

Principles of Consideration

Melvin Aron Eisenberg

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Melvin Aron Eisenberg, *Principles of Consideration*, 67 Cornell L. Rev. 640 (1982)
Available at: <http://scholarship.law.cornell.edu/clr/vol67/iss4/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE PRINCIPLES OF CONSIDERATION*

Melvin Aron Eisenberg†

A promise, as such, is not legally enforceable. The first great question of contract law, therefore, is what kinds of promises should be enforced. The answer to that question traditionally has been subsumed under the heading "consideration." Properly understood, that term merely stands for the set of general principles defining the conditions that make promises enforceable, and it might profitably be replaced by the more descriptive term "enforceability." Over the last hundred years or so, however, a more confined approach developed, under which consideration doctrine was made to turn on a bargain pivot, and was articulated through a set of highly particularized rules. This approach was part of a school that was characterized by an attempt to derive contract law through logical deduction from received axioms. The purpose of this Article is to reconstruct applicable doctrine along modern lines. To this end, I shall develop an analysis in which bargain is only one of several alternative conditions of enforceability, and the law concerning the enforceability of promises is expressed in principles that are sufficiently open-textured to account for human reality, and to permit growth of doctrine as principles unfold and social facts change over time.¹

Two propositions underlie the analysis and should be stated at the outset. First, the determination of what *kinds* of promises the law should enforce is tightly linked to the *extent* to which various kinds of promises should be enforced. Accordingly, theories of enforceability must focus heavily on appropriate measures of damages. Second, there is now taking place a major change in the way the courts review contracts for fairness. In the past, courts decided issues of fairness covertly, and expressed their decisions through the manipulation of rules and exceptions purportedly designed for other ends. In recent years, however, the principle has emerged that courts may limit or deny enforcement of bargain

* Copyright © 1982 by Melvin Aron Eisenberg.

† Professor of Law, University of California, Berkeley. A.B., Columbia 1956; LL.B., Harvard 1959.

I am indebted for extremely helpful comments by a number of colleagues and friends, particularly Meir Cohen, Alfred Conard, Robert Cooter, Alan Schwartz, Steve Sugarman, and Jan Vetter, and by participants in the Boalt Hall Faculty Colloquium and The Yale Legal Theory Workshop, where earlier versions of the Article were presented.

¹ This is the third in a series of articles attempting to reconceptualize contract law through the development of such principles. See Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

promises that are "unconscionable."² The agenda for the legal community is to crystallize, from the paradigmatic concept of unconscionability, those specific types of review for fairness that are consistent with due regard to efficiency and private autonomy,³ and to encourage the courts to perform such review openly.

Throughout this Article, emphasis will be placed on the rules embodied in the Restatement (Second) of Contracts, partly because of the *Restatement Second's* own importance, and partly because its formulations and rationales conveniently summarize the tenets of the axiomatic school.

I

THE MEANING OF THE TERM "CONSIDERATION"

To achieve clear thinking about the principles that determine what kinds of promises the law should enforce, these principles must be based on the social desirability of enforcing various categories of promise taken at wholesale. Questions concerning the quality of individual promises—questions relating to issues such as fraud, duress, mistake, or unconscionability—should then be dealt with at retail, through case-by-case application of the principles that deal with those more differentiated issues. Putting the problem in the language of civil procedure, the principles that address the enforceability of promises should determine whether breach of a given type of promise gives rise to a legal complaint. Issues concerning the quality of individual promises should then be matters of defense.

The axiomatic school, as reflected in the rules embodied in the first and second Restatements of Contracts, unfortunately takes a more restrictive approach, which turns on the so-called bargain theory of consideration. In the *Restatement Second*, this theory is embodied in section 71(1):

Requirement of Exchange

. . . . To constitute consideration, a performance or a return promise must be bargained for.⁴

The bargain theory of consideration produces two distortions. The first concerns terminology and style. Obviously, a number of conditions other than bargain should make a promise legally enforceable. The axiomatic school recognizes these conditions, as it must, but only under the

² In the modern period, this principle emerged first in § 2-302 of the Uniform Commercial Code, then in the cases, and later in other uniform acts, § 208 of the RESTATEMENT (SECOND) OF CONTRACTS (1979), and the RESTATEMENT (SECOND) OF PROPERTY (1977).

³ See Eisenberg, *The Bargain Principle and Its Limits*, *supra* note 1, at 748-85.

⁴ Section 71(1) of the *Restatement Second* is the opening provision of Chapter 4 ("Formation of Contracts—Consideration"), Topic 1 ("The Requirement of Consideration").

topic heading "Contracts Without Consideration."⁵ The unhappy result is that under the terminology of the axiomatic school, as reflected in the *Restatement Second*, a promise needs consideration to be enforceable unless it does not need consideration to be enforceable.

The second and more serious distortion produced by the bargain theory of consideration is substantive. If consideration means the set of principles defining the conditions that make promises enforceable, the elements of consideration will be continually adjusted as it becomes socially desirable to add new or drop old conditions. In contrast, the bargain theory of consideration suggests a closed system in which nonbargain promises are presumptively unenforceable.⁶ This closed-system approach does not necessarily restrict the Restatements themselves.⁷ If taken seriously, however, such an approach not only tends to stifle judicial creativity and reconceptualization, but conduces to the formulation of particularized rules, rather than general principles, to govern nonbargain promises.⁸

The bargain theory of consideration is certainly not mandated by contract doctrine. On the contrary, the theory cannot account for such basic contract doctrines as promissory estoppel, past consideration, and waiver, except by clumsily relegating them to the purgatory of "Contracts Without Consideration."⁹ Nor is the theory mandated by judicial decisions. A number of courts have adopted the bargain theory, to be sure, but many others have continued to use the term "consideration" in its broader sense to embrace such elements as the seal,¹⁰ reliance,¹¹ and moral obligation based on past benefit conferred.¹² It is time to discard the restrictive bargain theory of consideration in favor of an expansive conception that recognizes the enforceability of promises on the basis of various elements, and directs inquiry toward determining those elements

⁵ Topic 2 of the *Restatement Second's* Chapter 4.

⁶ The closed-system approach is made explicit by § 17 of *Restatement Second: Requirement of a Bargain*

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain

(2) Whether or not there is a bargain a contract may be formed under the special rules applicable to formal contracts or under the rules stated in §§ 82-94.

Sections 82-94 are the provisions of Chapter 4, Topic 2 ("Contracts Without Consideration"), many of which are discussed *infra*. The term "formal contracts" is defined by *Restatement Second* § 6 to mean (a) contracts under seal, (b) recognizances, (c) negotiable instruments and documents, and (d) letters of credit.

⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 86 (1979); RESTATEMENT OF CONTRACTS § 90 (1932).

⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 87, 88 (1979), discussed in the text accompanying notes 39-46 *infra*.

⁹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 84, 86, 90 (1979).

¹⁰ See 1 S. WILLISTON, *A Treatise on the Law of Contracts* § 217 (S. Williston & G. Thompson rev. ed. 1936).

¹¹ See, e.g., *Porter v. Commissioner*, 60 F.2d 673, 675 (2d Cir. 1932) (L. Hand, J.).

¹² See, e.g., *Jones v. Jones*, 242 F. Supp. 979, 982 (S.D.N.Y. 1965).

while fashioning principles that reflect them in an appropriate way. The balance of this Article is directed to that end.

II

THE ELEMENT OF BARGAIN

The determination of whether any given type of promise is legally enforceable should turn on both substantive and administrative considerations. As a substantive matter, the state (speaking through the courts) may justifiably take the position that its compulsory processes will not be made available to redress the hurt caused by every broken promise, but only to remedy substantial injuries, prevent unjust enrichment, or further some independent social policy, such as promotion of the economy. As an administrative matter, the state may fairly take into account the extent to which enforcement of a certain type of promise would involve difficult problems of proof. Cutting across both substantive and administrative categories is the question of whether the type of promise at issue is normally made in a deliberative manner, so as to accurately reflect the promisor's wants and resources.

By these standards, bargain promises clearly should be enforceable. The injury to the promisee is typically substantial. Usually he will have relied upon the promise, and often he will have seen the promisor enriched as a result of that reliance. The state has an independent interest in the enforcement of such promises. Exchange creates surplus, because each party presumably values what he gets more highly than what he gives. A modern free-enterprise system depends heavily on private planning and on credit transactions that involve exchanges over time. The extent to which private actors will be ready to engage in exchange, and are able to make reliable plans, rests partly on the probability that bargain promises will be kept. Legal enforcement of such promises increases that probability.

Other criteria for enforceability point in the same direction. For example, if the bargain has been half-completed, that a valuable performance has been rendered to an unrelated party helps satisfy the administrative concern for evidentiary security. Even if the transaction is wholly executory, bargains are not easy to fabricate from whole cloth. And because bargain promises are typically rooted in self-interest rather than altruism, they are likely to be finely calculated and deliberately made.

Ironically, however, the axiomatic school, having adopted the bargain theory of consideration, stopped short of giving the bargain element its full scope, and instead wrongly adopted rules that denied enforcement to several important classes of bargain promises. Among the most significant of these classes are promises given in bargains in-

volving either the performance of a legal duty or an illusory counterpromise.

A. *The Legal-Duty Rule*

The legal-duty rule is articulated as follows in section 73 of the *Restatement Second*:

Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

The rule as articulated covers both preexisting duties imposed by contract and duties arising out of an official position. These two types of duty raise very different issues, and in evaluating the rule each type must be considered separately.

1. *Preexisting Duties Imposed by Contract*

The rationale of the legal-duty rule as applied to preexisting contractual duties is stated in Comment a to section 73 of the *Restatement Second*:

. . . A claim that the performance of a legal duty furnishes consideration for a promise often raises a suspicion that the transaction was gratuitous or mistaken or unconscionable. If the performance was not in fact bargained for and given in exchange for the promise, the case is not within this Section: in such cases there is no consideration under the rule stated in Section 71(1). Mistake, misrepresentation, duress, undue influence, or public policy may invalidate the transaction even though there is consideration. . . . But the rule of this Section renders unnecessary any inquiry into the existence of such an invalidating cause, and denies enforcement to some promises which would otherwise be valid. Because of the likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty, the promise does not have the presumptive social utility normally found in a bargain. . . .¹³

Three propositions can be parsed from this Comment: (1) bargains involving the performance of a preexisting contractual duty are often gratuitous; (2) if not gratuitous, they are often mistaken; and (3) if neither gratuitous nor mistaken, they are often unconscionable.

The proposition that bargains involving the performance of a preexisting contractual duty are often gratuitous is empirically farfetched. Perhaps a few such cases could be found, but I have never run across one. In any event, if such cases really do arise they neither need nor

¹³ RESTATEMENT (SECOND) OF CONTRACTS § 73, Comment a (1979). Comment c elaborates, but does not significantly extend, Comment a.

justify a special rule. As Comment a points out, "[i]f the performance was not in fact bargained for and given in exchange for the promise, the case is not within this Section: in such cases there is no consideration" ¹⁴

The proposition that such bargains are often mistaken is similarly farfetched. It also would not support a special rule, because, as Comment a again makes clear, "[m]istake . . . may invalidate the transaction even though there is consideration." ¹⁵

The final proposition, that such bargains are often unconscionable, has some empirical basis, and might justify the legal-duty rule as an administratively convenient rule-of-thumb if a very high proportion of such bargains were unconscionable in a manner that is difficult to discern. There is, however, no evidence to suggest that most or even a substantial proportion of such bargains are unconscionable. ¹⁶ This is all but admitted both in Comment a, with its reference to a "suspicion" of unconscionability, and in Comment c, which states that "the rule has not been limited to cases where there was a possibility of unfair pressure, and it has been much criticized as resting on scholastic logic." ¹⁷ The lack of evidence to suggest that most such bargains are unconscionable is also confirmed by a review of the legal-duty cases, in which the unfairness often seems to lie more with the party who raises the legal-duty rule than with the party who rests on the new bargain.

As applied to preexisting contractual duties, the legal-duty rule also cannot be justified on the ground that the potential for unfairness in such cases is too subtle to ferret out through direct inquiry. On the contrary, the relevant unfairness norms in this type of case are limited in number and readily crystallized and applied. Essentially, the issues are: (1) Whether the promisee had a good-faith reason for requesting modification of his duties, such as changed circumstances of a kind that provide a moral although not a legal excuse for nonperformance; (2) whether the promisee was practicing moral extortion, as by trading on the transaction costs of litigation; (3) whether the promisor lacked practicable freedom to resist the promisee's proposal. The courts can easily deal with these issues directly, and indeed frequently do so, as in cases

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ It is also empirically unlikely that most members of a given category of promise are either (1) gratuitous and based on pure altruism, or (2) unconscionable and based on pure greed.

¹⁷ Comment c also states:

. . . [T]he lack of social utility in such bargains provides *what modern justification there is* for the rule that performance of a contractual duty is not consideration for a new promise. . . . Slight variations of circumstance are commonly held to take a case out of the rule And in some states the rule has simply been repudiated.

where a party who has made payment under the new bargain invokes the doctrine of economic duress to recover all or part of the payment.¹⁸

Apparently in recognition of these difficulties, many courts have adopted an exception to the legal-duty rule, reflected in section 89(a) of the *Restatement Second*:

Modification of Executory Contract

A promise modifying a duty under a contract not fully performed on either side is binding

(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made

. . . .¹⁹

In terms of result, this exception is welcome, but it is neither conceptually sound nor a satisfactory proxy for a direct inquiry into fairness. Conceptually, the exception is virtually impossible to reconcile with the rule. If, under the rule, a promise to perform a preexisting contractual duty is not consideration, whether it is fair or unfair, equitable or inequitable, how does it become consideration when it meets the conditions of the exception?²⁰

A more important problem with the exception is that it fails to make up for the defects of the rule. As articulated in section 89(a), the exception is inapplicable to a number of cases that fall within the legal-duty rule but involve no unfairness—for example, cases in which the modification is fair and equitable under circumstances that cannot fairly be characterized as unanticipated, or in which the modification is made after performance on one side has been completed. In the end, the exception illustrates that bad rules breed illogical distinctions.

The problem behind the legal-duty rule is simple. The tenets of the axiomatic school did not include a doctrine of unconscionability. Accordingly, until recently the courts believed that they lacked explicit power to review a bargain for fairness. In the absence of such power, the next best solution may have seemed to be to smuggle fairness issues into court through the doctrine of consideration. As matters turned out, this solution raised two major difficulties.

The first of these difficulties is obvious. That a bargain involves performance of a preexisting contractual duty may suggest the possibility of unfairness, but it does not establish unfairness. Under a strict ap-

¹⁸ See, e.g., *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971). See also *RESTATEMENT (SECOND) OF CONTRACTS* § 89(a) (1979).

¹⁹ *Restatement Second* § 89(c) adds in a welcome provision that a promise modifying a duty not fully performed on either side is also binding "to the extent that justice requires enforcement in view of material change of position in reliance on the promise."

²⁰ Because the exception is located in Topic 2 of the *Restatement Second*, the answer of the axiomatic school to this question might be that if a promise falls under the exception it is enforceable "without consideration." Such an answer, of course, would only serve to underscore the poverty of the bargain theory of consideration.

plication of the legal-duty rule, therefore, some contracts that are entirely fair are not enforced.

The second difficulty is more subtle. In reading the legal-duty cases, it is difficult to avoid the conclusion that many or most of them are covertly decided on grounds of fairness. The judicial technique is simple, even primitive. If the court thinks the new contract was unfairly procured, it simply applies the legal-duty rule. If the court thinks the new contract was fairly procured, it seeks to apply an exception to the rule. This approach, however, has proved drastically inadequate. It renders predictability in this area extremely difficult. It does not work in every case; some courts take the rule seriously, and others cannot find an applicable exception. And, because the decision on fairness is covert, it interferes with a full and open presentation of the real issues.

The modern emergence of the doctrine of unconscionability has stripped the legal-duty rule of what little justification it once had. Even courts that believe themselves obliged to follow the rule characterize it as "technical," regard it with "disfavor," and find it to be supported by "neither rhyme nor reason."²¹ The rule has been riddled with inconsistent exceptions,²² repudiated by judicial decisions in several states,²³ repudiated as to contracts for the sale of goods by the Uniform Commercial Code,²⁴ and effectively repudiated as to written contracts by statutes in several major jurisdictions.²⁵ The time has come to drop the legal-duty rule and substitute in its place a careful review of bargains involving the performance of a preexisting contractual duty, to determine whether they are unconscionable.

2. *Duties Arising Out of an Official Position*

A minor irony of the legal-duty rule is that although it is overinclusive in its treatment of bargains involving preexisting contractual duties, it is underinclusive in its treatment of bargains involving the

²¹ See, e.g., *Chicago, M. & St. P.R.R. v. Clark*, 178 U.S. 353 (1900); *Brooks v. White*, 43 Mass. 283 (1840); *Kellogg v. Richards*, 14 Wend. (N.Y.) 116 (1837); *Harper v. Graham*, 20 Ohio 105 (1851); *Brown v. Kern*, 21 Wash. 211, 57 P. 798 (1899); *Herman v. Schlessinger*, 114 Wis. 382, 90 N.W. 460 (1902).

²² See, e.g., *Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856 (10th Cir. 1968), cert. denied, 393 U.S. 1020 (1969) (legal-duty rule not applicable where preexisting contractual duty owed to third person); *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921) (legal-duty rule not applicable where prior contract mutually rescinded when new contract made); *Cohen v. Sabin*, 452 Pa. 447, 307 A.2d 845 (1973) (payment of that part of unliquidated obligation which is admittedly due is consideration for surrender of balance of claim); *Angel v. Murray*, 113 R.I. 482, 322 A.2d 630 (1974) (legal-duty rule inapplicable if new contract is fair and equitable in light of circumstances not anticipated when old contract was made).

²³ See *Dreyfus v. Roberts*, 75 Ark. 354, 87 S.W. 641 (1905); *Clayton v. Clark*, 74 Miss. 499, 21 So. 565 (1896); *Frye v. Hubbel*, 74 N.H. 358, 65 A. 325 (1907).

²⁴ See U.C.C. § 2-209.

²⁵ See CAL. CIV. CODE §§ 1524, 1541, 1697 (WEST 1954); MICH. COMP. LAWS ANN. § 566.1 (West 1967); N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 1964).

performance of official duties. It will be recalled that section 73 of the *Restatement Second* provides that "[p]erformance of a legal duty owed to a promisor that is neither doubtful nor the subject of honest dispute is not consideration" Comment b to section 73 puts the following gloss on this language:

Public duties A legal duty may be owed to the promisor as a member of the public, as when the promisee is a public official. . . . A bargain by a public official to obtain private advantage for performing his duty is . . . unenforceable as against public policy. . . . And under this Section performance of the duty is not consideration for a promise.

. . . .

In applying this Section it is first necessary to define the legal duty. The requirement of consideration is satisfied if the duty is doubtful

As the following hypothetical illustrates, this approach does not solve the real problem in bargains involving official duties:

Lost Ring. *A's* diamond ring has been stolen. *A* is insured, but the ring has great sentimental value. *A* asks *D*, a police officer in charge of the theft squad, to work on the case evenings and weekends, purely on his own time, at an hourly rate. *D* agrees, locates the ring, and presents a bill to *A*. *A* refuses to pay.²⁶

A's bargain with *D* would not be rendered unenforceable by the legal-duty rule. *D* owes no legal duty to either *A* or the government to render the requested performance. The police do not have enough manpower to investigate all the crimes that occur, and must allocate time and energy at their discretion. Nevertheless, *A's* promise should be unenforceable for two reasons of social policy. First, allowing public officials to accept private payment for acts that are within the scope of their duties might put those who deal with officials in the dilemma of making such payments or risking disfavor. Second, public officials who have discretion over how they allocate time and energy should not be consciously or unconsciously guided in making that allocation by the prospect of private gain.²⁷

In short, the real issue in cases involving private contracts with public officials is not whether the official owes a legal duty to render the bargained-for performance, but whether the performance was within the scope of his authority.²⁸ As in the case of bargains involving the performance of a preexisting contractual duty, applying the legal-duty

²⁶ *Lost Ring* is loosely based on *Gray v. Martino*, 91 N.J.L. 462, 103 A. 24 (1918).

²⁷ See N.Y. PENAL LAW § 200.35, Comment (McKinney 1965).

²⁸ See *id.* § 200.35 (unlawful for public servant to receive gratuities for engaging in official conduct that he was authorized to perform).

rule to private contracts with public officials merely obscures the real issue.

B. *Illusory Promises*

A second important class of bargain promises denied enforcement under the tenets of the axiomatic school consists of bargains involving illusory promises. The rule governing such cases is articulated in section 77 of the *Restatement Second*:

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) each of the alternative performances would have been consideration if it alone had been bargained for

This illusory-promise doctrine rests on a fallacy that is not apparent on the face of the rule, but emerges in its application. Consider the following Illustrations to section 77:

1. A offers to deliver to B at \$2 a bushel as many bushels of wheat, not exceeding 5,000, as B may choose to order within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order from A within that time. B's acceptance involves no promise by him, and is not consideration. . . .

2. A promises B to act as B's agent for three years from a future date on certain terms; B agrees that A may so act, but reserves the power to terminate the agreement at any time. B's agreement is not consideration, since it involves no promise by him.

These Illustrations are classic examples of the manner in which the illusory-promise doctrine is intended to operate. Observe, however, that there is a slight but highly important shift between the black-letter rule of section 77 and the tag lines in the Illustrations. The black-letter rule says that an illusory promise is not consideration. The tag lines say, in effect, that on the facts A's promise is not enforceable. These are two different propositions. In transactions like those in the Illustrations, consideration may be present even if one of the parties has not made a real promise.

The fallacy of the illusory-promise doctrine is that it treats transactions involving illusory promises as if they were failed bilateral contacts, intended to involve a promise for a promise. In fact, however, such transactions are often successful unilateral contracts, intended to involve a promise for an act—the act of giving the promisor a chance.²⁹ The party who makes the real promise in these cases does not do so for altru-

²⁹ See C. FRIED, *CONTRACTS AS PROMISE* 31 (1981). Even Williston admitted "that [illusory promises] are frequently . . . requested with intent to make a bargain cannot be successfully disputed. A contractor or seller is often so eager to obtain work, or a sale, that he will gladly subject himself to an absolute promise in return for one which leaves performance

istic reasons. Rather, he seeks to advance his own interests by inducing the promisee to give him a chance to show that his performance is attractive, so as to convince the promisee to transact. Giving a real promise in an illusory-promise transaction achieves that objective in two closely related ways. First, such a promise conveys information—the information that the promisor is so confident his performance will be found attractive that he is willing to limit his freedom of action to get a chance to demonstrate that attractiveness. In this sense the promise resembles a money-back guarantee or an extended warranty, which transmit information concerning a seller's confidence in his product. Second, such a promise is designed to alter the promisee's incentives. Giving a chance is not cost-free, and presumably the promisor believes that without the promise the promisee's incentives to give the promisor a chance would be insufficient. In effect, there is a disparity of information and incentives between promisor and promisee. The promisor has a degree of confidence in the attractiveness of his performance which he believes the promisee does not share. To increase the likelihood of exchange, the promisor makes a promise that is intended to change the promisee's incentives sufficiently to induce him to give the promisor a chance. If the promisee gives the chance, the inducing promise should be enforceable under standard unilateral contract analysis.

This proposition can be illustrated by the following hypothetical, involving an illusory promise comparable to that in the second Illustration to section 77:

Confident Student. *A*, a third-year law student whose grades are only fair but whose confidence is great, interviews the well-known Washington litigation firm, *F, G & H*. After the interview, which *A* feels went very well, he writes to *G* as follows:

Dear *G*:

I very much enjoyed meeting you at my recent interview. I know my grades are below the level *F, G & H* usually requires. However, I also know they are not a fair indicator of my skills, particularly in litigation. (As you may recall, I did exceptionally well in several moot court settings.) I am sure that if you gave me a chance you would be more than pleased with my work. In order to induce you to give me a chance I make you the following offer: I will work for you for one year at \$12,000 (one-third of *F, G & H's* normal starting salary), beginning September 1. If you concur in my proposal, you can nevertheless change your mind at any time before that date, and in addition you may discharge me at any time thereafter, without notice, and with no questions asked.

Sincerely yours,

A

G concurs, and *A* begins work. After three months, however, *A* leaves for another job, over *G*'s objection. *F*, *G* & *H* bring suit for breach of contract.

Under the illusory-promise doctrine, as exemplified in Illustrations 1 and 2 to section 77, *A* would not be bound to his promise. Clearly, however, *A* has made a bargain. If, in *Confident Student*, *F*, *G* & *H* had paid \$500 for *A*'s promise, the promise would clearly be enforceable. The act of giving *A* a chance to prove himself may be worth much more to *A* (and may cost *F*, *G* & *H* considerably more) than that amount. *A* received exactly what he bargained for and should be bound by his promise.

Of course, it is possible in a bargain involving an illusory promise that the party who made the real promise was not bargaining for a chance, and was unconscionably fast-talked into believing that a real promise was made to him. Indeed, as with the legal-duty rule, the illusory-promise doctrine may have been a crude technique for covertly introducing issues of fairness into contract law at a time when the courts believed it improper to deal openly with such issues. Many if not most of the illusory-promise cases, however, involve transactions between merchants who are unlikely to have misperceived what each was giving and receiving.³⁰

Even today, the illusory-promise doctrine has only a precarious toe-hold in the law. It is often avoided by some modern equivalent of the peppercorn,³¹ and its application is frequently rejected on flimsy if not specious grounds.³² Now that the doctrine of unconscionability has been explicitly recognized, the illusory-promise doctrine should be abandoned. Any potential for unconscionability in bargains involving illusory promises should be treated directly, by scrutinizing the transaction to ensure that it did not involve unconscionable fast-talking.

C. *Extent of Enforcement*

As pointed out earlier, the determination of what *kinds* of promises the law should enforce is tightly linked with the *extent* to which various kinds of promises should be enforced.³³ An aspect of this linkage is that the substantive reasons for enforcing a defined category of promises provide guidance in determining the proper extent of enforcement. Thus bargain promises should be enforced to the extent necessary to make fair

³⁰ See, e.g., *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693 (5th Cir. 1924); *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, 189 Iowa 1183, 179 N.W. 417 (1920).

³¹ See, e.g., *Lindner v. Mid-Continent Petroleum Corp.*, 221 Ark. 142, 252 S.W.2d 631 (1952).

³² See, e.g., *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *Gurfein v. Werbelovsky*, 97 Conn. 703, 118 A. 32 (1922).

³³ See text accompanying notes 1-2 *supra*.

compensation and to promote efficiency by facilitating planning and effectuating the parties' allocation of risk. In most cases three strong reasons show that those goals are best achieved by the expectation measure.

First, fairness normally requires that a bargain promisee should at least be compensated for the cost that he incurred in reasonably relying on the promise, and in many transaction-types expectation damages are approximately equal to cost but are much easier to measure.

Second, contracts for forward delivery typically are made with the purpose of enabling the parties to plan their future conduct reliably. Efficiency normally requires that such planning should be facilitated. The award of expectation damages promotes that end by making breach unprofitable in the normal case.

Third, contracts for forward delivery at fixed prices typically are intended to allocate the risk of changes in the market price. Efficiency normally requires effectuating this allocation, and that is exactly what expectation damages accomplish. Risk allocation also implicates considerations of fairness. When parties gamble on market movements and the market does in fact move, the breaching promisor is like a gambler who welsches on his bet.³⁴

Expectation damages should therefore be the normal measure of damages in the case of bargain promises. It must be borne in mind, however, that this measure is only a means of serving the interests of fairness and efficiency in the context of a bargain. In categories where the expectation measure does not best serve those interests, it should therefore give way to other remedies.³⁵

III

PROMISES ANCILLARY TO A BARGAIN

The promises at the core of a bargain are often surrounded by a penumbra of ancillary promises that are not independently and explicitly bargained for—most prominently, firm offers, guaranties, modifications, and waivers.³⁶ The axiomatic school took the position, embodied in the Restatements,³⁷ that such promises were not enforceable in themselves (although they might be made enforceable by elements such as reliance, or under certain rules that appear to be highly particularized and unrooted in principle). Both policy and fairness, however, support the enforcement of promises that are ancillary to a bargain and deliberately made.

³⁴ See Eisenberg, *The Bargain Principle and Its Limits*, *supra* note 1, at 785-98 for further exploration of these issues.

³⁵ See *id.* at 794-98 for one example.

³⁶ See Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 818-19 (1941).

³⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 17 & Ch. 4 (1979).

A. *Firm Offers*

A firm offer is a legal molecule consisting of two atoms: an offer, and a promise to hold the offer open for a fixed or reasonable time. The axiomatic school, applying the bargain theory of consideration, adopted the rule that the offeror was not obliged to keep the offer open, because the promise to do so was revocable unless paid for. But just as enforcing bargain promises is socially desirable because surplus is created through exchange,³⁸ so too the law should enforce promises that facilitate or augment the likelihood of exchange. Firm offers obviously fall within that category. As stated in the *Restatement Second* itself, “[t]he fact that the option is an appropriate preliminary step in the conclusion of a socially useful transaction provides a sufficient substantive basis for enforcement”³⁹

Furthermore, the logic of the rule that firm offers are not enforceable is flawed in exactly the same way as the illusory-promise doctrine.⁴⁰ A firm offer is made, not for altruistic motives, but to advance the offeror’s interests by inducing the offeree to deliberate. In deciding whether to accept an offer, an offeree must often make an investment of time, trouble, and even money. The offeree is more likely to make such an investment if he is sure the offer will be held open while the investment is being made than he is if the offer may be revoked during that period.⁴¹ Like the real promise in a bargain involving an illusory promise, a promise to hold an offer open normally has two closely related purposes, both of which are advanced by making the commitment legally enforceable. The first purpose of such a promise is to convey information—the information that the offeror is so confident his offer is attractive that he is willing to limit his freedom of action to demonstrate that attractiveness. The second purpose is to alter the offeree’s incentives. Presumably, the offeror believes that without the promise, the offeree’s incentives to deliberate on the offer would be insufficient. In effect, there is a disparity of information and incentives between offeror and offeree. The offeror has a degree of confidence in the attractiveness of his offer which he believes the offeror does not share. To increase the possibility of creating a surplus through exchange, the offeror makes a commitment that is intended to provide the offeree with additional information and change the offeree’s incentives to deliberate.⁴² Given the offeror’s intent to induce such an investment, the likelihood that the in-

³⁸ See Section II *supra*.

³⁹ RESTATEMENT (SECOND) OF CONTRACTS § 87, Comment b (1979).

⁴⁰ This is not surprising, because on scratching an illusory promise one normally finds a firm offer. See Section III(c) *infra*.

⁴¹ The opposite side of this coin is the high-pressure seller who, believing that his offer will suffer if it is deliberated upon, attempts to convince the offeree that it must be accepted immediately or not at all.

⁴² The main lines of this passage were suggested to me by my colleague Robert Cooter.

vestment will be made, the difficulty of proving the investment by direct means, and the probability that more exchanges will take place if firm offers are enforceable than if they are not, the law should respond by assuming that the offeror has received the investment he wanted to induce.

Enforcing firm offers would hardly be a radical change in the law. It has become well established that firm offers are enforceable if relied upon,⁴³ and in most cases reliance can reasonably be presumed. Section 2-205 of the Uniform Commercial Code renders enforceable written firm offers by merchants to buy or sell goods.⁴⁴ Section 87(1) of the *Restatement Second* adopts the rule that written firm offers are enforceable if they recite a purported consideration for making the offer, and propose an exchange on fair terms within a reasonable time. Sections 2-205 of the Uniform Commercial Code and 87(1) of the *Restatement Second* are important in themselves, because together with the principle of reliance they carve away much of the old rule's domain. In addition, these provisions constitute authority for the principle that a promise ancillary to a bargain and deliberately made should be enforceable, because that principle most satisfactorily explains the rules embodied in these provisions. Thus the rule embodied in section 87(1) of the *Restatement Second* can be explained by this principle on the ground that a firm offer is ancillary to a bargain and the form of a bargain shows deliberativeness. Similarly, the rule embodied in section 2-205 of the Uniform Commercial Code can be explained by this principle on the ground that a firm offer is ancillary to a bargain and a writing by a merchant shows deliberativeness.

These provisions also lead us back to the illusory-promise doctrine. Consider again Illustrations 1 and 2 to section 77 of the *Restatement Second*:

1. A offers to deliver to B at \$2 a bushel as many bushels of wheat, not exceeding 5,000, as B may choose to order within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order from A within that time. B's acceptance involves no promise by him, and is not consideration.

2. A promises B to act as B's agent for three years from a future date on certain terms; B agrees that A may so act, but reserves the power to terminate the agreement at any time. B's agreement is not consideration, since it involves no promise by him.

Observe that these Illustrations are just as much firm-offer cases as illusory-promise cases. In Illustration 1, A makes B an offer to sell up to 5,000 bushels of wheat at \$2 a bushel, his offer to hold good for thirty

⁴³ See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958).

⁴⁴ The offer must be signed by the offeror, and the period of irrevocability may not exceed three months.

days. In Illustration 2, *A* makes *B* an offer to act as *B*'s agent beginning at a future date, the offer to hold good for up to three years until *B*'s termination. Once it is recognized that the Illustrations involve firm offers, it is clear that both are wrongly decided under the rule embodied in section 87(1) of the *Restatement Second*—at least if the contracts are in writing—since in both the offer, when accepted, recited a purported consideration (the form of a bargain). Illustration 1 is also wrongly decided under section 2-205 of the Uniform Commercial Code, at least if the contract is in writing and *A* is a merchant, since it involves an offer to sell goods that by its terms gives assurance that it will be held open. In short, the illusory-promise doctrine is not only wrong analytically, but produces results that will not stand under other rules of contract law.

B. *Other Promises Ancillary to a Bargain*

Much the same reasoning supports the enforcement of other promises ancillary to a bargain, such as guaranties, modifications, and waivers. Although such promises may not be intended to communicate information, they do facilitate and therefore further the socially desirable process of exchange. Moreover, such promises are likely to be relied upon in a manner that is not susceptible of proof, often involve at least tacit reciprocity, and are usually intended to alter the promisee's incentives.

As in the case of firm offers, many of these other ancillary promises are even now often made enforceable as a result of elements such as reliance⁴⁵ or under special rules analogous to sections 87 of the *Restatement Second* and 2-205 of the Uniform Commercial Code. For example, a rule comparable to section 87, but applicable to guaranties, is embodied in section 88 of the *Restatement Second*: "A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if . . . the promise is in writing and signed by the promisor and recites a purported consideration . . ." Similarly, a rule comparable to section 2-205, but applicable to modifications, is embodied in section 2-209(1) of the Uniform Commercial Code: "An agreement modifying a contract within this Article needs no consideration to be binding." Under the doctrine of waiver, as embodied in section 84 of the *Restatement Second*, a promise to perform all or part of a conditional duty is binding and irrevocable in spite of the condition's nonoccurrence, provided its occurrence was not a material part of the exchange or an element of the risk assumed by the promisor, and either the promise was made after the occurrence was to take place or the occurrence was not within the promisee's control.⁴⁶ Like sections 87 and 2-205, these rules, which appear to

⁴⁵ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 88, 89 (1979).

⁴⁶ Under § 84(2), if the waiver promise is made before the time for the condition's occur-

be highly particularized and unrooted in principle, can in fact be explained by (and therefore support) the general principle that promises ancillary to a bargain and deliberately made should be enforceable.

C. *Deliberativeness and Remedy*

There is one respect in which promises ancillary to a bargain should be treated differently from bargain promises. In the case of a bargain, deliberativeness can normally be presumed as a result of the exchange context, and fairness can normally be presumed to follow from deliberativeness. Where explicit exchange is lacking, however, a separate showing of deliberativeness should be required, although there should be a presumption of deliberativeness where the promise is in the form of a writing or is made in the course of business. Furthermore, in the absence of explicit exchange the courts should be particularly sensitive to possible unconscionability. Manifest unfairness—as in a firm offer to sell property at a price materially below its market value—should at least suggest that deliberativeness was lacking.

For much the same reasons that apply to bargain promises, promises that are ancillary to a bargain and deliberately made should normally be enforced by expectation damages. Such promises, like bargain promises, are likely to induce costs that are difficult to establish by direct evidence; are typically made and enforced for the purpose of facilitating reliable planning; and often involve a strong, albeit tacit, element of reciprocity that justifies treating them as risk-allocation devices.

IV

THE ELEMENT OF RELIANCE⁴⁷

The first principle of the law governing the enforceability of promises is that an unrelieved-upon donative promise is normally unenforceable. This principle can be justified on several grounds, the most important of which is the low level of injury resulting from breach.⁴⁸ If, however, a donative promisee incurs demonstrable costs in reasonable reliance on the promise, the injury is significant and the promise should be enforced to the extent of those costs. Nevertheless, for a long time many courts would not enforce even relied-upon donative promises as such, and provided relief only when the underlying transaction could be

rence has expired, and the condition is within the promisee's control, the promisor can restate the condition if time remains for its occurrence under the contract or an extension, and reinstatement would not be unjust because of the promisee's material change of position. *See also* Koedding v. Slaughter, 634 F.2d 1095 (8th Cir. 1980); Graham v. San Antonio Mach. & Supply Corp., 418 S.W.2d 303 (Tex. Civ. App. 1967).

⁴⁷ The analyses in Parts IV and V parallel, but are not identical to, those in my earlier article, *Donative Promises*, *supra* note 1, at 18-33. The reader is referred to that article for more extensive discussion and citation.

⁴⁸ *See id.* at 2-7.

artificially construed as a bargain⁴⁹ or the relied-upon promise fell into one of several special categories, such as promises in contemplation of marriage or promises to give land.⁵⁰

In significant part this treatment was a product of the bargain theory of consideration. That barrier to enforcement was shouldered aside in 1932 when the first Restatement of Contracts, authored principally by Williston, appeared on scene. While adhering to the bargain theory in terms, the first *Restatement* nevertheless provided in its famous section 90:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.⁵¹

In effect, the rule embodied in section 90 of the first *Restatement* limited enforcement of relied-upon donative promises to cases that met four conditions: (1) the promisor should have reasonably expected that his promise would induce action or forbearance; (2) injustice could be avoided only by enforcement of the promise; (3) the reliance was of a substantial character; and (4) the reliance was of a definite character. The last two conditions were particularly questionable. Because the transaction costs of a lawsuit and the doctrine of *de minimis* would normally screen out trivial reliance without a special provision, the "substantial character" limitation in section 90 was presumably intended to set a barrier higher than triviality. But if a donative promisee's reliance is not trivial, and consists of action or forbearance that the promisor should reasonably have expected to induce—as has to be the case under section 90—how could the law justifiably refuse to enforce the promise, at least to the extent of the reliance?

The "definite character" limitation in section 90 was subject to a comparable objection. Williston explained this limitation to mean that section 90 was applicable only "where a reasonable person would say that the promisor expected the man to do *just* what he did or that he ought to have expected it."⁵² But if the promisee relied, and the promisor should reasonably have expected to induce reliance, how could the law justifiably refuse to enforce the promise on the ground that the promisor need not have expected the promisee to do "just" what he did?

⁴⁹ See, e.g., *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923).

⁵⁰ See Boyer, *Promissory Estoppel: Principle from Precedents* (pts. 1-2), 50 MICH. L. REV. 639, 873 (1952); Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908 (1937).

⁵¹ Gilmore suggests, based on conversations with Corbin, that Corbin pushed § 90 onto a reluctant Williston. G. GILMORE, *THE DEATH OF CONTRACT* 59-65 (1974). Wherever the idea first originated, Williston's attitude toward § 90 during the debate on the ALI floor was ferociously protective. See 4 ALI PROCEEDINGS 85-114 (App. 1926).

⁵² 4 ALI PROCEEDINGS 92-93 (App. 1926) (emphasis added).

The real reason for both limitations apparently rested in an unstated axiom of Williston concerning remedies—namely, that as a matter of contract law any promise that is legally enforceable at all must be enforceable to its full extent (through the award of expectation damages), rather than merely to the extent of the promisee's reliance. Having adopted that axiom, it is not surprising that Williston insisted that a relied-upon donative promise should not be enforceable unless the reliance was definite and substantial.

The *Restatement Second* properly rejects Williston's axiom. Section 90(1), the counterpart of old section 90, provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The express purpose of the newly-added last sentence is to sanction the use of a reliance measure of damages.⁵³ Furthermore, "[p]artly because of that change," the requirement that the promisee's action or forbearance have a definite and substantial character has been deleted.⁵⁴

These changes, while salutary, leave significant remedial and substantive problems. The newly added last sentence properly points up the intimate relationship between issues of enforceability and remedy.⁵⁵ However, it puts matters backward in implying that the expectation measure of damages should be used in reliance cases unless justice otherwise requires. Where enforcement of a promise is based solely on demonstrated reliance, damages normally should be measured by the costs (including opportunity costs) reasonably incurred in reliance. This does not mean that the expectation measure has no place in such cases. In practice, the costs reasonably incurred in reliance is often very difficult to measure. One solution, where this difficulty arises, would be to throw the issue to the factfinder for intuitive measurement, as the law does in personal injury cases. In those cases, however, the transaction typically is not consensual, and no objective financial measure is at hand. In relied-upon-promise cases, in contrast, it is the promise that causes the resulting costs. Thus a preferable solution in many such cases is to employ the promise—that is, the expectation—as an objective, although indirect, measure of costs. Broadly speaking, expectation should be employed as a surrogate measure of costs if costs appear to be significant, difficult to quantify, and closely related to the full extent of the promise. In a donative context, an important index for determining

⁵³ See RESTATEMENT (SECOND) OF CONTRACTS § 90, Reporter's Note (1979). See also 42 ALI PROCEEDINGS 296-97 (1966) (remarks of Prof. Braucher).

⁵⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 90, Reporter's Note (1979).

⁵⁵ See Eisenberg, *Donative Promises*, *supra* note 1, at 1-2, 32-33; Eisenberg, *The Bargain Principle and its Limits*, *supra* note 1, at 744-45.

whether this test has been met is whether the promisee was induced to make a substantial and not easily reversible change in his lifestyle.

A second major problem with *Restatement Second* section 90(1) is the provision that reliance makes a promise enforceable only if "the promisor should reasonably expect to induce" the reliance. This provision implicitly draws a distinction between (1) promises as a class, and (2) promises upon which reliance can reasonably be expected. The distinction is spurious. As Corbin pointed out, a promise is "an expression of intention that the [addressor] will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to [an addressee] that he may justly expect performance and may reasonably rely thereon."⁵⁶ Therefore, every promisor "should reasonably expect to induce" reliance. The real issue is not whether the promisor should have expected the promisee to rely, but whether the extent of the promisee's reliance was reasonable. Accordingly, the principle that ought to govern these cases is simply that a relying promisee should be compensated to the extent of the costs that he incurred in reasonable reliance on the promise. In most cases, the results under this principle will probably be identical to those under the principle of *Restatement Second* section 90(1). The former principle is preferable, however, because it is cleaner, does not embody a spurious distinction between promises as a class and those promises upon which reliance can reasonably be expected, and properly focuses attention on the reasonableness of the innocent promisee's reliance rather than on the contours of the promise-breaker's expectation.

V

THE ELEMENT OF FORM

Given that unrelayed-upon donative promises are normally unenforceable, the question arises whether the law should recognize some special form through which a promisor with the specific intent to be legally bound could achieve that objective. "It is something," said Williston, "that a person ought to be able . . . if he wishes to do it . . . to create a legal obligation to make a gift. Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so."⁵⁷

At early common law the seal served this purpose. In modern times, most state legislatures have either abolished the distinction between sealed and unsealed promises, abolished the use of a seal in contracts, or otherwise limited the seal's effect.⁵⁸ The axiomatic school, however, never rejected the rule that a seal makes a promise enforceable,

⁵⁶ 1 A. CORBIN, *CONTRACTS* § 13 (1963).

⁵⁷ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 194 (1925).

⁵⁸ See Eisenberg, *Donative Promises*, *supra* note 1, at 9 & nn.21-23.

and that rule is now embodied in section 95(1)(a) of the *Restatement Second*, which provides that “[i]n the absence of statute a promise is binding without consideration if . . . it is in writing and sealed”

The *Restatement Second* makes no attempt to justify this rule. That is not surprising, because justification would be hard to find. Originally, the seal was a natural formality—that is, a promissory form popularly understood to carry legal significance—which ensured both deliberation and proof by involving a writing, a ritual of hot wax, and a physical object that personified its owner. Later, however, the elements of ritual and personification eroded away, so that in most states by statute or decision a seal may now take the form of a printed device, word, or scrawl, the printed initials “L.S.,” or a printed recital of sealing.⁵⁹ Few promisors today have even the vaguest idea of the significance of such words, letters, or signs, if they notice them at all. The *Restatement Second* itself admits that “the seal has come to seem archaic.”⁶⁰ Considering this drastic change in circumstances, the rule that a seal renders a promise enforceable has ceased to be tenable under modern conditions. The rule has been changed by statute in about two-thirds of the states,⁶¹ and at least one modern case held even without the benefit of statute that the rule should no longer be strictly applied.⁶² Other courts can and should follow suit.⁶³

Should the law then recognize some new formality to play the role once played by the seal? An obvious candidate is nominal consideration—that is, the form of a bargain—because it can be safely assumed

⁵⁹ RESTATEMENT (SECOND) OF CONTRACTS § 96, Comment a (1979).

⁶⁰ See *id.* Ch. 4, Topic 3, Introductory Note at 255.

⁶¹ See *id.*

⁶² *Hartford-Connecticut Trust Co. v. Devine*, 97 Conn. 193, 116 A. 239 (1922); *cf.* *Ortez v. Bargas*, 29 Hawaii 548 (1927) (instrument is sealed only if it bears actual wax seal, and even if sealed, it may be attacked for lack of consideration).

⁶³ The rule embodied in § 95(1)(a) of the *Restatement Second* might be justified on the ground that a promise should be enforceable if the promisor had a specific, rather than a presumed, intent to achieve the status of being legally bound, and that the applicability of the rule in § 95(1)(a) is limited to cases where such an intent is present and demonstrable. There is just a hint of this position in § 96(1):

What Constitutes a Seal

(1) A seal is a manifestation in tangible and conventional form of an intention that a document be sealed.

Other provisions of Topic 3, however, make clear that the “intention” required by § 96(1) involves neither a specific intent to be legally bound nor an understanding by the promisor that a seal carries special legal significance. For example, § 98 (“Adoption of a Seal by Delivery”) provides that “[u]nless extrinsic circumstances manifest a contrary intention, the delivery of a written promise by the promisor amounts to the adoption of any seal then on the document which has apparent reference to his signature or to the signature of another party to the document.” Clearly such a delivery does not evidence a specific intent to be legally bound, as Illustration 1 drives home:

A signs and delivers a written promise to B, his signature being immediately in front of the word “seal,” which has been previously printed or written there by another person. Unless A manifests a contrary intention, he thereby adopts the seal and makes a contract under seal.

that parties who falsely cast a nonbargain promise as a bargain do so for the express purpose of making the promise legally enforceable. A rule that promises in this form were enforceable would have obvious substantive advantages, but would also involve serious difficulties of administration. As a practical matter, such a form would be primarily employed to render donative promises enforceable. Both morally and legally, however, an obligation created by a donative promise should normally be excused either by acts of the promisee amounting to ingratitude, or by personal circumstances of the promisor that render it improvident to keep the promise.⁶⁴ If Uncle promises to give Nephew \$20,000 in two years, and Nephew later wrecks Uncle's living room in an angry rage, Uncle should not remain obliged. The same result should ordinarily follow if Uncle suffers a serious financial setback and is barely able to take care of the needs of his immediate family, or if Uncle's wealth remains constant but his personal obligations significantly increase in an unexpected manner, as through illness or the birth of children.

Form alone cannot meet these problems. Thus the French and German Civil Codes, while providing special forms that enable a donative promise to be rendered legally enforceable, also provide extensive treatment of improvidence and ingratitude as defenses. For example, under article 519(1) of the German Civil Code, a promisor may refuse to keep a donative promise "insofar as, having regard to his other obligations, he is not in a position to fulfill the promise without endangering his own reasonable maintenance or the fulfillment of obligations imposed upon him by law to furnish maintenance to others."⁶⁵ Under article 530(1), a donative promise may be revoked "if the donee, by any serious misconduct towards the donor or a close relative of the donor shows himself guilty of gross ingratitude."⁶⁶ Similarly, under articles

⁶⁴ See M. RADER, *ETHICS AND THE HUMAN COMMUNITY* 170-71 (1964); H. SIDGWICK, *THE METHODS OF ETHICS* 305-11 (7th ed. 1907); Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 12, 16-17 (1942); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 943 (1958); Steele, *The Uniform Written Obligations Act—A Criticism*, 21 ILL. L. REV. 185, 187 (1926).

⁶⁵ Bürgerliches Gesetzbuch [BGB] art. 519 (W. Ger.) (1975).

⁶⁶ *Id.* art. 530(1). The operation of article 530 is illustrated by some of the cases. In Judgment of Jan. 17, 1910, Reichsgericht [RG], [1910] JURISTISCHE WOCHENSCHRIFT [JW] 148, the court held that adultery by one spouse outweighed the plaintiff's own offenses and therefore constituted gross ingratitude. In Judgment of Aug. 4, 1938, RG, 148 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 141, the court held that a daughter was guilty of gross ingratitude on the grounds that her husband had been guilty of serious misconduct toward her mother and stepfather (among other things, he had insulted and struck her mother, forcibly ejected the parents from the house, and left them in the rain), and she had taken no steps to separate the struggling parties, calm her husband down, apologize, or attempt a reconciliation. In Judgment of Jan. 30, 1970, Bundesgerichtshof [BGH], [1970] JURISTISCHE RUNDschau 263, the court held that a daughter was ungrateful on the ground that she had voluntarily confirmed to the police her husband's denunciation of her parents for pandering (by tolerating the adultery of the donee's own daughter, who lived with them), and the pandering charges were dropped by the prosecutor for lack of evidence. In Judgment of Apr. 19, 1961, BGH, 35 Entscheidungen des Bundesgerichtshof in Zivilsachen 103, the

960-966 of the French Civil Code, a donative promise made by a person with no living descendants is normally revoked by operation of law upon the birth of a child.⁶⁷ Under articles 953 and 955, a donative promise can be revoked on the ground of ingratitude that involves serious cruelty, wrongs, or injuries.⁶⁸

As these rules suggest, the common law could not appropriately make donative promises enforceable solely on the basis of a form unless our courts were also prepared to develop and administer a body of rules dealing with the problems of improvidence and ingratitude. Certainly such an enterprise is possible. It may be questioned, however, whether the game would be worth the candle. An inquiry into improvidence involves the measurement of wealth, lifestyle, dependents' needs, and even personal utilities. An inquiry into ingratitude involves the measurement of a maelstrom, because many or most donative promises arise in an intimate context in which emotions, motives, and cues are invariably complex and highly interrelated.⁶⁹ Perhaps the civil-law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common-law courts, which traditionally have been oriented toward inquiry into acts rather than into personal characteristics.⁷⁰ The question is whether the social and economic benefits of a facility for making donative promises enforceable would be worth its social and economic costs. The answer is that benefits and costs are in rough balance, so that nonrecognition of such a facility is at least as supportable as recognition would be.

court left open the possibility that a mistress-fiancee was probably ungrateful to her lover because she had talked about their private affairs in the plant he operated, and published a one-sided description of the dissolution of their engagement.

⁶⁷ C. Civ. arts. 960-966 (Fr.) (1981-1982).

⁶⁸ *Id.* arts. 953, 955. Examples include the infidelity of a spouse, Judgment of Oct. 19, 1927, Cass. req., [1927] *Receuil Sirey* [S. Jur.] I 382, and a serious libel in open court against the donor, Judgment of Aug. 4, 1873, Cour de cassation, [1874] *Receuil Dalloz* [D.P.] I 198. *But cf.* Judgment of July 20, 1936, Cass. civ., [1936] *Receuil Dalloz* [D.H.] 441 (the infidelity of a lover not sufficient); Judgment of July 12, 1881, Cour d'appel, Lyons, [1881] S. Jur. II 242 (ingratitude not shown by son's filing of unmerited petition for judicial declaration of his father's disability).

⁶⁹ *Cf.* Judgment of Jan. 23, 1967, BGH, [1967-I] *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1081 (behavior of appellee during litigation must be evaluated in context of the circumstances); Judgment of Mar. 27, 1916, RG, [1916] *JW* 833 (son's harsh words about father had to be seen in context of father's provocation); Judgment of Oct. 30, 1907, RG, [1907] *JW* 744 (in determining whether donee's actions constitute gross ingratitude, it is relevant whether he acts under the subjective impression that donor has committed serious provocation).

⁷⁰ See Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 *HARV. L. REV.* 637, 643-44, 644 n.20 (1976). See generally Fuller, *Two Principles of Human Association*, in *NOMOS XI: VOLUNTARY ASSOCIATIONS* 3, 17-19 (J. Pennock & J. Chapman eds. 1969); Fuller, *Human Interaction and the Law*, 14 *AM. J. JURIS.* 1, 34-35 (1969); Fuller, *Mediation—Its Forms and Functions*, 44 *S. CAL. L. REV.* 305, 328-31 (1971).

VI

THE ELEMENT OF BENEFIT CONFERRED

Suppose that *A* confers a benefit on *B* without *B*'s prior request. The resulting relationship will then fall into one of three categories:

I. *B* is legally obliged to compensate *A* under the law of restitution, as where *A* has paid *B* money by mistake.

II. *B* is morally but not legally obliged to compensate *A*, as where *A* has suffered a loss in rescuing *B*.

III. *B* is neither legally nor morally obliged to compensate *A*, as where *A* has given *B* a wedding gift.

If a case falls into Category I, a later promise by *B* to compensate *A* does not create a new liability (although if the value of the benefit is unclear the promise may bear on the extent of *A*'s recovery). If a case falls into Category III, a later promise to compensate *A* is essentially a donative promise, and also should be unenforceable.

Difficult problems arise, however, where *B* makes a later promise to compensate *A* in a case that falls into Category II. Traditionally this kind of promise was characterized as based on "past" or "moral" consideration. The axiomatic school recognized special rules that covered a few such promises (for example, promises to pay debts barred by the statute of limitations), but its general position, grounded on the bargain theory of consideration, was that promises based on past benefits were unenforceable.

This position had little to recommend it. By hypothesis, *A* has conferred a benefit on *B*, and *B* is morally obliged to make compensation. Presumably, therefore, the case is in Category II, rather than Category I, only because it is deemed desirable to protect persons against liability for benefits that they might have declined to accept and pay for if given the choice,⁷¹ and because of the severe difficulty in many such cases of measuring the value of the benefit to *B*. A later promise to make compensation invariably removes the first obstacle and normally removes the second. Such a promise should therefore be enforceable—or, perhaps more precisely, should render the promisor liable to make compensation.

Fortunately, the *Restatement Second* has dramatically broken away from the axiomatic school in this area and has adopted a sweeping new principle in section 86:

§ 86 Promise for Benefit Received

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

⁷¹ See RESTATEMENT (SECOND) OF CONTRACTS § 86, Comment a (1979).

- (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
- (b) to the extent that its value is disproportionate to the benefit.⁷²

In its emphasis on benefit conferred, this section represents a significant reform; but in its limitation on enforceability, the section has moved too far from its roots in moral principles. To distinguish between those benefits that will and those that will not support a subsequent promise, section 86(2)(a) adopts the test whether "the promisor has . . . been unjustly enriched." But if the promisor has been unjustly enriched in a legal sense, the law of restitution normally permits recovery even without the subsequent promise; and whether the promisor is unjustly enriched in any other sense must turn on concepts of morality. Indeed, even a requirement of unjust enrichment in a moral sense seems too narrow. For example, if *A*'s life or property is rescued by *B*, who later makes a promise of compensation, it cannot be said that *A* is unjustly enriched. What is unjust about needing and receiving rescue? The question should simply be whether, at the time he made his promise, *A* may be morally obliged, by reason of a past benefit conferred, to make some compensation to *B*. The courts should decide this question, like the question of unconscionability, directly rather than covertly.

Finally, since enforcement in these cases should be based on the moral obligation arising out of a benefit conferred, the promisee's recovery should ordinarily be limited to the lower of (1) the amount promised or (2) compensation that is fair in light of the underlying obligation, the value of the benefit, and the promisee's cost.⁷³

CONCLUSION

The principles governing the enforceability of promises should be based on the nature of the injury to the promisee, the presence of independent state policies, the likelihood of deliberativeness, and the ease

⁷² For a comprehensive discussion of § 86, see Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 115 (1971).

⁷³ Cf. Eisenberg, *The Bargain Principle and Its Limits*, *supra* note 1, at 754-63 (determination of recovery in rescue settings). Section 86(2)(b) looks as if it might embody the proper remedial principle, but Comment i and Illustration 12 suggest that the term "disproportionate to the benefit" is not equivalent to "more than the benefit":

i. *Partial enforcement.* Where the value of the benefit is uncertain, a promise to pay the value is binding and a promise to pay a liquidated sum may serve to fix the amount due if in all the circumstances it is not disproportionate to the benefit. . . .

[Illustration 12.] A, a married woman of sixty, has rendered household services without compensation over a period of years for B, a man of eighty living alone and having no close relatives. B has a net worth of three million dollars and has often assured A that she will be well paid for her services, whose reasonable value is not in excess of \$6,000. B executes and delivers to A a written promise to pay A \$25,000 "to be taken from my estate." The promise is binding.

of administration. Many presently articulated norms, such as the legal-duty rule, the illusory-promise doctrine, and the rules governing firm offers, modification, guaranties, and waivers, are inconsistent with these criteria.

As might be expected when underlying criteria and articulated norms diverge, the law governing the enforceability of promises has come to display a number of anomalies. These are manifested in decisions that are inconsistent with the articulated norms, and in particularized norms that are inconsistent with generalized norms despite the absence of any sound reason to differentiate the specific from the general. The anomalies have resulted in substantial part because the axiomatic school adopted a strong theory of consideration that attempted to analyze all problems of enforceability along a single axis. The purposes behind enforcing promises, however, are too rich and varied to be captured by a single theory. Indeed the bargain theory proved too strong even for its adherents. So many exceptions had to be recognized that the school could not stay true to its own tenets, and maintained a semblance of coherence only by adoption of a distorted terminology.

The common law, under the influence of the axiomatic school, adopted a posture in which the threshold for enforceability of promises was set relatively high. Once that threshold was crossed, however, defenses based on unfairness were seldom permitted, and promises were normally to be enforced to the full extent of the promisee's expectation. A sounder posture is to set the threshold for enforceability relatively low, but to carefully scrutinize enforceable promises for violation of discrete unconscionability norms, and to tailor the extent of enforcement to the substantive interest that enforcement is designed to protect.