Promises and Paternalism

E. Allan Farnsworth
PROMISES AND PATERNALISM*

E. ALLAN FARNSWORTH**

Consider the case of Jack Tallas, an immigrant from Greece who had achieved considerable success as an insurance agent and landlord during the nearly seventy years he spent working in Salt Lake City.¹ Jack, who lived in a hotel during the last years of his life, wanted to give $50,000 to Peter Dementas, a close friend of fourteen years, who had helped him during that time.² Jack dictated a memorandum to Peter in Greek.³ It stated that Jack owed Peter, who "treats me like a father and I think of ... as my own son," $50,000 for his kindness in having Jack at weekly dinners with Peter's family, his help in driving Jack to the doctor, and his assistance in the management of Jack's rent-

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** Alfred McCormack Professor of Law at Columbia University and Reporter for the Restatement (Second) of Contracts.

2. See id.
3. See id.
The memorandum promised that Jack would change his will to make Peter an "heir" and leave him $50,000. Jack kept the Greek document, retyped it in English, notarized the English version with his own notary seal, and delivered the documents to Peter three days later. Jack died six weeks later, leaving behind a substantial estate, but bequeathing nothing to Peter.

Too bad for Peter, decided an appellate court in Utah. Jack's promise was unenforceable because there was no consideration for it. Jack's intention to be bound legally could not have been clearer, but this was not enough. Not only was such an intention insufficient, but no formality would have been enough. Utah law afforded Jack no means of making an enforceable promise to make a gift to Peter. Jack could, of course, have gone to the trouble of changing his will and having it witnessed, but even then he would have been free to change his will again.

I want to convince you that for centuries the common law's treatment of promises such as Jack's—promises to make gifts—has been profoundly paternalistic. So let me at the outset explain what I mean by paternalism. It is commonly said that a legal rule is paternalistic if, for a person's "own good," it prohibits the person from doing something, such as using drugs, or requires the person to do something, such as wearing a helmet while cycling. I will use paternalism more broadly to include legal rules that for a person's "own good" disable that person from making a binding commitment, such as making an enforceable promise to give up relief under the bankruptcy laws. This usage is consistent with that of the philosopher John Stuart Mill, whose one exception to the prohibition against paternalism was selling oneself into slavery. See JOHN STUART MILL, ON LIBERTY 121 (Alan Ryan ed., 1997) (1859); see also Anthony T. Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 765 (1983) (agreeing with Mill "that some paternalistic restrictions on contractual freedom are ... permissible").
then apply this notion of paternalism to a broad category of promises: promises to make gifts. As suggested by the examples of drug use, helmets, and bankruptcy, paternalism can sometimes be justified, but in a legal system that prizes freedom of contract, we ought to eschew paternalistic restraints on that freedom. I intend to show that it is mainly for a promisor’s “own good” that our rules of contract law trump the preferences of a promisor who, like Jack, seeks to make a binding promise to make a gift and that there is no justification for this paternalistic intervention.

Because my argument assumes that a promisor, such as Jack, might have a preference for making a binding promise to make a gift, I turn to the reasons why that might be so. In most cases, a promisor wants to be able to make a binding promise because of self-interest. In order to get something that the promisor wants, such as a new Ferrari or a promise of one, the promisor has to make a promise to pay the price of the Ferrari. Furthermore, it is in the promisor’s self-interest that the promise be binding, for otherwise the seller will balk at delivering or at promising to deliver the car. In such transactions we exchange our promises for things, including other promises, that we want; however, that is not always so. Jack did not exchange his promise for something he wanted. Rather, Jack promised to make a gift. Jack’s situation thus raises a question as to why someone would promise to make a gift.

Before asking why one makes such a promise, it may be well to ask why one makes a gift. Is it pure altruism—an unselfish regard for the interests of others? Altruism unalloyed, as in the classic case of the saintly person who gives a fortune to a beggar, is a rare if praiseworthy commodity. Saint Anthony, we are told,

was twenty years old when he heard these words of Jesus read in the church: “If thou wilt be perfect, go sell what thou hast, and give to the poor!” At once Anthony sold all his

goods, gave the profit to the poor, and went off to the desert to become a hermit.\textsuperscript{13}

Today, however, most significant gifts are made either to someone in one's circle of friends or family, or to a charity. Those who make them are not motivated solely or even primarily by altruism.

According to fundraisers for higher education: "The most promising models of donor behavior favor exchange over pure altruism: They say donors are motivated by receiving 'goods' in exchange for gifts, and a repeated disequilibrium leaves donors with a need to respond to recognition and acknowledgement with even more gifts."\textsuperscript{14} To say that one \textit{asks} for nothing in return is not to say that one \textit{expects} nothing in return. For example, when real estate developer Samuel LeFrak promised to give $10 million to the Guggenheim Museum in New York City, he said that he made the promise "with no strings attached," meaning that he asked for nothing in return.\textsuperscript{15} It was understood, however, that he expected to see his name on the outside of the museum's rotunda, and it surely came as no surprise when he was reported to be rethinking his decision after the New York City Landmarks Preservation Commission refused to approve this form of recognition.\textsuperscript{16}

Such an expectation of an enhanced reputation is only one of many reasons for making a gift.\textsuperscript{17} In the case of a gift to a charity,

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\bibitem{13} The \textit{Golden Legend of Jacobus de Voragine} 99 (Granger Ryan & Helmut Ripperger trans., 1941).
\bibitem{14} Thomas R. Pezzullo & Barbara E. Brittingham, \textit{The Study of Money}, \textsc{Currents}, July-Aug. 1990, at 44. For a classic study of how, in archaic societies, exchange itself is sometimes driven by obligations to give, receive, and repay, see Marcel Mauss, \textit{The Gift: Forms and Functions of Exchange in Archaic Societies} (Ian Cunnison trans., 1967). As to the importance of peer pressure among wealthy philanthropists, see Francie Ostrower, \textit{Why the Wealthy Give: The Culture of Elite Philanthropy} (1995).
\bibitem{15} Carol Vogel, \textit{Clash over Name Puts Museum Gift in Doubt}, \textsc{N.Y. Times}, Dec. 17, 1994, § 1, at 13.
\bibitem{16} See id. (stating that the Guggenheim Museum put LeFrak's name on its fifth-floor gallery).
\end{thebibliography}
one might expect to gain tax advantages. In the case of a gift to a relative or friend, as in Jack's case, one might hope for love and affection or, if death seems near, better treatment in the hereafter. A decision to give often results from a complex mixture of these and other motives that sometimes are difficult to identify. Although one may get something in return for one's gift, one does not get it as the result of a swap. Despite the exchange, there is no bargain.

Whatever Jack's reasons for his initial decision to give $50,000 to Peter, Jack's decision was not to make a present gift. Why defer the gift? Perhaps he wanted the use of the $50,000 until his death, or he did not have the money to spare at the time of his promise. Perhaps he had $50,000, but it was tied up in collectibles, or he thought he could get a tax advantage by deferring the payment of the $50,000. Perhaps he thought he could earn a higher rate of return on the $50,000 than Peter could, or he was unsure of his initial decision to give $50,000 and hoped to keep his options open. Whatever the explanation, the $50,000 was not to be paid until Jack's death.

Our first question remains: Why would Jack make such a promise? If he wanted to make a deferred rather than a present gift, why not simply tell Peter he had made a firm but nonbinding resolution to leave him $50,000? Look back to the time that Jack made the promise. To the extent that altruism motivated

might, of course, be argued that his gift was part of a swap for a promise not to prosecute.


19. Nannerl O. Keohane, then president of Wellesley College, a leading institution in alumni donations, suggested that women differ from men in making such donations because for women "[i]t is the cause that matters, not the competition." Fox Butterfield, As for that Myth About How Much Alumnae Give, N.Y. TIMES, Feb. 26, 1992, at B6.

20. See supra text accompanying note 5 ("The memorandum promised that Jack would change his will to make Peter an 'heir' and leave him $50,000.").


22. Even if Jack's promise had been enforceable, Peter would have taken nothing if Jack had exhausted all his resources during his life and left nothing to pass under his will.

23. See supra text accompanying note 5.
him, he had an interest in maximizing the benefit to Peter. If Jack had actually made a gift by handing over $50,000, that gift, being complete and irrevocable, would have been worth its face value of $50,000 to Peter. Even if he had made a legally binding promise, Peter would have had to discount the value of the gift to take into account the difficulty of enforcement should Jack renege. Peter would have had to discount a nonbinding resolution even more deeply because of the greater likelihood that Jack would renege and the impossibility of enforcing the resolution.

In two situations Jack might have been particularly anxious to commit himself in order to dispel Peter's potential uncertainty. First, if there was a significant chance that Peter would mistrust Jack's resolution as not representing an actual decision to make the gift, Jack might have wished to dispel that misapprehension and enhance the value of the prospect of his gift by committing himself. Had Peter thought Jack untrustworthy, Jack might have wanted to make a binding promise to make a gift rather than a nonbinding resolution. Second, if there was a significant chance that Peter would overestimate the likelihood that Jack might change his mind, Jack might have wished to disabuse Peter of this misapprehension in the same way. Had Peter considered Jack to be excessively capricious, Jack might have preferred a binding promise to make a gift over a nonbinding resolution to make the same gift.

Remember that Jack was near the end of his life. As a matter of law, the promisor's death has the same effect as a capricious

25. See id.
27. See id. at 412-13. For a report that many charitable organizations are moving away from legally binding pledges in the hope that donors will give more, and that there actually will be less attrition, see JEROLD PANAS, OFFICIAL FUNDRAISING ALMANAC 33 (1989).
29. See id. (indicating that altruistic donors may make gifts to increase donee reliance).
30. See id.
31. See id.
revocation, and thus the promisor's death may be of no less concern to the promisee than the promisor's caprice.32 Litigation over promises to make gifts frequently arises following the promisor's death when a rule that denies effect to the promise favors those who will share in the promisor's estate—not the promisor—over the promisee.33 Because the executor or administrator of the promisor's estate has a fiduciary obligation to resist questionable claims on behalf of those who will share in the promisor's estate, extralegal sanctions have no effect.34 The promisor therefore may be particularly anxious to dispel the promisee's uncertainty in the event of death.

Having explained why Jack might have had an interest in making an enforceable promise to make a gift to Peter, I will now follow the story of Jack and Peter through history and trace the influence of paternalism at seven stages: first, in the institution of the seal;35 second, in the abolition of the institution of the seal;36 third, in the establishment, at least in Utah, of a substitute for the seal;37 fourth, in the abolition, at least in Utah, of the substitute for the seal;38 fifth, in the common law's general rule that denies enforcement of promises to make gifts;39 sixth, in the moral obligation exception to the general rule, at least as found in the Restatement (Second) of Contracts;40 and seventh, in the reliance exception to the general rule, at least as found in the Restatement (Second) of Contracts.41

33. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.8, at 93-94 (2d ed. 1998) (discussing two cases that illustrate this point).
35. See infra notes 42-59 and accompanying text.
36. See infra notes 60-63 and accompanying text.
37. See infra notes 64-68 and accompanying text.
38. See infra notes 69-71 and accompanying text.
39. See infra notes 72-88 and accompanying text.
40. See infra notes 89-98 and accompanying text.
41. See infra notes 99-120 and accompanying text.
THE FIRST STAGE: PATERNALISM AND THE
INSTITUTION OF THE SEAL

If Jack and Peter had lived in the nineteenth century, Jack could have made his promise enforceable by the use of a seal. In medieval times, Jack would have melted wax onto a document that recited his promise, made an impression of his personal emblem on the wax, and delivered the document with its wax seal to Peter. The seal was thus an efficient means for giving legal effect to promises that otherwise might have had moral force at most. Peter would not have had to give Jack anything in exchange for Jack's promise, nor would Peter have had to rely on Jack's promise.

The institution of the seal recognized a promisor's interest in being able to make a commitment. The force of the seal resided in the fact that the promisor chose to adopt it as a formality, and the resulting commitment rested on a recognition of the importance to a promisor of the power to make a commitment. Because every promise involves an expression of an intention to make a commitment, courts used the formality of the seal to distinguish those promises that were binding under the intention principle from those that were not.

What does it mean to say that the seal was a formality? For our purposes, a formality is a ritual procedure—a ceremonious manner of doing things— involving particular acts or special words that a person can use to produce a desired legal consequence. Rules requiring formalities do not turn on substance, and this gives them a game-like quality. Form dominated substance in the case of a sealed document representing a debt. Take away the form and the legal consequences were gone: tearing off the seal discharged the debt, regardless of what was

42. See 1 WILLISTON & LORD, supra note 32, § 2.2 passim.
43. See 1 FARNSWORTH, supra note 33, § 2.16, at 146-47.
44. See 1 id.
45. See 1 id.
47. See 1 WILLISTON & LORD, supra note 32, § 2:2, at 60-62.
48. See 1 id.
49. See 1 id.
intended. Leave the form, however, and the legal consequences remained: Pay the debt without cancelling or destroying the sealed document and the debt was not discharged, again regardless of what was intended.  

Most legal systems know formalities as a means of distinguishing between transactions that are in some respect effective and transactions that are not. Common ingredients of the prescribed ritual include a writing, an oath, a seal, and witnesses—sometimes with an official status. French law traditionally went to remarkable lengths to provide a formality for an effective gift or promise of a gift. After examining French law on gifts and promises, John Dawson wrote:

When the Code spoke of authentication before "notaries" this is what it meant, for two notaries were required, and if only one could be found, then two other unlicensed persons must replace the missing notary to serve as witnesses. The donor and normally the donee would also be present. After the terms of the transaction had all been written down, one of the notaries must read the whole document "aloud" to the group and all were required to sign. The only thing missing was an indication whether the meeting must open and close with prayer.

The question is why should a ritual such as this one or the one involving a seal give legal effect to a transaction? Scholars have lavished much ink on the functions of legal formalities. For our purposes, two functions are paramount.

50. See 1 id.
51. See 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 205 (Walter H.E. Jaeger ed., 3d ed. 1957). In addition, common law did not allow the defense of fraud, though an injunction was available in equity. See 12 id. § 1525, at 615-16.
52. See 1 WILLISTON & LORD, supra note 32, § 1:7, at 29 (suggesting that "some legal systems other than our own" use formal contracts to create binding contracts).
53. See JOHN P. DAWSON, GIFTS AND PROMISES 8 (1980); 1 WILLISTON & LORD, supra note 32, § 2:2, at 59-62.
54. See, e.g., DAWSON, supra note 53, at 68-69 (illustrating the earlier French method of "notarization").
55. Id. at 69 (footnote omitted).
56. The tripartite analysis of Lon Fuller, who described the evidentiary, cautionary, and channeling functions of formalities, has found particular favor with subsequent writers. See Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800-06 (1941); see also Eric A. Posner, Norms, Formalities, and the Statute of
One is "evidentiary"—the function of providing trustworthy evidence of the existence and terms of the promise in case of controversy.7 The other is "cautionary"—the function of bringing home to the promisor the significance of promising by encouraging reflection on its consequences. The cautionary function prevents ill-considered decisions by prompting apprehension of future fears.58 Requiring a formality to serve a cautionary function is therefore an exercise in paternalism, intended to serve the promisor's own best interests.59

THE SECOND STAGE: PATERNALISM AND THE ABOLITION OF THE SEAL

A wax seal may have performed these functions tolerably well in medieval England,60 but in the United States, few people owned or used a seal. The ritual deteriorated to the point that most people dispensed with wax, and printing houses simply decorated the signature lines of their standard forms with the printed letters "L.S." for locus sigilli, or place of the seal.61 Perfunctory invocation of the rules for sealed documents called into question the seal's utility in making promises enforceable.2 By the early part of the twentieth century, state legislatures, including Utah's, had largely abolished the seal's efficacy.62 Consequently, Jack could no longer use a seal to make an enforceable promise.

If the cautionary function of the seal showed an undercurrent of paternalism, the abolition of the efficacy of the seal showed a

57. See Fuller, supra note 56, at 800.
58. See id.
59. See id. at 800-04.
61. See 1 FARNSWORTH, supra note 33, § 2:16, at 147-49.
62. See 1 id.
tide of paternalism. The legislators who deprived promisors of the power to make binding commitments by following a simple ritual must have concluded that it was no longer in promisors' own best interests to have such a power.

The main impact of the abolition of the seal has been on promises to make gifts because of the lax judicial attitude toward the requirement of consideration in other contexts. If even a "peppercorn," or a promise of a peppercorn, can amount to consideration, most promises, except those to make gifts, will be enforceable. As for promises where there is not even a peppercorn, however, the effect of the abolition of the seal was profoundly paternalistic. Perhaps it reflected a decline in the belief that individuals know and can care for their own best interests.

THE THIRD STAGE: PATERNALISM AND A SUBSTITUTE FOR THE SEAL

The demise of the seal evoked no threnody, but it did prompt an attempt to provide a different formality through the Uniform Written Obligations Act. The Uniform Act enabled a promisor to make a binding promise by a signed writing if it contained "an additional express statement, in any form of language, that the signer intends to be legally bound." The requirement of such a statement was akin to the formality of the seal and showed at least a tinge of paternalism. The drafter of the Uniform Act, Samuel Williston, explained: "it seems to me it ought also to be possible that if a man makes a promise, knowing that it is gratuitous, and, nevertheless, purposes to have it legally binding, he shall have it so." This attempt to resurrect a formality was successful in only two states: Pennsylvania and Utah. Because Jack and Peter were in Utah, the Uniform Act would have provided a formality by which Jack could have made his promise enforceable.

64. See Unif. Written Obligations Act (1925).
65. Id. § 1.
68. See Holbrook, supra note 63, at 93-94 & n.156 (citing 1929 Utah Laws c.92).
THE FOURTH STAGE: PATERNALISM AND THE
ABOLITION OF THE SUBSTITUTE FOR A SEAL

Unfortunately, however, by the time Jack made his promise, Utah had repealed the Uniform Act. Utah’s Code Commissioners concluded, in a whimsically paternalistic outburst:

[T]hat there [was] no more vicious statute in the written laws of any civilized nation [because it would] . . . enable confidence men and swindlers to enforce written promises . . . which they may obtain from the unwary . . . and to take from such unfortunate persons a defense that has been recognized . . . in the courts of all civilized nations since the dawn of history.

These “unwary” and “unfortunate” persons were not to be trusted to look after their own interests. The Uniform Act, then in effect only in Pennsylvania, was renamed the Model Written Obligations Act.

THE FIFTH STAGE: THE GENERAL RULE DENYING
ENFORCEMENT OF PROMISES TO MAKE GIFTS

In Utah today, as in almost all states, there is no formality that enables a promisor to make a binding promise to make a gift, no matter how justifiable the promisor’s purpose, and no matter how serious the promisor’s intention to be bound. Promises to make gifts have sometimes been described as “sterile” to

69. In their 1931 report, the Utah Code Commissioners recommended that the Uniform Act be repealed. See CODE COMMISSIONERS ON THE REVISION OF THE UTAH STATUTES, REPORT TO THE GOVERNOR AND THE 19TH LEGISLATURE (1933) [hereinafter CODE COMMISSIONERS]. The legislature’s acquiescence seems to show that the legislature intended that the Uniform Act be repealed. See Holbrook, supra note 63, at 94-95 & n.65.

70. Holbrook, supra note 63, at 95 n.166 (quoting CODE COMMISSIONERS, supra note 69, at 12, 35).


72. If promises to make gifts were enforceable on the basis of a formality, the remedy of specific performance would not be available if the law that once applied to the seal was followed. Even in the heyday of the seal, a seal would not make a gratuitous promise specifically enforceable. See 4 JOHN NORTON POMEROY, JR., EQUITY JURISPRUDENCE § 1293, at 841 (reprint 1994) (Spencer W. Symons ed., 5th ed. 1941).
suggest the insignificance of their role in commercial life. The role of such promises in contemporary society, however, is anything but insignificant, as any museum, university, or religion will attest.

Suppose that Jack had made a present gift of $50,000 by handing over that amount in cash to Peter. Jack's gift then would have been irreversible and Peter could have kept the money because of the apparently primordial notion that a gift requires delivery. In Islamic law it is buttressed by the words of the Prophet, who is reported to have said that a gift is not valid without delivery. Thirteenth-century English law also lends support to this proposition; indeed, Bracton, the famous commentator on English laws, wrote that "[a] gift is not valid unless livery follows." In addition, nineteenth-century English law adheres to the requirement of delivery and the United States generally has accepted the delivery requirement.

Delivery gives a gift two salient characteristics that distinguish it from a promise to make a gift. First, because of the

73. Lon Fuller adopted the term "sterile transmission" from the nineteenth-century French writer Claude Bufnoir, who thought that gratuitous promises "do not present an especially pressing case for the application of the principle of private autonomy." Fuller, supra note 57, at 815. For criticism of the term, see Andrew Kull, Reconsidering Gratuitous Promises, 21 J. LEGAL STUD. 39, 49 (1992) (stating that a voluntary transaction will not occur absent some benefit to the parties).

74. Since 1993, charitable contributions from individuals have totalled over one hundred billion dollars a year. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 388 tbl.611 (1996).

75. French law, however, required notarization, with delivery being the exception to this rule. See Dawson, supra note 53, at 68.


77. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 124 (Samuel E. Thorne trans., 1968). This insistence on the delivery of personal property has been traced to the requirement of livery of seisin, developed in connection with transfers of land. For a description of how livery of seisin was executed, see 3 HOLDSWORTH, supra note 60, at 188-89, 222 (describing livery of seisin as "handing over a stick, a hasp, a ring, a cross, or a knife, which was sometimes inscribed or curved or broken").

78. See Cochrane v. Moore, 25 L.T.R. 57 (Q.B.D. 1890) (following Irons v. Smallpiece, 106 Eng. Rep. 467, 468 (K.B. 1819) (stating that a gift of goods is not valid without delivery)); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1766) (stating that "[a true] and proper gift . . . is always accompanied with delivery of possession").

requirement of delivery, a gift speaks to the present. A gift of $50,000 would be complete on delivery. The wrench of delivery would have brought home to Jack the finality of the transaction in a way that no promise could have done. If Jack gives Peter $50,000 right now he is likely to be more reflective than if he promises to give Peter $50,000 upon his death. It is an appealing notion that we are more competent in ordering our present actions than our future ones. If, then, we are less able to protect ourselves against the possibility of "second thoughts" in cases of promises to make gifts than in cases of present gifts, paternalism may seem more justifiable in cases of promises.

Second, because of the delivery requirement, a gift is limited to what one has. This intuitive truth is embodied in the maxim *nemo dat quod non habet*, or one cannot give what one does not have. Even a profligate Jack could give Peter only what he had; Jack would be powerless to squander his future by means of a gift. Jack could not give $50,000 to Peter unless he had the $50,000 to deliver. Nevertheless, he could have promised to give $50,000 to Jack though he had not so much as a penny. Indeed, Jack might have purported to commit not only his present fortune but also whatever he might acquire in the future. For this reason, it may seem that paternalism is more justifiable in cases of promises.

It is difficult to suppress the suspicion that there is a strong undercurrent of paternalism in denying one the power to make a promise on the ground that limiting one's profligacy is in one's own best interests. Otherwise, what would prevent one from committing oneself to give everything that one would acquire during the rest of one's life? It may be remembered that a profligate Fyodor Dostoevsky once gambled nine years of his future output on his ability to write a novel of at least 160 pages by a deadline that was only several months away.

80. See 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 229 n.1 (1965) (discussing the meaning and history of the phrase).

81. In addition to having these two salient characteristics, a gift ordinarily has the practical advantage of being self-executing, whereas a promise almost invariably requires a remedy. Once there has been delivery, nothing is ordinarily needed by way of remedy. Judicial inertia, then, may argue in favor of upholding a gift but not a promise of a gift.

82. Dostoevsky made the deadline by dictating a 200-page novel, *The Gambler*, in
In rationalizing the delivery requirement, legal scholars have not emphasized the paternalistic effect of *nemo dat*, preferring instead to explain delivery as a desirable formality.\(^8\) Delivery not only provides some evidence that the promisor had the requisite intention to make a present transfer, but delivery also exerts a cautionary impact to assure that the intention resulted from reflection and deliberation.\(^9\) This reasoning is difficult to accept in the face of the power of an owner of personal property to circumvent the delivery requirement by a mere oral declaration of trust. Under the law of trusts, as developed during the


83. A variation of this argument is that promises that are the product of bargains differ significantly from promises to make gifts because it is much less common to qualify the latter to take account of regret. See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1304-05 (1980). When there is no bargaining process, promisors are unlikely to qualify their promises to take account of regret. See *id*. If such unqualified promises were binding, parties might even be discouraged from making them. Paternalism, therefore, counsels that promises to make gifts should be denied enforcement. *See id.*

This distinction is questionable. It is reported that entrepreneurs often drive hard bargains when they make gifts, and that donors increasingly attach strings to gifts to institutions of higher education because, as one fundraiser put it, "I can't feel you want to feel your gift has impact, and know how it will be used in fairly exacting detail." Karen W. Arenson, *Alumni Generosity Has a Catch*, N.Y. TIMES, Mar. 19, 1995, § 4, at 5 (quoting Edward Resovsky, director of principal gifts at the University of Pennsylvania). The assumption that bargaining generally accompanies exchange ignores the prevalence of adhesion contracts, in which there is no bargaining whatsoever over conditions. *See, e.g.*, Mathews v. Sears Pension Plan, 144 F.3d 461, 465 (7th Cir.) ("Printed form contracts, sometimes called 'contracts of adhesion,' are as numerous as the grains of sand on a beach."), cert. denied, 119 S. Ct. 618 (1998).

84. See Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (pt. 1), 21 U. ILL. L. REV. 341, 348-49 (1926). So strong was the attachment at common law to the delivery requirement that it was even argued that delivery was not a mere formality evidencing the intention to give, but was a substantive element of the act of giving itself. *See Cochrane v. Moore*, 25 L.T.R. 57, 75 (Q.B.D. 1890) (Esher, M.R., concurring).

The effect of a donor's delivery to a donee differs from that of a seller's delivery to a buyer. A seller is bound by a commitment to deliver, whereas a donor is not. Compare 3 FARNSWORTH, supra note 33, § 12.11 (discussing damages available to a buyer when a seller fails to perform), with *RESTATEMENT (SECOND) OF TRUSTS* § 32 cmt. b & illus.1-2 (1959) (noting that a donor is not bound to deliver property to a donee, even if an oral promise or written deed is made).
nineteenth century, Jack could have created a self-declared trust of $50,000 by a simple declaration that he, as trustee, held the property in trust for Peter as beneficiary. Unlike a gift, no delivery of the property is required because the donor is both the creator of the trust and the trustee. Unlike a promise of a gift, the declaration of trust need not even be communicated to the donee or to anyone else, although it must be manifested by some external expression. In this sense, the declaration is more like a resolution than a promise. It is, to say the least, anomalous that the liberal law of trusts requires no formality, even though the rigorous law of gifts insists on delivery. It is possible, to be sure, that the impact of the liberal nature of the law of trusts is mitigated by the circumstance that few nonlawyers are likely to be aware of this device for avoiding the requirement imposed by the law of gifts. Indeed, Jack Tallas may well have been a case in point. Even under the law of trusts, however, the paternalistic restraint of nemo dat remains. A donor can include in the trust property only what the donor owns at the time of the declaration of trust, not what the donor may later acquire.

So much for paternalism in the general rule that denies a promisor the power to make a binding promise to make a gift. I turn now to the two leading exceptions to the general rule, involving promises to perform a "moral obligation" and promises on which a party has relied. In both of these contexts an undercurrent of paternalism is evident.

85. See Restatement (Second) of Trusts § 24 cmt. c.
86. Although the trust that is created is commonly revocable, it may be irrevocable. See id. § 37 cmt. a. Even if revocable, however, it can no longer be revoked after the donor's death. See id. § 57 cmt. a, illus.1.
87. It is difficult to explain the anomaly on the ground that in the case of a trust the donor must assume a fiduciary relationship to the donee. An authority on trusts has written that "[i]t is at least a matter for argument whether the requirement of delivery is a survival of a more primitive system of law in which symbolism is more important than intention." 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 31, at 331 (4th ed. 1987); see also John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L.J. 625, 672 (1995) (explaining that the "declaration functions as a curative doctrine to excuse noncompliance with the delivery requirement of the law of gifts").
88. See Restatement (Second) of Property: Donative Transfers § 32.2 cmt. a (1992).
Suppose that, after a debt has been barred by the statute of limitations, the debtor makes a new promise to pay the debt without getting anything in return for that promise. The new promise would seem to fall within the general rule that promises without consideration are unenforceable. The new promise is, in effect, a promise to make a gift. Courts, however, have long viewed the promise as one to perform a moral obligation, if not a legal one, and have made an exception to the general rule. Even a paternalistic judge is unlikely to be troubled by this exception because the most profligate promisor can commit no more than the amount of the barred debt.

There is now good authority for extending this exception to many other situations in which a promisor promises to perform what might be regarded as a moral obligation. For example, a person who is rescued by another is ordinarily under no legal obligation to the rescuer even if the rescuer has been injured during the rescue. Furthermore, a promise made after the rescue by the person rescued would not be supported by consideration and therefore would not be enforceable under the general rule. The promisor, however, may be seen as owing a moral obligation to the injured rescuer and the promise might be enforced under the exception devised for the debt barred by the statute of limitations.

Perhaps, Peter could have claimed that Jack's promise was enforceable under the moral obligation exception, on the ground that his help to Jack during the fourteen years of their friendship raised a moral obligation on Jack's part to compensate Peter. In fact, Peter made such a claim, but the court rejected it on the ground that "the 'moral obligation' exception has not been embraced in Utah."

90. See, e.g., Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945) (holding that the rescuer was not entitled to recover for injuries incurred while rescuing the defendant).
91. See id.
Even if Utah had embraced the rule, at least in its formulation in Section 86 of the *Restatement (Second) of Contracts*, Peter might not have won the $50,000 that he claimed because the *Restatement* states that "[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." The *Restatement* adds that the promise is not binding "to the extent that its value is disproportionate to the benefit." The court would have to put an approximate value on the benefit conferred by Peter over the fourteen years and limit recovery to a sum not disproportionate to that value. Again, the law's paternalistic concerns are assuaged by the thought that the promisor's power to commit the future is limited by the benefit received in the past.

Scholars have attempted to rationalize this exception on a variety of grounds. It seems both simpler and more convincing to say that because in the moral obligation cases the promisor's power to commit the future is limited, courts are able to recognize the promisor's interest in making a binding promise without the paternalistic concern for profligacy that underlies the general rule.

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94. The court held that the exception would not apply because Peter's services "were not rendered with the expectation of being compensated, but were performed gratuitously." *Id.*


96. *Id.* § 86(2)(b).

97. It has been emphasized that the promise reinforces the claim that there is an obligation. See Patrick S. Atiyah, *Promises, Morals, and Law* 70 (1981); Fuller, *supra* note 56, at 822. Conversely, it has been suggested that the obligation reinforces the claim that there is a promise. See Posner, *supra* note 24, at 418; see also Samuel Stoljar, *Enforcing Benevolent Promises*, 12 SYDNEY L. REV. 17, 38 (1989) ("[T]he promisee has good reason to suppose that the promise is meant seriously."). In addition, it has been claimed that in such cases the promisor is better able to negotiate conditions of the promise than in the case of the usual promise to make a gift. See Goetz & Scott, *supra* note 83, at 1311.

98. For an argument that, at least in the case of a debt barred by the statute of limitations, enforcement will be advantageous to the promisor in the future, see Posner, *supra* note 24, at 418.
Other decisions enforcing promises to make gifts turn on the fact that the promisee has relied on the promise. Under this exception, the promisor commonly is said to be "estopped," or precluded, from reneging on the promise as a result of the promisee's reliance. Despite difficulties in fixing the contours of Section 90, courts have welcomed it during the more than half a century since it first appeared—roughly the period during which the seal has been deprived of its effect. What has now become of the law's paternalistic concerns? The present version of Section 90 answers this question by giving the court discretion to limit the promisor's liability to the extent of the promisee's reliance. By exercising this discretion, a court may limit even the most profligate promisor's power to commit the future to the amount of the promisee's proven reliance. Peter did not claim that he had relied on Jack's promise during the six weeks between Jack's promise and his death, but even if he had relied on Jack's promise, for example, by buying a car for $20,000, the court could have limited liability under Section 90 to $20,000 rather than $50,000. As in the moral obligation cases, the thought that even a profligate promisor's power is limited assuages the law's paternalistic concerns.

Denying Jack the power to make a binding promise to give Peter $50,000 is hard to square with the exception on liability for charitable subscriptions—promises to make gifts to charities—that was grafted onto Section 90 when the Restatement (Second) was drafted. The exception dispenses with any requirement of reliance in the case of charitable subscriptions, making them "binding... without proof that the promise induced action or forbearance." It thus distinguishes promises made to charities from promises made to family or friends. The

99. See 1 FARNSWORTH, supra note 33, § 2.19.
100. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) ("The remedy granted for breach may be limited as justice requires.").
101. See id. § 90(2) cmt. f & reporter's note.
102. Id. § 90(2). For an explanation of the origins of this exception, see 1 FARNSWORTH, supra note 33, § 2.19.
impact is less significant than it might at first appear, however, because courts have long been creative in warping the doctrine of consideration to enforce charitable subscriptions.\textsuperscript{103} Nevertheless, if Utah followed the charitable subscriptions doctrine, it would lead to the extraordinary result that Jack could have made an enforceable promise over the telephone to give $50,000 to the University of Utah in response to a call from a fundraiser, though he could not make such a promise to his friend Peter no matter what formality he used. In contrast to the law during the heyday of the seal, the rule for charitable subscriptions does not require a formality to serve a cautionary function.\textsuperscript{104} Admittedly no such requirement is imposed for a promise to perform a moral obligation or a promise that has been relied on. In that situation, however, the magnitude of the moral obligation or the extent of the reliance acts as a limit on a promisor's liability. The rule for charitable subscriptions has no such limit.

The exception for charitable subscriptions has played to mixed reviews.\textsuperscript{105} Courts have been less than pellucid in assessing such

\textsuperscript{103} See Barnes v. Perine, 12 N.Y. 18, 24 (1854) ("[J]udges . . . have been willing, nay apparently anxious, to discover a consideration which would uphold the undertaking . . ."). A common solution was to find that the promises of subscribers were consideration for each other, a solution that was especially inviting if one subscriber was the bellwether of the flock. See Congregation B'hai Sholom v. Martin, 173 N.W.2d 504, 510 (Mich. 1969).

\textsuperscript{104} See RESTATEMENT (SECOND) OF CONTRACTS § 303 cmt. b.


In 1989, a New Jersey intermediate appellate court supported the exception by holding that a living donor was committed to honor a $2000 oral pledge that he admitted making. See Jewish Fed'n v. Barondess, 560 A.2d 1353, 1354 (N.J. Super. Ct. Law Div. 1989). The court's decision emphasized enforcing society's interest in such sensible displays of altruism. See id. Reliance, the court observed, "is . . . a questionable basis for enforcing a charitable subscription . . . because in reality, a charity does not rely on a particular subscription when planning its undertakings. . . . The real basis for enforcing a charitable subscription is one of public policy—that enforcement of a charitable subscription is a desirable social goal." Id.; see also More Game Birds in Am., Inc. v. Boettger, 14 A.2d 778, 780 (N.J. 1940) (discussing the enforcement of charitable subscriptions).

In the same year, however, the Supreme Judicial Court of Massachusetts held that a promisor's estate was not committed by a $25,000 oral charitable subscription. See Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691, 693 (Mass. 1989). Declining to dispense with the requirement of reliance, the court ruled that inclusion
important factors as whether the promise was written or oral and whether the promisor reneged before death or simply died. Scholarly efforts to justify the exception have been varied.

At one extreme, the exception for charitable subscriptions restores the promisor's power over such promises to what it was before the abolition of the seal, but it does so without the requirement of a signed writing to perform a cautionary function. At the other extreme, general adherence to the common law rule means that no formality whatsoever will suffice to enable a promisor to make a binding promise to make a gift, for example, in a family setting.

If a promise to make a gift were binding, questions would inevitably arise as to when, if ever, a promisor is free to renge on such a promise. Such questions are unavoidable even now because there are exceptions to the general rule and enlarging the category of binding promises will only increase their frequency. It seems safe to hypothesize that the less tolerant a legal system is in excusing promisors from their promises, the more hesitant courts would be in finding promises to be binding. If that is so, judges must fashion excuses if courts are to enforce more promises to make gifts.

of the promised sum in the promisee's budget did not meet the requirement. See id. The court distinguished earlier cases "because they involved written, as distinguished from oral, promises and also involved substantial consideration or reliance." Id. Even assuming that the court would follow the exception for charitable subscriptions in an appropriate case, the court saw no injustice in refusing to enforce the decedent's oral promise after his death. See id.

106. See, e.g., DeLeo, 540 N.E.2d at 693.
107. The judicial assumption that public policy in favor of charitable giving supports the enforceability of charitable subscriptions can be faulted on the ground that the enforceability might discourage such giving by increasing the cost to the donor of making pledges. See Posner, supra note 24, at 420. Instead, it has been suggested that the exception may rest on "the large size of many charitable [pledges] and the (related) desire of the donor to spread payment [out] . . . over . . . time." Id. Finally, it also has been suggested that, in comparison to a family setting, a charitable setting provides more opportunity for a donor to bargain over conditions and therefore extralegal sanctions are less likely to be effective. See Goetz & Scott, supra note 83, at 1307-08.

108. See RESTATEMENT (SECOND) OF CONTRACTS § 303 cmt. b.
109. See 1 FARNSWORTH, supra note 33, § 2.19, at 156-57.
Those who make such promises are no more immune from regretting that they have done so than are other promisors. When Richard H. Barclay, a seventy-two-year-old, self-made real estate developer, died without paying $600,000 of the $1 million he had promised the University of California for a new theater, his widow found herself enmeshed in a legal battle with the University. She protested that her husband’s estate could afford to pay no more than $250,000 because he had suffered heavy losses shortly before his death. One might therefore expect that the same courts that have lavished so much attention on rules to deal with regret in cases of conventional bilateral contracts would have paid some attention to the analogous questions posed under promises to make gifts. Until now, they have not answered these questions and, in the light of the many exceptional circumstances in which promises to make gifts turn out to be binding, it behooves one who makes such a promise to fashion explicit provisions that take account of the possibility of regret. Although it might sometimes be prudent to make only a promise to use “best efforts” to make the gift, this is not usually what is intended.

Any proposal to enlarge the category of binding promises must therefore address the question of how courts should deal with regret when the promisor has been silent. In broad outline, the reasons for their regret are not very different from the reasons considered above in the case of persons who swap their promises. When, in the words of Section 90, can “injustice... be avoided only by enforcement of the promise”? Should courts turn a deaf ear to excuses such as those based on medical emergencies, financial reverses, and even unexpected


111. For a case suggesting that the enforceability of a charitable pledge may turn on whether the pledge contains conditions, see Mount Sinai Hosp. v. Jordan, 290 So. 2d 484, 486-87 (Fla. 1974) (holding a pledge unenforceable against the pledgor's estate because "the donative intent as to the specific material plan... must be made an integral part of the pledge instrument, limiting the exercise of discretion by the donee...”). For a case suggesting the reluctance of courts to read in conditions when a donor has not been explicit, see Danby v. Osteopathic Hosp. Ass'n, 104 A.2d 903, 906 (Del. 1954).

112. RESTATEMENT (SECOND) OF CONTRACTS § 90(1).
competing business opportunities? Should the law imply that a person who promises to make a gift assumed such risks? Should the law imply that Samuel LeFrak assumed the risk that the Landmarks Preservation Commission would not approve the LeFrak name on the exterior of the Guggenheim Museum's rotunda? Should the law ignore even a devastating reversal of fortune? As far back as the second century, the Roman emperor Antoninus Pius established the rule that "those who are sued in order to secure a liberality [i.e., a gratuity] are to be condemned for what they can afford." An analogy might be found in cases defining the implied right of a donor to recover a gift causa mortis after making an unexpected recovery. Courts might find contemporary inspiration in an Israeli statute that allows a promisor to retract a promise to make a gift, even after reliance, "if the retraction is warranted . . . by a considerable deterioration in the [promisor's] economic situation."

114. Dig. 50.17.28 (Ulpian, Sabinus 36), translated in 4 THE DIGEST OF JUSTINIAN 958a (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., U. Pa. Press 1985). For a suggestion that the phrase "if injustice can be avoided" in Section 90 "might have served a useful purpose if it directed the attention of the courts to the issues of improvidence and ingratitude," see Melvin A. Eisenberg, Donative Promises, 47 U. CHI. L. REV. 1, 23 (1979).  
115. See RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 7.15 (Walter B. Raushenbush ed., 3d ed. 1975). The analogy is imperfect because such a gift is considered to be revocable on recovery rather than conditional.  
116. 22 L.S.I. 113, (1967-68). Both French and German statutes that apply to gifts as well as promises take account of a similar donor's right by imposing implied conditions that allow a donor to revoke a gift in specified circumstances of ingratitude or changed circumstances. See Farnsworth, supra note 71, at 376 nn.71-72.

For more on French law, see Dawson, supra note 53, at 53 (describing three grounds derived from Roman law: (1) the donee's ingratitude, defined as an attempt on the donor's life, "cruelty and grave wrongs or injuries," and refusal of support; (2) the donee's failure to perform an express condition; and (3) a previously childless donor's acquisition of a child); see also Eisenberg, supra note 114, at 14 n.49 (giving as examples of ingratitude "the infidelity of a spouse . . . and a serious libel in open court against the donor").  

For more on German law, see Dawson, supra note 53, at 140-41. In commenting on German law, Dawson describes the grounds as the donee's "gross ingratitude," the "donor's subsequent impoverishment," and "the donee's failure to perform a condition." Id.; see also Eisenberg, supra note 114, at 15 n.50 (noting as a ground the donee's not being in a position "to return the gift without endangering his own maintenance suitable to his station in life, or the fulfillment of the duties imposed upon him by law to furnish maintenance to others").
The challenge for courts is to adapt rules constructed to deal with the effects of the other party’s breach in a conventional exchange to situations involving the unfulfilled expectations of the promisor of a gift. The circumstances giving rise to a promisor’s regret for having made a gift are subject to myriad permutations. For instance, what if one is shocked at inefficient food distribution by one’s chosen charity; startled at the unavailability of one’s expected tax deduction; dismayed by recovery from the illness one supposed to be terminal; irritated at the insensitivity of one’s law school classmates to one’s generosity; displeased by the emphasis of the botanical garden on carnivorous plants; or outraged at the unexpected ingratitude of one’s intended recipient? How, if at all, should the law take account of regret in such situations? Is it significant that the promisee has at least some responsibility for the promisor’s regret? An analogy might be found in decisions addressing the implied right of a jilted fiancé to recover the gift of an engagement ring. At least some of these situations would fall within the further provision of the Israeli statute that allows a promisor to retract a promise to make a gift, even after reliance, “if the retraction is warranted by disgraceful conduct towards the [promisor] or a member of the [promisor’s] family.”

If common law courts were to fashion conditions for promises to make gifts, it would not be difficult to adapt those conditions to completed gifts, but no common law court has gone this far. I have made similar comparisons of the ways various nations treat promises to make gifts in a brief, earlier work. See Farnsworth, supra note 71, at 376 nn.70-72. The analysis here builds on these former comparisons.

117. For examples of charitable pledgors who were bound nevertheless, see Danby v. Osteopathic Hosp. Ass’n, 104 A.2d 903 (Del. 1954) (illustrating one such situation in which a hospital changed its plans for construction based on personal guarantee of its bank loan by a charitable pledgor); Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609 (Iowa 1974) (indicating that a pledgee’s attempt to establish a college collapsed when a charitable pledgor refused to effectuate his pledge); Congregation B’nai Sholom v. Martin, 173 N.W.2d 504 (Mich. 1969) (holding that a pledgor who had disputes with other members of the congregation and attempted to withdraw his pledge was still bound by it).

118. See PANAS, supra note 27, at 163 (stating that [a]fter H. Ross Perot gave $2 million and pledged $6 million more for a Dallas arboretum, few bonds were sold to raise additional money and “Perot decided that the arboretum would never become a world-class facility” and “wanted to withdraw his gift”).

119. See BROWN, supra note 115, § 7.13, at 122.

120. 22 L.S.I. 113.
This country has yet to develop a coherent set of answers.\textsuperscript{121} Answers are needed even now because of the exceptions for moral obligation and reliance, and this need will increase as the category of binding promises is enlarged, as has been attempted in the case of charitable subscriptions. If one assumes that the more tolerant a legal system is of reneging on binding promises, the more likely it will be to treat promises as binding, it follows that the expansion of the category of binding promises to make gifts will depend on the fashioning of excuses to take account of regret.

Yet if the technicality of a peppercorn will suffice to make a promise binding, why not the formality of a signed writing? This would, to be sure, require legislation. But a distinguished comparatist has asked whether, "for a legal system which lacks the institution of a notary in the civil-law sense, it is wholly impossible to create a fair equivalent of a civil-law-style notarial document,"\textsuperscript{122} and whether a document signed with the advice of counsel and filed in a public place might be such a fair equivalent.\textsuperscript{123} I share this sympathetic view of the intention principle, though I doubt that the formality needs to be this elaborate. A Canadian commission has recommended a simpler formality, proposing enactment of a statute providing that a witnessed, signed writing take the place of the seal.\textsuperscript{124}

Whatever the appropriate formality, the abolition of the seal without the substitution of some other formality is rash. To deny the power to make enforceable promises on the ground that an appropriate formality cannot be fashioned seems absurd.

\textsuperscript{121} An attempt to develop such rules might not be "worth the candle." Eisenberg, supra note 114, at 15.

\textsuperscript{122} RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 22 (5th ed. 1988).

\textsuperscript{123} See id.

\textsuperscript{124} See ONTARIO LAW REFORM COMM'N, REPORT ON AMENDMENT OF THE LAW OF CONTRACT 292 (1987) (proposing that the writing be executed "in the presence of a witness and signed by the witness in the presence of the executing party").