CONTRACT, POWER, AND THE VALUE OF DONATIVE PROMISES

Sabine Tsuruda[*]

According to the donative promise principle in U.S. contract law, an unrelied-upon promise to make a gift is unenforceable. Commentators worry that enforcement would taint the gift-giving practice by obscuring the promisor's motive, leaving it unclear whether the gift was ultimately given out of, for example, friendship, or from fear of legal sanctions. This Article argues that courts should abandon the donative promise principle. The principle creates doctrinally and morally perverse incentives to rely on the promise by conforming to promisor attempts at undue influence. Further, people who are too poor to change their circumstances in reliance on donative promises are left dependent on the whim of promisors for accessing basic goods and services.

This Article accordingly introduces an alternative to reliance-based enforcement—enforcement based on the promisee's reasonable and foreseeable need for the promised gift. It argues that enforcement on the basis of substantial need can counteract improper promisor influence by making donative promises immediately enforceable by vulnerable promisees. The specter of enforcement need not obscure promisors' motives, at least not any more so than criminal sanctions might obscure people's motives for stopping their cars at crosswalks or taking care of children. Indeed, enforcement may enhance the authenticity of donative relationships by mitigating the risk that the promised gift will be perceived as a carrot to conform to the promisor's wishes. Enforcement could also facilitate trust by obviating reasons to strategically overinvest in the promise and create contingency plans. But donative promises are not homogenous. Gift giving occurs within a variety of social settings that may be characterized by different power dynamics and moral values, some of which may be ill served by contract principles. This Article closes by briefly discussing one such case: volunteer work. Donative promises should not be pushed into the "world of contract," but contract may need to be adjusted for donative promises.

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[*] Predoctoral Fellow in Law and Philosophy, UCLA School of Law. Ph.D. Candidate, UCLA Department of Philosophy. B.A., Stanford University, 2006; J.D., 2016, UCLA School of Law. This Article is forthcoming in the *South Carolina Law Review*. I am grateful for help and comments on this topic from Jeremy Anderson, Lindsey Chambers, Hugh Collins, Nicolas Cornell, James Edwards, Jorah Dannenberg, Max Etchemendy, Barbara Herman, Katherine Kim, Gillian Lester, David Plunkett, Seana Shiffrin, Noah Zatz, the participants in the Stanford Legal Philosophy Workshop, and the members of the UCLA Ethics Writing Seminar.

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INTRODUCTION

If I promise to pay your tuition on the condition that you quit smoking, and you accept, we have likely made a contract. Under U.S. law, a contract is described as a legally enforceable promise or set of promises,[1] and a

[1] "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981). In this paper, I assume that contracts are in fact promises, and that contractual (and moral) obligations to perform may thus arise merely from having made a legally enforceable promise. *Compare* CHARLES FRIED, CONTRACT AS PROMISE (4th ed. 2015) (arguing that contracts are legally enforceable promises), *with* P.S. ATIYAH, PROMISES, MORALS, AND LAW (1983) (arguing that a promise alone normally does not create an obligation to perform until the promisee

promise is generally enforceable when it is made in exchange for valuable consideration,[2] such as money, goods, services, and promises to do or transfer something in the future, including a promise to abstain from smoking.[3] But if I just promise to pay your tuition, regardless of whether you quit smoking, my promise likely does not create a contract. Promises to make gifts are—precisely because of their donative character—not supported by consideration.[4] Instead, donative promises are typically enforceable only when the promise reasonably and foreseeably induces the promisee to rely on the donative promise.[5] I will refer to the principle that donative promises are typically unenforceable in the absence of reliance as the "donative promise principle."[6]

This Article argues that courts should abandon the donative promise principle. The principle creates perverse legal incentives to submit to promisor influence and exacerbates underlying power imbalances between promisors and promisees. First, donative promises occur against a background of profound social and economic inequality, and so the promised gift is often something the promisee desperately needs, such as

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relies on the promise).

[2] Courts will generally not inquire as to the adequacy of consideration. *See* Restatement (Second) of Contracts § 79 ("If the requirement of consideration is met there is no additional requirement of (a) a gain or advantage to the promisor and loss to the promise; (b) equivalence of values exchanged, or (c) mutuality of obligation."). Even so, "gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance." *Id.* § 208 cmt. c.

[3] *See* Talbott v. Stemmons, 89 Ky. 222 (1889) ("The right to use and to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless the surrender of that right caused the promise [to pay the plaintiff $500], and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to support the promise."); 3 WILLISTON ON CONTRACTS § 7:4 (4th ed. 2015) ("[A]bstaining from smoking and drinking, though in fact in the particular case a benefit to the promisee's health, finances, and morals and of absolutely no tangible benefit to the promisor, is a legal detriment insofar as the promisee is concerned, and if it is requested as such by the promisor, it is sufficient consideration for his promise.").

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

[5] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1). And even then, a judge may refuse to enforce the promise if enforcement is not required to avoid injustice. *See id.*

[6] Here I follow Melvin Eisenberg's use of the name "donative promise principle." *See* Melvin Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 822 (1997).

food or shelter.[7] By making promissory estoppel the primary basis for enforcing donative promises, the donative promise principle gives the promisee a legal reason to rely on the promise, namely, the availability of enforcement.[8] Thus, when a promisor attempts to use the promise as a source of influence over the promisee—the promisor might hope to change the promisee's religious faith,[9] or encourage the promisee to conform to gender stereotypes[10]—the promisee has a legal incentive to submit and thereby reasonably and foreseeably rely on the promise.[11] Such incentives not only risk reinforcing preexisting inequality, but are also doctrinally at odds with unconscionability, duress, and undue influence doctrines, which aim to remove legal incentives to engage in improperly induced courses of action.[12]

Second, the donative promise principle provides uncertain access to contract for promisees who may have the greatest need for the promised gifts: indigent and caretaking promisees. Promissory estoppel requires that the plaintiff change her position in reliance on the promise.[13] But poverty can be a barrier to such reliance—the promisee may not have a job from which to take time off, or an alternative to the gift to turn down. Caretakers who are promised financial support out of gratitude or recognition of their care may likewise fail to rely on such promises because they might have continued their caretaking anyway.[14] Yet the unlikelihood of detrimental reliance does not mean that caretaking and indigent promisees are any less in need of the promised gifts. By failing to reach such promisees, the donative promise principle leaves such promisees dependent on the whim and continued good will of promisors.

Given the risks of undue influence and disempowerment in the current legal regime, why not enforce donative promises in the absence of reliance? Commentators worry that enforcement would obscure the moral and

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[7] *See infra* text accompanying notes 83–85.

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

[9] *See infra* 83–85.

[10] *Cf.* Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898) (holding that a grandfather's promise of financial support was enforceable by the granddaughter because the grandfather made the promise to encourage her to stop working); *infra* text accompanying notes 77–80.

[11] *Cf. supra* note 8.

[12] *See infra* Subpart II.A.

[13] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f.

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

affective motives of the promisor, leaving it unclear whether the gift was ultimately given out of, for example, friendship, or from fear of legal sanctions.[15] By undermining the communicative power of donative promises, enforcement would taint the gift-giving practice.[16] Yet the specter of enforcement need not obscure promisors' motives, at least not any more so than criminal sanctions might obscure people's motives for stopping their cars at crosswalks, or taking care of their children. Indeed, I argue that contractual enforcement may actually enhance the authenticity of donative promissory relationships by mitigating the risk that the promised gift will be perceived as a carrot to conform to the promisor's wishes.

In contrast to the standard doctrinal and philosophical position, this Article thus argues that enforcing a variety of donative promises—even in the absence of reliance—could enhance values of trust and party autonomy internal to gift-giving practices. Rather than focusing on the existence or potential for changed circumstances—an imperfect and discriminatory proxy for promisee dependence on the promised gift—I argue that we should adopt a need-centered approach to inquire directly about the significance of the gift in the promisee's life. I propose that donative promises should be enforceable when the promisor should reasonably and foreseeably expect that the promised gift supplies a *substantial need* for the promisee, and injustice can be avoided only if the promise is enforced.

By dispensing with the requirement of actual reliance, a need-centered theory would make many donative promises that are currently enforceable only when detrimentally relied upon immediately enforceable. Treating substantial need for the gift as a basis for enforcement would also extend contract rights to donative promisees whose indigence and personal life make detrimental reliance particularly difficult. A need-centered theory of enforcement could thus counteract the risk of undue influence by reducing legal incentives to conform to promisor influence.

Apart from remedying defects in the current legal regime, enforcement more broadly could support trust in donative promissory relationships. The more a promisee relies on a promise, the more likely a promisor is to feel guilt for breaking the promise.[17] Accordingly, promisees will tend to strategically rely in anticipation of such "psychological lock-in" in a legal

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[15] *See, e.g.*, Eisenberg, *supra* note 6, at 848. Legal theorists also offer pragmatic and consequentialist arguments against enforcing donative promises. *See, e.g.*, Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). I do not address these arguments here, as my focus is on deontological arguments for and against enforcement.

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

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

regime where promises are not enforced.[18] I argue that strategic reliance can be manipulative, and that the existence of such a strategy may give a promisor reason to doubt the authenticity of the promisee. Strategic reasons to overrely may therefore inject distrust in even the most well intentioned of relationships. By obviating strategic reasons to rely, legal enforcement can enhance parties' power to autonomously shape their relationship and support the trust upon which promising depends.

Donative promises are, however, not homogeneous. Gift giving occurs within a variety of settings that may be characterized by different power dynamics and moral values, some of which may be ill-served by contract principles. To illustrate, I discuss one such case: promises to volunteer one's labor. While the commentary on the donative promise principle focuses on promises of money and interpersonal caretaking,[19] volunteer work has received much less, if any, attention. This is regrettable because volunteer work is potentially a paradigm illustration of how contract can be a poor fit for donative promises. As principles for market labor, service and employment contract principles are in tension with the associational and personal values of volunteer work. For example, service contract duties of flawless performance may undermine volunteer work's potential to be inclusive with respect to skill and ability.[20] Contract law more broadly may therefore need to be adjusted to enforce donative promises, whether on the basis of need or reliance.

This Article develops these arguments by inquiring how contract shapes power and associational values within donative promising practices.[21] Part I provides an overview of the scope and content of the donative promise principle and the character of the reliance it requires. Part II argues that the donative promise principle creates perverse legal incentives to submit to improper promisor influence and exacerbates preexisting power imbalances. Part III presents and defends a principle of enforcing donative promises based on the promisee's substantial need for the promised gift. Part IV uses the underexamined case of volunteer work to illustrate how contract law

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[18] *Id.* at 44.

[19] *See, e.g.*, Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L. J. 155 (1989).

[20] *See* Sabine Tsuruda, *Volunteer Work*, in PHILOSOPHICAL FOUNDATIONS OF LABOR LAW (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., forthcoming) (arguing that volunteer work's skill-based inclusivity can provide a legal and moral basis for distinguishing volunteer work from employment for purposes of wage and hour law).

[21] This methodology contrasts with the two dominant strategies for criticizing the donative promise principle: a public policy in favor of charitable giving, or, alternatively, rejecting any meaningful distinction between bargains and gifts. *See, e.g.*, Baron, *supra* note 19 (arguing that gifts are forms of exchanges and that the consideration doctrine devalues gifts by treating gifts differently than bargains); *infra* notes 48–49 and accompanying text.

may need to be adjusted more broadly to properly enforce donative promises.

I. THE DONATIVE PROMISE PRINCIPLE

Under the donative promise principle, a promise to make a gift is typically not enforceable unless the promisee has detrimentally relied on that promise. This Part provides a doctrinal explanation of the content and scope of the donative promise principle. In Subpart A, I argue that donative promises are normally not enforceable under a consideration theory. Donative promises tend to be affective and voluntary promises that are neither induced by nor conditioned on an exchange, even when it may be reasonable for promisors to expect reciprocation from promisees. Thus, under the donative promise principle, promissory estoppel is the primary legal theory for enforcing a donative promise. Charitable subscriptions, however, are sometimes enforced under a consideration theory, and hence constitute a significant but narrow exception. In Subpart B, I explain that donative promises induce detrimental reliance either by empowering the promisee to pursue a new project, or by influencing the promisee to conform to promisor values. I then address donative promises that tend to be unenforceable under a reliance theory, using promises to caretakers and indigents as paradigm examples.

A. Consideration

Making a promise typically creates a contract when the promise is given in exchange for valuable consideration,[22] for some bargained-for good,[23] service, forbearance, or promise of later performance.[24] But part of what is

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[22] *See supra* note 1.

[23] "To constitute consideration, a performance or return promise must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS § 71(1); *see also* 3 Williston on Contracts § 7:4 (3th ed. 1957) ("The very term 'charitable subscription' indicates that the subscriber's promise is made as a gift and not in return for consideration. There is no bargain between the parties.").

[24] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 71(3), 75; *cf.* Randy E. Barnett, *A Consent Theory of* Contract, 86 COLUM. L. REV. 269, 317 (1986). Lord Mansfield famously sought to abolish the doctrine of consideration in favor of a doctrine of "moral consideration:"

> Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.
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> Hawkes v. Saunders, 1 Cowp. 289, 98 Eng. Rep. R. 1091 (1782).

potentially distinctive about a promise to make a gift is that no such valuable consideration is bargained for in return.[25] A foundation does not ask for payment as a condition for providing vaccines; a volunteer does not promise or expect to work for a wage.[26]

Rather, donative promises are typically voluntary and purport to be made from an affective or moral motive, such as love or civic duty.[27] For example, in Dougherty v. Salt,[28] an aunt gave a signed promissory note for $3,000 to her eight-year-old nephew for "value received."[29] The court held that the note was not sufficient evidence of consideration.[30] The aunt had given the plaintiff the note because "she loved him very much" and "was going to take care of that child." [31] Judge Cardozo explained that "[a] note so given is not made for 'value received,' however its maker may have labeled it."[32] The court thus concluded that the note was a gift.[33]

As *Dougherty* illustrates, people often use gift promises to express ongoing love and support, and not to purchase something or induce any particular course of action as a condition of making the promise. Of course, a gift promise may not always be so well intentioned. People may use donative promises to exercise illegitimate influence over other people's lives. [34] But even in such cases, what makes the promise a donative promise is that the promise still purports to express affective motives, and the promisor does not communicate to the promisee that performance requires the promisee's submission to influence.[35] A donative promise is thus

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For a discussion of the evolution of Lord Mansfield's ideas on consideration, see generally Bernard L. Shientag, Lord Mansfield Revisited—A Modern Assessment, 10 FORDHAM L. REV. 345 (1941).

[25] "One of the functions of the doctrine of consideration is to deny enforcement to a promise to make a gift." RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f.

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

[27] *Cf.* Eisenberg, *supra* note 6, at 842 ("[A] gift is a transfer that is made, or at least purports to be made, not for economic gain, but for affective reasons or to satisfy moral duties or aspirations, and which is not expressly conditioned on a reciprocal exchange, so that any later exchange that occurs is not, or at least does not purport to be, viewed by the parties as the price of the transfer.").

[28] 125 N.E. 94 (N.Y. 1919).

[29] *Id.* at 94.

[30] *See id.* at 95.

[31] *Id.* at 94.

[32] *Id*. at 95 ("Nothing is consideration that is not regarded as such by both parties.").

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

[34] *See infra* Part I.B.1.

[35] *See, e.g.*, *Ricketts*, 77 N.W., at 367 (holding that a grandfather made his granddaughter a donative promise that was not supported by consideration even though his

unlikely to be supported by consideration, and consequently unlikely to be enforced on a consideration theory.[36]

1. Reciprocity and Exchange

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

But it does not follow that such expectations should be understood as the price for promise.[39] A person may help a friend move into a new apartment and with rides to and from the airport, and the friend may in turn help out in similar ways. It would be odd to characterize the pattern of reciprocation between friends as mere responses to favors. The reciprocation is rather likely a way of showing concern and taking an interest in a friend's life.

If the friendship becomes one-sided, it may of course be reasonable for the help and support to slow or cease, but that may be because the failure of

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clear and express intention was to "influence" her to quit her job); *see also infra* Part I.B.1.

[36] Some courts have adopted a slightly stronger position and suggested that, as a definitional matter, gifts are not supported by consideration. *See, e.g.*, Bleick v. North Dakota Dept. of Human Services, 861 N.W.2d 138 (N.D. 2015) ("A gift is a voluntary transfer of property made without consideration.").

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

[38] For a discussion of moral challenges surrounding creating and discharging debts of gratitude, see generally Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 391 (2012). For a discussion of challenges that the ethics of ingratitude may pose to enforcing donative promises, see Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979).

[39] *See* Eisenberg, *supra* note 6, at 842–44 (explaining that the reciprocity that may be expected by a donative promisor is unlike consideration, which is regarded by the promisor as a "requirement" for performance). I thus agree with Jane Baron that gifts are often not "one-sided transactions," but reject her conclusion that we should assimilate gifts to exchanges and gift giving to "non-commodity markets." Baron, *supra* note 19, at 196–98; *cf.* Rose, *supra* note 4, at 298 (arguing that there is "leakage" between gifts and bargains). Even so, I am ultimately sympathetic with Baron's position that the law's differential treatment of gifts and exchanges may be unprincipled and may actually undermine the values of gift-giving practices. *See* Baron, *supra* note 19, at 200–02; *infra* Part II.

reciprocity indicates a defect in their relationship, such as insensitivity or callous selfishness, rather than merely because a favor has not been returned.[40] An expectation of reciprocation thus does not imply that the gift or the donative promise was self-interestedly motivated. On the contrary, it is reasonable to expect reciprocation within relationships that are supported by ongoing donative practices and mutual concern, such as friendships and communities. Assimilating reciprocation and expectations of reciprocation to exchange suggests a tit-for-tat conception of reciprocity that oversimplifies and impoverishes the moral richness of donative relationships.[41]

So even if donative promises have some of the same features as commercial exchanges, donative promises still exhibit a potentially distinctive affective and moral character that supports a wide range of associational life. A legal regime that aims to give effect to promisor intent, and that aims to leave space for a diverse associational life, should be weary of importing into the law too narrow a view of donative promising; gifts seem to be neither one-sided nor wholly reducible to market-like exchanges.

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

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

For example, in Allegheny College v. National Chautauqua City Bank of Jamestown,[42] the promisor made a charitable pledge to Allegheny College to set up a memorial fund in the promisor's name.[43] The court held that in accepting the pledge, the college assumed a duty to create and

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[40] Such as a buyer might rightfully reject defective goods. *See* U.C.C. § 2-601 (AM. LAW INTS. & UNIF. LAW COMM'N 2002).

[41] It may certainly be true that some cultures engage in patterns of gift giving that have a more tit-for-tat structure common to the marketplace. *See* Baron, *supra* note 19, at 194–95. If they truly do resemble market exchanges in practically every way, I would not be opposed to simply treating them like ordinary bilateral contracts. Unlike commentators who worry that contract may commodify, *see infra* Part III.D, I ultimately argue that enforcement can support the affective purposes of donative promises (when they have such purposes), and thus the idea that gifts may be similar to exchanges does not pose a problem for my position.

[42] 159 N.E. 173 (N.Y. 1927).

[43] *See id*. at 174.

maintain the fund, and that duty was a sufficient legal detriment to constitute consideration for the charitable pledge.[44]

Courts have also enforced charitable subscriptions on a consideration theory even when no specific purpose was requested by the promisor. For example, in In re Morton Shoe Co.,[45] the court held that the promisee's agreement to "apply the pledged amounts in accordance with the charitable purposes set forth in its charter . . . [was] sufficient consideration to support the [charitable pledge]."[46]

Cases like *Allegheny* and *Morton Shoe* illustrate that donative promises are sometimes enforced on a consideration theory where there is some evidence that the charity agreed to certain terms as a condition for receiving the donation.[47] But this is a narrow phenomenon applying largely to charitable subscriptions, and courts and scholars alike have claimed that the exception is in fact a fiction used to facilitate public policy in favor of charitable subscriptions.[48]

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[44] *See id.* 176.

[45] 40 B.R. 948 (Bankr. D. Mass. 1984).

[46] *Id.* at 951; *cf.* Ladies Collegiate Institute v. French, 82 Mass. 196, 201 (1860) ("It is held that by accepting such a subscription the promisee agrees on his part with the subscribers, that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon a well settled principle in respect to concurrent promises.").

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

[48] *See, e.g.*, Jewish Fed'n of Cent. New Jersey v. Barondess, 560 A.2d 1353, 1354 (N.J. 1989) (finding that the statute of frauds is not a defense to enforcing a charitable subscription because "[i]f a charitable subscription is disguised as a contract in order to effectuate a public policy, logic would dictate that the law should not then permit the institution of a contractual defense to undermine that policy"); More Game Birds in Am. v. Boettger, 14 A.2d 778, 780 (N.J. 1940) (explaining that "in cases where public and charitable interests are involved, the courts lean towards sustaining such contracts, sometimes on consideration which in a purely business contract might be regarded as questionable," thus suggesting that "public policy forms the basis upon which consideration is spelled out in order to impose liability on charitable subscriptions"); William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 PENN ST. L. REV. 477, 487 (2015) (describing the application of the consideration doctrine to enforce charitable pledges as a "judicial concoction[]").

> [T[he charity's obligation could only be consideration if it provides a benefit to the donor or is a detriment to the charity. The charity cannot provide a private benefit to an individual donor without jeopardizing its tax-exempt status, and there is no detriment to the charity in receiving money to fulfill its charitable mission. Presumably, a charity would simply reject the contribution if a donor wanted the donation to go toward a specific project that the charity did not wish to undertake. Perhaps most important, the charity already has a preexisting duty to use all funds received for a charitable purpose.[49]

For my purposes here, not much turns on whether a charitable subscription is "disguised as a contract" when the subscription is enforced under a consideration theory.[50] The important doctrinal point is rather that some donative promises are, at least superficially, enforced on a consideration theory, but only narrowly and on uncertain grounds.

B. Promissory Estoppel

I have been arguing that donative promises are typically not supported by consideration. Thus, if donative promises are enforced, they are more likely to be enforced on a theory of promissory estoppel.[51]

1. Inducing Reliance

In the context of donative promises, promissory estoppel demands a different orientation towards the power relations between donor-promisors and donee-promisees than a consideration theory. A consideration analysis of a donative promise tends to be focused on whether the formal

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[49] Drennan, *supra* note 48, at 488 (citations omitted); *cf.* 3 WILLISTON ON CONTRACTS § 7:50 (4th ed. 2015) ("A gift is by definition not a bargain, and a promise to make a gift is not converted into a bargain by the donee's promise to accept the gift, or by its acceptance of all or part of gift.").

[50] *Jewish Federation*, 560 A.2d at 1354.

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

requirements of consideration are met.[52] Of course, if that initial hurdle is passed, it may then be appropriate to investigate relative power as required by duress,[53] undue influence,[54] and unconscionability doctrines.[55] But since donative promises often fail to meet the requirements of consideration, a consideration analysis of a donative promise will tend to leave the power relations of the parties opaque.[56]

In contrast, a reliance analysis inquires into the power of the promise—and thus, of the promisor—to shape the activities and choices of the promisee. Promissory estoppel generally requires showing that "the promisor should [have] reasonably expect[ed] to induce action or forbearance on the part of the promisee" in making the promise, the promise in fact induce[d] such reliance, and that "injustice can be avoided only by enforcement of the promise."[57] Hence, it is not enough that the promisee merely rely on the promise; making the promise must *induce* the promisee's reliance.

For example, in Harvey v. Dow,[58] the plaintiff's parents owned a large tract of land.[59] Growing up, the plaintiff and her brother had often discussed building their homes on the land—indeed this was a common topic of conversation within the family as a whole—and promises were made to leave the children "some land in the future."[60] The plaintiff

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[52] *See supra* Subpart I.A.

[53] RESTATEMENT (SECOND) OF CONTRACTS §§ 174–76 (explaining that duress by physical force prevents formation of a contract while duress by an improper threat that leaves the party with "no reasonable alternative" is voidable by that party).

[54] *Id.* at § 177(2) (explaining that a contract may be voided by a party whose "manifestation of assent [was] induced by undue influence by the other party . . . .").

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

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

[57] RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

[58] 962 A.2d 322 (M.E. 2008).

[59] *See id.* at 328.

[60] *Id.*

eventually financed and built a home on a portion of the land with the help and encouragement of her parents, but her parents ultimately refused to give her a deed.[61] The court found that a specific promise to convey the land could be implied from the parents' conduct, and concluded that it "would seem to be eminently reasonable and foreseeable" for the plaintiff to have built her home in reliance on that promise in light of the parents' support.[62]

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

> Against the backdrop of the parties' general understanding that [the plaintiff] would one day receive property as a gift or inheritance from her parents, she decided to build a new house on their land. [Her father] agreed to the location, obtained a building permit to allow construction at that site, and not only acquiesced in the house being built, but built a large portion of it himself.[63]

Harvey illustrates that donative promises are not always inert; they can facilitate going relationships of support that empower promisees to pursue freely chosen projects they might not have been able to pursue on their own.[64]

The empowerment potential of the promise in *Harvey* depended on the parents having something of value to the plaintiff. If the parents had not had the land, or if the plaintiff had been indifferent to the land, the parents would not have been able to make the promise, or the promise would not have had the potential to shape the plaintiff's life plans by encouraging her to build.[65] To be sure, the plaintiff might have been induced to build even if she did not want the land. People are vulnerable to the feelings of their close associates. If the plaintiff had felt that her parents would have been disappointed if she did not build, and her parents had in some way communicated that to her, the plaintiff might have felt pressure to build. But under these modified facts, the potential for the promise to reasonably

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[61] *See id.* at 324–25.

[62] *Id.* at 327.

[63] *Id.* at 325–26.

[64] *Cf.* Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974) ("[C]haritable subscriptions often serve the public interest by making possible projects which otherwise could never come about . . . .").

[65] To be sure, it is conceivable that the plaintiff might have been reasonably and foreseeably induced to build even if she did not want the land if the plaintiff had felt that her parents would have been pleased (and pleasing them was important to her).

and foreseeably induce reliance still lies in the promisors' power over the promisee.[66] The centrality of the promisor's power in inducing reliance points to a second mode of inducement: influence.

In Ricketts v. Scothorn,[67] the plaintiff earned $10 per week in a store.[68] One day the plaintiff's grandfather visited the store and gave her a promissory note for $2,000.[69] The grandfather told the plaintiff, "I have fixed out something that you have not got to work any more [sic] . . . . [N]one of my grandchildren work, and you don't have to."[70] The plaintiff then embraced her grandfather and immediately resigned.[71] But over the course of the following year, the grandfather was only able to pay interest on the note.[72] After a year of unemployment, the plaintiff returned to work with the help of her grandfather.[73] The court held that the promissory note, though not supported by consideration, was enforceable against the grandfather's estate because the grandfather had "intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due."[74]

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

But *Ricketts* is also open to an alternative reading. Recall that in

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

[67] 77 N.W. 365 (Neb. 1898).

[68] *Rickets*, 77 N.W. at 366.

[69] *Id.* at 366.

[70] *Id.*

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See id.* at 366–67.

[75] *See id.* at 366.

[76] Note that the promise may induce reliance by empowering that choice even if the promised gift was not transferred during the life of the grandfather. What matters is that, at the time of the plaintiff's choice to resign, she regarded the promise as a reason to believe she would not need to work anymore.

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

These alternative hypotheses about the plaintiff's motives are speculative, but they help to explain the court's theory that the plaintiff was influenced rather than empowered to choose.[80] These alternative hypotheses also illustrate another face of donative promises: While donative promises may empower people to pursue freely chosen projects, donative promises can also have a disempowering effect on the promisor by operating as a carrot to conform to promisor values, and hence, as vehicle for forms of manipulation and undue influence. While it is possible that the grandfather's promise empowered the plaintiff to choose to quit, it is also possible that the grandfather's promise empowered him to pressure her to conform to a gendered and classist distaste for "working girl[s]."[81]

The risk that a donative promise will induce reliance through promisor

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[77] *See id.* at 367 (explaining that the grandfather "doubtless desired that she should give up her occupation").

[78] The plaintiff might have also thought at the time that accepting her grandfather's note was a more secure financial option than her job, and accordingly may have wanted to please him to ensure her good standing and his long-term support.

[79] *Ricketts*, 77 N.W. at 367.

[80] An influence interpretation also comports with the often dependent social and economic status of nineteenth century middle class women, and the law's likely role in reifying that status. *See* Mary Louise Fellows, *His to Give; His to Receive; Hers to Trust: A Response to Carol M. Rose*, 44 FLA. L. REV. 329, 334–36 (1992). Fellows argues that the court may have been mistaken about the plaintiff's motives in *Ricketts*, and that the court's framing of her choice as one made under the influence of her grandfather may simply reflect gendered stereotypes about women's lack of agency. *See* id. at 335–36. Although I do not dispute Fellow's interpretation of the facts, as a critical matter it may also be valuable to be open to the likely possibly that the plaintiff indeed was influenced, and that gift promises may have (and perhaps have often had) a disempowering influence on certain donee-promisees.

[81] *Ricketts*, 77 N.W. at 367. *See* Fellows, *supra* note 80, at 335–36 ("For some reason it bothered the grandfather that his granddaughter was working. It may have been because her working indicated publicly that he was not financially able to provide for his family . . . .").

influence is not limited to interpersonal promises or middle class families. Donative promising practices occur against a background of profound social and economic inequality.[82] Indeed, it is precisely because there are people who need vaccines—or need the education, the food, or the shelter—but cannot secure them through their own labor or from the government that organizations like UNICEF and the Gates Foundation offer to provide them for free.[83] Under such conditions of need and inequality, donee-promisees are vulnerable to feeling pressure to conform to the values of charitable institutions. Refugees may, for instance, feel pressure to adopt a religious charity's faith to access basic goods and shelter.[84] Donee-promisees might also reasonably feel pressure to conform their self-presentation to potentially disempowering victim tropes.[85] In the international development context, there is evidence that some religious charities may be using their position of trust and the need of recipients to pressure religious conversion.[86] While U.S. contract law may not govern all such cases, they illustrate the potential for manipulation and undue influence in donative practices, and we can imagine like cases might happen domestically.[87]

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[82] Compare, for instance, Bill and Melinda Gates with the homeless residents of Washington State. While the Gates Foundation is often associated with philanthropy abroad, it also directs a substantial percentage of its resources to domestic philanthropy. *See 2015 Annual Report*, GATES FOUNDATION http://www.gatesfoundation.org/Who-We-Are/Resources-and-Media/Annual-Reports/Annual-Report-2015 (last visited Feb. 26, 2017). For an overview of the Gates Foundation's domestic homelessness projects, see *Homelessness and Family Stability*, GATES FOUNDATION, http://www.gatesfoundation.org/What-We-Do/US-Program/Washington-State/Homelessness-and-Family-Stability (last visited Feb. 26, 2017).

[83] *See Immunization*, UNICEF USA, https://www.unicefusa.org/mission/survival/immunization (last visited Feb. 26, 2017); *Vaccine Delivery*, GATES FOUNDATION, http://www.gatesfoundation.org/What-We-Do/Global-Development/Vaccine-Delivery (last visited Feb. 27, 2017).

[84] *See, e.g.*, http://www.telegraph.co.uk/news/2017/01/30/muslim-refugees-converting-christianity-find-safety/.

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

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

[87] There is, however, an emerging critical literature on the compatibility of charities with democracy. *See e.g.*, PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016); Rob

2. Caretaking and Indigence

Donative promises can thus induce reliance by empowering the promisee to realize important life projects, but may also induce reliance by enabling the promisor to successfully influence the promisee to conform to the promisor's values.[88] In both cases, promissory estoppel affords some protection for promisees who substantially change their lives by acting on the reliance that donative promises encourage. In *Harvey*, enforcement of the promise was predicated the plaintiff's decision to build her dream home; in *Ricketts*, on the plaintiff's decision to forego valuable employment.

But many donative promises do not have the facilitation of such projects and changes as their aim. For example, a brother may promise to financially support her sister while she cares for their elderly relative,[89] and a foundation may promise to administer free vaccinations to a poor neighborhood. In both cases, it seems plausible that the promisees might not change their position in reliance on the promise. The sister may have been taking care of their relative for a long time, and might continue to do so regardless of the donative promise. Similarly, the residents of the neighborhood might not have forgone other opportunities to get vaccinated (perhaps that was the only opportunity they had), and may not have otherwise relied, such as by taking time off work. It is hard to change one's position in these ways when one has little to lose and little to invest. Yet the promisees in both kinds of cases may still desperately require the promised gift to meet their basic needs.

To what extent does promissory estoppel recognize such need-based forms of reliance? Potentially very little.[90] According to the *Restatement (Second) of Contracts*,

> [A promise to make a gift] is ordinarily enforced by virtue of the promisee's reliance only if his conduct is foreseeable and reasonable and involves a *definite and substantial change of position which would not have occurred if the promise had not been made*.[91]

Reich, *Repugnant to the Whole Idea of Democracy? On the Role of Foundations in Democratic Societies*, 49 POL. SCI. & POL. 466, 466–68 (discussing how private foundations have "plutocratic elements" that pose a challenge for justifying support for private foundations in a democratic society).

[88] *See supra* Subpart I.B.1

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

[90] *See supra* note 92.

[91] RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt f. (emphasis added). The Restatement qualifies this general principle by noting that sometimes "other policies" support a detrimental reliance claim. *Id.* Examples of such policies include: prohibitions on unjust enrichment (permitting the promisor to "reclaim the subject of the promised gift

The *Restatement* suggests that reliance is typically protected by promissory estoppel only when the promise induces the promisee to do something different than she would have done otherwise.[92] For example, in Dewein v. Estate of Dewein,[93] a brother promised his sister to "take care of [her] for life" out of apparent gratitude for the many years of care his sister administered to their family.[94] The court held the promise unenforceable on a theory of promissory estoppel because the sister had not shown that "she had ever intended to act otherwise than the way she did."[95]

Similarly, in Ervin v. Ervin,[96] an ex-husband wrote to his ex-wife suggesting that he would pay for their son to attend college and that she had "nothing to be concerned about."[97] The court held that even if the letter communicated a promise to pay for their son's tuition, the ex-wife had not relied on the promise to her detriment.[98] Just as the court in *Dewein* denied the promissory estoppel claim because the plaintiff would have still cared for her parent, so the court in *Ervin* found no detrimental reliance because the ex-wife continued supporting her son as she had always done. The ex-wife had failed to show that she enrolled their son in college in reliance on the promise, no matter that "her income and expenses showed that she was unable to provide for the cost of the son's education . . . ."[99]

Ervin and *Dewein* illustrate that genuine need for the promised gift may not be enough to support a claim for promissory estoppel. In both cases, the plaintiffs had substantial financial needs that would have been alleviated had the promisors made good on their promises. In *Ervin*, for example, the

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after the promisee has improved it"), and public policy in favor of charitable subscriptions and marriage settlements. *Id.*

[92] *Compare* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing that promissory estoppel does not require actual reliance), *with* Eisenberg, *supra* note 6, at 852–65 (arguing that actual reliance is required for promissory estoppel). I do not take any stand in this larger debate, but, as I argue, promissory estoppel claims to enforce donative promises in particular do seem to require actual and quite substantial reliance.

[93] 174 N.E.2d 875 (Ill. App. Ct. 1961).

[94] *Dewein*, 174 N.E.2d at 448.

[95] *Id.* at 449 ("Surely, there can be no presumption or inference that after living with hre [sic] mother for so many years, she was now about to desert her in the time of her greatest need, but was persuaded to stay 'in reliance on promises made to her.'"); *cf.* Steve Thel Edward, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1050 (1992) ("A promise motivated by a past favor or by some other sense of obligation is not covered by the doctrines of consideration and promissory estoppel, which screen for promises that are made with a view to influencing the promisee's future behavior.").

[96] 458 A.2d 342 (R.I. 1983).

[97] *Id.* at 344.

[98] *Id.* at 345.

[99] *Id.*

ex-wife earned approximately $175 per week, and her expenses exceeded that amount.[100] Putting her son through college would have been a heavy financial burden. To be sure, the ex-wife was "unemployed," but the court does not say why.[101] Perhaps she could not work for physical reasons, or perhaps she was a fulltime caretaker for another child (or for their son). Regardless, the possibility that the ex-wife could have worked seems to play no role in the court's promissory estoppel reasoning.[102]

To be clear, I do not mean to suggest that *Ervin* and *Dewein* were wrongly decided under current doctrine.[103] While it does seem plausible that both plaintiffs relied on the promises in their plans for meeting their ordinary needs in the future, it also seems plausible that they would have continued caring for their family members regardless of the donative promises. The approaches to reliance in *Ervin*, *Dewein*, and the *Restatement*, thus indicate a further important feature of the donative promise principle: the principle may leave many donative promises made in support of—and not to induce—caretaking unenforceable.[104]

Because promissory estoppel typically requires showing that the promisee undertakes some concrete change in her behavior, it will also be difficult for indigent donee-promisees more broadly to use contract law to secure basic goods promised from a donative motive.[105] It will, for example, be hard for a homeless person to detrimentally rely on a promise of shelter, since that person may have no other alternatives and no financial means to make investments in reliance on such a promise. It is difficult to rely when you have little to lose.

Under the donative promise principle, promises that induce the promisee to change her position in some concrete and substantial way will

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[100] *Id.* at 344.

[101] *Id.* at 343.

[102] The court did not, for instance, say that she did not forego gainful employment because she was already unemployed, or that it would *not* be unjust to not enforce because she could have gotten a job. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (explaining that promissory estoppel requires showing that it would be unjust not to enforce the promise).

[103] For an argument that the cases were problematically decided because they reflect a sexist view about the value of caretaking, see Fellows, *supra* note 80, at 338–46.

[104] *Compare* Borelli v. Brusseau, 12 Cal. App. 4th 647 (1993) (holding that a husband's promise to leave his wife property in exchange for caring for him during his illness was not enforceable because the wife was already under a marital duty of support (citing Cal. Civ. Code §§ 242, 5100, 5132)), *with* Teason v. Miles, 118 N.W.2d 475 (Mich. 1962) (enforcing a mother's promise to leave her son a portion of her property in exchange for living on her farm and taking care of her). For a critical discussion of how to distinguish *Teason*, see Fellows, *supra* note 80, at 338–46.

[105] For a discussion of how contract law more broadly excludes historically marginalized and disempowered groups, see generally Gan, *supra* note 56.

therefore likely be enforceable. Promises by donors to charitable institutions may also be enforceable under the consideration doctrine. As a practical matter, this leaves many of the donative promises made to some of the most indigent members of society unenforceable.

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

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

On its face, Section 90(2) is a potentially revolutionary expansion of contract—the provision only requires a "probability of reliance,"[108] and thus, if expanded to donative promises more broadly, might include the caretaking and indigent promisees that tend to be unable to enforce on grounds of estoppel.[109] The Restatement's elaboration on that provision, however, suggests that Section 90(2) may actually be more conservative. The comments to Section 90 note that Section 90(2) is grounded in long-standing public policy favoring charitable subscriptions.[110] The comments also suggests that Section 90(2) is meant to replace the fiction of consideration historically used to enforce charitable subscriptions.[111] So far, only a very small handful of courts have adopted Section 90(2), and they have uniformly affirmed the *Restatement*'s public policy basis.[112]

Consequently, *Restatement 90(2)* does not seem to threaten the general principle that donative promises are usually not enforceable except under a theory of promissory reliance. In Part II, I discuss whether that should be

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[106] RESTATEMENT (SECOND) OF CONTRACTS § 90(2).

[107] *Id.* at § 90(1)–(2).

[108] *Id.* at § 90 cmt. f.

[109] *See supra* Subpart I.B.2.

[110] *Id.* at § 90 cmt. f.

[111] *Id.* at § 90 cmt. f.; *see also supra* Subpart I.A.2

[112] *See, e.g.*, Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974) ("We believe public policy supports [Restatement section 90(2)]. It is more logical to bind charitable subscriptions without requiring a showing of consideration or detrimental reliance."). For a case that has rejected Section 90(2), see, e.g., Arrowsmith v. Mercantile-Safe Deposit & Trust Co., 545 A.2d 674, 685 (1988) ("[T]his Court [will] not carve out an exception to the established law of contracts in order to give a privileged position to promises made to charities. That is what Restatement (Second) of Contracts § 90(2) does.").

so.

II. SHOULD THE DONATIVE PROMISE PRINCIPLE BE REJECTED?

In this Part, I adopt a more critical orientation and ask whether it is problematic that the donative promise principle makes reliance the primary legal theory for enforcing donative promises. I argue that such a basis for enforcement creates perverse legal incentives to submit to improper promisor influence, and exacerbates power imbalances between socially powerful promisors and historically disempowered promisees.[113]

A. Perverse Legal Incentives to Succumb to Undue Influence

Donative promises can induce promisees to rely by empowering promisees to pursue a freely chosen project, but the promises can and often do induce reliance by operating as a carrot to conform to promisor values.[114] The promised good is often something really important to the promisee, and even when it is not, the promise may be made in the context of a relationship of trust—such as family, or religion—that leaves the promisee nonetheless susceptible to undue influence.[115] The *Restatement (Second) of Contracts* describes undue influence as

> unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.[116]

Familial relations often fall in the latter category.[117]

Of course, it is not as if promisees have no power to resist influence. Promisees can still seek to enforce donative promises under a theory of promissory estoppel.[118] Promissory estoppel can give people who cannot access sufficient goods or money increased power and security.[119] For instance, it is plausible that the plaintiff in *Ricketts* might have had difficulty securing a decent standard of living earning $10 per week in 1891,[120] the equivalent of approximately $12,000 per year in 2016

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[113] To be clear, I am not arguing that promissory estoppel is in general problematic.
[114] *See supra* Part I.B.1.
[115] *See supra* note 66.
[116] RESTATEMENT (SECOND) OF CONTRACTS § 177(1).
[117] *See id.* at § 177 cmt. a.
[118] *See supra* Part I.B.
[119] *See supra* note 56.
[120] *See Ricketts*, 77 N.W. at 366. The plaintiff also likely would have faced significant

dollars.[121] An enforceable legal right to her grandfather's promise of support may have thus afforded the plaintiff a more stable economic status than she could have had without that right.[122]

Although promissory estoppel may empower the promisee to secure the promised gift, promissory estoppel does not mitigate the risk of manipulation and undue influence within the promissory relationship. Indeed, it may exacerbate that risk by creating a legal incentive to submit to the promisor's suspect attempts at influence. Promisees already face substantial rational pressure to rely on donative promises arising from their need for the promised good and their potentially personal relationship with the donor-promisor.[123] By making reliance the trigger for enforcement, promissory estoppel provides a new reason to rely: the acquisition of a legally enforceable right to the performance of the gift promise.[124] Thus, in cases where reliance is induced through the promisor's attempt to influence the promisee, the law supplies the promisee with a reason to submit to such attempts.

In fact, the more the promisee makes a substantial and concrete changes in her life, the greater the likelihood the promisee will secure a legal right in the gift.[125] Although reliance may vest in the promisee a contractual right in the performance of the promise, the court still retains the discretion to reduce the promisee's remedy in accordance with the extent of her reliance.[126] Even if expectation damages tend to be awarded more often than a reliance measure of damages,[127] the risk of being awarded merely the value of detrimental reliance provides a further reason to engage more substantial and concrete reliance.

And it is not enough for the promisee to detrimentally rely on the promise; she must rely in a way that the promisor could have reasonably

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gender-based barriers to accessing higher paying work, over sixty years before the passage of Title VII. For a discussion of work and gender discrimination in the nineteenth century, see Joseph A. Ranney, *The History of Wisconsin Women's Rights Law, Part I: Wisconsin Women and the Law 1846-1920*, Wis. Law., Sept. 1995, at 20; Pat Hudson, *Women's Work*, BBC (last updated Mar. 29, 2011), http://www.bbc.co.uk/history/british/victorians/womens_work_01.shtml.

[121] Assuming an average 2.6% yearly rate of inflation since 1891.

[122] "Could have" because the promise was not in fact preformed as intended in the plaintiff's lifetime. *See Ricketts*, 77 N.W. at 366; *supra* Part I.B.

[123] *See supra* Subpart I.B.1.

[124] Why not a legal right to the gift itself? Here I remain neutral in the larger debate concerning where contract vests a right in the promised performance or in the object of the performance (such as a finished house, a piece of land, an amount of money).

[125] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90.

[126] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90.

[127] *See* Stone & Stremitzer, *supra* note 17, at 35.

foreseen.[128] As *Harvey* and *Ricketts* suggest, reliance is often reasonable and most foreseeable when done in accordance with the promisor's communicated purposes in making the promise. In *Harvey*, the parents encouraged the plaintiff to build her home on the land;[129] in *Ricketts*, the grandfather gave the plaintiff the promissory note and encouraged her to resign.[130]

Consequently, promissory estoppel supplies legal reasons for the promisee to conform to the promisor's hopes and expectations. In cases like *Harvey*, that incentive may be fairly innocuous; but in Ricketts-type cases that additional incentive can make the promissory relationship all the more oppressive. If the plaintiff in *Ricketts* really did need the funds, she did well under this regime to quit her job.[131] The case may become even more troubling if we imagine the grandfather had promised her the funds to encourage her to leave her lesbian lover,[132] or convert to Christianity.[133] In such cases, having promissory estoppel as the sole basis for recovery creates reasons for the promisee to leave her lover or change her religion, and so foreseeably change her position in reliance on the grandfather's promise.

It is troubling that promissory estoppel may sometimes create such incentives. Contract law in such cases seems to make it easier for people to use their money or their position of trust to get people to act against their conscience.[134] From a doctrinal point of view, the incentives created are perverse. Doctrines of duress, undue influence, and unconscionability, all serve to eliminate legal reasons to perform promises that were improperly obtained.[135] In contrast, promissory estoppel creates legal reasons for the promisee to pursue a course of action in situations where these other doctrines would likely have relieved the promisee of legal reasons to pursue that course of action, if only the promisor had made his desire for that course of action an express condition of his promise.

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[128] *See supra* Part I.B.1.

[129] *See Harvey*, 962 A.2d at 325–36.

[130] *See Rickets*, 77 N.W. at 366.

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

[132] *Cf.* MARCEL PROUST, SWANN'S WAY (1913); Carroll Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, 1 SIGNS: J. OF WOMEN IN CULTURE & SOC. 1 (1975).

[133] *See supra* note 84.

[134] Perhaps the promisee should resist and decline the promised gift. But even if that is true, the promisee's need for the gift and the availability of a legal right to the gift if she relies still provides her with a reason—even if not a sufficient reason—to accept and conform to the promisor's wishes.

[135] *See supra* notes 53–55.

For example, if a church offered a refugee shelter in exchange for religious conversion, a court would likely find that agreement unenforceable by the church,[136] and thereby relieve the refugee of a duty to perform and hence legal incentives to go through with the conversion. But if instead the church had merely made a donative promise of shelter, and then encouraged the refugee to convert, promissory estoppel would give the refugee a reason to convert—namely, to secure a contract right in the shelter. Although the prospect of liability and the prospect of a contract right may provide different sorts of reasons for action, in both scenarios, promissory estoppel gives the refugee reasons to do precisely what unconscionability, duress, and undue influence doctrines would aim to *relieve* the promisee from rational pressure to do.

B. Exacerbating Inequality and Dependency

The donative promise principle also tends to exclude some of the most historically vulnerable and marginalized promisees—caretaking and indigent promisees.[137] These are people who are so poor they cannot detrimentally rely, and people who feel so morally compelled to care for others that they continue to will do so, even at great financial risk to themselves.[138] These are promisees who have great need for the promised gifts, but, paradoxically, because their need is so severe, are unlikely to be able to actively change their lives in reliance on the donative promise. Lacking a legal right to promised gift, the promisor may revoke her promise for practically any reason, and the promisee would have largely no lawful power to resist.[139] The donative promise principle thus leaves the very kind people to whom we want to distribute goods and empower susceptible to manipulation and exploitation.

Nonenforcement in such cases is also in tension with the purported purpose and value of the donative promises. The value of promise purports to lies in its potential to support the promisee's caretaking,[140] or lift the promisee out of a dependent social status—the promise, for instance, is framed as an expression of gratitude,[141] or the promisor's desire to

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[136] On, for instance, grounds of duress because of the promisee's great need and the church's position of trust. *See supra* note 53.

[137] *See supra* Subpart I.B.2.

[138] *See supra* Subpart I.B.2.

[139] Some equitable remedies may nonetheless be available, such as disgorgement for unjust enrichment, but at the discretion of the court.

[140] *Cf. Dewein*, 174 N.E. at 448 ("Sis, I am so grateful you are taking care of mother, and I am certainly going to see you are taken care of life, you deserve it.").

[141] *Cf. Dewein*, 174 N.E. at 448.

contribute.[142] But, instead, the promise invites the promisee to enter into a relationship that may operates as a vehicle for another person (or entity) to exercise improper influence over the promisee's life. In this way, the unenforceable donative promise may reify the promisee's disadvantaged social position.

To be sure, if the influence involves making some concrete change in the promisee's life, then the promisee may acquire a legal right to the promise.[143] But not all problematic forms of conformity to undue influence rise to the level of detrimental reliance. A promisor may encourage a promisee to adopt certain personality traits and moral dispositions, or conform to social stereotypes of victimhood[144] or femininity.[145] These forms of influence may be no less life changing than building a home or changing employment. Not to mention, although expectancy damages are often awarded on a theory of promissory estoppel, they need not be. And thus, even if these less tangible forms of reliance can ground a promissory estoppel claim, the promisee may still be, for all practical purposes, in the same economic position she would have been had the promise gone unenforced.[146]

To recognize financial detriment but not emotional and moral detrimental reliance also unfairly privileges wealthier donee-promisees over those most in need. Of course, it may be hard a promisee to prove a relationship between the promise and the influence, especially in close interpersonal relationships where there may be multiple sources of influence. But the difficulty of such proof in a situation where severe need (or intense personal obligation) also makes reliance hard provides a reason to enforce without such a showing, rather than a reason to not enforce at all.

In sum, according to the donative promise principle, some donative promises are contracts, but only if the promisee detrimentally relies. Because promisees often have an urgent need for the promised gift, or are in a special relationship of trust with the promisor, donee-promisees tend to systematically be vulnerable to a wide range of improper promisor influence. The donative promise principle—by making promissory estoppel the primary basis for enforcement—thus creates perverse incentives to succumb to influence, and reinforces the dependency of promisees who are too poor or otherwise unable to rely. Courts should therefore consider adopting a new basis for enforcing donative promises.

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[142] *Cf. Ervin*, 458 A.2d at 343 ("[Y]ou have nothing to be concerned about as to Michael's being able to attend college, even if I have to borrow the money.")

[143] *Cf. supra* Subpart II.A.

[144] *See supra* note 85.

[145] *Cf.* Fellows, *supra* note 80.

[146] I am indebted to Nicolas Cornell for this point.

III. WHY SOME DONATIVE PROMISES SHOULD BE CONTRACTS

In this Part, I present and defend an alternative approach to enforcing donative promises. I propose that donative promises should also be enforceable when the promisor should reasonably and foreseeably expect that the promised gift supplies a substantial need for the promisee, and injustice can be avoided only if the promise is enforced. Not only would actual reliance not be required, but enforcement would turn principally on the promisee's need for the gift. While I argue that a need-centered theory can remedy defects in a regime governed by the donative promise principle, I also argue that enforcement more broadly can enhance trust and authenticity in donative promissory relationships.

A. A Need-Centered Theory of Enforcement

Two features of promissory estoppel produce the disempowering effects discussed in Part II: the requirement to show *actual* reliance, and promissory estoppel's narrow conception of reliance itself.

By requiring promisees to actually rely in order to secure a legal right to the promise, promissory estoppel provides promisees with legal reasons to rely on the promise, even when doing so would involve succumbing to improper and undue influence by the promisor.[147] Further, by excluding less tangible but no less serious forms of emotional reliance from the legal category of reliance, the donative promise principle prevents promisees from enforcing donative promises who may actually have the greatest need to do so.

These defects might suggest that promissory estoppel should be revised to require only *probable* reliance, rather than actual reliance. For example, a donative promise might be enforceable if the promisor could reasonably and foreseeably expect the promisee to rely on the promise, and injustice can be avoided only if the promise is enforced.

Even if no actual reliance is required under a theory of probable reliance, the very idea of reliance may still import with it the discriminatory features that made promissory estoppel inadequate to being with. And thus a theory of probable reliance may still exclude promisees whose need makes it difficult for them to rely.

For example, in *Dewein*, the court not only found that the sister did not rely on her brother's donative promise, it suggested that it would also be unreasonable to suppose she would have stopped taking care of their mother

[147] *See supra* Subpart II.A.

"in the time of her greatest need . . . ."[148] The features of the sister's situation that may have led her not to actually rely were thus precisely what led the court to additionally conclude that it would be unreasonable to presume that she might have relied. The problem, then, seems to be with the very idea of reliance.

In cases of inducement by influence, serve poverty, and caretaking, the promisee's substantial need for the promised gift is a common lever for manipulation and improper influence, and the feature of the promissory relationship in virtue of which the promisee is made dependent on the promisor. Of course, substantial need alone is not sufficient. If the promisor has no reasonable way of knowing that the promisee might have a substantial need for the promised gift, it seems unlikely that the promisor would use the promise to exercise improper influence over the promisee. And it may be unfair to treat donative promisors as if they were using the promise to exercise such influence over the promisor.

I thus propose that donative promises should be enforceable when the promisor should reasonably and foreseeably expect that the promised gift supplies a substantial need for the promisee, and injustice can be avoided only if the promise is enforced. [149]

A need-centered theory of enforcement would shift the legal inquiry from the effects of the promise to the mechanism by which the promise operates as a vehicle for improper influence and dependency. Rather than focusing on the existence or potential for changed circumstances—an imperfect and discriminatory proxy for promisee dependence on the promised gift—it might be more fruitful to instead inquire directly about the significance of the gift in the promisee's life. Would the gift have enabled the promisee to take steps to exit poverty, to feed her family, or to find stable work? Was the gift a necessary or critical means to one of the promisee's ends? To what extent was she counting on the promised gift?[150] Substantial need thus provides more direct insight into the power dynamics

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[148] *Dewein*, 174 N.E.2d at 449–50.

[149] Notice this formulation still includes the injustice requirements of promissory estoppel. None of my objections to deploying promissory estoppel as the sole basis of enforcement apply to this, and I suspect it serves important fairness aims (although I do not explore them here).

[150] Edward Yorio and Steve Thel argue that the requirement that there be a prospect of reliance serves to screen for seriously made promises. Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113 (1991). I adopt a similar approach insofar as I propose that the character of reliance should track the seriousness of the promise *from the promisee's point of view*. In contrast, Yorio and Thel take the prospect of reliance requirement to inquire into whether the promisor has "seriously considered" her promise. *See id*. at 113. For a critical discussion of Yorio and Thel's proposal, see Eisenberg, *supra* note 6, at 852–65.

of the relationship, and hence, into the extent to which contract enforcement could counteract improper influence in the promissory relationship.[151]

Substantial need is certainly not the only source of undue influence in a promissory relationship. A person can also be emotionally vulnerable to friends and family. A need-centered theory of enforcement does not make emotional vulnerability alone a basis for contract enforcement, and so does not protect people from influence arising primarily from their emotional vulnerability to intimate associates. But I think that is a benefit of a need-centered theory. An important aspect of trusting and caring for someone involves a willingness to make one vulnerable to that person.[152] Donative promises are often made within and to facilitate affective relationships of friendship and family.[153] The law should not seek to eliminate all vulnerability in donative promises, and should probably create ample space for people to experience the vulnerability that may be so central to caring for others.[154]

B. Empowerment

A need-centered theory of enforcement would make potentially many donative promises immediately enforceable. For example, in cases like *Ricketts*, the promise of money would likely vest in the promisee an immediate contractual right in the promise, since the promisee's financial need and relationship of trust with her grandfather would have made it reasonable for him to expect that she might have great need for the funds. In situations where enforcement is unlikely under a theory of promissory estoppel, promisees who have, for instance, nutrition-based need, housing-based need, and strong economic need for the promised gift are also likely to have an immediate contractual right in the donative promise.

By immediately transferring a legal right over performance from the promisor to the promisee, and thus obviating the need to rely in a predictable way to secure a contract right, a need-centered theory should

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[151] Enforcement might also exacerbate that risk, as the donative promise principle illustrates. As I argue in Part IV, enforcement might also be improper in certain donative promises to provide services.

[152] See generally Samuel Scheffler, *Valuing*, in EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY (2010) (arguing that valuing a relationship or a person—such as a friendship or a family member—constitutively involves making oneself emotionally vulnerable to that relationship or person). I am indebted to Jorah Dannenberg for drawing my attention to the importance of leaving room for vulnerability.

[153] *See supra* Subpart I.A.1.

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

counteract perverse incentives to succumb to promisor influence.

An immediate contractual right also enhances promisee autonomy by freeing the promisee of rational pressure to rely for legal reasons on the promise. The promisee should build the home on her parents' land because it is her dream,[155] and not because she wants to lock in a remedy. The promisee should be encouraged to rely on the donative promise in a way that treats the promisor as a partner, not as a potential adversary.[156] A need-centered theory of enforcement may thus be able to support both promisee autonomy and the often-intended cooperative character of donative promising.

The contractual right should also insulate the promisee from attempts by the promisor to later on attach implicit conditions to the gift in ways that parallel the rights of commercial contractors. Once a school has a deal with the painter, the painter then cannot use the school's urgency to open its rooms for the term to pressure the school to pay 20% more than what was previously agreed. Similarly, once the ex-husband promises to his ex-wife to pay for his child's tuition, the ex-husband cannot then later, on the day of enrollment, use her financial need to reduce his contribution. Or at least, he retains no legal power to do so, unless he can show that reasons to discharge his duty to perform apply.[157] The promisee could also openly embrace different political or moral views than the promisor in the knowledge that she has an enforceable right to the promised gift.[158]

The contractual right would also have important symbolic value as a public rejection of the dependent status of donative promisees. Rather than need being a source of disempowerment, a substantial need theory of

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[155] *Cf. Harvey*, 962 A.2d at 323 ("From the time they were young, Teresa and her brother talked about the houses they would eventually like to build on the homestead; Teresa said she wanted her home to be located near a spring, close to where it now sits.").

[156] Similar considerations about incentives to cooperate apply to enforcement more broadly. *See infra* Part III.C.

[157] This Article does not take a position on whether different doctrines of discharge should apply to donative promises. Doctrines discharging performance are quite narrow—it is very hard to prevail on doctrines of impossibility, for instance. If a person's home burns down, she may still have to pay her credit card bills. And yet if your parents' home burns down it feels improper to insist that they continue covering your living expenses. *Cf.* Eisenberg, *supra* note 38. At the same time, it would be a strange result if a credit card company had a greater claim on a person when she loses her home than a homeless resident who depended on the person's income for shelter. Notice, though, that these problems of discharging performance are not limited to a need-centered theory, but apply more broadly to enforcement of donative promises.

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

enforcement would make need a ground for legal empowerment. The contractual right would also transform the promised gift from a legally discretionary gratuity,[159] into an entitlement to which the promisee has public (and not just private moral) standing to claim.[160] A need-centered theory of enforcement could thus reinforce the trust that the promise invites and empower donative promisees.

To be sure, the promisee may still be dependent on the promisor to make the promise to begin with. A redistributive regime that depends largely on private donations to provide for people's basic needs may produce the same manipulation and hierarchy worries ex ante, prior to the making of any particular donative promise (whether enforceable or not).[161] A need-centered theory of enforcement is certainly not a cure-all. But insofar as donative promises may be valuable—as expressions of shared concern, of friendship, and the like—a need-centered theory could support such value by minimizing the risks of manipulation and subordination created by the promissory relationship itself and the contract law that governs it.

C. Trust

So far my arguments in favor of enforcing donative promises on an need-centered theory have turned on remedying defects in the donative promise principle. Some of these arguments suggest more general arguments in favor of enforcement, such as the arguments grounded in extending contract to promisees who confront financial barriers to detrimental reliance. Before turning to objections to enforcement, I briefly highlight two arguments in favor of enforcement more broadly: that nonenforcement creates strategic reasons to rely that have a potentially

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[159] *Cf.* Elizabeth Wann, *American tipping is rooted in slavery—and it still hurts workers today*, FORD FOUNDATION (Feb. 18, 2016), https://www.fordfoundation.org/ideas/equals-change-blog/posts/american-tipping-is-rooted-in-slavery-and-it-still-hurts-workers-today/ (linking tipping practices to slavery and racial inequality).

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

[161] Indeed, I think this is a strong reason to move away from large-scale reliance on private donation and instead create and strengthen existing public redistributive schemes that do not leave one class dependent on the good will of another (and also, that do not leave which causes and needs that deserve attention up to a few, but rather permit the people who actually need the goods to have a say through the democratic process). *Cf.* Rob Reich, *Repugnant to the Whole Idea of Democracy? On the Role of Foundations in Democratic Societies*, 49 Pol. Sci. & Pol. 466, 466–68 (discussing how private foundations have "plutocratic elements" that pose a challenge for justifying support for private foundations in a democratic society).

corrosive effect on trust, and that enforcement would mitigate rational pressure to create contingency plans.

1. Strategic Reliance

Rebecca Stone and Alexander Stremitzer argue that in the absence of a legal regime enforcing promises, the promisee will tend to overinvest in reliance on the promise.[162] A promisor's motivation to keep her promise tends to increase the more a promisee relies on the promise[163]—the promisor may feel increased guilt for breaking relied-upon promises, or may "simply believe[] that it is a graver moral wrong to break a promise that has been relied upon more."[164] Anticipating this phenomenon, promisees "*strategically* rely on promises in order to make their promisors more likely to keep their promises."[165] Promisees thus tend to overinvest in reliance on promises in the absence of legal enforcement.

In contrast, overinvestment should drop in a legal regime that enforces promises. Now that the promise is enforceable, there is "no need to overinvest in order to increase . . . guilt from breaking a promise, because the legal regime ensure that a [promisor] has a sufficient self-interested reason to keep her promise, so long as the [promisee] invests . . . ."[166]

Although Stone and Stremitzer's study is not about donative promises in particular, their findings may still be probative.[167] Donative promising is already a morally laden practice. It seems plausible that promisees might anticipate that their grandfathers (*Ricketts*), parents (*Harvey*, *Teason*), brothers (*Dewein*), spouses and ex-spouses (*Ervin*), and foundations might be morally motivated to keep their relied-upon promises, and accordingly overinvest.[168]

To the extent that Stone and Stremitzer's study applies to donative promising, their study suggests that enforcing donative promises could

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[162] *See* Stone & Stremitzer, *supra* note 17, at 35–37 (arguing that in the absence of legal enforcement of an expectancy interest in the promise, the promisee may overinvest to psychologically "lock in" the promisor).

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

[164] *Id.* at 8 n. 6.

[165] *Id.* at 44.

[166] Stone & Stremitzer, *supra* note 17, at 36–37. In this passage, Stone and Stremitzer are discussing the particular dictator game that supports their findings.

[167] For a discussion of the extent to which Stone and Stremitzer's findings may apply "outside the laboratory," see Stone & Stremitzer, *supra* note 17, at 46–47.

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

support the cooperative character of donative promises and mitigate forms of *promisee* manipulation of promisors. In the context of a donative promise, overreliance to get the promisor to perform out of guilt seems disingenuous, an attempt to manipulate fidelity by playing with the promisor's emotions. If the promisor discovered the promisee's overinvestment, the promisor might reasonably feel betrayed in her discovery that the promisee did not trust that she would perform.

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

A stance of nonenforcement is thus not a neutral position—failure to enforce may actually undermine the meaning and relationships parties to donative promissory relationships intend to form in making and accepting donative promises. In contrast, legal enforcement can obviate strategic reasons to rely and thereby enhance people's ability to give the promissory relationship the meaning they want and support the trust on which promising depends.

2. Contingency Plans

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

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

On the other hand, now suppose that the grandfather discovers that she

has made such contingency plans. He might reasonably feel betrayed, since such plans give him a reason to believe she does not trust him. He might also feel that he was deceived. The granddaughter's affections for her grandfather may therefore give her reasons to *not* make contingency plans. Or, alternatively, knowing that he might be hurt if he discovered her plans, she might affirmatively try to hide them from him.

The reasons that nonenforcement gives a promisee to make contingency plans may thus exert a corrosive influence on trust. Nonenforcement also places the promisee in a bind: either she must expose herself financially, or she must engage in behavior that might reasonably be experienced as a betrayal of trust. [169]

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

To be sure, an important aspect of trusting someone involves a willingness to make oneself vulnerable to that person.[170] As I have argued, the law should not seek to eliminate all vulnerability in donative promises, but rather only that arising from the promisee's substantial and general need.[171] Enforcement of donative promises in the cases I have discussed thus far would not eliminate emotional vulnerability. Even if the son in *Ervin* had been able to secure a contract right to the tuition promised by his father,[172] it seems entirely plausible that he still would have been hurt when his father decided not to help. The kind of vulnerability enforcement mitigates is rather financial vulnerability and vulnerability to duress and undue influence. Mitigating that kind of vulnerability would rather seem to serve caring attitudes and relationships than undermine them.

D. Authenticity

Even if enforcement could mitigate the moral risks of dependency, one might worry that contractualizing donative promises might alter and taint their donative character. A common moral objection to contractualizing

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[169] For a broader discussion of the relationship between trust, contract, and promising, see FRIED, supra note 1; Dori Kimel, *Neutrality, Autonomy, and Freedom of Contract*, 21 OXFORD J. LEGAL STUD. 473 (2001).

[170] *See supra* note 152.

[171] *Cf.* Shiffrin, *supra* note 154, at 715 (arguing that, although the law should not enforce morality as such, it should make room for moral agency to flourish).

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

donative promises is that the threat of legal enforcement would obscure or displace promisors' motives for performing.[173] Melvin Eisenberg, for instance, argues that if donative promises were contracts,

> it could never be clear to the promisee, or even to the promisor, whether a donative promise that was made in spirit of love, friendship, affection, or the like, was also performed for those reasons, or instead was performed to discharge a legal obligation or avoid a lawsuit.[174]

Enforcing donative promises would thus interfere with the promises' communicative function, and thereby undermine their potential to create and support a variety of intimate and civil associations.

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

First, I doubt that contract enforcement would either displace or obscure—from the promisor's or the promisee's point of view—the motive of performance.[175] Criminal and family law contexts are instructive. When you stop your car at a crosswalk while I pass, it seems plausible to me that your stopping is principally motivated by your morals (you believe pointless injury is wrong, that your desire to get to the store before it closes does not trump my interests in physical integrity), rather than by the steep criminal penalties you might face should you decide to mow me down. Indeed, I suspect that if we could not regularly understand one another as being so motivated—not just to stop at crosswalks, but to comply with

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[173] *See* Eisenberg, *supra* note 6, at 848. Aditi Bagchi and Dori Kimel advance a similar thesis but as applied to donative interpersonal promises in particular. *See* Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709 (2011) (arguing that contract should not extend to "private" or "everyday" promises because "[t]he moral character of a private promise depends on the fact that it is not only freely made but also freely kept," and that the prospect of contract enforcement would undermine the "volunteer character" of performance); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003) (arguing that the prospect of contract enforcement makes it difficult for a promisee to know and thereby trust a promisor's motives for performance, and hence, that contract is a "singularly inadequate arena for revealing character traits and expressing attitudes of the kind of which personal relationships thrive"). So although this paper expressly addresses Eisenberg's arguments for the donative promises principle (since that is also his express focus), most of my arguments in response to Eisenberg should also be responsive to Bagchi's and Kimel's positions.

[174] Eisenberg, *supra* note 6, at 848.

[175] For a careful analysis and rejection of the various ways commentators, such as Eisenberg, feel that enforcement may affect the motive of a donative promisor (and the way that motive is perceived by the promisee), see Seana Valentine Shiffrin, *Are Contracts Promises?*, in ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW (2012).

much of criminal and tort law—it would be rare sight to see people crossing the street, let alone outside of their homes. Likewise, I doubt that many parents are confused about their motives when they feed and clothe their children, even though they have much to lose should they fail to comply with child neglect laws.[176] Why, then, would the threat of contract enforcement—which is standardly understood not to be punitive[177]—either displace or obscure a donative promisor's motives?[178]

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

> We use gifts to indicate our favorites—if we choose to withdraw our affections, then we should not be forced into making the transfer nevertheless. The forced transfer is no longer an indication of our feelings . . . . The enforcement (against the will of the giver) of a gift removes all characteristics of its "gift-ness" except the transfer of the ownership.[179]

I agree that if a donative promise were actually enforced, we would be hard pressed to call the court-ordered transfer a gift. But I disagree that that risk would taint donative promises and their unenforced performance. And that is because I disagree with Eisenberg that the performance is not

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

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

[178] And if the promisee were truly concerned about the motive of the promisor, she could just waive performance and see what happens. *See* Shiffrin, *Are Contracts Promises?*, *supra* note 175.

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

required in the first place.[180]

After making a promise, it is no longer, as a moral matter, within the promisor's discretion whether to perform.[181] Indeed it would be hard to understand the promisor as having made any kind of promise if she communicated to the promisee that she might change her mind on a whim.[182] By making a promise, the donative promisor makes a commitment to the promisee; it is then up to the promisee to release the promisor, and not for the promisor to decide whether to perform.[183] If the promisor had instead not wanted to be so bound, she could have simply not announced her commitment to the promisee, and then waited until she felt like performing to perform. The fact that contractualizing donative promises would render their performance required therefore need not undermine the "gift-ness" of donative performance, since the performance was required to begin with.

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

Contrary to Eisenberg's worries, contractualizing donative promises may actually serve to clarify that a donative promisor's motive is genuinely donative. Consider a teenager whose grandfather promises to pay for her college tuition. She really needs the funds, but also knows that her grandfather disapproves of her taste in clothing and her political views, and has been vocal about his disapproval in the past. In the absence of a contractual right to the promised funds, she may reasonably worry whether

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[180] Not to mention, I think it is a morally unattractive view to treat donative promises as discretionary for the dependency and gratuity reasons described *supra*, in Subparts II.B. and III.B.

[181]

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

To be clear, this is not to say you always have to keep your promises.

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

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

her grandfather made the promise out of love and respect, or out of a desire to get her to change her ways. But by having a contractual right to the funds, she may feel more secure in her belief that the promise was made out of love and respect. Since she has a right to the funds regardless of whether she conforms to her grandfather's moral precepts, she has an additional (and clarifying) reason to believe he did not mean the promise as a carrot for inducing conformity.

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

But if the granddaughter has a legal right to the funds, and she and her grandfather know this, then that right and knowledge give the grandfather a further and clarifying reason (in addition to the reasons based on their relationship prior to the promise) to believe she may be acting in a genuinely loving way—she need not remain in his good favors to receive the help, and they both know that. Hence, contractualizing the grandfather's promise may not only help to clarify his motives, but can also mitigate the threat that the donative promise poses to the larger authenticity of their relationship.[184] Contractualizing at least some donative promises, like the grandfather's promise, should therefore be something that philosophers like Eisenberg welcome.[185]

IV. TOWARDS A CONTRACT LAW FOR DONATIVE PROMISES

In Part III I argued that a need-centered approach to enforcement is

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

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

more responsive than an exclusively reliance-based approach to power asymmetries and associational values within donative promising practices. The substantial need supplied by the promised gift will often require enforcement in cases of interpersonal and institutional giving when the promisee in is in a particularly vulnerable social position. But donative promises are not homogeneous. Gift giving occurs within a variety of cooperative settings that may be characterized by different power dynamics and animated by different moral values, some of which may be ill-served by certain contract principles. This Part discusses the applicability of contract to volunteer work as an illustration.[186]

First, I argue that a need-centered approach will typically not recommend enforcing commitments to volunteer because volunteers may be beholden to their organization for accessing the labor market. Nevertheless, those organizations may provide essential services that are administered by volunteers. If volunteers do not make good on their commitments, would-be recipients of such services should have a need-based claim against the organization, and, in turn, the organization may then have a detrimental reliance claim against the volunteer. I argue that such a paradoxical result recommends legislating to protect volunteers, rather than denying enforcement of donative promises made by the organizations.

Second, even if some commitments to volunteer should be enforceable, I argue that it does not follow that all potentially applicable contract doctrines should then apply. For example, service contract duties of flawless performance may undermine the potentially inclusive and cooperative character of volunteer work. Similarly, strong antidiscrimination norms in employment contracts may undermine the potential to experiment with different conceptions of the good in associational life. Thus, contract law more broadly may need to be tailored to donative promising to enforce donative promises, regardless of whether the promises are enforced on the basis or need or reliance.

A. Volunteer Work

1. Promisee Power

Commitments to volunteer at an organization are often not characterized by the power imbalances that recommend enforcing unrelied-upon promises elsewhere. Unlike the individual promisee, the institutional or

[186] Volunteers are exempted from federal minimum wage law. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985) (explaining that a federal wage and hour statute, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq. (2012), does not reach "ordinary voluntarism");

organizational promisee may be much more powerful than the volunteer-promisor—consider the Peace Corps, the Red Cross, or the White House relative to a student volunteer. In such cases, the volunteer-promisor's legal right to later withhold her labor may not enable her to exercise any influence over the organization.[187] The organization may, for instance, have a long list of potential volunteers ready to jump in should the promisor drop out.

Indeed, if volunteering is important to the promisor's pursuit of employment, the power imbalance may be the reverse of that between a person promised a temporary food supply and a wealthy donative promisor. The volunteer-promisor may feel that she needs to do the unpaid work (and secure favorable references) to have a suitable CV for her public policy PhD application, or for her job application to the Gates Foundation.[188] That vulnerability is compounded by the fact that volunteers may not be protected by antidiscrimination law.[189] Hence, in cases of commitments to volunteer, the power imbalance created by the donative promise is often negligible, if not decidedly in favor of the organizational promisee. Imposing a contractual duty to perform the volunteer work may therefore tip the power balance even more in favor of the promisee, leaving the promisor vulnerable to abuse and manipulation by the organization to which she has committed to volunteer.[190]

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[187] Volunteers are also typically not employees for purposes of the federal right to engage in protected "concerted activities for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act, Section 7, 29 U.S.C. § 157 (describing the "right of employees as to organization, collective bargaining, etc."); *see* Wbai Pacifica Found., 328 NLRB 1273, 1275 (1999) (finding that volunteers at a radio station were not NLRA employees because their relationship to the station had "no economic aspect" as "[t]hey receive no wages or fringe benefits," and, "[t]o the contrary, they often raise[d] money or contribute money to the station").

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

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

[190] Such a power imbalance in the context of quasi-market work raises an issue as to

Thus, it may be the case that it is the volunteer—and hence *the promisor*—who has substantial need for making the gift promise, and thereby getting the work experience, and volunteer organizations often know this.[191] A volunteer organization offering such competitive, quasi-market positions therefore likely could not avail itself of a contractual right to the volunteer work under a theory of substantial need.

At the same time, although volunteers may be vulnerable to the organizations for which they volunteer, recipients of charitable services may also be dependent on volunteers to access basic services like medical care. Volunteering is not just about the volunteer's aims, whether they be to do good in the world or to advance their careers. Volunteers may be needed to help set up tents at a medical clinic and to administer vaccines. If no volunteers show up, then the promised recipients of the vaccines may have a claim against the organization under a theory of substantial need.[192] Enforcing the contract rights of recipients may therefore ground organizational claim against volunteers.[193]

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whether such "volunteer" positions should be lawful. Progress on this issue is unlikely, though, so long as we continue to conceptualize such positions as volunteer positions. *Cf. Tony & Susan Alamo Foundation*, 471 U.S. at 302 (explaining the wage and hour provisions of FLSA do not reach "ordinary voluntarism" and that the FLSA was "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage" (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947))); *Volunteers*, U.S. DEP'T OF LABOR, http://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp (last visited April 16, 2016) ("The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., 'to suffer or permit to work.' However, the Supreme Court has made it clear that the FLSA was not intended 'to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another.' In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services.").

Litigation efforts have instead been focused on unpaid internships in the for-profit private sector. *See, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016) (expressly rejecting the DOL's suggested approach in favor of an intern-specific test for determining whether the intern is "the primary beneficiary" of the internship); Kaplan v. Code Blue Billing & Coding, Inc., 504 Fed.Appx. 831 (11th Cir. 2013) (holding that student externs who "engage[d] in hands-on work for their formal degree program" were excluded from FLSA protection).

[191] *See, e.g.*, *Internships*, SAVE THE CHILDREN, http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.8631185/k.9CAE/Internships.htm (last visited Mar. 2, 2017) (explaining that an unpaid internship at Save the Children offers "[s]ocial and professional development opportunities" and "[p]romotes academic, career, and personal development").

[192] *See supra* Subpart III.A.

[193] Contract law is not the only source of law for protecting recipients and organizations. Sanctions by professional associations and tort liability for malpractice can also help to protect recipients of specialist services if, for instance, their volunteer attorney

But then what should we make of the initial worries about volunteer vulnerability? The problem, I suspect, is external to whether donative promises should be enforced. If vulnerability stems from not being paid for doing quasi-market labor, then perhaps the proper solution would be to pay such volunteers, or extend antidiscrimination law to volunteering.[194] The contract law of donative promises is not the only source of law for responding to power problems arising from unpaid work. Labor and employment legislation may also be appropriate.[195]

2. Inclusivity and Liability for Defects in Performance

Although some commitments to volunteer may be enforceable, it would be a mistake to infer that contract doctrines governing labor more broadly should apply. Although many volunteers perform work similar to paid workers, volunteer work can also be a context for distinctively inclusive work. Consider community gardening, neighborhood association event planning, or setting up for a political rally. These are forms of volunteering that are not necessarily about providing a good for some recipient or market, but rather about other values, such as political activism, religiosity, or community membership. Once a certain threshold of ability is met, volunteers are often selected on the basis of nonmeritocratic criteria, such as whether the volunteer signs up (or shows up), or expresses an interest in the project. So long as you can serve food, it may not matter whether you can serve twenty or five people per hour to be a volunteer at a local shelter. So long as you can help garden in some capacity, it may not matter whether you can lift heavy bags of dirt or skillfully prune a rose bush for purposes of

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fails to show up at court, or their surgeon fails to appear for a scheduled surgery. The organizations might also have an unjust enrichment claim against the promisor if the promisor reneged in order to do paid work. A person who benefits from breaching a fiduciary-like duty "imposed by a relation of trust or confidence" may be "liable in restitution to the person to whom the duty is owed." RESTATEMENT (THIRD) OF RESTITUTION § 43 (2011); *see also Hamberg v. Barsky*, 50 A.2d 345 (1947) (holding that the defendant, a long-term acquaintance of the plaintiff, was liable in restitution to the plaintiff for undertaking to represent the plaintiff in negotiating for a lease, while secretly negotiating the lease for himself); RESTATEMENT (FIRST) OF RESTITUTION § 166 cmt. d (1937) ("Confidential relation is not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, . . . dependence or trust, justifiably reposed; in both an unfair advantage is possible . . . ."). I do not explore whether a commitment to volunteer could create a fiduciary relationship here, as an adequate treatment of the topic would take me beyond the scope of this paper.

[194] *See* Rubinstein, *supra* note 188.

[195] *See supra* note 194.

volunteering to plant a community garden. And this is a good thing. By de-emphasizing performance, such organizations facilitate social bonds with people from different walks of life, people with radically different educational backgrounds and physical abilities. Further, by focusing on aspects of the cooperation beyond the quality of the product produced, volunteer work can be communicatively powerful, expressing that the point of the work is to enjoy one another's company, to overcoming social barriers, to share responsibility for one another's wellbeing.[196]

Treating commitments to volunteer like service contracts would, in contrast, bring performance to the fore. Consider, for instance, the duty of performance that arises from finding that a service contract exists. Part of the purpose of having a service contract is to ensure that the people you hire know how to perform—that, for instance, you want your roof to be one color rather than another.[197] Hence, even though imperfect performance may not amount to a material breach, the promisor is still liable for the monetary value of the defects in performance. Volunteers, fearful of incurring liability for defective performance, might reasonably ask one another, or the associations for which they volunteer, to be really clear and specific about what they want. Once I can become liable for the quality of my performance, it really starts to matter to me whether I am supposed to plant a magnolia in our community garden rather than a palm. Such a concern is not always inappropriate, but the risk of liability for performance shifts the focus away from the larger aims and values of the volunteer cooperation to the particular product produced, and hence, away from the things that made the volunteer work distinctively valuable to begin with.[198]

Contract liability for minor defects in performance may also discourage people from volunteering who may feel that they are not that good at performing, or who may be unsure as to how long they could make a commitment to volunteer—people with no prior experience or with busy work and family lives, people with disabilities, or certain elderly people.

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[196] *See* Tsuruda, *supra* note 20.

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

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

Part of what makes volunteer work a distinctive and potentially valuable form of social cooperation is the work's potential to facilitate bonds of friendship and civility between people who might not otherwise encounter one another in the paid workplace,[199] or in their preexisting social circles. Contract liability for minor flaws in performance may therefore undermine volunteer work's potential for inclusivity. The risk of incurring liability may also undermine the spontaneity of volunteer work. People may no longer feel comfortable dropping by their local shelter to help, out of fear that should they need to leave a little early, or volunteer inconsistently, they might incur liability for incomplete performance.

3. Discrimination and Associational Freedom

Duties arising from employment contracts may similarly be in tension with the value of volunteer work. Consider, for example, the duty of nondiscrimination, requiring that employers not discriminate on the basis of "race, color, religion, sex, or national origin" in their selection of employees.[200] Such a duty is essential to ensuring that each member of society is able to secure the goods that they need on an equal basis. Employment discrimination law also aims at realizing people's equal moral status in one of the most central and pervasive forms of social cooperation—a society's scheme of labor and production.[201]

Yet in part because of employment law's strong commitment to workplace equality (and, of course, because of the democratic values that require such equality), people may be limited in their ability to interact with

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[199] For a thoughtful discussion of the potential for the *paid* workplace to bring diverse people together, see generally CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2005). Even if the paid workplace can bring people together from diverse backgrounds, that potential is still limited by the meritocratic features of the workplace and the content of the primary work being done. For example, employees at an investment bank might come from a variety of backgrounds (even educational, assuming that people in different roles interact with one another supportive and meaningful ways). Yet differences in moral and political beliefs across a society may mean that those working at the bank systematically encounter only a small segment of the population, and do not encounter people who fundamentally disagree with their kind of work or have radically different life projects and interests.

[200] Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e–2 (2015). To be clear, I take an inclusive view of the content of a contract, according to which the content of a contract is not limited to the intent of the parities as expressed in a contractual agreement, but also includes the full range of legal duties and default terms the law imposes on the particular kind of promissory relationship formed by the parties. Hence, employment law, on my view, is part of the content of an employment contract.

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

and realize conceptions of the good in the paid workplace. Such limits are, of course, desirable (for all the reasons noted above).[202] But just because a value would be inappropriate to realize in the paid workplace does not mean it should have no context for its realization.

For example, a group aiming to facilitate women's community engagement may want to limit its membership to women. Similarly, a church may want to limit its ministerial positions to religious adherents. Treating commitments to volunteer like employment contracts would thus yield one of two undesirable results: either people would no longer be permitted to realize those moral and religious aims through their cooperative activity with one another, or we would have to give up on full workplace equality.[203] Extending antidiscrimination norms in employment contracts to volunteer settings may thus sometimes undermine volunteer work's value as a locus for engaging with and realizing a plurality of values (that might not be appropriately or freely realizable in the paid workplace).

To be clear, this is not to say that voluntary organization should have carte blanche to discriminate. Volunteer organizations may interact with the public in ways that parallel public accommodations. It is also not clear that antidiscrimination is always in tension with the internal norms of the organization. For instance, why would Pets Without Borders need to be able to engage in racial discrimination in either its membership or who it permits to adopt rescue animals?[204] My point is rather that employment contract norms should not be adopted wholesale to enforce volunteer commitments, even in cases where the organization (or a recipient of volunteer goods) has a claim against a volunteer.

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In sum, commitments to volunteer should sometimes be enforced, but the role of volunteer work in associational life likely makes service and employment contract principles a poor fit for guiding enforcement of commitment to volunteers.[205] Although volunteers sometimes do the same

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[202] *See* ESTLUND, *supra* note 199, at 8–9, 34, 125.

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

[204] I am indebted to Seana Shiffrin for this point.

[205] There are potentially analogous issues in donative promises of goods. Should, for instance, the perfect tender rule apply? *See* U.C.C. § 2-601. To be sure, the U.C.C. applies only to sale of goods, but we might still ask whether it is the "sale" portion or the "goods" portion of that requirement that forms the basis for the rule. If it is the latter, then that provides a reason for the perfect tender rule to apply.

kind of work as employees, volunteer work's distinctive potential for inclusivity and volunteerism's role in associational life makes service and employment contract principles a poor fit. This problem of fit is not just a problem for a need-centered theory of enforcement. Since volunteer commitments can be enforced on a theory of promissory estoppel, the problem of fit still arises even under the donative promise principle. While a need-centered approach can remedy defects in the donative promise principle, the case of volunteer work illustrates that we may also need to develop a contract law of donative promises.

V. CONCLUSION

It is a well-established contract principle that an unrelied-upon donative promise is unenforceable. The aim of this Article has been to challenge this principle. The donative promise principle creates perverse incentives for promisees to succumb to promisor attempts at undue influence to rely in a foreseeable way on the promise, and thereby secure a legal right to the much need gift.[206] An exclusively reliance-based approach to enforcement also does not reach promisees whose indigence or caretaking responsibilities make it difficult to change circumstances in reliance on the promise. The donative promise principle thus reifies the social inequality that donative promises purport to remedy.

In contrast, a need-centered approach to enforcement is responsive to the power dynamics and relationships within and against which donative promises are made. Enforcement on the basis of reasonably foreseeable substantial need for the promised gift can counteract risks of undue influence and dependency by vesting an immediate contract right in people who need it the most. Further, enforcement can obviate reasons for strategic overreliance and forming contingency plans, both of which may have a corrosive effect on trust within interpersonal relationships. A need-centered approach to enforcing donative promises thus need not undermine the moral character of donative promises, but may actually support the autonomy and associational values of donative practices.

But, as the case of volunteer work illustrates, we should resist importing wholesale other contract doctrines when enforcing donative promises, whether on theory of substantial need or reliance. "[T]he correct regulative principle for anything depends on the nature of that thing."[207] To the extent that other contract principles have developed in response to market relationships,[208] they may need to be modified to apply in a nonarbitrary

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[206] *See supra* Subpart II.A.

[207] JOHN RAWLS, A THEORY OF JUSTICE 29 (1971).

[208] *See supra* note 157.

and nondiscriminatory fashion to donative promises. Donative promises thus should not simply be pushed into the "world of contract,"[209] but contract needs to be adjusted to accommodate donative promises.

[209] Eisenberg, *supra* note 6, at 821.