supra* Section II.B.1.

117. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981).



reliance.<sup>118</sup> Even if expectation damages tend to be awarded more often than a reliance measure of damages,<sup>119</sup> the risk of being awarded merely the value of detrimental reliance provides a further reason to engage in more substantial and costly reliance.

And it is not enough for the promisee to detrimentally rely on the promise; she must rely in a way that the promisor could have reasonably foreseen.<sup>120</sup> As *Harvey* and *Ricketts* suggest, reliance is often most foreseeable when done in accordance with the promisor's communicated purposes in making the promise. In *Harvey*, the parents encouraged the plaintiff to build her home on the land;<sup>121</sup> in *Ricketts*, the grandfather gave the plaintiff the promissory note and encouraged her to quit her job.<sup>122</sup>

Consequently, promissory estoppel supplies legal reasons for the promisee to conform to the promisor's hopes and expectations for the promisee. In cases like *Harvey*, such reasons may be fairly innocuous, since the promisors' hopes and expectations for the promisee are that the promisee will succeed in her chosen projects. But in *Ricketts*-type cases, that additional rational pressure exacerbates the promisor's power over the promisee. If the plaintiff in *Ricketts* really did need the funds, she did well under this regime to conform to her grandfather's conception of the good life by quitting her job.<sup>123</sup> The case may strike some of us as even more troubling if we imagine the grandfather had promised her the funds to encourage her to leave her lesbian lover<sup>124</sup> or convert to Christianity.<sup>125</sup> In such cases, having promissory estoppel as the sole basis for recovery creates legal reasons for the promisee to leave her lover or change her religion, and so foreseeably change her position in reliance on the grandfather's promise.

Of course, promissory estoppel does not preclude promisees from resisting improper promisor influence or declining the promised gift. And

118. *See id.* at cmt. d (noting that "relief may sometimes be limited . . . by the extent of the promisee's reliance rather than by the terms of the promise").

119. *See* Stone & Stremitzer, *supra* note 17, at 4.

120. *See supra* Section II.B.1.

121. *See* *Harvey v. Dow*, 962 A.2d 322, 325–36 (Me. 2008).

122. *See* *Ricketts v. Scothorn*, 77 N.W. 365, 366 (Neb. 1898).

123. *See id.* at 366–67. Even though the plaintiff did not receive the support her grandfather had hoped to give her during his lifetime, by quitting her job, the plaintiff secured a portion of his estate. *See id.*

124. *Cf.* MARCEL PROUST, SWANN'S WAY (C. K. Scott Moncrieff, trans., Barnes & Noble 2005) (1913); Carroll Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, 1 SIGNS: J. WOMEN CULTURE & SOC'Y 1, 7 (1975).

125. *See generally supra* note 84 (describing some vulnerable Muslims' recent conversion to Christianity for non-theological reasons, such as to receive aid, to assist in their asylum applications, and other reasons).

once the promisee detrimentally relies on the promise, the promisee may thereby acquire a legal right to the performance and, hence, secure some legal protection from any subsequent attempts by the promisor to pressure the promisee to change her ways. The problem is not that promissory estoppel leaves promisees powerless to resist improper influence. It is rather that the law gives promisees reasons to conform to that influence. While not all influence is morally problematic,<sup>126</sup> here the law perversely operates to support people's use of promissory relationships as a means to convert their greater wealth or special relationship of trust into greater authority over another person's life.

Such reasons to rely are also in tension with doctrines of duress, undue influence, and unconscionability, which serve to eliminate legal reasons to perform promises that were improperly obtained.<sup>127</sup> For example, if a promise is induced by undue influence, any resulting contract is voidable by the party improperly induced to make the promise.<sup>128</sup> A promise is induced by undue influence when the promisor is unfairly persuaded to make the promise and the promisee is someone that the promisor is justified in assuming "will not act in a manner inconsistent with the promisor's welfare."<sup>129</sup> Paradigmatic relationships that give rise to the potential for undue influence include familial relationships and relationships between clerics and parishioners.<sup>130</sup> The doctrine of undue influence thus aims to relieve people from pressure to engage in courses of action induced through an abuse of a special relationship of trust.

Not all forms of corrupt donor-promisor influence over donee-promisees rise to the level of undue influence or duress. But by creating legal reasons to conform to that influence, the donative promise principle empowers the very kind of parties that the doctrine of undue influence aims to disempower—namely, parties who seek to abuse a relationship of trust through the creation of a promissory relationship.

### *B. Reifying Social Inequality*

Meanwhile, the donative promise principle tends to leave unenforceable donative promises that are made to some of the most historically vulnerable

126. For example, parents might provide their children with a valuable moral education, and friends may influence one another to be more open-minded through reasoned discussion and shared experiences.

127. *See supra* notes 52–54.

128. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (AM. LAW INST. 1981).

129. *See id.*

130. *See id.* § 177 cmt. a.

and marginalized groups of people—caretakers and indigent people.<sup>131</sup> These are promisees who may have great need for the promised gifts but, paradoxically, because their need is so severe (or their commitment to caretaking so steady) are unlikely to be able to financially change their lives in reliance on the donative promise.<sup>132</sup> Lacking a legal right to performance of the promise, the promisor may revoke her promise for practically any reason, and the promisee would have largely no lawful power to resist.<sup>133</sup>

The need for the gift coupled with the absence of a right to performance of the promise leaves promisees vulnerable to ongoing improper influence by promisors. And not all problematic forms of conformity to improper influence rise to the level of detrimental reliance.<sup>134</sup> A promisor may encourage a promisee to adopt certain personality traits and moral dispositions, such as conforming to social stereotypes of victimhood<sup>135</sup> or femininity,<sup>136</sup> or undergoing religious conversion.<sup>137</sup> These forms of influence may be no less life-changing than building a home or changing employment.<sup>138</sup> The donative promise principle thus leaves the very kind of people to whom we want to distribute goods and empower susceptible to manipulation and exploitation precisely because of their great financial need or commitment to caretaking.

By holding that a donative promise is not enforceable when and because the promisee has not financially relied on the promise, the donative promise principle treats persons of financial means as having weightier interests than

131. *See supra* Section II.B.2.

132. *See supra* Section II.B.2.

133. Some equitable remedies may nonetheless be available, such as disgorgement for unjust enrichment, but at the discretion of the court. *See generally* Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609 (1997) (discussing the historical development of courts' discretion to apply equitable remedies).

134. *See supra* Section II.B.2.

135. *See* Phillips, *supra* note 86, at 1647.

136. *Cf.* Fellows, *supra* note 80, at 337.

137. *See supra* note 84 and accompanying text. Religious conversion may, however, rise to the level of detrimental reliance if it is costly, such as when a church requires members to regularly donate a nontrivial percentage of their income.

138. Even if these less tangible forms of reliance could ground a promissory estoppel claim, the promisee may still be, for all practical purposes, in the same economic position she would have been had the promise gone unenforced. Although expectancy damages are often awarded in promissory estoppel cases, a court might elect to use a reliance measure of damages. In cases of emotional or moral reliance, the economic value of reliance may be very low or hard to measure. Hence, even if such intangible forms of reliance could ground a promissory estoppel claim, the promisee may still be just as dependent on and vulnerable to the promisor as the promisee was under a regime of nonenforcement. I am indebted to Nico Cornell for these points.

indigent persons in securing promised gifts. But why should a middle- or upper-class promisee have a greater interest in a family plot of land than a homeless person has in securing shelter (let alone a greater interest in being protected from abuse arising from that interest)? The donative promise principle thus seems to unfairly privilege wealthier persons.

At this point, it may be objected that the donative promise principle is neutral as between the wealthy and indigent. What explains the failure to enforce many promises to indigent persons and caretakers, one might argue, is the difficulty of proving less tangible forms of moral and emotional reliance.

In response, even if the premise about proof were true, the conclusion does not follow. Donative promises could be enforced in the absence of reliance, upon a finding that a donative promise was made, thus obviating the need to inquire whether, for instance, a charitable organization pressured recipients to act like victims or an ex-husband pressured his ex-wife to adopt a more servile demeanor with him. It may of course sometimes be difficult to show that a donative promise has been made, but that is also true wherever proof that a promise has been made is sought, including cases of reciprocal promising where consideration provides the ground for enforcement.<sup>139</sup>

Evaluated in the context of U.S. contract law more broadly, the donative promise principle does not merely privilege the wealthy with respect to their interests in *gifts*, but also with respect to their interests in securing basic needs and in protection from abuse arising from those needs. Under the consideration doctrine, a person can secure an immediately enforceable right to medical services, food, home repair, and the like, if and when she has promised to pay for them. Such a right insulates the promisee from pressure to conform to attempts by the promisor to later attach additional conditions on receiving such goods and services. While the promisor and promisee may certainly agree to modify the terms of their arrangement,<sup>140</sup> a promisor will likely be in breach (or anticipatory breach) if she attempts to unilaterally change the terms of their agreement.<sup>141</sup> For example, if a person's heater breaks down during the winter, and she has hired someone to fix it, once a

139. See Kull, *supra* note 15, at 51–55.

140. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 89 (AM. LAW INST. 1981) (explaining that parties may modify a contract not fully performed if, inter alia, “the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made”).

141. See *id.* § 241 (outlining considerations for determining whether a failure to perform some part of a contract is material, such as “the extent to which the injured party will be deprived of the benefit which he reasonably expected”).

price is fixed for the service the contractor cannot then lawfully use the promisee's urgent need for heat to unilaterally raise the price or demand that the promisee go out on a date with the contractor.<sup>142</sup>

In contrast, under the donative promise principle, if the contractor offers to fix the heater for free, the promisee has neither a right to the urgently needed repairs nor a right to be free from exploitation made possible by that need and relationship of dependence. The donative promise principle, when interpreted alongside the consideration doctrine, thus expresses and makes it the case that if you cannot buy what you need, people may use promises to meet that need to exploit you.<sup>143</sup> The donative promise principle thus reifies economic inequality by making access to promised goods and insulation from attendant exploitation risks contingent on the promisee's wealth.

#### IV. REMEDYING THE INEGALITARIAN DEFECTS OF THE DONATIVE PROMISE PRINCIPLE

Under the donative promise principle, some donative promises are contracts, but only if the promisee detrimentally relies on the promise. Because promisees often have an urgent need for the promised gift or are in a special relationship of trust with the promisor, donee-promisees tend to systematically be vulnerable to a wide range of improper promisor influence. By making promissory estoppel the primary basis for enforcement, the donative promise principle thus creates perverse incentives to succumb to improper promisor influence, reinforces the dependency of promisees who are too poor or otherwise unable to rely, and reifies broader social inequality by privileging wealthy promisees' interests in performance.

In this Part, I explore how a regime that made some donative promises automatically enforceable upon being communicated to promisees would remedy these defects in our extant doctrine. Such enforcement in the absence of reliance is, of course, not the only alternative to promissory estoppel. Donative promises might instead be enforced on a theory of probable reliance, on the basis of the promisee's need for the promised gift,

---

142. See FRIED, *supra* note 1, at 33–34 (explaining that the consideration doctrine can be deployed to deny enforcement to subsequent “bargains” that exploit a promisee's trust in the original promise); *cf.* U.C.C. § 2-305 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (explaining that parties may contract for the sale of a good even without settling on a price if, *inter alia*, the price later fixed by the buyer or seller is fixed in good faith). Any such last-minute modifications acceded to out of a lack of reasonable alternatives may even constitute duress. See RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (AM. LAW INST. 1981).

143. *Cf. supra* note 142.

or perhaps under a default rule of enforcement.<sup>144</sup> While I argue that simply enforcing donative promises in the absence of reliance is more responsive than these alternatives to the inegalitarian defects of the donative promise principle, such an enforcement regime might still compromise other moral and interpersonal values central to donative promising, such as trust and authenticity. I develop and address these concerns in Part V and discuss an important limit to enforcing donative promises—arising from the heterogeneity of donative promises—in Part VI.

*A. Enforcing Donative Promises in the Absence of Reliance*

Enforcing donative promises without requiring reliance could go a long way to remedy the inegalitarian character of our extant contract law of donative promises. In particular, if upon making a donative promise the promisee had a contractual right to performance of that promise, the promisee would be relieved of legal reasons to rely on the promise to secure the promised gift (or a financial equivalent). Such an enforcement regime could thereby counteract perverse legal reasons to succumb to promisor attempts at improper influence.

Enforcement of unrelieved-upon donative promises could also empower indigent and caretaking promisees by redistributing legal power over performance. Whereas under the donative promise principle the promisor has the legal power to perform or not perform an unrelieved-upon promise on a whim, here the promisee would retain the power to demand or waive performance (subject to doctrines excusing performance<sup>145</sup>).

In turn, legal protection from risks of promisor exploitation arising from dependency within the promissory relationship would no longer be contingent on the promisee's wealth or ability to pay for the promised good or service. Enforcing donative promises in the absence of reliance would insulate the promisee from attempts by the promisor to later on attach implicit conditions to the gift in ways that parallel the rights of commercial contractors. Once A and B agree for A to fix B's heater for a fee, A cannot then exploit B's urgent need for heat to extract an unreasonably high price for the work.<sup>146</sup> Similarly, were donative promises to be enforceable in the absence of reliance, once the ex-husband promised his ex-wife to pay for his

---

144. This list is not meant to be exhaustive. As I hope will emerge later, I have rather selected these alternatives because their benefits and limitations further illustrate the power dynamics at work in donative promising and the value of using contract law to shape those dynamics.

145. *See infra* Section IV.C.

146. *See supra* Section III.B.

child's tuition, the ex-husband could not then later, on the day of enrollment, use her financial need to reduce his contribution or otherwise take advantage of her.<sup>147</sup> Or at least, he retains no legal power to do so, unless he can show that reasons to discharge his duty to perform apply. A donee-promissee could also openly embrace different political or moral views than the promisor in the knowledge that she has a legal right to the promised gift.<sup>148</sup>

By reshaping power dynamics within donative promissory relationships, enforcement in the absence of reliance would also be valuable as a public repudiation of the vulnerable status of donee-promisees. Such a reformed contract law could thereby communicate that gift promises are not vehicles for moral imperialism, and that the interests of indigent persons in fair access to promised goods and services are just as valuable as the like interests of the wealthy. The contractual right would also transform the promised gift from a legally discretionary gratuity<sup>149</sup> into an entitlement to which the promisee has public (and not just private moral) standing to claim.<sup>150</sup>

To be sure, a redistributive regime that depends largely on private donations to provide for people's basic needs may produce the same manipulation and hierarchy worries *ex ante*, prior to the making of any particular donative promise (whether enforceable or not).<sup>151</sup> Reforming the donative promise principle is not a cure-all for social inequality. But while we work on broader problems of social inequality, enforcing donative

147. *Cf.* *Ervin v. Ervin*, 458 A.2d 342 (R.I. 1983).

148. Of course, it may be that promisees do not know that they have a contract right to the gift, or may reasonably feel that they cannot access courts because of costs. Under such circumstances, the motivational pressures to conform may be, for the promisee, no different than before. Knowledge of legal rights and access to the legal system is, however, a much larger problem.

149. *Cf.* Elizabeth Wann, *American Tipping is Rooted in Slavery—and it Still Hurts Workers Today*, FORD FOUNDATION: EQUALS CHANGE BLOG (Feb. 18, 2016), <https://www.fordfoundation.org/ideas/equals-change-blog/posts/american-tipping-is-rooted-in-slavery-and-it-still-hurts-workers-today/> (linking tipping practices to slavery and racial inequality).

150. *Cf.* *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970) (finding that welfare is an entitlement, not a gratuity, the deprivation of which triggers a constitutional right to due process).

151. Indeed, I think this is a strong reason to move away from large-scale reliance on private donation and instead create and strengthen existing public redistributive schemes that do not leave one class dependent on the good will of another (and also, that do not leave which causes and needs deserve attention up to a few, but rather permit the people who actually need the goods to have a say through the democratic process). *See* Reich, *supra* note 88 (discussing how private foundations have “plutocratic elements” that pose a challenge for justifying support for private foundations in a democratic society).

promises in the absence of reliance could help remedy contract law's complicity in perpetuating social inequality.

*B. Alternatives*

*1. Probable Reliance*

Simply enforcing donative promises in the absence of reliance is not the only alternative to promissory estoppel, nor is it the only way that donative promises could be enforced without requiring promisee reliance. Two features of promissory estoppel seem to produce the disempowering effects discussed in Part III: the requirement to show *actual* reliance and promissory estoppel's narrow conception of reliance itself. By requiring promisees to actually rely in order to secure a legal right to the promise, promissory estoppel provides promisees with legal reasons to rely on the promise, even when doing so would involve succumbing to improper influence by the promisor.<sup>152</sup> Further, by excluding less tangible but no less serious forms of emotional reliance from the legal category of reliance, the donative promise principle prevents promisees who may actually have the greatest need for the promised gifts from enforcing donative promises.<sup>153</sup>

These defects might suggest that promissory estoppel should be revised to require only *probable* reliance, rather than actual reliance. Under such a theory, a donative promise would be enforceable if the promisor could reasonably and foreseeably expect the promisee to rely on the promise, and injustice can be avoided only if the promise is enforced. Such a proposal would hence seek to expand Section 90(2) of the Restatement (Second) of Contracts beyond charitable subscriptions to donative promises more broadly.<sup>154</sup>

Enforcement under a theory of probable reliance has the benefit of drawing on two familiar sources of contract law—the Restatement and promissory estoppel itself.<sup>155</sup> Commentators also argue that requiring probable reliance may help to screen for seriously made promises.<sup>156</sup>

But even granting these benefits, probable reliance is a poor alternative because the very idea of reliance may still import the discriminatory features

---

152. *See supra* Section III.A.

153. *See supra* Section III.B.

154. *See supra* Section II.B.3.

155. But courts have been reluctant to adopt Section 90(2), even in the limited context of charitable subscriptions. *See supra* Section II.B.3.

156. *See, e.g.,* Yorio & Thel, *supra* note 94, at 113. For a critical discussion of Yorio and Thel's proposal, see Eisenberg, *supra* note 6, at 852–65.



that made promissory estoppel inadequate to begin with. For example, in *Dewein*, the court not only found that the plaintiff did not rely on her brother's donative promise; the court suggested that it would also be unreasonable to suppose that the plaintiff would have stopped taking care of their mother "in the time of [the mother's] greatest need . . ."<sup>157</sup> The circumstances in virtue of which the plaintiff was unlikely to rely were thus precisely what led the court to conclude that the plaintiff did not actually rely.<sup>158</sup> The problem, then, seems to be with the very idea of reliance. A theory of probable reliance would accordingly fall short of remedying the inequalitarian features of extant doctrine.

## 2. *Need-Based Enforcement*

In cases of inducement by improper influence, severe poverty, and caretaking, the promisee's substantial need for the promised gift is often a lever for manipulation and source of the promisee's dependency on the promisor. Enforcing donative promises when and because the promise supplies a substantial need for the promisee might thus have the potential to counteract manipulation and dependency risks arising from a donative promise.

In particular, a need-based theory of enforcement would shift the focus of legal inquiry from the effects of the promise to the mechanism by which the promise operates as a vehicle for improper influence and dependency. Rather than focusing on the existence or potential for changed circumstances—an imperfect and discriminatory proxy for promisee dependence on the promised gift—a need-based approach instead inquires directly about the significance of the gift in the promisee's life. Would the gift have enabled the promisee to take steps to exit poverty, to feed her family, or to find stable work? Was the gift a necessary or critical means to one of the promisee's ends? To what extent was she counting on the promised gift?<sup>159</sup> Substantial need thus provides more direct insight than reliance-focused theories into the power dynamics of the relationship and, hence, into the extent to which contract enforcement could counteract improper influence in promissory relationships.<sup>160</sup>

157. *Dewein v. Estate of Dewein*, 174 N.E.2d 875, 877 (Ill. App. Ct. 1961).

158. *Id.*

159. It is not clear how the notion of need would need to be defined under this approach. I discuss problems with objective and subject standards for need below.

160. Depending on the theory of enforcement, enforcement might also exacerbate that risk, as the donative promise principle illustrates. As I argue in Part VI, enforcement might also be improper in certain donative promises to provide services.

Such a need-based theory of enforcement is nonetheless problematic, as it is either underinclusive or arbitrarily favors people with many wants and desires. First, there are two ways we might understand a substantial need. “Need” might be understood objectively, in terms of basic goods and services that humans generally require to live a decent life, such as adequate nutrition and a place to call home. An objective notion of need, however, would make a need-centered approach to enforcement underinclusive. Promissory estoppel would continue to govern inducement by improper influence cases where the promised good is something other than a basic need, such as a family heirloom, a house,<sup>161</sup> medical school tuition, and the like. But just because something is not a basic need does not mean it cannot be used as an inducement to conform to the promisor’s wishes. The promised good may figure centrally in the promisee’s life plans—the promisee may, for instance, really want to become a physician. Consequently, a need-centered approach would fail to counteract legal reasons for promisees to conform to improper promisor influence.

Alternatively, to accommodate these concerns, need might be understood subjectively, in terms of the value to the particular promisee. But, second, if that is the case, a need-centered theory of enforcement has the peculiar consequence of giving people who have many wants enforceable rights with respect to a broader range of donative promises than people who happen to have fewer wants. Donative promises made to an insatiable consumer would tend to more often be enforceable than donative promises made to a philosophical Stoic. Such a need-based principle of enforcement is thus arbitrary in its operation.

Further, a subjective need-based theory of enforcement suggests a quasi-commercial view of donative promising. By making promisee-want the basis for enforcement, a subjective need theory suggests that the contract law of donative promising aims to get goods and services to promisees who want them *because those promisees want them*. As I discuss in more detail in Part V, people often make donative promises to express friendship, solidarity, and other affective and moral values.<sup>162</sup> A need-based theory’s vision of donative promising thus seems a poor fit with the purportedly affective and moral character of donative promising.

---

161. As opposed to a home, which might well be a basic need but take the form of a condo, mansion, and so forth. For a discussion of the moral significance of having a home, see generally Christopher Essert, *Property and Homelessness*, 44 *PHILOSOPHY & PUB. AFF.* 266 (2016).

162. *Cf.* Eisenberg, *supra* note 6, at 848 (arguing that if enforcement commodified donative promises, that would provide a reason not to enforce).

### 3. *Default Enforcement*

Alternatively, donative promises could be enforceable under a default rule of enforcement. Under such a proposal, promisors would have to communicate a specific intention to the promisee to *avoid* legal enforcement of the donative promise.<sup>163</sup> In the absence of such an expressed intention, the promise would be enforceable upon being communicated to the promisee.

A default rule of enforcement has the advantage of doing away with the problematic categories of need and reliance that animate the alternatives to simply making donative promises enforceable discussed thus far. Further, one might worry that opting for a mandatory rule of enforceability in the absence of reliance would leave many people and entities uncomfortable making promises for fear of liability, and would accordingly reduce gift promises. In contrast, by giving promisors control over whether their promises are legally binding, a default rule may be less likely to reduce donative promises.

In response, assuming, for the sake of argument, that these concerns about mandatory enforceability are true, it is not clear that a default rule would really change current donative promissory relationship dynamics. Replacing the donative promise principle with a default rule of enforcement would obviate perverse legal reasons to conform to improper promisor influence, but the promisee's right to the promised gift would still be largely (if not even more) in the hands of the promisor. And while some interpersonal promisors may feel embarrassed to tell promisees that their promises are not to be legally binding—grandfathers might feel uncomfortable promising a gift to a grandchild while at the same time saying that the gift is not enforceable<sup>164</sup>—it is less clear that charitable institutions would have such qualms. Given the risks of liability and the ease of disclaiming it, why wouldn't such institutions always contract around such a default rule?

---

163. See, e.g., U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (stating that an implied warranty of merchantability will be implied unless the parties to an agreement for sale of goods agree otherwise). Default rules often “fill gaps in incomplete contracts,” unlike the proposal here. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989). For an argument grounded in party autonomy that default rules should be used more broadly, see HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 109 (2017) (arguing that a concern with party autonomy recommends default over mandatory rules for contracting, except, inter alia, in cases where mandatory rules are needed to “vindicate contract law’s commitment to relational equality”).

164. I am indebted to Hanoach Dagan for this point.

These points are, to be sure, empirically speculative. But they point to an important moral limit of a default rule: either the rule will simply put performance in the hands of the more powerful party (thus replicating inegalitarian features of the donative promise principle), or the rule will effectuate enforcement by means of shame and embarrassment. Even if the latter mechanism turns out to be effective, in practice it leaves the promisee dependent on the particular moral sensibilities of the promisor for public recognition of the promisee's right to performance. A default rule will thus either fail to cure the larger social inequality perpetuated by the donative promise principle or will fail to cure the relational inequality between donee-promisees and promisors. Given the equality values at stake, a default rule is therefore less attractive than mandatory enforceability.<sup>165</sup>

### C. *Implementation and Scope*

Reducing donative promising is also not necessarily a regrettable consequence of enforcing donative promises. If making donative promises enforceable in the absence of reliance would lead people and entities to make only or mostly sincere donative promises, that reform would have succeeded in lessening the risk that donative promises will function as vehicles for improper influence over promisees. A sincerer donative promising practice could also support larger patterns of trust that enable promising to flourish. Of course, it may still be true that fewer people will receive needed goods and services. But that result should prompt us to adopt more robust redistributive policies rather than continue to have a contract law that gives such people reasons to conform to the expectations and mores of more powerful social classes.

Some of the seeming harshness of enforcement in the absence of reliance might also be lessened by tailoring doctrines that excuse performance to the morality of donative promising. Doctrines excusing performance are traditionally quite narrow. For example, to show that performance has been made impracticable by an unexpected and supervening event, the nonoccurrence of the event must be a basic (though not necessarily express) assumption of the contract,<sup>166</sup> and the event must make performance unreasonably difficult, expensive, or injurious.<sup>167</sup> If a person's home burns down, she may still have to pay her credit card bills.

---

165. Cf. DAGAN & HELLER, *supra* note 163, at 109 (arguing that mandatory rules may be better suited to vindicating social and relational equality).

166. See RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (AM. LAW INST. 1981).

167. See *id.* at cmt. c.

But if your grandparents' home burns down, it may be unreasonable if not objectionable to insist that they continue paying for your tuition, even if paying would not leave them unable to care for themselves or they should have insured themselves for the risk.<sup>168</sup> Were doctrines excusing performance to apply here as narrowly as they do in commercial settings, promisors might reasonably feel uncomfortable promising gifts and accordingly make fewer gift promises. Ensuring that expanded enforcement of donative promises does not unduly shrink our donative promising practice may therefore require tailoring doctrines excusing performance to the reasonable expectations of promisors and promisees regarding improvidence and other moral aspects of donative relationships, such as ingratitude.<sup>169</sup>

To be sure, it seems undesirable that courts should, at least in theory, be able to inquire into every reason for not keeping a donative promise. For example, it seems overly intrusive for courts to determine whether your friend's decision to stay in to rest after a long day of work was compelling enough to excuse her from having to bring a dish to your potluck.

In response, as a practical matter, it is highly unlikely that friends would sue friends and acquaintances over quotidian matters such as failing to bring dishes to potlucks. Such litigation would be extremely costly in proportion to the value of the promised help. Moreover, the considerations that I have argued supporting enforcement will often not extend to such cases. It is, for instance, not at all clear that merely by promising to bring a casserole to your party that I can induce you to mold some significant aspect of your life to my ends. In arguing that enforcing donative promises could remedy inequalitarian defects in our current legal regime, I am thus not arguing that all donative promises should be enforceable.

It may admittedly be difficult to draw a line between these quotidian and innocuous kinds of donative promises and other donative promises that recommend enforcement on egalitarian grounds. As I discuss in Part VI, should we move towards a legal regime that enforced donative promises in the absence of reliance, enforcement would need to be calibrated to the heterogeneity of donative promises. But even if such issues of scope can ultimately be resolved, enforcement will be morally problematic if enforcement would compromise the moral values of donative promises. Thus, before further exploring matters of implementation and scope, I will now turn to enforcement's influence over the cooperation, trust, and

---

168. Cf. Eisenberg, *supra* note 15, at 5–6.

169. For a general overview of how the civil law treats improvidence and ingratitude, see Eisenberg, *supra* note 15, at 13–15.

authenticity that support donative promises and donative practices more broadly.

## V. SUPPORTING THE MORAL VALUES OF DONATIVE PROMISES

Many of the donative promises I have discussed thus far are morally defective, either because the promisor covertly intends the promise to operate as a vehicle for improper influence or because there is a serious risk that the promise will be so perceived. But donative promises are, of course, not all nefarious. Donative promises play valuable roles in sustaining interpersonal relationships and moral communities. The promises can reinforce shared projects and facilitate forms of social cooperation that might not otherwise come about through preexisting social and economic arrangements. By promising to pay for a sister's rent while she takes care of an elderly family member, a sibling can communicate love, gratitude, and long-term commitment to both family members.<sup>170</sup> Such a promise can also express shared values that the work both siblings perform is equally important, even if the market treats them differently. By expressing such commitment and values, a joint undertaking between equals can grow from the promise.

Similarly, by promising to contribute funds for a public park, a neighborhood association can bring a community together and enable members of that community to communicate to one another their shared responsibility for creating healthy public spaces. A grandparent's promise to pay for her grandson's college fees can likewise express love and commitment, while also communicating to her children that they are not alone in endeavoring to provide for their child's future.<sup>171</sup> Meanwhile, a foundation's promise to provide vaccines for an indigent community can direct resources to people who need them most. A society's donative promising practice can thus create and reinforce civic and intimate relationships of equality and facilitate freely undertaken social cooperation.

The moral values of our donative practices suggest that however we respond to the inequalitarian character of the donative promise principle, it

---

170. *Cf.* *Dewein v. Estate of Dewein*, 174 N.E.2d 875, 876 (Ill. App. Ct. 1961) (“Sis, I am so grateful you are taking care of mother, and I am certainly going to see you are taken care of for life, you deserve it.”).

171. *Cf.* *Ervin v. Ervin*, 458 A.2d 342, 343 (R.I. 1983) (“[Y]ou have nothing to be concerned about as to Michael's being able to attend college, even if I have to borrow the money.”); *Dougherty v. Salt*, 125 N.E. 94, 94 (N.Y. 1919) (explaining that an aunt's promissory note of \$3,000 to her nephew was made because “she loved him very much” and wanted to take care of him).

should be in such a way that leaves ample room for such values to flourish. In this Part, I argue that making a wide range of donative promises of goods and services to persons and nonprofit organizations enforceable, even in the absence of reliance, could support the moral values of our donative practices.<sup>172</sup> In Section A, I discuss and reject one prominent objection to enforcing donative promises, according to which enforcement would undermine the donative character of the promised gift. I then argue in Sections B and C that enforcement in the absence of reliance could actually enhance the authenticity of donative promissory relationships and the trust upon which they depend.

*A. Enforcement Need Not Obscure the Motives of Donative Promisors*

Even if enforcing donative promises in the absence of reliance could resolve the inegalitarian features of our current contract law of donative promises,<sup>173</sup> one might worry that such a reform would alter and taint the promises' donative character.<sup>174</sup> A common moral objection to contractualizing donative promises is that the threat of legal enforcement would obscure promisors' motives for performing.<sup>175</sup> Melvin Eisenberg, for instance, argues that if donative promises were contracts, "it could never be clear to the promisee, or even to the promisor, whether a donative promise that was made in spirit of love, friendship, affection, or the like, was also

172. I hence do not discuss whether promises made from an affective or moral motive to for-profit entities should be enforceable in the absence of consideration and reliance. A promise to, for example, forebear from suing such-and-such airline in gratitude for their smooth handling of an otherwise actionable series of events does not seem central to our donative practices. Further, enforcement of such promises would potentially alter power dynamics between consumers and for-profit entities and a discussion of such power dynamics is beyond the scope of this Article.

173. See *supra* Section IV.A.

174. See Eisenberg, *supra* note 6, at 848.

175. See *id.* Aditi Bagchi and Dori Kimel advance a similar thesis but as applied to donative interpersonal promises in particular. See DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 76 (2003) (arguing that the prospect of contract enforcement makes it difficult for a promisee to know and thereby trust a promisor's motives for performance, and hence, that contract is a "singularly inadequate arena for revealing character traits and expressing attitudes of the kind of which personal relationships thrive"); Bagchi, *supra* note 95, at 710, 716 (arguing that contract should not extend to "private" or "everyday" promises because "[t]he moral character of a private promise depends on the fact that it is not only freely made but also freely kept," and that the prospect of contract enforcement would undermine the "voluntary character" of performance). So although this Article expressly addresses Eisenberg's arguments for the donative promises principle (since that is also his express focus), most of my arguments in response to Eisenberg should also be responsive to Bagchi's and Kimel's positions.

performed for those reasons, or instead was performed to discharge a legal obligation or avoid a lawsuit.”<sup>176</sup> Making donative promises enforceable in the absence of reliance would thus interfere with the communicative function of the promises and thereby undermine their potential to create and support a variety of intimate and civil associations.

Although I ultimately argue that contractualizing all donative promises may undermine the value of an important subset of those promises (namely promises to volunteer), Eisenberg’s worry about enforcement may be misplaced.

First, I doubt that contract enforcement would obscure—from either the promisor’s or the promisee’s point of view—the motive of performance.<sup>177</sup> Criminal and family law contexts are instructive.<sup>178</sup> When you stop your car at a crosswalk while I pass, it seems plausible to me that your stopping is principally motivated by your moral sense (you believe pointless injury is wrong, that your desire to get to the store before it closes does not trump my interests in physical integrity), rather than by the steep criminal penalties you might face should you decide to mow me down.<sup>179</sup> Indeed, I suspect that if we could not regularly understand one another as being so motivated—not just to stop at crosswalks, but to comply with much of criminal and tort law—it would be a rare sight to see people crossing the street, let alone outside of their homes. Likewise, I doubt that many parents are confused about their motives when they feed and clothe their children, even though they have much to lose should they fail to comply with child neglect laws.<sup>180</sup>

176. Eisenberg, *supra* note 6, at 848.

177. For an analysis and rejection of the various ways commentators, such as Eisenberg, feel that enforcement may affect the motive of a donative promisor (and the way that motive is perceived by the promisee), see Seana Valentine Shiffrin, *Is a Contract a Promise?*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 253–55 (Andrei Marmor ed., 2012).

178. See Shiffrin, *supra* note 177, at 253.

179. It may be that Eisenberg is making the empirical claim that enforcement would displace or “crowd out” donative motives. As much may be suggested by Eisenberg’s remark that, were donative promises to be enforced in the absence of reliance, “the promisor’s motives [to perform] would invariably be mixed.” Eisenberg, *supra* note 6, at 848. Since Eisenberg does not offer empirical support for the claim of displacement, I interpret Eisenberg to be instead claiming that enforcement would leave promisors and promisees confused about the communicative content of the promise and motivations for giving the gift.

180. To be sure, the bar is quite high for terminating parental rights on grounds of neglect. See *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982) (holding that, in state neglect proceedings, in order to terminate parental rights, the state must support its claims with at least clear and convincing evidence and that a preponderance of the evidence standard violates due process). Even so, a divorced or single parent who fails to comply with child neglect laws may easily lose custody of her child, as a majority of U.S. states permit modification of custody orders if modification would be in the “best interests of the child.” See, e.g., *COLO. REV. STAT. ANN.* § 14-10-129 (West 2014).



Why, then, would the threat of contract enforcement—which is standardly understood not to be punitive<sup>181</sup>—leave a donative promisor’s motives unclear when she makes the gift?<sup>182</sup>

In Eisenberg’s defense, there is, however, perhaps another way to understand his concern that enforcement would undermine the donative character of the promises. Eisenberg suggests that donative promises are donative precisely because their performance is not required:

We use gifts to indicate our favorites—if we choose to withdraw our affections, then we should not be forced into making the transfer nevertheless. The forced transfer is no longer an indication of our feelings . . . . The enforcement (against the will of the giver) of a gift removes all characteristics of its “gift-ness” except the transfer of the ownership.<sup>183</sup>

I agree that if a donative promise were actually enforced, we would be hard-pressed to call the court-ordered transfer a gift. But I disagree that the risk of enforcement would taint donative promises and their unenforced performance. And that is because I disagree with Eisenberg that the performance is not required in the first place.<sup>184</sup>

After making a promise, it is generally no longer, as a moral matter, within the promisor’s discretion whether to perform.<sup>185</sup> Indeed it would be hard to understand the promisor as having made any kind of promise if she

181. I do not mean to take a stand on whether contract remedies are or should be punitive and on the related issue of whether penalty clauses should be enforceable. *Compare* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985) (suggesting that penalty clauses in contracts should be enforceable in light of economic benefits of parties being able to signal their credibility by agreeing to such clauses, and that “refusal to enforce penalty clauses is (at best) paternalistic”), *with* Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975, 984 (Ind. 1993) (“We hold that in order to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded.”).

182. If the promisee were truly concerned about the motive of the promisor, she could just waive performance and see what happens. *See* Shiffrin, *supra* note 177, at 252–54.

183. Eisenberg, *supra* note 6, at 848 (quoting Thomas Mayhew, *Discussion Questions for Seminar in Contracts Theory* (unpublished manuscript) (on file with author)).

184. Not to mention, I think it is a morally unattractive view to treat donative promises as discretionary for the dependency and gratuity reasons discussed earlier. *See supra* Part III.

185. “By promising we put in another man’s hands a new power to accomplish his will, though only a moral power: What he sought to do alone he may now expect to do with our promised help, and to give him this new facility was our very purpose in promising. By promising we transform a choice that was morally neutral into one that was morally compelled.” FRIED, *supra* note 1, at 8.

communicated to the promisee that she might change her mind on a whim.<sup>186</sup> By making a promise, the donative promisor makes a commitment to the promisee; in the absence of circumstances excusing performance,<sup>187</sup> it is up to the promisee to release the promisor and not for the promisor to decide whether to perform.<sup>188</sup> If the promisor had instead not wanted to be so bound, she could have simply not announced her intention to the promisee, and then waited until she felt like performing to perform. The fact that contractualizing donative promises would render their performance required therefore need not undermine the “gift-ness” of donative performance, since the performance may already be morally required. Meanwhile, by voluntarily making a promise of a gift, a person could still indicate her “favorites” or communicate her affections.

Nor do I think we should worry about the cases where the promise is actually enforced. In such cases, it is largely irrelevant that the transfer after litigation is not a gift. The relationship has already gone bad, the promisor having failed to remain faithful to her promise. And so enforcing the promise should not confuse the parties as to whether the court-ordered transfer expressed friendship, love, or the like.

### *B. Authenticity*

Contrary to Eisenberg’s worries, contractualizing donative promises may actually serve to clarify that a donative promisor’s motive is genuinely donative. Consider a teenager whose grandfather promises to pay for her college tuition. She really needs the funds but also knows that her grandfather disapproves of her taste in clothing and her political views and has been vocal about his disapproval in the past. In the absence of a contractual right to the promised funds, she may reasonably worry whether her grandfather made the promise out of love and respect or out of a desire to get her to change her ways. But by having a contractual right to the funds, she may feel more secure in her belief that the promise was made out of love and respect. Since she has a right to the funds regardless of whether she conforms to her grandfather’s moral precepts, she has an additional (and clarifying) reason to believe he did not mean the promise as a carrot for

---

186. And if the promisor kept this plan to herself, we might well charge her with being deceptive.

187. See *supra* Section IV.C.

188. See Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 506–07 (2008) (explaining that in making a promise to A, B has waived her right to decide whether to perform purely on the merits and instead has transferred that power to A by promising).

inducing conformity. In turn, the contract right can enable the grandfather to more clearly communicate his aims in making the promise.

The contractual right may also help to clarify the granddaughter's motives towards her grandfather more generally. In the absence of the right, after he makes the promise, if his granddaughter's attentiveness to his needs starts to increase, he may entertain doubts as to whether her attentiveness was motivated by love or by a desire to stay in his good graces. If she has to wait many years for the funds (suppose she has to delay applying to college for some unrelated reason), she may start to question her own motives towards her grandfather, especially if she really does deplore his political views.

But if the granddaughter has a legal right to the funds, and she and her grandfather know this, then that right and shared knowledge give the grandfather a further and clarifying reason (in addition to the reasons based on their relationship prior to the promise) to believe she may be acting in a genuinely loving way—she need not remain in his good favors to receive the help, and they both know that. Hence, contractualizing the grandfather's promise may not only help to clarify his motives but can also mitigate the threat that the donative promise poses to the larger authenticity of their relationship.<sup>189</sup> Contractualizing at least some donative promises, like the grandfather's promise, should therefore be something that commentators like Eisenberg welcome.<sup>190</sup>

### C. *Trust*

So far I have been arguing that making donative promises enforceable in the absence of reliance could remedy inegalitarian features of extant contract law and enhance the authenticity of donative promissory relationships. Before turning to limitations of my proposal in Part VI, I want to briefly highlight two further arguments in favor of enforcing donative promises:

---

189. If the grandfather wants the promised tuition to encourage the granddaughter to change her ways, then contract might encourage him to say so. To be sure, he might still be using his money to push her around, but at least now he is being honest. And that honesty is a good thing for the promising practice and a good thing for their relationship. The granddaughter now has no illusions about what he is about, and she can make an informed decision on where to take their relationship next.

190. Of course, contract enforcement would likely constrain people's ability to use gift promises to express favoritism, since promisors could not simply revoke their promise if the promisee falls out of favor (or if a more favored potential promisee comes on the scene). But it is not clear why that is a power the law should leave intact. Deploying gift promises to such ends feels manipulative, especially when the promised performance is something that actually matters to the promisee, as the college funds example suggests.

that nonenforcement creates strategic reasons to rely that have a potentially corrosive effect on trust, and that enforcement would mitigate rational pressure to create contingency plans.

### 1. *Strategic Reliance*

Rebecca Stone and Alexander Stremitzer argue that in the absence of a legal regime enforcing promises, the promisee will tend to overinvest in reliance on the promise.<sup>191</sup> A promisor's motivation to keep her promise tends to increase the more a promisee relies on the promise<sup>192</sup>—the promisor may feel particularly guilty for breaking relied-upon promises or may “simply believe[] that it is a graver moral wrong to break a promise that has been relied upon more.”<sup>193</sup> Anticipating this phenomenon, promisees “*strategically* rely on promises in order to make their promisors more likely to keep their promises.”<sup>194</sup> Promisees thus tend to overinvest in reliance on promises in the absence of legal enforcement.<sup>195</sup>

In contrast, overinvestment should drop in a legal regime that enforces promises.<sup>196</sup> Now that the promise is enforceable, there is “no need to overinvest in order to increase . . . guilt from breaking a promise, because the legal regime ensures that a [promisor] has a sufficient self-interested reason to keep her promise, so long as the [promisee] invests . . .”<sup>197</sup>

Although Stone and Stremitzer's study is not about donative promises in particular, their findings may still be probative.<sup>198</sup> First, donative promising is already a morally laden practice.<sup>199</sup> It seems plausible that promisees might anticipate that their grandfathers,<sup>200</sup> parents,<sup>201</sup> brothers,<sup>202</sup> spouses

191. See Stone & Stremitzer, *supra* note 17, at 3–4 (arguing that in the absence of legal enforcement of an expectancy interest in the promise, the promisee may overinvest to psychologically “lock in” the promisor).

192. See *id.* at 44 (“Our results suggest that, even in the absence of a legal regime that enforces relied upon promises, a promisee's reliance on a promise makes the promisor more likely to keep it.”).

193. *Id.* at 8 n.6.

194. *Id.* at 44.

195. *Id.* at 3–4.

196. *Id.*

197. *Id.* at 36–37. In this passage, Stone and Stremitzer are discussing the particular dictator game that supports their findings.

198. For a discussion of the extent to which Stone and Stremitzer's findings may apply “outside the laboratory,” see *id.* at 46–47.

199. *Cf. id.* at 8 n.6, 14, 47.

200. *Cf. Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

201. *Cf. Harvey v. Dow*, 962 A.2d 322 (Me. 2008).

202. *Cf. Dewein v. Estate of Dewein*, 174 N.E.2d 875, 877 (Ill. App. Ct. 1961).

and ex-spouses,<sup>203</sup> and foundations might be morally motivated to keep their relied-upon promises and accordingly overinvest.<sup>204</sup>

Second, even though Stone and Stremitzer's study focuses on enforcement of relied-upon promises,<sup>205</sup> their study may still lend support to enforcing donative promises in the absence of reliance. Stone and Stremitzer contend that strategic reasons to rely can be obviated by enforcing relied-upon promises because such enforcement gives a promisor "a self-interested reason to keep her promise . . ."<sup>206</sup> Such a self-interested reason is also given by a regime that makes a donative promise enforceable when made. Enforcing donative promises in the absence of reliance should therefore also obviate strategic reasons for donee-promisees to over-rely.

To the extent that Stone and Stremitzer's study applies to donative promising, their study suggests that enforcing donative promises could support the cooperative character of donative promises and mitigate forms of *promisee* manipulation of promisors. In the context of a donative promise, relying to get the promisor to perform out of guilt seems disingenuous, an attempt to manipulate fidelity by playing with the promisor's emotions. If the promisor discovered the promisee's motives for overinvesting, the promisor might reasonably feel betrayed in her discovery that the promisee did not trust that the promisor would perform.

Further, if the promisee can anticipate that the promisor will experience psychological lock-in the more the promisee relies, then it is not too far off to imagine that promisors might also anticipate that promisees will strategically rely. Strategic reasons to overinvest might thus perpetuate distrust. And in the cases where the promisee really does trust the promisor, the reasons the promisor has to distrust the promisee may leave the promisor confused about the promisee's motives. The strategic reasons that create distrust in the absence of enforcement may therefore corrupt even the most well-intentioned donative promise.

Similar concerns apply even in the regime in which Stone and Stremitzer recommend for obviating strategic reasons to overinvest, namely a regime that enforces promises under a theory of promissory estoppel.<sup>207</sup> Promissory estoppel gives promisees reasons to rely by investing in and thereby detrimentally relying on the promise, and hence, securing a right to

203. *Cf.* *Ervin v. Ervin*, 458 A.2d 342 (R.I. 1983).

204. Indeed, the court in *Ricketts* suggests that the grandfather felt guilty towards the end of his life for not having been able to pay out the full amount of the promissory note. *See Ricketts*, 77 N.W. at 366.

205. Stone & Stremitzer, *supra* note 17, at 4.

206. *See id.* at 36–37.

207. *See id.* at 4.

enforcement. It seems at odds with the purportedly cooperative character of donative promises that a person would rely to secure a right to performance of the promise. The promisee should feel free to build the home on her parents' land because it is her dream,<sup>208</sup> and not because she wants to lock in a remedy. The promisee should be encouraged to rely on the donative promise in a way that treats the promisor as a partner, not as a potential adversary. Enforcing donative promises even when not relied-upon can thus not only obviate strategic reasons to *over-rely*, but also obviate strategic reasons to rely in the first place. Enforcing donative promises in the absence of reliance can thereby support promissory trust and the cooperative character that our donative practices purport to have.

## 2. *Contingency Plans*

In addition to producing strategic reasons to invest, nonenforcement also produces reasons to create backup plans in the event that the promisor does not make the gift. Similar to strategic reasons to invest, backup plans may evince distrust, especially in a close personal relationship between a promisor and a promisee.

Suppose, for instance, the granddaughter in *Ricketts*, after having accepted her grandfather's promise, contacted her previous employer to develop a plan to return to work if the grandfather did not soon make good on his promise. On the one hand, creating such contingency plans seems perfectly reasonable in a legal regime where donative promises are not enforced. In hoping that the granddaughter would rely on his promise, the grandfather was asking his granddaughter to take on a substantial financial risk (especially since, in hindsight, we know that he did not actually have the promised funds). It might even be irresponsible for her not to make any contingency plans.

On the other hand, making such plans may reasonably be understood by the promisor as evincing distrust. To see why, now suppose that the grandfather discovers that she has made such contingency plans. He might reasonably feel betrayed, since such plans give him a reason to believe she does not trust him. He might also feel that he was deceived if she kept her plans secret. The granddaughter's affections for her grandfather may in turn give her reasons to *not* make contingency plans, as she may not want to act in ways that could hurt him emotionally. (Or, alternatively, fearing that he

---

208. *Cf.* *Harvey v. Dow*, 962 A.2d 322, 323 (Me. 2008) (“From the time they were young, Teresa and her brother talked about the houses they would eventually like to build on the homestead; Teresa said she wanted her home to be located near a spring, close to where it now sits.”).

would be hurt if he discovered her plans, she might affirmatively try to hide them from him.)

The reasons that nonenforcement gives a promisee to make contingency plans may thus exert a corrosive influence on trust. Nonenforcement also places the promisee in a bind: either she must expose herself financially or engage in behavior that might reasonably be experienced as distrustful or even deceptive.

Enforcement can lessen some of the rational pressure to make contingency plans. If the promise is enforceable, the remedy available through enforcement provides the promisee with a default contingency plan.<sup>209</sup> The promisee need not feel as much pressure to plan for the worst because she already has a legal right that can offer her some protection in the event that the promisor breaches her trust.

To be sure, an important aspect of trusting and caring for someone involves a willingness to make oneself vulnerable to that person.<sup>210</sup> The law should not seek to eliminate all vulnerability in donative promises and should probably leave ample room for people to experience the vulnerability that may be so central to caring for others.<sup>211</sup> But enforcement of donative promises in the absence of reliance would not eliminate emotional vulnerability. For example, even if the son in *Ervin* had been able to secure a contract right to the tuition promised by his father,<sup>212</sup> it seems entirely plausible that he still would have been hurt when his father decided not to help.

209. Community property law and spousal support default rules may play a similar role in supporting trust and intimacy in marital promises. By providing a default division of property upon divorce, family law can lessen the need to make contingency plans. Discussing contingency plans while planning to get married and thus imagining who gets what should the marriage not work out may be particularly emotionally painful for some people. Planning together for such contingencies after getting married may likewise be painful, while making such plans on the side may lead a spouse who discovers such plans to feel that divorce is on the horizon.

210. See SAMUEL SCHEFFLER, EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY 22–24 (2010) (arguing that valuing a relationship or a person—such as a friendship or a family member—constitutively involves making oneself emotionally vulnerable to that relationship or person). I am indebted to Jorah Dannenberg for drawing my attention to the importance of leaving room for vulnerability.

211. Cf. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 715 (2007) (arguing that, although the law should not enforce morality as such, it should make room for moral agency to flourish).

212. The son would have to prevail on a third-party beneficiary theory since the promise was made to his mother.

## VI. TOWARD A CONTRACT LAW FOR DONATIVE PROMISES

Enforcing donative promises in the absence of reliance can make for a more egalitarian contract law and support moral values that sustain donative promising, such as trust and sincerity. In advancing these positions, I have been relying on two more basic moral principles: that the law should not facilitate social inequality and that the law should support the flourishing of interpersonal and broader social relationships. As the defects in the donative promise principle illustrate, the first principle requires taking a close look at how the law creates power and status through both its remedial functions and what the law publicly communicates about the people and relationships it regulates.

Meanwhile, ensuring that the law is compatible with a social environment supportive of interpersonal and broader social cooperation may require doctrinal sensitivity to different values depending on the particular social domain under regulation. The case of donative promising illustrates that even if doctrines of consideration and promissory estoppel may be well-suited to commercial relationships, we should not assume that those doctrines are a good fit for donative relationships, which may require different forms of social support to flourish. For example, as I have been arguing, enforcement of donative promises in the absence of reliance is needed to remedy inequalitarian defects in our contract law of donative promises.

A similar, but often overlooked, point should be made about donative relationships themselves: donative promises are not homogeneous. Gift giving occurs within a variety of cooperative settings that may be characterized by different power dynamics and animated by different moral values, some of which may be ill-served by certain contract principles. Just as contract should attend to differences in power, status, and values between commercial and donative settings, so contract should also attend to differences within donative practices. To illustrate this point, before closing I briefly discuss the underexamined case of volunteer work. While I do not hold that contract is poorly suited to donative promises generally, volunteer work may actually be a paradigm case of donative practices that should be kept outside “the world of contract.”<sup>213</sup>

---

213. Volunteers are exempted from federal minimum wage law. *See* Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 302 (1985) (explaining that a federal wage and hour statute, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (2012), does not reach “ordinary voluntarism”).



A. *Volunteer Work and the Heterogeneity of Donative Promises*

1. *Promisee Power*

Commitments to volunteer at an organization are often not characterized by the power imbalances that recommend enforcing unrelieved-upon promises elsewhere. Unlike the individual promisee, the institutional or organizational promisee may be much more powerful than the volunteer-promisor—consider the Peace Corps, the Red Cross, or the White House relative to a student volunteer. In such cases, the volunteer-promisor’s legal right to later withhold her labor may not enable her to exercise any influence over the organization.<sup>214</sup> The organization may, for instance, have a long list of potential volunteers ready to jump in should the promisor drop out.

Indeed, if volunteering is important to the promisor’s pursuit of employment, the power imbalance may be the reverse of that between a person promised a temporary food supply and a wealthy donor-promisor. The volunteer-promisor may feel that she needs to do the unpaid work (and secure favorable references) to have a suitable CV for her public policy Ph.D. application or her job application to the Gates Foundation.<sup>215</sup> That vulnerability is compounded by the fact that volunteers may not be protected by antidiscrimination law.<sup>216</sup> Hence, in cases of commitments to volunteer,

214. Volunteers are also typically not employees for purposes of the federal right to engage in protected “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act, 29 U.S.C. § 157 (2012) (describing the “right of employees as to organization, collective bargaining, etc.”); see *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1275 (1999) (finding that volunteers at a radio station were not NLRA employees because their relationship to the station had “no economic aspect” as “[t]hey receive no wages or fringe benefits,” and, “[t]o the contrary, they often raise[d] money or contribute money to the station”).

215. See David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227 (1998); Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147 (2006).

216. Volunteers are generally not covered by federal antidiscrimination law. See, e.g., *Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 439 (5th Cir. 2013) (“[A] volunteer is generally not an “employee,” and thus no “hire” has occurred since there is no receipt of remuneration supporting an employer-employee relationship.”); *O’Connor v. Davis*, 126 F.3d 112, 113–14, 116 (2d Cir. 1997) (holding that a volunteer at a psychiatric hospital, whose supervisor suggested that she join in an orgy and called her “Miss Sexual Harassment,” was not an employee for purposes of Title VII). For an argument that volunteers should be protected by Title VII, see generally Tara Kpere-Daibo, Note, *Unpaid and Unprotected: Protecting Our Nation’s Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135 (2009) (arguing that Title VII should be amended to extend to volunteers at nonprofits and for-profits alike).

the power imbalance created by the donative promise is often negligible, if not decidedly in favor of the organizational promisee. Imposing a contractual duty to perform the volunteer work may therefore tip the power balance even further in favor of the promisee, leaving the promisor vulnerable to abuse and manipulation by the organization to which she has committed to volunteer.<sup>217</sup>

And thus, remedying the inegalitarian character of certain voluntary positions may require a legislative solution. For instance, we might need to legislate that competitive voluntary positions be paid a minimum wage or protected by antidiscrimination law.

## 2. *Inclusivity and Liability for Defects in Performance*

Contract principles governing performance may also be at odds with moral values of the volunteering practice itself. Although many volunteers perform work similar to paid workers, volunteer work can also be a context for distinctively inclusive work.<sup>218</sup> Consider community gardening, neighborhood event planning, or setting up for a political rally. These are forms of volunteering that are not necessarily about providing a good for some recipient or market, but rather about other values, such as political activism, religiosity, or community membership. Once a certain threshold of ability is met, volunteers are often selected on the basis of nonmeritocratic

---

217. Such a power imbalance in the context of quasi-market work raises an issue as to whether such “volunteer” positions should be lawful. Progress on this issue is unlikely, though, so long as we continue to conceptualize such positions as volunteer positions. *Cf.* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 294, 302 (1985) (explaining the wage and hour provisions of FLSA do not reach “ordinary voluntarism” and that FLSA was “obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage”) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)); *Volunteers*, U.S. DEP’T OF LABOR, <http://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> (last visited Nov. 8, 2017) (“The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., ‘to suffer or permit to work.’ However, the Supreme Court has made it clear that the FLSA was not intended ‘to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another.’ In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services.”). Litigation efforts have instead been focused on unpaid internships in the for-profit private sector. *See, e.g.*, *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2nd Cir. 2016) (expressly rejecting the Department of Labor’s suggested approach in favor of an intern-specific test for determining whether the intern is “the primary beneficiary” of the internship); *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831, 834 (11th Cir. 2013) (holding that student externs who “engage[d] in hands-on work for their formal degree program” were excluded from FLSA protection).

218. *See* Tsuruda, *supra* note 21, Part II.

criteria, such as whether the volunteer appears at a posted date and location.<sup>219</sup> So long as you can help garden in some capacity, it may not matter whether you can lift heavy bags of dirt or skillfully prune a rose bush for purposes of volunteering at a community garden. And this is a good thing. By de-emphasizing flawless performance, such organizations facilitate social bonds with people from different walks of life, people with radically different educational backgrounds and physical abilities. Further, by focusing on aspects of the cooperation beyond the quality of the product produced, volunteer work can be communicatively powerful, expressing that the point of the work is to enjoy one another's company, to overcome social barriers, and to share responsibility for one another's wellbeing.<sup>220</sup>

Treating commitments to volunteer like service contracts would, in contrast, bring performance to the fore. Consider, for instance, the stringency of the duty of performance that arises from finding that a service contract exists. Part of the purpose of having a service contract is to ensure that the people you hire know how to perform—that, for instance, you want your roof to be one color rather than another.<sup>221</sup> Hence, even though flawed performance may not amount to a material breach, the promisor may still be liable for the monetary value of the defects in her performance. Volunteers, fearful of incurring liability for defective performance, might reasonably ask one another, or the associations for which they volunteer, to be very clear and specific about what they want. Once I can become liable for the quality of my performance, it really starts to matter to me whether I am supposed to plant a magnolia in our community garden rather than a palm. Such a concern is not always inappropriate, but the risk of liability for performance shifts the focus away from the larger aims and values of the cooperation to

---

219. *See id.* This is in contrast to professional volunteering. But professionals, such as licensed physicians and attorneys, already have no right to minimum wage in virtue of their professional status. *See* 29 U.S.C. § 213(a)(1) (exempting people employed in a “bona fide . . . professional capacity” from wage and hour provisions); 29 C.F.R. § 541.304 (2004) (explaining that licensed attorneys and physicians are employed in a “bona fide professional capacity” under 29 U.S.C. § 213(a)(1)). Minimum wage exemptions for volunteers are thus not oriented towards facilitating professional volunteerism.

220. *See* Tsuruda, *supra* note 21, Part II.

221. *Compare* O.W. Grun Roofing and Constr. Co. v. Cope, 529 S.W.2d 258, 263 (1975) (holding that substantial performance was not tendered because the uniform color of the roof was an essential part of the contract), *with* Jacob & Youngs, Inc., v. Kent, 230 N.Y. 239 (1921) (holding that the defendant could not withhold payment even though the plaintiff installed a different brand pipe than the defendant requested in part because the pipes were of the same type and quality).

the particular product produced and, thus, away from the things that made the volunteer work a unique arena to begin with.<sup>222</sup>

Contract liability for minor defects in performance may also discourage people from volunteering who may feel that they are not that good at performing, or who may be unsure about how long they could make a commitment to volunteer—people with no prior experience or with busy work and family lives, people with disabilities, or certain elderly people. Part of what makes volunteer work a distinctive and potentially valuable form of social cooperation is the work's potential to facilitate bonds of friendship and civility between people who might not otherwise encounter one another in the paid workplace<sup>223</sup> or in their preexisting social circles. Contract liability for minor flaws in performance may therefore undermine volunteer work's potential for inclusivity. The risk of incurring liability may also undermine the spontaneity of volunteer work. People might no longer feel comfortable dropping by their local shelter to help out of fear that should they need to leave a little early or volunteer inconsistently, they might incur liability for incomplete performance.

### 3. *Discrimination and Associational Freedom*

Duties arising from employment contracts may similarly be in tension with the value of volunteer work. Consider, for example, the duty that employers not discriminate on the basis of “race, color, religion, sex, or national origin” in their selection of employees.<sup>224</sup> Such a duty is essential to

222. Of course, there are certain kinds of volunteer work for which quality performance is absolutely essential, such as volunteer medical and construction work. But in contrast to the service and construction contract context, performance in such voluntary contexts does not matter because of the intent of the relevant parties or the particulars of their promissory relationship. Quality medical care and safe housing are public policy issues, and their provision can be (and often is) regulated through legislation (and of course criminal and tort law).

223. For a thoughtful discussion of the potential for the *paid* workplace to bring diverse people together, see generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003). Even if the paid workplace can bring people together from diverse backgrounds, that potential is still limited by the meritocratic features of the workplace and the content of the primary work being done. For example, employees at an investment bank might come from a variety of backgrounds (even educational, assuming that people in different roles interact with one another in supportive and meaningful ways). Yet differences in moral and political beliefs across a society may mean that those working at the bank systematically encounter only a small segment of the population, and do not encounter people who fundamentally disagree with their kind of work or have radically different life projects and interests.

224. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (2015). I take an inclusive view of the content of a contract, according to which the content of a contract is not limited to

ensuring that each member of society is able to secure the goods that they need on an equal basis.<sup>225</sup> Employment discrimination law also aims at realizing people's equal moral status in one of the most central and pervasive forms of social cooperation—a society's scheme of labor and production.<sup>226</sup>

Yet in part because of employment law's strong commitment to workplace equality (and, of course, because of the democratic values that require such a commitment), people may be limited in their ability to interact with and realize conceptions of the good in the paid workplace. Such limits are, of course, desirable (for all the reasons noted above).<sup>227</sup> But just because a value would be inappropriate to realize in the paid workplace does not mean it should have no context for its realization.

For example, a group aiming to facilitate women's community engagement may want to limit its membership to women. Similarly, a church may want to limit its clerical positions to religious adherents. Treating commitments to volunteer like employment contracts would thus yield one of two undesirable results: either people would no longer be permitted to realize those moral and religious aims through their cooperative activity with one another, or we would have to give up on full workplace equality.<sup>228</sup> Extending antidiscrimination norms in employment contracts to volunteer settings may thus sometimes undermine volunteer work's value as a locus for engaging with and realizing a plurality of values (that might not be appropriately or freely realizable in the paid workplace).

To be clear, this is not to say that voluntary organizations should have *carte blanche* to discriminate. Volunteer organizations may interact with the public in ways that parallel public accommodations. It is also not clear that antidiscrimination is always in tension with the internal norms of the organization.<sup>229</sup> For instance, why would Doctors Without Borders need to

the intent of the parties as expressed in a contractual agreement, but also includes the full range of legal duties and default terms the law imposes on the particular kind of promissory relationship formed by the parties. Hence, employment law, in my view, is part of the content of an employment contract.

225. *See id.*

226. *See, e.g.,* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971) (explaining that employment discrimination law aims to bring about "equality of employment opportunities").

227. *See* ESTLUND, *supra* note 223, at 8–10, 34, 125.

228. I am suggesting here that a strong commitment to workplace equality recommends rejecting the ministerial exception to employment law. I argue for this position in Sabine Tsuruda, *Why the Equality View of Religious Liberty Should Reject the Ministerial Exemption* (unpublished manuscript) (on file with the author).

229. Indeed, I argue elsewhere that antidiscrimination protections may be required by the inclusivity values of volunteer work. *See* Tsuruda, *supra* note 21, at 27–29.

engage in racial discrimination in either its membership or who it treats?<sup>230</sup> My point is rather that employment contract norms should not be adopted wholesale to enforce volunteer commitments because those norms may sometimes be in tension with the associational values of volunteering.

## VII. CONCLUSION

Under the donative promise principle, a promise of a gift is typically unenforceable in contract unless the promisee foreseeably changes her financial position in reliance on the promise. The donative promise principle is an egalitarian principle. Donative promises are often made against a background of profound social and economic inequality, and many people rely on gifts to meet their basic needs. Promisees are hence susceptible to promisors' attempts at using promised gifts as inducements to conform to promisors' values and wishes. A reliance-based regime perversely supplies legal reasons to conform to such attempts and to thereby rely on the promises in foreseeable ways. Meanwhile, promisees who are too poor to change their circumstances in reliance on the promises are left dependent on the whim of promisors for continued access to basic goods and services. Enforcement in the absence of reliance could relieve promisees of such perverse reasons to rely and publicly repudiate the otherwise vulnerable status of indigent promisees.

Commentators nevertheless worry that enforcement in the absence of reliance would taint donative relationships by obscuring the promisor's motive, leaving it unclear whether the gift was ultimately given out of, for example, friendship, or from fear of legal sanctions. In response, I have argued that the specter of enforcement need not obscure promisors' motives, at least not any more so than criminal sanctions might obscure people's motives for stopping their cars at crosswalks or taking care of children. Indeed, enforcement could actually enhance the authenticity of donative relationships by lessening the risk that the promised gift will be interpreted as a carrot to conform to the promisor's wishes. Enforcement could also facilitate trust by obviating reasons to strategically overinvest in the promise and create contingency plans.

But donative promises are not homogenous. Gift giving occurs within a variety of social settings characterized by different power dynamics and moral values, some of which may be ill-served by contract principles. The underexamined case of volunteer work offers such an example. People often perform volunteer work to improve their job prospects. Enforcement would

---

230. I am indebted to Seana Shiffrin for this point.

thus worsen the power imbalance between volunteers and volunteer organizations. Holding volunteers liable for minor defects in their work (as with service contracts) would also undermine volunteerism's potential to engage people with different skills and abilities, and hence, would undermine volunteerism's inclusivity.

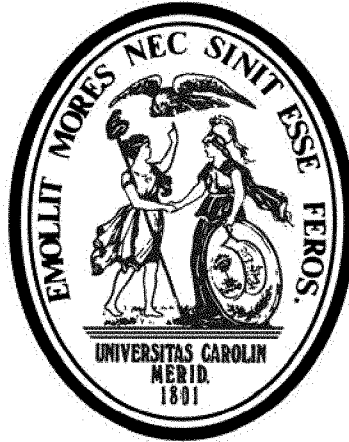
Many donative promises should therefore be enforceable in the absence of reliance, but enforcement will need to be calibrated to the power dynamics and moral values that characterize different kinds of donative promises.

# SOUTH CAROLINA LAW REVIEW

VOLUME 69

SPRING 2018

NUMBER 3



Except as otherwise expressly provided, the author of each article in this volume has granted permission for copies of that article to be made for any educational use, provided that (1) copies are distributed at or below cost; (2) the author and *South Carolina Law Review* are identified; and (3) notice of the use is given to *South Carolina Law Review*.

© Copyright 2018 by the *South Carolina Law Review*

Member of the National Conference of Law Reviews.

The *South Carolina Law Review* (ISSN 0038-3104) is published quarterly by the University of South Carolina School of Law, Columbia, SC 29208. Subscription rate: \$40.00 per year payable in advance, \$35.00 per year for members of the South Carolina Bar. Periodical postage paid at Columbia, SC, and additional mailing offices.

POSTMASTER: Please send address changes to *South Carolina Law Review*, University of South Carolina School of Law, 1525 Senate Street, Columbia, SC 29208.

The *Law Review* seeks to publish materials representing meritorious viewpoints on subjects of interest to the legal profession. Publication does not indicate that the views expressed are adopted by the *Law Review*. The *Law Review* accepts submissions by mail or email sent to [submissions@sclawreview.org](mailto:submissions@sclawreview.org). Manuscripts received by mail are not returned unless accompanied by a stamped, self-addressed envelope.

All citations conform to *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). South Carolina cases are cited to *South Carolina Reports* in conformity with South Carolina Appellate Court Rules.

VOLUME 69

SPRING 2018

NUMBER 3



\*

# SOUTH CAROLINA LAW REVIEW

---

VOLUME 69

2017–2018

NUMBER 3

---

## BOARD OF EDITORS

CHELSEA N. EVANS  
*Editor in Chief*

ETHAN B. CLARK  
*Executive Student Works Editor*

KATHERINE ABDULLAH  
TYRA S. MCBRIDE  
MATTHEW ROBINS  
JONATHAN TODD  
GRANT WILLS  
*Associate Editors in Chief*

J. EVAN PHILLIPS  
*Managing Editor*

RAYMOND J. PRINCE  
*Senior Student Works Editor*

ELLIOT CONDON  
ELLE KLEIN  
*Executive Articles Editors*

CREASIE M. PARROTT  
*Associate Managing Editor*

JAMES DAVID GEORGE, JR.  
JENNIFER GREENE  
JACOB TAYLOR  
*Student Works Editors*

HOLLY BROWN  
ELIZABETH K. VON KELLER  
*Senior Articles Editors*

HAMILTON BARBER  
*Technology Editor*

KAYLA MARIE ADRIANNA CULVER  
*Senior Research Editor*

ZACHARY J. CROWL  
ROSS DU RANT  
MATTHEW HARRISON  
SHANNON L. VOGAN  
*Articles Editors*

JOSEPH D. SPATE  
*Fourth Circuit Editor*

SARAH TATE CHAMBERS  
EUGENE GORDON HAY, VI  
JOHN DUNBAR KORNEGAY, III  
CHANDLER DAVID ROWH  
*Research Editors*

ANTHONY D'ELIA  
RONALD T. SCOTT  
*Symposium Editors*

## EDITORIAL STAFF

MAURA ASHTON  
CARA BASS  
CRESTON W. BROWN  
LINDSAY T. CARPENTER  
GRACE P. CHANDLER  
KRISTEN COBLE  
CURTIS J. COPELAND  
AXTON D. CROLLEY  
WILSON DANIEL

CHRISTOPHER HENRY  
C. ROSS HEYL  
CATHERINE HUNTER HOLLAND  
ZACHARY W. JONES  
MARY A. MASSALON  
WILLIAM PETER MAURIDES  
WILLIAM A. NEINAST  
KIRSTEN M. PETERSON  
KELSEY POORMAN  
JOHN C. ROBERTS

ERICA G. SAFRAN  
MADISON SMITH  
EVAN SOBOCINSKI  
SARAH SPECTER  
RYAN VAN BUREN  
ERIN E. WALDRON  
SARA WEATHERS  
WILLIAM ENGLISH WHITNEY, III  
J. ALEXANDER ZIMMERMAN

LISA A. EICHHORN

MARTIN C. MCWILLIAMS, JR.  
PHILIP T. LACY  
*Faculty Advisors*

HOWARD B. STRAVITZ

KIM L. FANNING  
*Administrative Assistant*

\*

UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW FACULTY  
2017–2018

ADMINISTRATION

Robert M. Wilcox, A.B., J.D.; *Dean and Professor of Law*  
Jaclyn A. Cherry, B.A., J.D.; *Associate Dean for Academic Affairs and Professor of Law*  
Colin Miller, B.A., J.D.; *Associate Dean of Faculty Development and Professor of Law*  
Susan Palmer, B.A., J.D.; *Associate Dean for Student Affairs and Director of Career Services*  
Karen Britton, B.A., M.A., Ph.D.; *Assistant Dean for Admissions*  
Gary Moore, B.S.; *Assistant Dean for Academic Technology*  
Elizabeth Niehaus, A.B., M.B.A.; *Assistant Dean for Administration*

EMERITUS

F. Ladson Boyle, B.S., J.D., LL.M.; *Charles E. Simons, Jr. Professor Emeritus of Federal Law*  
R. Randall Bridwell, B.A., J.D., LL.M.; *Distinguished Professor Emeritus of Law*  
Katharine I. Butler, B.S., M.Ed., J.D.; *Distinguished Professor Emeritus of Law*  
W. Lewis Burke, B.A., J.D.; *Professor of Law and Director*  
Nathan M. Crystal, B.S., J.D., LL.M.; *Distinguished Professor Emeritus of Law and Class of 1969 Professor Emeritus of Professional Responsibility and Contract Law*  
Richard E. Day, B.S., J.D.; *Distinguished Professor Emeritus of Law*  
Robert L. Felix, A.B., LL.B., M.A., LL.M.; *James P. Mazingo, III Professor Emeritus of Legal Research, Distinguished Professor Emeritus of Law*  
James F. Flanagan, A.B., LL.B.; *Oliver Ellsworth Distinguished Professor Emeritus of Federal Practice*  
Patrick J. Flynn, A.B., J.D.; *Professor Emeritus of Law*  
John P. Freeman, B.B.A., J.D., LL.M.; *Distinguished Professor Emeritus of Law and John T. Campbell Distinguished Professor Emeritus of Business and Professional Ethics*  
Thomas R. Haggard, B.A., LL.B.; *Distinguished Professor Emeritus of Law*  
F. Patrick Hubbard, B.A., J.D., LL.M.; *Ronald L. Motley Distinguished Professor of Tort Law*  
Herbert A. Johnson, A.B., M.A., Ph.D., LL.B.; *Distinguished Professor Emeritus of Law*  
Henry S. Mather, B.A., M.A., J.D.; *Distinguished Professor Emeritus of Law*  
William S. McAninch, B.A., LL.B., LL.M.; *Distinguished Professor Emeritus of Law*  
Ralph C. McCullough, II, B.A., J.D.; *Distinguished Professor Emeritus of Law*  
John E. Montgomery, B.Ch.E., J.D., LL.M.; *Distinguished Professor Emeritus of Law, Dean Emeritus*  
Dennis R. Nolan, A.B., M.A., J.D.; *Distinguished Professor Emeritus of Law and Webster Professor Emeritus of Labor Law*  
David G. Owen, B.S., J.D.; *Carolina Distinguished Professor of Law*  
Burnele Venable Powell, B.A., J.D., LL.M.; *Miles and Ann Loadholt Professor of Law*  
Walter F. Pratt, Jr., B.A., D.Phil., J.D.; *James P. Mazingo III Professor Emeritus of Legal Research Distinguished Professor Emeritus of Law*  
O'Neal Smalls, B.S., J.D., LL.M.; *Distinguished Professor Emeritus of Law*  
Stephen A. Spitz, B.S., J.D.; *Distinguished Professor Emeritus of Law*  
Roy T. Stuckey, B.A., J.D.; *Distinguished Professor Emeritus of Law and Webster Professor Emeritus of Clinical Legal Education*  
Jon P. Thames, J.D., LL.M.; *Distinguished Professor Emeritus of Law*  
James L. Underwood, A.B., J.D., LL.M.; *Distinguished Professor Emeritus of Law*  
Eldon D. Wedlock, Jr., A.B., J.D., LL.M.; *Distinguished Professor Emeritus of Law*

FACULTY

Gregory B. Adams, B.S., J.D., LL.M., J.S.D.; *Associate Professor of Law*  
Janice M. Baker, B.A., J.D.; *Assistant Director of Legal Writing*  
Derek W. Black, B.A., J.D.; *Professor of Law*  
Robert T. Bockman, B.A., M.A., J.D.; *Senior Legal Writing Instructor*  
Marie C. Boyd, A.B., J.D.; *Assistant Professor of Law*  
Josephine F. Brown, B.A., J.D.; *Associate Professor of Law*  
James R. Burkhard, B.A., M.A., J.D.; *Associate Professor of Law*  
Elizabeth Chambliss, B.S., M.S., Ph.D., J.D.; *Professor of Law and Director, NMRS Center on Professionalism*  
Thomas P. Crocker, B.A., M.A., M.A., Ph.D., J.D.; *Distinguished Professor of Law*  
Jesse M. Cross, M.A., J.D.; *Assistant Professor of Law*  
Elizabeth M. Dalzell, B.S., J.D.; *Legal Writing Instructor*  
Tessa Davis, B.S., J.D., LL.M.; *Assistant Professor of Law*  
Joshua G. Eagle, B.A., M.S., J.D.; *Solomon Blatt Professor of Law*  
Lisa A. Eichhorn, A.B., J.D.; *Director of Legal Writing and Professor of Law*  
Ann M. Eisenberg, J.D., LL.M.; *Assistant Professor of Law*  
Jacqueline R. Fox, B.A., J.D., LL.M.; *Associate Professor of Law*  
Kenneth W. Gaines, B.S., J.D., LL.M.; *Associate Professor of Law*

Joshua Gupta-Kagan, B.A., J.D.; *Assistant Professor of Law*  
 Susan S. Kuo, A.B., J.D.; *Associate Dean for Diversity and Inclusion and Professor of Law*  
 Philip T. Lacy, B.A., LL.B.; *Professor of Law*  
 Shelby Leonardi, B.A., J.D.; *Legal Writing Instructor*  
 Ami Leventis, B.A., J.D.; *Legal Writing Instructor*  
 David K. Linnan, B.A., J.D.; *Associate Professor of Law*  
 Lisa Martin, B.A., J.D.; *Assistant Professor of Law*  
 Martin C. McWilliams, Jr., B.A., J.D., LL.M.; *Professor of Law*  
 Benjamin Means, A.B., J.D.; *Professor of Law*  
 S. Alan Medlin, B.A., J.D.; *David W. Robinson Professor of Law*  
 Amy L. Milligan, B.S., B.A., J.D.; *Assistant Director of Legal Writing*  
 Eboni S. Nelson, B.A., J.D.; *Professor of Law*  
 Elizabeth G. Patterson, B.A., J.D.; *Professor of Law*  
 Aparna Polavarapu, B.S., J.D., M.A.L.D.; *Assistant Professor of Law*  
 Claire Raj, B.A., J.D.; *Assistant Professor of Law*  
 Nathan Richardson, B.S., J.D.; *Assistant Professor of Law*  
 Wadie E. Said, A.B., J.D.; *Professor of Law*  
 Joel H. Samuels, A.B., M.A., J.D.; *Professor of Law*  
 Joseph A. Seiner, B.B.A., J.D.; *Professor of Law*  
 Bryant Walker Smith, B.S., J.D., LL.M.; *Assistant Professor of Law*  
 Ned Snow, B.A., J.D.; *Professor of Law*  
 Seth Stoughton, B.A., J.D.; *Assistant Professor of Law*  
 Howard B. Stravitz, B.A., J.D.; *Associate Professor of Law*  
 Emily F. Suski, B.A., J.D., M.S.W., LL.M.; *Assistant Professor of Law*  
 Michael J. Virzi, B.A., J.D.; *Legal Writing Instructor*  
 Clinton G. Wallace, A.B., J.D., LL.M.; *Assistant Professor of Law*  
 Shelley Welton, B.A., J.D., M.P.A., Ph.D.; *Assistant Professor of Law*  
 Marcia A. Zug, A.B., J.D.; *Professor of Law*

### COLEMAN KARESH LAW LIBRARY FACULTY

Duncan E. Alford, B.A., J.D., M.L.I.S.; *Associate Dean and Director of the Law Library, Professor of Law*  
 Megan Brown, B.A., M.L.I.S.; *Acquisitions and Electronic Resources Librarian*  
 Amanda Bullington, B.A., M.L.I.S.; *Cataloging and Serials Librarian*  
 Terrye M. Conroy, B.S., J.D., M.L.I.S.; *Assistant Director of Legal Research Instruction*  
 Aaron Glenn, B.A., J.D., M.L.I.S.; *Reference Librarian*  
 Andrew Kretschmar, B.A., M.L.I.S.; *Access Services Librarian*  
 Rebekah K. Maxwell, B.A., J.D., M.L.I.S.; *Associate Director for Library Operations*  
 Cornelius Pereira, B.A., M.A., M.L.I.S.; *Head of Technical Services*  
 Eve Ross, B.A., M.L.I.S.; *Reference Librarian*  
 Candle M. Wester, B.S., J.D., M.S.L.I.S.; *Associate Director for Faculty Services and Administration*

### ADJUNCT AND VISITING FACULTY

Hon. Joseph F. Anderson, Jr.	Hon. David R. Duncan	John D. Martin
Steven Austermiller	Hon. John C. Few	Joseph M. McCulloch, Jr.
Hon. James R. Barber, III	Christopher Todd Hagins	Lawrence C. Melton
Brett H. Bayne	Richard Handel	Elizabeth Scott Moïse
Shannon Bobertz	Richard Harpootlian	Deborah Morgan
Margaret Bodman	Rachel A. Hedley	Clarke Newton
William B. Brannon	William O. Higgins	Sara Parrish
Teri Callen	Christopher G. Isgett	Charles F. Reid
Ronald M. Childress	Lee P. Jedziniak	Hon. Dennis W. Shedd
Joseph D. Clark	Bill Killough	Karen Thomas
Lesley M. Coggiola	Stanford E. Lacy	Travis C. Wheeler
Hon. Thomas W. Cooper, Jr.	John K. Langford	Hon. H. Bruce Williams
C. Jennalyn Dalrymple	Ernest Lipscomb	Benton D. Williamson
Emma Dean	Hon. James E. Lockemy	Richard H. Willis
Patrick G. Dennis	James B. Lybrand, Jr.	David S. Wyatt
	Cory E. Manning	