Nebraska Law Review

Volume 98 | Issue 4 Article 5

2020

Irrevocable Gift Promises and Promises Inducing Reliance: A Mandate for the Return of the Seal in Contract Law

Alex M. Johnson Jr.
University of Virginia Law School, ajohnson@law.virginia.edu

Alex M. Johnson, Jr.*

Irrevocable Gift Promises and Promises Inducing Reliance: A Mandate for the Return of the Seal in Contract Law

TABLE OF CONTENTS

I. INTRODUCTION

All too often the statement is made and accepted that one cannot legally make an enforceable gift promise. In other words, it is stated and accepted that an individual cannot bind one's future self to make a donative transfer that will be enforced by the court should the future self opt not to honor the previously promised gift transaction. However, not all agree that this is an acceptable state of affairs. A case in point: the great contracts scholar Williston once wrote that the ability to make an enforceable donative promise "is something that a person ought to be able . . . if he wishes to do it . . . create a legal obligation to make a gift. Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so."[1]

* James C. Slaughter Distinguished Professor of Law, University of Virginia Law School. I thank my Research Assistant, Armina Manning, for an excellent job editing and reviewing the Article. All faults are my own.

1. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 8 (1979) (citing Proceedings, 35 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 56, 194 (1925)).

Of course, a thorough examination of the history of contract doctrine and transactions reveals that Williston's statement is somewhat inaccurate. This is because at common law, a donor could make such an enforceable promise using a "sealed" agreement.[2] Indeed, in a few states that have adopted the position of the Restatement (Second) of Contracts, one can still use the seal to make and deliver an enforceable promise.[3] However, in a majority of jurisdictions in which the use of the seal is prohibited, it is often stated and accepted that a donor cannot make an enforceable donative promise. Thus, as contract law has evolved, one initially could make an enforceable donative promise via a seal, but for reasons that are peripheral to the issues addressed in this Article, eventually that avenue was blocked.

By and large, contract law does not currently provide a legal avenue for enforcement of gratuitous promises that require future performance. Indeed, contract law has largely become irrelevant when analyzing the enforceability of donative promises because gifts and the enforceability of donative promises are the province of the law of property. In order to make a valid gift, property law requires the donor to intend to make a gift, deliver the gift, and that the gift be accepted by the donee.[4]

Furthermore, it is hornbook law[5] that a mere promise to make a gift in the future without delivery made contemporaneously with or shortly after the expression of intent to make the gift will not be enforced as a gift no matter how sincere the promise was when made.[6] Thus, one can make an enforceable gift transfer if the donor and donee meet the three requirements of intent, delivery, and acceptance.[7] What apparently cannot be done is to enforce against the donor her mere promise to make a gift in the future if the donor subsequently

2. *See infra* notes 20–21, 124–27, 121–22, 139–42, 154–64 and accompanying text.
3. RESTATEMENT (SECOND) OF CONTRACTS § 97 et. seq. (AM. LAW INST. 1981). The state of Wisconsin has explicitly equated a sealed contract with a finding of consideration, while other states (including Alabama, Arkansas, Delaware, Georgia, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Mexico, North Carolina, and West Virignia) afford sealed instruments longer statutes of limitations for civil actions even though those same states have abolished the evidentiary significance of the seal by adopting the Uniform Commercial Code.
4. *See* JESSE DUKEMINIER ET AL., PROPERTY 114 (9th ed. 2018); for discussion of the three requirements, see *infra* notes 6–7, 26–40, 146, 157–60 and accompanying text.
5. *Id.* at 114; JOSEPH M PERILLO, CALAMARI & PERILLO ON CONTRACTS § 4.5 at 156 (6th ed. 2009).
6. *See infra* notes 6–7, 26–40, 146, 157–60 and accompanying text (discussing in greater detail the requirements for a valid gift).
7. Gifts are categorized as enforceable because once the three requirements are met, the gift cannot be reversed by unilateral action of the donor. Thus, if the gifted property is physically taken by the original donor, the original donee, now owner, can bring an action in replevin to force the transfer of the gifted item to the donee-owner.

changes her mind and opts not to make the gift transfer or delivery. The donor cannot make a valid and enforceable contractual agreement that binds herself alone to complete the donative transaction.[8]

Despite broad acceptance of the rules described above, the statement that one cannot make an enforceable donative promise is incorrect as a legal conclusion. An examination of the law and legal doctrine beyond the province of gift or the law of property demonstrates that there do exist enforceable donative promises. In terms of the donor's intent (i.e., her desire to bind her future self to an act for which there is no consideration or reciprocity), enforceable donative promises are effectively indistinguishable from so-called unenforceable donative promises. These enforceable donative promises are not denominated as gifts and, thus, when the issue of the enforceability of so-called gift promises is addressed, they are often ignored.

It is quite common in other related areas of the law—particularly contracts and trusts and estates law—for courts to enforce donative promises lacking consideration. These enforceable donative promises, however, are not analyzed per this requirement and are therefore beyond the imprimatur of contract. Hence, the presence or absence of consideration is irrelevant. Indeed, it is possible to make inter vivos gift promises and testamentary promises that are enforceable.[9] One interesting fact about these enforceable promises that create donative transfers is that the person ultimately making the transfer is not the donor, the person who makes an enforceable promise.[10] Instead, the

8. In the lexicon of contracts, when there is no agreement with the donee that is supported by the mystical glue of consideration, there is no enforceable contract, but simply an unenforceable promise that lacks consideration. For a discussion of the tautological nature of consideration, see Alex M. Johnson, Jr., *Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, Inter Vivos and Testamentary Gift Transfers*, 91 N.D. L. REV. 547 (2015).

9. In this sense the promises are not made after the donor dies (which is clearly impossible) but the promise is performed after the donor's death even though it was made earlier when the donor was alive.

10. As detailed in Part II, the party making the actual transfer will either be a trustee for trusts or an executor for valid wills. I should note at this point that should the individual die without a will, she will be deemed to die intestate and the applicable state's probate code will determine who inherits the decedent's property based on their relationship with the decedent. In this situation where there is no will, the decedent is not making any promises that will be enforced in the future by the executor of the estate because she has not made a valid will. Hence, individuals who die intestate will not be treated as having made an enforceable donative promise. Instead, these individuals will be deemed to make a gift of their estate to those individuals selected as a result of the state's intestacy statute. *See* UNIF. PROBATE CODE § 2-101 (amended 2010). In effect, by dying intestate, the deceased has opted to "give" her property pursuant to a default rule that is premised on distributing property to the decedent's heirs according to what most decedents would do with their property if given a choice. This is the prototypical majoritarian default rule. *See* Ian Ayres & Robert Gertner, *Filling Gaps*

person ultimately making the transfer is an agent of the donor usually acting in a fiduciary capacity.[11]

To be clear, examining trusts and estates law, donors may use irrevocable inter vivos trusts to make donative promises that are enforceable against the donor during the donor's life.[12] Putative donors can also make certain inter vivos gifts without complying with the requisite formalities attendant to the creation of an irrevocable inter vivos trust by intending to make a future gift but dying before being able to act upon that intent. Under the contractual doctrine of reliance or promissory estoppel, courts will indeed enforce certain uncompleted gift promises against the putative donor (actually, the donor's estate) if the court finds reasonable and foreseeable reliance on the part of the donee.[13]

Just as importantly, a donor can make donative promises that are enforceable after the donor's death by executing a valid and enforceable will.[14] Upon execution of an enforceable will, the donor makes an inter vivos promise regarding the disposition of assets following the donor's death. These promises will later be enforced by the courts through an agent of the donor as long as the donor has not revoked her will or revoked the gift before dying.[15] These donative promises made in a will are herein labeled transitive. This is because when the promise is made in a will, it is unenforceable because wills are not irrevocable.[16] The promise may subsequently be revoked by the putative donor. However, if unrevoked or unchanged at the putative donor's death, the unenforceable promise is now transformed (hence, the de-

---

in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87 (1989).

11. If the putative donor is dead, an executor or administrator will be appointed to distribute the decedent's estate. *See infra* notes 16, 51–52 and accompanying text. If, however, the property is placed in a trust, a trustee who owes fiduciary duties to the beneficiaries will distribute the property pursuant to the terms of the trust. *See id.*

12. These are designated herein as inter vivos promises resulting ultimately in inter vivos transfers. For further discussion of irrevocable inter vivos trusts, see *infra* notes 16, 99–107 and accompanying text.

13. For further discussion of this oft overlooked inter vivos conveyance that is enforced by the courts, see *infra* notes 18, 24, 110–123, 134 and accompanying text.

14. *See supra* note 11; *infra* notes 16–17, 28, 89–91, 134 and accompanying text.

15. As I address in some detail in my article, Alex M. Johnson, Jr., *Is It Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393 (2016) [hereinafter Johnson, *Is It Time for Irrevocable Wills?*], although the donor can make promises that are enforceable following the donor's death, those promises become enforceable only if the donor opts not to revoke, change, amend, or alter the promise made in the validly executed will before the donor's death. In other words, even though the donor's promises in the donor's will are enforceable, they are currently not irrevocable or unalterable.

16. *Id.*

nomination transitive) into an enforceable promise against the donor's estate.

Once it is accepted that three types of donative promises—those made in trust, those made in a valid will, and those that induce reliance—are enforceable while others are not, the seminal question and issue becomes: Why are these promises deemed enforceable and others are not? What makes irrevocable inter vivos trust donative promises—promises that induce reliance on the part of the donee—and promises made in a will enforceable, while other simple or future gift donative promises are not?

The primary purpose of this Article is answering that question. Part II briefly details the state of the law as it pertains to the enforceability of donative promises (i.e., gifts)—plowing ground that has been well-furrowed by numerous prominent scholars. However, this Article goes beyond describing and defining these pedestrian gift transactions in Part II by expanding the definition of donative promises and demonstrating that certain transactions made in irrevocable inter vivos trusts, promises that induce reliance, and solemn promises made in a will are also the product of donative promises, yet are enforced.

In Part II, this Article explains another puzzle regarding the line that divides donative promises that are enforceable and those that are not. The dispositive factor is the formalities attendant at the execution of the promise. These formalities provide courts with sufficient evidence to affirm and enforce the promise efficiently (i.e., at little or low cost and with attendant low error costs). In effect, they serve the same purpose and act as a substitute for the doctrine of consideration in contract law.

The formalities associated with an irrevocable inter vivos trust and a valid will are well documented and require little explanation. On the contrary, the formalities associated with promises that induce reliance and are enforced pursuant to the Restatement (Second) of Contracts § 90[17] are somewhat opaque and require detailed explication in Part II. Indeed, focusing on the formalities supplied by the putative donee who relies on the donor promises, this Article provides a coherent normative thesis for enforceable reliance promises that heretofore has been lacking.

Part III parses the distinction between enforceable and unenforceable donative promises, including those premised on reliance, as a product of the functional formalities associated with enforceable donative promises and the lack of same with unenforceable donative promises. The conclusion is buttressed with a brief recitation of the

17. For a discussion of the doctrine of reliance and the use of promissory estoppel to enforce promises made without consideration per the Restatement, see PERILLO, *supra* note 5, at 218–36.

use of the seal at common law and how it served as a functional formality in the context of an irrevocable inter vivos trust or a will.

Part III then explores the distinction between donative promises to prove that the different formalities required to validate the different promises rationally reflect the different types of relationships that produce donative versus bargained-for promises. Part III pays particular attention to promises that induce reliance and are therefore enforceable. The formalities supplied by reliance on the part of the donee do not seem similar to the formalities supplied by inter vivos trusts and wills, yet focusing on their functional purpose, these formalities serve the same purpose of allowing courts to enforce promises with remedial certainty (efficiently) and with low error costs (collectively, low adjudicative costs).[18]

Part IV focuses on the remedy sought for breach of a promise and calls for an expansion—or rather the resurrection—of use of the seal to supply requisite formalities to bind a gratuitous promisor to complete the promise they have made by making that promise enforceable.[19] This is consistent with the current economic theory of contracts that convincingly posits that promises should be enforceable when the parties intend them to be enforceable.[20] The seal allows courts to efficiently and effectively determine when the donor intends to be bound and, just as importantly, provides proof of what the promisor is bound to do.

Given the formalities associated with the common law execution of the seal, this Article proposes to expand upon these inter vivos gifts by adding future gifts made pursuant to a seal. Consequently, when the putative donor intends a gift and satisfies the requisite formalities of sealing, the gift should be given effect. The seal, like the other irrevocable and enforceable gifts, satisfies the requirements of functional formality. Indeed, it is the epitome of functional formality that served as green light to an enforceable agreement that predated the development and use of the doctrine of consideration to demarcate an enforceable contract or agreement.

The use of a seal to validate a future gift of a present interest or a future interest in a present asset will satisfy the channeling, ritualistic, and evidentiary functions served by the requirements for a completed inter vivos gift and, relatedly, a testamentary gift via a properly executed will. These three types of enforceable donative

18. To presage the thesis throughout, this Article contends that all the formalities serve a functional purpose allowing the court to provide an effective remedy if the promise is breached. *See infra* Parts III and IV.

19. Thereby validating Williston's thesis that gift promises that are intended to be enforceable should indeed be enforceable. *See* Eisenberg, *supra* note 1, at 8.

20. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 195 (Denise Clinton et al. eds., 4th ed. 2004).

promises—completed gifts, inter vivos gifts accomplished pursuant to an irrevocable inter vivos trust, and testamentary promises in a valid will—are widely accepted and noncontroversial.

Consequently, this Article concludes that donors should have five vehicles by which they can complete donative transactions, three of which result in the enforceability of mere donative promises: (1) If the putative donor is interested in making an inter vivos transfer, the putative donor can validate the donative intent by making a delivery and effectuating a completed gift. If, however, the donor chooses to make a future gift, putative donors can use: (2) inter vivos irrevocable trusts; (3) promises that are reasonably relied on; and (4) transitive promises (designated as such because the donor can amend or revoke the promise) made in a validly executed and subsequently enforced will. In addition, putative donors or contracting parties should be able to make enforceable promises pursuant to (5) a sealed agreement.

Thus, the concluding portion of Part IV builds upon the insights gleaned in Part III to propose a fifth type of future non-testamentary transfer via the use of a seal. This Article defends the expanded use of a seal by the functional formalities it provides to the arbiter and the safe harbor it provides to putative donors acting as the equivalent of legal version of a simple inter vivos trust. The original functional purpose of the seal informed both parties to the bilateral transaction that they were entering into an enforceable agreement—more specifically, an agreement enforceable by the state should one of the parties choose not to honor the promise(s) embodied in the seal. This Article contends that there is no viable reason not to employ the same functional formalities to validate a unilateral promise even if that promise is a mere gift or donative promise.

Proving that the doctrine of consideration is largely tautological and circular,[21] expanding the use of the seal in contractual agreements as well as donative transactions will provide contractual certainty to agreements when the parties both desire that it be enforceable.[22] In other words, the inherent tautological character of consideration provides no certainty that a court will later determine that there was valid consideration and enforce a disputed promise. The court may, for whatever reason it deems acceptable, choose to find or not find that there is consideration.

21. For a more thorough discussion of this point, see *infra* notes 34–35 and accompanying text. *But see* Johnson, *supra* note 8, at 556–57 (discussing the normative basis for consideration).

22. Both must assent to the transfer because, as with gifts, no transferee should be forced to accept a transfer by a transferor in a non-bargained-for transaction. For a discussion of the requirement of acceptance for donative transfers, see *infra* notes 26–28 and accompanying text.

By recognizing sealed promises as enforceable promises, parties can guarantee that their promises will later be honored by a court. Furthermore, once the seal is universally available and enforceable, other benefits may flow therefrom. The so-called trichotomy of reliance promises—implied good faith in business relationship, uncompleted gift transfers, and public policy cases—can be reduced to the sole category of public policy cases.[23] Thus, if parties wish to make an enforceable gift or enter into an enforceable promise before a final and formal contract is executed, they may do so through the use of the seal eliminating any reliance or reliance promises (pun intended). Moreover, the illusory and highly chimerical distinction between gifts and contract transactions will dissipate.

II. GIFTS, TRUSTS AND WILLS: FORM OVER SUBSTANCE

Throughout my career as a legal academic I have predominantly taught four courses on a recurring basis: Property; Modern Real Estate; Trusts and Estates; and, for the last ten years, Contracts. Property and Modern Real Estate are obviously related but the other two, Trusts and Estates and Contracts, are not. As any student of law would know, enforceable transactions or conveyances[24] are treated differently in different areas of law. More importantly, these conveyances have different requirements that must be met before the court or arbiter will deem them valid and enforceable. To be clear yet concise,[25] enforceable contracts require consideration; enforceable gifts require intent, delivery, and acceptance; and wills require compliance with Wills Act formalities.[26]

---

23. I detail this characterization and typology of reliance promises that are enforced by the courts, even though lacking in consideration, in light of the Restatement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981). As this Article discusses, one of the primary reasons that consideration can be viewed as tautological and manipulable by the courts is the use and enforceability of reliance promises per the Restatement—promises that lack any notion of consideration.

24. This Article refers to a transfer of a legal entitlement or right from one party to another party (one legal entity to another legal entity) as a transaction or conveyance instead of a contract, gift, will, etc. because imbuing the conveyance with such a narrow and area-specific label (area-specific because contracts are associated with contract law, gifts are associated with property law and, of course, wills are associated with trusts and estates or will law) has the effect of further solidifying distinctions between the conveyances rather than focusing on the similarities of the conveyances. Also, referring to the conveyances by their area-specific denomination has the effect of reinforcing the silos that have arisen in the respective areas of law—silos that should be destabilized if not eradicated.

25. This Article discusses each of these in greater detail. For contracts, see *infra* notes 116–23; gifts, *infra* notes 61–62; and wills *infra* notes 85–90 and accompanying text.

26. The normal Wills Act formalities are that the will must be signed by the putative testator and witnessed by a minimum of two attesting parties. These formalities

Teaching courses in three disparate areas of law—property, contracts, and trusts and estates—each with its own set of rules governing the validity of conveyances in that area, leads to the conclusion that the law has developed in different areas or "silos." Although the reason for the development of these silos is largely historical and beyond the ken of this Article, one can easily point to the promulgation of different writs at common law for the distinction and development of the different silos in contract and property law,[27] as well as, the promulgation certain foundational statutes like the Statute of Frauds[28] in contract law, and the Wills Act[29] in trusts and estates that have shaped the rules in the respective silos.

What is crucial to the primary thesis of this Article is what I have learned in teaching in these three different areas of silos of law. The different silos with their different rules for enforceability have a unifying principle: each silo requires the party seeking to validate a conveyance or transfer to demonstrate or, in the argot of law, prove that certain functional formalities have been met. Essentially, the reason functional formalities are required in each of these silos is so a court is able to adjudicate with low error cost and low administrative costs.[30] Thus, efficiency and fairness produce the requirement of functional formalities in the adjudication of disputes in these three areas.[31]

---

are, however, significantly reduced by the Uniform Probate Code, which simply requires that the putative testator substantially comply with the requisite formalities. *See* UNIF. PROBATE CODE § 2-503 (amended 2010). Indeed, it is the primary thesis of this Article that the substantial compliance doctrine in trusts and estates promulgated by the UPC is a recognition that what the courts are looking for in making the determination that a will is valid and enforceable is the completion of formalities by the putative testator that allows the court to make a correct and efficient adjudication of the issue before it. *See infra* note 39 and accompanying text.

27. Indeed, suits to enforce covenants or promises originally sounded in tort and called for the use of the Writ of Assumpsit. *See* J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888). The various writs used to enforce contracts or covenants in early common law and their breadth are addressed in FREDERICK POLLOCK & FREDERIC MAITLAND, HISTORY OF ENGLISH LAW VOL. II 204 (1968).

28. The Statute of Frauds was enacted by the British Parliament in 1677 and became part of American Law in Colonial America as a result. *See* BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 241 (4th ed. 2019). For the current version of the Statute of Frauds in America, see RESTATEMENT (SECOND) OF CONTRACTS § 110 (AM. LAW INST. 1981) and the U.C.C. § 2-201(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

29. The British Parliament enacted the Wills Act in 1837 and American courts quickly embraced its requirements. *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 141–42 (10th ed. 2017).

30. *See infra* Part III.

31. In developing material to teach a seminar on conveyancing that breaks down the barriers between the silos to focus on the different types of conveyances that are legally enforceable, I have observed that these functional formalities are replicated in many of the silos that make up our body of law. Hence, functional formalities are required both with respect to voluntary and involuntary conveyances.

New law students learning contracts must first confront and master the doctrine of Consideration to determine when there is an enforceable agreement. My students quickly grasp the concepts of the benefit/detriment test courts employ to demarcate enforceable from unenforceable promises,[32] as well as the Restatement (Second) of Contracts § 1 definition of consideration as "a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty,"[33] (the exchange of promises or bargain theory of consideration). However, they quickly become confused when I try to convince them that using either test results in a tautology.

I prove my thesis by an examination of "dead guy" cases. These are cases in which a putative donee claims that a transfer of an entitlement was made by a putative donor that should be enforced by the court or arbiter. What these cases have in common, epitomized by *Ricketts v. Scothorn*,[34] is that the putative donor is dead and the conveyance cannot be enforced because it lacks the magical glue of consideration. It fails the bargain theory test of consideration because no reciprocal promises were exchanged; the only promise made was a promise by a grandfather to make a future gift of money to his granddaughter so that she would not be required to work to earn a living. The conveyance also fails the benefit/detriment test because only a benefit was legally conferred on the granddaughter nor was any legal detriment incurred by the grandfather in making the promise to give in the future.

I take this occasion to point out the tautological nature of consideration per each test by noting that the court's decision to enforce the future promise would result in a promise that gives a remedy to the granddaughter or recognizes a duty on the part of the grandfather to perform his promise (and it would bind his estate should he die before the time of performance). Her lawsuit seeking to enforce the grandfather's intent would also constitute acceptance of the gift creating an exchange of promise—the offer of a future gift by the grandfather and the acceptance by the granddaughter.

Similarly, a decision by the court to enforce the grandfather's promise would satisfy the benefit/detriment test because it would result in the creation of a benefit in the granddaughter and a detriment in the grandfather. It is the court's determination that there is no consideration that causes the conveyance to fail both tests used by courts to determine if there is consideration. That is a tautology. The reason why a contract is enforceable is because the court finds consideration, and consideration is required to make a contract enforceable.

32. *See infra* note 36 and accompanying text.
33. FRIER & WHITE, *supra* note 28 at 34.
34. Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (Neb. 1898).

Once the students are convinced that consideration is a tautology capable of manipulation by the courts to find an enforceable agreement, they become even more puzzled about the requirement of consideration when they learn that the fact pattern *Ricketts* represents is often enforced by courts even though it allegedly lacks legal or formal consideration. This is because such promises are enforceable via the doctrine of promissory estoppel or reliance.

This Article addresses the three types of promissory estoppel cases that are normatively distinct, yet are treated as promissory estoppel cases largely as a result of an historical anomaly. They are treated as contract-like cases because the only legal writ that provided an appropriate remedy developed in contract law as a result of more flexible pleading requirements for contract causes of action when compared to the precise pleading rules employed in other related fields such as property and wills and trusts.

In addition to what this Article characterizes as the prototypical promissory estoppel case, which is precontractual and premised on an impending commercial or business relationship,[35] this Article examines modern, idiosyncratic promissory estoppel cases (those premised on public policy)—which this Article denominates as conscionable—as well as the older, gift-like common law promissory estoppel cases (those premised on donative intent)—which this Article denominates as donative.[36] This Article contends that the latter two types of promissory estoppel cases, conscionable and donative, have expanded contract law to encompass cases outside the scope of the Restatement (Second) of Contracts § 90 because they involve neither a promise by a promisor or reliance by a putative promisee.

With respect to the category of cases that are characterized as donative, this Article contends that the remedy of promissory estoppel is employed when there is clearly no consideration and the promisee has not reasonably relied or relied at all on any promise by the promisor. Instead, these are donative or putative gift cases. However, in these reliance cases, neither testamentary nor inter vivos formalities are met to support either a valid completed gift or a will transfer via a validly attested will, even though the court is subsequently convinced of the donor's donative intent. These cases are unique in that the remedy is not measured by the loss or damage incurred by the promisee (i.e., reliance costs).

Instead, the remedy provided in the donative cases is cabined by the proof of donative intent that identifies with specificity the exact

35. These are cases in which certain civil law countries would apply *culpa en contrahendo*. For a discussion of this rather interesting doctrine, see *infra* notes 112–14 and accompanying text.

36. Indeed, this Article contends that these cases are better cast and treated as incomplete gift cases because the putative donor dies before delivery can be made.

nature and character of the item to be transferred from donor to donee. That specific and limited remedy reduces adjudicative and error costs by fixing the scope of the court's inquiry to something that is concrete and provable: What is the property subject to the donative intent?

These uncompleted gift cases should be evaluated by either cannons established in property law, where inter vivos gift transfers are validated, or by trusts and estates law, where testamentary transfers are validated. Given that most, if not all, of the uncompleted gift cases are created as a result of the putative donor's death and the evidentiary challenges that are created as a result of that death, this Article concludes that these cases are best evaluated pursuant to trusts and estates or will law. To be more specific, these cases should be decided per the principles and rules promulgated by the Uniform Probate Code and its focus on substantial compliance and harmless error.[37]

Similarly, in the public policy cases employing promissory estoppel, there is neither a promise nor reliance by the aggrieved party, yet a remedy is provided consistent with the court's conception of equity and fairness. In these rather atypical cases, courts act creatively to fashion a remedy for a wrong for which there is no other appropriate, pleadable cause of action and no facts indicating the parties contemplated, discussed, or considered a contract. Indeed, different legal norms and doctrines validate the enforceability of both donative and public policy cases. However, those norms and doctrines are not contractual (therefore, not requiring consideration) and are not based on reliance, which is or should be necessary to support a claim of promissory estoppel.

To prove these three types of promissory estoppel cases are normatively distinct, requiring the application of different doctrines from different areas of law, this Article focuses on the relationship of the parties at the time the alleged injury occurs. As a result, this Article concludes that the three different relationships require use of different norms to determine if a remedy will be provided when there clearly is no agreement supported by consideration and typically no provable reliance on the part of the promisee.

I struggle to make the reliance doctrine and promissory estoppel relevant and understandable when teaching Contract Law to first-

37. Substantial compliance and harmless error are two distinct but related curative doctrines developed to validate improperly attested wills when there is significant and compelling evidence of the testator's intent. Given that evidence of testatorial intent, courts then validate the improperly attested will confident that in doing so they are giving effect to the deceased testator's will.

year law students.[38] First, of course, is the anomaly that in the typical reliance case there is no agreement supported by consideration and, as a result, no enforceable contract. This focus on the lack of consideration is puzzling to the students after I have begun the course by emphasizing the importance of consideration to the determination of whether there is an enforceable contract per classical contract theory.[39] That absence of consideration is the primary focus of reliance as the exception to the rule that enforceable agreements must be supported by consideration. That absence has prompted some scholars to contend that use of the reliance doctrine through the remedy of promissory estoppel has caused the death of classical contracts.[40]

In addition to the evisceration of the requirement of consideration to establish enforceability, I also find these cases difficult to teach because of the variety of factual circumstances that have employed the doctrine to find an enforceable agreement. My students seem to intuitively agree with the courts' decisions in contract-like cases such as *Midwest Energy, Inc. v. Orion Food Systems*[41] that hold a remedy should be provided for the equivalent of what some have characterized as promissory fraud.[42]

The students are also sympathetic to claims made by putative donees in cases similar to *Ricketts*.[43] Like me, they struggle with identifying how the promisee relied on a promise to receive money from her grandfather when there was no material change in her position based on the promise.[44] They also struggle with cases that find a contract remedy and award damages in cases like *Cohen v. Cowles Media, Inc.*,[45] in which neither of us can find a promise that is relied on by the

38. I am a relatively new teacher of Contract Law, having taught the course five times in the last seven years. By comparison, I have taught Property to first-year law students approximately thirty times since I began teaching in 1980.

39. I use Frier and White's casebook on contracts, which first follows cases that address the requirement of consideration, then cases that address the remedy of restitution. FRIER & WHITE, *supra* note 30 at 78–107.

40. Grant Gilmore, THE DEATH OF CONTRACT 61–66 (2d ed. 1995). *See also* Timothy J. Sullivan, *Book Review, The Death of Contract*, 17 WM. & MARY L. REV. 403, 420 (1975).

41. Midwest Energy, Inc. v. Orion Food Sys., 14 S.W.3d 154 (Mo. Ct. App. 2000).

42. *See* Gregory Klass & Ian Ayres, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507 (2004). But I do not think of these cases as pure promissory fraud. For a discussion of my characterization of promissory fraud, see *infra* Part III. Instead, I see these particular cases as filling a gap created by American common law's rejection of the doctrine of *culpa en contrahendo*. *See infra* notes 112–14 and accompanying text. I contend that the promissory fraud doctrine is most apt for the cases I denominate as conscionable, calling for the use of the court's equitable powers to provide a remedy to redress a wrong.

43. Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (Neb. 1898).

44. *Id.*

45. Cohen v. Cowles Media Co., 479 N.W.2d 387 (Minn. 1992).

promisee and no action is taken in reliance by the injured or aggrieved promisee.

We finally come to the conclusion in class that there are three types of reliance cases that are factually and normatively unrelated. First, there are contract-based or commercial cases in which the parties have established some sort of business relationship (negotiating parties, for example) that has not reached fruition, if fruition is deemed to be an enforceable contract. Specifically, the court does not find an enforceable agreement supported by consideration, but does find an injury that supports a remedy.[46] Although some characterize these cases as a type of promissory fraud,[47] a more apt doctrine to categorize these cases is *culpa en contrahendo*.[48]

Second, there are family relationship cases that create promises and expectations that equitably call for the use of promissory estoppel to find an enforceable promise even though the promise does not rise to the level of consideration that supports the imposition of a remedy to the putative promisee.[49] These are characterized as donative intent cases. To be more precise, these are failed donative intent cases because delivery is not technically accomplished by the putative donor to the putative donee before the putative donor's death. In all of these cases, the one fact that unites them is that the putative donor is dead and the executor of the putative donor's estate is refusing to honor the putative donor's promise.

The lack of delivery by the now-deceased putative donor should be characterized as an estate problem caused by the (usually unanticipated) death of the putative donor. This Article contends that these failed gift cases should be enforced, if at all, under the rubric of substantial compliance. The Uniform Probate Code developed the doctrine of substantial compliance to validate testamentary transfers when the donor does not comply precisely with the rituals prescribed by the applicable Wills Act at the time of the testator's death.[50]

Third and finally, there are unique relationships that give rise to duties created and imposed by public policy that support the use of promissory estoppel to provide a remedy to the aggrieved or injured party and can be breached.[51] In these "conscionability" cases, the ag-

46. Promissory Estoppel is used in these cases because the United States has largely rejected the doctrine of *culpa en contrahendo* which this Article will discuss in greater detail. *See infra* notes 115–16 and accompanying text.
47. *See* Klass & Ayres, *supra* note 42.
48. *See infra* notes 112–14 and accompanying text.
49. It is my contention that these family cases are in reality uncompleted gift or donative transfers and should be covered in property and trusts and estates law.
50. For further discussion of this point, see *supra* notes 28–31 and accompanying text.
51. These cases are harder to characterize as appropriate for the doctrine of promissory estoppel, but I contend that they are explicable given the relationship of the

grieved party seeks to employ the court's equitable powers to provide a remedy to redress a wrong. Although much scholarship has focused on the doctrine of unconscionability, little attention has been given to its mirror image—cases in which courts use the doctrine of reliance or promissory estoppel to produce an effective remedy based on equity and fairness.

These atypical reliance cases are essentially contextual and do not fit into traditional doctrinal areas with settled remedies. Instead, they have migrated into the flexible catch all category of reliance per the Restatement (Second) of Contracts § 90. The problem, as this Article addresses, is that the reliance-based remedy provided by § 90 is ineffective and inapposite when applied to these cases. Typically, there is no reliance on the part of the aggrieved party, and even if there is, the damages that are awarded bear no relation to the costs incurred based on that reliance.

Note that in this trifecta of promissory estoppel cases the focus is on the relationship between the parties and how that relationship results in the creation of enforceable rights. In the precontractual relationship cases, the relationship is founded on a business (i.e., economic) purpose in which each party seeks to enter into an agreement that is pareto optimal.[52] In the donative cases, the relationship is typically familial or something close to it. In the atypical reliance cases (i.e., the conscionability cases where it would be unconscionable not to provide a remedy), the relationship is defined by what it is not. It is not a business or a familial relationship. Yet it is a voluntary relationship that ultimately leads to harm that is foreseeable and preventable.[53]

Interestingly, these three disparate relationships all result in the enforcement of those promises via promissory estoppel even though they lack consideration, thereby precluding the finding of an enforceable contractual agreement. This raises an interesting question about these three normatively distinct types: Should any of these types of reliance cases continue to be governed by contract law and principles now that their normative base has been identified?

This Article contends that only the contract-based commercial cases are truly promissory estoppel cases calling for the use of the Re-

---

parties and the harms occasioned thereby. *See infra* notes 115–17 and accompanying text.

52. Pareto optimal or Pareto efficiency "concerns the satisfaction of individual preferences. A particular situation is said to be Pareto or allocatively efficient if it is impossible to change it so as to make at least one person better off (in his own estimation) without making another person worse off." ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 14 (6th ed. 2014).

53. Why aren't these harms remedied via a tort cause of action? Because the forms of pleading in tort and property limited the causes of action that could be brought. *See supra* note 29 and accompanying text.

statement Second of Contracts § 90. To the contrary, the donee cases should properly be considered as incomplete gift transactions that should be evaluated pursuant to the rules of property and trusts and estates law, not contract law.[54] The tricky cases are cases that are not based on either: (1) a business foundation or relationship or (2) a familial foundation or a preexisting long-term relationship. These cases employing promissory estoppel represent the olio of contract law and are hard to square with the concept of reliance. This Article contends that these cases call for the use of the court's equitable powers to provide a remedy when the aggrieved party is in a relationship with the other party that implicates a public policy concern. This Article will address each type of promissory estoppel case in turn.

The three types of reliance cases—contract-based, donative, and public policy—are neither purely donative transactions (i.e., gifts) nor agreements supported by the traditional definition of consideration, yet they are enforced under the rubric of reliance. The key question is: What differentiates these cases from enforceable contracts (that is, donative promises and agreements supported by consideration)? Once one recognizes that no consideration is present in reliance cases, one must develop a theory identifying which otherwise unenforceable agreements are properly the subject of reliance and which are not.

The confluence of the heretofore unidentified factors dictates which of these otherwise unenforceable agreements are remediable (in effect, enforced) through the doctrine of promissory estoppel. The first factor is closely related to valid donative transfers but does not satisfy the requirement of a valid donative transfer. In other words, donative intent is present in the donative reliance cases, but some intervening act (usually death of the putative donor) precludes completion of the donative transfer by precluding delivery.[55]

The second type of reliance cases are not pre-contractual, lacking donative intent, and cannot be viewed as failed delivery cases. These cases do not neatly fit within a tight template with recognizable and categorizable fact patterns. Quite the contrary, their fact patterns range from promises to maintain anonymity[56] and repudiated promises of employment[57] to cases repudiating strict interpretation of insurance policies.[58] There are two factors that create these conscionable cases. First, and perhaps most importantly, these cases arise when a relationship between the parties implicates a larger public policy concern. Second, these cases lack an otherwise effective remedy.

54. *See infra* notes 115–17 and accompanying text.

55. For further discussion, see *infra* notes 63–65 and accompanying text.

56. *See, e.g.*, Cohen v. Cowles Media, 479 N.W.2d 387 (Minn. 1992).

57. *See, e.g.*, Grouse v. Grp. Health Plan, 306 N.W.2d 114 (Minn. 1981).

58. *See, e.g.*, Hetchler v. Am. Life Ins. Co., 254 N.W. 221 (Mich. 1934).

Indeed, in a somewhat ironic manner, the flexible writ of assumpsit to right wrongs at the birth of common law is the logical ancestor and progenitor of the doctrine of promissory estoppel and the use of the Restatement (Second) of Contracts § 90 to validate the same.[59] Hence, just as the demise of the use of the seal to establish valid and enforceable contracts led to the development of the doctrine of consideration to supply that functional role, the development of pleading requirements and the demise of assumpsit created a gap in the remedial scheme to redress wrongs. Thus, § 90 emerged as a necessary corollary to inflexible pleadings that failed to remedy all wrongs.

After treating *Ricketts* as a pure contract case to demonstrate the tautological nature of consideration and the loophole created by the court's use of promissory estoppel to enforce the grandfather's promise as a failed gift,[60] I return to the facts of the case and press the students to apply the two consideration tests. In particular, I ask them if the grandfather had the intent to enter into a contract with his granddaughter. Applying both the bargain theory and the benefit/detriment tests to determine if consideration was present, the students quickly conclude that given the familial relationship and the grandfather's intent, the grandfather was not seeking to establish and enforceable contract. Instead, they almost universally conclude that the grandfather was attempting to make a gift to his granddaughter.

Here is the first problem with the creation of silos in legal academia. At this stage of their legal career at the University of Virginia Law School, most first-year law students have not yet been exposed to property law. One of the major benefits in teaching courses in different silos is that, as a property professor, I can explain to them in contracts why the grandfather's promise to the granddaughter was not a valid gift. I explain to them that a valid gift requires intent, delivery, and acceptance.[61] What *Ricketts* lacked was delivery from the grandfather to the granddaughter before the grandfather's death. Hence, no gift in the property law silo and, as addressed above, no enforceable contract if consideration is required.

Why *Ricketts* is a contract case and not a property case is no doubt due to the fact that at the time *Ricketts* was litigated, contract law gave the courts a remedial loophole to enforce the grandfather's intent post-mortem that was not available if enforceability of the promise was sought as a valid inter vivos gift. Because the grandfather's estate could be sued to enforce the conveyance based on a theory of estoppel *en pais* (at that time, the pleading equivalent of promissory estoppel or reliance), the granddaughter used contract law to enforce or com-

59. *See, e.g.*, *supra* note 29 and accompanying text.

60. *See supra* notes 34–35 and accompanying text.

61. *See* DUKEMINIER, *supra* note 4.

plete the conveyance. That remedial avenue was unavailable in the property law at that time.

What the students do not learn while studying contract law but are exposed to while studying property law is the law of gifts. Contracts does not address why the promise made by the grandfather to the granddaughter is not enforced as a valid gift. Property, on the other hand, teaches the law of gift transactions. Although students have each participated in the giving and receiving of gifts, most of them have not considered the legal requirements that create an enforceable gift. Understandably, those requirements are not given much thought because typically a gift is simply made or not. Very rarely, if at all, does one hear or learn about a lawsuit to enforce a gift promise.[62]

An analysis of *Ricketts* from the contracts silo juxtaposed against the gift transactions principles in the property silo presents a conundrum, the answer to which is the thesis of this Article. The use of the seal should be allowed to permit the promisor to make an enforceable promise irrespective of consideration. The conundrum is quite simple: the grandfather's purported conveyance is invalid in property law because one of the functional formalities for a valid gift is delivery, which the gift in *Ricketts* lacked. The grandfather's promise to make a gift in the future also fails to be enforceable contract because it lacks consideration. However, the promise is enforceable based on the doctrine of promissory estoppel.[63] How can that be?

These three outcomes can only be resolved or harmonized if it is recognized and acknowledged that the functional formalities required for a valid gift or contract are not ends but means to an end. The end is the production evidence that allows a court (especially when one party to the transaction is dead) to produce an optimal result in dispute resolution of the dispute. That result is to come to the correct decision with low adjudicative costs and no or low error costs. The reason why the grandfather's promise is enforced against his estate using the loophole of promissory estoppel is because the court is convinced of the grandfather's intent given the evidence presented.[64] The absence of the functional formalities with a finding of a valid conveyance proves that the functional formalities are means and not ends. The applicable ends in deciding to enforce a conveyance is correct and efficient adjudication.

Consequently, although the means are the enumeration and use of functional formalities that require delivery for a valid gift or the con-

62. Indeed, there are no cases in which the putative donee claims there was a valid gift promise and the living putative donor claims to the contrary.

63. *See supra* notes 34–37 and accompanying text.

64. Using a sealed document to make a promise when the donor's or transferor's intent is clear provides even more stable and reliable evidentiary evidence regarding the transferor's intent. *See infra* notes 159–60 and accompanying text.

sideration for a valid enforceable contract, the end is the production of evidence that later allows a court to correctly and efficiently adjudicate a dispute. The functional formalities are designed and required to produce that evidence, but as *Ricketts* demonstrates, they are not the sole vehicle to produce such evidence. Instead, *Ricketts* had sufficient evidence to enforce the grandfather's promise irrespective of its failure to become a valid gift or enforceable contract.[65]

After having exposed Contracts students to the requirement of consideration, I attempt to convince Property students that the functional formalities required in the property silo are means to an end exactly like the functional formalities are means to an end in the contract silo. I do so by closely analyzing cases like *Gruen v. Gruen*,[66] in which a son alleged that his deceased father made a gift to him of a very valuable painting that the father possessed at the time of his death.

In *Gruen*, the father's wife at the time of his death alleged that no gift was made during her husband's life and that the painting therefore remained in her deceased husband's estate.[67] If the property was in his estate at the time of his death, the surviving spouse presumably has some claim for at least a portion of the value of the painting.[68]

The issue was whether the gift was valid, as the painting was not physically delivered to the son contemporaneously with the expression of the father's stated intent to make the gift.[69] As such, it lacked the required formality of delivery. In fact, the painting remained in the father's physical possession until his death.[70] However, the court held that the father had given his son a vested remainder in the painting, retaining the equivalent of a life estate that obviated the need for a physical delivery of the painting from the father to the son.[71]

---

65. The dead guy cases represent one of three types of contract cases in which the courts use promissory estoppel or reliance to vitiate the need for consideration. The other two types of reliance cases are precontractual promise cases and conscionable reliance cases. These are addressed in detail in Part III. *See infra* notes 115–16 and accompanying text.
66. Gruen v. Gruen, 496 N.E.2d 869 (N.Y. Ct. App. 1986).
67. *Id.* at 869.
68. Depending on the couple's marital domicile, the surviving spouse may have a claim to an elective share of the decedent's estate in a separate property jurisdiction or she may claim an ownership interest in the painting if the marital domicile is a community property jurisdiction and the painting was acquired with marital assets. For a discussion of a spouse's elective share in a separate property jurisdiction, see SITKOFF & DUKEMINIER, *supra* note 29 at 520–23 (10th ed. 2017).
69. *See Gruen*, 496 N.E.2d at 872.
70. Indeed, the delivery of a future interest in an item of personal property like a painting is very similar the delivery of a testamentary gift in the middle ages by which the donor retained a life estate in the item. Making a will created an irrevocable gift of a future interest in the donee. This type of gift was called a post-obit gift. *See* Johnson, *Is It Time for Irrevocable Wills?*, *supra* note 15, at 402.
71. Because the father retained a life estate in the painting, the court deemed it pointless to require him to physically deliver it to the son when the son would

In most cases, the requirement of acceptance is not at issue because the gift has significant value; there are at least two parties claiming ownership of the item. Consequently, when deciding whether the putative donor has made a valid gift, the focus is on the requirements of intent and delivery. Did the donor intend to make a present gift of the item in question and did she validate that intent by making some sort of delivery of the item in question?[72]

After considering a series of gift transaction cases, I ask my students to think of what common fact pattern recurs in each case. It takes some time and hints, but eventually they realize that the putative donor is dead in all of the gift cases discussed and these cases represent another species of dead guy cases. They are dead guy cases being enforced as gifts using property law doctrines, as opposed to contract law. Because intent plays such a large role in the gift cases, the fact that the putative donor is dead is not only a commonality among these cases, but is almost a necessity in order to create a triable legal dispute over the gift. Were the putative donor alive, she could simply state that there was no intent to make a gift. If that statement is made, there is no gift.[73]

I then return to an analysis of the *Ricketts* case and prod them to see that the issue in *Ricketts* is exactly the same as the issue in *Gruen*. In both cases the putative donor/promisor seeks to make a future gift to a putative donee/promisee. Further, in both cases the putative donor/promisor is dead and their estate is being sued to enforce the putative donor/promisor's clear intent to make a future conveyance.[74]

---

have to then return the painting to the father to give effect to his retained life estate. *Gruen*, 496 N.E.2d at 874. This case demonstrates that it is possible to make a valid and enforceable gift without a physical delivery when there is sufficient evidence of donative intent. *Id.*

72. This Article says "some sort of delivery" because as demonstrated in *Gruen*, a present gift of at least a future interest can be made without a delivery. *Id.* In addition, the requirement of delivery is complicated by the fact that there are multiple ways to make delivery of a valid gift, including constructive (the means of access to the thing that is the subject of the gift like keys to a car) and symbolic (something that symbolizes the gift like a tuning key to a piano) delivery. *See id.*

73. This assumes, of course, that the putative donee is not claiming that she entered into a contract supported by consideration. With respect to the distinction between gifts and contracts, see Johnson, *supra* note 8, at 585.

74. The estate is being sued in both cases because the executor has an incentive not to deliver property to a putative donee/promissee if there is any legal question regarding the enforceability of the promise. If the executor distributes property of the estate improperly, that is, to someone who has no valid and enforceable claim, the executor may subsequently be liable to the beneficiaries of that estate for the diminution in value of the estate caused by inappropriate transfer of estate assets. Hence, cautious executors will not transfer estate assets outside of the probate process unless the executor is convinced that such a transfer results in little or no probability that a court will later adjudicate that such a transfer was inappropriate. *See* SITKOFF & DUKEMINIER, *supra* note 29 at 43. *See also* Thomas C. Boyer, *Personal Liability of Executors and Administrators for Decedents' Federal*

This commonality is masked by the siloed contexts of the law school curriculum. In the gift context, the putative donor is dead and the combatants are the putative donee and the recipients of the donor's estate.[75] Someone is going to receive the property that is the subject of the dispute without paying any consideration—either the putative donor or the recipient of the donor's estate. Neither party is claiming that there was a mere gratuitous promise made by the putative and now deceased donor. The putative donee is claiming that a completed gift was made prior to the donor's death while the taker pursuant to the will is claiming to the contrary.[76]

In the contracts context, the death of a party is atypical and the presumption is that both parties are alive at the litigation of the dispute. In these cases, one party is alleging that a promise was made and that the presence of consideration means the promise can be enforced against the promisor notwithstanding the fact that the promisor would currently opt not to honor the promise if given a choice. The other party, stylized herein as the promisor, may admit making the promise but claims that the promise is unenforceable because it is not supported by consideration. Neither party is alleging that there is a mere gratuitous promise motivated by donative intent.[77]

Upon closer inspection, both of the above contexts involve examination and resolution of the same issue: Is there a promise that courts

---

Tax Liability, 51 MARQ. L. REV. 452 (1968). The failure of a functional formality, delivery with a purported gift, and the lack of consideration with respect to a purported enforceable contract creates the lack of legal certainty that will cause an executor not to honor a donor/promisor's clear and proven intent to make a future transfer. Courts' validation of that intent by dispensing either with the requirement of delivery (gift) or consideration (contract) provides the executor with the safe harbor to make such a transfer free of any potential legal claim by those taking the decedent's estate. Indeed, in these dead guy cases the legal battle over the asset and whether there has been an enforceable conveyance is between two set of putative donees—the inter vivos donees (the granddaughter in *Ricketts* and the son in *Gruen*) and the testate donees (those entitled to the estate of the putative donor/promisor).

75. If the identity of the putative donee and the recipient of the item or property in the will are one in the same, there would be no lawsuit because that person will receive the item in any case.

76. One way to defeat the claim is for the individual opposing the gift to demonstrate that a promise was made to make a gift but it was never completed via delivery. The point is that in gift cases the focus is on the three requirements necessary to effectuate a completed gift. In contracts the focus is on consideration or the lack thereof and not on any party's intent, delivery, or acceptance.

77. It should be self-evident that if the alleged promisor is alive, the putative promisee will always allege that a contract with consideration has been executed. To the contrary, if the putative promisee alleges a donative transfer, the promisor will prevail by simply stating that there was no intent to make a gift. *See supra* note 75 and accompanying text.

will enforce later when the promising party is either deceased[78] or claims that no valid and enforceable promise was made?[79] In the gift transaction context with the deceased putative donor, the putative donee's claims concern whether the putative donor intended to make a gift, whether it was communicated (i.e., promised to the donee or not), and whether the donee has the right to enforce that intent (i.e., promise) against the donor's estate.

In the contract transaction context, both parties may acknowledge the fact that a promise (i.e., expression of the intent to make a transfer) was made, but one party is claiming the promise is enforceable and the other not.[80] In effect, one of the parties is claiming there was no intent to make a gift and because intent and delivery are lacking,[81] it is clear that the promise cannot be enforced as a gift. There must be some other legal principle, however, to create an enforceable legal promise. In contract law, that legal principle is consideration.[82]

In the gift transaction context, the court must determine the donor's intent notwithstanding the donor's death and inability to testify. In the contract transaction context, the court must determine whether to enforce a promise when the two parties to that promise present conflicting evidence regarding the presence or absence of consideration.

However, in both contexts the court is called upon to do essentially the same thing: decide whether to complete a transaction when there are two opposing views or claims regarding whether the transaction should be enforced. Although the remedy sought is the same in both contexts—the movant is seeking to enforce or complete a transaction—the reason these similar cases are treated as dissimilar by students and academics is that gift transactions arise and are covered in the silo of property law while contract transactions arise in the silo of contract law.

78. As discussed throughout this Article, in cases in which the donee is claiming that a valid gift was made, the common fact pattern is the death of the putative donor as a prerequisite to litigation.

79. This latter situation does not involve a putative gift transaction but instead raises the question of whether there is a valid and enforceable contract.

80. Again, assuming acceptance is a given, the key questions are intent and delivery. Given the death of the donor, as a practical matter these two requirements often collapse into one issue; delivery is often proven by intent when physical delivery is lacking and intent is often proven (or assumed) by the fact that there has been a delivery. *See supra* notes 5–8 and accompanying text.

81. *See supra* notes 6–7 and accompanying text.

82. If the transaction is not treated or analyzed as a gift and the party seeking to validate the transaction cannot demonstrate that there is consideration either pursuant to the bargain theory or the benefit/detriment test, the party seeking to validate the conveyance may attempt to use promissory estoppel or reliance as the appropriate vehicle to validate the conveyance even though there are no functional formalities. *See supra* notes 36–61 and accompanying text.

The courts have developed what this Article calls functional formalities as a prerequisite to the enforceability of either gift or contract transactions in an attempt to correctly and efficiently resolve disputes in these different contexts. In other words, the requirements of intent and delivery for gift transactions and consideration for contract transactions were developed as prerequisites to enforceable agreements in order to provide the court with evidence to be used in determining whether to enforce the promise.[83]

Those formalities and the functions they perform for the court are addressed in Part III. Importantly, the two allegedly dissimilar contexts of property and contract law produce the same judicial resolution: the development of safe harbor formalities that are functional and are designed to be used when there is a conflict to correctly adjudicate the matter. These safe harbor formalities are designed to produce an outcome that is correct (i.e., has a low risk of error) and to be achieved at relatively low administrative or adjudicative costs (which enforces efficiency norms).

The use of functional formalities to validate transfers appears in other areas of the law as well. Indeed, the presence of certain functional formalities in trusts and estates law proves this Article's thesis that it is the presence of those formalities and the function that they provide that allows courts to later validate or invalidate inter vivos or testamentary conveyances. As noted, the Wills Act, or Statute of Wills, requires certain formalities in order to validate a will and the transfers that subsequently take place in probate as a result.

What this Article has neglected to address is the importance of the will in distributing the decedent's assets following death. The will allows the putative testator to make a future gift based on a previous intent—perhaps an intent that was expressed many years before the decedent's death.[84] Because of functional formalities, a putative testa-

83. When consideration and the gift formalities are lacking and there are no provable functional formalities, contract law provides a loophole for enforceability per the doctrine of promissory estoppel or reliance. *See supra* note 62 and accompanying text.

84. For example, the putative decedent may have her will drafted and executed with all of the attendant formalities in 2005. In that will the decedent may express her intent to give her expensive automobile to her only brother. If the putative decedent dies in 2019 with the unchanged will in effect and owning the same automobile, that automobile will be transferred, that is, conveyed to the brother in 2019 based on an intent expressed in 2005. Of course, wills are not irrevocable and it is conceivable that sometime between 2005 and 2019 the will may be revoked or modified. On the revocability of wills, see Johnson, *Is It Time for Irrevocable Wills?*, *supra* note 15. The decedent must still own the automobile at the time of her death (or an automobile obtained to replace the automobile mentioned in the unrevoked will) or the gift of the automobile will be adeemed and invalid. For a discussion of the doctrine of ademption, see SITKOFF & DUKEMINIER, *supra* note 29, at 373–82.

tor by making a will can accomplish what the grandfather attempted to accomplish in *Ricketts* in making a gift in the future with no contemporaneous delivery.

The only distinction between what the grandfather wanted to accomplish in *Ricketts* and what a putative testator accomplishes with the execution of a valid will is that in *Ricketts*, the grandfather intended the gift to be inter vivos and, presumably, irrevocable.[85] As the testator is dead at the time of the resolution of any issues arising from the will, the functional formalities are designed to allow the adjudicating court to decide whether to enforce the will at low administrative cost and with little attendant error, just like in the gift and contract contexts.[86]

What is also often ignored is that a will represents a completed future gift. This violates the maxim that one may not make a future gift. Quite the contrary, if one complies with the requisite functional formalities, one can indeed complete a valid and enforceable future gift or conveyance. The will completes the donative transaction pursuant to which the testator decides to make a gift, complies with certain formalities in order to accomplish that gift, and takes no contrary action invalidating that intent before delivery/death (i.e., modification via a codicil or revocation of the will).[87] The testator dies in compliance with the intent to make the gift as expressed in the will, and the gift is completed following the testator's death in compliance with that previously expressed intent.

This testamentary gift has all the attributes of the typical inter vivos gift except that delivery is performed after the owner's death. Intent is expressed in the will, satisfying that requirement, and the item shall be delivered by the person charged with distributing the assets in the estate.[88] Finally, as with inter vivos gifts, the donee or recipient of the testamentary gift has the right to reject the gift so that acceptance is part and parcel of a completed gift.[89]

Thus far, this Article has discussed and addressed three types of enforceable transfers: (1) inter vivos gifts, (2) contracts supported by consideration, and (3) testamentary gifts or transfers made pursuant to a properly executed will. Although these three transfers are en-

85. Wills are revocable by definition. One cannot make an irrevocable will. *See* Johnson, *Is It Time for Irrevocable Wills?*, *supra* note 15, at 394.

86. *Id.* at 401–02.

87. *See supra* note 28 and accompanying text.

88. This person is normally called the executor with respect to the will and has a fiduciary duty to carry out the wishes or intent of the testator as expressed in the will. The executor should be viewed as the agent of the testator and as an agent carrying out the wishes of the testator.

89. The recipient or legatee of the testator's generosity has the right to reject the gift via a process known as disclaimer. *See* UNIF. PROBATE CODE §§ 2-1101–2-1107 (amended 2010).

forceable if the requisite functional formalities are supplied, none represent a pure enforceable promise binding the promisor in a way that is unalterable. That is the province of the trust—in particular, the inter vivos irrevocable trust.[90]

If the putative donor, say grandfather Ricketts, desires to make a future gift of an asset that is irrevocable at the time the intent to make the gift or conveyance is present, the putative donor may do so through the use of an inter vivos irrevocable trust. Trusts may be revocable or irrevocable. By using a valid irrevocable inter vivos trust, the settlor has the power to divorce herself from ownership in the asset by making a transfer that eliminates her ownership interest. Thus, a settlor, A, can establish a trust where the trustee is the settlor or a third person, and that grants a life estate or interest in beneficiary A, with a remainder to A's children equally (if any), and in default of such issue, to the settlor's alma mater, the University of Virginia School of Law.

By this act, the settlor has made an irreversible donative transfer that will benefit A, A's children (if any), and, if none, the University of Virginia School of Law. The ultimate beneficiary of the corpus of the trust will be determined by whether A has any children,[91] but after the creation of the trust the settlor cannot alter the disposition of the property except manage it as a trustee if the settlor sets up the trust with the settlor as trustee. If the settlor is not the trustee, the settlor will have no connection to the property after the creation of the trust.[92]

Alternatively, the settlor can set up an irrevocable trust in which the settlor retains a life estate interest, with a discretionary power to consume the corpus. If this occurs, then the use of an irrevocable trust, although still irrevocable, has no real impact on the settlor's dominion and control over the trust assets. While the trust cannot be revoked, this irrevocable trust creates no measurable or valuable interest to the remainderman, be it A's children or the University of Virginia School of Law, because of the settlor's discretionary right to consume the corpus of the trust. Who would pay anything of value for

90. *See infra* notes 97–98 and accompanying text.

91. This assumes that A has no children at the time the trust is created. If that is the case, the equitable title to the property is life estate in A, contingent remainder in A's children, alternative contingent remainder in UVA Law. Once a child is born to A, the children's remainder turns into a vested remainder subject to open to allow addition children born or adopted by A to share in the trust corpus when A dies.

92. To be technical, because the settlor set up the trust with alternative contingent remainders, at law the settlor would be regarded as holding a reversion. In equity the settlor would not be regarded as retaining that interest because with this gift, UVA Law is the intended beneficiary should A have no children and therefore the gift or corpus must be transferred to UVA Law no matter how the preceding life estate terminates.

the remainderman's interest that is contingent on the failure of the settlor to consume the assets prior to death? The power of consumption gives the settlor the right to deplete the trust in its entirety.

The point is simple: the irrevocable inter vivos trust provides the putative donor with a flexible vehicle to make a future gift of a present asset based on that putative donor's intent at the time the irrevocable inter vivos trust is established. If Mr. Ricketts had consulted a lawyer and told her of his intent to make an inter vivos gift of a present asset in the future to his granddaughter, he should have been advised to execute an irrevocable inter vivos trust. By that devise, the putative donor can expand the typology of valid transactions to include a fourth, the irrevocable inter vivos trust, which makes erroneous the oft-stated maxim in property law that one cannot make a future gift.

What this Article hopes to demonstrate next in Part III is that inter vivos gifts, inter vivos trusts, and wills (including testamentary trusts which are trusts that are created in a validly executed and enforced will) are related and united by functional formalities that allow a court to later adjudicate the claim of ownership at low administrative costs and little to no error costs. Given that the focus is on validating the settlor's intent with respect to these trusts, what is it about these trusts, with their lack of functional formality, that causes them to be enforceable?

In Part III, this Article contends that the use of "magic words" in the creation of "informal" oral trusts and knowledge of what those words mean allows the court to find a trust when other formalities are lacking, like delivery and acceptance with respect to gifts, witnessing or attestation with respect to wills, and a written document with respect to trusts that affect land. If these magic words, when spoken by the putative settlor, are sufficient to validate the settlor's intent to create a trust, a gift promise made with a seal should serve the same functional purpose, allowing courts to enforce gift promises at low administrative cost with little attendant error costs.

III. ENFORCEABLE OR UNENFORCEABLE: A FUNCTION OF FORMALITIES

Courts enforce future donative promises because each complies with certain functional formalities. These functional formalities provide courts with the assurance that the putative donor intended a donative transaction. In other words, each one of these future donative promises satisfies the ritualistic, cautionary, and evidentiary functions addressed by the delivery requirement with respect to valid and completed inter vivos gifts.[93]

93. Again, testamentary gifts are the province of wills.

For example, consider future donative promises made in an irrevocable trust. These enforceable promises must meet the following requirements: the settlor must have and demonstrate the intent to create a trust, the settlor must identify a beneficiary or beneficiaries of the trust, the settlor must identify the trust res,[94] and the settlor's intent to make the trust irrevocable must be clear in an age when the default rule is to make trusts revocable.[95] When the settlor/donor meets these requirements, she clearly satisfies the requirement that she evinced sufficient intent to make a gift.

In addition, the settlor/donor has completed the appropriate ritual to establish the inter vivos trust containing the donative promise, as well as the cautionary role by making the gift irrevocable. Essentially, she is aware that she is making a gift in the future that may impoverish her and she is embracing an irreversible precommitment strategy. By creating an irrevocable trust with a trustee, the settlor/donor provides the court with sufficient evidence of the terms of the future donative promise when she is dead.[96]

The fact that the creation of the trust, with the exception of those concerning real property,[97] may be oral[98] seemingly represents an exception to the requirement of the functional formalities and undercuts the evidentiary purpose they serve. That, however, ignores the reality of the creation of the oral trust. In order to create the trust orally, the settlor must evince intent by knowing which words must be used in

94. At common law, the trust had to have a res—an asset or something of value to be held by the trustee pursuant to the terms of the trust. In other words, the trust could not be unfunded and could not contain an interest not yet in existence like a contingent remainder. That requirement is eliminated if a state has enacted the Uniform Testamentary Additions to Trusts Act (1991) (UTATA) that allows such an unfunded trust to be created. *See* UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1. However, even in states that embraced UTATA, the settlor must identify the contingent or future interest that will become the res of the trust.

95. These requirements for the creation and existence of an irrevocable trust are well-known and established. The goal of this Article is not to provide a primer on trusts for the uninformed. The assumption herein is that those with the interest to peruse this Article also possess some elemental or basic knowledge of the nuts and bolts of trusts and estates.

96. This avoids a best evidence problem that occurs when a matter is litigated following the death of the putative donor who, of course, cannot testify.

97. "While it is possible in most states to have personal property trusts created orally, most important trusts of realty or personalty are created by the use of one or more writings. Such a document is called the 'trust instrument' . . . [the usual] effect of which is to provide the terms of the trust and to transfer an equitable property interest in the described property to one or more beneficiaries. It also, in the case of trusts created by transfer, evidences the passing of title to the trustee." RESTATEMENT (THIRD) OF TRUSTS § 20 cmt. a (2003) (citing GEORGE T. BOGERT, TRUSTS § 23 (6th ed. 1987)).

98. "Standing alone, the law of trusts does not require a writing to create a valid trust." SITKOFF & DUKEMINIER, *supra* note 29, at 403 (citing RESTATEMENT (THIRD) OF TRUSTS § 20 (2003)).

order to create the trust and must identify the trustee, the beneficiary, and the res.[99] Most importantly, there must be independent corroboration of all of these facts by a third party. That corroboration, which normally occurs following the settlor's death, provides the evidentiary proof that suffices to establish the cautionary and ritualistic functions normally met in a written irrevocable trust.[100]

Moreover, the formalities associated with the execution of one's will—the requirement that it be signed by the testator in the presence of two witnesses in the case of non-holographic wills,[101] or the requirement that a holographic will be entirely in the handwriting of the testator[102]—also complies with the ritualistic, cautionary, and evidentiary functions performed by delivery of the gift. For the sake of brevity, focusing only on the evidentiary function, both non-holographic and holographic wills provide ample evidentiary proof to allow a court to correctly discern and give effect to the testator's intent.

A. Reliance Cases

The one type of transaction that is given effect—apparently without functional formalities—are promises that induce reliance on the part of the promisee. Only a special type of reliance case fits within this analysis and supports the theory that certain irrevocable gift promises are enforceable when a court believes it has sufficient evidence to validate the donative promise at low administrative and error costs.

There are three types of promises that courts enforce pursuant to the doctrine of promissory estoppel and the Restatement (Second) of Contracts § 90.[103] Promises made in a business setting, which this Article characterizes as precontractual, sometimes result in courts employing the promissory estoppel doctrine. These cases fill the gap created by American courts' failure to embrace the doctrine of *culpa en contrahendo*, which in most European jurisdictions requires negotiating parties to act in good faith towards one another.[104] These are true reliance cases that should be governed by the law of contracts and are appropriately remedied by the doctrine of promissory estoppel because there is a promise, reasonable reliance, and subsequent injury.

---

99. *Id.*
100. *See In re* Estate of Fournier, 902 A.2d 852 (Me. 2006).
101. *See* UNIF. PROBATE CODE § 2-502 (amended 2010).
102. In the score of states that allow holographic wills, those wills were valid only if they were entirely in the handwriting of the testator. That requirement has been abolished in most states and supplanted with the requirement that only the material provisions must be in the testator's handwriting. *See* SITKOFF & DUKEMINIER, *supra* note 29, at 198.
103. *Id.*
104. *Id.*

As these cases are precontractual, they are necessarily treated as reliance cases per the Restatement (Second) of Contracts § 90 because of the lack of *culpa en contrahendo* in American jurisprudence. They are appropriately considered within the province of contract law and are remediable given the harm that is created by reasonable reliance on promises. A failure to provide a remedy in these cases results in the creation of irremediable wrongs that could have the effect of chilling or deterring future business relationships. The correct question to address is: Which precontractual relations provide a remedy and which do not?[105] In other words, where must we draw the line between cases for which a remedy is provided and those for which it is not? Furthermore, do these cases represent a de facto embrace and validation of the doctrine of *culpa en contrahendo* in American law?[106]

The second type of reliance promises for which a remedy is supplied are promises that are conscionable.[107] Although much scholarship has focused on the doctrine of unconscionability, little attention has been given to its mirror image: cases in which courts use reliance to produce an effective remedy based on equity and fairness. These cases do not fit neatly within a type or arise from a common set of facts or within a defined context. Adjudication of these atypical reliance cases has migrated into the rather flexible, catch-all category of reliance per the Restatement (Second) of Contracts § 90.

This Article advances that the public policy cases remedied through application of § 90 of the Restatement fall within the milieu of conscionable cases. Public policy cases are properly characterized as common law equity cases in which the aggrieved party is appealing to the court's equitable powers to provide a remedy consistent with the court's conceptions of equity and fairness, despite the lack of promise or reliance by the aggrieved party. In these cases, the modern court is called upon to reprise its historical role as Chancellor of the Court exercising equitable powers. Courts here act creatively to fashion a remedy for a wrong for which there is no other appropriate, pleadable cause of action and for which there are no facts indicating contemplation of a contract. As such, express equitable doctrines are better suited for resolving public policy cases. Again, this is best described by

105. My preliminary answer is that what is reasonable reliance given the context of the relationship between the parties delimits what is actionable and remediable and what is not. *Culpa en contrahendo*, on the other hand, attaches to any negotiation that is entered into by two opposing parties.

106. My preliminary answer to this question is negative. The contours of the doctrine of *culpa en contrahendo* are much broader than the use of reliance per RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981). *See* Johnson, *supra* note 8, at 607–09. The doctrine of reasonable reliance per the use of § 90 limits the reliance doctrine to egregious cases of promissory fraud. For further discussion of promissory fraud, see *supra* note 49, 111–13 and accompanying text.

107. *Id.*

use of a conscionable equitable doctrine that is the antithesis of the unconscionability doctrine embraced by the Uniform Commercial Code.[108]

Different legal norms and doctrines validate the enforceability of both donative and public policy cases. However, those norms and doctrines are not contractual, therefore not requiring consideration, and are not based on reliance necessary to support a claim of promissory estoppel. Even so, certain unique relationships give rise to duties created by public policy that can be breached and, therefore, support the use of promissory estoppel to provide a remedy to the aggrieved party.[109]

The third category of cases that are enforced pursuant to the doctrine of promissory estoppel are "failed gift" or donative cases in which the donor's intent to make the gift is clear, but the delivery element is lacking. The donative intent cases are explicable given the clear intent of the putative donor and the concomitant fact that the donor's untimely death occurs before delivery can take place. What is unclear, however, is why these failed gift cases are covered by the Restatement (Second) of Contracts § 90 instead of being addressed and decided by property law principles. The development of English common law causes of action and the laxity of pleading requirements in contract law created the loophole that resulted in donative intent being relegated to § 90.[110]

Importantly, all three categories of reliance cases involve a certain level of evidentiary proof that satisfies the functional formalities. Most importantly, evidentiary and corroborative needs are easily met in the three types of reliance cases addressed above.[111] Of course, the easiest cases to explain are donative promissory estoppel cases where a gift fails for lack of delivery due to the untimely death of the putative donor. In these cases, intent is clearly proven by two distinct and independent variables.

First and most obviously, because the putative donor is dead, a third party must corroborate the donor's intent. That evidence must conclusively establish the donor's intent to make a gift in order to avoid the property passing pursuant to the intestacy scheme (if the putative donor dies without a will) or pursuant to the putative donor's will (usually in the residuary clause).

---

108. For further discussion, see *supra* notes 29, 55, 94, 98–100 and accompanying text.

109. These cases are harder to characterize as appropriate for the doctrine of promissory estoppel but I contend that they are explicable given the relationship of the parties and the harms occasioned thereby. *See supra* notes 58–60 and accompanying text.

110. *See supra* notes 29, 55.

111. *See supra* notes 37–38, 109–11 and accompanying text.

The second and somewhat counterfactual variable is the untimely death of the putative donor before delivery of the donative asset. If the putative donor anticipated her demise, the natural question raised would be why the donor did not effectuate delivery prior to the anticipated death in order to make an inter vivos transfer, or if that was unfeasible, memorialize her intent in a valid will to make a testamentary transfer. The channeling and ritualistic variables are less important in this context because the proof of intent coupled with the putative donor's untimely demise provides sufficient and stable proof that the putative donor intended to comply with the rituals associated with the requisite formalities. Unfortunately, the untimely demise of the putative donor precludes participation in the ritual.

Also, relatively easy to explain as enforceable promises based on the formalities are the *culpa en contrahendo* cases. In these near deal cases, two important factors coincide to produce an enforceable promise—a promise that satisfies the functional requirements. First, there is sufficient documentation of the parties' putative agreement. In these cases, all the details of the deal are reached, yet one of the parties chooses for opportunistic reasons not to act as promised. Hence, the evidence of the details of the deal sought to be enforced and the ostensible agreement of both parties to that deal are available.

Second, and perhaps just as importantly, the conscience of the judge in equity is engaged to enforce the agreement. Consequently, the party seeking to enforce the agreement must prove to the satisfaction of the arbiter that the agreement is fair and equitable given the circumstances and the relationship of the parties. Thus, when evidence and fairness coincide to require the arbiter to find an enforceable agreement, there is little question regarding the costs of either or both the adjudication of the dispute or any error costs associated with the adjudication.

Again, the channeling and ritualistic functions are less important in this context given the relationship between the parties. The parties have already come to a preliminary agreement that they have sufficiently memorialized in all-but-final form. Indeed, they have channeled their behavior to conform with the norms required by the context provided. What is lacking in this context is the one final act, or "finality." For whatever reason, one party acts opportunistically and chooses not to take the final step that precludes finality, but all other parts of the ritual have been completed.

The hardest cases to explain as producing functional formalities remain the public policy cases—that odd lot of cases that cannot be cabined or classified as a type. In these *sui generis* cases, there are no central or unifying factors. However, in a perverse way, they provide proof that the functional role played by the formalities in the irrevocable gift cases are the means to an end and not the end itself. As such,

they support the view that the use of the seal should be resurrected and expanded to allow a party to achieve the end of enforceability if so desired.

In other words, when the putative donor complies with the functional formalities necessary to complete an irrevocable gift promise and to effectuate a sealed contract, the putative donor is signaling her intent to be bound to the court or trier of fact—to be bound to the end of completing the promise in the irrevocable gift promise or in the sealed contract. The formalities serve the function of proving the certitude of the donor's intent in cases in which the promisor is often dead and, hence, unavailable to testify.[112]

In the idiosyncratic or public policy reliance cases, the court is convinced that the end of doing justice or performing equity must be deployed to rectify inequitable behavior. The end in these factually unique cases is to achieve equity or justice and promote conscionability or fairness.[113] Moreover, this behavior is odious from a societal perspective and should be penalized and dissuaded in the future. Thus, just like courts use the functional formalities to channel behavior to achieve a desirable outcome, the public policy reliance cases also have a channeling function, although it is the obverse of the channeling function associated with the functional formalities. In this area, the courts employing their broad equitable powers in conjunction with the Restatement (Second) of Contracts § 90 channel inappropriate societal behavior by punishing same. This inhibits odious societal behavior in the same way that criminal punishment deters future criminal behavior.[114]

IV. THE RISE AND FALL OF CONSIDERATION AND THE HISTORY OF THE SEAL

Contracts under seal predated the development of the doctrine of consideration by centuries, from the late middle ages until recently the seal was essentially supplanted by the doctrine of consideration.[115] Seals were deemed to validate a transfer even without consideration because of the formalities associated with the execution of the sealed writing. The formalities associated with the execution of a sealed instrument satisfied the evidentiary function, providing reliable evidence that a transaction was intended and actually took place.[116] Similarly, the sealing of wax on the parchment paper suf-

112. *See supra* notes 24, 34–41 and accompanying text.
113. *See infra* notes 118–119, 122 and accompanying text.
114. *See, e.g.*, Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259 (1972).
115. PERILLO, *supra* note 5, at § 7.1.
116. *Id.*

ficed to satisfy the ritualistic and cautionary function by providing a secure and stable ritual to produce an enforceable agreement.

Finally, sealing satisfies the requirement of channeling by providing a stable and secure method of ensuring that if a seal is properly used, then a court will validate the outcome later. In other words, ordinary citizens know that if they seal a document properly, that document will later be validated as an enforceable agreement.[117]

Consequently, the act of sealing serves the same functional formalities that are present with respect to the other irrevocable promises that are enforced without consideration: inter vivos trusts, wills, and promises that are relied on pursuant to the Restatement (Second) of Contracts § 90.

As a substitute for the functional formalities provided by the seal, it stands to reason that the doctrine of consideration must satisfy those same functional formalities to serve as a viable substitute. Hence, it is to the rise and fall of consideration, focusing on the functional formalities, that this Article now turns to establish the predicate for the resurrection and expansion of the seal.

What, then, is the normative basis for the requirement of consideration in enforceable contracts and does that normative reason remain viable? The search for a normative basis for consideration is not a novel undertaking. Consideration has been required to enforce voluntary agreements since well before the promulgation of the first Restatement of Contracts in 1931,[118] and an examination of the normative basis of consideration has been fair game for contract scholars. The four primary normative theories supporting the use and function of consideration to find enforceable contracts and will then analyze the same to determine if they support the continued use of the doctrine of consideration to determine the enforceability of contracts. The four normative theories can roughly and rather broadly be char-

117. *Id.*

118. With respect to the operation and use of seals to establish enforceable agreements at common law, consideration was required at common law when seals were used for informal agreements not requiring a seal in order to be made enforceable. *See infra* note 141 and accompanying text.

acterized as: (1) functional/formal;[119] (2) realist;[120] (3) moral;[121] and (4) efficiency (law and economics).[122]

119. Any search for a normative basis for consideration must begin with Lon Fuller's classic article, *Consideration and Form*. Lon Fullerton, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Professor Fuller convincingly demonstrates that the role of consideration in contractual agreements is both formal and functional. *Id.* Indeed, Professor Fuller's primary hypothesis is that consideration has both formal and substantive components and he sets as his task disentangling the two. *Id.* at 799. Consideration, he contends, performs primarily three functions: evidentiary, cautionary, and channeling. *Id.* at 800–01. These three definitive functions are well known to contract scholars (and, as we see, property and trust and estate scholars) and do not require much explication.

120. The second normative base alleged for consideration is that theorized by the realists. Briefly, realists believe that consideration is simply a tautological device used by the courts to determine which contracts should be enforced. Professor Patrick Atiyah is a leading proponent of the realist approach and contends that consideration simply means that there is a valid societal reason like good faith, duress, reliance or the enforcement of a moral obligation, to enforce the contract. *See* PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). *See also* Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891) (addressing consideration in the form of the enforcement of a moral obligation). Given the realist account, it makes sense that the doctrine of consideration is tautological because it means that courts manipulate the rule or doctrine to find consideration when there are good reasons to enforce the agreement and do not find consideration in similar situations when there are exogenous reasons not to enforce the agreement.

121. The third normative basis alleged for consideration is premised on the contract as a promise. It focuses on the moral obligation of the promisor to do as promised. The leading proponent of this theory is Professor Charles Fried. According to Professor Fried, individuals have autonomy to impose obligations on themselves by promising to do so. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (2d ed. 2015). These promises morally obligate them to perform based on theories of individual autonomy and trust. *Id.* at 14–15. Professor Fried produces an elegant theory in which only certain promises (knowing and fair promises, for example) should be enforced. *Id.* at 5, 49. He dismisses the doctrine of consideration as a requirement for enforceable contracts because it is alleged to be too indeterminate. Instead, he argues for the development of an alternative theory that focuses on which promises should be enforceable based on their fairness. *Id.* at 4, 49–52.

122. Certain law and economic theorists, like Professors Robert Cooter and Thomas Ulen, criticize the doctrine of consideration encapsulated within the bargain theory of contracts because it does not capture and enforce certain unilateral promises that both the promisor and promisee want enforced, and the enforcement of which makes both parties better off (a pareto superior state of affairs). ROBERT B. COOTER & THOMAS ULEN, LAW AND ECONOMICS 281–82 (6th ed. 2014). Instead they argue that a contract should be enforceable when both the promisor and promisee want it to be enforceable. *Id.* This is alleged to be more efficient and societally productive. *Id.* 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 to advance the view that contracts should be enforceable if the parties intend them to be enforceable. The weakness of this approach is determining, of course, whether or when the parties truly intend that the promise be enforceable. A full endorsement of this latter theory produces the result that any promise, including perhaps a gra-

In an earlier article,[123] I establish a typology of transfers that highlights the legal requirements for five types of distinct transfers of property or assets: (1) contracts or agreements supported or proven by consideration; (2) sealed agreements; (3) irrevocable inter vivos promises (trusts);[124] (4) testamentary transfers (wills); and (5) reliance promises that are enforceable pursuant to the Restatement (Second) of Contracts § 90.[125] Lawyers and academics regard these transfers as so legally separable that they are taught in three different courses in the normal law school curriculum: Contracts (consideration and non-consideration based promises or agreements and reliance based promises), Property (inter vivos irrevocable gifts), and Trusts and Estates (testamentary transfers or gifts).

The different legal requirements necessary to validate each transfer, however, mask a similar functional role embedded in each transaction. Consequently, what unifies these five types of transfers is that each supply the courts with agreements that can be enforced with low error and adjudicative costs.[126]

As a result, the earlier article compared valid and enforceable non-consideration transfers that satisfy certain functional requirements (irrevocable gift transfers 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). Contract law discerns the normative base that unifies these two disparate transactions (donative transfers and reliance-based transfers).

Gifts and testamentary transfers have a common element with promises that create reliance even though these transactions are not

---

tuitous uncompleted promise, becomes enforceable as long as the parties' intent is sufficiently proven.

123. *See* Johnson, *supra* note 8.

124. Although there are two types of valid gift transfers—inter vivos and causa mortis (i.e., made in contemplation of impending death)—the distinction between the two is largely disappearing and, for the purposes of this Article, makes little if any difference. Hence, I choose instead to focus on the more common inter vivos gift and ignore for the sake of my argument gifts causa mortis.

125. Testamentary transfers are those that take place pursuant to a validly executed will. Although these transfers relate back to the instant of the testator's death, 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. For a discussion of testamentary transfers, see *supra* notes 84–89 and accompanying text.

126. Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 NAT'L CTR. FOR ST. CTS. 1, 6–7 (2013). For detailed tables on the adjudicative costs of real property disputes and contract disputes, see *Caseload Highlights: Estimating the Cost of Civil Litigation*, COURT STATISTICS PROJECT, www.ncsc.org/CLCM [https://perma.unl.edu/5545-ZA8Q] (last visited Feb. 24, 2020).

supported by consideration in its classical bargain theory form. Each transaction 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 irrevocable gift transfers (i.e., completed gifts),[127] testamentary transfers, and reliance-based promises unsupported by consideration are deemed enforceable and validated judicially.

The goal herein is not to prove that certain normative theories are wrongheaded, nor is it to provide a comparative analysis of the four normative theories addressed above. Rather, 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 and testamentary transfers. In other words, can this approach find reveal a normative theory that can explain legally enforceable promises in contract law, as well as legally enforceable inter vivos gifts and testamentary transfers? Given that the test to find consideration has not remained static over time, the best theoretical normative basis for consideration is indeed the functional or formal basis for consideration fully addressed by Professor Fuller.

The demise of the use of the seal, for good and valid reasons, should not obscure the purpose served by its use.[128] The rise of the use of consideration as the vehicle by which contracts or promises are deemed enforceable also should not obscure the functional role of the seal. Rather it should lead to inquiry of whether that functional role has been met via the requirement of consideration. Thus, this Article turns to the functional roles sealing initially served 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 valid-

127. Uncompleted gifts are gratuitous promises and are deemed unenforceable. *See supra* notes 1–6 and accompanying text. A completed gift is delivered and accepted by the donee and the transfer is accompanied with donative intent, which 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.

128. The demise of the seal was due to several factors, but mainly because it was too restrictive given the growth of commercial industry and the need for a less formalistic manner of making enforceable promises. JEFF FERRIELL, UNDERSTANDING CONTRACTS § 3.02 (2d ed.). In addition, the formalism associated with the seal eventually gave way to very informal methods of sealing. For example, one could seal by placing the initials "L.S." on a document so that 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 with little if any error costs. *See* Pitts v. Pitchard, 201 So. 2d 563 (Fla. Ct. App. 1967); RESTATEMENT (SECOND) OF CONTRACTS § 96 cmt. a (AM. LAW INST. 1981).

ity and use of consideration in contract law can only be ascertained by examining valid agreements or transfers that are made without it.

More importantly, consideration in modern contracts serves the same role that the seal served in England in the Middle Ages and today in jurisdictions that still validate its use. The Restatement requires consideration and courts find agreements enforceable with it because consideration supplies the evidentiary, cautionary, channeling, and ritualistic functions at the time of contracting and evidence of the agreement (including establishing the remedial boundaries for enforcement of the right established by the contract) ex post at the time of adjudication.

The contract under seal provided the adjudicative body with extremely reliable evidence of the agreement and its terms with the formalities attendant at the time of execution (ex ante) and the information conveyed at the time of adjudication (ex post). This allowed the adjudicative body to enforce the agreement with little if any error costs and to do so by reviewing one document (i.e., at low administrative cost). Although the reasons for the demise of the seal are beyond the purview of this Article,[129] no one claims or has demonstrated that the seal raised difficult issues of interpretation or enforceability. To the contrary, the contract under seal represented an effective and efficient vehicle for a party to signal that she was entering into an agreement that should be enforced against the sealing party notwithstanding any subsequent objection.

Notably, the doctrine of consideration was used as a vehicle to regulate and control informal unsealed promises during the time of the seal's prominence and use in the Middle Ages.[130] 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. Key to this Article's thesis is the substitution role consideration originally played, which if used as a substitute for a seal, should suffice to serve the same role and function.

To summarize, the initial role consideration provided was purely formal and quite functional in the guise of a seal. As use of the seal waned, the need for some method to validate enforceable agreements without seals still remained. Enter the doctrine of consideration, which was the informal stepchild of the seal when the seal reigned supreme. Eventually the doctrine of consideration evolved into an al-

129. For a discussion of what caused the demise of the seal, see Frederick E. Crane, *The Magic of Private Seal*, 15 COLUM. L. REV. 24 (1915). However, the seal does remain valid in a few jurisdictions: Delaware and Wisconsin most prominently. *See* PERILLO, *supra* note 5 at § 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).

130. JOHN P. DAWSON, ET AL., CONTRACTS: CASES AND COMMENT 196 (10th ed. 2013).

most tautological test[131] that now requires the identification of a bargain and the conferral of a benefit and/or the creation of a legal detriment. The focus on the bargain, and relatedly, the benefit/detriment created thereby, has largely obscured the functional and formal role originally supplied by the seal. This Article is not the first to note this phenomenon, 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.[132]

That raises another mystery: however one grounds the normative basis 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.[133] Courts fixate on the lack of consideration; there is no item or thing transferred to show consideration under the common law formalistic view, no process pursuant to which bargained-for promises are exchanged under the Restatement (Second) of Contracts view, and no mutual intent to be bound per the academics' theory of consideration. Thus, courts find mere donative promises gratuitous and unenforceable. Those who contend that contracts or agreements should be enforceable if the parties so intend come to the same conclusion that gratuitous promises are unenforceable per se, albeit for different reasons.[134]

Thus, what begins as a puzzle ends in unanimity. Whether one understands the need for consideration, whether one applies one requirement of the rule for consideration or the other, or whether one focuses on the parties' intent, there is a whole class of promises that are unen-

131. *See supra* notes 32–33 and accompanying text.

132. *See supra* notes 126–30 and accompanying text.

133. To explain:

> The starting point is that donative promises *generally* are not 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, even deliberated, there might be reason not to enforce it if it was made improvidently or if the promisee showed ingratitude.

PERILLO, *supra* note 5, at § 4.1 (citations omitted) (emphasis in original). *See* Melvin Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997); Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977).

134. 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. *See supra* Part I.

forceable. Promises can therefore be divided into those that are enforceable and hence non-gratuitous, and those that are not enforceable and gratuitous. In this lexicon, the focus is on whether the promise is subsequently legally enforceable.

On the other hand, an examination of transfers, rather than promises, reveals that a class of gratuitous transfers based on donative promises are enforceable if certain formalities or functions are met. None of these formalities or functions, however, are consideration. A gift or donative transfer must satisfy three distinct requirements to become enforceable.[135] First, the putative donor must have the requisite intent to make a gift. Second, the donor must transfer possession to satisfy the delivery requirement necessary to effectuate a gift. Third—and often overlooked—the putative donee must accept the gift in order for it to be valid. Once these three requirements are met, the donor has made an irrevocable gift promise.

These three formal requirements also serve functional purposes similar to the requirement of consideration.[136] Because gifts are enforced once these three requirements are met, it is incorrect to state that all gratuitous transfers are unenforceable when only those gratuitous promises that do not meet the three requirements are not enforced. When these requirements are met, a court will find a completed and valid gift and award the donee the property that is the subject of the gift.[137]

Although this is a fine distinction, courts find unenforceable uncompleted gift or gratuitous promises or acts that do not satisfy intent, delivery, and acceptance. Hence, a promise to give a gift in the future that lacks delivery and/or acceptance by the donee is unenforceable. If, however, the subject of the promise is delivered (and delivery does not have to mean present delivery of possession, but can mean present delivery of a future interest in which possession is postponed)[138] and subsequently accepted by the donee, that transfer is just as enforceable as an agreement supported by bargained-for consideration. My earlier article[139] examined three different types of exchanges: (1) contract-based exchanges with consideration, (2) gratuitous transfers

135. *See infra* notes 149, 161, 190 and accompanying text.

136. The functional purposes are: ritualistic, evidentiary, cautionary, and channeling. *See* Phillip Mechem, *Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 22 ILL. L. REV. 341, 348–49 (1926); *supra* note 99–108 and accompanying text.

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

138. *See id.* at 194.

139. *See* Johnson, *supra* note 8.

that are enforced even given the absence of consideration,[140] and (3) gratuitous promises that are not supported by consideration and are largely unenforced.

Consequently, what has heretofore been ignored in the academic literature discussing the distinction between contracts that are enforceable because of consideration and irrevocable gift promises are functional formalities, which both transactions have in common. The resurrection and use of the seal in contract transactions will serve those same functional formalities and should be embraced by parties, scholars, and courts.

In *Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, Inter Vivos and Testamentary Gift Transfers*,[141] I presented my thesis that conveyances, that is contracts, inter vivos, and testamentary gifts, although arising in different silos of the law, are connected and related by the functional formalities. The functional formalities present in each conveyance allow courts to later adjudicate their validity at low error and administrative costs. The present-day functional formalities are substitutes for the functional formality originally produced by using the seal.

In order to validate the thesis that today's functional formalities and their role in validating conveyancing are historical successors to the role played by the seal, the earlier article exhaustively detailed the rise and fall of the use of the seal in the contracts silo. That is summarized herein.

First, to give context to the current lack of the seal's use, I examine the requirements for a valid sealed contract and a briefly review the rise and fall of the seal. In order to have a valid sealed contract, a deed (meaning a formal writing and not a conveyance of real property) must be produced in writing, the writing must contain a promise which is sufficiently definite, and the promisor and the promisee must be named. For most of the time that seals were used, seals were additionally required to consist of wax affixed to the paper or writing upon which the terms of the instrument were written.[142]

A few requirements must be met in addition to these formalities. First, the party executing the sealed instrument must intend it to be a sealed instrument.[143] Essentially, if there is fraud in execution—for example, if the executing party believed she was sealing another document—that would negate the intent required to have a sealed instrument. This was an important requirement because many of the

140. These gratuitous and enforceable transfers can be inter vivos, that is gift, or testamentary via wills.

141. Johnson, *supra* note 8.

142. PERILLO, *supra* note 5, at § 7.3.

143. *Id.* at § 7.5.

parties sealing at that time were illiterate. Thus, one who could not read could easily be duped to execute a seal on the wrong document.

Second, the sealed instrument must be delivered in order to attain validity.[144] There is debate over a potential third requirement, which is beyond the scope of this Article, but some have claimed that the party receiving the sealed instrument must accept it.[145] Acceptance may not have been viewed as a formal requirement to the creation of an enforceable sealed document because it may have been difficult, if not impossible, for the common law at that time to recognize "negative property," or property rights that could impose costs on the donee worth more than the conveyed property. Hence, acceptance may have been assumed as a given (why would anyone refuse positive value property?) rather than as a requirement.

However, given that the requirements for the validity of a gift are intent, delivery, and acceptance, it makes perfect sense that in another transaction lacking consideration (which presupposes mutual assent of the parties), the same trilogy of requirements should apply. Furthermore, the fact that the same functional formalities are required for a sealed document and a valid gift is not coincidental. The fact that the same requirements must be met for donative as well as non-donative transactions is illustrative of the normative basis for the requirements. These functional formalities serve a number of purposes. Primarily, however, they serve evidentiary, cautionary, and channeling functions.[146]

Over time the requirements of a waxed seal waned and, because ordinary citizens did not have access to a signet ring to effectuate a seal, the law began to accept substitutes for a seal: the words "seal" or the letters "L.S." (*locus sigilli* in Latin, meaning literally the place of the seal) were sufficient to establish a sealed document.[147] Indeed, the laxity that led to the replacement of the wax seal with these lesser requirements contributed to the demise of the seal in many jurisdictions. The legal community alleged that the non-legal community failed to respect the seal, making sealed and non-sealed documents largely indistinguishable.[148]

Consequently, the use and legal effect of the seal has been minimized, if not abolished, in many jurisdictions. These jurisdictions have

144. *Id.*
145. *Id.* at § 7.6.
146. For further discussion of these formalities and how they operate in contract law, see *infra* notes 115–26 and accompanying text.
147. PERILLO, *supra* note 5, at § 7.3.
148. This collapse of the use of the seal due to its ultimate incoherence is similar to the collapse of the doctrine of consideration due to its incoherence. The reason this Article contends that the seal should be revived today is that the population is literate and that the novelty of the seal will cause it to be used only when intended. Hence, the seal will not fall into the same incoherence today.

concluded that the disadvantage of the conflation of sealed and non-sealed documents by the populace outweighed the seal's advantages of ease and certainty. The informality with which a document may be sealed created a process of sealing that did not impress upon parties the seriousness of the formal conduct.[149] The seal is now viewed largely as an historical anachronism with little or no relevance in today's modern, fast-paced, transactional world. Today, the fact that a sealed contract is validated in the Restatement (Second) of Contracts[150] seems to have had no positive impact on the use of the seal in transactions. As a result, the seal has largely been relegated to the historical dustbin as an antiquated formalistic transaction that has no place in modern contractual relationships.

However, in an age in which standard form contracts are the norm, using a seal to formalize a contract will be the exception and not the rule. It will impart to the sealing parties that they are engaged in an atypical transaction. Standard form contracts are drafted by businesses and other commercial enterprises that engage in multiple transactions over a period of time. Instead of negotiating with each new party, businesses reduce individual transaction costs by offering the other party (normally the consumer) a contract on a take it or leave it basis. The cost of drafting the standard form contract is thus spread over many transactions and passed on to consumers in the form of lower prices. This is the positive aspect of standard form contracts.[151]

The many negative aspects associated with the use of standard form contracts are relevant to the thesis of this Article. First, standard form contracts contain lengthy paragraphs of densely drafted terms that may allocate legal rights (i.e., waivers and admissions) that only a lawyer or one well-versed in contract law can understand.[152] Second, as the standard form contract is drafted typically by businesses and used repeatedly in their dealings with consumers, these contracts are drafted to favor and reward the draftsmen's employer—the businesses.[153]

What is even more insidious is that because contracts are lengthy, dense, and ubiquitous, in most transactions—including transactions as important as financing the purchase of a house with a mortgage

149. PERILLO, *supra* note 5, at § 7.1. The demise of the use of the seal has not gone unnoticed or without criticism. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 100 (7th ed. 2007) ("[I]t's disappearance is a puzzle.").

150. RESTATEMENT (SECOND) OF CONTRACTS § 95 et. seq. (AM. LAW INST. 1981).

151. *See* W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW 30 (1996).

152. *Id.*

153. *Id.*

that is executed on as a standard form contract[154]—the consumers entering into these contracts do not read them. Even if they do read them, they do not understand them.[155] Although Henry Maine presented a thesis that as societies evolve and modernize contract and other rights that were once grounded on one's status rights (i.e., as a peon, serf, nobleman, or lord) will eventually evolve and be based on individual rights or individually negotiated rights, one can make the argument that the evolution did not stop there. Instead individual rights have been supplanted by the "status right" of being a "consumer" and a "consumer" does not read or understand the standard form contract that is almost universally used in all consumer transactions.[156] Given the rise and almost universal use of standard form contracts, contract rights have evolved from status to contract (i.e., individual rights) back to status rights (i.e., consumer versus commercial business entity).[157]

What that means for the thesis of this Article is that a sealed contract, because it is not a standard form contract, represents a significant outlier in the world of contracting. A sealed contract is anomalous in that it is not used repeatedly by businesses or consumers in their transactions,[158] nor is it a complex customized contract drafted by two lawyers representing the parties to the contract.[159] A sealed contract would occupy a niche of contracting that would allow a party to bind his or her promise in a gratuitous or non-gratuitous transaction simply because that party intends to be bound.[160] In other words, the act of sealing would become the exception in contracts, not the norm, and would not run the risk of being used indeterminately or unknowingly.

154. *See* Alex M. Johnson, Jr., *Preventing a Return Engagement: Eliminating the Mortgage Purchasers' Status as a Holder-in-Due-Course: Properly Aligning Incentives Among the Parties*, 37 PEPP. L. REV. 529, 553 (2010).

155. *Id.*

156. HENRY SUMNER MAINE, ANCIENT LAW 100–01 (2007).

157. SLAWSON, *supra* note 151, at 135.

158. Admittedly, nothing would preclude businesses from drafting standard form contracts with a requirement that they be sealed by the consumer or the party who did not draft it. But why would they bother? The seal is not a standard form contract requirement and through the talents of the scrivener who drafted the standard form contracts, there should be no question regarding the existence of consideration or the enforceability of that standard form contract. Adding sealing to such a contract would simply add another cost with no benefit but with a potential harm that the standard form contract was not properly sealed.

159. In other words, it is not a relational contract. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090–91 (1981) (defining relational contracts).

160. This comports with current law and economic theories that parties should be legally bound to an enforceable promise if that is their wish and there are no exogenous reasons (i.e., duress or unconscionability) not to respect that intent nor indigenous reasons (i.e., lack of capacity, intoxication, minority) not to respect those wishes. *See supra* note 122 and accompanying text.

Thus, the reasons for the demise of the seal at common law would not exist is the use of the seal is resurrected.

V. CONCLUSION

The oft-stated shibboleth that promises unsupported by consideration are unenforceable is wrong, as is the related claim that gift promises are mere *nudum pactums* and are likewise unenforceable. Instead, certain promises and acts that are executed with certain formalities are enforceable. Although they are distinct and varied, they satisfy certain functional formalities: ritualistic, channeling, and, most importantly, evidentiary and corroborative. The latter two formalities allow courts to adjudicate disputes efficiently and with low error costs.

Although these promises are factually and legally distinct, they all lead to the conclusion that what is important about the promise is not so much the intent of the promisor, but the fact that the intent can later be proven in a way that demonstrates that the promisor desired to be bound—that the promise was not precatory in nature.

Theory and practice support the view that one should be able to bind her future self to act as promised as long as there are no inequitable consequences of such a promise. Thus, the resurrection and expanded use of the seal in contractual relationships is now warranted. This resurrection and expansion is buttressed by the fact that the doctrine of consideration in contract law has become almost illusory in nature. The formalities provided by the use of a seal in contractual relations (as opposed to donative contexts) satisfies those formalities that are necessary to find an irrevocable gift promise.

In addition, the use of the seal in donative transfers and contractual relations provides a degree of certainty to the enforceability of a promise that may be lacking if the doctrine of consideration is the only method used to examine it. That certainty will induce and increase donative transfers avoiding the necessity of consulting legal counsel to complete the formalities required for an inter vivos trust (the other method of making an irrevocable inter vivos transfer). It will also simplify arms-length bargaining or contracting without requiring something so cumbersome as consideration. In both donative and arms-length conveyances, the use of the seal will reduce adjudicative and error costs regarding the enforcement of both donative and non-gratuitous agreements.

As a result, sealed contracts must be added to those irrevocable gift promises that are currently enforced: to wit, promises made in inter vivos irrevocable trusts and testamentary wills, and promises that induce reliance per the Restatement (Second) of Contracts § 90. When this is accomplished, the acts of contracting and accomplishing an effective and irrevocable donative transfer will be more efficient.