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## Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, Inter Vivos and Testamentary Gift Transfers

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# CONTRACTS AND THE REQUIREMENT OF CONSIDERATION: POSITING A UNIFIED NORMATIVE THEORY OF CONTRACTS, INTER VIVOS AND TESTAMENTARY GIFT TRANSFERS

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## ABSTRACT

This Article addresses a subject that has mystified generations of Contracts students: the normative basis for “consideration.” Instead of attempting to define consideration, which can be largely tautological, the focus is on the normative basis for its use in deciding which contracts are enforceable. After examining the four major normative theories that have been put forth to date to explain the requirement of consideration: functional, realist, moral, and efficiency, the Article concludes that functional is the best normative theory mandating the use of consideration in enforceable contracts.

The Article compares enforceable contracts in which consideration is found with transactions in other legal areas, that is, valid inter vivos gifts and Wills (Property and Trusts and Estates), to determine what requirements are necessary to validate those transfers. With respect to both of these latter transfers, functional formalities are required that satisfy evidentiary, channeling, ritualistic, and protective functions—the same functions that are satisfied by the consideration doctrine in Contracts.

The Article then details why these formalities are so important and cut across these transactions in different areas of the law. By expanding the analysis to the adjudication phase of the legal process, the critical role these functions play *ex post* allows the court or other arbiter to make a determination regarding the enforceability of a transaction with low administrative costs and with little attendant error costs. In two of the three transactions, inter vivos gifts and testamentary (Will) transfers, inevitably one of the parties (the putative donor) to the transaction is deceased. In the third, arms-length contracts, the two parties to the putative contract have two different stories regarding the formation of that contract which, in the

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absence of the functional formalities, would be indeterminate. The functional formalities thus provide the arbiter with reliable and crucial information *ex post* to guide the decision-maker's resolution of the question of enforceability.

Finally, the outlier transaction that has bedeviled Contract scholars for generations and which requires no consideration—promises enforced as a result of the use of the doctrine of promissory estoppel—is addressed and analyzed. It is theorized that these cases actually represent three different types of transactions—failed gift cases, promissory fraud cases, and pre-contractual promise cases (based on fact patterns similar to those employing the doctrine of *culpa en contrahendo* in Civil Law countries). Disaggregating these cases, it is demonstrated that only the latter, pre-contractual promise cases, are true contract cases calling for the imposition of the same normative basis as contract cases supported by consideration. Hence, the article concludes by demonstrating that the contract cases that are enforceable per the doctrine of estoppel or reliance supply the courts with the same functional formalities as consideration-based agreements. These enforceable reliance cases provide the courts with an efficient and effective way to make an adjudication with low error costs.

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## I. INTRODUCTION

The concept of consideration in contract law has always been something of a mystery. As it has evolved over centuries to mean one thing instead of another in contract formation, it has primarily served as the line of demarcation between those contracts that are enforceable by courts and those not. Indeed, given the central role played by the doctrine of consideration in contract formation, one would think that its definition and contours would be fixed and resolute for academics, judges and lawyers alike. Ah, but that is not the case. Quite the contrary, the doctrine of consideration is highly contestable and very malleable. Some might even contend that the doctrine of consideration is subjective and tautological.<sup>1</sup> And none of these latter contentions are verifiably wrong.

What is absolutely and irrefutably true is that consideration, however defined, *is* a requirement for enforceable contracts.<sup>2</sup> That requirement is

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1. For further discussion of this issue, *see infra* notes 39-45 and accompanying text.

2. As with most broad statements or principles of law, the statement is both over and under inclusive. Certain agreements lacking consideration are indeed enforced using the doctrines of estoppel and reliance. *See infra* Part V. Certain other agreements, which are allegedly supported by consideration, are, however, deemed unenforceable because they violate public policy. *See, e.g., A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (court refused to enforce agreement to transfer embryos to ex-wife following a divorce). On the other hand, I contend that *A.Z. v. B.Z.* does not involve an enforceable contract or agreement and should instead be viewed like any other intra-

hornbook law drummed into the head of every first year law student and known to every competent (and even an incompetent) lawyer. Determining whether consideration was present – in which case the contract is enforceable – in a dispute between two parties often becomes the first and most important question that courts address in contractual disputes.<sup>3</sup> But determining what constitutes enforceable consideration and when it is required to have an enforceable agreement is perplexing. Knowing that consideration is required to have an enforceable contract is one thing; however, defining it and determining when there is or is not consideration is the subject of thousands of cases and the content of much law review fodder.<sup>4</sup>

For contract law, this means that one of its primary tenets—a foundational building block—in deciphering and resolving issues that arise in voluntary agreements between two or more parties or entities is “functional” at best,<sup>5</sup> illusory at worst. Often based on criteria that are unstated and obtuse, it allows judges and other mediators to arbitrarily decide which contracts are or are not enforceable with the imprimatur of the state. Consequently, given its central and important gatekeeping role in contract law, it is unsurprising that scores of articles and treatises have been authored to examine, address, and define the purpose, scope, and role of consideration in contract law.<sup>6</sup> Thus, to some students of the law, the

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family promise, that is, as gratuitous. See Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements* 43 SW. L. REV. 191 (2013) (article demonstrates that although Consideration is present in intrafamily contracts governing the disposition of embryos upon divorce or separation, these contracts are not enforced due to public policy and other concerns).

3. See, e.g., JEFF FERRIELL, UNDERSTANDING CONTRACTS ¶3.01, at 63 (2d ed. 2009); BRUCE W. FRIER & JAMES WHITE, THE MODERN LAW OF CONTRACTS 35 (3d ed. 2015).

4. See, e.g., Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982); Lon Fuller, *Consideration and Form*, 41 COLUMBIA L. REV. 799 (1941); James D. Gordon III., *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987 (1990) to name a few.

5. Meaning functional in the sense that an adjudicating court will make the determination of whether consideration is present based on the underlying and unstated decision to enforce or not enforce the agreement. See *infra* notes 27-36. Consideration thus serves the function of the “on/off” switch demarcating which contracts are viable. If the court wants, for whatever reason, to enforce the agreement, it will find “consideration.” See FERRIELL, *supra* note 3. Conversely, if the court finds the agreement lacking in whatever respect, it can choose not to enforce same by deciding that there is an absence of consideration. *Id.* This view tracks the “realist’s” normative view of consideration discussed below. See *infra* notes 37-45 and accompanying text.

6. See, e.g., Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Fuller, *supra* note 4; Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 (1985); Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

requirement of consideration to establish an enforceable contract remains a mystery.

Yet, none of these excellent and informative articles adequately explain the normative and functional roles of consideration once the focus on consideration is expanded to explore and explain related doctrines and cases addressed in other areas of the law, like property law and trust and estate law, where voluntary transfers that are lacking consideration (however it is defined) *are* enforced by the courts.<sup>7</sup> In other words, once the focus on the function of consideration is expanded to analyze related and symbiotic doctrines, such as gifts and the testamentary transfer of assets where consideration is not required, the definition and role of consideration in contract law again becomes even more confusing and contestable.<sup>8</sup>

This expansion leads to the two seminal issues addressed in this Article: 1) what is the normative basis for the requirement of consideration in enforceable contracts and 2) why is consideration lacking in other enforceable agreements like inter vivos gifts and testamentary transfers? The search for a normative basis for consideration, however, is not a novel undertaking. As one might imagine, since consideration has been required to enforce voluntary agreements since well before the promulgation of the Restatement (First) of Contracts in 1931,<sup>9</sup> an examination of the normative basis of consideration has been fair game for contract law scholars. Hence, scholars who address the normative basis for the use and function of consideration to establish an enforceable agreement are not writing on a blank slate. As a result, Part II of this Article begins by briefly summarizing the appropriate literature that establishes the four primary normative theories supporting the use and function of consideration to find enforceable contracts. The four normative theories can be roughly and rather broadly be characterized as: 1) functional or formal; 2) realist; 3) moral; and 4) efficiency (law and economics).

To demonstrate that the functional or formal role is the appropriate and best normative paradigm by which to evaluate consideration, Part II

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7. These are gratuitous transfers but it should be noted at the outset that these gratuitous transfers *are* enforced by the courts. The old shibboleth that gratuitous transfers are not enforced is erroneous and misleading. Gratuitous promises that are not completed are not enforced. This is discussed in greater detail below. *See infra*, notes 113-114 and accompanying text.

8. One insight gleaned from my analysis of this issue is how different transfers are treated legally simply because the transfer is cabined in one area of the law, for example, Trusts and Estates which regulates testamentary gift transfers, versus another area of law, say inter vivos gift transfers that is regulated by rules in Property Law.

9. Indeed, and as discussed *infra* notes 62-86 and accompanying text, with respect to the operation and use of Seal to establish enforceable agreements at common law, consideration was required at common law for informal agreements not requiring a Seal in order to produce an enforceable agreement.

addresses the current definition of consideration in the Restatement (Second) of Contracts, paying some attention to its historical progress beginning with the development and use of the “Seal” as a variant of consideration at common law.<sup>10</sup> In tracing its evolution, particular attention is paid to the functional or formal role performed by the doctrine of consideration and related doctrines that are used to validate non-consideration based transfers such as donative transfers.<sup>11</sup> This ground has largely been ploughed by other scholars but must be rehearsed to set the stage for what follows.

By comparing consideration-based contracts to gratuitous transfers, however, this Article demonstrates that through employing the “benefit or detriment test” to determine whether there is consideration, the current “bargain theory” of consideration is highly chimerical and illusory at best.<sup>12</sup> Once the distinction between consideration-based contracts and gratuitous transfers is deconstructed,<sup>13</sup> the only normative basis for consideration and its use in contract law is to provide a functional or formal role. Given the status of the parties, strangers or acquaintances in the contract setting rather than family or friends in the gratuitous transfer setting, Part II of this Article is concluded by establishing that the functional or formal role of consideration supplies the best normative grounding for the requirement of consideration when that “stranger” relationship is paramount. Conversely, in a setting involving promises or agreements between friends or family, the functional or formal requirement of consideration is inapt, unnecessary, and counterproductive thereby requiring a different set of functional requirements to validate gratuitous transfers (be they *inter vivos* or testamentary).<sup>14</sup>

Part III supports the conclusion reached in Part II by continuing to compare contract-based transfers to gratuitous transfers that do not require

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10. The development and use of the Seal in contracts is discussed *infra* notes 62-86 and accompanying text.

11. *Id.*

12. See *infra* notes 91-96 and text accompanying.

13. At the outset, it is noted that gratuitous transfers, which are enforceable by courts, must be differentiated from unenforceable gratuitous promises. The two are often conflated but have quite different legal consequences. See *infra* notes 113-114 and accompanying text.

14. See *infra* notes 143-194 and accompanying text. Note that reputational sanction works in the gratuitous context because if the promise is not kept the putative donor’s friends and family are likely to be informed of the breach and the donor will lose reputational capital as a result. In the business context, the offeree and offeror may not travel in the same circles and breach of one’s word will not result in the same loss of reputational capital. In the first setting, informal or group sanctions may properly police inappropriate or immoral behavior. In the second setting, court action may be necessary to address the same issue. Hence, the need for consideration *ex post*. See, e.g., Albert H. Choi, *Non-Profit Status and Relational Sanctions: Commitment to Quality through Repeat Interactions and Organizational Choice*, 58 J.L. & ECON. 969 (2015).

consideration. In order to be validated, this Article establishes that these transfers have to satisfy similar functional formal requirements. Hence, this Article establishes a typology of transfers that highlights the legal requirements for three types of distinct transfers of property or assets: 1) contracts or agreements supported or proven by consideration; 2) inter vivos gifts;<sup>15</sup> and 3) testamentary transfers.<sup>16</sup> These three distinct transfers are regarded by academics and lawyers as so legally separable and different, that they are taught in the normal law school curriculum in three different courses: Contracts (consideration and non-consideration based promises or agreements), Property (inter vivos gifts), and Trusts and Estates (testamentary transfers).

The different legal requirements necessary to validate each transfer, however, mask a similar functional role embedded in each transaction. Furthermore, although the explication of the functional role of consideration as the normative base for the doctrine is not new and has been well-described in the scholarly literature. That literature, to date, has focused only on the functional role played by consideration at the time of contracting (which this Article characterizes as “ex ante”). Instead, in Part IV, this Article demonstrates that the functional basis for consideration serves a more important dyadic role. In addition to its ex ante functional role, consideration also provides a different functional role at a time that this Article characterizes as ex post—that is, at the time of adjudication when the contract has allegedly been breached and a remedy is sought for its enforceability. Having provided the legal glue that allows a court to later adjudicate the existence of an enforceable contract, consideration later provides the remedial basis to effectively enforce the contract.

This ex post role of consideration reveals another function or purpose served by consideration that has previously gone undertheorized and unnoticed: the role that consideration plays at the end of the contract. Therefore, this Article concludes Part IV by demonstrating that, like constitutional rights, contract rights only exist if there is an effective

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15. Although there are two types of valid gift transfers, those inter vivos and those that are causa mortis—made in contemplation of impending death—the distinction between the two is largely disappearing and for the purposes of my thesis herein makes little if any difference. Therefore, this article instead focuses on the more common and prevalent typical inter vivos gift and ignore for the sake of my argument gifts causa mortis.

16. Testamentary transfers are those that take place pursuant to a validly executed Will (this Article will capitalize the noun “Will” throughout to avoid any confusion with the verb “will”) and although these transfers relate back to the instant of the testator’s death (under the relation-back doctrine), the actual or physical transfer is accomplished through the probate process pursuant to which the Will is validated and the testator’s assets are distributed pursuant to the Will. Testamentary transfers are discussed below. *See infra* notes 186-195 and accompanying text.



remedy to validate that right. By comparing and contrasting contract-based transfers with their non-consideration counterparts (gifts and testamentary transfers), this Article elucidates the role played by consideration in providing that remedial basis—its *ex post* function. Indeed, given that courts strive to ensure that their decisions are made correctly and efficiently, the formalities associated with each such transfer are designed to achieve those twin goals.<sup>17</sup> Consequently, contracts validated by a finding of consideration, *inter vivos* gifts largely validated by the delivery requirement,<sup>18</sup> and testamentary transfers validated by Wills Act formalities<sup>19</sup> are unified in that each supplies the courts with agreements that can be enforced with low error and adjudicative costs.<sup>20</sup>

Absent from the analysis in Parts II, III, and IV, are agreements between individuals that are not deemed to be gratuitous promises and lack consideration but are nevertheless deemed enforceable. This refers to those promises which induce reliance on the part of the promisee and are deemed enforceable pursuant to Section 90 of the Restatement (Second) of Contracts.<sup>21</sup> These promises are addressed to buttress this Article's central claim that the formalities associated with the three other transfers not only serve a functional role *ex ante*, but they also serve a remedial role *ex post*, as well. A fuller exploration of enforceable gratuitous promises per the rationale of Section 90 of the Restatement (Second) of Contracts is addressed in a companion article that focuses solely on these transfers.<sup>22</sup> The companion article contends that early contract cases like *Hamer v. Sidway*,<sup>23</sup> which were deemed supported by consideration, were not contract cases, but instead were *inter vivos* gift cases that were not completed due to changed conditions.<sup>24</sup>

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17. See *infra* notes 179-185 and accompanying text.

18. See *infra* note 142 and accompanying text for discussion of the legal requirements for a valid gift.

19. See *infra* notes 152-160 and accompanying text.

20. See, e.g., Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994); see *infra* notes 179-182 and accompanying text.

21. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981) states in part:

(1) 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. The remedy granted for breach may be limited as justice requires.

22. Alex M. Johnson, Jr., *A Trichotomy of Reliance Promises: Implied Good Faith in Business Relationships, Uncompleted Gift Transfers, and Public Policy Cases—Historical Development and Normative Explanation* (2016) (unpublished manuscript) (on file with the NORTH DAKOTA LAW REVIEW).

23. 27 N.E. 256 (N.Y. 1891).

24. The companion article, *supra* note 22, makes the claim that enforceable reliance based promises are enforceable solely due to the fact that the action of reliance establishes the remedial

As a result, Part V concludes by comparing valid and enforceable non-consideration transfers (gifts and testamentary bequests hereafter collectively sometimes referred to as “donative transfers”) with valid and enforceable non-consideration transfers that do not satisfy those same certain functional requirements (reliance-based transfers enforced by use of the promissory estoppel doctrine). These three types of distinct transfers in three different areas of the law have but one thing in common: they lack consideration. This Article contends that even though these gifts, testamentary and reliance-based transactions *are not* supported by consideration in its classical form, i.e., the bargain theory of consideration, the functional formalities required for each allows the court to supply a remedy consistent with two related requirements: low administrative costs and minimized error costs associated with adjudication. This is why “completed gifts,”<sup>25</sup> testamentary transfers, and reliance-based promises unsupported by consideration are deemed enforceable and validated judicially.

## II. THE SEARCH FOR A NORMATIVE BASE FOR CONSIDERATION: FOUR THEORIES DOMINATE

Any search for a normative basis for consideration must begin with Lon Fuller’s classic article, *Consideration and Form*.<sup>26</sup> In that article, Professor Fuller convincingly demonstrates that the role of consideration in contractual agreements is both formal and functional.<sup>27</sup> Indeed, Professor Fuller’s primary hypothesis is that consideration has both formal and substantive components and he sets as his task disentangling the two.<sup>28</sup>

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evidence necessary to create an enforceable promise. *Id.* That evidence allows the court to dispense with the requirement of any formality attendant to enforceable promises. *Id.* Certain cases, however, mischaracterized as reliance cases should be properly characterized as gift transfers in which the requisite formalities are not complied with due to a change in conditions affecting the putative donor. *Id.* These cases developed at a time when contract law was immature and the doctrine of promissory estoppel was unavailable to courts as a category to capture cases in which the putative donee exhibited reliance behavior. *Id.* Hence, in many of these cases the courts incorrectly (for the right reasons) held that consideration was present in the transaction. *Id.*

25. As discussed *infra*, see notes 130-135 and accompanying text, uncompleted gifts are deemed gratuitous promises and deemed unenforceable. A completed gift because it is completed, i.e., the gift is delivered and accepted by the donee and the transfer is accompanied with donative intent, supplies the evidentiary basis for validating the gift, and insures that improvident transfers do not take place. Completed gifts should be contrasted with uncompleted gifts in which the ritualistic, corroborative and evidentiary functions are not complied with and the gift is deemed unenforceable.

26. Fuller, *supra* note 4.

27. *Id.* at 799.

28. *Id.* at 800.

Consideration, he contends, performs primarily three functions: evidentiary, cautionary, and channeling.<sup>29</sup> These three definitive functions are well known to contract scholars (and, as later examined, property and trust and estate scholars)<sup>30</sup> and do not require much explication. Briefly, consideration satisfies the evidentiary function by producing tangible and verifiable evidence that an enforceable agreement has been reached by and between the parties.<sup>31</sup> The cautionary function brings home to those parties that they are entering into a transaction that can later be enforced against them.<sup>32</sup> Hence, consideration “serves a check against inconsiderate action.”<sup>33</sup> The channeling function is served by creating a process that creates an enforceable agreement if the requirement of consideration is met.<sup>34</sup> A function closely related to channeling, but sometimes set out separately, is the so-called “ritualistic” function. This function validates an agreement when parties to an agreement comply with a certain previously prescribed ritual.<sup>35</sup> Again, to the parties performing the ritual, this brings home the notion that they are indeed making an enforceable promise. These functions are alleged to be interlocking and complementary.<sup>36</sup>

The second normative base alleged for consideration is that theorized by the realists.<sup>37</sup> In short, realists believe that consideration is simply a tautological device used by the courts to determine which contracts should be enforced.<sup>38</sup> Professor Patrick Atiyah is a leading proponent of the realist approach. Professor Atiyah contends that “consideration” simply means that there is a valid societal reason to enforce the contract,<sup>39</sup> like good faith, duress, reliance,<sup>40</sup> or the enforcement of a moral obligation.<sup>41</sup> Given the

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29. *Id.* at 800-01.

30. These same three functions are required with respect to validate gift or donative transfers, *see infra* notes 165-172 and accompanying text, and what are characterized as “Wills Act” formalities that are necessary to validate properly attested Wills. *See infra* notes 173-178 and accompanying text.

31. *See infra* notes 196-198 and accompanying text.

32. *See infra* note 195 and accompanying text.

33. Fuller, *supra* note 4, at 800.

34. *Id.* “It [the formality of consideration] serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability. This function of form Ihering described as the ‘facilitation of judicial diagnosis’ . . .” *Id.*

35. *See infra* note 127 and accompanying text.

36. *See* JESSE DUKEMINIER & ROBERT SITKOFF, *WILLS, TRUSTS, AND ESTATES* 150 (9th ed. 2013).

37. P. S. ATIYAH, *Consideration: A Restatement* in *ESSAYS ON CONTRACT* 179, 181 (Oxford Univ. Press, 1990).

38. *Id.*

39. *See generally* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

40. Although this Article does not address good faith and duress, reliance is addressed *infra* notes 233-274 and accompanying text.

realist account, it makes sense that the doctrine of consideration is tautological<sup>42</sup> because it means that courts manipulate the rule or doctrine to find consideration when there are good reasons to enforce the agreement, yet find no consideration in similar situations when there are exogenous reasons not to enforce the agreement.

The third normative base alleged for consideration is one premised on the contract as a promise, which focuses on the moral obligation of the promisor to do as promised. The leading proponent of this theory is Professor Charles Fried who details the basis for this normative claim in his classic work, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION*.<sup>43</sup> According to Professor Fried, individuals have autonomy to impose upon themselves obligations by making promises. These promises morally obligate the individual to perform based on theories of individual autonomy and trust.<sup>44</sup> Professor Fried produces an elegant theory in which only certain promises, knowing and fair promises, for example, should be enforced. He dismisses the doctrine of consideration as a requirement for enforceable contracts because it is alleged to be too indeterminate.<sup>45</sup> Instead, he argues for the development of an alternative theory that focuses on which promises should be enforceable based on their fairness.<sup>46</sup>

A related normative justification has been characterized as “teleological.” As portrayed elsewhere,<sup>47</sup> Professor James Gordley is the leading proponent of the theory that contract law enforces agreements to

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41. The issue adjudicated in *Hamer*, 27 N.E. at 257 (uncle promises to pay nephew \$5000 when nephew reaches the age of twenty-one, if nephew refrains from drinking alcohol, swearing and certain forms of gambling), raises this type of moral obligation. These alleged moral obligation cases, I argue, are not moral obligation cases but cases of changed conditions. They are addressed in my companion article. See *supra* note 22 and accompanying text.

42. See *supra* note 1 and accompanying text.

43. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981), <http://www.law.harvard.edu/programs/about/privatelaw/contract.as.promise.1.56.fried.pdf>.

44. *Id.* at 16.

An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.

*Id.* (citation omitted).

45. *Id.* at 38; “My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it.” *Id.*

46. *Id.* at 39.

47. See Zhouyan Xie, *Towards a Normative Basis of the Doctrine of Consideration*, (unpublished Master’s Thesis, University of Toronto), [https://tspace.library.utoronto.ca/bitstream/1807/25523/5/Zhuoyan\\_Xie\\_201011\\_LLM\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/25523/5/Zhuoyan_Xie_201011_LLM_thesis.pdf).

achieve the substantive end of the “good life” in the Aristotelian tradition.<sup>48</sup> Pursuant to this theory, cumulative and distributive justice demands that most fair promises be enforced but certain promises, gratuitous promises made in haste, for example, should not be enforced because the promises do not promote the good life. Thus, the law should not respect the latter type of promises.

Certain law and economic theorists, such as Professors Robert Cooter and Thomas Ulen, criticize the doctrine of consideration encapsulated within the “bargain theory” of contracts. Both professors believe the doctrine does not capture and enforce certain promises that both the promisor and promisee want enforced—the enforcement of which makes both parties better off—a pareto efficient or superior<sup>49</sup> state of affairs.<sup>50</sup> Instead, they argue that a contract should be enforceable when both the promisor and promisee intend it to be enforceable.<sup>51</sup> This is alleged to be more efficient and optimally societally productive.<sup>52</sup>

Consequently, even though the vast majority of courts continue to follow the view that consideration is produced via this process in which promises are bargained for and exchanged, modern contract theory has moved beyond this rather simplistic, circular, and tautological test<sup>53</sup> to advance the view that contracts should be enforceable if that is the parties’

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48. See JAMES GORDLEY, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 265, 265-334 (Peter Benson ed., 2011).

49. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16-17 (4th ed. 2003).

50. They prove their thesis by detailing a hypothetical in which a shopping automobile buyer is given an offer by a seller/dealer and the seller/dealer wants to induce the buyer to carefully consider the offer as she visits other dealerships by making it a firm and irrevocable offer that can be accepted at the option of the buyer. See COOTER & ULEN, *supra* note 49, at 194.

51. “In general, *economic efficiency requires enforcing a promise if the promisor and promisee both wanted enforceability when it was made* . . . Both parties want a promise to be enforceable so that the promisor can credibly commit to performing. A credible commitment to performing enables the parties to cooperate, and cooperation is efficient.” *Id.* at 195, 199. This theory has found purchase in the UCC’s firm offer rule that validates firm offers made by merchants for a reasonable period of time. U.C.C. § 2-205 (AM. LAW. INST. & UNIF. LAW COMM’N 1977). The problem with the theory is that there is no way to differentiate contracts which should be enforced from gratuitous or gift promises which both parties want enforced at the time they are made and which are deemed unenforceable. Although they do not address this issue, perhaps they intend such gratuitous promises to be enforceable. On the contrary, these promises per se should remain unenforceable unless certain formalities (functions) are complied with, i.e., delivery and acceptance because these formalities prevent improvident transfers. See *infra* notes 168-172 and accompanying text for further discussion of this issue.

52. See COOTER & ULEN, *supra* note 49, at 194-95.

53. The test is circular because a benefit is conferred or a detriment incurred only if the court later determines that the agreement is enforceable. The benefit or detriment test does not identify which promises are enforceable, it only identifies that once a promise is deemed enforceable a benefit is conferred and a detriment incurred.

intention.<sup>54</sup> The weakness of this approach is determining, of course, whether or when the parties truly intend that they be enforceable.<sup>55</sup> A full endorsement of this latter theory produces the result that any promise, including perhaps a gratuitous uncompleted promise,<sup>56</sup> becomes enforceable as long as the parties' intent is sufficiently proven.

These four normative theories are not in conflict and, to a large degree, are not inconsistent. Indeed, one can make the argument that they are also, to a large extent, complementary. In other words, it is fair to state that to some extent, consideration is in the eye of the beholder. A promise made in writing to pay \$500 for a watch that is accepted by the promisee in a separate writing may be justified on the basis of all four theories (five if teleological is counted as one of the distinct normative theories). Similarly, a gratuitous promise by a father, at his daughter's sweet sixteen party, to purchase his daughter a Rolls Royce automobile if she makes the honor roll during her senior year, is not enforceable using these same normative theories (although one can make a stronger argument that the promise should be enforced if the father has the means to enforce it under the moral normative theory).<sup>57</sup>

The goal herein is not to prove that certain normative theories are wrongheaded, nor is it to provide a comparative analysis of the four or five normative theories addressed above. The goal is to assess and describe the best normative theory to support the doctrine and use of consideration in contract law when it is acknowledged that consideration is not required for other enforceable agreements, such as gifts or testamentary transfers. In

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54. We want to replace the bargain theory with a less dogmatic, more responsive theory of contracts. In the two preceding examples, enforceability of the contract apparently makes two people better off, as measured by their own desires, without making anyone worse off. Whenever a change in the law makes someone better off without making anyone worse off, "Pareto efficiency" requires changing the law. . . In general, *economic efficiency requires enforcing a promise if the promisor and promisee both wanted enforceability when it was made.*

COOTER & ULEN, *supra* note 49, at 195.

55. In the rare case when both parties testify or plead that they intended to be bound, there will be no dispute regarding the existence of consideration pursuant to this test. However, in this rare case, there should be no litigation since both parties "agree" on their respective intents. In the more likely real-world case when one party is seeking to enforce the agreement while the other party is seeking to avoid enforcement of the agreement, it is very unlikely that the party seeking to avoid the agreement will testify that the specific intent was to be bound *ex ante*. When the Restatement (Second) of Contracts establishes exceptions to its consideration rule in this context—when the parties' express intent is to be bound—it does so in very formalized or stylized transactions in which the channeling, corroborative, and evidentiary functions of the transaction are proven as part of the transaction. *See infra* notes 168-180 and accompanying text.

56. A gratuitous promise that is performed is a completed gift and legally enforceable as such. *See infra* notes 162-168 for a discussion of the requirements necessary for a valid and enforceable gift transfer.

57. *See supra* notes 45-48.

other words, when employing a comparative approach that examines transactions beyond contracts, is there a normative theory that can explain promises that are legally enforceable in contract law as well as inter vivos gifts and testamentary transfers that are also legally enforceable? Given that approach and the fact the test used to determine whether there is consideration has not remained static over time, this Article concludes that the best theoretical normative basis for consideration is indeed the functional or formal basis for consideration fully addressed by Professor Fuller.

But this will be discussed more in detail later. How we arrived at this confused state of affairs, with certain promises deemed enforceable and others not is the product largely of history.<sup>58</sup> But this history is informative because contract law and the requirement of consideration start with form and formalism,<sup>59</sup> eradicate the same, and then embark upon a search for a substitute of the formalism that eventuates in a construct of consideration which replicates the purpose and substance of the eradicated formalism.<sup>60</sup> Moreover, the ancient form and formalism that was the key to the initial concept of consideration holds the answer to the question of why unperformed gratuitous promises are unenforceable and completed gratuitous promises and certain testamentary transfers *are* enforced, and rightly so.<sup>61</sup>

At one time, consideration was not required to find an enforceable agreement.<sup>62</sup> Instead, when contract law was evolving and modernizing under English common law, “Contracts under Seal” were enforced by the courts.<sup>63</sup> Indeed, here the history of contract law is somewhat illuminating and instructive for this thesis. At the dawn of the Industrial Revolution in England, contracts were enforceable when they were accompanied by the promisor’s Seal.<sup>64</sup> The use of a Seal, which predated the formal requirement of consideration, made the promisor’s promise enforceable in

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58. Here, for the sake of argument, this Article ignores reliance-based acts taken by the promisee that causes these promises to be deemed enforceable per Section 90 of the Restatement (Second) of Contracts. For a discussion of these interesting cases, see *infra* notes 251-273 and accompanying text.

59. See *infra* notes 76-80 and accompanying text.

60. See *infra* notes 86-96 and accompanying text.

61. *Id.*

62. See *infra* notes 76-80 and accompanying text.

63. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 7 (6th ed. 2009).

64. See Frederick E. Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24, 24 (1915); What is a Seal? “For some period in history [S]eals were required to consist of wax affixed to parchment or paper on which the terms of the instrument were written. The wax was required to have an identifiable impression made upon it. Usually this was made by a signet ring.” PERILLO, *supra* note 63, § 7.3 (citation omitted).

courts of law.<sup>65</sup> In brief, a promisor would affix his<sup>66</sup> Seal—a blob of melted wax—which was impressed upon the document or contract and delivered to the promisee.<sup>67</sup>

A contract under Seal was deemed to be a valid and enforceable contract if three required formalities were met: a writing was executed, affixed with a Seal, and the sealed instrument was delivered to the promisee or the promisee's agent.<sup>68</sup> There was also a fourth requirement that cannot be characterized as a formality: the party executing the sealed instrument must intend it to be a sealed instrument.<sup>69</sup> Although this was the law and the state of affairs centuries ago, it is addressed herein not only as the precursor to consideration but because of the functional role that the Seal provided:

By the late Middle Ages, English Law had developed the Seal, a highly serviceable, all-purpose formality. It was used to authenticate transfers of ownership, especially transfers of interest in land by way of “deed,” and also to make promises enforceable . . . Viewed in light of Professor Fuller's description of the [evidentiary, cautionary and channeling] functions that legal formalities can perform, the Seal in its heyday deserved a high rating . . . A ceremony with all of these elements (affixing a Seal and delivering the sealed instrument) was surely calculated—definitely calculated, it seems, by those who conceived it—to produce persuasive evidence, to make a sharp impression on the participants, and to provide visible signs of authenticity. <sup>70</sup>

If the prescribed formalities were followed, nothing more was needed to make enforceable a promise “under Seal.”<sup>71</sup>

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65. *Id.*

66. Back then, promisors were mostly all males given that females had not yet attained the freedom to contract except in unusual circumstances. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earning, 1860-1930*, 82 GEO. L. J. 2127, 2127 (1994).

67. Note that delivery was part of this process. See A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 90 (1987).

68. PERILLO, *supra* note 63, § 7.1.

69. *Id.* § 7.3. The fact that intent and delivery were required for a contract under Seal, which mimics the requirements of donative intent and delivery for an effective inter vivos gift should not go unnoticed and is addressed in greater detail. See *infra* notes 160-172 and accompanying text. Indeed, the third requirement for a valid inter vivos gift—acceptance by the donee—has a similar counterpart in contracts under Seal—acceptance by the promisee. *Id.* § 7.6.

70. JOHN P. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON & DOUGLAS G. BAIRD, *CONTRACTS: CASES AND COMMENT* 196 (10th ed. 2013) (referencing Fuller, *supra* note 4).

71. *Id.*



Indeed, the contract under Seal was very effective in proving that a contract or agreement was enforceable. In fact, the contract under Seal was said to be almost invulnerable to attack. The party whose signature and Seal appeared on the document could only attack same by showing that it was either a forgery or if he<sup>72</sup> had in fact signed and Sealed, that the document signed and sealed was misrepresented to him at the time of signing and sealing (no intent—the fourth requirement), thereby establishing fraud in factum.<sup>73</sup> No other defense or claim could establish the invalidity of the sealed document, including a claim that the other party's performance had not been received (i.e., failure of consideration).<sup>74</sup> If the promisor subsequently failed to perform the promise that was "Sealed," the promisee could bring suit for breach of the promise by using the traditional common law writ of "covenant."<sup>75</sup>

The formalist Seal that preceded the requirement of consideration was no doubt influenced by several factors, including the ancient formalities associated with the transfer of land that required there be some livery of seisin to effectuate a valid transfer.<sup>76</sup> The Seal was also used at a time when most individuals were illiterate and the execution or preparation of a written document was a rarity that denominated a special, important, and memorable occasion and not a casual promise.<sup>77</sup>

As a result, the process by which the Seal was produced, the rarity it represented, and the solemnity of the process made it an effective way to ensure that a serious and genuine promise had been made, could be proven easily later (even if one of the parties to the agreement subsequently died), and guaranteed that the promisor carefully considered the validity of the promise before its making.<sup>78</sup> That is to say, the Seal satisfied the evidentiary, cautionary, channeling, and ritualistic functions in the role of contracts.<sup>79</sup> These important functions, which are discussed in greater detail,<sup>80</sup> allowed the parties, and most importantly, the courts, to determine

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72. Again, it was all "he's" in the fifteenth and sixteenth centuries, because women lacked the capacity to contract. See *supra* note 68 and accompanying text, addressing the impact of Married Woman Property Acts.

73. DAWSON, ET AL., *supra* note 70, at 196-97.

74. *Id.*

75. *Id.* § 1.03.

76. This predated delivery of title via written and executed deed. See JESSE DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER, MICHAEL SCHILL & LIOR STRAHILEVITZ, PROPERTY 243-44 (8th ed. 2015).

77. FERRIELL, *supra* note 3, at 66-67.

78. See Fuller, *supra* note 4, at 800-01.

79. FERRIELL, *supra* note 3, § 3.02.

80. See *infra* notes 160-172 and accompanying text.

at almost no cost with little risk of error, which agreements or promises were enforceable.

The demise of the application of the Seal, for good and valid reasons, should not obscure the purpose for which it served.<sup>81</sup> The rise of the use of “consideration” as the vehicle by which contracts or promises are deemed enforceable if valid consideration is found, also should not obscure the functional role of the Seal and should lead to inquiry whether that functional role has been met via the requirement of consideration. It is to the functional roles served initially by “Sealing” that this Article now turns with a focus on why agreements unsupported by consideration, either *inter vivos* (via gift) or testamentary (via Will) are deemed valid. The key to the validity and use of consideration in contract law can only be ascertained by examining those valid agreements or transfers that are made without consideration.

More importantly, consideration in modern contracts serves the same purposive role that the Seal served in contracts under Seal in England in the Middle Ages and today in jurisdiction that still validate the use of the Seal. To find an enforceable agreement, consideration is required, by the Restatement (Second) of Contracts and the courts, because it supplies the evidentiary, cautionary, channeling, and ritualistic functions at the time of contracting and evidence of the agreement<sup>82</sup> *ex post* at the time of adjudication.<sup>83</sup>

At this juncture, it is important to note that the contract under Seal, because of the formalities attendant at the time of execution (*ex ante*) and the information conveyed at the time of adjudication (*ex post*), that is, intent, delivery and acceptance, provided the adjudicative entity with extremely reliable, almost irrefutable, evidence of the agreement and its terms. This allowed the adjudicative entity to enforce the agreement with little, if any, error costs and to do so via the review of one document,

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81. As explained by FERRIELL, *supra* note 3, § 3.02(A), the demise of the Seal was due to several factors, but was primarily due to the fact that it was too restrictive given the growth of commercial industry and the need for a less formalistic and ritualistic manner of making enforceable promises. In addition, the formalism associated with the Seal eventually gave way to very informal methods of “Sealing”—i.e., one could Seal by placing the initial L.S. on a document. See *Pitts v. Pitchford*, 201 So. 2d 563, 564 (Fla. Dist. Ct. App. 1967); RESTATEMENT (SECOND) OF CONTRACTS § 96 cmt. a (AM. LAW INST. 1981). Sealing no longer satisfied the cautionary, evidentiary, channeling, and ritualistic functional requirements that would later allow a court to easily determine which agreements should be deemed enforceable and which not with little if any error costs. *Id.*

82. Including establishing the remedial boundaries for enforcement of the right established by the contract.

83. This is assuming there is a dispute over either the enforceability or validity of the agreement or the performance of the terms of the agreement. See *infra* notes 110-111 and accompanying text.

producing low administrative costs. Although the reasons for the demise of the Seal are many and beyond the purview of this Article,<sup>84</sup> no one claims or has demonstrated that the Seal raised difficult issues of interpretation or enforceability. To the contrary, the contract under Seal represented a very effective and efficient vehicle for a party to signal that he was entering into an enforceable agreement that should be enforced against the sealing party notwithstanding any subsequent objection.

Moreover, it is illuminating to note that the doctrine of consideration was in use as a vehicle to regulate and control informal (unsealed) promises during the time of the Seal's prominence and use in the Middle Ages.<sup>85</sup> Thus, consideration originated as a doctrine to serve the same function as the Seal when individuals either lacked a Seal or the transaction was not important enough to use a Seal. What is key for this thesis is the substitutionary role played by the doctrine of consideration at its origination, which if used as a substitute for a Seal, should suffice to serve the same role and function.

Of course, after the demise of the Seal, only contracts supported by consideration were enforceable by the courts<sup>86</sup> and the initial conception of consideration that covered only informal agreements expanded and evolved to cover all contracts.<sup>87</sup> The first formulation of "consideration" that appears in the Restatement (First) of Contracts defines consideration as follows: "Consideration for a promise is an act other than a promise, or a forbearance, or the creation, modification, or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise."<sup>88</sup>

Given the prominence and relevance of the Restatement (Second) of Contracts and its requirement and definition of consideration, little is gained by exploring and explicating the requirement and definition of consideration in the Restatement (First) of Contracts except to note two

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84. For a discussion of what caused the demise of the Seal, see Crane, *supra* note 64. However, the Seal does remain valid in a few jurisdictions: Delaware and Wisconsin. See PERRILLO, *supra* note 63, § 7.9. A contract under Seal is also recognized by the Restatement (Second) of Contracts. See RESTATEMENT (SECOND) OF CONTRACTS §§ 95-96 (AM. LAW INST. 1981). My views on the demise of the Seal and support for the expanded use of the Seal in contemporaneous transactions are addressed in Johnson, *A Trichotomy of Reliance Promises*, *supra* note 22.

85. DAWSON, ET. AL., *supra* note 70, at 196.

86. Enforceable in this context simply means that the mechanisms of the State, i.e., the courts can be successfully employed to enforce the agreement or determine and enforce an appropriate remedy if the contract is breached by one of the parties.

87. See FERRIELL, *supra* note 3, § 3.02, at 66-68. Agreements that are deemed enforceable due to the doctrine of promissory estoppel are discussed *infra* notes 234-273 and accompanying text.

88. RESTATEMENT (FIRST) OF CONTRACTS § 75 (AM. LAW INST. 1933).

important points. First, although the definition of consideration evolved and morphed into the requirement of either an act of forbearance,<sup>89</sup> an impact on a legal relation, or a return promise by the promisee, one should not lose sight of the fact that consideration served as a substitute for the Seal in informal contracts. As such, the purpose of consideration should be similar to the purpose served by the role of the Seal in sealed contracts. Furthermore, if the primary purpose of the Seal was to provide verifiable, irrefutable evidence of an enforceable agreement that could be validated ex post at little or no cost, consideration should serve a similar purpose, a topic discussed shortly.<sup>90</sup>

Second, and not as importantly, Section 75 of the Restatement (Second) of Contracts contains within its definition of consideration the first and very prominent reference to a bargain between the promisor and the promisee.<sup>91</sup> Pursuant to the Restatement (Second) of Contracts, courts began enforcing agreements or promises as long as the promises exchanged by and between the parties were “*bargained for*.”<sup>92</sup> Or, to be more precise, consideration which was once viewed as an exchange of things—the items, goods, etc. that passed between the parties<sup>93</sup>—that caused the promise to be enforceable, literally became *a process* rather than a thing. This process that creates an enforceable contract between two or more distinct parties occurs when the parties make promises (bilateral<sup>94</sup> as opposed to unilateral)<sup>95</sup> and each intends that the promise be given or received in exchange for the other’s promise.<sup>96</sup>

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89. Forbearance is a difficult concept to grasp in brief, but it is sufficient to note at this point that if forbearance is found that is sufficient consideration to establish an enforceable contract.

90. For further discussion of this issue, see *infra* notes 221-232 and accompanying text.

91. RESTATEMENT (SECOND) OF CONTRACTS § 75 (AM. LAW INST. 1981).

92. FRIER & WHITE, *supra* note 3, at 36.

93. In law school hypotheticals, these things were always a peppercorn in exchange for something else.

94. A bilateral contract is formed when both parties have made promises. Consequently, each party to the agreement is both a promisor and a promisee. A party is a promisor with respect to the promise she has made to the other and simultaneously a promisee with respect to the promise received from the other party. See PERRILLO, *supra* note 63.

95. Unilateral contracts by comparison are contracts where only one party acts as promisor and invites performance by the other party but does not require a reciprocal promise in exchange, as part of the bargain. Unilateral promises become enforceable contracts when the promisee begins performance per the terms of the offer. See RESTATEMENT (SECOND) OF CONTRACTS § 50 (AM. LAW INST. 1981). The prototypical unilateral promise is when one offers a reward for return of a lost pet.

96. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981): Requirement of Exchange; Types of Exchange states:

(1) To constitute consideration, a performance or a return promise must be bargained for.

Although not explicitly stated in the Restatement (Second) of Contracts, most courts operationalize that treatise's definition of consideration by employing what is commonly called the "*benefit-detriment test*" to determine whether a bargained-for promise is supported by consideration.<sup>97</sup> In other words, the promisee must suffer some legal detriment—to do, or promise to do, something that the promisee was not legally obligated to do before the promise was received. Concomitantly (and the mirror image), the promisor obtains a legal benefit that he or she did not have before the bargain was struck. This benefit-detriment test, or requirement in bargained-for exchanges, represents the view of consideration currently in vogue in the majority of courts which is prevalent in the definition of consideration in the Restatement (First) of Contracts with its focus, in part, on an act, or forbearance of an act, or the creation, modification, or destruction of a legal relation.<sup>98</sup> Indeed, one can credibly argue that the definition of consideration in the Restatement (Second) of Contracts represents an evolution of the definition of consideration in the Restatement (First) of Contracts with a greater emphasis, however, on the bargaining process that creates the promises or forbearance that subsequently affects the parties' legal relationship.<sup>99</sup>

To summarize, the initial role provided by consideration was purely formal and quite functional in the guise and use of a Seal. For whatever reason, the use of the Seal waned but the need for some method to validate enforceable agreements from those not still remained. Enter the doctrine of consideration that was the informal stepchild of the Seal when the Seal

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(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

97. FRIER & WHITE, *supra* note 3, at 38. The benefit-detriment test may, in part, be attributable to the requirement in the RESTATEMENT (FIRST) OF CONTRACTS § 75 (AM. LAW INST. 1933), that consideration is found when the promisee can show that he or she incurred either the "creation, modification, or destruction of a legal relation." *Id.*

98. *Id.* at 48.

99. The weakness of the benefit-detriment test is that almost any promise or act can be manipulated so that the promisee or promisor, as the case may be, can suffer a legal detriment or obtain a legal benefit. For example, since a donee is not legally required to accept a gift, the donee's acceptance of the gift can be construed as a legal benefit conferred on the donor thereby collapsing the distinction between gratuitous transfers and bargained-for exchanges when the benefit-detriment test is used to determine whether there is consideration. For fuller discussion of this important point as it pertains to gratuitous transfers, see *infra* notes 160-168 and accompanying text.

reigned supreme. The Seal was used for formal and important agreements while consideration was used for less formal agreements. Hence, consideration was viewed as something lesser than the Seal. Eventually the doctrine of consideration evolved into an almost tautological test<sup>100</sup> that requires the identification of a bargain and the conferral of a benefit and/or the creation of a legal detriment. This Article contends that the focus on the bargain, and relatedly, the benefit or detriment created thereby, has largely obscured the functional and formal role originally supplied by the Seal and now supplied by the doctrine of consideration. This Article is not the first to note this phenomenon<sup>101</sup> nor will it be the last to base a normative theory of consideration on the form and functions so provided. Indeed, a healthy debate has emerged regarding the normative base for consideration that was previously addressed.<sup>102</sup>

But that raises another mystery: however one grounds the normative base for consideration and regardless of the historical evolution of the doctrine of consideration, so-called gratuitous promises between parties in a preexisting relationship are not enforceable.<sup>103</sup> Courts fixate on the lack of consideration to find “mere” donative promises gratuitous and unenforceable.<sup>104</sup> Those who contend that contracts or agreements should be enforceable if the parties so intend come to the same conclusion, that so-called gratuitous promises are unenforceable *per se*, albeit for different reasons.<sup>105</sup>

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100. *See supra* note 44 and accompanying text.

101. *See Fuller, supra* note 4.

102. *See supra* notes 28-57 and accompanying text.

103. The starting point is that donative promises are not *generally* enforced. This is a tenable position. In addition to difficulties of proof, the injury in this type of case is relatively slight; there are no significant costs on the part of the promisee and no enrichment on the part of the promisor at the expense of the promisee. Furthermore, a donative promise may be made without sufficient deliberation and not a promise made with deliberation is unenforceable if the promisee subsequently shows ingratitude. PERRILLO, *supra* note 63, § 4.1 (citations omitted); see also Melvin Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 842-46 (1997); see also Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J.L. STUDIES 411, 414-15 (1977).

104. Lack of consideration means no item or thing is transferred under the common law formalistic view, no process pursuant to which bargained for promises are exchanged under the view adopted by the Restatement (Second) of Contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

105. In brief, there are three views why gratuitous promises should not be enforced: 1) societal resources should not be employed to enforce promises when no economic gain is created by the transfer or transaction (the prototypical sterile transaction of yore); 2) courts are not capable of enforcing promises made with, say, love or affection because there is no appropriate remedy in case of breach; and 3) somewhat counterfactually and gaining ground among academic theorists, certain promises are by their very nature only valuable and valid if they are not enforceable by the courts. These three very different reasons are discussed *infra* in Part IV and notes accompanying.

Thus, what begins as a puzzle, ends in unanimity. Whether you understand the need for consideration, whether you apply one requirement or another of the rule for consideration, and lastly, whether you focus on the parties' intent in determining whether there is an enforceable agreement, there remains a whole class of promises that are unenforceable. Promises can, therefore, be divided into those that are enforceable and hence, non-gratuitous, and those promises that are not enforceable, i.e., those deemed gratuitous. In this lexicon, the focus is on whether the unperformed promise is subsequently legally enforceable.

On the other hand, an examination of transfers rather than promises, reveals that a certain type of gratuitous transfers based on donative promises are enforceable if certain formalities or functions are met. But none of these formalities or functions are viewed or treated as consideration. As previously discussed,<sup>106</sup> to become enforceable a gift or donative transfer must satisfy three very distinct requirements. First, the putative donor must have the requisite *intent* to make a gift.<sup>107</sup> Second, the donor must transfer possession to satisfy the *delivery* requirement necessary to effectuate a gift.<sup>108</sup> Third, and oft overlooked, the putative donee must *accept* the gift in order for it to be valid.<sup>109</sup>

These three requirements are important for several distinct reasons. First, these three formal requirements also serve functional purposes similar to the requirement served by consideration.<sup>110</sup> Again, the functional purposes are ritualistic, evidentiary, cautionary, and channeling.<sup>111</sup> Second, gifts are enforced once these three requirements (intent, delivery, and acceptance) are met. This means it is incorrect and inappropriate to state that all gratuitous transfers are not enforced, when only gratuitous promises that do not meet these three requirements are not enforced. When these requirements are met, a completed and valid gift is found and the donee is awarded the property that is the subject of the gift.<sup>112</sup>

Although this is a fine point and distinction, courts will not enforce uncompleted gift or gratuitous promises which are acts that do not satisfy

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106. See *supra* note 7; see *infra* notes 160-168 and accompanying text.

107. These three requirements are discussed in DUKEMINIER, ET. AL., *supra* note 76, at 165.

108. *Id.*

109. *Id.*

110. See *infra* notes 160-68 and accompanying text.

111. See Phillip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 22 ILL. L. REV. 341, 348-49 (1926). These three requirements are addressed in greater detail *infra* notes 160-168 and accompanying text.

112. See *Gruen v. Gruen*, 496 N.E. 2d 869, 875 (N.Y. 1986) (donee awarded possession of Gustav Klimt in possession of stepmother when donee established delivery, intent, and acceptance of the painting as a twenty-first birthday present).

the three requirements of intent, delivery, and acceptance that are addressed above. Therefore, a promise to give a gift in the future that is not carried out (lacking delivery) and/or accepted by the donee is unenforceable. If, however, the subject of the promise is delivered (delivery does not have to mean present delivery of possession, it can mean present delivery of a future interest in which possession is postponed)<sup>113</sup> and subsequently accepted by the donee, the transfer is just as enforceable as an agreement (contract) supported by bargained-for consideration. In sum, this Article has examined three different types of exchanges or transaction: 1) contract-based exchanges with consideration; 2) so-called gratuitous *transfers* that are enforced even given the absence of consideration;<sup>114</sup> and 3) so-called gratuitous *promises* that are not supported by consideration and are largely unenforced.

Testamentary transfers made pursuant to valid Wills are gift transfers that differ from completed inter vivos gifts because these revocable promises in Wills create future gifts if certain formalities are complied with at the time the promises (in the Will) are made and the promises made in the Will remain unrevoked prior to the death of the will maker.<sup>115</sup> As previously discussed,<sup>116</sup> these enforceable unperformed gratuitous promises are similar to contracts supported by consideration even though they admittedly lack consideration. This testamentary donative transfer, however, is not an inter vivos or present transfer but a future transfer that violates the oft stated precept that unperformed gratuitous promises are mere nudum pactums<sup>117</sup> and unenforceable.<sup>118</sup> Wills and other testamentary bequests, however, are indeed enforceable if requisite formalities are met. In fact, most states have specialized courts, denominated Probate, Wills, or Chancery Courts that exist solely to enforce these promises.<sup>119</sup> Furthermore, like inter vivos gifts, recipients of testamentary gifts must

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113. *See id.*

114. These gratuitous and enforceable transfers can be inter vivos, that is gift, or testamentary via Wills. As to the latter, see *infra* notes 160-72 and accompanying text.

115. Wills are by definition revocable and cannot be made irrevocable thus providing the putative testator with an option, assuming the testator is competent, to revoke any gift made pursuant to an otherwise valid Will. *See* Alex M. Johnson, Jr., *Is it Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393, 394 (2016).

116. *See supra* note 7 and accompanying text.

117. A *nudum pactum* is defined as “[a] voluntary promise, without any other consideration than mere good will, or natural reflection.” *Nudum pactum*, BLACK’S LAW DICTIONARY (4th ed. 1968).

118. *See, e.g.*, *Grimes v. Baker*, 133 Neb. 517, 275 N.W. 860, 863 (1937).

119. *DUKEMINIER & SITKOFF, supra* note 36, at 43.



confer a legal benefit of the testator's estate by accepting the testamentary gift given the donee's right to disclaim it.<sup>120</sup>

The third and perhaps most important point then is when comparing so-called valid gift or donative transfers and bargained-for contracts supported by consideration, the benefit-detriment test is employed to validate the latter transactions. If the benefit-detriment test is taken seriously, there is no distinction between a gratuitous transfer of inter vivos gifts and a contract supported by bargained-for consideration. Because donees are required to accept a gift in order to make it legally valid,<sup>121</sup> the agreement bestows upon the donor a benefit and the donee incurs a legal detriment.<sup>122</sup> At that point, the donee is the owner of the property with all of the attendant rights and responsibilities that accrue to the ownership of property. What this means is that completed inter vivos donative transfers – gifts – can be validated as contracts if consideration and the benefit-detriment test are taken seriously and employed.<sup>123</sup>

Once again, there is no legal distinction between gift or gratuitous transfers and bargained-for or contract-based transfers when each is examined and validated by employing the benefit-detriment test.<sup>124</sup> Here, both types of transfers are technically supported by consideration thus blurring the distinction between gifts and contracts (bargained-for exchanges that are deemed non-gratuitous) and requiring them to be treated similarly by the courts. Why then *are* gift and testamentary transfers treated differently than bargained for transfers supported by consideration because consideration is broadly defined? Why are donative transfers covered in property law and testamentary transfers treated in probate law

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120. UNIF. PROBATE CODE § 2-1105 (amended 2010).

121. The requirement of donee acceptance seems superfluous because who rejects a gift? However, acceptance plays a vital role in these transactions because if a donee was not required to accept a gift, donors could transfer burdensome property to donees and rid themselves of harmful or costly obligations such as transferring real property that is polluted. Of course, if donees were required to accept all gifts, our donee in this example could simply retransfer the gift back to the original donor thereby creating a perpetual gift cycle.

122. In most cases, the “detriment” incurred by the donee is beneficial. For example, in *Gruen*, the donee received a very valuable painting that he later sold for several million dollars. 496 N.E.2d at 875. That is hard to qualify as a detriment. However, detriment in this context refers to legal detriment, not financial detriment so that even if the right ceded in the transfer by the donee (here the legal right not to accept the painting) that bestows a benefit on the promisor results in financial gain or benefit to the donee, legal detriment has occurred. This is made crystal clear in the discussion of *Hamer*, 27 N.E at 257.

123. Likewise, testamentary transfers require acceptance on the part of heirs and beneficiaries. Under the Uniform Probate Code, these individuals have the right to disclaim any bequest bestowed upon them either through intestacy (no Will) or via Will. UNIF. PROBATE CODE §2-1105 (amended 2010). Beneficiaries often disclaim their interest to redirect the gift elsewhere and to avoid tax liability. *DUKEMINIER & SITKOFF*, *supra* note 36, at 141-42.

124. *See supra* notes 121-23 and text accompanying.

(trusts and estates) instead of contract law if valid gift and testamentary transfers are supported by consideration? The answer to these questions and the reason why these transfers are conceptually and legally distinct is due to the different formalities necessary to validate each such transfer.

Those formalities are necessary and divergent because of the context within which the transactions arise. These disparate contexts are key to illuminating normative bases and establishing the formal and functional role of consideration in non-gratuitous transfers (contracts). These formalities not only suffice to establish the existence and validity of the transfer, but they also provide proof of the transfer and supply the adjudicator with the basis for providing an effective remedy.

Consequently, what was previously ignored in academic literature discussing the distinction between contracts and gratuitous transfers was the common element of functional formalities that is shared by both transactions. What has been overlooked are the different contexts within which these transfers occur. Gratuitous transfers are different from contracts not because they lack consideration (they are indeed supported by the broad and tautological definition of consideration); gratuitous transfers, however, differ from contracts in the context in which they are given when compared to so-called bargained-for contracts. If a dispute were to arise regarding a contract's enforceability or the meaning of its terms, the different contexts require different formalities that subsequently provide courts with adjudicative evidence at low error and administrative costs.

The same can be said for testamentary donative transfers. In regard to these testamentary "transactions," the functions are designed to provide courts with evidence that can be adduced and enforced following the death of the donor with low cost and little attendant error.<sup>125</sup> The valid execution of a written document designated as the testator's Will,<sup>126</sup> that requires acknowledgment of the document as her Will in the presence of the two witness and that may require the testator to sign the Will in the presence of the two witnesses, is clearly designed to satisfy the evidentiary function as well as the cautionary, channeling, and ritualistic functions similar to the use of the Seal and later consideration.<sup>127</sup> Hence, contracts, *inter vivos*

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125. Testamentary transfers are addressed *infra* Part IV.

126. Designating the document a Will with an initial capital "W," is a means to clearly delineate a validly executed testamentary document known as a Will from the noun will meaning the power of control that the mind has over its own actions.

127. The attestation requirements for execution of a non-holographic Will can be found in the Uniform Probate Code. See UNIF. PROBATE CODE §§ 2-501 & 5-502 (amended 2010). It is interesting and informative to note that in Section 2-503, a Will that does not strictly comply with the formalities of attestation can nevertheless be probated as the product of "harmless error" if the proponent of the Will can establish "by clear and convincing evidence that the decedent intended

gifts, and testamentary transfers have one element in common: they require formalities that provide courts with evidence that can be adduced later at low error and adjudicative cost.

Similarly, the context within which these two types of gratuitous transfers occur is very important and has often been overlooked. It is imperative that agreements requiring consideration typically occur between strangers or business acquaintances (that is, people who negotiate at arms-length) and not among family or friends, which is of course the province of most gratuitous transfers. The context within which each transfer arises not only establishes the contours of the transfer and provides evidence of motive and purpose, but the context dictates the formalities that must be present for a transfer to later be validated by the courts. Consequently, the context plays a key role in dictating the formalities that are required to effectuate a valid transfer and those formalities, in turn, perform a functional role, not only at the time of the transfer (*ex ante*), but also *ex post* when either one or both of the parties are unable to testify regarding the details or validity of the challenged transfer<sup>128</sup> or when the parties have a conflicting view regarding whether an enforceable agreement was reached.<sup>129</sup>

To prove this point, this Article turns specifically to *inter vivos* gifts and then testamentary transfers to compare them with a contract or consideration-based transfer.

### III. COMPARING CONTRACTS (ENFORCEABLE TRANSFERS-CONSIDERATION REQUIRED) TO INTER VIVOS GIFTS AND TESTAMENTARY TRANSFERS (ENFORCEABLE TRANSFERS-NO CONSIDERATION REQUIRED), WHAT GIVES?

Determining what is a mere gratuitous promise and, hence, unenforceable is also something of a tautology,<sup>130</sup> and worthy of a lengthy analysis<sup>131</sup> that is beyond the purview of this Article. Suffice it to say, a

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the document or writing to constitute the decedent's will . . ." *Id.* § 2-503. This is important because it means that as long as the evidentiary function can be satisfied by different means, the formal or functional requirements are dispensed.

128. Here, this Article refers to *inter vivos* gifts and testamentary transfers in which the putative donor is deceased. This is discussed further *infra* Part IV.

129. Here, this Article refers to contract disputes where the initial issue is not breach but formation.

130. See *supra* Part II and text accompanying. Again, it is only when the court later determines that a promise is deemed unenforceable that it then becomes "gratuitous" and unenforceable. If the promise is deemed to be enforceable it is *ipso facto* not gratuitous. See *Hamer*, 27 N.E at 257.

131. See *FERRIELL supra* note 3, § 3.04.

promise by a father at his daughter's birthday to pay for her law school tuition that is not induced by any action or forbearance on the daughter's part is just such a gratuitous promise and unenforceable *ex ante*.<sup>132</sup>

Therefore, the result is universally accepted, notwithstanding the rationale in support of the result. Hence, the presence or absence of consideration (which, after all, is yet another tautology)<sup>133</sup> is irrelevant to the question of the enforceability of gratuitous promises. These promises are not within the province of contracts and are justifiably policed by moral as opposed to legal suasion.<sup>134</sup> Determining which promises are deemed gratuitous has more to do with the preexisting relationship of the parties and the context within which the promise is made, rather than the substantive content of the promise which, in the right setting between different parties in a different relationship, may be later judged as a non-gratuitous promise supported by consideration.<sup>135</sup>

But then how are completed gratuitous promises treated by courts and commentators? Are those enforceable? Yes, but they are not called gratuitous promises, unenforceable or not.<sup>136</sup> Instead, they are called gifts.<sup>137</sup> These gifts, like certain testamentary transfers (i.e. Wills or testamentary bequests that are previously discussed)<sup>138</sup> are indeed enforced by the courts.<sup>139</sup>

As a result, there are actually three types of agreements or transactions that raise questions regarding enforceability. First, there are agreements

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132. *Ex ante* is stated because if the daughter subsequently relies on the promise to her detriment, she may be able to state a claim based on estoppel or reliance. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

133. See *supra* notes 39-44 and accompanying text.

134. FRIED, *supra* note 43.

135. As explained in the companion article, Johnson, *supra* note 22, gratuitous promises can be divided into two types. The first type of unenforced promises are gratuitous promises that are uncompleted during the promisor's life. *Id.* In this case, the promisor bears the full brunt of the reputational effect of not honoring her promise by subsequent act. *Id.* The second type of gratuitous promise that is unenforceable is that promise that is uncompleted because of a change in circumstances, typically the death of the promisor, that was not contemplated or internalized at the time the promise was made. *Id.* This latter type of gratuitous promise has bedeviled the courts and created cases like *Hamer* and others in which the testator's executor is refusing to honor the promisor's commitment. *Hamer*, 27 N.E at 257. As previously explained, these cases do not raise issues involving consideration. *Id.* Instead, these case should be treated as uncompleted gift cases primarily because of a change of circumstances or frustration of purpose, i.e., putative donor dies before effectuating a valid deliver. Unfortunately, however, property law does not recognize these two doctrines or apply them to gift transfers. As a result, courts reflexively applying property law doctrines refuse to find a completed gift thereby leaving the issue to be decided by employing contract law with doctrines that are ill-suited for the task. *Id.*

136. See *infra* notes 160-168.

137. *Id.*

138. See *infra* notes 168-178 and accompanying text.

139. *Id.*

typically made between strangers with no preexisting or long-term relationship that are required to be supported by consideration and, as a result, are then enforceable by the courts (commercial contracts).<sup>140</sup> Second, there are agreements between parties that have a preexisting relationship which are deemed unenforceable gratuitous promises because no actions were taken by the donor or promisor to validate his or her intent to make the gift.<sup>141</sup> Third, there are completed gratuitous acts or promises that represent valid inter vivos gifts or testamentary transfers that are enforceable ex post because the donor did take the necessary action to validate his or her intent to make either a valid inter vivos gift or testamentary transfer.<sup>142</sup>

Some examples will illuminate this thesis. For whatever reason, a father promises his daughter that he will buy her a brand new car if she graduates from high school and makes the honor roll list. Indeed, the father states that he will purchase and give the daughter the car if she receives all “A” level grades her senior year. The daughter, recognizing that she has little interest in History and will not likely receive a grade above “B+” responds by asking whether the father will make the gift if she receives one grade of “B+”? The father agrees and the promise is made (the entire negotiation takes place) at the daughter’s sweet sixteen birthday party with the entire family, and assorted neighbors and their children in attendance. In addition, the parties “shake on it” (that is, the father’s promise and the parties’ agreement) in full view of several attending witnesses.<sup>143</sup>

The daughter, up to that date an indifferent student, redoubles her academic effort motivated by the promise of new wheels, buckles down, and subsequently graduates on the honor roll with all “A’s” and a “B+” in History. The father, discovering that the daughter is dating another woman, a relationship he is highly critical of, reneges on the promise and refuses to deliver the car unless the daughter terminates her relationship with her new

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140. This refers to contingent or discrete contracts—that is, one time or limited transactions. These are not what are characterized as long-term relational contracts that may call for different interpretative rules because of the ongoing relationship in which the contracting parties adjust their respective behavior based on that relationship. There is literature on relational versus contingent contracts, but the best place to start is with Charles Goetz & Robert A. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

141. See *infra* notes 160-178.

142. *Id.* Gratuitous acts or promises that are incomplete are unenforceable gratuitous promises. *Id.* It is only when the promise is actualized or completed by undertaking certain formalities that the gratuitous act or promise becomes either an enforceable gift or an enforceable testamentary transfer. *Id.* That determination can only be made ex post and not ex ante since intent must be proven to validate the transaction. *Id.*

143. This is in an attempt to clearly establish a fact pattern or hypothetical in which the proof of the promise that induces action is largely indisputable and easily proven.

lady-friend. The daughter, indignant over her father's meddling in her personal affairs, brings suit to enforce the father's promise, which he does not deny.<sup>144</sup> It safe to conclude that in every jurisdiction the father would prevail and the daughter would, in the absence of other facts, be bereft of any meaningful remedy against the father, notwithstanding the fact that a bargain was struck between the two parties.<sup>145</sup>

The refusal by all courts to enforce the father's promise represents a puzzle and problem if the doctrine and requirement of consideration and the bargain theory is taken seriously. It suffices to say that all elements of consideration are met in this hypothetical. But what occurs when the hypothetical is somewhat altered to illuminate even more problematic issues? Assume for the sake of argument, that before the father discovers the existence of the daughter's relationship with her female friend, he makes good on his promise by purchasing and delivering to his daughter the car keys.<sup>146</sup> The next day, before the car is physically delivered by the dealer, the father discovers the existence of the offending relationship and in a fit of pique attempts to rescind his gift. If the father brings suit to rescind the gift, he will lose because every court in the nation would find

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144. Although there are certain intra-family promises deemed enforceable later by a court, almost all such promises are enforced following the death of the promisor before the promise is performed. These intra-family promises are addressed in Johnson, *The Legality of Contracts Governing the Disposition of Embryos*, *supra* note 2. In almost all other cases, intra-family promises are deemed to be unenforceable by the courts.

145. In fact, other than charitable subscription cases, *see, e.g.*, Dougherty v. Salt, 125 N.E. 94, 94 (N.Y. 1919), it is almost impossible to find a case where a putative donor expresses an intention to make a future gift, changes her mind, and later declines to make same, and is then sued by the putative donee who is made aware of the intention to make the gift contemporaneous with the putative donor's expression. This, assumes of course, that there is no detrimental reliance on the promise by the putative donee. One can also posit that detrimental reliance should not be used in this context because the promisee daughter is actually better off as a result of the father's inducement—she achieved better grades. *See* discussion *infra* Part V. There are of course several cases in which the putative donor expresses an intent to make a gift under certain expressed conditions, dies, and the executor is sued when the conditions are met. That is the classic fact pattern in *Hamer*, and is better addressed as a case involving the issue of which donee, the inter vivos donee or the testamentary donee, should be given the subject property. *Hamer*, 27 N.E. at 257; *see supra* note 25; *see infra* Part V. The point to be made is that there are literally no cases where a donor expresses an intent to make a gift, later repudiates, and is then sued, forget successfully, by the putative donee. When the putative donor is alive, the donee just doesn't sue—there is no credible claim to be made. When the putative donor dies in the interim and the estate is sued, the real issue is whether the putative donor would have wanted the gift to be completed notwithstanding the change in circumstance—the putative donor's death—that has occurred. That is a different and more complicated issue that is addressed briefly in Part V and in greater detail in the companion article. *See* Johnson, *A Trichotomy of Reliance Promises*, *supra* note 22.

146. Assume for the sake of discussion that delivery of the keys to the daughter constitutes both a symbolic and constructive delivery of the car and completes the act of delivery necessary to find a valid gift. The requirement of delivery in a completed gift is discussed *infra* notes 160-168 and accompanying text.

that the unenforceable gratuitous promise became a completed and enforceable gift once delivery took place and the car is accepted by the daughter. Here, delivery is complete upon what is characterized as constructive delivery through the conveyance of the keys, which gives the daughter the means of access to the car.<sup>147</sup>

The seminal distinction between the two situations described above is that the father's promise to make a gift of the car is deemed unenforceable if the gift is not completed by the dual acts of delivery (actual, symbolic, or constructive), on the part of the donor<sup>148</sup> and acceptance, on the part of the donee. In the latter case in which these two requirements are met, the courts will hold that a valid gift has been made and refuse to cancel or negate the completed transaction. The gift is non-revocable and the donor cannot make a successful claim that enforcing the gift results in unjust enrichment to the donee, regardless of whether the donee has done nothing to "earn" the subject of the gift and the legal conclusion that the transaction lacks the legal glue of "consideration."<sup>149</sup> Key to this analysis, however, is a recharacterization of the court's refusal to modify or rescind the gift transaction once it is completed.<sup>150</sup> This should be viewed as a positive act of the court in enforcing the promise made by the father.<sup>151</sup> The father, for

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147. In this case, timing is indeed everything. Just as importantly and as discussed in more detail below, there are very few cases that address this exact fact pattern pursuant to which a donor who completes a gift, later attempts to revoke or modify same; *see infra* notes 160-168 and accompanying text. Indeed, it is hornbook law that a completed gift cannot be undone. Melvin Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 17 (1979). In almost all litigated cases, the donor is dead and the battle is between the putative donee and the intestate takers of the donor if the donor dies without a Will, or the residuary legatee if the donor dies with a Will and without a specific bequest addressing the disputed item. If there is a specific bequest in the Will devising the previously gifted item to a devisee, the question will be whether the bequest is deemed. UNIF. PROB. CODE § 2-606 (amended 2010).

148. Actual delivery occurs when the item that is the subject of the gift is capable of manual delivery and the item is physically delivered from the donor to the donee. Symbolic delivery occurs when the item is not capable of physical delivery (think, piano) and a symbol like a piece of paper expressing the gift is given to the donee and that is the only physical delivery that takes place. Constructive delivery occurs when the item is not capable of manual delivery and the donee is given the means to access the item and obtain same (think key to a safe deposit box). DUKEMINIER, ET. AL., *supra* note 76, at 164-65.

149. For the sake of argument, the claim that by accepting the gift the donee incurs a legal detriment that satisfies the rubric of consideration is ignored and may be irrelevant if the focus is on the bargain principle rather than the benefit/detriment test. For a discussion of the bargain principle and its enforceability via the benefit/detriment test, see *supra* notes 94-101.

150. If the father wanted to make a revocable gift and determine when said gift should be revoked, he should have been counseled to use a revocable trust designating himself as trustee and settling the trust with the car as the res and the putative donor as the trustee of the revocable trust. DUKEMINIER & SITKOFF, *supra* note 36, at 440-68.

151. The fact that there are similarly no successful cases in which the donor seeks return of the gift could of course mean that the unhappy donor who made the completed gift was successful in retrieving the item from the donee when he later changed his mind and sought return of the item gifted—this could happen in a close-knit family situation to preserve family harmony. However,

example, cannot later claim that the daughter has been unjustly enriched if she retains the automobile and seeks its return on that basis.

One last example completes this triptych. Thus far, this Article has addressed an uncompleted gift transfer and a completed gift transfer. Assume that when the father makes the promise to gift the car to the daughter should she achieve the status of an honor roll student, he is very ill and near death. So, in order to assure that his promise is kept should he die before the daughter graduates, he adds a valid addendum, called a codicil,<sup>152</sup> to his valid Will in which he states that it is his wish that the daughter be given the automobile should she make the school's honor roll.

If the father dies before the daughter's graduation with the codicil still in effect, the executor of the father's estate must later determine whether the daughter did indeed graduate on the honor roll. If so, the car will be delivered to the daughter by the executor of the estate, if not, the daughter does not receive the car. In other words, the "gratuitous" promise will be enforced later by the probate court even if the father's executor discovers the daughter's offending relationship and claims that the father, a noted homophobe, would have objected and withheld delivery of the car.<sup>153</sup> That duck will not quack and the executor will be bound by his or her fiduciary duty to perform the promise by delivering the car to the donee-daughter.<sup>154</sup>

In a suit between the daughter and the executor, the daughter will prevail. So, in this case, courts do enforce the gratuitous promises, but they do not call it a gratuitous promise or treat it as such. Instead, courts characterize this gratuitous transfer as a testamentary bequest and claim to

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given human nature, the value of the item given, and family dynamics, it is not a given that a family member would return an item—reverse a gift transaction—simply when asked to do so. The fact that there are no reported cases in which the donor seeks to reverse the gift transaction is instead better proof that such donors are advised not to waste their money when the gift is made; that their time is better spent attempting to retrieve same through informal mechanisms because to resort to the legal system will be spectacularly unsuccessful given the fact that a completed gift has been previously made.

152. UNIF. PROB. CODE § 1-201(57) (amended 2010).

153. Assume for the sake of argument that the father, while alive, delivered a note to his future executor expressly stating that he wished to cancel the bequest if his daughter is guilty of what he considers an act of moral turpitude including engaging in same sex acts. Such a note does not qualify as either a valid codicil to his Will changing its provisions or a revocatory act sufficient to invalidate the bequest in the Will. See UNIF. PROB. CODE §§ 2-507 & 2-508 (amended 2010).

154. Indeed, in the famous iconic cases such as *Hamer v. Sidway*, discussed *supra* note 23-24 and accompanying text, the reason those cases are considered contract rather than estate cases is that the promisor did not have the foresight to memorialize the contentious promise in his or her estate plan. That lack of formality is key to the resolution of those cases. See *infra* notes 160-68 and accompanying text.



be enforcing the testator's intent by enforcing his last Will and Testament.<sup>155</sup>

To be clear, this situation is quite distinct from a situation where the father makes the same promise and before the daughter makes the honor roll, the father dies without a Will or without changing the Will to reflect his intent to make the gift. In this situation, we have a gratuitous promise that was not completed before the putative donor's death—like, for example, the one described in this triptych. The donor's death represents a changed condition but has no impact on the legality of the gratuitous promise made by the putative donor.<sup>156</sup> In these cases, if there is a dispute between the executor of the putative donor's estate who presumably refuses to complete the gift, as intended by the putative donor, then it is not enforceable and the executor is charged with completing and performing only legally enforceable obligations of the estate.<sup>157</sup> If the basis of a claim against an estate is a gratuitous promise that is ipso facto unenforceable, the executor's completion of the gift would subject the executor to a successful claim by the decedent's heirs, if he died intestate, or legatees if he died testate.<sup>158</sup>

In cases where there is a validly executed Will and the executor is simply carrying out those wishes, it is the existence of the validly executed Will that serves as the basis for a valid future transfer of the property to the

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155. See Johnson, *The Legality of Contracts Governing the Disposition of Embryos*, *supra* note 2, at 237. What's in a name? The fact that this is called a testamentary bequest should not obscure the fact that this is essentially a gift transaction. It is not an inter vivos gift, since it takes place after the death of the donor, nor is it a gift causa mortis (one made in contemplation of death but while the donor is still alive). This gift takes place and becomes effective only at the instant of the donor's death when a court later determines that the testator died with a valid Will. The relation-back doctrine of Will enforcement is addressed in Johnson, *Is it Time for Irrevocable Wills?*, *supra* note 115.

156. As noted and discussed, *see infra* notes 168-78 and accompanying text, this fact pattern can generate cases in which the promises are subsequently enforced by the courts even when delivery has not been completed due to the death of the putative donor before delivery can be effectuated. The exemplar of this fact pattern is *Hamer*, 27 N.E. at 257; *see supra* note 23-24.

157. *DUKEMINIER & SITKOFF*, *supra* note 36, at 43.

158. *Id.* The fact that the executor is subject to a claim by either heirs of legatees if the gift is completed by the executor predisposes the executor to inevitably refuse a request to complete a gift transaction in this setting. Saying no forces the putative donee to go to court to enforce the gift and if the putative donee is successful, a court order to effectuate the gift immunizes the executor from a subsequent lawsuit. Just as importantly, the asset that is the subject of the gift is removed from the decedent's estate and given to the putative donee affecting a change in assets between the competing donee and the heirs or legatees. No assets of the executor are involved and from the executor's perspective it is irrelevant who gets the asset as long as there is no possible liability for the executor. If, however, the executor more generously completes the gift because of a belief that it comports with the decedent's intent, that act will be subject to later challenge by the heirs and legatees and the executor may be personally liable for the value of the gift. Hence, it always behooves the executor to say no and force the court to decide. That is the common fact pattern in cases like *Hamer*, 27 N.E. at 257; *see supra* note 25.

putative donee following the testator's death.<sup>159</sup> The uncompleted gift transaction is deemed to be largely irrelevant from the perspective of the executor and the courts in effectuating the actual transaction or transfer of the gifted item. Instead, the validly executed Will serves as the focal point for a determination of whether the item Will be transferred to the donee—now deemed “devisee” because of the placement of the future gift in the Will.<sup>160</sup> Functionally, a completed gift and a completed testamentary transfer serve the same purpose and are deemed effective for somewhat similar reasons.

In both cases there is no claim of consideration and no claim on the part of the donee or legatee, depending on the case, that the donee or legatee merits, or has somehow earned, the item that is the subject of the gift or bequest. This is the epitome of the so-called sterile transaction that is unenforceable as a gratuitous promise but enforced as a completed gift or testamentary transfer only if the putative donor complies with certain formalities.<sup>161</sup> These formalities for the two different types of transfers are described in greater detail below.

This section is titled, in part, *Inter Vivos Gifts and Testamentary Transfer (Enforceable Transfers-No Consideration Required)* and the reference to these agreements as “Enforceable Transfers” is intentional. Perhaps this section should be titled “Valid Enforceable Agreements Unsupported by Consideration.” The intent, however, is to draw particular attention to the fact that the only separation of these transactions from contractual or consideration-based transactions that are deemed enforceable is the alleged lack of consideration, however consideration is defined by the arbiter.<sup>162</sup> Assuming that the promisor possesses the requisite intent to make a transfer, that intent does not differ in intensity and nature from the intent that the promisor has in making a bargained-for transfer that is deemed to be supported by consideration and is therefore enforceable.<sup>163</sup>

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159. DUKEMINIER & SITKOFF, *supra* note 36, at 43-48.

160. UNIF. PROB. CODE § 2-605 (amended 2010).

161. *See supra* notes 106-109.

162. Irrespective of which consideration formula is used by the applicable court, *see supra* notes 94-101 and accompanying text, no finding of consideration will be reached.

163. One can quibble that when the donor intends to make a gift, what is lacking is an agreement with another party or entity, and it is the absence of the other party or entity that makes a gift different from a contract that is enforceable. That, of course, ignores the fact that certain unilateral contracts are deemed enforceable when supported by the consideration. FRIER & WHITE, *supra* note 3, at 38. In addition, the absence of an agreement between two parties does not preclude courts from utilizing the doctrine of promissory estoppels to enforce promises made by one party without obtaining a reciprocal promise. *See infra* Parts V for a discussion of the use of promissory estoppel by the courts.

Yet, this species of promise or agreement—typified by the father’s promise to transfer the car to the daughter, should she make the honor roll—is deemed unenforceable unless the donor complies with certain formalities, including intent, delivery, and acceptance to effectuate a valid and enforceable inter vivos gift or transfer.<sup>164</sup> If the donor wishes to make a gift to an individual or entity effective after the donor is dead, the gift can be validated as long as the gift transaction is properly memorialized in a validly executed Will.<sup>165</sup> Consideration is not required in order to validate the now future testamentary gift.

The two reasons why both inter vivos gifts and testamentary transfers are validated are the formalities associated with each transaction and the situational context of the gift or testamentary transfer given the relationship of the parties to the gift or testamentary transfer. First turning to the formalities with respect to gifts, intent, delivery, and acceptance, and attestation with respect to Wills, all provide the evidentiary and corroborative predicate to find a valid transaction. It is generally accepted that once the “formality requirements” are met, courts have little trouble in finding a valid transaction.<sup>166</sup>

The most important point about these two transactions that often goes overlooked or ignored, is the absence of an exchange between the parties, characterized as putative donor and putative donee, be it inter vivos (gift) or testamentary (Will). The mere fact that there is no quid pro quo in these two transactions means that what is being exchanged for the gift or bequest is nil, now or later. And that nil does not have to be measured; it has no value because nothing, except perhaps gratitude, is being exchanged. The

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164. Although gifts are historically categorized as either inter vivos—made while the donor is alive—or gifts causa mortis—gifts made in contemplation of death, the focus herein is on inter vivos gifts for several reasons. First, the differing requirements and treatment of gifts causa mortis seem to be disappearing from the law. This is probably so because the importance of gifts causa mortis has been lessened by the ease of the creation and use of revocable inter vivos trusts. Pursuant to these trusts, grantors can easily designate takers upon death but retain, in essence, total control over the asset up to the instant of death including the possibility of revoking the gift should the donor or trustor not die of the anticipated peril. For a discussion of revocable inter vivos trusts, see *DUKEMINIER & SITKOFF, supra* note 36, at 440-68. In addition, the differing requirements for a gift causa mortis, including that the donor be motivated to make the gift because of fear of imminent peril or the possibility of demise, and that the putative donor perish from the anticipated peril in order to complete the gift, are largely irrelevant to the issues addressed herein. For a discussion of gifts causa mortis, see *DUKEMINIER, ET. AL., supra* note 76, at 198.

165. The rest of the article will assume that the decedent-donor resided in a state that has adopted the Uniform Probate Code (UPC) and that the Will executed by the decedent-donor, whether holographic or non-holographic, complies with the formalities, such as attestation, that are required by the applicable UPC code. UNIF. PROBATE CODE §§ 2-502 & 2-503 (amended 2010).

166. *DUKEMINIER & SITKOFF, supra* note 36, at 148-53.

thing being given establishes the value of the transferred item. The intrinsic value of the transferred item is unique to the gift, whether inter vivos or testamentary.<sup>167</sup>

The fact that the putative donee has promised nothing in exchange for the gift or the testamentary bequest means nothing has to be measured or assessed by the court in determining what needs to be transferred in order to complete either the gift transfer or the testamentary bequest.<sup>168</sup> Indeed, what is quite striking about both inter vivos gifts and testamentary transfers is that the formalities requirements associated with each are neatly calibrated so that the function each serves has the effect of identifying and credibly establishing the item that is being transferred. This allows a court to later (ex post) determine the ownership, not the value, of the item in question. That question of ownership is what is being litigated and decided in the dispute.

Focusing first on inter vivos gifts, the three requirements of intent, delivery, and acceptance do more than corroborate the gift or provide evidence of the intent to make a gift. These requirements establish the contour, the identity, and the limits of the gift. By requiring delivery and acceptance to effectuate a valid gift, both the putative donor and putative donee must identify the thing being transferred with specificity and also agree on the boundaries of what is being transferred.<sup>169</sup> Delivery requires the donor to make the identity of the proposed gift certain and concrete.<sup>170</sup> In other words, the putative donor cannot make a gift of something indistinct like, for example, “things that I want you to have because they are perfect for you” without positively identifying those things in a more deliberate and exacting fashion. Failure to positively identify the item or items gifted results in no gift because no matter how certain the donor’s intent, it is impossible for both the donee and any third party (court or arbiter) to ascertain the object of that intent. Moreover, that intent cannot be clarified by the donor if the putative donor dies shortly after making the

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167. To a large extent the remedy enforced in donative transactions is very similar to the remedy sought in a specific performance action. Thus, there is no need to place a price or value on the item that is the subject of the dispute. The winner of the dispute obtains that item, thereby obviating the need for valuation. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 360-62 (1978).

168. In the gift transaction, the donee has not made a bargain in order to obtain the gifted item. In this sense, the donee is only a promisee and not a promisor and there is no bilateral agreement or contract. For a discussion of the bargain theory of consideration, see *supra* notes 94-101.

169. The act of delivery requires the donor to specify what is being gifted and is positive evidence of that fact. Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348-49 (1926).

170. *Id.*

statement supporting the intent to make a gift of those things ‘perfect’ for the putative donee.<sup>171</sup>

Acceptance of the gift by the donee likewise fixes the scope of the thing being transferred. It requires the putative donee to delimit the item being accepted by requiring the donee to make a conscious or deliberate choice to take dominion, control, and usually present ownership over the thing being transferred. In order to convey the valid acceptance, the putative donee must be made aware of the scope and identity of the item that is being voluntarily transferred. And even though there is no bargained-for exchange with respect to a gift, the acceptance requirement mandates that there is the equivalent of a meeting of the minds (similar to an agreed-upon bargain) with respect to the item being voluntarily transferred. That means the donee must accept the gift proffered, no more, no less. Thus, the donee cannot partially accept a gift, nor can a donee expand the scope of the gift beyond that intended to be transferred to the donee and it is presumed that the donee accepts the gift when the gift has positive value.<sup>172</sup>

Essentially, the same requirements are present in a valid testamentary transfer. In order to effectuate a voluntary future testamentary transfer,<sup>173</sup> the formality requirements mandate that the putative testator identify the items contained within her estate and the takers of such items, even if that identification is something as broad as a residuary clause, by which the testator gives “the rest and residue of her estate to her best friend, Karen.” By using even a broad and vaguely worded clause,<sup>174</sup> the testator has

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171. Indeed, if this Article focused solely on the formalities associated with gift transfers, the analysis would be expanded to demonstrate why constructive and symbolic delivery are allowed and substituted for actual delivery. This also adequately explains why a putative donor may make a gift of a future interest in a current possession like a painting which was the subject of just such a gift in *Gruen v. Gruen*, 496 N.E.2d 869 (1986). Both constructive and symbolic delivery serve the function of defining precisely, by objective indicia, what is being transferred. Similarly, the requirements that must be complied with to make a delivery of valid future interest, serve the same function.

172. RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 493-95 (2012).

173. This is an attempt to differentiate involuntary testamentary transfers, which occur when the decedent dies intestate, without a Will. In this situation, the state of the decedent’s domicile at the time of death, dictates the taker(s) of the decedent’s estate through off-the-rack default rules known as intestacy provisions. See UNIF. PROBATE CODE §§ 2-101 & 2-105 (amended 2010). The takers of the decedent’s estate are deemed “involuntary” to the extent that there is no evidence that the decedent opted or chose to select these intestate takers to receive her property. The only thing known, with any degree of certainty, is that the decedent died without a validly executed Will. Whether that means that the decedent intentionally opted into the default rules provided by intestacy statutes is untestable.

174. A Will, unlike most other documents, effectuates a transfer of title of the testator’s property, and is both revocable and ambulatory. Although a Will’s revocability is accepted as normal, ambulatory in this context means that will can dispose of after-acquired property. As to its revocability, what is interesting about a Will is that it cannot be made irrevocable. For a

identified the taker, Karen, and the items to be taken— everything she owns at the time of her death that she has not specifically bequeathed to others in her Will.<sup>175</sup> And, although most lay persons are not aware of this requirement, similar to inter vivos gifts, testamentary gifts must be accepted by the donee or legatee before they can be completed.<sup>176</sup> Thus, a testamentary gift requires the same identification (certainty) of the item being bequeathed, as well as acceptance (meeting of the minds) of that item by the putative donee or legatee (completion).<sup>177</sup> Consequently, both formalities associated with gratuitous inter vivos and testamentary transfers serve the function of identifying the item transferred to reduce any uncertainty regarding what is being transferred even the donor is dead.<sup>178</sup>

More importantly, these similar functional requirements serve identical purposes. The functional requirements are designed to limit the administrative and error costs associated with these transactions, in which no exchange of items (no bargained for exchange) is made between the putative donor and donee. In other words, in transactions in which only one transfer is being made, from donor to donee or testator to legatee, the only issue to be adjudicated is the nature and extent of the asset to be transferred. The formality requirements are designed to furnish information to the arbiter or trier of fact by providing assurance that if a transfer is validated, both the administrative costs associated with making that determination and any error costs associated with that decision are *de minimis*.

Recall that in cases involving inter vivos gifts, as well as cases involving testamentary gifts, the possibility of error arises because the putative donor is more than likely deceased and unable to state her past or current intent.<sup>179</sup> Hence, the possibility of error is most likely to occur

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discussion of this issue, see Johnson, Jr., *Is it Time for Irrevocable Wills?*, *supra* note 115, at 409-10.

175. DUKEMINIER & SITKOFF, *supra* note 36, at 374.

176. See UNIF. DISCLAIMER OF PROPERTY INTERESTS ACT (UDPIA) (UNIF. LAW COMM'N 1999) which was incorporated into the UNIF. PROBATE CODE in 2002 as Article 2, Part III §§ 2-1101-2-1107, replacing § 2-801.

177. Given that a testamentary bequest can be disclaimed, *id.*, the choice not to disclaim is the equivalent of acceptance and is required to complete a valid bequest.

178. It is obvious and redundant to state that the testator is dead in cases involving testamentary bequests and Wills. It is not so obvious, that the putative donor will be dead in cases adjudicated involving alleged inter vivos gift transfers. However, and as noted previously *supra* notes 166-74 and accompanying text, there are no cases in which a live putative donor is sued by the putative donee after the putative donor states he is repudiating the gift because his intent has changed. Quite the contrary, the putative donor's death before the gift can be completed represents a changed condition, *supra* notes 160-65 and accompanying text, that was not anticipated by the putative donor.

179. For a discussion of why this is more than likely the case, see *supra* notes 160-78 and accompanying text.

when those interested in obtaining the item that is the subject of dispute, claim the item as an inter vivos gift or testamentary transfer and the deceased owner is unable to positively refute such a claim. By proving that the donor complied with the requisite formalities, the testamentary formalities place the burden on the individual claiming the donative transaction to prove the validity of the transfer and the donor's intent.<sup>180</sup>

It is important to realize that in adjudicating an inter vivos gift claim or testamentary transfer claim, the real parties in interest are the individuals or entities claiming that the transfer took place, and the decedent's heirs or testate takers. The putative donor or testator is out of the picture due to her death, and the only question is who will be substituted as the next owner or occupant of the item(s) that are the subject of the dispute. Discerning which party was the intended recipient when competing claims are made cannot be performed with one hundred percent certainty because the putative donor is dead. A court can make inquiries amongst the decedent's friends and relatives to try to make an ex post determination about whether the transfer alleged was intended, but the cost of that determination would be very high and more than likely produce highly indeterminate results.<sup>181</sup>

The formality requirements make quick resolution of this issue and provide a determination that minimizes the possibility of error by placing the burden on the party claiming a transfer to prove that the requisite formality requirements were accomplished. Failure to do so, will result in the property being transferred to the testator's heirs or legatees, which is the equivalent of a majoritarian default position that society has embraced.<sup>182</sup> In other words, if no valid inter vivos gift can be proven, the presumption enforced by the court is that the property becomes part of the donor's estate.

Turning now to the contextual dimensions of these transfers, what is often overlooked in a comparative discussion of gifts or gratuitous transfers versus contracts, are the two different contexts that produce these transfers. It is the context that drives the functional or formal requirements of each of these transactions. For example, inter vivos gifts occur in a typical setting that has two important attributes or characteristics. First, although there are anonymous gifts (usually to institutions or charities),<sup>183</sup> most gifts of

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180. DUKEMINIER & SITKOFF, *supra* note 36, at 147-53.

181. After the decedent's death, parties' motivation and memories may change depending on the circumstances and cause conflicting testimony and evidence to be adduced regarding the putative donee/testator's true intent and wishes.

182. Ian Ayres & Robert Gertner, *Majoritarian and Minoritarian Default Rules*, 51 STAN. L. REV. 1591, 1591-93 (1999).

183. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW INST. 1981) ("A charitable subscription or a marriage settlement is binding . . . without proof that the promise induced action or forbearance."). These anonymous gifts are said to be truly altruistic as opposed

donative transactions involve family members or individuals who have had a preexisting long-term relationship. That stands to reason because most people do not give away their assets to strangers. The preexisting relationship is important for several reasons. Given the multiple interactions that occur between the parties in several domains over an extended period of time, statements can be made that are taken out of context to support the allegation that a gift has been made. How often does one say to one's child or lover, "If I could give you the moon, I would?"

Second, since donative transfers do not focus on an exchange of things or promises, the putative donee must demonstrate that the donor not only transferred the item by delivering it, but that the donor had the requisite intent to transfer.<sup>184</sup> This means that if there is a dispute later regarding whether there is a valid donative transfer, the putative donor can dispose of the issue by simply stating that he or she had no intent to make such a gift. If the transfer lacks intent, there is no gift—it is that simple. Perhaps that is why there are no cases in which the putative donor is alive and claims that she did not intend to make a gift. That case would be disposed of on a motion for summary judgment.<sup>185</sup>

This means that in most, if not all of the litigated cases involving donative transfers, the putative donor is dead and unable to testify at any trial concerning the validity of the gift. This also means one additional thing: since the donor is dead and has no need for the item in the afterlife, the real parties in interest in a dispute over the alleged gift are, again, the putative donee and the putative donor's intestate heirs or testate takers. If the gift is validated, the donor's estate will not include the gift. Even if there is a specific bequest of the gifted item in the Will to someone else, that item will be 'adeemed' in the testator's Will, i.e., that is treated as not in the testator's estate because of the transfer that took place prior to the testator's death.<sup>186</sup>

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to other gifts which are made to enhance one's reputation (reputational), or benefit the donor by providing the donor with a feeling of beneficence (beneficent), or made with the expectation of receiving a return gift (reciprocity). *Id.*

184. If the putative donor claims he gave something of value in exchange for the gifted item, he is alleging that this is a contract supported by consideration.

185. Better yet, no attorney would file suit in such a case recognizing what a waste of time and resources it represents.

186. Ademption occurs when the testator specifically bequeaths an item that is not in his estate. *See* UNIF. PROBATE CODE § 2-606 (amended 2010). In other words, one's Will can leave Dodger Stadium to her husband but unless she owns Dodger Stadium at the time of her death, the dispositive provision in the Will is ineffective to transfer Dodger Stadium to her husband. Items of personalty and realty that were once owned by the testator but are not owned by the testator at the time of her death are treated similarly.



Consequently, and here's the payoff, the inter vivos gift transfer, even though it is an inter vivos gift transfer, looks remarkably similar to a testamentary transfer when it is challenged later. In the testamentary transfer setting, if there is a challenge to one of the testator's bequests or the validity of the Will or a codicil, the question is who among the donor's heirs, relatives, friends, or acquaintances will receive the disputed item(s).<sup>187</sup> Thus, with respect to inter vivos gifts and testamentary transfers, there is no question that the item which is the subject of the dispute will not be returned to the putative donor or testator because that individual is dead. Instead, the issue will be who among the living relatives, friends and acquaintances will receive the item given that no one has paid for or contracted for the transfer of the item. The situation is complicated because of the donor or testator's death and the fact that he or she cannot testify or contradict any statements made by the competing claimants to the disputed item. How does one make a determination regarding transfer of the deceased property without viable input from the decedent? How does the court get it right?

Now, this Article will examine the formalities required to establish the validity of these two different transactions: gifts and testamentary transfers. As previously noted previously and discussed,<sup>188</sup> to establish a valid gift the donee must establish intent, delivery, and acceptance. The burden of proof is placed on the donee to demonstrate that, there was an intent to make a gift. This can obviously be accomplished in a variety of ways, including testimony of the donee as to what was said by the donor contemporaneous with the delivery of the gift. Intent, however, is not the key requirement because it is subjective and the donor is dead. The key requirement is delivery.<sup>189</sup>

The delivery buttresses any claim by the donee that the donor intended a gift. The fact that the item has been physically transferred to the donee shifts the burden to the party challenging the transfer to show that the donor had no such intent to make a gift.<sup>190</sup> Delivery thus serves as the fulcrum for

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187. If the testator has died with a Will and a specific bequest—a transfer to a named individual—is successfully challenged, the gift fails and “falls” into the residuary clause, i.e., the rest and residue of my estate to X. If the entire Will or the residuary clause is successfully challenged, the testator will be deemed to have died intestate with respect to the items passing pursuant to the invalid residuary clause or Will. In this case, the assets will then pass to the testator's intestate heirs, i.e., the default-takers of the decedent's estate identified by statute. *See* UNIF. PROBATE CODE § 2-101(a) (amended 2010).

188. *See supra* notes 166-74 and text accompanying.

189. *See* Mechem, *supra* note 169, at 348-49.

190. In the litigated cases there is little question that the donee has accepted the gift. Indeed, the presumption in most cases is that the donee has accepted the gift. *See* HYLAND, *supra* note

the court to make a determination regarding whether a transfer has indeed occurred. It provides *objective* evidence that a transfer has or has not been made. That, of course, does not mean that the objective evidence, i.e., that the donee has the item in question, is foolproof or always dispositive.<sup>191</sup> It does mean that the court has a principled means to make a determination in the most difficult circumstances—when one of the principal parties is not available (due to the putative donor’s death) for corroboration or evidentiary purposes. The requirement of delivery necessary to validate the transfer satisfies the corroborative and evidentiary purposes. If the putative donee has the item, there is a strong presumption of a gift transfer with the requisite intent. If that is not the case, the burden is on the intestate or testate heirs to prove otherwise.<sup>192</sup>

The same essentially applies to testamentary transfers. The Wills Act established the requirement of attestation of the document signed by the testator with two or more witnesses.<sup>193</sup> It likewise later (ex post) supplies a court with sufficient evidence to make a principled determination as to the disposition of the testator’s assets by placing the burden of proof on the party seeking to invalidate the Will.<sup>194</sup> The formalities required to establish a testamentary transfer are vehicles or paths by which courts navigate these difficult disputes to reach a principle and, hopefully, correct decision.

By focusing on the remedy sought by the parties, in the case of donative and testamentary transfers that means determining ownership, the functional role of the requirements necessary to validate the transfer reveals a normative base that is telescopic. At one end of the telescope is the ex ante position of the parties when the transaction is taking place. The

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172, at 493-95. Failure of the donee to accept the gift would not produce any litigation over the validity of the gift.

191. The donee, for example, could have stolen the item or taken it without the knowledge of the donor. Alternatively, the donee could have come into possession of the item following the death of the putative donee.

192. For example, they may be able to demonstrate that the item was stolen or taken without permission.

193. These requirements are embodied in the UNIF. PROBATE CODE §§ 2-501-2-503 (amended 2010). Indeed, Section 2-503 dispenses with the requirement of witnesses, if sufficient evidence to discern testator’s intent can otherwise be proven. It must be highlighted that once the evidentiary function is otherwise satisfied the formalities associated with the execution of the Will are also dispensed. Thus, the Uniform Probate Code is quite clear on the view that the functions of attestation are evidentiary. UNIF. PROB. CODE §§ 2-501, 2-503 (amended 2010).

194. There are a number of ways that the Will can be challenged. First and foremost, the party challenging the Will can allege that the attestation process was not properly complied with including, but not limited to, proving that the testator did not sign the proffered Will because it is a forgery or that the testator did not know he or she was signing a Will because there was fraud in the inducement. Of course, there are other ways to challenge a validly executed Will by showing that the testator lacked the mental capacity to make the Will or that the executed Will was the product of undue influence, etc. See UNIF. PROB. CODE Part 5 (amended 2010).

formalities are designed to inform the parties of the importance and legal effect of their actions at the time they are made. At the other end of the telescope is the *ex post* position when the court is called to adjudicate the dispute given the absence of one of the key parties to the transaction. Here, not only are the interests of the parties impacted and affected, but the interests of others as well.

This Article now turns to consideration and the formalities required to prove that it has been established. Assume for the sake of argument, that the bargain theory of consideration is the only way to establish consideration. This simplifying assumption allows the Article to focus on the process that produces the bargain—the negotiations that take place between the promisor and the promisee that results in an exchange of promises. For example, Able agrees to sell his car to Baker for \$5000.00 and their agreement is reduced to writing, specifying that the car is to be delivered to Baker one year after the execution of the agreement that is signed by both parties.<sup>195</sup> *Ex ante*, at the time of contracting, both Able and Baker are aware of the serious nature of the transaction because of their negotiation and the reduction of their agreement to writing. Executing the agreement brings home to each, their promise to perform pursuant to the terms of the agreement (cautionary function).

Moreover, the fact that the agreement will be reduced to writing raises issues regarding whether the agreement reflects the true intent of the parties executing same. If there is a question regarding the written agreement, either party can use standardized forms that have previously been interpreted and have a settled interpretative meaning<sup>196</sup> or they can have their respective attorneys draft language that insures their intent is properly memorialized per the terms of their agreement (the channeling function). The existence of the agreement serves as evidence that an agreement was reached by and between Able and Baker. Furthermore, the terms of the agreement are proven by the writing (evidentiary function).

The recognition that consideration serves these functional roles is not novel.<sup>197</sup> However, what is often lost in the discussion of the functional role of consideration is that the requirements necessary to effectuate a Seal are also satisfied by the requirement of consideration in the hypothetical

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195. The existence of the writing satisfies the requirement of the Statute of Frauds that is embodied in the Restatement (Second) of Contracts at § 110. RESTATEMENT (SECOND) OF CONTRACTS § 110 (AM. LAW INST. 1981).

196. On the virtue of the interpretation of standardized forms versus customized formulation. See FRIER & WHITE, *supra* note 3, at 180-81.

197. See Fuller, *supra* note 4, at 799.

bargain between Abel and Baker.<sup>198</sup> The execution of the written agreement proves each party's *intent* to enter into the agreement and to be bound by the terms of the agreement. Similarly, and assuming each party has a copy of the executed agreement, there is delivery of the document to the other, the surrender of which signifies to promisor that the deal is final. Finally, the acceptance of an executed copy by the promisee in this bilateral contract (each party in this case) causes both Abel and Baker to be bound.

The fact that intent, delivery, and acceptance are present, binds these transactions to inter vivos gift transfers and testamentary transfers that are addressed in Part IV. Suffice it to say, the fact that these three requirements are met in each of these transactions, later allows a court to efficiently and correctly adjudicate a dispute that might arise between the parties by initially determining whether there was an enforceable agreement.<sup>199</sup> Those three requirements are necessarily met in the arms-length transaction that represents the hypothetical bargain between Abel and Baker because either party has incentive *ex post* to act opportunistically<sup>200</sup> depending on events that have occurred subsequent to the execution of the contract.

In situations involving inter vivos gifts and testamentary transfers courts are faced with the evidentiary hurdle of deciding the validity of such transfers: one party to the transaction is deceased and her "live" testimony cannot be made before the court. Therefore, the court is faced with two opposing stories regarding the intent of the putative donor that cannot be verified by relying upon the testimony of that donor. With respect to gifts, the act of delivery ensures that the intent of the putative donor is as claimed by the putative donee in the absence of any other evidence.<sup>201</sup> With respect to the testamentary transfer, in lieu of the testator's testimony compliance with the formalities mandated by the Wills Act,<sup>202</sup> suffices to document and

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198. *See supra* notes 64-77 and accompanying text.

199. Subsidiary questions such as the interpretation of the agreement and whether the agreement can be performed or has been breached can only be addressed once the seminal question of whether consideration has been found.

200. Opportunistic behavior is behavior of a performing party to an agreement that is "contrary to the other party's understanding of their contract, but not necessarily contrary to the agreement's explicit terms, leading to a transfer of wealth from the other party to the performer." Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 521 (181).

201. For the sake of simplicity, this Article ignores symbolic and constructive delivery of the item that is the subject of the gift and instead focusing on actual delivery of the item that is the subject of the gift.

202. The original Wills Act enacted in 1837 required a writing signed by testator at the end thereof (subscription) and witnessed by two individuals. *DUKEMINIER & SITKOFF, supra* note 36, at 149.

prove the intent of the testator.<sup>203</sup> In other words, *ex post* the adjudicating court uses these requirements of form to ensure that it can make the correctly and efficiently decide the outcome of the case.

In comparable situations involving a contract dispute, however, both parties are before the court but each has a strong incentive to convince the court that their view on the validity of the contract is correct. Notwithstanding the existence of perjury and the moral suasion on truth-telling, the court has no independent way of divining which party is telling the truth or which parties' recollection of events is accurate. Enter consideration, which allows the court to make the correct and efficient decision regarding the enforceability of the alleged contract or agreement. The three requirements of intent, delivery, and acceptance are verifiable signifiers of the existence of such an agreement. The formality requirements supply objective and verifiable evidence of an agreement that can be subsequently evaluated by the court in light of the circumstances that caused the parties to enter into the agreement.

To prove this point, the Article will turn to *inter vivos* and testamentary transfers that establish the baseline by which contractual agreements are to be judged.

#### IV. CONSIDERATION RECONSIDERED: AN EXPANDED FUNCTIONAL APPROACH FOCUSING ON RIGHTS AND REMEDIES

So far, this Article has demonstrated that consideration is a formality that is required at formation to ensure a valid contract. In so doing, this Article joins a long, and some might add prestigious, line of scholarship that focused on the formal or functional role of consideration as its normative base. However, contrary to what is standard thinking, the consideration formality does serve a purpose beyond evidentiary, cautionary, channeling, and ritualism: it is functional. To date, however, scholars have focused on the functional role played by the formalities as the parties enter into the transaction—characterized here as the *ex ante* position of the parties.<sup>204</sup> The functional role is much broader in scope than

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203. The Uniform Probate Code has supplanted the Wills Act in a majority of states. For example, under the UPC, the formalities required to execute a valid Will have been lessened. *See* UNIF. PROB. CODE § 2-502 (amended 2010). This, however, does not impair the argument regarding the functional role served by these requirements because the lessening of formalities allows validation of a Will when there is clear and convincing evidence of intent that the Will represents the testator's intent. DUKEMINIER & SITKOFF, *supra* note 36, at 150-53. As such, the UPC can be said to recognize and adopt the approach that when the court is satisfied with the proof of the testator's intent, the Will can be deemed enforceable. *Id.* at 152-53.

204. *See supra* notes 92-104 and text accompanying.

previously considered. The additional function it serves is to provide an effective remedy in the case of breach.<sup>205</sup> The absence of consideration does not mean no contract, it means no enforceable contract, and, hence, no remedy enforced by the court. This becomes clear when comparing gift promises that are enforced, gift promises that are not enforced, and the use of promissory estoppel to enforce promises admittedly lacking consideration.

This Article will further demonstrate that consideration's additional functional purpose is to supply the court with an effective and efficient remedy in the case of a breach. To accomplish that goal, a brief review is in order before turning to contracts supported by consideration. There are certain formalities associated with valid inter vivos gift transfers.<sup>206</sup> The formality requirement associated with gift transactions serves the functional purpose of identifying with certitude the item voluntarily transferred from the donor to the donee. The formality requirements associated with a valid testamentary transfer serve a similar purpose of identifying both the item being transferred and the recipient of the item. The formality requirements associated with both transactions allow a court to later validate the transfer at low cost and with little change of adjudicative error.

Starting with the assumption that X is the owner of real property and proving ownership beyond any doubt, that ownership interest provides X with the power to make inter vivos transfers as well as testamentary transfers.<sup>207</sup> The inter vivos transfers can be one of two types given the current characterization of transactions. First, the transaction can be characterized as a gift transaction in which title and ownership of the item are transferred to another, with the donor receiving nothing material in return.<sup>208</sup> The second type of inter vivos transaction is a bargained-for

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205. See *infra* notes 223-34 and text accompanying.

206. See *supra* notes 166-74 and text accompanying.

207. The power to make testamentary transfers was not always a given. It is only with the execution and acceptance of the Statute of Wills in 1540 that testators were given the power to make transfers that became effective upon the testator's death. STATUTE OF WILLS (1540).

208. Although gifts are said to be altruistic with the donor receiving nothing in return for the gift, it is actually incorrect to say the donor receives nothing in exchange for making a gift. First, there is the emotional benefit created when the gift is transferred. It is beyond cavil that the donor will not make a gift if it makes her feel worse or makes her worse off than she was before the gift. Given that this is indeed a gift and a truly voluntary transaction, there would be no incentive to make the transaction if there was no positive benefit to the donor. See Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 6 n. 17 (1979). Second, there are reputational effects that make the donor better off when she makes a gift. Meaning that the donee's view of the donor's reputation is enhanced as a result of the gift. See Posner, *supra* note 103, at 412. Third, many gifts are given with the hope that a gift will be received in return (so-called reciprocity gifts). HYLAND, *supra* note 172, at 19. Consequently, when stating that the donor received nothing material in return, to be more precise, this means that the donor does not receive a

exchange that is typically characterized as an enforceable contract.<sup>209</sup> That is, the original owner, X, receives something in return as an inducement to transfer ownership of the subject property and its use to Y. The third type of transfer is the transfer that occurs at death—the so-called testamentary transfer.<sup>210</sup> This transfer looks much more like the first transfer in that the owner, X, will not receive anything in return for the testamentary gift other than perhaps gratitude from the donee or legatee.<sup>211</sup>

In the first transaction, the gift transfer, if the matter is disputed or litigated, the person characterized as the putative donor is more than likely dead.<sup>212</sup> The same is obviously true of the testamentary transfer: the putative donor is dead. This is obvious in the testamentary transaction but not as obvious in inter vivos donative transaction. If the putative donor is alive when the dispute arises regarding whether X has transferred an ownership interest to Y, one would start with the assumption that X is the owner and can prove that fact to the satisfaction of all concerned. To overcome the assumption of ownership by X, Y has the burden of proving that a transfer of ownership has occurred. Y can do this by claiming one of two alternatives.

First, Y can claim that X made a gift to him, expecting nothing in return. However, since intent to make a gift is one of the formality requirements, if X is alive and disputes this account there is ipso facto no gift.<sup>213</sup> This is why there are no gift cases in which the putative donor is alive and the putative donee claims a gift that is contrary to the putative donor's claim of ownership, meaning no gift. The other avenue is a bargained-for exchange in which Y claims that he is entitled to the item

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material quid pro quo (res) as a precondition or contemporaneous condition at the time the gift is made.

209. FRIER & WHITE, *supra* note 3, at 33-36.

210. DUKEMINIER & SITKOFF, *supra* note 36, at 147-53.

211. A limited exception to the donative testamentary transfer arises when X, our putative testator, contracts to make a Will and dies in compliance with the contract. In this situation, X may agree to leave her estate to Z if Z agrees to make a Will that is reciprocal, meaning upon his death, his estate will be left to X. In this situation, both parties, are in a contractual relationship, not a donative relationship. DUKEMINIER & SITKOFF, *supra* note 36, at 256-58; UNIF. PROB. CODE § 2-514 (amended 2010).

212. See *supra* notes 180-84 and accompanying text.

213. The fact that a gift is more than likely to arise in situations where X and Y have a preexisting relationship that motivated the animus to make a gift—provided donative intent—influences whether Y makes a claim against X while X is alive because by doing so Y most likely terminates the relationship and the benefits that flow from it. This type of end-game strategy in an iterative long-term relationship can occur, but likely will not occur, because the donor is presumably in a superior economic position and it makes little sense for the donee to assert an ownership interest contrary to X if doing so may anger X. A discussion regarding parties in long-term relationships and that impact on the legal issues raised by this Article are addressed *infra* Part V.

from X because, in exchange for the item, he provided something to X. In order to prevail, this contracts-based approach requires Y show that there was consideration for the agreement and the existence of a contract.<sup>214</sup> Y must then document that she promised to give, do, or fail to do something in exchange for the property, and that the act or inaction had been communicated to X. That exchange of the property must be proven to establish a contracts-based agreement.

Continuing the focus on the donative transaction as opposed to the bargained-for exchange is more like the testamentary transaction in terms of proof given the death of the original owner, X. In both inter vivos gift transfers and testamentary transfers, the death of the putative donor creates an evidentiary issue that could conceivably flummox a court and lead to inconsistent and, some might argue, incoherent results. Because of the donor's death, there is no recourse to contemporaneous or "live" testimony of the donor, so the court is faced with two narratives regarding the alleged donative transfer.<sup>215</sup> In the absence of probative and reliable evidence, the choice between the two narratives would be indeterminate leading to the inconsistent and incoherent judicial outcomes.

Although the resolution of the typical contract dispute does not normally involve a deceased party (it can happen, however), there is a similar problem presented to the adjudicating court although both parties are alive and present before the court. Both parties have different interpretations regarding the enforceability and/or performance of the agreement that is the subject of the dispute. And if the dispute is over the validity of any such agreement, the requirement of consideration will determine whether there was or was not such a valid agreement.<sup>216</sup> Consideration, at this later adjudicative point, must be proven by the person seeking to establish that there is indeed a valid agreement. Again, it is a rule of proof<sup>217</sup> that the party seeking enforceability of the agreement must

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214. For this discussion, the Article ignores any claim by Y that he is entitled to a remedy due to promissory estoppel.

215. A few years ago there was a fierce debate regarding the use of narratives in legal scholarship. For a defense of narrative in that context, see Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 830-42 (1994). This Article does not revisit the debate that the court must decide between two narratives in adjudicating cases involving gifts and testamentary transfers. Instead, this Article makes the more simplistic and accurate claim that in these cases the courts are presented with two different interpretations of the decedent's actions and must choose one or the other as the "truth"—one that presents the picture of a completed transfer with the intent to make the transfer and one that does not, with no intent to make the transfer in a manner lawfully recognized by the court.

216. FRIER & WHITE, *supra* note 3, at 32-36.

217. FERRIELL, *supra* note 3, at 63-66.



establish by a preponderance of the evidence.<sup>218</sup> Under the bargain theory of consideration,<sup>219</sup> the bargain not only brings home to the promisee that he or she is entering into an enforceable agreement (protective and channeling), it also provides evidence of the agreement and the value of the agreement, which is later important for establishing an appropriate remedy.<sup>220</sup>

Once an agreement is validated through the use of consideration, each party to a bilateral contract<sup>221</sup> is provided with rights arising from that enforceable contract. The primary and most simplistic way of thinking about the rights provided by the contract is its enforceability by each party. Although there are several reasons to enforce an individual's promise—morality<sup>222</sup> and efficiency<sup>223</sup> are primary among them—this Article takes as given that promises made should be enforced. Moreover, because the promise can later be enforced against the wishes of the person who made it, the person seeking to enforce the promise has a “right” that is protected by a liability rule.<sup>224</sup> That right to enforce the agreement creates a valuable interest in the party seeking its enforcement. But that right is not self-executing.

Of course, there is no right to be protected unless the court can fashion an effective remedy to protect it. This symbiotic relationship is recognized most prominently in constitutional law. In an influential article,<sup>225</sup> Professor Daryl Levinson persuasively demonstrates that constitutional

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218. *Id.*

219. FRIER & WHITE, *supra* note 3, at 32-36.

220. *See infra* Part V and accompanying text.

221. FRIER & WHITE, *supra* note 3, at 38.

222. FRIED, *supra* note 43.

223. COOTER & ULEN, *supra* note 49, at 194-96.

224. Liability rules differ from property rules according to the Calabresian nomenclature, *see* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972), given that property rules allow the holder of the right to retain the right and only transfer it at a price deemed acceptable to the holder of the right. Compare, however, liability rules that allow a third party, in this case, the court to enforce the rights by forcing a transfer of the right per the terms decided by the third party. *Id.* In the contracts context, property rules become liability rules as a result of the agreement or contract. In our example involving Abel and Baker, Abel's interest in his car was initially protected by a property right. Abel was not and could not be forced to sell his car to Baker even if Baker offered \$50,000 or \$500,000 for a car with a Bluebook value of \$4000. However, once Baker enters into a valid contract to purchase the car for \$5000, Abel's interest in the car is protected by a liability rule. In other words, Baker can force Abel to sell him the car for \$5000 and Abel has the reciprocal right to require Baker to pay \$5000 for the car on the agreed upon date or compensate him for any harm suffered for his failure to do so on that date or when Baker repudiates the agreement.

225. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

rights cannot be separated from the remedies used to enforce those rights.<sup>226</sup> The right or remedy connection is so strong that Professor Levinson documents that the content and contour of certain constitutional rights are severely impacted by the remedy used to enforce them.<sup>227</sup>

As Professor Levinson documents, the determination that there is no right without a remedy and that the two are functionally inseparable, was established very early on by Oliver Wendell Homes in his article, *The Path of the Law*,<sup>228</sup> which stated: “[A] legal duty is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.”<sup>229</sup> A remedy is what is referred to as “this or that way” by Justice Holmes. When a promisor decides to breach, the promisor has essentially chosen not to perform and instead pay the price for breaching. In Guido Calabresi and Douglas Melamed’s seminal work, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*,<sup>230</sup> the authors expand on Holmes’s insight by showing how decisions about rights or entitlements are interrelated with decisions about remedies in the fields of property, torts, criminal law, and other areas of the law.<sup>231</sup>

The goal herein is not to articulate a theory of the relationship between rights and their accompanying remedy in various legal areas, including constitutional law. Instead, the goal is to demonstrate that the same symbiotic relationship is present between rights and remedies in private agreements including contract rights enforced by courts. Thus, one claiming an interest that arises as a result of an agreement reached with another is claiming a “right” that has arisen as a result of that contractual agreement reached. That right or interest in the agreement is only valid and effective if the court can fashion an effective remedy to protect it. Consideration is the vehicle that establishes the worth of the right and provides the court with an assessment of its value to provide a remedy for the party injured as a result of the breach.

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226. “In this view, constitutional rights are inevitably shaped by, and incorporate, remedial concerns. Constitutional adjudication is functional not just at the level of remedies, but all the way up.” *Id.* at 873.

227. “Rights are often shaped by the nature of the remedy that will follow if the right is violated . . . What the *Brown* right ‘really was’ at that point is a question that cannot be answered meaningfully without describing the attendant remedies.” *Id.* at 874-76. And, “[a] subtle inversion of right and remedy thus occurs. Remedies are used by the court to define a constitutional standard that would otherwise be impossible to articulate, and those remedies become the normative criterion by which constitutional violations are judged.” *Id.* at 880.

228. *Supra* note 227.

229. *Id.* at 458.

230. *Id.*

231. Levinson, *supra* note 225, at 859.

Without “consideration” courts would have no way of assessing damages for breach of the contractual rights that were created by the executed agreement. Returning to the hypothetical involving Abel and Baker, and the contract to sell a car for \$5000, the respective value they place on each promise is contained in the agreement and that value is consideration for the other’s promise. That value also establishes the remedy for breach if it should subsequently occur. In the hypothetical agreement, Baker agrees to buy the car for \$5000. If Abel takes any action which ultimately precludes the transfer to Baker, such as selling the car to a third party, the previously negotiated price of \$5000 becomes the value used for measuring damages should Baker sue for breach of contract. If a similar car could be purchased at a minimum price of \$6000, Baker can establish damages of \$1000. Thus, the proof that Baker made a good deal is the agreement between the parties that they negotiated. A court does not need to make an independent assessment of the value that the parties placed on the car at the time of contracting. The court must simply obtain objective evidence of the value of a similar automobile at the time of the breach. Again, this *ex post* functional role both minimizes error and adjudicative costs.

An examination of the typical testamentary gift transaction, that is a bequest pursuant to a valid Will, and a comparison to what is deemed to be a valid gift, reveals that in both transfers the court is not called upon to adjudicate the value of the item being transferred. Instead, the court is being called upon to adjudicate ownership of the item that has been allegedly transferred by either the live or now dead donor. Compare and contrast contract-based transfers. In those transfers, the initial ownership of the item is not in question. What is in question is whether the two parties in dispute have reached an agreement to transfer ownership in the item from one party to the other. If so, the party against whom the promise is enforced, is then liable in damages to the other. Those damages are established and verified by the “consideration” that the parties agreed on for the item.<sup>232</sup> The court does not have to expend any resources in establishing the value of the item.

Consideration, like the functional formalities required to validate *inter vivos* gifts and testamentary transfers serve a dual role. In addition to the *ex ante* functional roles of channeling, ritualistic, and protective, the

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232. Although beyond the scope of this Article, an argument can be made pursuant to this thesis that the functional reason for the remedial use of specific performance is that the items that are the province of specific performance have no market value by which damages can be established. Compare the arguments made for the use of specific performance in Kronman, *supra* note 167.

formalities serve an ex post role by identifying with specificity the item to be transferred. To further buttress the contention that the doctrine of consideration serves an ex post evidentiary role, this Article turns to examine a transaction that lacks consideration but is nevertheless enforced by the courts pursuant to the principle of reliance. Reliance based transfers are enforced in large part because the promise made by the promisor provides and limits the scope of the remedy. This reduces the adjudicative and error costs in determining which fair and just promises to enforce.

## V. PROMISSORY ESTOPPEL: FUNCTION OVER FORM

There is yet another type of transfer that is enforced or validated by the courts but is not based on a traditional contract or agreement. Clearly, this unique transfer is not supported by consideration and no claims are made that consideration is necessary for its validity. Interestingly enough however, this third type of transfer is not a donative transfer, either inter vivos or testamentary, and therefore does not satisfy the formality requirements requisite to those transactions. This transfer is unsupported by consideration, yet not donative. It is enforced by the courts although it lacks the formality requirements of donative transfers with no viable proof of consideration; it is a transfer validated by the doctrine of promissory estoppel or, reliance.

Much academic<sup>233</sup> and judicial ink<sup>234</sup> has been spilled over the use and efficacy of Section 90 of the Restatement (Second) of Contracts which provides in part:

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. The remedy granted for breach may be limited as justice requires.<sup>235</sup>

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233. See, e.g., L. L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L. J. 52 (1936); Melvin Aaron Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741 (1982); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970); Stewart McCaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247; W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197 (1990); Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

234. Three representative cases each representing a different sort of reliance, which is discussed *infra* notes 253-89, including *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898), *Cohen v. Cowles Media Co.*, 479 N.W.2d 387 (Minn. 1992), and *Midwest Energy Inc. v. Orion Food Sys., Inc.* 14 S.W.3d 154 (Mo. Ct. App. 2000).

235. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

In brief, Section 90 is much decried and criticized for allowing courts to enforce promises that are not supported by the traditional notion of consideration. Indeed, the expanding use of the reliance or promissory estoppel doctrine to enforce agreements lacking consideration has been said to create a loophole so large that it obliterates the consideration doctrine.<sup>236</sup> Almost all agree that what unites these promissory estoppel cases is that there is some impediment to enforcing the promise relied upon as a valid and enforceable contract because some element necessary for contract formation, normally bargained-for consideration, is lacking.<sup>237</sup>

These promissory estoppel cases, however, differ from the two types of donative cases discussed previously—gift and testamentary transfers—because the focus is not on the promisor’s intent and acts, but on the actions of the promisee.<sup>238</sup> When those cases are contrasted to inter vivos gifts, testamentary transfers, and formal contract transfer, there is a lack of formality requirements. Although an exhaustive review of the cases is beyond the scope of this Article, what is apparent is that the promissory estoppel cases cover a wide range of fact patterns and scenarios that are largely incapable of synthesis into one category with homogenous facts.<sup>239</sup> Promissory estoppel cases also do not raise univocal legal issues. Nevertheless, a review of the literature reveals that the cases employing promissory estoppel as a remedy can be largely grouped into three categories: uncompleted donative transactions, promises made in commercial settings, and misrepresentations.<sup>240</sup> And, although each type of promissory estoppel case will be discussed in turn, what is important to note is that the lack of formality requirements unifies these cases.

As noted in Section 90 of the Restatement (Second) of Contract, liability is imposed on the promisor when a promise is made which the promisor reasonably knows will induce action or forbearance by the promisee, and the promise does indeed induce such action or forbearance on the part of the promisee.<sup>241</sup> Hence, the elements necessary to establish promissory estoppel are: first, a promise; second, a promise intended to induce reliance which is reasonably foreseeable at the time the promise is

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236. Most famously Grant Gilmore declared that the reliance and estoppel doctrine embodied in Section 90 caused the death of the law of contracts. GRANT GILMORE, *THE DEATH OF CONTRACT* (2d ed. 1995).

237. FERRIELL, *supra* note 3, at 135-38.

238. *Id.* at 141-42.

239. *Id.* at 143-54.

240. This is the reason for selecting the three cases stated *supra* note 234 and accompanying text.

241. FERRIELL, *supra* note 3, at 141.

articulated; and third, reliance in the form of action or forbearance in the manner reasonably anticipated.

Although one can argue that a promisor seeking to induce reliance can be viewed minimally as a “formality requirement”<sup>242</sup> that triggers the use of the promissory estoppel doctrine, that minimal level of specificity—a promise which the promisor is cognizant should induce reliance—does not identify which promises are enforceable pursuant to the doctrine and which not.<sup>243</sup> This does not inform or illuminate why certain promises are deemed to be enforceable pursuant to the doctrine and others not.

Finally, the mere fact that a promise is made with the intent to induce reliance that causes such reliance does not identify any item bargained for given that there is no bargain between the promisor to the promisee. Instead, what the promisor seeks is some action on the part of the putative promisee which may or may not be forthcoming, but the promise itself does not seek to establish the contours of the promisee’s subsequent action. The promise is controlled by the promisor but the subsequent “reliance” actions are within the province of the promisee and may or may not rise to the level of reasonableness to create an actionable charge.

So, what exactly is required for the use and validation of promissory estoppel, and why? Just as importantly, what is it about promissory estoppel cases that aligns them with inter vivos gift cases and testamentary transfers? What can be learned from the absence of formality requirements and what has it to do with the requirement of consideration in contracts? These are important questions. The answers to which may provide insight into the contract formation question of why is consideration required for valid contract?

The starting place is what unifies the three types of cases that most often employ promissory estoppel: donative transactions, promises made in commercial settings, and misrepresentations. The actions taken by the promisee in reliance on the promise that can be precisely measured later by a court to provide an effective remedy, are what unites and validates promissory estoppel cases. The differences between the three types of cases are the contexts which generate these three types of Section 90 cases. Moreover, it is the context that provides the key to understanding these three categories of cases and allows the contention that only one of the three categories considered under Section 90 is valid. The other two classes of

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242. That is, a promise must be made by the promisor.

243. Furthermore, even if one was able to clearly identify such promises, the existence of the promise is not enough to trigger Section 90. One would still need to show reasonable reliance on the part of the promisee. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

cases do not and should not belong in contract law but find themselves included in contract law's domain for reasons that are addressed in greater detail in a companion article.<sup>244</sup>

There are three categories of promissory estoppel cases: donative cases (property), misrepresentation cases (torts), and transactional cases (contracts lacking consideration).<sup>245</sup> Each type of case represents a form of an agreement that subsequently goes awry and causes harm or injury to the putative promisee. However, each arises in a different setting. The donative case arises most often in a family or family-like setting. The misrepresentation case arises in a variety of settings that can only be grouped by what they are not: they do not arise in a family or family-like setting, nor do they arise in a typical transactional setting. The transactional case arises in a transactional or business setting.

In fact, this Article joins a growing list of scholarship that contends the category of cases classified as misrepresentation cases are in fact best considered and dealt with as tort cases.<sup>246</sup> As detailed below, these cases should be considered torts absent one fact: the parties have the opportunity to voluntarily negotiate or transact before the harmful (tortious) act occurs. The voluntary and preexisting nature of the relationship between the putative promisor and promisee causes courts and commentators to miscast these promises as "agreements" that provide a remedy under Section 90 of the Restatement (Second) of Contracts.<sup>247</sup> Instead, these promises should be treated as a species of tort that require no animus or intent of the alleged tortfeasor, who is not deemed strictly liable because the reliance shall be foreseeable, reasonable, and actually incurred resulting in a loss.

Moreover, there is support for this new species of tort-based, not contract-based, promise in public policy arguments. Just as certain otherwise valid agreements are unenforceable because they violate public policy,<sup>248</sup> so-called agreements that are otherwise unenforceable because they lack a necessary element, should be deemed enforceable for public policy reasons. However, consistent with this thesis herein, if the remedy is not supplied by the agreement or if the remedy is measured by the injury to the "promisee" who relies on it, that remedy calls for the imposition of tort damages decided by the trier of fact based on the harm occasioned by the injurer or promisor.

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244. See *supra* note 22 and accompanying text.

245. FERRIELL, *supra* note 3, at 152-54.

246. *Id.* at 134-38.

247. *Id.* at 162-64.

248. See discussion *supra* note 2 and text accompanying.

Thus, this type of promise should not be covered by Section 90 of the Restatement (Second) of Contracts and is miscast as an agreement that is enforceable pursuant to its doctrine. Just as the Uniform Commercial Code has come to grips with cases that are fair in form but foul in execution,<sup>249</sup> courts should honestly state that they are providing equity, not enforcing a contract, when enforcing promises or representations made that cause reasonable reliance in a non-business, non-family context if a failure to do so would produce an unconscionable result.<sup>250</sup> Because the remedy is measured by the harm created, the promises should be viewed as tortious and not contractual. There is also no reliance by the injured promisee and no proof needed to obtain a recovery from the promisor. The fact that expectation damages are not created or measured by cases employing promissory estoppel is dispositive of the true nature of the legal right that is formed when the “promisee” claims harm or damages.

Two cases illustrate the “tortious” nature of legal claims generated by this category of cases. The first is the aforementioned *Cohen v. Cowles Media Co.*,<sup>251</sup> and the second is the less-known, *Grouse v. Group Health Plan, Inc.*<sup>252</sup> Coincidentally, both are Minnesota cases. In *Cohen*, a fairly complicated case that this Article will simplify, the promisor reporter, agreed to maintain the anonymity of a source who informed him of salacious details of a candidate for public office.<sup>253</sup> Instead of maintaining anonymity, the reporter divulged the name of the source which resulted in the source being humiliated and fired from his job.<sup>254</sup> The source’s two hundred thousand dollars verdict was affirmed by the Supreme Court of Minnesota based on a theory of promissory estoppel.<sup>255</sup>

The problem with employing the theory of promissory estoppel in that case is that the reliance had nothing to do with the detriment incurred by the

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249. See U.C.C. § 2-302(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977) which states:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

250. Indeed, this Article argues that the courts should recognize the doctrine of conscionability and enforce promises when it is fair to do so focusing on the equities presented by the promisee. See Johnson, *A Trichotomy of Reliance Promises*, *supra* note 22.

251. 479 N.W.2d 387 (Minn. 1992).

252. 306 N.W.2d 114 (Minn. 1981).

253. *Cohen*, 479 N.W.2d at 388-89. The case was on remand from the United States Supreme Court. A more complete recitation of the facts of the case are set out in *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200-02 (Minn. 1990), *rev’d*, 501 U.S. 663 (1991).

254. *Id.* at 389.

255. *Id.* at 392.



promise. The promisee relied on the reporter's promise to maintain the source's anonymity in turning over the information to the reporter.<sup>256</sup> The harm occurred when the reporter, actually the newspaper editors over the reporter's objection, broke the promise and revealed his identity that resulted in his being fired: the detriment.<sup>257</sup> Turning over the information, which was the action taken in reliance on the promise, was clearly not the detriment complained of, though it was clearly the action taken in reliance on the promise. Interestingly, the Minnesota's Supreme Court's affirmation of the judgment holds that the reporter's promise to maintain anonymity must be enforced to prevent injustice.<sup>258</sup>

Tellingly, in *Cohen*, the parties were not in a business relationship (the reporter did not pay the source for the information that Cohen provided), nor was one anticipated. This was clearly a discrete transaction in which Cohen possessed information that would have no value after it was disclosed and published. Hence, the factual context was unlike the transactional cases that are discussed below.<sup>259</sup> Similarly, the parties had no previous relationship that would support or induce donative action, by either the promisor or promisee.<sup>260</sup> This is best viewed as a case in which a tort-like duty is imposed upon the reporter to keep his promise to the source with a breach occurring because of a failure to do so. The remedy granted to the injured party is measured by the harm created by that breach, rather than the cost of reliance incurred by the promisee.

In *Grouse v. Group Health Plan, Inc.*<sup>261</sup> the plaintiff applied for a pharmacist job with the defendant.<sup>262</sup> After interviewing, he was offered the job and accepted.<sup>263</sup> He agreed to resign from his current job by giving two weeks' notice and turned down another job offer.<sup>264</sup> When the plaintiff showed up for work, he was informed that someone else had been hired for the position and his services were no longer required.<sup>265</sup> It is important to note that the employment agreement was at-will, meaning that had he been hired and employed for that initial day, he could have been fired for any

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256. *Id.* at 391.

257. *Id.*

258. *Id.*

259. *See infra* notes 263-75 and accompanying text.

260. *Cohen*, 479 N.W.2d 387.

261. 306 N.W.2d 114.

262. *Id.* at 115-16.

263. *Id.*

264. *Id.*

265. *Id.* at 116.

reason or no reason, and would have no cause of action against the employer and therefore no damages.<sup>266</sup>

Consequently, the parties in *Grouse* did anticipate entering into a business relationship, like the transactional cases discussed below. However, the specific business relationship did not provide the putative employee with a basis on which to rely because the relationship was at-will employment terminable at any time for any non-constitutionally protected reason or for no reason whatsoever.<sup>267</sup> In other words, given the facts in *Grouse*, any reliance by the putative employee of the promise of employment made by the putative promisor must be unreasonable since the putative employee had no term contract of employment.

A better view of *Grouse* is to characterize it as a public policy case and, indeed, a large number of cases in various states follow what is characterized as the “public policy exception” to the at-will termination of employees.<sup>268</sup> As such, a breach of the public policy exception constitutes a tort giving rise to remedies, including punitive damages.<sup>269</sup> Better than promissory estoppel, is the “public policy exception” theory in at-will employment cases to provide damages to the injured party when there was no reasonable reliance by the promisee.<sup>270</sup>

The other type which is often treated as a promissory estoppel case, but should not be viewed as a contract or agreement, is a familial promise case that cannot be treated as a valid gift because intent, delivery, or acceptance<sup>271</sup> is lacking. *Ricketts v. Scothorn* is the paradigmatic case to illustrate.<sup>272</sup> Indeed, this category is also responsible for creating a line of cases, predating the development and expansion of promissory estoppel, in which the court mistakenly, and knowingly, found consideration where none was present to enforce an agreement that it deemed worthy of protection.<sup>273</sup>

This line of cases is best characterized as uncompleted gratuitous transfer cases that are incomplete because of a change of circumstances or conditions that were unanticipated by the putative donor.<sup>274</sup> These cases

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266. For an analysis of at will employment contracts, see Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 54 BAYLOR L. REV. 97, 718-30 (2006).

267. *Grouse*, 306 N.W.2d at 116.

268. PERILLO, *supra* note 63, at 51-52.

269. *Id.*

270. FERRIELL, *supra* note 3, at 161.

271. For a discussion of these requirements, see *supra* notes 166-74 and accompanying text.

272. 77 N.W. 365 (Neb. 1898).

273. See *supra* notes 166-74 and accompanying text.

274. Johnson, *A Trichotomy of Reliance Promises*, *supra* note 22.

should reside in the province of property law and be decided like other gratuitous or donative transfer cases. However, the fact that these cases arose at a time when property law doctrines were rigidly and reflexively applied, with no thought to equitable or other considerations, often meant that form triumphed over substance and lead to determinations that were often improvident and unfair.

One other factor also provided an impetus to choose contract law when the choice was between contract law and property law. Unsurprisingly it had to do with the formalities attendant to the two “separate” transactions. In property law, it is black letter law that delivery is required to complete a valid gift.<sup>275</sup> Either the thing is delivered or it is not. Courts, deploying the doctrine of delivery to validate or invalidate gifts, did so remorselessly even if it means invalidating a gift where the intent to make a gift was proven beyond a reasonable doubt.<sup>276</sup> This was accomplished in large part because gifts were not viewed as socially valuable as contracts: they were the so-called sterile transaction that did not create or increase societal wealth.<sup>277</sup> Hence, the channeling function of the requirement of delivery dictated that only those gifts that strictly complied with the requirement be validated.<sup>278</sup> Failure to conform with the delivery requirement results in a failed gift.

Compare this, however, to the evolution of the doctrine of consideration in contract law. Consideration has always been viewed as a malleable doctrine used by the courts to enforce agreements when equity and or justice requires.<sup>279</sup> Indeed, the tautological nature of consideration has been stressed throughout and illuminates why putative donees might and would prefer their claim to be adjudicated per contract rather than property law.<sup>280</sup> The fact that the law of contracts had developed to the point of employing ends-oriented flexible doctrines, while property law had not likewise advanced, provided the necessary space in contract law to find these agreements not only contractual in nature, but agreements allegedly supported by consideration. In other words, it is the flexibility of the consideration doctrine compared to the inflexibility of the delivery requirement in gratuitous transfers that resulted in these familial donative

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275. Even when delivery is met constructively or symbolically, see *supra* note 148 and accompanying text, something that is a symbol or the means of obtaining the gift is transferred from the dominion and control of the donor to the donee.

276. DUKEMINIER, ET. AL., *supra* note 76, at 189-91.

277. See *supra* note 105.

278. DUKEMINIER, ET. AL., *supra* note 76, at 189-91.

279. See *supra* notes 30-44 and text accompanying.

280. On the tautological nature of consideration, see *supra* notes 39-44 and accompanying text.

transfer cases being validated in contract law rather than correctly disposed of pursuant to a kinder, gentler, and more flexible property law.

Thus far this Article has claimed that certain agreements enforced under Section 90 should be better considered as torts and treated under tort law.<sup>281</sup> Somewhat relatedly, this Article has argued that other agreements or promises should be judged by doctrines in property law, although these doctrines need to be liberalized to accomplish this objective.<sup>282</sup> That leaves only promises that lack consideration in the business setting as those that should be enforced under the rubric of Section 90 of the Restatement (Second) of Contracts and that stands to reason given the context that generates these promises and the Restatement (Second) of Contracts' purpose in enacting Section 90.<sup>283</sup>

These latter cases are best characterized as consideration substitute cases in which promissory estoppel serves as a substitute for consideration in a setting that would normally be viewed as contractual if consideration was supplied. The genesis for these cases is the repudiation of the doctrine of *culpa in contrahendo* by most courts in the United States.<sup>284</sup> Pursuant to that doctrine, which is recognized in a number of civil law jurisdictions, damages are allowed for injuries sustained as the result of unsuccessful negotiations when required by the interests of justice.<sup>285</sup> In the United States, however, a bright line is drawn between harm created by contract negotiations, with no liability, and harm created after a contract is entered into between the parties, with liability imposed if a contract is established and contractual obligations are breached.<sup>286</sup> In effect, the overwhelming majority view in the United States is that each party to a negotiation bears the risk of any loss occasioned by that process up to the execution of a valid contract, at which point new rights and remedies arise out of that contract.<sup>287</sup>

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281. See Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 67-72 (1996): "In contrast, phase three demonstrates that courts use promissory estoppel to award reliance damages which equate more with tort damages in restoring the promisee to a pre-promise status. That tort-like restoration is not necessarily paradoxical when courts recognize that one branch of promissory estoppel's family tree lies in tort." *Id.* at 71-72.

282. For the sake of conceptual clarity, this Article argues that all gratuitous transfers, even those that "fail" because they don't satisfy all of the formality requirements, should be treated and governed by property law and doctrines generated thereby. It makes little sense to argue that the donor has donative intent when successfully attempting to make a gift or testamentary transfer but then look for consideration under contract law when the delivery requirement necessary for validated gifts is not accomplished.

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

284. FRIER & WHITE, *supra* note 3, at 176.

285. See, e.g., PERILLO, *supra* note 63, § 6.3, at 232.

286. FRIER & WHITE, *supra* note 3, at 176.

287. *Id.*

The problem with this bright-line approach is that the imposition of a strict bright-line approach would lead to behavior that is suboptimal and inefficient. Meaning, if no remedy is awarded for harm created during negotiation that does not result in a valid contract, parties will have to alter their behavior to eliminate the harm that does occur which will result in inefficiencies and an increased cost of contracting.

A legendary case on point is *Drennan v. Star Paving Co.*,<sup>288</sup> which established the remedy of promissory estoppel with the following fact pattern: a general contractor (“the general”) receives a low bid from a subcontractor (the “sub”) and incorporates the sub bid into its own bid for a project.<sup>289</sup> At this point, the general has not yet accepted the sub’s bid, and under traditional contract law, it can be withdrawn prior to acceptance.<sup>290</sup> The general relies on the sub’s bid and is awarded the contract.<sup>291</sup> Either before or after the award of the contract to the general (but definitely after the bid is submitted and before the sub’s bid is accepted by the general contractor), the sub revokes its offer causing injury to the general.<sup>292</sup>

*Drennan* establishes the sub’s liability for that injurious reliance even though the general is not bound to accept the bid of the sub.<sup>293</sup> This type of bidding is efficient and normal for the industry. Failure to hold the sub liable would create consequences in the bidding process that could result in increased costs and expenses. Permitting the general to rely on the sub’s bid even though the bid has not been accepted (the general cannot accept the sub’s bid at this stage since the general has not been awarded the contract because the bidding process is ongoing) is rational and customary in the construction industry and allowing the sub to rely on contract formalities (formal acceptance by the general to make the sub’s offer binding) would raise the cost of bidding and ultimately the cost of contracting.

As a result, courts are faced with two alternatives. First, courts can embrace the doctrine of *culpa in contrahendo*<sup>294</sup> and find liability for harms created in contract negotiations. Second, courts can embrace an ad hoc approach when efficiency dictates and find liability during negotiations when a remedy can be fashioned at low costs with little or no administrative

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288. 333 P. 2d 757 (Cal. 1958).

289. *Id.* at 758-59.

290. PERILLO, *supra* note 63, § 2.6(g).

291. *Drennan*, 333 P. 2d at 758.

292. *Id.*

293. *Id.* at 760.

294. FRIER & WHITE, *supra* note 3, at 176.

error. Obviously, courts have chosen the second alternative for good and rational reasons.

The problem with embracing the doctrine of *culpa in contrahendo* in all contracts is that it improperly shifts the risk or regret contingency to the promisor who is the least able to bear it during contract negotiations, and would hold him liable for damages or loss incurred by the promisee when the promisor cannot control or limit the promisee's expenditures. Before the parties enter into a contract, the putative promisee has no way to control reliance expenditures incurred by the putative promisor during the negotiations. The putative promisee can, however, control its expenditures made in reliance during the negotiations. Furthermore, the same is true with respect to costs incurred by the promisor. Therefore, it is efficient for each negotiating party to have incentives to minimize their reliance and other costs during negotiations because each will bear the loss if the negotiations are fruitless. Rejecting *culpa in contrahendo* achieves that result.

Yet, rejecting all claims of loss by a putative promisee as a result of the rejection of the doctrine could result in the promisee being exposed to what some have characterized as promissory fraud.<sup>295</sup> In their article, Professors Ayres and Klass describe promissory fraud as situations in which insincere promisors intentionally mislead promisees to their detriment by engaging in deceptive behavior.<sup>296</sup> And although their thesis is agreeable, it can be criticized for not defining, except on an ad hoc and ex post basis, when promissory fraud is present and actionable by the courts.

The thesis and contribution herein is that promissory fraud is more likely to be provable and found when the promisor has engaged in wrongful behavior that is easily measured and remedied ex post. That is, when the reliance damages incurred by the promisee are not speculative or approximate but are either precise or fall within a narrow and predictable range that is easily known, ascertainable, or foreseeable to the promisor at the time that the promissory fraud takes place, it is easier to demonstrate and convince the court to find liability.

A hypothetical involving the general contractor and subcontractor is a perfect example of this phenomenon. Once the subcontractor submits its bid to the general contractor it is reasonable that the general contractor will rely on that bid in preparing its own bid for the contract, and the amount

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295. Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507, 508-09 (2004).

296. *Id.* at 515-17 (citing *Hoffman v. Red Owl*, 133 N.W. 2d 267 (Wisc. 1965)) (as an example of promissory fraud).

and harm created by the subcontractor's later repudiation are fixed at the time the bid is submitted by the subcontractor to the general contractor. The loss created by the subcontractor's later breach is easily ascertainable and provable by comparing the higher cost of the substituted bid to the lower cost of the repudiated bid and awarding the difference to the general contractor. The loss is also unavoidable because once the general contractor's bid is accepted for the project the general contractor must perform per the terms of that contract or be in breach of that agreement.

In this *ex post* setting the court is more likely to grant a remedy when the remedy is capable of easy calculation and the court's confidence in that calculation is very high (low error costs). That scenario is more likely to occur in the reliance context when the parties are engaged in a business transaction and have reached a point where the negotiations have produced an exchange of a promise or mutual promises that fix the scope of the promisee's harms as a result of the insincere promise made by the promisor. Again, this allows the court to provide an effective remedy with very low error costs.

Thus, the question in precontractual liability cases is not whether the courts should employ the doctrine of *culpa in contrahendo* thereby imposing a rather broad duty of good faith on the negotiating parties, but whether the negotiating parties have reached a stage in the negotiation where finite promises are exchanged that cause reliance *ex ante* (at the time the parties are negotiating) that later allows a court *ex post* to award an appropriate amount of damages with little risk of making an error. These are prototypical reliance cases and call for the imposition of Section 90 of the Restatement (Second) of Contracts. Uncompleted donative transfers should be adjudicated pursuant to doctrines of property law and public policy cases are best addressed either through doctrines of tort law or the recognition that these cases call for the imposition of equitable remedies to validate otherwise viable public policy doctrines.

Hence, true promissory estoppel cases (those that are contract-based and not the subject of either an aborted gift transaction or the product of tortious conduct on the part of the promisor) are enforceable by the courts because the harm that is created is easily and accurately measurable by a court *ex post*. Thus, the only difficult issue in these cases is the "fairness" question: is it fair to find an enforceable agreement based on the promisor's promise given the context within which the promise was made and the intent of the promisor in making the promise?

## VI. CONCLUSION

This Article started by examining the mystery that is the doctrine of consideration as currently employed by the courts. By reexamining its normative base, this Article comes to a conclusion that is not new (that consideration serves a formal and functional role in contract formation) or particularly insightful. However, by comparing the lack of the consideration requirement in gratuitous inter vivos and testamentary transfers, this Article emphasizes that the formal and functional role theorized by early contract law scholars like Lon Fuller is accurate,<sup>297</sup> and demonstrates that the functional role played by consideration is important at a later stage when the court is called upon to adjudicate the dispute between the parties to provide a remedy. By providing the correct remedial scope, consideration allows courts to provide a remedy to the parties at a low cost with little attendant judicial error.

Indeed, by focusing on the remedy provided by the court, this Article parses the detrimental reliance cases to posit that only cases involving a commercial context should properly be characterized as detrimental reliance cases calling for the application of Section 90 of the Restatement (Second) of Contracts. More importantly, the detrimental reliance cases, although lacking traditional consideration, are effectively and efficiently enforceable by the courts because they are able to accurately measure the cost or reliance expended by the aggrieved party.

Given the absence of an actual contract and the rejection of the *culpa in contrahendo* doctrine in the United States, the promisee's action taken in response to the promise made by the promisor must be reasonable and will be policed by the aggrieved promisee because of the uncertainty of his recovery in the absence of a formal contract supported by consideration. In other words, the promisee who lacks a formal contract will have a strong self-interest in mitigating damages because of the uncertainty associated with actually receiving damages from the promisor when there was no formal contract.<sup>298</sup> As a result, certain promises, even those technically lacking in consideration, are enforceable, and rightly so. Donative promises and promises not relied on by the promisee should not be the subject of promissory estoppel. Instead, there are other doctrines of the law better suited to adjudicate disputes arising in those contexts.

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297. See Fuller, *supra* note 4 and accompanying text.

298. See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983).