5 Gratuitous promises

Robert A. Prentice

1. Introduction
The 'first great question of contract law' is why some agreements are enforced and others are not (Eisenberg 1979: 1). Standard Anglo-American common law contract doctrine requires consideration for legal enforceability of promises. Consideration is premised upon the notion of reciprocity: something of value in the eyes of the law must be exchanged for the promise to be enforced (Beale 2008: 3–4). Thus, the presence of a bargained-for exchange formally demarks the critical fault line between enforceable and unenforceable promises. Promises that are the product of a bargained-for exchange are presumptively enforceable. Presumptive unenforceability attaches to mere gratuitous promises, even if it is indisputable that their makers well considered and seriously intended them. In the US, putting such a promise in writing or even under seal will not make it enforceable (Farnsworth 2000: 396), which contrasts with the result in civil law systems. Civil law systems tend to enforce gratuitous promises, at least if certain formalities are observed, absent changed circumstances such as ingratitude by the promisee or impoverishment of the promisor (Dawson 1980: 29–196).

Naturally the common law recognizes exceptions which authorize enforcement of certain promises in the absence of consideration. One major exception arises from a promisee’s foreseeable reliance. The doctrine of promissory estoppel is very important, but outside the scope of this discussion. Another significant exception involves charitable subscriptions. A few other exceptions are occasionally allowed, such as firm offers to sell goods under US law and promises under seal in Anglo-Canadian law. Absent a recognized exception, gratuitous promises will not be enforced even though courts will refuse to undo a completed gift.

This discussion will focus primarily upon the most-explored subset of gratuitous promises – donative or gift promises. Other gratuitous promises, such as uncompensated contract modifications, will receive only brief discussion, consonant with their treatment in the law and economics literature. Exploration of the economics of this issue is a bit of an academic exercise because the courts that established current legal doctrine seldom used explicit economic reasoning in doing so. Furthermore, the conscious economic analysis that has been brought to bear on the topic since
the 1970s has not influenced the state of the law in an observable way. Nonetheless, whether the notion of exchange that underlies the consideration doctrine should ‘set the boundaries of the law of contract’ remains an intriguing question (Calamari and Perillo 1977: 135), and economic analysis has much to add to the search for a satisfactory answer to that question.

2. The Traditional Rationale
What do bargained-for promises have – and gift promises lack – that leads courts to enforce the former but not the latter? In 1941, Fuller suggested the leading traditional (noneconomic) rationale for using the doctrine of consideration to distinguish enforceable bargained-for promises from unenforceable gift promises (Fuller 1941: 814–15). Fuller cited reasons of both form and substance.

Regarding form, the consideration requirement first provides reliable evidence that a promise was truly made. Second, enforcement of gratuitous promises is denied as a cautionary matter to encourage proper deliberation by promisors. Finally, consideration serves a channeling function by aiming donors toward a means of indisputably signaling their intent, such as by putting the promise under seal in former days, or setting up an irrevocable trust in more recent times (Gordley 1995: 570).

Regarding substance, Fuller argued that the natural formality of consideration should be reserved for relatively important transactions and concluded that if gift promises are not wholly ‘sterile transmissions’ (Bufnoir 1900: 487), they are not far from it and are therefore undeserving of the full force of the law.

Fuller’s arguments have been found reasonably persuasive, but not completely satisfying. Consideration is not an impressive form of proof that a promise was made, yet it remains a requirement for enforcement even in situations where all parties concede that a promise was indeed made. Fuller assumed that plaintiffs in gift promise cases are more likely to lie than plaintiffs in cases involving bargained-for promises. He also assumed that jurors are more likely to be misled by fraudulent testimony in cases of gift promises than in cases of bargained-for promises. However, there is little evidence for either assumption (Kull 1992: 53).

Fuller’s argument in favor of the cautionary function of consideration rested on the observation that some people make gift promises while in an emotional state. However, promisors also often act emotionally when making bargained-for promises (as in the excitement of a live auction), yet these promises are typically enforced. Additionally, Havighurst sampled 183 cases where promises were denied enforcement for lack of consideration; in only three did absence of deliberation appear to play a role...
In short, there is little or no evidence that gift promises are typically less well considered than bargained-for promises or that the doctrine of consideration often plays a cautionary role in actual cases.

Similarly, the channeling function is arguably no more important regarding gift promises than bargained-for promises, because there is no reason to believe that it is an easier matter to determine when a person is serious about making a commercial bargain than when a person is serious about making a gift promise (Havighurst 1942: 7). Neither the maker of a gift promise nor the maker of a bargained-for promise need be capable of sophisticated usage of the King’s English (or other language) in order to clearly express his or her intent to be bound, not to be bound, or to be bound only under certain conditions.

Finally, Fuller’s substantive claim that gratuitous promises do not generate sufficient social benefit to justify the costs of enforcement is plausible, but only an assumption. A conclusion that gratuitous promises are merely sterile transmissions is ‘no more obviously correct’ than the contrary deduction (Kull 1992: 52).

Thus, the traditional rationale for the courts’ stated refusal to enforce gratuitous promises is unconvincing on its own terms. Its apparent shortcomings invited use of an economic lens to reanalyze, critique, and extend the relevant arguments. Thus, economists have examined the issues surrounding the consideration doctrine in order to determine if the traditional refusal to enforce gratuitous promises (with certain exceptions) is consistent with sound economic principles, to determine whether there are ways to improve the law, and to illustrate the theory that the law, particularly judge-made law, is significantly shaped by a concern for achieving efficiency (R. Posner 1977: 416). The remainder of this chapter is devoted to an exploration of important points made in the relevant literature. The discussion will disclose that economists have used different approaches, launched analysis from inconsistent premises, and drawn contrary conclusions. Use of economic analysis regarding the issues surrounding consideration often leads to ‘serious indeterminacies’ (Trebilcock 1993: 176). This should not be surprising in such a complex area.

One caveat: Although economic analysis in this area has assumed that the state of the law is as summarized above, in English law the trend is to treat consideration as a formality that should not necessarily prevent ‘finding of a contractual obligation if the requirement of a common, agreed intention to contract is satisfied’ (Grubb 2007: 246–7). Moreover, Kull has claimed that in the US, contrary to the stated law, courts almost always enforce promises that have actually been made and seriously intended either by manufacturing consideration or by finding
reliance so as to invoke promissory estoppel (Kull 1992: 43). An extensive survey indicates that when US courts do state that a promise is not being enforced due to lack of consideration, there are almost always independent reasons unrelated to consideration that actually underlie the decision (Wessman 1996: 816). Thus, economic analysis of the rule as stated, but not necessarily as applied, may be all the more academic in nature.

3. Why Do People Make Gifts?
The motivation of those who make gift promises is relevant to the question of whether they should be enforced, yet traditional analysis ignored this foundational question. Economic analysis has most commonly been based on the assumption that most giving is altruistically motivated. Presumably ‘interdependent utilities’ account for most giving because donors derive utility or welfare by improving the utility or welfare of others (R. Posner 1977: 412; Shavell 1991: 401). Many people seem to receive a ‘warm glow’ from giving to others (Andreoni 1990: 464).

Importantly, there are also significant nonaltruistic reasons for giving gifts, although in order to simplify analysis economists and others often ignore them. Sometimes people give to gain status by demonstrating to others either that they are wealthy, or generous, or both. Also, people often give in order to create or enhance trust in furtherance of an exchange relationship. For example, an employer may signal an interest in establishing a relationship with a job applicant by taking her out for an expensive meal or may give exchange gifts to an established employee such as a raise in salary in hopes that the employee will respond by continuing to work with more rather than less diligence (E. Posner 1997: 567).

4. Why Do People Make Gift Promises?
Traditional analysis also ignores the fundamental question of why, if A wishes to give something to B, A does not just do so. Why would A merely promise to give a gift to B at some point in the future rather than giving the gift now? Economists have pointed out several reasons, including that the donors’ assets are not currently liquid, the donors may currently be able to derive a higher rate of return or secure more tax advantages from the assets than the donees, and the donors may wish to allow for contingencies that would enable them to change their minds about giving the gift.

Perhaps the most important reason to make a promise of a future gift is that it conveys information to the donees, allowing them to plan (Shavell 1991: 402). If A promises to give B a house next July, B can cancel plans to buy a house next week. If X promises to pay for Y’s college education, Y can quit her part-time job and begin studying for college entrance exams.
5. Are Gifts Valuable?

The legal system should not expend valuable resources enforcing transactions that are useless or counterproductive. If gifts are simply wasted exchanges and gift promises nothing more than harbingers of inefficient transactions, then the law should encourage neither. Few doubt the worth of exchange transactions which create value by transferring goods from those who value them less to those who value them more. By contrast, on its face, ‘[a] truly gratuitous, nonreciprocal promise to confer a benefit is not a part of the process by which resources are moved, through a series of exchanges, into successively more valuable uses’ (R. Posner 1986: 86).

Some economists have suggested that non-cash gifts are worse than merely nonproductive, noting surveys indicating that on average people would not pay nearly as much for the Christmas and other presents that they receive as the givers paid for those same items. Thus, it has been suggested that the Christmas gift-giving tradition alone constitutes a multibillion dollar drag on the economy (Waldfogel 1993: 1328). On the other hand, an economic argument for the value of gift-giving can be based upon search costs being lower for the giver than the receiver (Kaplan and Ruffe 2009: 24–5). Another claim is that gifts often transfer money or money’s worth from more wealthy individuals to less wealthy individuals. Because each individual dollar is valued more by the poorer person than by the wealthier person, value is arguably created by the redistribution, although perhaps not in amounts significant to the economy. Regardless of this effect, other economists assume that gifts must be valuable simply because rational donors would not make gifts if doing so did not make them better off and donees presumptively would prefer the gifts to nothing. Others point out, however, that this approach double counts the donee’s benefit, ignores scenarios in which donees can exploit donors, and ignores the adverse impact that gifts can have upon third parties, such as where a donor injures his family’s reasonable expectations by squandering his wealth on gifts to a paramour (E. Posner 1997: 586–7). These arguments all raise empirical questions that are unresolved.

Status-enhancing gifts are particularly questionable in terms of value creation, although they may result in production of public goods (E. Posner 1997: 601), as where a rich person demonstrates her wealth by donating large sums to build a new library at a local college. Trust-enhancing gifts seem potentially more valuable in that they can contribute to future beneficial exchange relationships (Camerer 1988: S180), although in some societies people may ruin themselves in an attempt to meet gift-giving obligations under social norms (E. Posner 1997: 590).

All in all, economic analysis does not seem to settle the question of
whether gifts are sufficiently valuable to justify engaging the judicial machinery of the state to enforce promises to make them.

6. Are Gift Promises Valuable?
Even a conclusion that gifts, on balance, create significant economic value would not necessarily mean that gift promises do. Nonetheless, the traditional approach recognizes that enforcing gift promises permits promisees to plan, ensures performance if the promisor dies before completing the gift, allows the promisor to derive the satisfaction of having made an effective disposition, and protects the promisor’s ‘present aspirations against defeat by a less worthy self’ (Eisenberg 1979: 8). While the mere making of gift promises creates some value for both promisor and promisee, these benefits would generally be increased by legal enforcement. For example, if gift promises are legally enforceable, promisees can plan more concretely and promisors can be more certain of the effect of their planned gifts.

Explicit economic analysis emphasizes that although it is obvious that legal enforcement of gift promises can benefit promisees, such enforcement can benefit promisors as well. While enforcement of gift promises would cause promisors to suffer the cost of decreased freedom of action should they later change their minds about wishing to make the gift, that enforcement can also benefit them significantly. Most particularly, if a promisor’s goal is to improve the welfare of the promisee, that goal is advanced by enforcing a gift promise because enforcement allows the promisee to plan with more certainty and therefore with more efficiency. Enforcing gift promises arguably increases the gift’s net present value to promisees who can now enjoy a greater certainty of actually receiving promised future payments (R. Posner 1977: 412). This, in turn, increases the benefit to the promisor who, at least in the setting of altruistic promises, presumptively desires to maximize the gift’s beneficial effects for the promisee.

7. Should Most Gift Promises Be Enforced?
Previous discussion has indicated a lack of consensus among both economists and noneconomists regarding some of the foundational questions in the area of gratuitous promises. There remains controversy regarding why people make gifts and gift promises and whether gifts or gift promises create value. Even if these matters were settled, it would not lay to rest the larger issue of whether gift promises should generally be enforced. Even if gifts and gift promises create substantial value, they might not create sufficient value to justify the costs of their enforcement. On the other hand, even if they create only minimal value, countervailing considerations might not outweigh that value and enforcement could be good policy.

As noted earlier, noneconomists look at the same justifications (such as
evidentiary, cautionary and channeling functions of consideration) and reach different conclusions. The official legal position is generally that gift promises should not be enforced, although completed gift transactions should not be undone. In practice, to the contrary, most clearly proven and seriously intended gratuitous promises are enforced. Given this contradictory state of affairs, it is unsurprising that various economic analyses have also led to different conclusions. This is particularly true because much analysis is based upon empirical assumptions that are unsubstantiated.

Some economists have concluded that standard gift promises should not be enforced because (a) most gift promises probably involve small amounts and therefore any value their enforcement could create would be outweighed by litigation costs and legal risk (the chance that judges or juries may decide wrongly whether a gift promise was truly intended), and (b) most gift promises are made within families where there are non-legal means of punishing promise breakers, such as refusing to trust them in future dealings, that are more effective than alternative means available in exchange settings (R. Posner 1977: 416–17). These factual assumptions are plausible, but not verified.

Another line of economic analysis emphasizes that while legal rules may have an impact on whether parties live up to promises or not, they will also impact whether and in what form parties choose to make promises in the first place. Gift promises are beneficial in that they allow promisees to plan and the more certain they are to be enforced, the more efficient the planning that promisees can undertake. However, promisors realize that they may wish to change their minds, so the more certain that gift promises are to be enforced, the more likely it is that promisors will either qualify their promises or perhaps even refrain from making them at all. Enforcing gift promises could, therefore, lead to fewer promises and fewer gifts. Social value would be maximized by rules that provide the optimal balance between the benefits of promising (better planning by promisees) and the harmful effects of promising (fewer and more qualified promises), but in a world of costly legal process and imperfect information, an optimal balance may not be attainable. Ultimately, the current rule of nonenforcement is arguably justified because self-sanctions against breach (shame and guilt) are frequently effective. Furthermore, by tempering their reliance on promises, promisees are often better able than promisors to adapt to the risks posed by the fact that the promisor may regret having made the promise (Goetz and Scott 1980: 1265, 1283, 1321–2).

Another approach focuses on a particular set of facts wherein an altruistic promisor signals her intent to give a gift, a promisee adjusts his or her level of reliance, and then the promisor chooses the size of the gift to
maximize value. Donors often make gift promises because they perceive value in donees’ reliance. As the donees increase their reliance on the promises, donors perceive that their gifts will create greater value and, consequently may give larger gifts. In such a setting, if the promisee knows that the promisor will fulfill the promise, the promisee will choose a high level of reliance, causing the donor to give a larger gift than he perhaps would have liked. If the promisee cannot determine whether the promisor is a more altruistic type (who will respond positively to a promisee’s increased reliance) or a less altruistic type (who may not), presumably more altruistic promisors can induce higher levels of beneficial reliance simply by announcing their status. Under these assumptions there is no reason to enforce the gift promise (Shavell 1991: 403–9).

However, what if the promisor is potentially a ‘masquerader’ who does not intend to live up to the promise at all? In this setting, it may benefit altruistic donors to make gift promises enforceable because they can then more readily induce beneficial reliance by promisees. They can do so by signaling their status as sincere donors through taking the steps necessary to qualify their promises as binding, steps which masqueraders presumably would not wish to take. However, as others have noted, making gift promises enforceable may induce potential donors to refuse to make such promises or to heavily qualify them, which can result in less reliance and (in this model) smaller gifts (Shavell 1991: 403–9). Ultimately, this line of argument may lead to the conclusion that donors should be able to bind themselves through gift promises in order to distinguish themselves from masqueraders so that promisees will increase their reliance, enhancing the overall value of the gifts. However, donees might not wish for a regime that enforced such promises because potential enforcement might cause sincere donors who wish to reserve the option to change their minds not to make promises at all. Thus, enforcement could render both donors and donees worse off (Shavell 1991: 419–20). Are there enough masqueraders in the world that their impact should be considered? As with other lines of economic argument, this line of reasoning rests on empirical facts that seem nearly impossible to determine.

Yet another approach distinguishes among the various motivations for giving gifts, concluding that (a) altruistic gift promises should not be enforced as routinely as exchange promises, and (b) when they are enforced they should result in lower levels of damages than comparable non-gratuitous promises. In general, a disappointed recipient of a gift promise will suffer less damage than a disappointed promisee in an exchange relationship (E. Posner 1997: 596–601). Similarly, recipients of promises for trust-enhancing gifts of the signaling variety should seldom be able to enforce those promises, for they can often lead to inefficient
equilibria in which donors try to outdo each other in giving numerous and lavish gifts in order to avoid being thought untrustworthy. If allowed to enforce such promises, promisees should again receive less in the way of damages compared to promisees of exchange promises (E. Posner 1997: 603–4). According to this view, status-enhancing gift promises should not be enforced, primarily because of various inefficiencies involved in transferring property for such a purpose (E. Posner 1997: 601–2). Nor should the courts enforce ‘exchange gift’ promises of the trust-enhancing category because, among other reasons, such promises are bound up in the ongoing relationship of the parties, making it likely that judicial enforcement would do more harm than good to the parties’ trust relationship (E. Posner 1997: 604–6). Given the difficulty of telling the difference between the various motivations for making a gift or gift promise and the premise that commercial promises are generally more socially valuable than gratuitous promises, the ultimate conclusion, on this view, is that courts should be reluctant to enforce gratuitous promises.

Put together, these various streams of economic analysis bring to light many interesting and important factors that should be considered but do not create a clearly convincing rationale either for maintaining the current stated legal rules regarding the nonenforcement of most gratuitous promises or for changing those rules.

8. Should Gift Transfers Be Undone?
Is there a defensible economic rationale for the stated rule that courts will not enforce most gift promises when promisors change their minds (thus protecting promisors), but will not reverse completed gift transactions when promisors/transferors change their minds (thus protecting promisees/transferees)? The accepted noneconomic answer seems to be that delivery provides evidence that a gift was intended and that deliberation occurred. This answer is not entirely satisfactory, since formalities that also evidence intentionality and deliberation, such as a signed writing or use of a seal, are insufficient to make donative promises enforceable, at least in the US.

The most promising economic rationale for the differential treatment of gift promises and completed gift transfers seems to lie in reliance costs. One economic explanation provides that donees will generally keep reliance costs low and discount the value of the promised gift by incorporating the risk that the donor will not fulfill the promise, thereby rendering gift promises less valuable than completed gifts. However, the recipient of a credible gift promise presumably will engage in potentially costly reliance activities in anticipation of receiving the gift. Indeed, one of the main reasons to make a donative promise rather than just to wait and give the
gift is to communicate information to the promisee so that the promisee may incur reliance costs in order to make the gift more useful. Therefore, it is not unreasonable to conclude that gift promises, even those not foreseeably leading to the type of specific reliance that provides the predicate for a promissory estoppel claim, should be enforced in order to increase the credibility of most gift promises.

However, an even stronger case can be made for refusing to undo gift transactions that have been executed. It is more likely that one who receives and possesses a gift will reasonably incur a higher level of reliance costs than a mere promisee. Greater adjustments in consumption and investment patterns are to be expected by one who has received the item than by one who has simply received the promise of an item, particularly where that promise is not legally enforceable.

Additionally, recipients of unenforceable gift promises need take measures to protect themselves from rescission only until the date the gift is supposed to be delivered, whereas recipients of gift items in a legal regime that allowed gift transactions to be reversed would have to take measures to protect themselves from rescission for as long as the donor lives (or perhaps longer). They would have to be concerned ten or twenty years later that the item would be reclaimed and to take potentially costly precautions to account for that contingency. Because the amount of efficient reliance is greater for transferees than mere promisees, it makes economic sense to provide more legal protection for the former than the latter (E. Posner 1997: 594). Furthermore, the ambiguity of ownership in a legal regime where donors could rescind executed transfers would likely injure both parties. What bank would loan money to B to build a house on a tract of land that had been given by A when A might demand that the land be returned in the middle of construction (Fellows 1988: 46)? A rule allowing donors to reclaim gift items that have already transferred to donees would prevent both donors and donees from achieving their goals in a wide variety of settings.

9. Should Gift Promises to Charities be Enforced?
The accepted rule refuses to enforce most gift promises, but contains exceptions. One important exception in the US (but not under Anglo-Canadian law) is for charitable pledges. Why should the law enforce a promise to make a gift to a charitable endeavor when it refuses to enforce a similar promise to make a gift to a friend or relative? The traditional explanation for the exception is that courts favor charities because of the societal value that they create. The public goods (for example, a new hospital wing or university classroom building) produced by such gifts arguably justify the exception (Gordley 1995: 577).
An alternative economic explanation is that charitable gifts tend to be larger than other gifts and therefore better justify the judicial resources and legal risk involved in their enforcement (R. Posner 1977: 420). However, others question this assumption regarding the relative size of charitable and non-charitable gifts (Eisenberg 1979: 7). Most workaday commercial bargains also involve relatively small sums, yet the law views them as enforceable.

Another view is that it makes more economic sense to enforce charitable gift promises than intrafamilial gift promises because self-sanctions (guilt and shame) are less likely to be effective enforcement alternatives in the former case. Also, promisors can arguably qualify their promises more effectively in cases of charitable gifts because social conventions often prevent them from effectively doing so in family situations (Goetz and Scott 1980: 1308).

Some economists, however, have suggested that enforcing such charitable pledges may be counterproductive. As noted earlier, a regime that enforces such promises improves the reliability of the promise and therefore enables more effective promisee reliance measures. However, enforcement simultaneously reduces promisor flexibility and may cause promisors to make fewer, smaller, and more conditional pledges. There is no clear empirical evidence to resolve the question of whether an enforcement rule or a nonenforcement rule would result, on balance, in more gifts actually being transferred to charities, leaving this issue unresolved.

10. Should Promises Supported by Nominal Consideration be Enforced?

English courts enforce promises based on nominal consideration, on a peppercorn. US courts are split on the question of whether promises supported by nominal consideration should be enforceable, even though it is well recognized that courts are generally unconcerned with the sufficiency of consideration, which is a matter for the parties to judge. Except in cases of options and guarantees, most US courts have held that promises supported only by nominal consideration are not enforceable. Which is the more defensible approach?

Many courts that refuse to enforce promises supported only by nominal consideration conclude that it is not a ‘natural formality’. Another argument against enforcing such promises is that they often are simply disguised gift promises and therefore should be unenforceable for all the substantive reasons supporting the view that gift promises should not be enforceable.

An interesting argument in favor of enforcing such promises is that introduction of nominal consideration is a clear signal that the parties actually wish to be bound. Additionally, there is little risk of legal error
regarding the parties’ intentions because there seems little doubt that parties seriously intend a transaction when they go to the effort to pretend that there is consideration. In many settings, social norms prevent parties from bargaining over the terms of a promise; so, when parties are able to expressly address consideration, there can be little doubt that their expressed intentions correspond with their true desires (Gamage and Kedem 2006: 1364–5).

11. Should Gratuitous Promises be Enforced if under Seal?
Gratuitous promises placed under seal are enforceable under Anglo-Canadian law and in most civil law nations. Use of a seal or similar formality to enable a promisor to make a gift promise binding arguably makes economic sense by providing a relatively efficient means for a promisor to signal his status as a sincere donor (rather than a masquerader) and to ensure achievement of his own goals. The risk of legal error is minimized so that it is arguable that the social benefits of enforcement exceed the social costs. On this theory, and ignoring the fact that formalities may solve problems of form but not satisfy substantive objections to enforcement of gratuitous promises (such as the lack of value of gifts and the nontrivial administrative cost of enforcing them), abandonment of the seal in the US has been deemed a ‘mysterious development from the standpoint of efficiency’ (R. Posner 1977: 419).

On the other hand, some have observed that because the ancient requirement of a personal seal and melted wax could be a bit of a bother, it began to be replaced by just the letters ‘L.S.’ As the ‘elements of ritual and personification dropped away,’ the seal ‘not only ceased to be a natural formality but became an empty device whose legal consequences were not widely understood’ (Eisenberg 1979: 9). For those reasons, US courts and legislatures stopped giving formal effect to gratuitous promises under seal. Williston’s attempt to revive the formality in the US died with the near total rejection of the Uniform Written Obligations Act (adopted only in Pennsylvania), which would have recognized as binding any writing containing an express statement that it was intended by the parties as legally binding. A possible reason is the ease with which the ‘magic words’ could be hidden in the boilerplate language of a form contract.

Others have pointed out that in many settings gift promisors might not wish to be bound. However, if there are means to bind themselves (via a seal or a writing) and others use these formalities, then gift promisors who do not wish to be bound may feel forced to use the formalities to signal their sincerity. Thus, the assumption, frequently made in economic analysis, that promisors who take advantage of formalisms truly wish to be bound may be erroneous (Gamage and Kedem 2006: 1305).
12. Should Improvidence or Ingratitude Bar Enforcement of Gift Promises?

Civil law nations typically enforce gift promises, but not if promisees have demonstrated ingratitude or promisors have suffered serious financial reverses. Should this rule apply in the UK for a promise under seal, or the US for a promise to a charity? Some argue that these are sensible grounds for refusing to enforce gratuitous promises and that the difficulty that courts would have sorting out the factual questions surrounding such issues justifies a policy of generally refusing to enforce gratuitous promises (Eisenberg 1982: 662).

Others argue that these considerations present no basis for distinguishing treatment of gratuitous promises from that of exchange promises. Whether one is making an exchange promise (perhaps to purchase an expensive vacation home) or a gift promise, a promisor should consider not only his or her current financial status but also potential future developments, such as illness or disability. Also, just as a party to a commercial transaction may suffer in the future if he or she acts rudely to the other side, a donee who acts with ingratitude will suffer the loss of future gifts (Fellows 1988: 33).

13. For Gratuitous Promises that are Enforced, What is the Proper Measure of Damages?

Contract damage issues are intractable in most settings, including those involving breach of gratuitous promises. Some argue that the most common contract default damage rule – expectation damages – may not be appropriate in this setting for several reasons. First, the theory of efficient breach arguably has little application to gratuitous promises for monetary payment. Second, the claim that expectation damages often appropriately measure reliance costs makes more sense in exchange transactions than in gift settings where recipients of donations typically incur no opportunity costs by agreeing to accept a gift. Third, the expectation measure may induce excessive reliance by failing to discount for the possibility of breach. Finally, individuals often attach a higher value to out-of-pocket costs than to forgone opportunities, suggesting that reliance costs warrant more serious legal protection than lost expectancies (Trebilcock 1993: 186).

Nonetheless, reliance damages have several shortcomings as a potential default measure for gratuitous promises. First, given interdependent utility functions, many donors may want their donees to be able to rely upon their gift promises to the full value of the expectation. Second, expectation damages can serve as a penalty default rule that motivates promisors to clearly communicate contingencies with which they wish to qualify
Gratuitous promises

their promises. And, third, measuring reasonable reliance costs in gratuitous promise cases is a highly speculative enterprise with attendant costs that should not be foisted upon the taxpayer-subsidized court system. Therefore, the expectation measure arguably remains the superior default rule (that promisors may alter if they choose) (Trebilcock 1993: 186–7).

14. Contract Modification Promises

Thus far attention has been paid primarily to gift promises. What about other promises that lack consideration, such as a promise to modify a contract? In the US, if in the middle of performance of a contract A promises to pay more to B than the original agreement (and nothing else changes in the parties’ relationship), the promise usually is not enforceable if A was purchasing services, but usually is enforceable notwithstanding the lack of consideration if A was purchasing goods. The common law refusal to enforce A’s promise to make additional payments, which can be characterized as gratuitous since nothing was demanded of B in return, has been overruled in cases involving sale of goods by legislation in the form of the Uniform Commercial Code’s Article 2. Which approach makes more economic sense?

Even the US common law has an exception to the consideration requirement in cases involving services where unforeseeable conditions prompted the promise. Perhaps A hired B to dig a hole which will serve as the basement for A’s new house. The promised $5,000 price seems too little when B happens upon an unusual geological formation which neither party contemplated that will make it exceptionally costly for B to complete the job. A promises B an additional $5,000 to complete the job that he is already obligated to perform. An economic argument in support of this exception to the common law will also support the Uniform Commercial Code’s general rule. Consider the possible motives that A might have to promise the extra $5,000. First, it might give him a reputation for ‘fair dealing’ that will benefit him economically in the future. Second, it might avoid driving B into bankruptcy which would often reduce the chances that B could finish the job. Third, it may be cheaper for A to pay B the additional $5,000 than to sue him and be forced to hire C to finish the job, especially since C will charge a high price due to knowledge of the geological formation. For all these reasons, A will want B to finish the job, but B may be unwilling to do so if A’s promise is not enforceable in court. Therefore, A could benefit by a rule that enforces his promise though it lacks fresh consideration (R. Posner 1977: 421). Overall, enforcement of such promises seems to make economic sense because they are made in exchange relationships and serve to keep the contracting process flexible and serviceable (Gordon 1991: 288).
15. Past Consideration/Moral Consideration
Concerning another category of promise lacking consideration, but not strictly involving a gift, assume that A owes B $10,000, but B has been dilatory and the statute of limitations has run on the obligation. Or perhaps A has discharged the claim in bankruptcy. No court would force A to pay B pursuant to the contract. Nonetheless, assume that A promises B that he will pay the $10,000 nonetheless. Or, in a related vein, assume that A’s life is saved by B. A is grateful and promises to pay B $5,000 every year as long as B lives. A pays for a few years and then discontinues payments. If B sues for breach of contract in these scenarios, can he recover?

In the US, the promises to pay debts that are no longer legally binding because of a discharge via bankruptcy or the statute of limitations, are (notwithstanding their resemblance to gifts) enforceable despite a lack of consideration. Some courts also enforce the promised gift made in the ‘life saving’ scenario. All three are based upon a theory of ‘moral consideration’ that under traditional theory derives from notions of unjust enrichment. Because of the benefits earlier conferred by B upon A, these are the sorts of promises that A should have made and therefore the law should enforce them.

Economic reasoning plausibly supports enforcement of these promises based on ‘past consideration’ because, unlike with the typical gift promises which arguably should not be enforced, these sorts of promises presumably often involve substantial stakes (which justify the administrative expense and legal risk involved in enforcing them) and are the sorts of promises that are naturally made (so consideration is not needed to serve evidentiary, deliberative, or channeling functions) (R. Posner 1977: 418–19).

16. Conclusion
Ultimately, traditional (noneconomic) analysis neither satisfactorily explains the current state of the law of gratuitous promises nor makes a strong case for an alternative. The same may be said for economic analysis of the issues surrounding gratuitous promises, although economists have added many useful insights to the discussion. Because gift-giving is as much a social phenomenon as an economic one, additional light can be cast on the debate by consulting works from sociology, psychology, and related fields (Baron 1988–89; Eisenberg 1997; E. Posner 1997; Prentice 2007).

Bibliography
Gratuitous promises


**Statutes**


Uniform Written Obligations Act (1925).