Enforcing Promises

James Gordley†

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† Professor of Law, University of California at Berkeley.

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This Article shows that when American courts apply the doctrines of consideration, promissory reliance, and offer and acceptance, they are not concerned with the presence of a bargained-for detriment, reliance, or meeting of the minds. They are concerned with the effect of the transaction on the wealth of the parties. Promises intended to enrich the promisee at the promisor's expense are enforced if the promisor's decision is likely to have been sensible. Promises that impose no costs on the promisor are enforced freely. Promises to exchange resources are enforced subject to safeguards that prevent one party from being enriched at the other's expense. These concerns are captured by Aristotelian ideas of commutative justice and liberality that have long been disregarded. These ideas still provide the best explanation of contract formation.

In American law, whether the parties have made a binding contract is supposed to depend on the doctrines of consideration, promissory reliance, offer and acceptance, and unconscionability. In an earlier Article, Equality in Exchange, I discussed unconscionability.¹ I argued that we could make sense of it by resurrecting an idea from the past: Aristotle's idea that in an exchange, the value of what each party gives should equal the value of what he receives.

In this Article, I will argue that this same principle also best explains the way American courts have applied the other three doctrines. Their decisions do not turn on whether the parties made a bargain or the promisee relied or the offeree assented. They turn on the effect of the transaction on the distribution of wealth between the parties. Promises that enrich the promisee at the promisor's expense are not enforced, unless the promisor intended to enrich him and there is some reason to think the promisor's decision is sensible and will change the distribution of wealth for the better.

The idea that this ancient principle could explain contract formation in American common law will seem less strange if we examine what this idea once meant, how continental jurists once used it to explain contract formation, and how our own doctrines originated. We will do so in Part I.

The rest of the Article will show that the Aristotelian principle of equality best explains modern American law. Some promises, which we will call donative, are intended to benefit the promisee at the promisor's expense. We will see in Part II that courts enforce these promises subject to some rules that encourage the promisor to behave sensibly. Other promises are intended to benefit the promisee without recompense but at no significant cost to the promisor. We will see in Part III that courts enforce such promises freely, imposing few if any safeguards. Still other promises are intended to benefit the promisee in return for the promisee's

performance. We will see in Part IV that courts enforce such promises subject to rules designed to ensure that the value of the performances exchanged is equal.

I

PROLOGUE

A. The Principle of Equality in Exchange

According to Aristotle, distributive justice secures a fair share of resources for each citizen. Commutative or corrective justice preserves that share. If one person takes or destroys what belongs to another, commutative justice requires that an equivalent amount be paid as compensation. If two people exchange, it requires that they exchange performances of equivalent value.

Many people today, whether scholars or not, agree that a society should try to achieve a just distribution of wealth. Few legal scholars think that contracting parties should exchange performances of equal value. Yet if I was right in my earlier Article, a society concerned about distributive justice should be concerned about equality in exchange.

A society that wishes to achieve a fair distribution of wealth should also wish to preserve the distribution that it has achieved. The distribution need not be perfectly just to be worth defending. From the standpoint of this objective, I argued, wealth must mean the purchasing power each person commands—the number of chips, so to speak, with which each person has to play. The same amount of purchasing power may, indeed, bring people different degrees of satisfaction, but no system of distributive justice could take these differences into account. By some theories of distributive justice, these differences should not even matter.

Ideally, then, a society that wishes to preserve its distribution of resources will try to preserve for each citizen the share of purchasing power that he possesses. I argued that a society with this objective will enforce transactions entered into at the market price. Admittedly, when market prices change, some people become poorer and others richer. But if prices were frozen, then, as modern economists say, there would be unsold surpluses or waiting lines of buyers. Worse evils would ensue if we did not tolerate the changes in the distribution of wealth produced by changes in the market price. In contrast, there is no reason to tolerate the changes that occur when


4. See Gordley, supra note 1, at 1591.

5. Gordley, supra note 1, at 1614-16.
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a party is ignorant of the market price or physically unable to get to the
market and so pays more or receives less than others do. Moreover, if mar-
kets work as economists say they do, at the time a contract is made, the
chances that prices will rise and enrich one party are equal to the chances
they will fall and enrich the other. Thus, when the parties contract at the
market price, their contract will be actuarially fair, that is, fair in the same
way as a fair bet.\textsuperscript{6}

In my earlier Article, I argued that these considerations best explain
the relief American courts give for unconscionability of the price term.\textsuperscript{7}
Courts and scholars talk about bargaining disadvantages in their discussions
of unconscionability, but the disadvantages they have in mind seem to be
ignorance of the market price, as when a consumer pays twice the normal
retail price for a refrigerator,\textsuperscript{8} or inability to use the market, as when ship-
wrecked whalers sell their oil for a fraction of its market value.\textsuperscript{9} One would
not care about these bargaining disadvantages unless one cared about their
effect: one party does not receive the market price. One would not care
about that effect unless one regarded the market price as normatively signif-
icant, as a just price.\textsuperscript{10} I described it as just, not absolutely, but as the
closest feasible approximation to an ideally just price.\textsuperscript{11}

In my earlier Article, I wished to show, not only that this view was
defensible and explained American case law, but also that writers in the
Aristotelian tradition understood the principle of equality in exchange
in much the same way. In medieval and early modern times, when
Aristotelian philosophy dominated the universities, Aristotle's interpreters
understood perfectly well that the economic value of a thing was not an
intrinsic property. They identified the just price with the market price.
They acknowledged that the market price fluctuated from day to day and
region to region in response to changes in need, scarcity, and cost.\textsuperscript{12} They
seem to have thought, as I do, that changes in the distribution of wealth
caused by fluctuations in the market price had to be tolerated because the
market price must reflect need, scarcity, and cost. Also, they seem to have
regarded a transaction at the market price as actuarially fair, like a fair bet,
because while a party might lose, he might also win.\textsuperscript{13} As the 16th century
jurist Domingo de Soto said of price changes: "as the business of buying
and selling is subject to fortuitous events of many kinds, merchants ought to

\textsuperscript{6} Id. at 1611-14.
\textsuperscript{7} Id. at 1649-55.
\textsuperscript{8} Toker v. Westerman, 274 A.2d 78 (N.J. Super. Ct. 1970); Frostifresh Corp. v. Reynoso, 274
\textsuperscript{9} Post v. Jones, 60 U.S. (19 How.) 150 (1856).
\textsuperscript{10} Gordley, supra note 1, at 1633-37.
\textsuperscript{11} Id. at 1611-13.
\textsuperscript{12} Id. at 1604-11; see also JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN
\textsuperscript{13} Gordley, supra note 1, at 1610-11; Gordley, supra note 12, at 99-101.
bear risks at their own expense, and, on the other hand, they may await good fortune."

B. Origins of Modern Contract Law

Jurists and philosophers in medieval and early modern times used Aristotle's ideas to explain contract formation. They described contracts as either acts of commutative justice which required equality, or acts of another Aristotelian virtue, liberality, through which the promisor disposed of his wealth sensibly. In the 16th century, a group of jurists centered in Spain and known to historians as the late schoolscists, or the Spanish natural law school, self-consciously rebuilt the Roman law in force in their day on Aristotelian principles. Roman law had previously lacked a theory or a systematic doctrinal organization. The late scholastics gave it one by working out the implications of concepts such as commutative justice and liberality. Paradoxically, their conclusions were accepted by the 17th and 18th century jurists of the northern natural law school and disseminated widely even as the Aristotelian philosophy on which they were based was falling into disfavor. The civil law of contract formation thus acquired a shape it still retains. Aristotelian ideas of equality in exchange and liberality may still provide the best explanation of continental law.

In contrast, the common law doctrines of consideration, offer and acceptance, and promissory reliance were not developed by working out the implications of the concepts of bargain, mutual assent, and reliance. Instead, these doctrines were impressed into service ad hoc and stretched to cover some quite heterogeneous case law. Moreover, these doctrines were developed in the 19th and early 20th centuries at a time when courts and scholars were reluctant to admit that the enforceability of a contract should depend on its fairness. Judges used each of these doctrines surreptitiously to deny enforcement to unfair promises and to allow fair promises to be enforced. We pretended we did not need a theory of fairness. The scholars of the 16th century believed they had such a theory. It is not so surprising that we may be able to learn from them now.

1. Contract Formation in the Aristotelian Tradition

In the 13th century, Thomas Aquinas drew on Aristotle to distinguish two types of contracts: acts of commutative justice and acts of liberality. The former, as Aristotle said, required equality. According to Thomas, that was why Roman law, as it had been interpreted since the 12th century,
gave a remedy to a party who had paid more or received less than the just price. For pragmatic reasons, Thomas explained, the remedy was given only when the contract price deviated by more than one half from the just price.\(^\text{19}\)

According to Thomas, when one party did not receive an equivalent, but intentionally enriched the other party, the transaction was the act of another Aristotelian virtue: liberality.\(^\text{20}\) Liberality did not mean simply giving money away, but giving it away sensibly.\(^\text{21}\) According to Aristotle, "the liberal man... will give for the sake of the noble, and rightly; for he will give to the right people, the right amounts, and at the right time, with all the other qualifications that accompany right giving."\(^\text{22}\)

In the 14th century, one of the greatest medieval jurists, Baldus degli Ubaldi, seems to have had this Aristotelian distinction in mind when he developed the doctrine of *causa*, which for centuries afterward remained a staple of the civil law. To be enforceable, a promise must be made for one of two *causae* or reasons: to receive something in return, or out of liberality.\(^\text{23}\) His doctrine is not found in the Roman texts he claimed to be interpreting.\(^\text{24}\) Moreover, he defended it with an argument that makes sense only if one believes exchange requires equality and gifts require prudence: "without a *causa* equity will not say that an action arises lest one party use his substance badly and the other be unjustifiably enriched."\(^\text{25}\)

In the 16th century, the late scholastics self-consciously rebuilt Roman law on an Aristotelian and Thomistic groundplan. The Romans themselves had not been interested in theory. Their contract law consisted of rules for particular kinds of contracts, not principles governing contracts in general. The 16th century jurists gave it a theory and a systematic doctrinal organization.

In Roman law, when a contract became enforceable depended on which contract it was. Contracts of sale, lease, partnership, and *mandatum* (a kind of gratuitous agency) were enforceable upon consent. Contracts to loan property gratuitously for consumption (*mutuum*), or use (*com-

19. *Id.* q. 77, a. 1, ad 1.
20. *Id.* q. 61, a. 3.
21. *Id.* q. 117, a. 2-4.
23. Thus he claimed that without a *causa*, a promise could not even be enforced in canon law, in which even informal promises were binding. *Baldus degli Ubaldi, Commentaria corpus iuris civilis* to C. 3.36.15 no. 3 (1577); *Baldus degli Ubaldi, In Decretalium volumen commentaria* to X 1.35.1 (1595) (reprinted 1971).
24. One text said that a contract is not actionable without a *causa*. Dig. 2.14.7.1-2. The text was speaking of inominate contracts, and the *causa* of which it speaks is performance by one of the parties. The other text said that a *condictio* was not binding without a *causa*. Dig. 12.7.1. The text uses *causa* to mean a good reason why it should be binding, but it does not identify the two *causae* of Baldus as good reasons.
modatum), or to deposit it gratuitously for safekeeping (depositum), or to pledge it (pignus) were enforceable when the object concerned was actually delivered. Other contracts were enforceable only when a formality was completed. Large gifts required a formality called insinuatio. By the 16th century, this formality could be performed by registering with a court a document describing the gift.\textsuperscript{26} Contracts that fell into none of these categories, such as informal agreements to barter, were enforceable only after one party had performed.\textsuperscript{27}

Following Thomas, the late scholastic jurists classified some of these contracts as acts of commutative justice, and others as acts of liberality.\textsuperscript{28} They said that the former required equality, and for that reason Roman law had remedied large deviations from the just price.\textsuperscript{29} Their classification of the Roman contracts consequently differed from that of the Romans. They classified sale, lease, and barter as acts of commutative justice though, in Roman law, sale and lease were enforceable on consent while barter was not. They classified gratuitous agency, gift, and gratuitous loans and deposits as acts of liberality, though, in Roman law, stated that the first of these was enforceable on consent, the second on completion of a formality, and the last upon delivery.

The late scholastics concluded that the Roman rules governing enforceability were merely features of Roman positive law, adopted, no doubt, for sound practical reasons but lacking a principled justification. They disagreed, however, about which promises should be enforced in principle, or as they put it, as a matter of natural law. Aristotle and Thomas Aquinas had said that it was ethically wrong to break a promise.\textsuperscript{30} But it did not follow automatically that the promisee was entitled to the performance of the promise as a matter of justice. In his commentary on Thomas Aquinas, the 16th century theologian Cajetan pointed out that the disappointed promisee was no poorer than if the promise had not been made. Therefore, the promisor owed the promisee nothing as a matter of commutative justice unless the promisee had suffered a loss by changing his position.

\textsuperscript{26} Ludovicus Molina, De iustitia et iure tractatus disp. 278 no. 3 (1614). The need for the formality is mentioned by Leonardus Lessius, De iustitia et iure: ceterisque virtutibus cardinalibus libri quatuor lib. 2, cap. 18, dub. 13, no. 97 (1628). On the formality in the 16th century, see Alexander Clarius, Sententiarum receptarum liber quintus lib. 4, § Donatio q. 15 no. 3 (1595); D. Antonius Gomez, Variar in resolutionibus, iuris civilis, communis, et regii t. 2, cap. 4, no. 14 (1759).


\textsuperscript{28} Lessius, supra note 26, lib. 2, cap. 17, dubs. 1, 3; Molina, supra note 26, disp. 252, 259; Soto, supra note 14, lib. 3, q. 5, aa. 1, 3; lib. 4, q. 1, a. 1; lib. 6, q. 2, a. 1; see Gordley, supra note 12, at 71-72, 102-06.

\textsuperscript{29} Lessius, supra note 26, lib. 2, cap. 21, dubs. 2-4; Molina, supra note 26, disp. 348; Soto, supra note 14, lib. 6, q. 2, a. 3; see Gordley, supra note 12, at 94-102.

\textsuperscript{30} Aristotle, Nicomachean Ethics, supra note 3, IV.vii 1127\(a\)-1127\(b\), at 998-1000; Thomas Aquinas, Summa Theologiae, supra note 17, at II-II, q. 88, a. 3.
tion. In that case, the promisor owed only compensation for the loss.\textsuperscript{31} Cajetan thus anticipated the doctrine of promissory reliance.

The leading late scholastic jurists rejected Cajetan’s position. Luis de Molina pointed out that when money or property was given away, a right passed to the donee on delivery. In the Roman law of the time, the donor could not reclaim the gift except for gross ingratitude.\textsuperscript{32} Otherwise, the donor who reclaimed the gift would violate commutative justice by taking something that belonged to the donee. But there was nothing magic about delivery. In principle, Molina argued, the promisor should be able to transfer a right to the promisee by simply indicating an intention that the right be transferred. If he had done so, the promisee should be able to enforce the promise. It would then be left to the judge to decide from the circumstances whether the donor had such an intent.\textsuperscript{33} Presumably, the completion of the formality or actual delivery indicated that the promisor had such an intent.

Leonard Lessius took this argument about the intent of the promisor a step further. If Cajetan were right, there would be no difference between liability for breaking a promise and liability for making a false statement. But, Lessius argued, “to promise is not merely to affirm that one will give or do something but beyond that to obligate oneself to another, and consequently to grant that person the right to require it.”\textsuperscript{34} By this definition, all promises conferred a right on the promisee and were therefore actionable as a matter of commutative justice. Lessius added, however, that sometimes a promise in this sense had not been intended. A person might describe his intentions without promising.\textsuperscript{35} Indeed, a person might say “I promise” merely to show a willingness to help another but not intending to incur an obligation.\textsuperscript{36} Thus Molina and Lessius were not so far apart. Neither would regard a promise as enforceable absent an intention to confer a right on the promisee. But Lessius, unlike Molina, defined “promise” to include the intention to confer such a right.

According to Molina and Lessius, before a gift would be enforced Roman law required a formality, not only as evidence of the promisor’s intent but also to ensure that the promise was made with deliberation.\textsuperscript{37} As we have seen, liberality meant not simply giving money away, but giving it away sensibly. Domingo de Soto, another late scholastic, thought that a sufficiently imprudent promise was not binding, at least in conscience.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{31} Cajetan (Tomasso di Vio), Commentaria to Thomas Aquinas, Summa theologica II-II, q. 88, a. 1; q. 113, a. 1 (1698).
\item \textsuperscript{32} Lessius, supra note 26, lib. 2, cap. 18, dub. 8 no. 52; Molina, supra note 26, disp. 272, 281.
\item On ingratitude, see Gomez, supra note 26, at t. 2, cap. 4, no. 14.
\item \textsuperscript{33} Molina, supra note 26, disp. 262.
\item \textsuperscript{34} Lessius, supra note 26, lib. 2, cap. 18, dub. 8 no. 52.
\item \textsuperscript{35} Id. dub. 1, no. 5.
\item \textsuperscript{36} Id. no. 6.
\item \textsuperscript{37} Lessius, supra note 26, lib. 2, cap. 18, dubs. 2, 8; Molina, supra note 26, disp. 278, no. 5.
\item \textsuperscript{38} Soto, supra note 14, lib. 4, q. 7, a. 1.
\end{itemize}
Molina and Lessius disagreed. They pointed out that a variety of imprudent acts could have legal effects: for example, the promise of a noble and wealthy woman to marry an ignoble and poor man. Although they believed an imprudent promise could be enforced, they nevertheless had no objection to efforts to prevent imprudence.

For these 16th century jurists, then, rules governing promises to give away money or property had two purposes: to ensure that the promisor wished to confer a right on the promisee and to avoid imprudent promises. Although they are not explicit, these jurists may have thought these objectives explained why, in the Roman law as it was in force in their time, promises to charitable causes (ad causas pias), or to people on account of their marriage (ad nuptias vel propter nuptias) were enforceable without a formality. The promisor was more likely to have intended to confer a right on the promisee and less likely to have acted foolishly. A promise was also enforceable without a formality when the promisor agreed to reward someone who had conferred a benefit on him without payment, for example, by rescuing him from robbers (donatio remuneratoria). Molina explained that such a promise was enforceable because it was not really donative. It was made in return for something received.

If, in principle, all promises intended to confer a right on the promisee are enforceable, then gratuitous agreements to make a loan for consumption or for use, or a deposit or a pledge should be enforceable even before delivery. The Roman rules were merely features of Roman positive law established for pragmatic reasons. According to the late scholastics, such promises are acts of liberality. They differ from promises to make gifts of money and property, however, because the promisor might be able to perform without cost to himself.

Indeed, according to Lessius and Molina, the promisor normally made a gratuitous loan on the assumption that he would not have an alternative use for the property he loaned. If this assumption proved unfounded, the promisor should have the right to withdraw from the transaction even after delivery. He did not have such a right if he promised a gift of money or property because then he was usually not acting on the assumption that the transaction would be costless. Lessius and Molina reached this conclusion even though it seemed to contradict a Roman text:

39. LESSIUS, supra note 26, lib. 2, cap. 18, dub. 6, no. 9; MOLINA, supra note 26, disp. 271, no. 4.
40. LESSIUS, supra note 26, lib. 2, cap. 18, dub. 13, no. 102; MOLINA, supra note 26, disp. 279 no. 2. On the exception in the 16th century, see CLARUS, supra note 26, lib. 4, § Donatio, q. 17, no. 1; GOMEZ, supra note 26, t. 2, cap. 4, no. 10.
41. MOLINA, supra note 26, disp. 279 no. 7. On the exception in the 16th century, see ANTONIUS DE GAMA, DECISIONUM SUPREMI SENATUS LUSITANIE CENTURIEAE IV dec. 348, no. 5 (1622).
42. MOLINA, supra note 26, disp. 279 no. 6. On the exception in the 16th century, see CLARUS, supra note 26, lib. 4, § Donatio, q. 2 no. 2; q. 3 no. 1; GAMA, supra note 41, dec. 213; dec. 302 no. 7; GOMEZ, supra note 26, t. 2, cap. 4, no. 10.
43. MOLINA, supra note 26, disp. 279 no. 6.
44. LESSIUS, supra note 26, lib. 2, cap. 27, dub. 5; MOLINA, supra note 26, disp. 294, nos. 8-10.
As lending rests on free will and decency, not on compulsion, so it is the right of the person who does the kindness to fix the terms and duration of the loan. However, once he has done it, that is to say, after he has made the loan for use, then not only decency but also obligation undertaken between lender and borrower prevent his fixing time limits, claiming the thing back or walking off with it in disregard of agreed times. . . . Thus, if you have lent me writing tablets for my debtor to enter a cautio, you will do wrong suddenly to demand them back. For if you had refused, I would have either bought some or made sure I had witnesses present. The same applies where you have lent timber to prop up a building and then hauled it away again or even knowingly supplied defective materials. Favors should help, not lead to trouble.45

Molina agreed that, as a general principle, one should not be able to change one’s mind in a way that injures another. But, he argued, the borrower should have understood that the loan was made on the tacit condition that the lender continued to have no need for the object. If the need arose, it was an accident for which the promisor should not be held responsible.46

The conclusions of the late scholastics depended throughout on the effect of a transaction on the distribution of wealth between the parties. Promises to exchange required equality, and were subject to a special rule remedying serious inequalities. Promises to enrich the other party at one’s own expense required safeguards to ensure the promisor acted sensibly. Acts of liberality that need not cost the promisor anything did not require a formality but the promisor could withdraw if he had incorrectly assumed they would be costless.

In the 17th and 18th centuries, the authority of Aristotle was challenged and ultimately destroyed by the founders of modern critical philosophy. One of the casualties was his theory of distributive and commutative justice. Distributive justice was supposed to give citizens what they needed to live a distinctively human life. “[T]he form of government is best,” according to Aristotle, “in which every man, whoever he is, can act best and live happily.”47 Acting well and living happily, for Aristotle, meant living a life consonant with human nature, one in which one’s human capacities were developed. When modern philosophers rejected Aristotle’s conception of human nature, they pulled out the prop that supported his ideas about just distribution of wealth and equality in exchange.

Paradoxically, changes based on Aristotelian principles that the late scholastics had made in the law of contract formation endured even as Aristotelian philosophy itself fell into disfavor. Their main conclusions were adopted in the 17th century by the founders of the northern natural law

45. Dig. 13.6.17.3.
46. Molina, supra note 26, disp. 279 no. 10.
47. Aristotle, Politics, supra note 3, VII.i 1324a, at 1279.
school, Hugo Grotius and Samuel Pufendorf. Like the late scholastics, Grotius and Pufendorf regarded the Roman rules of contract formation as mere matters of positive law. A formality was sometimes required to show that a promise was well considered. But, in principle, one could transfer a right to another by indicating one’s intention to do so. They classified the contracts familiar in Roman law as either contracts of reciprocal interest or liberalities. The former required equality, and therefore the law gave a remedy for large disproportions in price. Contracts of liberality did not require equality. Nevertheless, Pufendorf explained, in some contracts of liberality, the promisor did not intend to benefit the promisee at his own expense. Thus, if he found he needed something he had loaned gratuitously for another’s use, he could take it back.

In the 18th century, even after the Aristotelian origins were forgotten, many jurists accepted these conclusions on the authority of Grotius and Pufendorf or as a matter of what then seemed to be common sense. An example is the influential French jurist Robert Pothier. Indeed, in the 17th and 18th centuries, the traditional Roman rules of contract formation fell into disuse. Instead, the rules formulated by the late scholastics—rules they had characterized as belonging to an idealized natural law founded on philosophical principle—became rules of positive law. As Aristotelian philosophy waned, the civil law of contract formation became more Aristotelian than Roman.

Jurists only broke with these Aristotelian conclusions in the 19th century. Nineteenth century jurists no longer talked about a virtue of liberality. They denied that exchange required equality. They espoused “will theories” in which, in principle, all that should matter in contract formation was the will of the parties. Nevertheless, the civil law of contract formation

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48. Hugo Grotius, De iure beli ac pacis libri tres II.xi.4.2-3 (B.J.A. de Kantje-van Hettinga Tromp ed., 1939); Samuel Pufendorf, De jure naturae et gentium libri octo III.vi.16 (1688).
49. Grotius, supra note 48, II.xi.1.3-4, II.xi.4; Pufendorf, supra note 48, III.v.7-8.
50. Grotius, supra note 48, II.xii.1-7 (classifying contracts as either “accompanied by mutual obligation” or “gratuitous”); Pufendorf, supra note 48, V.ii.8-10 (classifying contracts as either “onerous” or “gainful”).
52. Pothier said that contracts are formed by the sole consent of the parties except for those like gratuitous loans for use and for consumption, and gratuitous deposits, which are normally not binding until delivery. Traité des obligations no. 10, in 2 Oeuvres de Pothier Annotées et Mises en Corrélation avec le Code Civil et la Législation Actuelle (M. Bugnet ed., 2d ed. 1861) [hereinafter Oeuvres]. But the reason is that the names of these transactions refer to an act of delivery: to lend means to hand over something for another’s use. Therefore, although a “loan” is not binding in advance, an agreement to make a loan is binding. Traité du prêt d’usage no. 6, in 5 Oeuvres, supra. To be binding, contracts must have a cause, which may be either receipt of something in return or liberality. Traité des obligations, supra, no. 42. In the former case, the contract requires equality, and large disproportions will be remedied. Id. no. 33. In the case of a pressing and unforeseeable need, Pothier lets the lender take back the object of his loan because “no one should be presumed to want to gratify another at his own cost.” Traité du prêt à usage, supra, no. 25.
54. See Gordley, supra note 12, at 161-213.
never lost the shape the Aristotelian tradition had given it. Even some of
the features the 19th century jurists purged came back in the 20th century.

For example, although 19th and 20th century jurists do not talk about a
virtue of liberality, modern civil codes have preserved the distinction
between gifts of money or property, which require a formality, and other
gratuitous transactions that do not. Today, in some continental European
countries the parties complete the formality by subscribing to a document
before an official called a notary.\(^5\) Neither the French nor the German
Civil Code has preserved the old exception from the formality requirement
for gifts to presumptively good causes such as charities. Nevertheless,
French courts have upheld such promises by classifying them as exchanges
on the grounds that the feeling of satisfaction or other intangible benefit the
donor experiences is a recompense.\(^6\) German courts have done the same
by holding that such a promise is not a gift because it does not enrich the
charitable organization which itself is merely an intermediary between the
promisor and the ultimate beneficiary.\(^7\) Section 1624 of the German Civil
Code exempts another presumptively sensible gift from the requirement of
a formality: “that which the father or mother accords to a child towards
marriage, or towards obtaining an independent position in life, for founding
or preserving the establishment of the position in life” does not count as a
gift except to the extent it is immoderately large, given the parents’
circumstances.\(^8\)

Were this Article addressed to Europeans, it would ask whether one
can really make sense of these rules without talking about a virtue of liber-
ality. It makes sense to encourage the promisor to deliberate only if one
thinks that some gifts are more sensible than others, and that deliberation
will lead to a more sensible decision. Further, it is sensible to enforce
promises to charities and to the newly married without a formality only if
one thinks these promises are especially likely to be sensible. At that point,
one has reintroduced the idea of prudent gift-giving whether or not one
speaks of the virtue of liberality or conceives of the human welfare that
prudent gifts promote in the same way Aristotle conceived of the good.

\(^{55}\) Code civil [C. civ.] art. 931 (Fr.); Bürgerliches Gesetzbuch [BGB] § 518 (Ger.).
\(^{56}\) See, e.g., Judgment of March 15, 1900, Trib. civ. de Langres, 1900 D.P. II 422 (finding an
assignment of right of recovery to three priests not a pure act of liberality because assignor could receive
compensation through feelings such as vanity, piety, or moral obligation); Judgment of July 19, 1894,
Cass. civ. Ire, 1895 D.P. I 125 (calling a promise of land to build a church a “contract subject to
payment” rather than a donation requiring a formality, where promisor could expect benefits to himself
and to the community); see also John P. Dawson, Gifts and Promises 84-96 (1980) (arguing that
French courts treat such contracts as commutative, made for the benefit of third parties and thus
enforceable).

\(^{57}\) See, e.g., Judgment of May 7, 1909, Reichsgericht, 71 Entscheidungen des Reichsgerichts in
Zivilsachen [RGZ] 140 (Ger.). See Ferdinand M. Fromholzer, Considerations on Consideration 45-52

\(^{58}\) See Fromholzer, supra note 57, at 7-11. For the possibility that such an informal promise
would be enforced in France, see Dawson, supra note 56, at 100 (noting that notarization of such
promises is probably not required).
Gratuitous transactions that are not gifts of money or property do not require either a formality or actual delivery. Nevertheless, the French and German Codes allow a person who loans property gratuitously to reclaim it if he has a need for it himself that he did not foresee at the time of the transaction. In German law, though perhaps not in French law, the lender can do so even if he was at fault for failing to foresee that the need would arise. An express provision waiving this right may violate section 242 of the German Civil Code which requires good faith and operates like the American doctrine of unconscionability. The most straightforward explanation of these rules is that a formality is unnecessary just because, and as long as, the transaction does not enrich the promisee at the promisor's expense.

The French Civil Code preserves the old Roman remedy for a seriously unjust price in sales of land. Legislation has extended it to other situations. French courts have strained traditional doctrines to give a remedy for other one-sided bargains. In Germany, where the old remedy was abolished, new and powerful methods have been developed to help the victim of a one-sided exchange. The German remedies operate like the American doctrine of unconscionability. The courts talk about bargaining disadvantages but give relief when they believe a contract is substantively unfair. When it is, they are always able to find a bargaining disadvantage in the sense of a reason that the victim did not obtain better terms. In my earlier Article, I argued that the principle of equality in exchange best explains the relief that continental courts give for an unfair price. In a future article, I hope to show that this principle also explains the relief that European and American courts give for other unfair terms.

2. Contract Formation in the Common Law

It should not be too surprising that Aristotelian principles still provide a straightforward explanation of some basic civil law rules of contract formation. After all, if our historical analysis is correct, they originally inspired these rules. In contrast, most of the common law doctrines of contract formation were developed in the 19th and early 20th centuries when Aristotelian philosophy was all but forgotten. Nobody suggested that it should matter whether an exchange was unequal or a gift was imprudent.

59. C. civ. art. 1889; BGB art. 605.
62. Kummer, supra note 60, to § 605 no. 1; see Helmut Kollhosser, 3 Münchener Kommentar zum Bürgerlichen Gesetzbuch to § 605 no. 1.
63. C. civ. art. 1674.
64. Gordley, supra note 1, at 1625-26.
65. Id. at 1645-46.
66. Id. at 1646-49.
67. Id. at 1628-33.
The common lawyers appealed to other concepts: bargain, mutual assent, and reliance. The chronic problem was that these concepts did not do the work expected of them. They were impressed into service ad hoc to explain the case law. But one could not explain the case law by working out the logical consequences of these concepts.

Before the 19th century, English courts had said that a promise must have “consideration” to be enforceable in an action of assumpsit. Bargains had consideration, but so did many other transactions that were not bargains in any normal sense, and which, indeed, the late scholastics had classified as acts of liberality. Examples are promises to care for and return an object or sum gratuitously loaned or bailed, and promises to give money or property to those about to marry.68 The courts did not try to frame a definition of consideration that would embrace all these transactions, and no one seemed upset that they did not. There were no law professors to worry about such matters until William Blackstone began to teach the common law in the late 18th century. He devoted only a few pages to the law of contracts.69 The first treatise on the common law of contracts was written by John Powell in 1790.70 Before that time, as A.W.B. Simpson has noted, there was scarcely any common law literature on contracts beyond Blackstone and the reports of decided cases.71

Blackstone described consideration in language that the civil lawyers had used to describe the *causa* of a contract of exchange.72 So did Powell, Comyn, Tayler, William Story, and Parsons.73 As Simpson has observed, in the early 19th century, treatise writers regarded consideration as a local version of the doctrine of *causa*.74

Thereafter, the common lawyers never doubted that the concept of exchange or bargain was at the core of the doctrine of consideration. The problem was to define bargain in a way that would free it from older ideas about equality in exchange and also fit the earlier decisions that enforced promises that were not bargains in any ordinary sense. The most successful solution was the bargained-for-detriment formula developed by Sir Frederick Pollock. To say the promisor entered into a bargain means that

72. 2 Blackstone, *supra* note 69, at *444.
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he was induced to give his promise by some change in the legal position of the promisee. Modified versions were adopted by Oliver Wendell Holmes and Samuel Williston, whence they passed into the First and Second Restatements of the Law of Contracts.

According to these scholars, consideration did not need to be equivalent in value to the performance promised. As a result, they were able to sweep the gratuitous transactions just mentioned under their definition of bargain. There was consideration when the promisee loaned an object or a sum of money gratuitously since the borrower’s promise to give it back was made, in part, to induce the lender to part with it. The promise to the prospective son-in-law was a bargain because the promise was made, in part, to induce him to marry.

In the age of legal formalism in which these scholars lived, it seemed enough that all these transactions could be covered by a single definition. Their work was unacceptable to a later generation of legal scholars that was looking for functional rather than formal reasons why a group of transactions ought to be treated similarly. Because his approach was functional, Arthur Corbin rejected the idea that the doctrine of consideration had a single meaning.

The bargained-for-detriment formula did not simply transmute certain gratuitous transactions into bargains so that they could be enforced. It also characterized certain commercial transactions as non-bargains so that enforcement could be denied: for example, options and modifications of contractual duties that were not paid for. As Melvin Eisenberg has pointed out, the courts did so to achieve the very purpose that was supposed at the time to be illegitimate: to scrutinize the fairness of the transaction.

Consequently, today we should not be asking whether a promise has consideration. We should be asking whether a transaction is unfair.

Without any elaborate discussion of its history, one can see that the doctrine of offer and acceptance has the same weakness. Its common law applications are not the logical consequences of requiring mutual assent any more than those of the doctrine of consideration are the logical consequences of requiring a bargain.

75. Frederick Pollock, Principles of Contract 164 (10th ed. 1936).
77. Samuel Williston, Consideration in Bilateral Contracts, 27 Harv. L. Rev. 503, 527-28 (1914).
78. Restatement of Contracts § 75 (1932); Restatement (Second) of Contracts § 71 (1979).
80. Id. at 696-97.
As I have shown elsewhere, the doctrine of offer and acceptance was unknown to Roman law.\(^\text{83}\) It was first formulated by the late scholastics of the 16th century, then preserved by the northern natural law school, and eventually borrowed by the common lawyers in the late 18th and early 19th century. Once the late scholastics had decided that in principle, all promises intended to confer a right on the promisee should be enforced, they asked whether the promise needed an acceptance. They concluded that an acceptance was necessary when the promisor would not have wished to be bound otherwise, that is, when the acceptance was a *sine qua non* condition of the promise.\(^\text{84}\) When the common lawyers borrowed this doctrine, again, they used it to deal indirectly with problems of fairness that they were not supposed to be confronting. Nearly always, as we shall see, the problem in the common law cases is not whether a party assented. Most of the time, the problem is to avoid the unfairness of holding one party bound when the other is not. Again, we should be asking about unfairness rather than about whether an offer has been accepted.

It might seem one could raise no similar objection to the doctrine of promissory reliance. Unlike consideration and offer and acceptance, its applications seem to be the logical result of a single underlying concept: that the promisee who changes his position in reliance on a promise should be protected. Supposedly, the doctrine arose when legal scholars realized that courts were protecting reliance despite the rule that contracts require consideration.

American scholars differ over whether promissory reliance is ultimately subversive of pre-existing contract law or ultimately compatible with it. According to Grant Gilmore, consideration and promissory reliance are like "matter and anti-matter." "The one thing that is clear," he said, "is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up."\(^\text{85}\) According to Clare Dalton and Jay Feinman, the conflict between the doctrines is due to inherent difficulties in liberal contract theory.\(^\text{86}\) According to Michael Metzger and Michael Phillips, promissory estoppel was part of a reaction against earlier individualistic contract law.\(^\text{87}\)

Other scholars, such as Melvin Eisenberg, believe that promissory reliance is not only compatible with the doctrine of consideration, but complementary to it. For economic reasons, bargains should be enforced, and that, supposedly, is the central teaching of the consideration doctrine. In other

\(^{83}\) Gordley, *supra* note 12, at 45-49.

\(^{84}\) Id. at 79-82.


transactions, these reasons do not justify enforcing a promise, at least not to its full extent. Nevertheless, the promisee should be compensated if he was hurt through reliance on the promise.  

Nevertheless, despite their differences, all of these scholars conceive of promissory reliance as a single principle instantiated in the cases that apply the doctrine. Historically, however, the doctrine arose neither as a rebellion against consideration nor as its logical complement. It arose to explain a variety of cases that had little in common with each other except that a court enforced a promise without consideration as it was conceived by the 19th and early 20th century jurists.

In 1857, Theophilus Parsons observed that the courts of equity were enforcing promises to make a gift of land if the intended donee had actually taken possession and made improvements. Parsons concluded that unlike common law courts, courts of equity would find consideration “if the promisee on the faith of the promise, does some act or enters into some engagement or arrangement, which the promise justified and which a breach of the promise would make very injurious to him.”

Parsons thought that in such cases, the courts of equity were applying the doctrine of consideration—not some new doctrine—and doing so “more rationally and less technically” than the common law courts. American jurists eventually recognized, however, that if consideration meant bargain, then there was no consideration in these cases. In 1919, Roscoe Pound described them as “anomalous.” Pound mentioned the reliance of the promisee—which he called “the theory of Parsons on ‘Contracts’”—as one of five alternative explanations of why the courts had not required consideration in the normal sense.

The courts had also enforced promises of gifts to persons about to marry. Since the time of Blackstone, common lawyers had claimed that there was “consideration” for such a promise because the agreement to marry was given in return for the money. Nevertheless, beginning in 1856 with the leading English case of Hammersley v. De Biel, courts sometimes said that a promisor was bound because he had made a “representation” on which the promisee had “acted.” Sir Frederick Pollock, in his influential treatise, dismissed these cases as insufficient to support “[t]he exploded doctrine of ‘making representations good.’” Pollock acknowl-

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89. 2 Theophilus Parsons, The Law of Contracts 517-18 (3d ed. 1857) (previous editions did not contain a chapter on specific performance, and so do not contain such a remark).
90. Id. at 517.
92. 2 Blackstone, supra note 69, at *444 (noting that contracts for consideration, including marriage contracts, are enforceable).
edged that according to a doctrine called “estoppel,” a person who made false representations about matters of fact could not later prove the facts were otherwise.\(^9\) But one could not apply this doctrine to enforce promises to act a certain way in the future since an enforceable promise was a contract, and a contract required consideration.\(^6\) Pollock claimed that promises to persons about to marry were enforceable because they had consideration.\(^7\)

Samuel Williston edited Pollock’s treatise. He noted that Pollock’s view could not be squared with certain American decisions.\(^8\) In one case, a court enforced a promise to give money to a college that had begun to erect a building in reliance on the promise.\(^9\) Another case, *Ricketts v. Scothorn*,\(^10\) is now so celebrated that it is found in almost all the casebooks. In *Ricketts*, the court required payment of a note for $2000 given by a man to his granddaughter in order that she would quit her job, which she did. In both cases, the would-be donor had died solvent without changing his mind, but the executors had refused to pay on the ground that there was no legal obligation.

Williston was familiar both with what Pollock called the “exploded doctrine of making representations good” and with what Pound called Parsons’ theory. When editing Parsons’ treatise, he added several annotations to the passage quoted above.\(^1\) He had also read and cited Pound’s article.\(^2\) In his enormously influential treatise on contracts published in 1920, Williston generalized these ideas to create a doctrine he called “promissory estoppel.” The courts, he suggested, might be allowing reliance to serve as a substitute for consideration in the four situations just discussed: promises to give land when the promisee had entered and made improvements, promises to marry, charitable subscriptions, and promises such as the one in *Ricketts*.\(^3\)

By the time Williston wrote his treatise, that idea seemed to have the support of history. James Barr Ames had shown in a famous essay that

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95. *Id.* at 648-49.
96. *Id.* at 650.
97. *Id.* at 915-21.
98. *Id.* at 650 n.1.
99. Miller v. Western College, 52 N.E. 432 (Ill. 1898). Williston, as editor, cites this case as Beatty v. Western College. *Pollock*, *supra* note 94, at 650 n.1. Although the case deals with the disposition of Mary Beatty’s estate, she is not a party to this case.
100. 77 N.W. 365 (Neb. 1898). There was a third case that Williston cited in his critical note to Pollock’s treatise but did not cite in his discussion of promissory estoppel in his own treatise or later in his defense of the Restatement: The M.F. Parker, 88 F. 853 (E.D. Va. 1880). Perhaps it seemed to take the doctrine beyond the limits Williston wished to impose. For a description of the case, see infra notes 288-290 and accompanying text.
103. *Id.* § 139, at 307-14.
consideration had not always meant bargain. As Williston summarized one of Ames’ conclusions: “[I]t may fairly be argued that the fundamental basis of simple contracts historically was an action in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price . . . .”

Nevertheless, Williston’s conclusion was tentative. The idea that a promise was enforceable because of the promisee’s reliance was “by no means without intrinsic merit,” but, he noted, “if generally applied it would much extend liability on promises, and . . . at present it is opposed to the great weight of authority.”

Arthur Corbin arrived at the same principle at almost the same time but apparently by a different route. His notes to his 1919 edition of Anson’s Principles of the Law of Contract contain two of his principal ideas about contract formation. First, “[n]o single definition” of consideration could “explain all the currently approved decisions.” Consequently, one should not try to fit all the cases into a single formula. Second, when courts find consideration they are sometimes holding the promisor liable because of “subsequent facts consisting of acts in reliance on the promise.”

Although Corbin does not say so expressly, he seems to have been thinking of cases in which the courts found “consideration” for gratuitous agencies and bailments. In the text Corbin was editing, Anson had listed them as an exception to the normal requirements of consideration.

In contrast, Williston, while uncomfortable with these cases, seems to have thought that most of them could be explained as instances of genuine consideration or else as tort actions.
Only a few years later, despite his remarks about "the great weight of authority," Williston, with Corbin's support, wrote the doctrine of promissory estoppel into some of the earliest drafts of the First Restatement of Contracts, for which he served as reporter. With minor changes, this provision was enacted as Section 90 of the final version:

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.\footnote{Restatement of Contracts § 90 (1932).}

Williston defended the doctrine by citing the same types of cases as in his treatise and also the cases on gratuitous agency and bailment that seem to have impressed Corbin. The last clause of Section 90 reflected Williston's admission in his treatise that, despite these cases, courts do not enforce all promises on which the promisee relied.\footnote{See American Law Institute, Commentaries on Contracts, supra note 105, at 20; Restatement of Contracts § 90 explanatory notes, at 249-50 (Official Draft No. 1, 1928).}

Some scholars, as mentioned earlier, have claimed the doctrines of consideration and reliance are irreconcilable antagonists. To show that they always were, Grant Gilmore told a story of how the doctrine of promissory estoppel was adopted that is repeated by Dalton, Feinman, and Metzger and Phillips.\footnote{Dalton, supra note 86, at 1084; Feinman, supra note 86, at 679-80, 683; Metzger & Phillips, supra note 87, at 485.} In Gilmore's story, Corbin urged Williston to include a far less stringent definition of consideration in the First Restatement. When this attempt failed, "Corbin returned to the attack."\footnote{Gilmore, supra note 85, at 63.} "At the next meeting of the Restatement group" he produced "a list of cases—hundreds, perhaps or thousands?—in which courts have imposed contractual liability" without consideration as Williston defined it.\footnote{Id. at 64.} "The Restaters, honorable men, evidently found Corbin's argument unanswerable," and they adopted Section 90.\footnote{Id.}

Certainly, there was disagreement over how to define consideration. It is reflected in the varying stress placed by different drafts on the element of bargain, and in a "brief" Williston circulated to his advisors in support of his own ideas.\footnote{An early printed, but undated, draft containing sections numbered 1-83 defines consideration in one section as "a detriment to the promisee or a benefit to the promisor," The Law of Contracts § 71, at 55 (undated draft, collected and bound with other numbered drafts of the First Restatement of Contracts), and provides in another that it be "given and received with the express or implied assent that it shall be the price or exchange for the promise." Id. § 75, at 57. In what seems to be a later draft, the detriment/benefit requirement is retained in section 75, while the "price or exchange" requirement is dropped. Restatement of Contracts § 75 (Tentative Draft No. 5-R, 1924) (noting on the cover page that this draft was prepared "for Submission to Advisers"). An official draft defines consideration in}
consideration, returned to the attack, and then won on promissory estoppel. Even the early drafts contain the ancestor of Section 90.118. Nor is it likely that Williston, who thought the doctrine had “intrinsic merit” but lacked authority in 1920, accepted it a few years later only because Corbin sent him a list of authorities. The earliest draft to illustrate the doctrine, dated September 1, 1924, contains a single illustration based on two cases cited in Williston’s treatise. When Williston wrote a defence of the doctrine in 1926, his principal authority was his own treatise, which he cited ten times. He cited five cases, of which only two are not found in his own treatise and could have been sent to him by Corbin before September 1924. Both were decided in 1920, which is very likely why they were not also in his treatise.119

The doctrine of promissory reliance, then, did not emerge in a revolt against consideration. It emerged in the same way as the bargained-for-detriment formula. Once consideration had been identified with bargain in the early 19th century, there were bound to be anomalous cases. The effort to frame a rule that would explain them produced first the bargained-for-detriment formula and then the doctrine of reliance. Williston played a key role in developing both.

Other scholars have claimed that the doctrines of consideration and reliance are naturally complementary. The former protects the expectation interest of the parties to a bargain, and the latter the reliance interest of the promisee of a gratuitous promise. But neither Corbin nor Williston seems terms of “acts,” “forebearances,” and the like, rather than “benefits” or “detriments,” but adds, in the same section, a requirement that whatever serves as consideration be “bargained for and given in exchange for the promise.” Restatement of Contracts § 75, at 87 (Official Draft No. 1, 1928).

118. An early draft proposed that “[a] promise which the promisor should reasonably expect to induce the promisee to act upon to his detriment, and which did induce such action” would be binding without consideration “if great injustice [could] be avoided only by enforcement of the promise.” Law of Contracts § 83(l)(e), at 64–65 (undated draft). Another early draft said that “[a] promise which the promisor should reasonably expect to induce detrimental action or forebearance of a definite character on the part of the promisee and which did induce such action or forbearance” would be enforceable without consideration and without manifestation of assent by the promisee, unless conditional on such assent, and “if injustice [could] be avoided only by enforcement of the promise.” Restatement of Contracts § 85(l)(e) (Tentative Draft No. 5-R, 1924). Note that the latter draft, which is more liberal in its definition of consideration than the presumably earlier, undated draft (see supra note 117) is also more liberal in allowing an unaccepted offer to be binding where there is reliance.

119. Corbin never seems to have told this story to anyone except Gilmore. He did not tell it to other contracts professors I have been able to interview who were Corbin’s colleagues or friends. Telephone Interview with William Laube (June 12, 1993); Interview with Friedrich Kessler, in Berkeley, CA (June 12, 1993); Telephone Interview with Warren Shattuck (July 2, 1993). Nor, apparently, did he tell it to Gilmore in so many words. The story is based on “the substance of conversations which I had with Professor Corbin during the early 1950s.” Giumore, supra note 85, at 62 n.135. Indeed, according to Gilmore, it is based on his efforts, over twenty years later when he was writing his book, to recollect the substance of these conversations. Id. Apparently, he had not previously confided the story to someone to whom he could turn to refresh his memory. He warned that “there is bound to be a certain amount of slippage between what really happened and this second-hand reconstruction of what happened.” Id. There seems to have been, as he correctly anticipated.
to have glimpsed this possibility at the time Section 90 was adopted. They were merely trying to frame a rule to cover a small number of significant but anomalous cases. The idea that the promisee should only recover under Section 90 to the extent he had relied was first suggested, not by Corbin, but by Warren Shattuck and by Lon Fuller and William Perdue in articles written in 1936. Shattuck’s article, published the following year, was written as a thesis at Yale Law School under Corbin. Shattuck, though a great admirer of Corbin, has told me that Corbin did not suggest this idea to him. That statement is consistent with positions taken during the debates in 1926 when Section 90 was adopted. Williston maintained that if an uncle promised his nephew $1000 for a car, the nephew is entitled to $1000 even if he only spent $600 purchasing a car in reliance on the promise. Corbin did not contradict this view, either then, or anytime before Shattuck’s article was written ten years later.

We have seen, then, that the doctrine of promissory reliance was devised to explain the outcomes of a small number of cases involving quite different factual situations. The idea that it involves a principle that is either irreconcilable with the doctrine of consideration or naturally complementary to it was an afterthought.

The suggestion of Shattuck, Fuller, and Perdue that the doctrine protects the promisee only to the extent of his reliance has since become mainstream academic opinion. A similar position was taken in well-known articles by Warren Seavy and Benjamin Boyer in the early 1950s. In 1965, this scholarly account had become so widely accepted that a sentence was added to Section 90 in a preliminary draft of the Second Restatement: “The remedy granted for breach may be limited as justice requires.” The reason was to allow courts to protect only the promisee’s reliance interest.

One hates to criticize fifty years of sustained and apparently fruitful scholarly effort. But an increasing number of scholars are noting the difficulties with this position. Paul Wangerin has pointed out that there was little if any support in the case law for the 1965 amendment just

122. Interview with Warren Shattuck, supra note 119.
125. See Restatement (Second) of Contracts § 90 (Tentative Draft No. 2, 1965). The statement remained in subsequent drafts and was eventually adopted by the American Law Institute in the Second Restatement.
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One study after another has shown that courts still rarely protect only the promisee's reliance interest. They enforce the promise to its full extent or not at all. This conclusion was reached by Farber and Matheson in 1985, Wangerin in 1986, Feinman in 1984, and again in 1992, Becker in 1987, and Yorio and Thel in 1991. Feinman and Henderson have observed that while the courts sometimes use the doctrine to enforce promises of gifts, they use it far more frequently to enforce promises auxiliary to an exchange. Feinman and Henderson suggested, and Yorio and Thel have recently confirmed, that most often the promisee recovers under the doctrine without proving he changed his position in reliance on the promise. Indeed, sometimes he recovers when it is fairly clear his position did not change.

Applications of the doctrine of promissory estoppel, then, may have as little to do with reliance as applications of the doctrine of consideration and offer and acceptance have to do with bargain and mutual assent. Reliance may not even have been the critical common feature in the small number of cases the doctrine was invented to explain.

Thus the question arises, what matters, if not reliance? The studies just cited do not suggest a clear answer. Wangerin calls for a unified theory but "makes no attempt to suggest what that theory might be." Barnett and Becker, and Yorio and Thel say that their studies are empirical rather than normative. They do say that courts are enforcing promises rather than protecting reliance. Farber and Matheson conclude that "any promise made in furtherance of an economic activity is enforceable." But courts do not enforce all promises, or even all those that further an eco-


129. Farber & Matheson, supra note 127, at 904, 909-10; Yorio & Thel, supra note 127, at 152-60. Yorio and Thel even argue that a court will sometimes deny relief despite proof of reliance. Id. at 160.

130. Wangerin, supra note 126, at 49.


133. Farber & Matheson, supra note 127, at 905 (footnote omitted).
nomical activity. So the question is which promises they do enforce, and why.

Feinman claims that this question itself is rooted in “neo-classical contract law.” He believes that once we ask it, we will be unable to avoid giving one of two unsatisfactory answers: courts simply enforce promises or they protect reliance. He is right that these answers do not work. He is also right that we have to look beyond 19th and 20th century contract law to find something else that matters. But we will still need a reason why certain promises are or should be enforced. As we have seen, jurists sought a reason long before the 19th century. They thought that what matters is the effect of a transaction on the wealth of the parties. As we will see, that is a very good answer.

II

DONATIVE PROMISES

A. When are Donative Promises Enforced?

By donative promises, I will mean those in which the promisor benefits the promisee gratuitously and at significant cost to himself. A thesis of this Article is that the 16th century jurists had the best explanation of the way American law enforces such promises. For them, as we have seen, the Roman rules requiring a formality had two purposes: to be sure the promisor wished to confer a right on the promisee, and to avoid indeliberate promises. Promises were enforced without a formality when the promisor’s decision was particularly likely to be sensible: when the promise was made to a charitable cause or to people about to marry.

1. Formalities

In American law, one cannot make a promise binding by registering it with a court, as in the 16th century, or subscribing to it before a notary, as in continental Europe today. But one can often achieve the same result by using a deed of gift or a trust. By a deed of gift, one can make an immediate gift of personal property. The donor executes a signed document declaring the intention to make a gift, and naming the donor, the donee, and the object given. By a trust, one can give away any type of property by declaring that one holds it in trust for the donee. The trust is then irrevocable if the donor so declares, and the intention to create an irrevocable trust

134. Feinman, The Last Promisory Estoppel Article, supra note 127, at 307-08, 315-16.
135. See Lon L. Fuller & Melvin A. Eisenberg, Basic Contract Law 7-8 (5th ed. 1990).
136. 1 Austin W. Scott & William F. Fratcher, The Law of Trusts § 28, at 310-12 & n.4 (4th ed. 1987) ("The rule is undoubtedly now well established that where the owner of property declares himself trustee of it for another, a trust is created although the declaration of trust is gratuitous.").
will usually be found even without such a declaration.\textsuperscript{137} While a deed of gift transfers the property right away, one who wishes the gift to take effect in the future can create the trust at once by specifying that the property is reserved for his own use, or that income from the trust is to be paid to himself, for a certain period of time.\textsuperscript{138} By using a trust, one can thus give away anything one presently owns, though not property to be acquired in the future.\textsuperscript{139} The deed and the trust are legally effective even though there is no bargain, no reliance, and no acceptance of an offer.

Use of a trust or a deed of gift shows unambiguously that the donor wished to confer a legal right on the donee, which, according to Molina and Lessius, was one prerequisite for the enforcement of a donative promise. Eisenberg pointed out, however, that if this were the only objective, then a donative promise should be enforceable if the donor clearly intended to confer a right to the promisee. Yet the common law will not enforce such a promise.\textsuperscript{140} In the classic case of *Dougherty v. Salt*,\textsuperscript{141} for example, Judge Cardozo held that an aunt’s promise to pay her nephew $3000 was unenforceable even though she had filled out and signed a printed form of promissory note for that amount and handed it to him.

To explain why the donor can do through trust law what he cannot do through contract law, one must identify some additional objective. The most likely candidate is the other purpose mentioned by Lessius and Molina: to encourage deliberation. In one way the requirement of a trust or deed of gift is like *insinuatio* or notarization: laypeople usually cannot complete the formality without consulting a lawyer. Trusts can be established without any formality unless land is involved, and deeds of gift require a very simple one, but a nonlawyer is not likely to know how to establish a trust or draft a deed. Thus, the donor is likely to deliberate more than he would if the formula were a simple one that he could execute soon after first conceiving the idea of making a gift. The aunt in *Dougherty* did not consult her lawyer, and had she done so, she would have had more time to reflect. She signed the promissory note while visiting her nephew, after the boy’s guardian had taunted her that instead of actually helping the child she was only willing to “take it out in talk.”\textsuperscript{142}

\textsuperscript{137} *Id.* § 29, at 315 (noting that a trust is presumed to be irrevocable, “unless the settlor reserves a power of revocation”). Trusts of money in bank accounts are often presumed revocable if the passbook is not delivered, but delivery is an interpretation of the settlor’s intent, not a formal requirement. *Id.* § 32.5, at 368-69.

\textsuperscript{138} See 1A *id.* § 57.6, at 188 (discussing situation where owner of property declares himself trustee “upon trust to pay the income to himself during his life and subject thereto upon trust for another person”).

\textsuperscript{139} 1 *Id.* § 30, at 316 (“No present trust can be created of property to be acquired in the future.”).

\textsuperscript{140} Melvin A. Eisenberg, *The World of Contract and the World of Gift*, Md. L. Rev. (forthcoming 1995) (manuscript at 6-7, on file with author) (referring to *Dougherty v. Salt*).

\textsuperscript{141} 125 N.E. 94 (N.Y. 1919).

\textsuperscript{142} *Id.* at 94.
There would hardly be a point in encouraging the promisor to deliberate unless one believed that some decisions were wise, others foolish, and that deliberation increases the chance that a wise decision will be made. In the 16th century, that belief was supported, not only by common sense, but by Aristotelian philosophical principles that educated people still regarded as authoritative.\textsuperscript{143} To some philosophers, at least as early as the 17th century, and to many legal scholars at least since the 19th century, it has seemed that there can be no standard other than the preferences or will of the donor which could make a gratuitous promise wise or foolish.\textsuperscript{144} But if one fully—or blindly—respected the will or preference of the promisor, one would respect the promisor's own decision as to how much deliberation is necessary. Moreover, if one believed that the donor's decision depends simply on his will or preferences, there would be no reason to encourage him to deliberate. The donor does not deliberate in order to discover what he already prefers or wills. He thinks that deliberation will help him decide what is the right thing for him to do. When he makes up his mind, he prefers and wills a course of action because he believes it is right; he does not believe it is right merely because he prefers it or wills it. Courts would not encourage deliberation unless they thought it increased the chance a donor will act rightly. At that point, one is close to the Aristotelian idea of liberality as right gift-giving whether or not one defends that idea by appealing to an Aristotelian conception of the good human life.

Other explanations of the reluctance of the law to enforce donative promises are not convincing. Richard Posner, as well as other scholars less committed to the law and economics movement,\textsuperscript{145} have said that a gift does not serve the same useful purpose as an exchange: a gift "is not a part of the process by which resources are moved, through a series of exchanges, into successively more valuable uses."\textsuperscript{146} But if one is to judge matters solely from the standpoint of the preferences of the individual, as Posner wants to do, then whatever a person chooses must be valuable—whether to

\textsuperscript{143} See supra notes 17-22 and accompanying text. For a modern defense of certain private donations based on these ideas, see Robert D. Cooter & James Gordley, \textit{The Cultural Justification of Unearned Income: An Economic Model of Merit Goods Based on Aristotelian Ideas of Akrasia and Distributive Justice}, in \textit{PROFITS AND MORALITY} 150 (Robin Cowan & Mario J. Rizzo eds., 1995).


\textsuperscript{145} \textit{E.g.}, FARNSWORTH, supra note 144, § 2.5, at 47 (suggesting that gifts are not productive); Lon L. Fuller, \textit{Consideration and Form}, 41 COLUM. L. REV. 799, 815 (1941) (referring to gift as a "sterile transmission"); Edwin W. Patterson, \textit{An Apology for Consideration}, 58 COLUM. L. REV. 929, 944-46 (1958) (preferring bargained-for promises over gifts as useful economic devices). Eisenberg speaks of the absence of independent social interests. The only one he identifies is the redistribution of wealth, and he discounts it because "[e]ven assuming ... that the redistribution of wealth is an appropriate goal of contract law, the enforcement of donative promises would be a relatively trivial instrument for achieving that end." Eisenberg, \textit{supra} note 144, at 4. As the objection indicates, he is not thinking about redistributing wealth to a particularly deserving person or charitable cause, but of achieving a more desirable distribution of wealth among the members of society generally.

\textsuperscript{146} \textit{RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW} 69 (2d ed. 1977).
sell property, to give it away, or to destroy it. As Posner has observed elsewhere, such a promise “would not be made unless it conferred utility on the promisor.”

Posner has also proposed another solution. Gratuitous promises are often not enforced because the social cost of doing so may exceed the utility the promisor gains when he can bind himself to make a gift. Social cost includes the administrative costs of enforcement and the cost of making mistakes as to whether the promise was actually made. According to Posner, when the “stakes” are high so the administrative cost is worth it, and the promise is well evidenced so the chance of error is low, one would expect the courts to enforce such promises. But if that were so, any well-evidenced donative promise would be enforced when the “stakes” are as high as in commercial litigation. Yet courts would not enforce the promise of a modern Diamond Jim Brady who circled the Berkeley campus with a bull horn offering to buy a car for every student enrolled at the University of California. Nor would they enforce a well-evidenced promise of a small fortune to a stranger who returned a favorite umbrella, or to a taxi driver who reached the airport on time, or to a waitress who waited with a nice smile. They did not even enforce the aunt’s promise in Dougherty v. Salt.

2. Delivery

In the Roman law of the 16th century, in modern continental law, and in American law, one usually cannot revoke a gift of personal property after delivery. The object becomes the property of the donee. Lessius and Molina seem to have regarded delivery as a circumstance showing deliberation and an intent to confer a right on the donee. Scott and Fratcher made much the same point when they observed that the only way to explain why delivery is required by the law of gifts, but not by the law of trusts (since one can declare oneself to be the trustee), is that “it subserves the purpose of drawing a line between transactions that are inchoate and those that are final.” Again, after delivery, the transfer is effective though there is neither a bargain nor reliance.

But if delivery matters because it distinguishes final from inchoate decisions to give away personal property, we do not really need the doctrine of promissory reliance to account for one of the results it was devised to explain: why a promise to give land is enforceable after the promisee has moved on to the land and made improvements. Before Williston and the First Restatement popularized the promissory estoppel explanation, some

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148. Id. at 415.
149. Id. at 415, 426.
150. See supra text accompanying note 140.
151. 1 SCOTT & FRATCHE, supra note 136, § 31, at 331.
courts defended relief by an analogy to delivery of a gift of personal property. In 1951, Boyer claimed their reasoning was "objectionable" because it "overlook[ed] the formalities which have always characterized the transfers of interests in land." But these formalities have not always characterized the transfer of such interests if courts have been overlooking them since the time of Theophilus Parsons.

Admittedly, the courts have required more than delivery. The promisee must not only enter but must also make improvements. But a plausible explanation is that mere delivery is not as clear an indication of an intent to part with property forever in the case of land as in the case of personal property. The fact that someone lets his friends or relatives move in does not prove he wants to give them anything. But when they not only move in but make valuable improvements at their own expense, it is evidence they expect to keep the property. Indeed, if courts were giving relief because of the promisee's reliance, then they ought to give relief whenever the promisee relied. Traditionally, however, they have not done so when he or she relied without making improvements.

Also, despite the urgings of scholars, the usual remedy is specific performance rather than damages compensating the promisee for what he has suffered by his reliance. The remedy makes sense if the courts are treating these transactions as executed gifts. The remedy is especially significant since the problem is not to explain the fact that courts give some kind of remedy but rather the one they give. In England, opponents of the doctrine of promissory reliance have explained relief in such cases as the prevention of unjust enrichment. Patrick Atiyah has sensibly observed that if it were so, the courts would only be giving damages for the amount the promisor was enriched. One can equally well observe that if the courts only wished to protect the promisee against the consequences of his reliance, they would not grant specific performance.

3. Charitable Pledges and Marriage Settlements

As we have seen, according to Roman law as it was interpreted in the 16th century and in some continental legal systems today, donative promises were enforceable without a formality and without delivery when they were made to charitable causes or to people about to marry. Although

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152. See, e.g., Evenson v. Aamodt, 189 N.W. 584, 585 (Minn. 1922) (occupancy and improvement of the land established delivery).
153. Boyer, supra note 124, at 659.
154. See 2 Parsons, supra note 89, at 518 n.(b).
155. See, e.g., Burns v. McCormick, 135 N.E. 273 (N.Y. 1922) (Cardozo, J.) (refusing to enforce the promise where plaintiff had moved in in reliance on the promise, but never had exclusive possession and did not make improvements); see also Boyer, supra note 124, at 664 (discussing Burns).
they were not explicit, the late scholastics presumably thought that these promises were likely to be sensible dispositions of the promisor’s wealth.

Before the rise of promissory estoppel, American courts used various fictions to find consideration for promises of both types. Consideration for pledges to charitable causes was found in commitments of other subscribers to donate money,157 or in the commitment of a charity to name a fund after the donor,158 to locate a college in a particular town,159 or even to use the money for charitable purposes.160

Consideration was found for promises to those about to marry by saying that the forthcoming marriage was the inducement for the promise. In effect, parents who might have begged their children not to marry were treated as though they had bribed them to do so. Even then, in the famous case of De Cicco v. Schweizer,161 it was hard to arrive at the desired result since the promise was made to a fiancé who, having already engaged himself to marry, was legally obligated to do so. Cardozo ingeniously observed that the affianced couple might still have given up their legal right to dissolve their engagement by mutual consent.162 In effect, the parent’s promise was treated as though it were made to induce them to marry should they no longer wish to do so.

Promissory estoppel supposedly made these fictions unnecessary. But if that doctrine correctly explains the cases, then relief is given because the charitable organization or the engaged couple relied on the promise. Reliance is not required either by modern continental law or by older Roman law. And indeed, American courts have not required proof that the promisee relied.163 In deference to the case law, the Second Restatement changed the language of Section 90: charitable subscriptions and marriage settlements are enforceable “without proof that the promise induced action or forbearance.”164 To say the gift is enforced because the promisee relied is therefore as much a fiction as to say it is really a bargain.165

Moreover, the courts have awarded the promisee the value of what he was promised rather than the amount he suffered by changing his posi-

159. Rogers v. Galloway Female College, 44 S.W. 454, 455 (Ark. 1898).
161. 117 N.E. 807 (N.Y. 1917).
162. Id. at 809-10.
164. RESrrATmRT (SECOND) OF CoNTRAcrs § 90(2) (1979).
165. See CAlAMARI & PERILLO, supra note 163, at 279-81.
Williston therefore seems to have erred when he identified reliance as the element that explains relief. The most plausible explanation, as some scholars have noted, is that the courts regard promises to charities and engaged persons as particularly meritorious. According to the Reporter for the Second Restatement, E. Allan Farnsworth, the enforcement of promises to charities is "particularly desirable as a means of allowing decisions about the distribution of wealth to be made at an individual level." But then one has left the principle of reliance behind. Indeed, one is back to the idea that donative promises should be enforced because they allow people to make sensible changes in the distribution of wealth. One is committed to some ideal of human welfare that makes some changes better than others even if one does not conceive of the good in the same way as Aristotle.

Nevertheless, Eisenberg has argued:

Of course, a marriage settlement is unenforceable unless there has been reliance, in the form of a marriage. As to marriage settlements, therefore, Section 90(2) is best explained on the ground that when two persons have married after a marriage settlement has been made, they should be deemed to have relied upon the settlement, rather than forced to testify that they married for the money. More generally, once a promise has been made that a given act by the promisee will be compensated, if the act occurs it will be literally impossible, even for the promisee, to sort out whether and to what extent the act was motivated by the compensation.

But the question is not whether the engaged couple did change their position, but whether they obtain relief because they might have married in reliance on the promise. If so, the judges who enforced these promises, first by twisting the doctrine of consideration, and later by dispensing with proof of reliance, must be rather odd people. Ideally, if they only knew matters that admittedly are hard to know, they would not want to give relief to couples who would have married for love. They would only give relief to those who married for money, and then, only to the extent that they married for money. In principle, if they knew that Ann cared so much for Bert that she would have married him if offered $10,000, they would award that sum, even if she had been promised $100,000; but if they knew she would not marry for a penny less than she was promised, they would award the full amount.

166. This was observed long ago by Shattuck, supra note 120, at 930-31, 934, and more recently by Becker, supra note 127, at 136-40.
167. See CALAMARI & PERILLO, supra note 163, at 280; Knapp, supra note 163, at 60.
169. Eisenberg, supra note 140 (manuscript at 50).
That is implausible. Moreover, if judges felt that way, even though they might not want testimony to be taken on the matter in court, one would expect them to be freer with relief when they are dealing with the successful fortune hunter than with an obviously loving couple promised a modest amount the day before their long-awaited union. There is no sign of this tendency in the case law.

As to charitable subscriptions, Eisenberg argues, "Restatement Second § 90(2) seems to go beyond the case law, which at least nominally requires either a bargain or reliance to make a charitable subscription enforceable." But the accent should be on the word "nominally," for the case law does not genuinely require consideration or proof of reliance. He gives a better explanation:

Most important, to the extent that Section 90(2) does support dispensing with reliance in the case of charitable pledges, the position is justified not because reliance should generally be unnecessary, but because social policy favors charitable giving in a society that stresses the promotion of general welfare through decentralized private institutions.171

Quite correct. To put it another way, such a promise is likely to be a genuine act of liberality by which, as Aristotle said, the donor gives "to the right people, the right amounts, and at the right time."172

The difficulty might seem to be that one can imagine other equally deserving promises that the law does not enforce: for example, to give a brilliant acquaintance the cash he needs to finish university; or to give money to family members who are in need but who are not about to marry.

According to the thesis we are defending, however, it is not enough that the promisor's decision was probably sensible. He or she must also have intended to confer a right on the promisee to claim performance. The late scholastic jurists were not overly clear about when the promisor intended to do so. But some of Eisenberg's observations in the article just quoted help clarify the point.

According to Eisenberg, certain donative promises should not be enforced because they symbolize and cement a relationship based on affection and trust. To confer a legal claim on the promisee would be inconsistent with the nature of the underlying relationship.173 For other donative promises, a "host of circumstances will serve as moral excuses for a donative promisor and should therefore serve as legal excuses as well, if simple donative promises were enforceable." It would be difficult for the law to "deal adequately with the fluid and informal nature of these excuses."174 In

170. Id. (manuscript at 51).
171. Id. (manuscript at 52).
172. See Aristotle, supra note 22, at 985; supra note 22 and accompanying text.
173. Eisenberg, supra note 140 (manuscript at 76-87).
174. Id. (manuscript at 88-89).
the first case, as Molina would have said, the promisor would not want to transfer a claim to the promisee at all. In the second case, he or she would not want to transfer an unconditional legal claim that a court could recognize.

Unlike a promise to contribute to a scholarship fund to aid brilliant students, the promise to the brilliant acquaintance is personal. For both of the reasons given by Eisenberg, the promisor may not have wished to confer a legal claim on the promisee. To do so might run counter to a personal relationship based on trust and affection. Moreover, a "host of . . . excuses," might morally justify nonperformance. In addition, because the promise is personal, many factors, other than a mere desire to aid the brilliant and deserving, may have been at play, some of which could distort one's judgment and make the promise a foolish one.

Promises to family members, like promises to friends, are personal. Sometimes, however, though the promisor and promisee may have a relationship based on trust and affection, the promisor may nevertheless want the promisee's claim to the gift to be both independent of that relationship and not defeasible by a "host of . . . excuses." He may wish the promisee to have a legal claim. For example, parents might give an adult child a house or bonds, rather than the use of a house or the interest on bonds kept in the parents' name, so the child's relationship with them will not be one of continual economic dependence. For the same reason, they might promise a certain sum every year, but wish the child to receive it, so to speak, as of right. If so, refusal to enforce such a promise would be as contrary to the purpose of the parents as allowing them to reclaim the house or bonds. Marriage settlements are particularly likely to be made for this purpose. Often they are made to enable the couple to establish and run an independent household. The settlement is supposed to let them regard what they receive as their own. They can have it without explaining why they need it or how they will use it, and without having their needs weighed against those of others, as when they were still part of their parents' household. Thus, it is not surprising that courts will also enforce marriage settlements.

4. The Promisor-Decedent

We come, then, to cases like Ricketts v. Scothorn,175 in which a relative promised to bear the financial consequences of some action by the promisee, and the promise was enforced, supposedly because the promisee relied. In Ricketts, the promisee's action was quitting a job. In Devecmon v. Shaw,176 it was traveling to Europe. In Sandoval v. Bucci (In re Estate of Bucci),177 it was buying a house. In the famous case of Hamer v.

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175. 77 N.W. 365 (Neb. 1898); see supra text accompanying note 100.
176. 14 A. 464 (Md. 1888).
Sidway, an uncle promised to pay his nephew $5000 if the nephew would not drink, smoke, swear, or gamble until he reached the age of twenty-one. This case is usually used to illustrate the doctrine of consideration, but some scholars believe the promise would be enforceable under the doctrine of promissory reliance.

In all the cases just mentioned, however, the promisor died solvent without a change of heart. Whether the promisee would have been allowed to recover against the wishes of the promisor, or to take his place in line with creditors, is sheer conjecture.

Once again, Eisenberg suggests a plausible explanation of why the promise was enforced. Both of the obstacles he mentions to enforcing a donative promise disappear when the promisor dies without a change of heart. To sue the estate is not inconsistent with a relationship of trust and affection with the promisor. Moreover, even if the promisor had a "host of . . . excuses," all legitimate, for changing his mind, he died without doing so. These concerns also explain the similar rule that if a gift of property is ineffective because delivery was not made or a formality not completed, the donor cannot be required to complete the gift; but if the donor dies believing the conveyance effective, a constructive trust may, in some cases, be imposed on the property for the benefit of the donee. But these concerns have nothing to do with reliance or bargain or mutual assent.

B. But What About Sister Antillico?

I have attempted to demonstrate that the doctrine of promissory reliance does not explain the American case law. But why should that be so? If a promisor makes and then breaks a promise, knowing that the promisee will rely, shouldn't he be liable? Eisenberg has said that it is "hard to quarrel with a rule that the loss must be borne by the promisor, if, but only if, he was at fault." Sometimes, moreover, the doctrine seems necessary to avoid injustice. In Kirksey v. Kirksey, the defendant promised to provide his sister Antillico with a place to live if she would give up her house and move in with him. After she had done so, and lived a few years in a house her brother provided, he changed his mind and asked her to leave. The case was decided before the rise of the doctrine of promissory reliance, and the court denied relief on the ground that the promise was a mere gratuity unsupported by consideration. Yet most legal scholars today regard this result as unfortunate, and an illustration of why we need the doctrine.

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178. 27 N.E. 256 (N.Y. 1891).
179. CALAMARI & PERILLO, supra note 163, at 275 & n.34.
180. Id. at 275 n.31.
181. 1 SCOTT & FRATCHER, supra note 136, § 31.5, at 350 (finding such trusts imposed where the donee was a "natural object" of the donor's bounty).
182. Eisenberg, supra note 144, at 20.
183. 8 Ala. *131 (1845).
184. Id. at *133.
Let us note first, that although sister Antillico may be a sympathetic figure, not everyone who suffers through reliance on a promise is equally sympathetic, or as likely to obtain relief. Suppose that the rich owner of a factory or a plantation promises his children, “Someday all of this will be yours.” When one child asks, “What exactly, Daddy?” he satisfies this precocious taste for precision by answering, “At least $20,000,000 apiece, kids, net of taxes, net of debt.” If he later mortgages the property and dies insolvent, no court on earth will allow the children to share with the creditors. That is so even if the children failed to learn anything that could help them make a living by their own efforts in reliance on their father’s promise.

Second, it is not obvious that a person should be entitled to compensation when he was caused a financial loss through another’s fault. If it were so, as the great German jurist Rudolf von Jhering pointed out, one who caused a traveller to lose money by misdirecting him might be liable. To avoid that result, the German Civil Code does not impose liability for negligence for purely economic loss. American law is similar. Courts have not imposed liability for economic harm on a defendant who negligently severs an electric company’s power lines that service the plaintiff’s plant, or who negligently damages the propeller of a third party’s boat that the plaintiff has chartered. The New Jersey Supreme Court allowed an action when the plaintiff had to evacuate its office after the defendant negligently discharged explosive gas nearby, but that is far short of allowing recovery in principle for negligently caused economic loss. Similarly, those who make negligent misstatements of fact have not been held liable merely because those who relied on them suffered an economic loss. Accountants have been held liable for mistakes in financial statements to people for whom these statements were specifically prepared, but not to investors, creditors, and others who foreseeably would rely on them. So one must ask why the promisee who suffered an economic loss should recover, even if the promisor was at fault for making and then breaking a promise.


186. Bürgerliches Gesetzbuch [BGB] §§ 823, 826 (Ger.).


190. See, e.g., Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 119-20 (N.Y. 1985) (holding accountant liable when the primary purpose of a financial report was to inform a specific lender, but not to other parties who might rely); White v. Guarente, 372 N.E.2d 315, 318 (N.Y. 1977) (holding accountants liable to limited partners because their services were extended “to a known group possessed of vested rights”); Ultramares Corp. v. Touche, 174 N.E. 441, 444-47 (N.Y. 1931) (holding accountants not liable to investors for negligent errors).
Again, the promisor may not be at fault. As Eisenberg himself observes, and as we have seen, one reason for not enforcing a donative promise is that there may be a "host of . . . excuses" that morally justify the breach. But these may be too inchoate for a court to take into account. If so, the promisor who refuses to perform may not only be without fault, but may not have broken the promise at all since it was made with the understanding that it was subject to these excuses.191

Next, when a promise is not enforceable for reasons unrelated to reliance, the promisee may have acted unreasonably in relying on it. If so, then, according to Section 90 itself, he should not obtain relief. Admittedly, it may seem odd to say that the promisee was unreasonably in relying on the promisor to keep his word. Eisenberg makes this point by quoting Corbin's definition of a promise: it is "an expression of intention . . . communicated in such manner to [an addressee] that he may justly expect performance and may reasonably rely thereon."192 Nevertheless, the promisee might be aware that the promisor acted foolishly or without deliberation and that he may later regret having made the promise. It may then be unreasonable for the promisee to rely, at least without asking the promisor to do something that shows deliberation such as seeing a lawyer or making delivery. Indeed, the promisee who is deciding whether it is reasonable to rely on a promise may be in the same position as a court that is deciding whether it is reasonable to enforce it. The same considerations that lead the promisee to rely would lead the court to enforce the promise independent of his reliance. Sometimes, admittedly, the promisee may be in a better position than the court to know that the promisor acted deliberately and wisely. The promisee might then reasonably rely on a promise the court would not enforce without a clearer sign of deliberation. But it would be hard for the promisee to convince the court that his reliance was reasonable absent such a sign, especially since the promisor did change his mind.

Finally, as Eisenberg also observes, sometimes a donative promise should not be enforceable because it is made as part of a relationship of trust and affection, and it would be contrary to that relationship to allow the promisee to sue. But if that is so, the promisee should not be allowed to sue on the basis of reliance.

In short, if the promisee relied, it may be, so far as the court can tell, that the promisor was justified in failing to perform; or that the promisee was not justified in relying; or even that the promisee who justifiably relied should not be allowed to sue. In such cases, the court should not protect the promisee who relied. But in such cases, it is also unlikely that the promisor acted with deliberation, intending to confer a legal claim on the promisee. If the court could be sure that he did so, then it should enforce the promise

191. See supra text accompanying note 174.
192. Eisenberg, Principles, supra note 82, at 659 (quoting 1 Arthur Corbin, Corbin on Contracts § 13 (1963)); Eisenberg, supra note 144, at 20 (same).
whether the promisee relied or not. Corbin said, "[I]t would be unnecessary for the Roman and Continental jurists to develop an action in reliance doctrine" if their law "make[s] enforceable every promise on which it would be reasonable to rely."193 While that is not quite right, it is very close. If the promisee who relied should be protected, then usually the promise is one that should be enforced for reasons independent of his reliance.

If a court could know that the promise to sister Antillico was deliberate, not defeasible for a host of inchoate reasons, and not part of a relationship of trust that should confer no right of action on the promisee, then the court should enforce it whether or not she sold her house. It would then have the same reasons for enforcing the promise as if the brother had seen his lawyer and worked out some appropriate formality. But if the court cannot make that determination, then it cannot rule out the possibility that sister Antillico herself suspected that the promise might be indeliberate, defeasible for a host of reasons, and not intended to confer a right of action. In that event, she is not such a sympathetic figure.

III

Promises of a Nonburdensome Performance

In making a donative promise, as I have used the term, the promisor wishes to transfer wealth from himself to the promisee. Other promises are gratuitous in the sense that they are unrecompensed, but they can be performed without any significant cost. A second thesis of this Article is that courts enforce such promises because they can be performed without significant cost to the promisor. As the late scholastic jurists seem to have recognized, these promises raise neither the fear that the promisor acted foolishly to his detriment, nor that the exchange was unfair. Moreover, the enforcement of these promises is desirable because, nearly always, while the promisor can confer the benefit at a negligible cost, the promisee either cannot obtain the benefit otherwise or can do so only at a significantly greater cost. Had the promisor charged some small amount for the performance, the promise would be enforceable. The fact that he or she chose to charge nothing instead does not make it less worthy of enforcement or significantly unfair.

A. Gratuitous Agency

Courts have sometimes enforced a promise to do some service for the promisee as a favor. Since such a promise does not have consideration in the sense of a bargained-for-detriment, scholars have said that the real reason for enforcing it is the reliance of the promisee.194

193. 1A Arthur Corbin, Corbin on Contracts § 196, at 199-200 (1963).
194. See Boyer, supra note 124, at 665-74, 873-88; Seavey, supra note 124, at 926; Shattuck, supra note 120, at 918.
Most often, such a promise was made in a commercial context. Sometimes, it was made to the other party to a contract but after the contract was concluded. For example, the seller of property promised to file papers to insure it.195 A railway promised to help one of its customers obtain a rebate by filing papers with a government agency.196 The holder of a security interest in property promised to insure it at the promisee’s expense197 or at his own expense for a short time.198 In other cases, three parties were involved in a transaction, and one agreed to do something, not for the party who was paying him, but for the other party. For example, the senior creditor in a financing arrangement agreed to give notice of default to a junior creditor.199 A general contractor agreed to write checks payable to his subcontractor’s supplier rather than to his subcontractor alone.200

Reliance cannot be the real reason for enforcing these promises. The courts have rarely demanded that the promisee prove he changed his position. In some cases, the promisee could have done the act himself or found someone else to do it: for example, he could have taken out his own insurance. But the promisee is not required to prove that he would have done so. In other cases, the promisee could not have done the act himself, but, had the promisor refused to do it, the promisee might have been able to exert pressure by threatening something within his legal rights. For example, in the three party situations, the junior creditor could have told the senior creditor that it would not supply credit unless the senior creditor promised to give notice of default. Similarly, the subcontractor’s supplier could have threatened to withhold materials unless it was paid directly by the general contractor. Nonetheless, in both these cases, the promisee was not required to prove, or even allege, that he would have made the threat or that it would have been successful. Moreover, sometimes the promisee recovered even though it is hard to see what he could have done had the promisor refused to promise. The former customer of a railroad recovered when the railroad failed to send a government agency papers entitling him to a rebate, though it is not clear he could have somehow obtained the rebate had the railroad refused to cooperate from the beginning.201

Moreover, as Yorio and Thel point out, courts have nearly always enforced the promise to its full extent instead of awarding compensation for

199. Miles Homes Division of Insilco Corp. v. First State Bank, 782 S.W.2d 798 (Mo. Ct. App. 1990).
the amount that the promisee was hurt through his reliance.\textsuperscript{202} It is noteworthy that although all these promises were unrecompensed, and most were made in a commercial context, none of them raised concerns about unconscionability either for Yorio and Thel, or for the courts that decided them. The reason is that in virtually all of them, either the cost of the performance to the promisor was obviously trivial, or one can assume it was trivial since otherwise the promisor would have been unlikely to promise it gratuitously in a commercial context. Consequently, relief can be explained by a simpler principle than detrimental reliance: that promises that entail little cost to oneself are binding.

This principle also explains why, in some cases, courts have been reluctant to give relief even when the promisee may have relied. In these cases the promisor’s liability can be very large if he fails to perform. Therefore, although the performance may be almost costless, the exposure to such a large liability is itself a significant cost. An example is a promise to help obtain insurance on the promisee’s property. Some courts do not allow the promisee to recover.\textsuperscript{203} Indeed, the Second Restatement says that Section 90 should be “applied with caution to promises to procure insurance,” noting that “[t]he appropriate remedy for breach of such a promise makes the promisor an insurer, and thus may result in a liability which is very large in relation to the value of the promised service.”\textsuperscript{204}

\section*{B. Gratuitous Bailments}

Some of the earliest promises that common law courts enforced in assumpsit were those of a bailee to look after an object entrusted to him. After the victory of the bargained-for-detriment formula, scholars found consideration for such promises by exploiting the fact that the formula does not ask whether the transaction as a whole is a bargain. It asks whether the promise is made, in part, to induce another to give up some legal right. Since a borrower’s promise to look after the object and return it is made to induce the lender to part with the object, its delivery is said to be consideration for the promise.\textsuperscript{205} Yet courts have enforced such a promise against a bailee who gratuitously agreed to take care of another’s goods. In the early case of \textit{Coggs v. Bernard}, where a carter agreed to transport a keg of brandy free of charge, the court said that “a bare being trusted with another man’s goods, must be taken to be a sufficient consideration.”\textsuperscript{206} Pollock

\textsuperscript{202} Yorio & Thel, \textit{supra} note 127, at 129-51.

\textsuperscript{203} \textit{E.g.}, Hazlett v. First Fed. Sav. & Loan Ass’n, 127 P.2d 273, 276-77 (Wash. 1942) (holding mortgagee not liable on promise to secure insurance on mortgaged property); Comfort v. McCorkle, 268 N.Y.S. 192, 194-95 (Sup. Ct. 1933) (finding defendant not liable on promise to file insurance claim on plaintiff’s behalf); Prescott v. Jones, 41 A. 352 (N.H. 1898) (declaring defendant not liable on promise to renew fire insurance on plaintiff’s property).

\textsuperscript{204} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 90 cmt. e (1979).

\textsuperscript{205} \textit{See id.} § 71 cmt. c, illus. 8.

and Williston admitted that in this situation the bargained-for-detriment formula did not work. The bailee is not promising, even in part, to induce the bailor to entrust him with the goods. He is looking after them as a favor. One possible explanation, Corbin noted, is that the bailee is liable in tort for his negligence. Without explaining what was wrong with that explanation, Corbin concluded that the bailee is really liable on the ground of promissory reliance. Others have agreed.

But if the bailee is liable on tort principles, there is no need to invoke the doctrine of promissory reliance, or any other contract doctrine. This is a case of physical damage caused by failure to use reasonable care. The only reason he would not be liable is if he were not under a duty to use care. According to § 323 of the Second Restatement of Torts, however, he is under such a duty:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

This section is based on tort principles. It does not smuggle in a principle of contract law. A person who creates a risk of harm, however innocently, must have a duty to use reasonable care to control that risk. Otherwise a person who carefully started a car in motion and hit another car when he negligently failed to brake would not be liable. Thus, "[i]f the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." This rule applies "even though at the time of the act the actor has no reason to believe that it will involve such a risk." Thus, if a golfer drives a ball he must shout a warning if he sees it is about to hit someone. If a car owner lends his car he must warn the borrower if he later learns the steering is defective. If a truck skids and blocks an icy road, the driver must warn oncoming vehicles. And these duties arise even if the golfer, the car owner, the truck driver, and the borrower are all strangers.

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207. Pollock, supra note 75, at 174 n.6; 2 Williston, supra note 102, § 1038, at 1950-53.
208. 1A Corbin, supra note 193, § 207, at 262-63.
209. See Boyer, supra note 124, at 665-74; Seavey, supra note 124, at 926-27; Shattuck, supra note 120, at 918.
210. Restatement (Second) of Torts § 323 (1964).
211. Id. § 321(1).
212. Id. § 321(2).
owner, and the truck driver were without fault in creating the risks of the harm which they must now prevent. 213

Section 323 merely treats an "undertaking" to look after someone's things the way Section 321 treats these other acts. The defendant must use reasonable care to control the risk of harm that his undertaking created. It creates a risk of harm if, absent the undertaking, the owner would have found some other way to safeguard his things, or, as Section 323(b) says, if the harm is suffered because of his reliance upon the undertaking. If he had no alternative, the harm would have been suffered anyway, and the defendant would not be liable.

From the perspective of tort law, it would be bizarre to treat an "undertaking" differently from other acts simply because the "undertaking" also happens to be a promise. What matters from a tort perspective is that it can be a source of physical danger. One person puts his car in motion and then discovers that unless he takes action by braking it will hit someone else's car. Another person signals the driver behind him it is safe to pass, and then discovers that unless he takes action by signaling again that driver will hit an oncoming car that suddenly and unpredictably appeared. A third person offers to take care of the car of a friend who otherwise would have garaged it, and realizes that unless he moves the car to a safe place it will be vandalized. All of them have a duty of care, and for the same reason.

As a matter of tort law, then, the bailee who fails to use reasonable care will not be liable unless the bailor relied. But one does not need the doctrine of promissory reliance to explain why. Neither does one need to use the principle for which we are currently arguing: that promises that benefit the promisee without significant cost to the promisor should be enforced. From a tort perspective, if the undertaking of the bailee is a source of danger to the bailor, then the bailee must use reasonable care even if he can only do so at considerable cost.

The principle for which we are arguing would come into play only if the bailor did not rely because his only alternative was to entrust his goods to the bailee. Suppose, in Coggs v. Bernard, that the bailor was a traveler who had been informed when he tried to board a passenger ship that he was legally prohibited from taking his keg of brandy on board with him as he had planned. Suppose his only alternatives were to abandon the keg on the dock or to accept the offer of the only nonpassenger standing nearby to take care of it until his return. By accepting the offer, the bailor has not relied in the sense of changing his position to his own detriment. Neither the doctrine of promissory reliance nor Section 323 of the Second Restatement of Torts will help him if the bailee fails to use due care. According to the principle we are defending here, he should be liable if he can protect the brandy with no significant cost to himself: for example, by loading it in a

213. Id. § 321 cmt. a, illus. 1-3.
taxi and keeping it in his basement until the owner’s return. That result seems quite reasonable. The bailor would have had an action if he had charged $20 for the service. The fact that the service could be performed so inexpensively that he did not bother to do so should not lead to a different result.

The case is harder if the bailee could only protect the brandy at a significant cost to himself, though a cost that was less than the value of the brandy to its owner. If the costs are really significant, and the owner really had no alternative but to abandon the brandy, a possibly imprudent promise on the dock raises the same problems we discussed earlier about promises to assist other deserving people. There are the same reasons for doubting whether the promise should be enforced. If the law of unjust enrichment functioned ideally and frictionlessly, instead of enforcing the promise, one might allow the bailee to incur the costs necessary to protect the brandy and recover them from the bailor. But if that result is not possible, enforcing the promise raises the same difficulties as enforcing any other promise to enrich another at one’s own expense.

A different question is whether the bailor who has loaned something gratuitously can take it back if he finds he has a need for it. As we have seen, late scholastics such as Lessius and Molina, natural lawyers such as Pufendorf and Pothier, and the French and German Civil Codes allow the lender to do so if he did not foresee the need when he loaned the object.

There are virtually no American cases dealing with this issue. Consequently, in seeking a solution, American scholars have tried to be consistent with the general principle that a contract requires consideration. In the early 19th century, Joseph Story explained the civil law rule that even if the lender had promised the object for a fixed term, he could take it back only in case of sudden and unexpected need.214 According to Story, the requirement of consideration made that rule untenable. Since the bailment is gratuitous, the lender can terminate at will even if a time is fixed. “But if he does so unreasonably,” Story added, “and it occasions any injury or loss to the borrower, the latter may, perhaps, have a suit for damages . . . .”215

Story’s view was accepted by John Lawson.216 But the trouble with it, as William Hale pointed out, was that if there was no action for breach of contract, there should not be any action at all.217 So American scholars tried to find a way that the borrower could sue for breach of contract. James Schouler and Armistead Dobie cited the Roman law rule described earlier: after delivery, a gratuitous loan for use could not be revoked if a

215. Id. § 258, at 266.
term was set. Schouler rejected that rule because he could not square it with the doctrine of consideration. Nevertheless, he and others suggested that consideration could be found in the change of position of the borrower. Consequently, a bailor’s promise to lend an object gratuitously for use for a fixed term or a specific purpose was binding. Similarly, a bailee’s promise to care for an object gratuitously for a fixed term was binding. This solution lost its doctrinal appeal with the victory of the bargained-for-detritment formula for consideration. The change of position, as Williston pointed out, could no longer count as consideration. Williston concluded that a gratuitous loan could be revoked at will. Under the First and Second Restatements, presumably, one would conclude that the promise lacked consideration but that the promisee who relied could be protected at least to the extent of his reliance.

These scholars reached their conclusions without judicial authority in an attempt to be true to the doctrine of consideration as they understood it. If the thesis of this Article is correct, we should not try to be faithful either to this doctrine or to that of promissory reliance. If our analysis of promises to give away money or property was correct, then we should follow the rule advocated by Lessius, Molina, and Pufendorf, and currently in force in Germany. The lender should be able to reclaim his property if otherwise he will incur a significant cost that he did not anticipate at the time the loan was made.

The one significant difference between a gratuitous loan and a promise to give money or property is that the loan may be costless to the promisor but the gift cannot be. If the loan is costless and remains so, it is hard to see why the lender should be able to revoke it. As in the case of a gratuitous service, he would be liable had he charged a small sum, and he should not be in a different position because he charged nothing.

If making the loan imposed a significant cost on the promisor at the time it was made, there is no reason to treat it differently from gifts of money or property. Gifts are irrevocable upon delivery. The loan should not be irrevocable before delivery. To that extent, the Roman rule that such loans are binding only upon delivery made sense.

But the promisor may make a loan, unlike a gift, without expecting to incur a cost. If so, delivery does not indicate his intention to incur one.

218. ARMISTEAD M. DObIE, Handbook on the Law of Bailments and Carriers § 41, at 92 n.46 (1914); JAMES SCHOUler, A Treatise on the Law of Bailments § 70, at 86, § 81, at 96 (2d ed. 1887).

219. SCHOUler, supra note 218, § 70, at 86.

220. DOBIE, supra note 218, § 41, at 92 n.46; HALE, supra note 217, § 22, at 97; SCHOUler, supra note 218 § 70, at 86 n.6.

221. DOBIE, supra note 218, § 41, at 91-92; HALE, supra note 217, § 22, at 97; SCHOUler, supra note 218, § 81, at 95-96. The same view was held by WILLIAM F. ELLIOTT, A Treatise on the Law of Bailments and Carriers § 35, at 60 (2d ed. 1929).

222. DOBIE, supra note 218, § 30, at 73; ELLIOTT, supra note 221, § 41, at 65; HALE, supra note 217, § 15, at 75; SCHOUler, supra note 218, § 55, at 73.

223. 2 WILLISTON, supra note 102, § 1039, at 1953-54.
There is no reason to treat the promisee differently than if he had been promised money or property. If we were right before that courts do not protect his reliance interest in the one case, they should not do so in the other. The lender should be able to reclaim his property if he will incur a significant cost that he did not anticipate when the loan was made.

If that rule seems harsh to the borrower, one could adopt the version of it that some French scholars have supported. The lender would be allowed to reclaim his property only if he would otherwise incur a cost he could not have anticipated. That rule, however, would give the borrower more protection than, as we have seen, courts have accorded the promisee of a gift of money or property even after the rise of promissory reliance. The reason for protecting the promisee, presumably, is that the promisor is at fault for not anticipating a cost. But as we have seen, American law does not generally give relief simply because someone has suffered an economic loss through someone else's fault. Moreover, even if the promisor was at fault for failing to anticipate the cost, it is not so clear he is at fault for demanding the return of his property. He made the promise, as the promisee knew, because he supposed it could be kept costlessly. It is odd to construe such a promise as an obligation to insure the promisee against the economic consequences of the promisor's lack of foresight.

C. Modification and Waiver of Contractual Duties

The costlessness of a promise also explains the result in another context: the modification and waiver of contractual duties. Traditionally, a modification of existing contractual duties counted as a new promise that required a new consideration. Waiver of a condition did not. Eventually scholars recognized that the real problem presented by modifications was one of fairness: one party might be taking advantage of the other by demanding more compensation for the same performance, or the same amount for a performance of lesser value. Consequently, the Uniform Commercial Code provided that a modification of a contract for the sale of goods is binding without consideration unless made in "bad faith."\(^\text{224}\) The Second Restatement provided that a modification is binding without consideration or reliance when it is "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."\(^\text{225}\) If the objective is to prevent unfairness, then, presumably, a modification that entails no significant extra burden for the promisor would be binding even absent unanticipated circumstances.

Similarly, in considering whether a contractual term is a "condition" that can be waived without consideration, the modern tendency is to ask directly whether, as the Second Restatement puts it, the condition was "a

\(^{224}\) U.C.C. § 2-209(1) cmt. 2 (1990).

\(^{225}\) Restatement (Second) of Contracts § 89(a) (1979).
material part of the agreed exchange.”

Instead of driving three different doctrines abreast, it would be simpler to say that promises entailing no significant costs to the promisor are binding without reliance. As it is, the modern approach of the Second Restatement and the Uniform Commercial Code to modifications is hard to reconcile with the doctrine of promissory reliance. Supposedly, modifications of a contract are enforceable to their full extent and without reliance, but other promises are enforceable only if relied upon, and possibly, only to the extent relied upon. As already seen, however, many promissory reliance cases arise in a commercial context when businesses make promises to their customers. Nothing should turn on whether or not the promise can be construed as a modification of some prior contract with the customer. Nor could there be standards for determining whether or not the new promise is “really” part of a prior contractual relationship.

Rather than messing with such problems, courts have simply applied the doctrine of promissory reliance. They have aggravated law professors who continually object that there is no need to do so since reliance is supposed to be a substitute for consideration, and modifications and waivers do not require consideration. Moreover, the courts have not required the promisee to prove that he actually did rely. For example, in Brewer v. Universal Credit Co., a credit company promised to store a debtor’s car for a month to allow him to make overdue payments. The court held the company liable when it breached the promise by selling the car as the original contract entitled it to do. As Barnett and Becker note, in this case the debtor recovered without proving he changed his position in reliance on the promise—for example by trying to raise money to meet his payments. What mattered, they note, is that the promise “did not substantially change the value of the contract” to the credit card company. According to the thesis of this Article, that is all that should and usually does matter.

IV
PROMISES TO EXCHANGE

A performance may also be promised, not gratuitously, but in exchange for the other party’s performance. Then, according to the 16th century jurists, the parties ought to exchange performances of equal value. According to the final thesis of this Article, this principle also explains the results American courts have reached when: (1) a party agrees to pay more or take less than originally promised; (2) a party agrees to pay for benefits

226. Id. § 84(1)(a).
227. 192 So. 902, 902 (Miss. 1940).
228. Id. at 904.
received but not previously paid for; and (3) a party agrees to be bound although the other party is not. Eisenberg has argued that when the courts invoke the doctrine of consideration in such cases, they are making it do the work of the doctrine of unconscionability.\textsuperscript{230} As we will see, the same can be said of other doctrines that courts have invoked, including offer and acceptance, and, once again, promissory reliance.

\textbf{A. Modifications of the Original Terms of Exchange}

As just noted, traditionally, a party’s agreement to pay more or take less than originally promised was not binding without new consideration. Courts\textsuperscript{231} and scholars\textsuperscript{232} recognized that the real problem is that the new agreement might be unfair, although they have been indefinite about when it would be unfair. Some scholars have recognized that, as traditionally applied, the doctrine of consideration is a poor instrument for preventing this unfairness since it strikes down both fair and unfair modifications,\textsuperscript{233} though courts have sometimes upheld a fair modification by saying that the parties might have intended first to dissolve their old contract, and then, an instant later, to enter into a new one.\textsuperscript{234} Consequently, as noted earlier, the Second Restatement and the Uniform Commercial Code dispensed with consideration while requiring that the modification be fair or in good faith. We must therefore ask when a modification is fair. According to the principle of equality, the performances exchanged ought to be equal in value. To apply this principle, one must ask which terms are most likely to preserve equality: those on which the parties originally agreed, or the modified terms.

\textsuperscript{230} Eisenberg, \textit{Principles, supra} note 82, at 641-47.

\textsuperscript{231} It is interesting that this danger of unfairness occupied the court’s attention in Harris v. Watson, Peake 102, 103, 170 Eng. Rep. 94 (K.B. 1791), in which the court refused to enforce a promise made to sailors during the course of a voyage whereby the sailors would receive additional pay for the work which they had already contracted to do. In a later case, Stilk v. Myrick, 2 Camp. 317, 170 Eng. Rep. 1168 (K.B. 1809), the court reached the same result, citing \textit{Harris}, but said that the true ground for refusing to enforce the promise was absence of consideration. In Alaska Packers’ Ass’n v. Domenico, 117 F. 99 (9th Cir. 1902), \textit{superseded by statute as stated in Wisconsin Knife Works v. Nat’l Metal Crafters, 781 F.2d 1280 (7th Cir. 1986)}, no consideration was found when workers, hired to go from San Francisco to Alaska for the season, refused to work until they were paid more for duties specified in the original contract. The court noted the difficulties of finding new workers in time for the season. \textit{Id.} at 101-02. In Lingenfelder v. Wainwright Brewery Co., 15 S.W. 844 (Mo. 1891), no consideration was found for a promise to pay more to an architect who walked off the job when a contract for a different job was awarded to a competitor.

\textsuperscript{232} \textit{See}, e.g., 1A Corbin, supra note 193, § 171, at 105-06; Eisenberg, \textit{Principles, supra} note 82, at 644-47; Harold C. Havighurst, \textit{Consideration, Ethics and Administration}, 42 COLUM. L. REV. 1, 25-30 (1942); Karl N. Llewellyn, \textit{Common Law Reform of Consideration: Are There Measures?}, 41 COLUM. L. REV. 863, 873-74 (1941); Patterson, supra note 145, at 956-38; Malcolm P. Sharp, \textit{Pacta Sunt Servanda}, 41 COLUM. L. REV. 783, 786-87 (1941).

\textsuperscript{233} \textit{E.g.}, \textit{Restatement (Second) of Contracts} § 73 cmt. c (1979); Eisenberg, \textit{Principles, supra} note 82, at 644-47.

\textsuperscript{234} \textit{E.g.}, Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887, 889 (N.Y. 1921). This approach is rejected as a fiction in \textit{Restatement (Second) of Contracts} § 89 cmt. b (1979).
As already mentioned, normally the requirement of equality means that the parties’ performances should represent equal amounts of purchasing power at prevailing market prices. That is how the 16th century jurists understood the principle. As long as the parties are both aware of the market prices and able to use the market, neither will take less or give more for a performance than he can get elsewhere. Consequently, the terms on which the parties agree themselves will usually preserve equality, and the fact that the parties agreed on them is evidence that these terms will do so. When the terms are modified, the question becomes whether the new terms would better preserve equality than the original ones. They are less likely to do so if the disadvantaged party agreed because he became vulnerable to the other party’s threat not to perform. If so, the threat should matter because the new terms are less likely to be fair.

Indeed, if the objective is to preserve equality, it might seem that the old common law was right, and that modifications should never be enforced. As noted earlier, the equality required is an actuarial equality, like the fairness of a fair bet. If Ann sells Berta ten carloads of California oranges for the market price per carload, the contract is equal because although Berta may win if the market rises, Ann will win if it falls. At least in the judgment of most people trading, the chance that the market price will rise is equal to the chance that it will fall or else that price would not be at its current level. Thus if the price rises by the time of delivery, and Ann somehow persuades Berta to pay more, equality is violated by the new terms. The original bet was fair, and so it is unfair for Ann to refuse to accept her losses.

If, indeed, the original terms reflected all future risks, the new terms would always violate the principle of equality. Nevertheless, the fact that the parties could have adjusted the terms to reflect a certain risk does not prove they did or wished to do so. Suppose that Al wishes to sell Bill an Old Master drawing which always had been ascribed to Domenico Beccafumi, although, as they both know, it is always possible that art historians might someday uncover evidence that the drawing is inauthentic. The parties could adjust the contract price to reflect this risk. If Al can best bear it, he can guarantee the authenticity of the drawing and receive a proportionately higher price; if Bill can best bear this risk he can buy the drawing without a guarantee but at a proportionately lower price. But they could allow for this risks in another way as well: they could provide that the terms of the contract will be modified or subject to renegotiation if serious doubts arise as to the authenticity of the drawing. Such a provision would be tricky to draft. Because it would be tricky, and if the event is unlikely, such a provision might not be included in the agreement even if the parties did not wish to adjust the contract price to reflect the risk. The parties may not have wished the express terms of the contract to govern if such an event happened. Nevertheless, they were not acting foolishly when they agreed to
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them. They were acting prudently (or, if one likes, efficiently) given the size of the risk and the difficulty of tinkering with the terms.

In another article, I would like to show that the doctrine of changed circumstances gives relief even absent an agreed modification of the original terms in cases when it is plausible that the parties would not have intended the original terms of the contract to govern. At present, we need only note that if one of the parties spontaneously agrees to modify the terms because of an unlikely event, it is evidence that he or she feels that the contract price did not already reflect it, and that the other party is not simply refusing to pay a lost bet. Thus it is not surprising that courts give relief more readily than if the party had never agreed to such a modification. They have done so, for example, when unexpected subsoil conditions have made it difficult to build a cellar, or an unexpected influx of population made it more expensive to collect all the rubbish in a city.

By the same reasoning, a party’s agreement to a modification should be upheld in other situations where it is plausible to think that the contract was silent, not because a risk was reflected in the price, but because a provision to adjust the price would have been difficult to draft. One such situation involves an ongoing relationship, such as a lease or an employment contract, in which the parties realize that they will know more in the future than they do now about the value of the premises to be leased or the services to be performed. While, as before, they could set a price that fully reflects this risk, they might prefer to make the rent or salary renegotiable later on. It is hard to draft a suitable provision, however, without one of two consequences that the parties may wish to avoid: either allowing each party to withdraw if no agreement were reached, or allowing the rent or price to be set by a court or a third party. Thus they may omit such a provision, not because the terms reflect the risk, but because they do not intend the contract to be hard and fast. They expect the salary or rent to be renegotiated if the value of the premises or services proves quite different from their initial estimates.

This possibility may explain why some courts have upheld agreements in which a lessor has agreed to reduce the rent when economic conditions make the premises less valuable, or an employer has agreed to pay

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235. For evidence that the 16th century jurists conceived of the doctrine of changed circumstances in a similar way, see Gordley, supra note 12, at 86-90.
238. For an illustration of the difficulties, see Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 417 N.E.2d 541, 544 (N.Y. 1981) (denying enforcement to a lease provision that provided rent for renewal period is "to be agreed upon").
239. In Levine v. Blumenthal, 186 A. 457, 459 (N.J. 1936), aff’d, 189 A. 54 (N.J. 1937) (per curiam), the court would not enforce a promise to lower rent on retail store below amount already agreed upon although the lessee was having economic trouble and feared he would go broke unless rent was lowered.
more salary when good performance or other offers have made an employee seem more valuable.\textsuperscript{241} Again, of course, it is hard to tell what the parties originally intended, especially because the risk in question seems to be covered by the language of their contract. Nevertheless, if the party making the concession did so without coercion, then that party presumably thought that the initial agreement did not adequately compensate the other party for bearing the risk.\textsuperscript{242}

Sometimes, courts have reached the same result by invoking the doctrine of promissory reliance. In the famous English case of \textit{Central London Property Trust Ltd. v. High Trees House Ltd.},\textsuperscript{243} approved in an official illustration to the Second Restatement,\textsuperscript{244} a lessee who had leased a building to sublease it to others found he could not do so profitably because the outbreak of World War II had crimped the rent he could charge. Lord Denning held that the owner's promise to reduce the rent would be upheld because of the tenant's reliance.\textsuperscript{245} But the tenant did nothing in reliance except to continue to pay rent as he was already obligated to do. Invoking the doctrine obscured the real issue: whether or not the depressed market should be viewed as one of the risks already taken into account in setting the original rent, or whether the original agreement was not meant to be hard and fast but subject to revision if conditions got that bad.

Similar considerations explain why courts have often strained to uphold promises to pay a pension to a valued employee in return for past services. If the possibility that the employee's services would be of such great value had been fully reflected in his salary, the employer who offers a pension would simply be giving away money. A second possibility is that the original agreement was not meant to exclude the human expectation that good service would be given a proportionate reward. This expectation might not have been included in the agreement because legally it is almost

\textsuperscript{241} That may be why the court was sympathetic in Schwartzreich \textit{v. Bauman-Basch, Inc.}, 131 N.E. 887 (N.Y. 1921), where a jury was allowed to find that the parties had torn up a previous contract and made a new one which was enforceable. Plaintiff had contracted to work for one year as a designer for $90 a week, then received a better offer from another firm, and subsequently was promised $100 a week by his employer. The employer, however, claimed the promise had been made only after the designer threatened to quit at a time when it would have been hard to hire a replacement. \textit{Id.} at 888. The Second Restatement approves this result on the grounds that the circumstances have changed. \textit{Restatement (Second) of Contracts} § 89 cmt. b, illus. 3 (1979). Here, however, the circumstance that changed was that the designer received a better offer elsewhere—just the risk a term employment contract is supposed to anticipate.

\textsuperscript{242} Although we have discussed leases and employment contracts, similar considerations might justify upholding such a modification in a contract to sell goods. Speaking of the reasons that would justify a modification, an official comment to the Uniform Commercial Code notes that "such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance." U.C.C. § 2-209 cmt. 2 (1990).

\textsuperscript{243} 1 K.B. 130 (1946).

\textsuperscript{244} \textit{Restatement (Second) of Contracts} § 89 cmt. d, illus. 7 & reporter's note (1979).

\textsuperscript{245} \textit{High Trees}, 1 K.B. at 134-35.
meaningless to obligate the employer to pay more if, in its sole discretion, it chooses to do so. When an employer voluntarily agrees to pay the pension, a court might think that this second possibility is more likely than that the employer is playing Santa Claus. If the employer says the services were worth so much, why should the court think it knows better?

Thus it is not surprising that while some courts have held that such promises lack consideration, others have enforced them. Consideration has been found in a variety of painless undertakings by a retiring employee, such as not to disclose trade secrets (which would probably be illegal anyway), to refrain from competition (which, if truly a fear, would have been included in his employment contract when he was younger and more able to do so), and to be available for consultation (surely not the cheapest way to obtain an unspecified amount of such services). If the employee is to retire right away, consideration has been found in his agreement to do so. The true ground of these decisions, it is submitted, is the feeling of the courts that if an employer believes his employee's past services were worth such a reward, they probably were.

In my view, these considerations explain the willingness of some courts to enforce similar promises under the doctrine of promissory reliance. Admittedly, the courts themselves often ask whether the employee did something, such as retire earlier, that could count as reliance. Eisenberg stresses this point in his reply to Yorio and Thel. He notes that when the promise of a pension was enforced in *Feinberg v. Pfeiffer*, the court emphasized that after the promise was made, the plaintiff decided voluntarily to retire earlier. In contrast, in *Pitts v. McGraw Edison Co.* and *Hayes v. Plantations Steel Co.*, the promise was not enforced. In *Pitts*, the court noted that the plaintiff gave up nothing that he wouldn't have lost anyway. The company had already decided to retire him, and had a right to

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249. Thus Patterson regards the promise of a pension as resting on past consideration, and argues that since it is exchange-motivated it could be enforced on the grounds that it is in fact a "deferred compensation." Patterson, *supra* note 143, at 954.


251. 322 S.W.2d 163 (Mo. Ct. App. 1959).


253. 329 F.2d 412, 416 (6th Cir. 1964).

do so without promising a pension.\(^{255}\) In *Hayes*, the court emphasized that the plaintiff had not retired in reliance on the promise. He had announced his intention to do so before the promise was made.\(^{256}\)

Nevertheless, the same court that decided *Feinberg* enforced the promise of a pension in a later case much like *Pitts*. In *Katz v. Danny Dare, Inc.*, the company wanted the plaintiff to leave and had the right to fire him without a pension.\(^{257}\) As in *Pitts*, the plaintiff seems to have given up nothing that he wouldn’t have lost anyway. Yet, as in *Feinberg*, the court enforced the promise to its full extent rather than limiting damages to the extra amount the plaintiff could have made by not retiring early.\(^{258}\)

Moreover, *Pitts* involved neither an employee, as the court noted several times,\(^{259}\) nor an ordinary pension geared to his economic needs. The promise was to a retiring manufacturer’s representative who ran an independent business that sometimes represented competing manufacturers. It urged him to “help Paul,” who was taking over his territory, “in every way that you can,” and gave him a 1% overwrite commission on the sales Paul made in his former territory.\(^{260}\) It sounds less like a reward for past services than an incentive to help establish good relations with former customers during an unspecified transitional period.

In *Hayes*, the plaintiff had merely been told that the company “‘would take care’ of him.” He then received a $5000 check each year for four years.\(^{261}\) That would hardly evidence a decision by the company that his past services were worth some definite amount above his former salary. Indeed, although the court said it assumed for purposes of argument that these acts constituted a tacit promise, it found there was no promise definite enough for the plaintiff to rely upon: “He inquired each year about whether he could expect a check for the following year. Obviously, there was no absolute certainty on his part that the pension would continue.”\(^{262}\)

\(^{255}\) 329 F.2d at 416.

\(^{256}\) 438 A.2d at 1096.

\(^{257}\) 610 S.W.2d 121, 123 (Mo. Ct. App. 1980). The court cited Trexler’s Estate, 27 Pa. D. & C. 4 (1936), cited with approval in *Fried v. Fisher*, 196 A. 39, 42 n.10 (Pa. 1938). *Katz*, 610 S.W. 2d at 125. In *Trexler’s Estate*, the promise of a pension had been enforced although, again, the employer wanted to remove from the payroll several employees who had no right either to continued employment or to a pension. One might speculate that in these cases, the companies would not have fired the employees even if the employees had not agreed to leave with the promise of a pension. But the courts seemed unconcerned about the absence of evidence on that point even though it supposedly should be an element in a plaintiff’s case. In *Pitts*, the court could have speculated on this possibility and did not.

\(^{258}\) *Katz*, 610 S.W. 2d at 126.

\(^{259}\) 329 F.2d 412, 413, 414, 415 (6th Cir. 1964).

\(^{260}\) *Id.* at 414.

\(^{261}\) 438 A.2d 1091, 1093 (R.I. 1982).

\(^{262}\) *Id.* at 1097.
B. Past Benefits Not Paid For

The desire to maintain equality also explains why courts have upheld promises to pay for benefits received in the past that were not conferred gratuitously but nevertheless were not paid for. By the bargained-for-detriment formula, the promisee must give up a legal right he still has in order to bind the promisor. Rights the promisee gave up in the past are not consideration. Yet courts have traditionally enforced three types of promises to pay for benefits conferred in the past. The first are promises to pay claims barred by the statute of limitations, although most states require that the promise to pay be in writing and signed by the promisor, or else that partial payment has been made or security given. The second are promises to pay debts discharged in bankruptcy, although the Bankruptcy Reform Act of 1978 contains safeguards to prevent the debtor from making casual or uninformed promises he can ill afford to keep. The third are promises by a person who has come of age to be bound by a contract entered into as a minor.

In each of these cases, a legal barrier has been erected to suit on an otherwise good claim because of a certain fears. The new promise eliminates this fear: the fear of trumped up claims when a long time has passed, at least when the promise is in writing; the fear of preventing a bankrupt from getting a new start in life, at least when the bankrupt promises advisedly; the fear that a minor will be imprudent. One no longer needs to tolerate the inequality that arose when the barrier prevented enforcement of the claim.

In another type of case, one party conferred a benefit on the other without request at some cost to himself, and the other party subsequently agreed to pay for it. As we have seen, the 16th century jurists said that the promise of payment in such a case was not really a gift, and therefore should be enforced without a formality. Similarly, American courts have sometimes enforced such a promise despite the doctrine of consideration. Examples are a promise of support made to one who crippled himself while saving the promisor from serious injury, and a promise to pay for a well installed by the tenant on property leased from the promisor without asking his permission.

263. Restatement (Second) of Contracts § 82 & cmt. a (1979).
264. Id. § 83.
266. Restatement (Second) of Contracts § 85 cmt. b, illus. 2 (1979).
The Second Restatement approves of this result in order to prevent one party from being "unjustly enriched." Eisenberg has pointed out that there is nothing unjust about needing and receiving rescue. Certainly not; the injustice seems to lie rather in a violation of the principle of equality. Even though the parties did not agree in advance to exchange, the promisee conferred a benefit at a cost to himself which was not intended to be a gift. He did not obtain the promisor's agreement in advance to take and pay for the benefit due to inadvertence or pressure of time. The subsequent promise again removes an obstacle that would otherwise stand in the way of the claim: absent the promise one cannot know how much the recipient would have paid for the benefit. Thus, according to the Second Restatement, such promises should not be enforced "if the promisee conferred the benefit as a gift" or to the extent the value promised is "disproportionate to the benefit."

C. One-Sided Commitments

As discussed earlier, the principle of equality requires that the value of the performances exchanged be actuarially equal. Actuarial equality may also be violated when one party is bound and the other is not. The party who is not bound may be able to speculate at the other's expense, which makes for an unequal exchange.

This consideration explains why special rules limit the freedom of a party when an output and requirements contract does not commit him to a definite quantity. The "output" or "requirements" in question must be those that "occur in good faith" and "no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded."

Sometimes, however, the court must either uphold a one-sided commitment or invalidate it. According to two basic traditional rules of contract formation, the commitment is invalid. One is the rule that there is no consideration unless both parties are bound to some performance. The other is the rule that an offer is revocable until acceptance. As Eisenberg

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270. "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." Restatement (Second) of Contracts § 86(1) (1979).

271. See id. § 86(2)(a).

272. Eisenberg, Principles, supra note 82, at 664.

273. Restatement (Second) of Contracts § 86(2) (1979). Promises to pay for benefits that may have been gratuitously conferred were not enforced in Manwill v. Oyler, 361 P.2d 177, 179 (Utah 1961); Allen v. Bryson, 25 N.W. 820, 822-23 (Iowa 1885).

274. See, e.g., Restatement (Second) of Contracts § 41 cmt. f (1979) (concerning risk that offeree can speculate at offeror's expense if offeror is bound while offeree contemplates offer).

has pointed out, however, these rules are too broad since some one-sided commitments are not unfair.\textsuperscript{276} The unfairness of the commitment depends on whether the committed party is likely to receive any better offers.\textsuperscript{277} Usually he is. In a relatively perfect market in which fungibles are traded at a price that is the same for everyone, a one-sided commitment is actuarially unequal because the price is as likely to go up as to go down. As described in my previous Article, some markets are less than perfect.\textsuperscript{278} In particular, when goods and services are not fungible, it is impossible for any seller and buyer to know just what price or performance they might be offered elsewhere. The more they shop around and the more they make intelligent guesses, the closer they will come to the ideal market price that would prevail if all buyers and sellers were present together and could bid simultaneously. In such a market, a one-sided commitment might be actuarially unfair because it lets one party seek a better deal while the other cannot. But the unfairness depends on the chance that there will be a better deal. Therefore, the commitment will not be unfair if the chance of a better deal is insignificant, and the commitment is therefore costless. Similarly, the deal will not be unfair or if the loss of this chance is worth less than some advantage gained by the committed party.

1. Costless Commitments

These concerns explain why today, some one-sided commitments are enforced. Sometimes, the commitment is so short term that the loss to the committed party is likely to be small. Such commitments will be enforced without any inquiry into what advantage the committed party expected to obtain, at least when the commitment is made in writing, which shows that the committed party is likely to have made a considered judgment. The Uniform Commercial Code provides that if a merchant promises in writing not to revoke an offer to buy or sell goods, the promise is binding for up to three months.\textsuperscript{279} An Official Comment notes that in an appropriate case, it could still be struck down under the doctrine of unconscionability.\textsuperscript{280} The Second Restatement, with some support in the case law, will enforce an option when consideration is nominal—for example, one dollar—and the option is signed by the offeror and “proposes an exchange on fair terms within a reasonable time.”\textsuperscript{281}

\textsuperscript{276} Eisenberg, \textit{Principles}, supra note 82, at 649-55.
\textsuperscript{277} The purpose of preventing speculation at the committed party’s expense is noted by \textit{Farnsworth}, supra note 144, § 3.23, at 173-74. \textit{See also} U.C.C. § 2-205 (limiting firm offers to three months arguably to prevent speculation).
\textsuperscript{278} Gordley, \textit{supra} note 1, at 1620-21.
\textsuperscript{279} U.C.C. § 2-205 (1990).
\textsuperscript{280} Id. § 2-205 cmt. 4.
\textsuperscript{281} \textit{Restatement (Second) of Contracts} § 87(1) (1979) (“An offer is binding as an option contract if it (a) is in writing and signed by the offeror, recites a purported consideration for the making
2. Commitments Where the Offsetting Advantage is Enabling the Uncommitted Party to Learn More

In other cases, the commitment is not so short term but the court can see that it procures an advantage for the committed party that may well be worth the cost. The commitment allows the uncommitted party to learn more about the profitability of the contract. We will begin with the simplest situations. The uncommitted party may have to incur some expense evaluating the contract and be unwilling to do so without a commitment. Or the uncommitted party may want to make two related deals and is reluctant to agree to one before knowing what the terms of the other will be. We will then consider two situations that raise special problems of fairness: those in which one party has to perform before the uncommitted party can learn what he wishes to know; and those in which what the uncommitted party wishes to know is whether a better offer is available.

a. Learning More: The Simplest Situation

When one party is reluctant to commit himself before incurring some cost to evaluate the benefits of the contract, or entering into some related contract, the parties could make a two-sided conditional commitment. They could condition their contract on the results of the evaluation or the conclusion of the related contract. But it is often difficult to do so without the two-sided commitment amounting, in effect, to a one-sided commitment because whether the condition is met is within the discretion of one of the parties.

When it is unlikely that one party could speculate at the other’s expense, courts have upheld such conditional commitments even if de facto only one party was really committed. For example, in Scott v. Moragues Lumber Co., consideration was found when the defendant promised that if he acquired a certain ship he would charter it to the plaintiff. The court held there was consideration because, though the defendant had been free to buy the ship or not, he could not buy it and then refuse to charter it. Similarly, in Mattei v. Hooper, consideration was found for a contract to buy land for a shopping center provided the buyer obtained leases satisfactory to himself. The court noted that because of the “multiplicity of factors which must be considered in evaluating a lease,” it could not have held a
buyer who professed to be dissatisfied to the standard of a reasonable person. Nevertheless, when the seller tried to back out, the court held that there was consideration because the buyer was bound as a matter of good faith to buy the land if he was satisfied.

Courts have upheld similar arrangements when they were structured, not as bilateral conditional commitments, such as Scott and Mattei, but as unilateral commitments. In Scott and Mattei, the parties made a commitment conditional on buying the ship or being satisfied with the leases. But in other cases, one of the parties made no commitment at all. For example, in The M.F. Parker a man bought a ship for $315 after a carpenter had said repairs to the ship would cost $150. Unlike the defendant in Scott, he did not commit himself to hire the carpenter if he bought the ship. Nevertheless, when the carpenter later billed him $356 for making these repairs, the court held the carpenter could charge no more than $150.

Similarly, in Wilson v. Spry the defendant agreed to hold an offer to sell his land open for forty-five days so that a prospective buyer could make a thorough examination of it at a significant cost to himself. Unlike the plaintiff in Mattei, the prospective buyer did not commit himself to buy if he was satisfied with the result of his examination. Yet the court enforced the contract when the seller tried to back out. The court said there was consideration. But as Williston observed, there is no consideration in any normal sense when one of the parties is not committed to do anything. In his notes to Pollock's treatise, Williston explained the result in The M.F. Parker by reliance, although he did not cite the case later in defense of his own doctrine of promissory estoppel. Perhaps the implications seemed too radical.

There are difficulties, however, in explaining the Wilson and The M.F. Parker decisions by promissory reliance. If one does, the promises should become enforceable only at the moment the promisee relied, and perhaps even then not to their full extent. Consequently, the outcome will be different when the commitment is one-sided de jure, as in The M.F. Parker and Wilson, then when it is one-sided de facto, as in Scott and Mattei. Promissory reliance will govern the former cases but not the latter. Conversely, the promise in The M.F. Parker would become binding immediately and be enforceable to its full extent if it were simply worded differently so as to be conditioned on one party's decision to buy the vessel; the

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286. Id. at 627.
287. Id. at 627-28.
288. 88 F. 853 (E.D. Va. 1880).
289. Id. at 855. Though the court held the carpenter to the $150 estimate, it allowed him to collect an extra $60 for additional work not considered in the original estimate. Id. at 854-55.
290. 223 S.W. 564 (Ark. 1920).
291. Id. at 568-69.
292. See Pollock, supra note 94, at 650 n.1.
promise in *Wilson* would be treated similarly if it were conditioned on one
party's satisfaction with the inspection.

It is hard to see why so much should depend on a difference that may
not have mattered to the parties, and may even be the result of an accident
in the way they happened to express themselves. The promises in all of
these cases are made so that the party who is uncommitted, either *de facto*
or *de jure*, can rely by taking some action he might otherwise be unwilling
to take. The fact that one party was not committed at all in *The M.F.
Parker and Wilson* does not show that the one-sided commitments in *The
M.F. Parker and Wilson* were unfair. They were fair if the advantage the
committed party received was greater than any opportunity lost by making
the commitment. If they were fair, then they should be enforced in the
same way as any other fair commitment.

b. *Learning More from the Performance*

In the situation just discussed, the uncommitted party is reluctant to
make a commitment before learning more about the cost or value of the
performance. Nevertheless, he can acquire this knowledge without actually
performing. Therefore, he can make a commitment after he learns what he
needs to know but before he starts to perform. In another type of situation,
the uncommitted party is reluctant to commit himself before performance
has begun or even is completed, since only then will he have learned
enough about its cost or value.

i. *Learning About the Value of the Performance*

In one variant, the uncommitted party agrees to pay for a performance
but does not know what value to put on it until the performance has been
completed. In a standard two-sided commitment, the party to receive the
performance bears this risk. But customers are sometimes promised their
money back if they are not completely satisfied. An artist's agreement to
paint a portrait might be conditioned on the satisfaction of a client.
Eisenberg has put the case of a law student who agrees that he will work for
a law firm for a year at a third of its normal salary, and that the firm can fire
him whenever it wishes.293 All of these one-sided commitments may be
fair. The committed party gains by having the opportunity to convey infor-
mation to an uncommitted and initially unconvinced party about the value
of the performance. It might be worth the risk.

Or it might not be. The court ought to be suspicious, especially in
cases in which the promisee can profit while rejecting performance, and
could either have put a value on the performance before it was made or
allowed disinterested persons to do so afterward. For example, in *Morin*

Building Products Co. v. Baystone Construction, Inc.,\(^{294}\) a contractor agreed to build an aluminum shed in a General Motors Assembly plant. The work was subject to approval by a GM agent whose "decision in matters relating to artistic effect shall be final."\(^{295}\) When the agent withheld approval because the finish on the shed was not uniform when viewed in bright sunlight at an acute angle, Judge Posner, of all people, came to the rescue. Contracts, he said, should be interpreted according to the intention of the parties, and since no reasonable party would put himself at another's mercy to this extent, the contract could not mean what it seemed to say. General Motors could reject the performance only if a reasonable person would have done so.\(^{296}\) Judge Posner is quite right that no reasonable party would have agreed to the contract. The contract was actuarially unequal, and that is a sufficient justification for the remedy he gave.

ii. Learning About the Risks and Costs of the Performance

In another variant of this situation, the problem is not that the party to receive performance does not know in advance what it may be worth, but that the party who is to render it does not know how difficult it will be or whether it will even be possible. Therefore, the party who is to perform is reluctant to make a commitment, at least not at a fixed price to achieve a given result. For the same reason, the party who wants the performance is reluctant to pay for the other party's "best efforts," at least by the hour or cost-plus. One solution is for the party who wants the performance to make a one-sided commitment to pay a certain amount if the performance is achieved, leaving the other party free to abandon performance if it becomes difficult or impossible. The arrangement is fair if, under the circumstances, there is no danger that the uncommitted party will speculate at the committed party's expense, or if this danger is outweighed by the benefit the committed party receives. The benefit is that the uncommitted party will have an incentive to make efforts that otherwise would not be made unless payment for them were guaranteed.

Life would be simpler if we just said that such arrangements will be enforced when they are fair for the reasons just described. Instead, we handle these situations by invoking either a theory of unilateral contract or of promissory reliance, and then adding epicycles until one party is bound and the other is not.

Unilateral Contract: Typically, when the promisee wants to quit without incurring liability if the task proves difficult or impossible, courts call the transaction a unilateral contract. The promisee must, for example, catch

\(^{294}\) 717 F.2d 413 (7th Cir. 1983).
\(^{295}\) Id. at 414.
\(^{296}\) Id. at 416.
a criminal, find a buyer for property, pay off a debt by a certain date, or look after an old person for life. Such promises are sometimes made to a specific person, such as a specific detective or broker, and other times by offering a reward to anyone who accomplishes the task.

Unilateral contract analysis, however, calls the promise an “offer” and the performance an “acceptance.” Section 45 of the Second Restatement retains that terminology even though it expunges the term “unilateral contract.” I. Maurice Wormser argued in a well-known article published in 1916 that because the promise is an offer, the promisor can revoke it any time before the promisee accepts by completing performance. If A promises to pay B $100 if B walks across the Brooklyn Bridge, A can revoke his offer when B is halfway across. The courts rejected that harsh result, and even Wormser eventually recanted “clad in sackcloth.”

But no happy solution has been found to the question of when the promisor can revoke. The courts sometimes have allowed such promises to be revoked even after the promisee has incurred some expense: for example, in cases of offers of rewards and nonexclusive listings with brokers. When the Second Restatement was written, fidelity to the case law therefore seemed to rule out two possible solutions: such promises are irrevocable when made, or they become irrevocable after reliance by the promisee. So the Restaters preserved the substance of the solution contained in the First Restatement which had been invented as an answer to the Brooklyn Bridge hypothetical: the promise is irrevocable after the promisee “tenders or begins the invited performance.”

The Restaters were now forced to distinguish the beginning of performance from a mere change of position in reliance on the promise. An

297. Shuey v. United States, 92 U.S. 73, 76-77 (1875). Though the reward in Shuey would later be characterized as an offer of unilateral contract, the Court did not use that terminology.
301. Restatement (Second) of Contracts § 45(1) (1979) speaks of “an offer [that] invites an offeree to accept by rendering a performance and does not invite a promissory acceptance.”
303. Id. at 136-37.
304. E.g., Brackenbury, 102 A. at 107; Los Angeles Traction Co. v. Wilshire, 67 P. 1086, 1088 (Cal. 1902). But see Petterson v. Pattberg, 161 N.E. 428, 429-30 (N.Y. 1928) (allowing creditor to revoke promise of discounted mortgage after debtor had approached creditor with payment but before actual tender was made).
305. I. Maurice Wormser, Book Review, 3 J. Legal Educ. 145, 146 (1950) (reviewing Edwin W. Patterson & George W. Goebel, Cases on Contracts (1949)).
306. E.g., Shuey v. United States, 92 U.S. 73, 76-77 (1875) (holding that revocation of offer for reward was valid when made through the same channel of communication as the offer, even though plaintiff did not receive notice of revocation and subsequently acted on the offer).
308. Restatement (Second) of Contracts § 45(1) (1979).
ENFORCING PROMISES

Official Comment explained that "[b]eginning preparations, though they may be essential to carrying out the contract or to accepting the offer, is not enough." That would mean that one step across the bridge binds the promisor but massive "preparations" do not. To avoid such an odd result, the Comment further explained that an "offeree" might recover anyway under another section of the Restatement which provides that an "offer" will be irrevocable "to the extent necessary to avoid injustice" when the "offeree" reasonably relies upon it.

It helps to recognize that only some of the situations which the courts have described as unilateral contracts are situations in which the promisee cannot make a commitment without knowing more about the difficulty and cost of performance. Sometimes, the promisor has offered a reward which can be earned, possibly with no significant cost, by anyone who happens to be in a position to do whatever the promisor needs done. Typically, "offers of unilateral contract" have been held to be revocable in this second type of situation. A reward was offered publicly in hopes that someone would know of the whereabouts of a criminal rather than to provide an incentive to a bounty hunter. In another case, a nonexclusive listing was placed with a number of brokers, at an insignificant cost to each, in hopes one of them would contact a buyer. In these types of situations, the promisees should realize that the promise is not supposed to protect them if they incur significant costs. The promise should be revocable. Its revocability is likely to be less a burden to the promisees than its irrevocability would be to the promisor.

But as described earlier, sometimes the point of the promise is to make a commitment so that the promisee will incur significant costs even though he may not succeed. It would defeat that very purpose if the promise were revocable. But although it is made precisely so that the promisee can rely, again it does not follow that the promise should be binding only after reliance or that the promisee should only be protected from harm suffered through reliance. The promise was to pay if the promisee produced a certain result. Once we have stopped calling the promise an offer and the production of that result an acceptance, and once we have seen why such a

309. Id. § 45 cmt. f.
310. Id.
311. Id. § 87(2) (concerning option contracts).
312. Shuey v. United States, 92 U.S. 73, 76-77 (1875).
314. Thus an exclusive listing with a particular broker was held to be irrevocable in Garrett v. Richardson, 369 P.2d 566, 568 (Colo. 1962); Geyler v. Dailey, 217 P.2d 583, 585 (Ariz. 1950). In contrast, in Marchiondo v. Scheck, 432 P.2d 405, 407-08 (N.M. 1967), the court held that because the listing was an offer of unilateral contract, its revocability depended, not on whether it was exclusive, but on whether the broker had begun performance though possibly not completed it. The court remanded for a finding on this issue. Id. at 408. One can see the difficulties of this solution by imagining how one could distinguish starting performance from preparing to preform when the performance in question is finding a buyer.
promise should be binding, there is no more reason here than in a "bilateral" contract why the promisor should be able to revoke before the promisee has done anything.

To begin with, there is no reason to construe the promise to mean that if the promisor revokes, he will pay the costs the promisee incurred. That is not what he said he would do. Imagine two contracts a person might make with a detective for finding an heir or tracing a lost relative or recovering a family heirloom: a two-sided commitment, and a one-sided commitment that leaves the detective free to abandon the search. If the detective is on the brink of success, there is no more reason in the one case than in the other to allow the promisor to terminate the arrangement and pay the detective's expenses. In both cases, the detective did not incur these expenses in hopes of reimbursement but rather as a bet that he could earn what was promised. The only difference is that in the former case he agreed to be liable if he fails, while in the latter he did not.

Sometimes, as in the case of two-sided commitments, reliance damages might be awarded as a surrogate for expectation damages because the expectation damages are hard to measure. But it is hard to see why they should be awarded in principle. And if, in principle, expectation damages should be awarded then it would be odd if the arrangement were binding only when the promisee relied. The promisee who spent two minutes time in reliance would be entitled to full expectation damages while the one who has spent no time would get nothing.

Promissory Reliance: As mentioned earlier, sometimes instead of analyzing a one-sided commitment as a unilateral contract, courts have invoked promissory reliance. The famous case is *Hoffman v. Red Owl Stores, Inc.* 3115 We can now see that the use of the doctrine was unnecessary and inappropriate. It was unnecessary because one should not need a special doctrine to justify enforcing a fair one-sided commitment. It was inappropriate because it suggests that the promise in that case should be binding only if, and to the extent that, the plaintiff relied.

In *Hoffman*, the court held a franchisor was bound by a promise made to an applicant that he would receive a franchise if he raised a certain amount of capital, sold his business, and relocated. The court said that it needed to apply the doctrine of promissory reliance, instead of finding the contract enforceable on other grounds, because the promise was too indefinite to constitute an offer, acceptance of which would form a contract. 3116 That is a strange reason. Indefinite communications are usually held not to be offers because they do not indicate a willingness to be committed. Consequently, they are not held to be promises but mere preliminaries to further negotiations. 3117 If the intent to make a commitment is clear, the

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315. 133 N.W.2d 267 (Wis. 1965).
316. Id. at 274-75.
317. E.g., Nebraska Seed Co. v. Harsh, 152 N.W. 310, 311 (Neb. 1915).
communication merely has to be definite enough so that a remedy can be given. More likely, the court thought that the doctrine of promissory reliance gave it an alternative to holding both parties bound conditional on a future event: that the franchise applicant raise the money, sell his business, and relocate. The court may have thought that the franchise applicant should not be bound.

It would be better to say that in Hoffman, as in the cases already described, the one-sided commitment by the promisor is fair. It is made to give the promisee an incentive to take the steps necessary to see if the parties have a deal. Absent a one-sided commitment, the promisee either could not contract or would demand a premium for doing so, and so the commitment is in the interest of the promisor as well. Furthermore, there is little chance the promisee would speculate at the promisor’s expense.

Consequently, there is no reason either to insist that the promisee have relied or to award only those damages incurred in doing so. In Hoffman, the court did award only reliance damages, but courts often do so where, as in Hoffman, expectation damages are hard to measure. When the lost profits are not too speculative, however, courts have allowed the plaintiff promised a franchise to recover them.

c. Learning More by Shopping Around

There is still another situation in which a party may be reluctant to make a commitment before learning something else. The party may want time to canvass other offers. In the situations we have dealt with previously, a one-sided commitment was to the advantage of the committed party because the commitment enabled the uncommitted party to get information about the deal the committed party was offering. It is harder to see the advantage to the committed party of enabling the uncommitted person to learn of other deals available. It might seem that a one-sided commitment is never fair in this situation.

To the contrary, Eisenberg has suggested that one party might agree to keep an offer open to show confidence that the other party would be unable to find a better deal. Such a commitment might be fair. Here, as in the situations discussed earlier, it might give the other party information that would make that party more likely to contract with the party making the commitment. The uncommitted party might now feel more free to shop around, believing, rightly or wrongly, that the committed party has sacrificed his own chance of finding a better deal. But the fact that this very opportunity is given to the uncommitted party by one who will lose out if a

319. 133 N.W.2d at 275-77.
321. Eisenberg, Principles, supra note 82, at 653.
better deal is found indicates that the committed party either is bluffing or believes there is little chance of finding such a deal. The uncommitted party therefore has new information about the committed party's beliefs, and even after discounting it to allow for the possibility of a bluff, the uncommitted party may decide not to shop around as much since it seems less worthwhile. Thus the commitment is not only fair, but advantageous to the committed party if he gains more by discouraging the uncommitted party's search than he loses by giving up the chance of finding a better deal himself.

While such a case is possible, it is rare. Usually, courts do not enforce a one-sided commitment which has no purpose except to let the other party shop around. When they do, the reason enforcement is fair is not that there is an off-setting advantage for the committed party, as in the situations just discussed. Sometimes, the reason enforcement is fair is that both parties cannot remain uncommitted and the burden is allowed to fall where it will be least unfair. Sometimes, paradoxically, unless one party makes a one-sided commitment, the other will not have an equal opportunity to shop around.

i. Commitments That Minimize the Unfairness of Leaving One Party Free to Shop Around

Concern for the committed party's inability to shop around may best explain the way the courts have applied the doctrine of offer and acceptance. Offers are effective on receipt and revocable before acceptance, but, by the "mailbox rule," acceptances are effective on dispatch. As mentioned earlier, the rule that offers are revocable can, of course, be explained by the unfairness of holding one party bound when the other is not. But the rule that acceptances are effective on dispatch has the effect that the offeror, de facto, cannot assume the offer is validly revoked when a retraction is mailed. For it could be that the offeree has already mailed an acceptance. The offeror is de facto bound, and must turn down any better deals that come along. The offeree is not. Beth Eisler has concluded that the offeree therefore obtains an "unexpected and unbargained-for protection."322 Ian Macneil thinks this protection is warranted because the offeror's conduct when he revokes is "somewhat undesirable."323

We would have a better explanation of the "mailbox rule" if we could see why the offeree has a greater need than the offeror to know if a contract is concluded. One reason might be that the offeree can then set to work immediately on the performance. But then, it would seem, the offeree should be protected only when he is supposed to perform first, and only if it

is desirable that he start right away. And even then, it is hard to see why the
offeree who has not started performance should be protected.

A better reason for binding the offeror and not the offeree is that one
party or the other will be bound *de facto*. That party will have to wait for a
response before accepting a better deal. As we have seen, to the extent that
this party is likely to receive the opportunity to enter into a better deal, the
one-sided commitment will be actuarially unfair. But since one party will
have to be committed while the other is not, the fairest rule will hold the
party bound who is least likely to receive a better deal.

The rule that an acceptance is effective on dispatch is most likely to
achieve that result. The party who chooses to be offeror has several ways of
protecting himself if he does not wish to be committed *de facto* while wait-
ing for a response. One way is to indicate in the offer that the offer will
lapse unless the acceptance is actually received by a specified time. Another is not to make an offer at all, but to solicit one from the other party.
Indeed, the offeror will be held to have solicited an offer rather than to have
made one himself if his proposal seems to be directed to a number of pros-
pects or if it says that he must hear quickly since he expects another offer.
If the other party writes back that the terms proposed are accepta-
table to him as well, that party becomes the offeror and bears the risks that
accompany the period of uncertainty. The offeror, then, is the less likely of
the two parties to turn down a better deal because of the *de facto* com-
mitment, and so the rule that an acceptance is effective on dispatch is likely to
be the most fair. If the offeror protects himself in none of these ways, it is
reasonable that he should have to wait for a response rather than the offeree.
He had the chance to protect himself, and he is less likely than the offeree to
need a quick response.

The same considerations help to explain another common law rule:
the offeror is bound even if the acceptance is lost in the mails and never
arrives. He is the party that has cast himself in the role of offeror know-
ing that he may face a period of uncertainty, and who could have protected
himself, even then, by specifying that his offer would lapse unless he heard
from the other party by a certain date. Consequently, he is the party least
likely to be hurt by a further period of uncertainty.

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325. *Nebraska Seed Co. v. Harsh*, 152 N.W. 310, 311 (Neb. 1915); *see Moulton v. Kershaw*, 18
N.W. 172, 174-75 (Wis. 1884).
327. *Restatement (Second)* of Contracts § 63(a) (1979). The rule was established as early as
*Vassar v. Camp*, 11 N.Y. 441, 448 (1854).
328. If he so specifies, no contract will be formed if the acceptance is dispatched but not received.
329. Admittedly, this rule is supported by another consideration. As Llewellyn pointed out, the
offeror is more likely to realize that something has gone wrong since he was expecting to receive a
response to his offer while the offeree ordinarily has no reason to expect a response to his acceptance.
The offeror is bound *de facto*, not because this result is completely fair, but because it is likely to be more fair than binding the offeree. Thus in the following four situations, special rules limit the extent to which the offeror is bound *de facto*.

First, according to the Restatement, supported by some judicial authority, the offeree cannot countermand an acceptance already dispatched, even if the countermand reaches the offeror before the acceptance. According to the Restatement, the reason is that otherwise, there will be a period of time when the offeror is bound but the offeree is not, and therefore is able to speculate at the offeror's expense. Ian Macneil has argued persuasively that when courts have allowed the offeree to countermand an acceptance, speculation at the offeror's expense was unlikely under the circumstances.

Second, courts have found ways to limit the extent to which an offeree can prolong his *de facto* option by delaying acceptance. If the offeree delays too long, a court will either find that he can no longer accept the offer because it has lapsed by passage of time, or that he can no longer reject it since he has accepted by silence. Often, a court will present its finding as an interpretation of the intent of the parties. Sometimes it can point to the way the parties acted in past transactions. Even if it cannot,

(1939). Some weaker arguments have also been made for it. Llewellyn also argued that the offeree should be protected because he may already be acting in reliance while the offeror must be holding things open. *Id.* at 795. Macneil claims that this argument only has force when the offeror actually has relied. Macneil, *supra* note 323, at 967. Macneil claims that the rule is better because of problems of proof, but notes that this consideration is not very important. *Id.* at 966-67. According to the Second Restatement, the rule that an acceptance is effective on dispatch applies when the acceptance is lost "[i]n the interest of simplicity and clarity." *Restatement (Second) of Contracts* § 63 cmt. b (1979).

330. *Restatement (Second) of Contracts* § 63, cmt. c (1979); *accord* Morrison v. Thoelke, 155 So. 2d 889, 905 (Fla. Dist. Ct. App. 1963) (holding invalid attempted repudiation of mailed acceptance by telephoning offeror before receipt of acceptance). *But see* G.C. Casebolt Co. v. United States, 421 F.2d 710, 714 (Ct. Cl. 1970) (Collins, J., concurring) (arguing that no contract was formed when United States retrieved its acceptance of a bid from the mail before delivery). In Rhode Island Tool Co. v. United States, 128 F.Supp. 417, 419-21 (Ct. Cl. 1955), the court held that a bid could be withdrawn by telephone after it was dispatched and before notice or the award of the contract was received, but that case involved an honest mistake by the bidder, and was decided on the curious ground that because U.S. postal rules allow a sender to retrieve his letter, acceptance should now be effective only on receipt. In Dick v. United States, 82 F. Supp. 326 (Ct. Cl. 1949), the court indicated, without squarely holding, that a telegraphic repudiation overtaking an acceptance was effective, but that case involved an error in calculating the price, and, as we will see, such errors sometimes call for relief by themselves. These last three cases are all Court of Claims cases, and the Ninth Circuit has indicated that the Court of Claims is the only federal court to so hold. Soldau v. Organon Inc., 860 F.2d 355, 356 (9th Cir. 1988).


332. Macneil, *supra* note 323, at 960-62; *accord* Dick, 82 F. Supp. at 326 (involving wartime contract for ship propellers where speculation was extremely unlikely).

333. *See, e.g.*, Hobbs v. Massasoit Whip Co., 33 N.E. 495 (Mass. 1893) (finding contract where buyer retained unsolicited eelskins from seller for several months and refused to pay when they were destroyed, given that buyer had paid seller for similar unsolicited skins on four or five past occasions); American Bronze Corp. v. Streamway Products, 456 N.E.2d 1295, 1300 (Ohio Ct. App. 1982) (finding contract where, for over 20 years, buyer had telephoned orders to seller and followed them by written purchase orders which would be filled without an express acceptance).
it will resolve doubts so as to avoid unfairness. For example, when prices fluctuate rapidly, offers will be deemed to expire rapidly, lest the offeree speculate at the offeror's expense. Moreover, courts have sometimes found the offeree accepted by silence just because he first created a de facto option for himself and then abused it. In such cases, a party cast himself in the role of "offeree" by providing on an order form or application that no contract was to be formed until he gave his final acceptance. He then delayed needlessly.335

Third, courts and the Second Restatement have insisted that the offeree's acceptance be unambiguous. The offeree can accept by mailing a letter, or by shipping goods, or by sending a crew of workers to roof a house, but usually not by silence or by writing a letter not yet mailed. In these last two cases, the outward act is ambiguous, and to allow the legal effect of that act to turn on the offeree's intentions, which only he can know, would in effect prolong his de facto option even after he has supposedly accepted.

Fourth, similar considerations may explain why the offer lapses automatically if the offeree rejects it or makes a counteroffer. The ambiguity of the offeree's response is resolved against the offeree. It is too easy to rest this rule on the presumed intention of the parties. A rejection of the offer or a counter-offer does not cause the offer to lapse if the offeree has paid the offeror to hold it open.342

334. A sends B a telegraphic offer to sell oil which at the time is subject to rapid fluctuations in price. The offer is received near the close of business hours, and a telegraphic acceptance is sent the next day, after the offeree has learned of a sharp price rise. The acceptance is too late if a fixed price was offered, but may be timely if the price is market price at time of delivery. RESTATEMENT (SECOND) OF CONTRACTS § 41 cmt. f, illus. 7 (1979).

335. See, e.g., Ammons v. Wilson & Co., 170 So. 227 (Miss. 1936) (holding that whether delay was reasonable is question for jury); Kukuska v. Home Mut. Hail-Tornado Ins. Co., 235 N.W. 403 (Wis. 1931) (finding unreasonable delay by insurance company before denying applicant); Cole-McIntyre-Nofleet Co. v. Holloway, 214 S.W. 817, 818 (Tenn. 1919) (finding unreasonable delay in rejection where price rose 50% during delay).


340. According to the Second Restatement, an acceptance is effective "as soon as put out of the offeree's possession." RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1979).

341. Id. § 36(1)(a); accord Minneapolis & St. L. Railway v. Columbus Rolling Mill, 119 U.S. 149, 151-52 (1886) (holding offer to sell 2,000 to 5,000 tons of iron rails at $54 per ton lapsed when the offeree ordered 1,200 tons at that price).

342. RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979); accord Humble Oil & Refining Co. v. Westside Inv. Corp., 428 S.W.2d 92, 93-95 (Tex. 1968) (finding contract when buyer tried to exercise option, first with an amendment that seller install power lines, then without any qualification); Cerbo v. Carabello, 103 A.2d 908, 909 (Pa. 1954) (finding contract when buyer first sought lower price, then exercised option).
ii. Commitments That Equalize the Opportunity to Shop Around

There is still another situation in which a one-sided commitment is fair, even though the reason for holding the committed party bound is so that the other party can shop around. It is exemplified by *Drennan v. Star Paving Co.*, a California case that has been widely followed in other American jurisdictions. Once again, the court dealt with a novel problem by invoking the doctrine of promissory reliance. It held that a subcontractor’s bid was irrevocable when the general contractor relied by using it to figure its own bid for a project. The consequence of analyzing the transaction this way, instead of as a contract with consideration and conditional on award of the project to the general contractor, is that the general contractor is not committed to hiring the subcontractor. After receiving the award, it can shop for the lowest bid and choose someone else. Indeed, some cases have held the general contractor is free to do so.

To apply the doctrine of promissory reliance in cases like these, as Margaret Kniffin has pointed out, the courts have had to transform an offer of a contract, which is usually construed as a promise conditional on the offeree’s assent, into an unconditional promise on which the general contractor can rely. The doctrine of promissory reliance does not explain why a court should strain to reach a result in which the sub is bound while the general is not.

The best explanation has nothing to do with promissory reliance. The reason that offers are revocable in other situations is that otherwise the offeree could shop around while the offeror could not. As we have seen, however, whether a one-sided commitment is fair depends on the likelihood that the committed party will receive a better offer. Here, there is no likelihood the sub will receive one, and so, for that reason alone, the commitment is not unfair to the sub.

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346. *E.g.*, Williams v. Favret, 161 F.2d 822, 823-24 (5th Cir. 1947); Holman Erection Co. v. Orville E. Madsen & Sons, Inc., 330 N.W.2d 693, 697-99 (Minn. 1983). The California Supreme Court has held that as a matter of general contract law, the general contractor is free to shop around after receiving the award, though in California, he cannot because of a special statute. Southern California Acoustics Co. v. C. V. Holder, Inc., 456 P.2d 975, 978, 981 (Cal. 1969) (Traynor, C.J.). In Electrical Constr. & Maintenance Co. v. Maeda Pacific Corp., 764 F.2d 619, 621 (9th Cir. 1985), it was held, nevertheless, that the general contractor must use the subcontractor if he promised to do so should he be awarded a contract for the entire project.
Moreover, paradoxically, allowing the general contractor to shop around while the subcontractor is bound gives the general contractor the same opportunity to shop that the subcontractor enjoyed prior to submitting its bid. Holding the subcontractor bound does not affect its ability to find the best deal with the best general contractor. The subs can work out their bids in advance and submit them to every general contractor. The sub may submit its bid shortly before the bids from the general contractors are due. Thus the subs would not be shopping around anyway during the period when they are bound. In contrast, the general contractor not only receives bids at the last minute but has to use one of them before knowing it will be awarded the project. Before submitting its bid, the general contractor has neither the time nor the economic incentive to examine a subcontractor’s qualifications closely. If the general contractor is free while the sub is bound, it can shop around after it is awarded the contract. Thus the parties’ opportunities are more nearly equal when the normal rule that offers are freely revocable is not applied.

The reason to hold the subcontractor bound, then, is not that the general has relied. And that explains why, in Drennan and the cases that have followed it, courts have simply held the subcontractor to his bid. They have not considered the possibility that had the subcontractor not submitted such a low bid, the general would not have been awarded the project, and might be worse off than he now is even if the subcontractor is allowed to retract his bid.\footnote{348}

**Conclusion**

If we are right, most of the American cases dealing with contract formation can be explained by a simple principle. A promise will not be enforced that enriches the promisee at the promisor’s expense unless the promisor is likely to have made a prudent decision to enrich him. That principle explains the results that courts have reached by applying the doctrines of consideration, promissory reliance, and offer and acceptance. It also explains some of the law of trusts.

This approach does not dispense with the concepts of bargain, reliance, and mutual assent. It matters whether the parties made a bargain because in a bargain or exchange, the performances they exchange should be of equal value. If the promisor has made a one-sided commitment, it matters whether the promise was made so that the promisee could rely. The promisor may have gained some advantage by allowing him to do so that makes

\footnote{348. In such a case, the general contractor might be better off because he did not submit the lowest bid for which he would be willing to undertake the project (assuming the accuracy of his subbids). He submitted a higher bid because he thought his cost structure was lower than that of other bidders, and so he could underbid them and still make a profit greater than the minimum necessary to induce him to undertake it. Or he might be better off even if he submitted the lowest bid for which he would undertake the project, since by chance his other costs may have come out lower than he calculated.}
the one-sided commitment fair. Mutual assent matters because often it means mutual commitment, and a transaction may be fair because both parties are committed. Nevertheless, the doctrines of consideration, promissory reliance, and offer and acceptance obscure the reasons that bargain, reliance, and mutual assent should matter.

If we are to explain our own cases, our doctrines should look more like those of continental law, and indeed, more like those of continental law long ago. It doesn’t follow that we common lawyers have wasted our time. Our own doctrines have not captured, let alone successfully prescribed, what our courts should be doing. But perhaps for that reason, they have not inhibited our courts from following implicitly a simple, if unarticulated, principle of justice. They have created an extraordinarily rich case law. By analyzing the cases, we may understand how the principle should be applied even better than the continental jurists who once understood the principle abstractly but described only some of its more obvious implications. Aristotle was constantly defending his principles by pointing out that they could explain the actions of people who acted in accordance with these principles but could not formulate them abstractly. One can imagine his pointing to the American case law as a vindication of his ideas of liberality and commutative justice.