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ARTICLES

Gifts, Bargains, and Form

JANE B. BARON*

It is a truism of Anglo-American law that there is a difference between gifts and bargains, between donative transfers and contractual exchanges.¹ The two types of transactions are commonly presumed to accomplish divergent purposes in distinct settings. Donative transfers carry out benevolent urges in the context, usually, of the family, whereas contractual exchanges carry out self-interested aims in the context, usually, of the market.² In addition, gifts and bargains are subject to divergent legal requirements, taught and learned in separate law school courses. Gifts

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1. A note on terminology: Technically speaking, gifts (*inter vivos* and *causa mortis*) are but a subset of a larger category, "donative transfers," which also includes wills and other devices such as trusts. For the sake of simplicity, however, the term "gifts" is often used in this article as a less cumbersome synonym for donative transfers.

Similarly, bargained-for exchanges are but a subset of a larger category, "contracts," which also includes agreements enforceable on the basis of reliance or unjust enrichment by one of the parties. The term "contracts" is used in this article primarily to refer to bargained-for exchanges.

2. See, e.g., Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L.

require formalities such as delivery, signature, or attestation, whereas contracts require offer, acceptance and consideration.³

The divergence between the requirements is, under accepted principles, not arbitrary; rather, it is thought to be a rational response to the respective goals and settings of the two different fields of law. Thus, with respect to gifts, where the primary legal goal is to effectuate donative intent, formalities are said to be required to put that intent beyond question. In contrast, with regard to contracts, where the primary legal goal is protection of expectations and security of transactions, consideration is said to be required to mark off those promises customarily understood, in a market economy, to be binding.

The divergent doctrinal treatment of gifts and bargains is thought to be appropriate not only in light of the different purposes of the two transactions, but also in light of their relative importance. Traditional discussions of gifts and contracts posit a world in which legal resources are scarce and costly; legal intervention must, in consequence, be rationed. In these discussions, gifts are treated as one-sided transfers which merely redistribute existing wealth, and they thus are not thought to warrant legal enforcement unless their formality renders administration of them simple. Bargains, on the other hand, are considered two-sided exchanges which create wealth, and due to their substantive importance they are thought to warrant enforcement without formality.

The divergence between the doctrinal requirements for gifts and bargains, and the particular requirements applicable to each, are thus alike considered appropriate responses to the true nature of each distinct kind of transfer. The notion that there is a "fit" between the nature of a given transaction

REV. 825, 827 (1941) ("[I]f a promise sued on is alleged to have its cause in a liberal intention, we are prompted to inquire into the family and personal relations of the parties in order to test the probability that such a promise was actually made as alleged, questions which would not be pertinent if the promise was alleged to have a commercial basis."); Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979) ("[A]ctors involved in a donative transaction are often emotionally involved.").

There are, to be sure, cases at the margin: promises of gifts to nonfamily members and contracts between family members. In these cases, a court must determine whether the transaction in question is "truly" a one-sided donation or a two-sided exchange. See, e.g., *Balfour v. Balfour*, 2 L.R.-K.B. 571 (C.A. 1919); *Kirksey v. Kirksey*, 8 Ala. 131 (1845); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917); *Hertzog v. Hertzog*, 29 Pa. 465 (1857). This determination is possible only if gifts and bargains are assumed to be fundamentally different, distinguishable types of transactions. See *infra* Part II.

3. The extent to which the latter requirements are appropriately characterized as formalities is open to question. The "objective theory" of contracts, the rule that an acceptance must match the terms of the offer, and the requirement of "definiteness" all may operate as formalities. See Friedman, *Law, Rules and the Interpretation of Written Documents*, 59 Nw. U.L. REV. 751, 775-76 (1964-1965); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1691-92 (1976). On the other hand, the consideration requirement is said to have a substantive, as well as formal, dimension. See *infra* Part II.

and the legal rules applicable to it is comforting. It suggests the law is rational, responsive to reality.

There are, however, reasons to question this notion of "fit." First, it rests on assumptions about human behavior in giving and bargaining which are at odds with conventional views of the contexts in which such transfers are ordinarily said to arise. Despite the benevolent motives and family settings usually associated with gifts, the accepted justification of donative formality assumes that, in giving, people are fundamentally unreliable and deceitful. Despite the self-interested aims and arm's length relationships usually associated with bargains, the accepted justification of the consideration doctrine assumes that, in business, people are trusting and trustworthy. These justifications turn the world topsy-turvy. We are to be suspected when we give, relied on when we trade.

Second, the notion of "fit"—the entire structure of rule and justification in the field of gifts—requires that gifts and bargains be truly different transactions. Only if gifts are not exchanges can they be characterized as so unimportant that they warrant enforcement on the basis of form alone. The now-accepted legal definition of a gift as a transfer without consideration is designed to assure that any particular transaction can be placed on one and only one side of the gift/bargain line. Yet there is nothing inevitable about this definition, which developed late in the life of the common law and which has never been used in the civil law. Indeed, the definition contrasts sharply with non-lawyers' understandings of gifts. Anthropological, sociological and psychological studies of gifts all suggest that gifts and bargains are alike exchanges, differing only in that bargains involve the exchange of commodities, while gifts may involve the exchange of non-commodities such as status, obligation, "psychic reward" or the like. The "purely" one-sided donative transfer is not part of the "reality" non-legal social scientists have studied.

In light of this historical, comparative and social scientific evidence, the presumed dichotomy between gifts and bargains is difficult to sustain. This essay argues that that dichotomy is less a reflection of real differences than it is a construct, a portrait or story, depicting individuals whose urges to give are sharply differentiated from their urges to trade and a world in which self-interested gain is more important and more frequent than other-oriented beneficence. Like any caricature, this picture emphasizes some aspects of experience, but suppresses others. In so doing, it molds our vision of our attributes and capabilities, and it may limit our view of our potential.

Part I explores the justifications which have traditionally been offered to explain the formalities of gift-giving, justifications which rely on the ritual, evidentiary, protective and channelling functions of form. An inquiry into the historical origins of the delivery and Wills Act formalities suggests that

these functions may not have been of primary concern when the formal requirements were adopted. Moreover, the functional justification relies on rather pessimistic assumptions about human behavior in the gift-giving context. Evidence from the social sciences provides a basis from which to question those assumptions.

Part II turns to the doctrine of consideration. That doctrine is essential to the gift/bargain dichotomy because it is the presence or absence of consideration that is used to set a disputed transaction on one side or the other of the presumed bright line. Consideration is said to delineate which promises are worthy of legal enforcement. It gives effect to executory business bargains because of their wealth enhancing qualities and denies effect to gift promises because of their lack of social utility. The justifications offered for the consideration doctrine reflect the view that gifts and bargains truly differ in both nature and importance.

Part III returns to gifts, questioning whether it is accurate to define them as nonbargains. Historical and comparative evidence suggests other definitions are possible. More importantly, social scientific studies suggest it may be misguided to distinguish sharply between gifts and bargains, that the two apparently different categories of transfer share many attributes. If gifts are not the one-sided transactions the law depicts, then there may be reason to doubt the need for the formal rules currently applicable to them. Moreover, if gifts and contracts are alike exchanges, then the disparaging discussions of gifts in the contracts context may be read to reflect a view that market exchanges are more significant than other exchanges. This view ignores the possibility that not all wealth consists of commodities. In the end, the use of intent-defeating formalities in an area of law ostensibly committed to the effectuation of intent may express an underlying ambivalence about the true "worth" of gifts in a society organized around commodities markets.

I. FORMALITY AND FUNCTION IN DONATIVE TRANSFERS

The law of gratuitous transfers is said to have as its object the effectuation of donative intent.⁴ In the abstract, there is nothing incongruous about the

4. See, e.g., Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) ("One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.") (citation omitted); Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("The first principle of the law of wills is freedom of testation."); Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 U. ILL. L. REV. 341, 350 (1926) ("It is not to be doubted that the tendency of the law has been . . . towards the policy of allowing intention to govern, or that such a tendency is a wise one.").

use of formal requirements to serve this goal. The formalities required by the law of gratuitous transfers can be conceived as but means to individually chosen ends, of concern only *if* a donor has decided to make a gratuitous transfer, and pertaining only to *how* the transfer is to be made.⁵

Yet it is widely recognized that in reality, formalities often defeat donative intent. The undelivered gift remains the donor's property however passionately she or he may have wished to give it away; the unwitnessed formal will is of no effect.⁶ The irony of these results has not gone unremarked. Why should a body of law ostensibly devoted to the effectuation of donative intent adopt a series of requirements that may—and frequently do—thwart that intent?⁷

The commonly accepted answer to this question is that formalities may be justified, despite their intent-defeating potential, on functional grounds. They provide a ritual that alerts the donor to the import of the act she or he is undertaking, they provide reliable evidence of the intent to give and the terms of the gift, they protect donors against fraud, undue influence or the like, and, finally, they channel donors into using easily recognized devices for gratuitous transfers, thus easing administrative burdens and

5. Kennedy, *supra* note 3, at 1691 ("Formalities are premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter. Their purpose is to make sure, first, that the parties know what they are doing, and, second, that the judge will know what they did.").

6. Gulliver & Tilson, *supra* note 4, at 1; Langbein, *supra* note 4, at 489; Mechem, *supra* note 4, at 350.

7. See, e.g., Gulliver & Tilson, *supra* note 4, at 3; Langbein, *supra* note 4, at 491-92. There has been a noticeable trend in recent years to relax the formal requirements for probate transfers. See, e.g., UNIFORM PROBATE CODE (UPC) § 2-502 (eliminating the requirement that a will be signed "at the end") and § 2-505(b) (eliminating the requirement that witnesses to wills be "disinterested"). Further steps in the same direction seem to be in the offing. See Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). The rise in frequency and acceptance of nonprobate transfers has also made it easier for would-be donors to avoid the rigors of formal requirements. See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) [hereinafter Langbein, *The Nonprobate Revolution*].

The actual frequency with which wills or gifts are defeated on formal grounds is difficult to determine. One recent study of will contests concludes that "invalidation of wills in will contests on the ground of nonobservance of testamentary formalities is rare and of minimal significance." Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. & TR. J. 607, 647 (1987). Yet as that study found, only a handful of wills are contested. *Id.* at 614. The infrequency of contests cannot confidently be attributed to lack of formal grounds for contests; potential litigants may simply be disinclined to sue, or they may perceive the will's provisions to be fair, or they may be unaware of the legal remedies available. *Id.* at 614-15. Thus, it cannot confidently be said that compliance with donative formalities is easy or common.

In an area ostensibly devoted to the effectuation of donative intent, the invalidation of even a handful of donative transfers on formal grounds is problematic. The potential of formalities to defeat intent must be taken seriously, regardless how frequently that potential is realized. The ultimate question is why *any* donative transfer should be invalidated on purely formal grounds.

ensuring that intended transfers will be given legal effect.⁸ The functional justification of form has a dual aspect. To the extent that formalities protect donors from impulsiveness, misinterpretation and pressure, their focus is individual, "private" will. On the other hand, to the extent that formalities foster careful deliberation and efficient administration of gifts, their focus is social, "public" good.

The notion that form serves function is not unique to the law of donative transfers; it has been discussed in connection with such other fields as contracts and negotiable instruments.⁹ However, in the donative transfers field it has become so widely accepted that the choice of formal rules no longer seems to be a choice at all. Debate among commentators and, to a lesser extent, courts tends to focus not on whether formalities are appropriate, but instead on whether strict compliance with formalities should be required or whether, in disputed transfers, the functions of form have been satisfied by other means.¹⁰

While the debate concerning the interrelation of form and function is of undeniable importance, there lies beneath the debate a very different question which is worthy of some examination. Why do we need the functions formalities serve? Delivery and attestation requirements can be justified on ceremonial and evidentiary grounds only if donors and those who must effectuate donative transfers require rituals and proofs. If they do indeed have these requirements, why?

The following sections examine this question. Part A explores the historical origins of the formalities of donative transfers. This history suggests that the functions commonly attributed to the formal requirements may not have been of major importance when those requirements were formulated. Part B examines the functional justification of formalities offered in the influential articles by Mechem and by Gulliver and Tilson early in the twentieth century. This examination focuses on the unarticulated assumptions on which the functional justification relies. Part C canvasses the social scientific literature on altruism and giving. This literature presents a vision of giving that is at odds with that presupposed by the traditional functional justification and suggests that the assumptions underlying the traditional justification may be unfounded.

A. *The History of the Formalities of Donative Transfers*

The formalities of the law of donative transfers have a respectable historical pedigree. The modern requirements for a valid will—a writing,

8. Gulliver & Tilson, *supra* note 4, at 3-5; Langbein, *supra* note 4, at 492-97; Mechem, *supra* note 4, at 348-50. See also Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-04 (1941) (discussing these functions in contract law).

9. See, e.g., Friedman, *supra* note 3; Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39 (1974).

10. See, e.g., Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955); Langbein, *supra* note 4; See also *infra* note 72.

signature, witnesses—were codified centuries ago, in the Statute of Wills (1540)¹¹ and the Statute of Frauds (1677).¹² The requirement that a gift be delivered was discussed by Coke as early as 1675,¹³ and though the requirement was not firmly established until late in the nineteenth century, Kent was already insisting upon it in 1806.¹⁴

The sheer age of these formal requirements lends credibility to the functional justification. If they did not do something, how could we have put up with them for so long? This sense of appropriateness is enhanced by scattered references in early cases and treatises to some of the dangers of evidentiary unreliability, perjury, and fraud that preoccupy the twentieth century functional explanations.

The genesis of the now-familiar formal requirements is murky, complicated, and often debated. However, as the review below suggests, what is striking about the history of the requirements is how difficult it is to connect the origins of the requirements to the functional justification that has been offered for them. Formalities may in fact perform the functions ascribed to them, but they do not seem to have been adopted because they do so.

1. Gifts

The need for delivery to complete an inter vivos gift¹⁵ was discussed by early treatise writers, but delivery was not conclusively established as a requirement in England until *Cochrane v. Moore*¹⁶ was decided in 1890.¹⁷ Bracton stated that no gift was complete without tradition of the subject of the gift.¹⁸ Yet in dictum that stirred great controversy later on,¹⁹ Coke

11. The Act of Wills, Words, Primer Fifens, Whereby a Man May Defeif 2 Parts of His Land (Wills Act, 1540), 32 Hen. 8, ch. 1.

12. An Act for Prevention of Frauds and Perjuries (Statute of Frauds), 1677, 29 Car. 2, ch. 3.

13. *Wortes v. Clifton*, 1 Rol. Rep. 61, 81 Eng. Rep. 328 (1675).

14. *Noble v. Smith*, 2 Johns. 52 (N.Y. 1806).

15. The second category of gifts, gifts causa mortis, also requires delivery. R. BROWN, *THE LAW OF PERSONAL PROPERTY* 132 (W. Raushenbush 3d ed. 1975). This article does not specifically discuss gifts causa mortis, which are subject to the additional requirements that they be made in expectation of approaching death and that they be revocable if the donor survives. *Id.* at 130-31.

16. 25 Q.B.D. 57 (1890).

17. *Irons v. Smallpiece*, 2 B. & Ald. 551, 106 Eng. Rep. 467 (1819), appeared to have established that delivery is required in the case of gifts, yet the point remained in dispute thereafter. See *infra* note 24 and accompanying text.

18. 1 BRACTON 128, quoted in Stone, *Delivery in Gifts of Personal Property*, 20 COLUM. L. REV. 196, 196 (1920). Stone holds this statement to be the "genesis" of the delivery requirement. *Id.*

19. See, e.g., *Noble*, 2 Johns. 52; *Irons*, 2 B. & Ald. 551, 106 Eng. Rep. 467. See also Pollock, *Gifts of Chattels Without Delivery*, 6 LAW. Q. REV. 446, 448-49 (1890) (According to Pollock, the common law rule requiring delivery was established during the reign of Edward IV and had not been overruled by any modern decision. This rule was precisely the opposite of the civil law rule and the opposite of that stated by Coke.)

suggested that while delivery was required in the civil law, it was not a requirement in the common law.²⁰ Blackstone wrote that transfer of title by gift could be made "either in writing, or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential."²¹ Although early nineteenth century decisions in both England²² and America²³ held Coke's dictum to be inaccurate, the need for delivery remained in dispute.²⁴ The conflict among the courts provoked the elaborate discussion of the delivery requirement in *Cochrane*.

Some of those who insisted upon delivery prior to the decision in *Cochrane* justified the requirement in functional terms. Blackstone's reference to delivery of possession as "sufficient evidence" of a parol gift invokes the evidentiary function.²⁵ Others, noting the possibility that words of gift might be "inadvertently uttered,"²⁶ required delivery as an "act . . . evincing deliberation and completeness of purpose,"²⁷ and thus invoked the ritual function.²⁸ Finally, courts referred to the "rapacity of unscrupulous attendants"²⁹ and "opportunities of unfair dealing,"³⁰ suggesting sensitivity to the protective function.³¹

In light of this background,³² it is somewhat surprising that neither of the opinions in *Cochrane* relied on or even mentioned the functions of form in holding delivery to be required to effectuate an inter vivos gift. Lord Fry, with whom Lord Bowen concurred, justified the requirement entirely

20. *Wortes*, 1 Rol. Rep. 61, 81 Eng. Rep. 328.

21. 2 W. BLACKSTONE, COMMENTARIES *441.

22. *Irons*, 2 B. & Ald. 551, 106 Eng. Rep. 467.

23. *Noble*, 2 Johns. 52.

24. *Winter v. Winter*, 4 L.T.R. 639, 9 W.R. 747, 127 Rev. Rep. 925 (1861); *Danby v. Tucker*, 31 W.R. 578 (1883). See also *Arrington v. Arrington*, 2 N.C. (1 Hayw.) 1 (1789) (where the identity of the property given can be otherwise proved, delivery is not required).

25. 2 W. BLACKSTONE, COMMENTARIES *441. See also *Pitts v. Magnum*, 18 S.C.L. (2 Bail.) 588, 590 (1832) ("Possession is prima facie evidence of the right to personal property, and nine times out of ten it is the only evidence.").

26. *Adams v. Hayes*, 24 N.C. (1 Ired.) 361, 368 (1842).

27. *Id.*

28. See also *Chevallier v. Wilson*, 1 Tex. 161, 172 (1846) (noting that "in moments of playfulness or anger, or of excited feeling, parents may make loose declarations of having given property to this or that one of their children").

29. *Dickeschied v. Exchange Bank*, 28 W. Va. 340, 368 (1886).

30. *Id.* at 369.

31. See *Noble*, 2 Johns. at 56 (delivery required to prevent mistake and imposition).

32. English courts were also sensitive to the need for formalities in the context of gifts and wills. See, e.g., *Sharlington v. Strotton*, 1 Plowd. 298, 308, 75 Eng. Rep. 454, 470 (1765) (Since words pass from man to man "lightly and inconsiderately," gifts require formalities to ensure that donors will not be bound by words not intended to create legal obligation. Gifts made by deed are binding without inquiry into consideration because "of the great deliberation used in the making of deeds"); *Whitchurch v. Whitchurch*, 25 Eng. Rep. 118, 120 (1721) (formalities act to "hinder . . . [a testator] from surprize"); *Wyndham v. Chetwynd*, 96 Eng. Rep. 53, 55 (1757) (wherein Lord Mansfield discusses the Roman symbolic sale as a means of testamentary disposition and the relationship of that ancient formality to the formalities prescribed by the Statute of Frauds for the making of wills of land).

in historical terms,³³ holding, after extensive review of authorities, that the "old law requiring delivery had never been overruled."³⁴ Lord Fry's historical analysis demonstrated that the delivery requirement had its origins not in function but in medieval notions of seisin, which necessitated "tradition or the delivery . . . from one man to another as essential to the transfer of the property in [a] thing."³⁵

The opinion of Lord Esher is even more striking, for it comes close to repudiating a functional justification for the delivery requirement. Lord Esher noted that "there was a time when" actual delivery was required "as part of the evidence" to prove the transfer of property "by way of exchange or barter, or by way of bargain and sale for a consideration, or by way of . . . a mere gift"³⁶ But, he concluded, "actual delivery in the case of a 'gift' is more than evidence of the existence of the proposition of law which constitutes a gift, . . . it is part of the proposition itself"³⁷

Lord Esher's opinion clearly verges on tautology, holding that delivery is "part of" and not "evidence of" a gift without accounting why.³⁸ Both opinions, in the end, are declaratory, not explanatory.³⁹ Later commentators and courts were quick to supply the omission, suggesting that, whatever the historical origins of the delivery requirement, its perpetuation rested on the

33. Roscoe Pound derided the *Cochrane* court for its use of "the historical method." Pound, *Juristic Science and Law*, 31 HARV. L. REV. 1046, 1057 (1918).

34. The *Cochrane* court concluded:

This review of the authorities leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery: that on that law two exceptions have been grafted, one in the case of deeds, and the other in contracts of sale where the intention of the parties is that the property shall pass before delivery

Cochrane, 25 Q.B.D. at 72-73.

35. *Id.* at 65. See also Stone, *supra* note 18, at 197. For the proposition that delivery is required for gifts of chattels as well as for gifts of land, both the *Cochrane* court and Stone relied, in part, on Maitland, *The Seisin of Chattels*, 1 LAW. Q. REV. 324 (1885); Maitland, *The Mystery of Seisin*, 2 LAW. Q. REV. 481 (1886); and Maitland, *The Beatitude of Seisin*, (pts. 1 & 2), 4 LAW. Q. REV. 24, 286 (1888).

36. *Cochrane*, 25 Q.B.D. at 74.

37. *Id.* at 75.

38. Lord Escher's attempted explanation was as follows:

[T]here cannot be a "gift" without a giving and a taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a "gift." They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift

Cochrane, 25 Q.B.D. at 76. This statement fails to explain why delivery is something other than simply evidence of the necessary "taking."

39. See Pound, *supra* note 33, at 1057 (In *Cochrane*, "[T]he history of legal institutions and legal doctrines is relied upon to give us a conception or a principle from which the rule for a particular situation may be reached.").

need for "cogent evidence"⁴⁰ of gifts to prevent fraud.⁴¹ However persuasive these efforts, they are admittedly post hoc.⁴² The delivery requirement may have persisted for functional reasons, but it is not at all clear that it originated in them.

2. Wills

The development of the modern will in England is difficult to trace through the complications created by the rise of feudalism and primogeniture and the separation of ecclesiastic from secular courts following the Norman Conquest.⁴³ It is clear, however, that testaments of personalty, under supervision of the ecclesiastical courts, were established by the 13th century and that post-mortem disposition of realty could be controlled by the feoffment to uses by the end of the 14th century.⁴⁴ Yet the formalities which are now associated with wills arose much later, in the 16th and 17th centuries. As with the delivery formality in the case of gifts, there is no clear causal connection between the imposition of execution formalities and the functions currently offered to justify them.

The first formality to be imposed was the requirement of a writing, enacted through the Statute of Wills in 1540.⁴⁵ The absence of any requirement of witnesses suggests little concern for the ritual or protective functions. Though writings help serve the evidentiary function, the statute does not appear to have been primarily concerned with ensuring evidentiary reliability. The required writing did not have to be in the testator's handwriting, and it did not need to bear the testator's signature.

The historical context of the Statute of Wills suggests that the statute was enacted primarily to counteract the effects of the Statute of Uses.⁴⁶ Medieval doctrine held that land could be transferred only by livery of seisin and thus prevented devises of land.⁴⁷ The Statute of Uses effectively

40. Stone, *supra* note 18, at 197.

41. Labatt, *The Inconsistencies of the Laws of Gifts*, 29 AM. U. L. REV. 361, 365 (1895). These attempts to provide an explanation for the delivery requirement came to fruition in Mechem's article, see *infra* text accompanying notes 58-99.

42. Labatt, *supra* note 41, at 365; Mechem, *supra* note 4, at 346; Stone, *supra* note 18, at 197.

43. Post-mortem disposition—through the post-obit gift, the death-bed distribution, and the *cuide*—was possible as early as the Anglo-Saxon period, though it is not clear that any of these devices had the revocable or ambulatory qualities associated with modern wills. On the general history of the English will, see T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 11-23 (2d ed. 1953); 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 314-56 (2d ed. 1898 repr. 1978); A. REPPY & L.J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* (1928).

44. T. ATKINSON, *supra* note 43, at 14.

45. Wills Act, 1540, 32 Hen. 8, ch. 1.

46. An Act Covering Uses and Wills (Statute of Uses), 1535, 27 Hen. 8, ch. 10.

47. T. ATKINSON, *supra* note 43, at 14.

eliminated the mechanism commonly employed to evade this restriction, the feoffment to uses.⁴⁸ It was the gentry's resulting protest over the loss of post-mortem control of land, and not the perceived need for additional formality, that led to the enactment of the Statute of Wills.⁴⁹

More than a century elapsed before the enactment of the Statute of Frauds,⁵⁰ which imposed the bulk of the formal requirements now so familiar to us, including signature and attestation of witnesses.⁵¹ In contrast to the Statute of Wills, the Statute of Frauds seems to have been designed in part with the functions of form in mind. The original bill was "[a]n act for preventing many fraudulent practices which are commonly endeavored to be upheld by perjury, and subornation of perjury."⁵² At least one of the amendments to the original act was offered in response to the infamous

48. Atkinson provides the following illustration:

If A conveyed land to B to the use of C, courts of law recognized B as the owner and would not compel him to perform the use. Chancery, however, would intervene and require B to account to C in accordance with the terms of the use.

By the latter part of the fourteenth century it came to be the practice for A to enfeoff B for the use of such person as A might appoint. The instrument of appointment, enforceable in equity, performed the function of a will.

Id. at 14. See also A. REPPY & L.J. TOMPKINS, *supra* note 43, at 14. Thus owners of land were able to control post-mortem disposition notwithstanding restrictions upon devises and without the feudal prerequisite of livery of seisin.

49. T. ATKINSON, *supra* note 43, at 14; Reppy, *The Ordinance of William the Conqueror—Its Implications in the Modern Law of Succession*, 42 Ky. L.J. 522, 534 (1953); see also J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 217-18 (2d ed. 1979) ("[The Statute of Uses] . . . imposed compulsory primogeniture on a society which had accustomed itself to greater flexibility Lawyers immediately set about finding loop-holes [sic], and landowners set about demanding the repeal of the statute. Within four years, . . . the king restored to the landowner the power to devise land."); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 221 (2d ed. 1981) (the effect of the Statute of Uses was "intolerable, and in 1540 there was passed the Statute of Wills restoring a power of devise") (footnote omitted). The historical record does not make clear why a writing was required.

50. Statute of Frauds, 1677, 29 Car. 2, ch. 3. On the general history of the Statute of Frauds, see 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379-97 (2d ed. 1937); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 599-620 (1975).

51. The Statute of Frauds required that wills of real property be (i) in writing, (ii) signed by the testator or by one who, in the presence of the testator, acted according to the testator's direction, and (iii) attested by three or four credible witnesses. Written wills could be revoked in one of only three ways: (i) by another will or codicil executed according to the same formalities as were required for written wills of real property; (ii) by a writing, signed by the testator in the presence of three or four credible witnesses, declaring the will revoked; or (iii) by destruction or obliteration of the will by the testator or by one who, in the presence of the testator, acts according to the testator's direction and consent. Statute of Frauds, 1677, 29 Car. 2, ch. 3, §§ 5, 6. See also 6 W. HOLDSWORTH, *supra* note 50, at 385. The statute did not apply to wills of personal property in the amount of 30 pounds or less, or to the oral wills of soldiers in actual military service or mariners at sea. Statute of Frauds, 1677, 29 Car. 2, ch. 3, §§ 19, 23. But for restrictions upon oral wills of personal property exceeding 30 pounds, see Statute of Frauds, 1677, 29 Car. 2, ch. 3, §§ 19, 20.

52. 12 JOURNAL OF THE HOUSE OF LORDS 638, quoted in 6 W. HOLDSWORTH, *supra* note 50, at 380.

case of *Cole v. Mordaunt*,⁵³ which involved perjured testimony that a testator's written will containing substantial devises to charities had been orally revoked by a nuncupative will in favor of the testator's wife.⁵⁴

Yet while there is strong evidence of a concern for evidentiary and protective functions at the time the Statute of Frauds was enacted, historians have identified an additional, unrelated, influence on the enactment of the statute: the need for judicial control over juries. At the time the statute was passed, the institution of trial by jury was in a state of transition, with the jury free to decide a case on its own knowledge of the facts, apart from the evidence and contrary to the directions of the court.⁵⁵ By making certain kinds of evidence necessary for the proof of certain transactions, the Statute of Frauds effectively barred juries from reaching conclusions as to whether documents before them were wills or contracts in the absence of such evidence. The statute thus placed "a limitation on the uncontrolled discretion of the jury."⁵⁶ This explanation suggests that the drafters' aims may have been procedural as well as facilitative.

In summary, the power of post-mortem disposition existed in England for centuries before being subject to any formal requirements. The first formality to be imposed, the requirement of a writing, appeared in a statute enacted chiefly to restore the power to devise land, not to enhance evidentiary reliability. It was not until the passage of the Statute of Frauds in 1677 that there was any mention of the need for formalities to combat fraud and perjury. Even then, there is some historical evidence to suggest that the impetus for the statute arose as much out of procedural concerns related to jury control as it did out of concern for the protection of testamentary intent.⁵⁷

53. Unpublished case decided May 22, 1676 (28 Car. II 1676), discussed in Mathew v. Warner, 31 Eng. Rep. 96, 107 n.2 (1798).

54. *Id.* For a discussion of *Cole*, and its influence upon the Statute of Frauds, see A. REPPY & L.J. TOMPKINS, *supra* note 43, at 9. For background on the Statute of Frauds generally, see Hening, *The Original Drafts of the Statute of Frauds (29 Car. II C. 3) and Their Authors*, 61 U. PA. L. REV. 283 (1913).

55. 6 W. HOLDSWORTH, *supra* note 50, at 388. See also G. CHESHIRE & C. FIFOOT, *THE LAW OF CONTRACT* 174 (9th ed. 1976); A.W.B. SIMPSON, *supra* note 50, at 604-05.

56. 6 W. HOLDSWORTH, *supra* note 50, at 388. See also Friedman, *supra* note 3, at 753-55 (mandatory rules, which allow no leeway to the interpreter, enhance the "autonomy" of written documents, binding the interpreter to the legal import of the words used in the document).

57. It is possible to understand the development of the formal requirements in a quite different way from that proposed here. To put things in the simplest possible terms: In the feudal era, when realty was the only asset of real value, all transfers of land required livery of seisin. Livery served all the functions of form, whether it was meant to do so or not. The Statute of Uses ended the need for livery and permitted new modes for conveying realty, e.g., the bargain and sale deed. Thereafter, parties and courts were confronted with problems that had never arisen when livery was required—problems of perjury, fraud, evidence and the like. As these problems became perceptible, courts and legislatures responded, over time developing

B. *The Assumptions Underlying the Functional Justification*

Those who have been most influential in proposing a functional explanation for the formalities of donative transfers do not base their arguments on the historical origins of the formal requirements. Instead, they assert that "well founded . . . considerations of policy lie behind the requirement[s]." ⁵⁸ The formalities, they argue, "should not be revered as ends in themselves"; ⁵⁹ rather, they "seem justifiable only as implements for [the] accomplishment" ⁶⁰ of the "primary" ⁶¹ objective of the law of donative transfers, which is to give effect to any intentional exercise of an owner's power to determine his successors in ownership. ⁶²

Functional explanations of formal requirements are scattered through Anglo-American cases and treatises from the 17th century onward. ⁶³ Yet the functional justification received its most striking—and most influential—expression in articles published in America early in the 20th century, primarily Mechem's *The Requirement of Delivery in Gifts of Chattels* ⁶⁴ and Gulliver and Tilson's *Classification of Gratuitous Transfers*. ⁶⁵ As these articles contain what has now become the standard explanation of the functions of form in donative transfers law, they warrant close examination.

The purpose of both articles was, in a sense, anti-formalist: to demonstrate that transfers could and should be upheld, despite failure to comply literally with formal requirements, if the functions usually served by formalities were

requirements designed to meet them.

There is no historical evidence either to support or to contradict this understanding. While the historical events can be read this way, the question is whether they ought to be so read. The point of the text's discussion is that that question is an open one. It is at least possible that we are inclined to read the historical development of formality in functional terms only because the functionalist rationale is both familiar and appealing to us as 20th century thinkers. On this view, the expectation that the *Cochrane* court or the drafters of the wills' formalities would speak in functional terms is an arguably unreasonable imposition of a 20th century functional perspective on thinkers who did not share that tradition.

58. Mechem, *supra* note 4, at 342. Mechem argued that he was "not in substance urging new doctrine, but . . . only reducing to fundamentals the considerations that have, in fact, actuated the decision of courts." *Id.* at 355.

59. Gulliver & Tilson, *supra* note 4, at 3.

60. *Id.*

61. *Id.*

62. *Id.* at 2; see also E. CLARK, L. LUSKY & A. MURPHY, *GRATUITOUS TRANSFERS* 1 (3d ed. 1985) ("[In] a capitalist economy based on the institution of private property, owners have the widest possible latitude in disposing of their property in accordance with their own wishes whether they be wise or foolish. The statutes and cases in the field have as their purpose the discovery of the true intent of the property owner, not to thwart it, but to give it effect.").

63. See, e.g., *Adams*, 24 N.C. (2 Ired.) at 301; *Noble*, 2 Johns. 52; W. THORNTON, *A TREATISE ON THE LAW RELATING TO GIFTS AND ADVANCEMENTS* 106-08 (1893); 2 W. BLACKSTONE, *COMMENTARIES* *441.

64. Mechem, *supra* note 4.

65. Gulliver & Tilson, *supra* note 4; Fuller's *Consideration and Form*, *supra* note 8, which discussed the functions of form in the context of contract law, was also highly influential.

otherwise performed in the circumstances of the transfer.⁶⁶ The articles identified two major functions ordinarily served by form, and Gulliver and Tilson discussed a third, which they clearly saw as less important.⁶⁷ The first, the ritual function, involves "the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative."⁶⁸ The second function of form is evidentiary. "[T]he existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court."⁶⁹ The third function is protective. "[S]ome of the requirements of the [statutes of wills] have the stated prophylactic purpose of safeguarding the testator, at the time of the execution of the will, against undue influence or other forms of imposition."⁷⁰

There is no denying the popularity and appeal of Mechem's and Gulliver and Tilson's formulation; excerpts from their articles appear in almost every trusts and estates casebook,⁷¹ and much of contemporary scholarship in the trusts and estates field assesses disputed donative transfers in functional terms.⁷² Yet little attention has been paid to the assumptions underlying their argument. These assumptions are critical. The functional explanation asserts that ritual, reliable evidence, and protection (which are usually supplied by formalities, but which may be supplied by other means) are necessary. They are necessary because of the way people are. The functional justification thus depends on a vision of human nature and interaction, an image of the way we "are." The articles offer such a vision, making many conclusory statements about what people will or will not do if unchecked by formalities. As the influence and appeal of the articles depends in some measure on this vision, it is worth describing in depth.

66. Gulliver & Tilson, *supra* note 4, at 17; Mechem, *supra* note 4, at 342.

67. The third function, protection of the testator, was discussed dismissively by Gulliver & Tilson, and not at all by Mechem. The fourth function, the channelling function, is discussed (in connection with wills) by Langbein, *supra* note 4, who attributes it to Fuller (who discussed it in connection with contracts). The need for the channelling function was recognized implicitly by Gulliver & Tilson in their discussion of the distance of courts from events. *See infra* text accompanying notes 85-99.

68. Gulliver & Tilson, *supra* note 4, at 4; *see also* Mechem, *supra* note 4, at 348 ("[D]elivery makes vivid and concrete to the donor the significance of the act he is doing.").

69. Gulliver & Tilson, *supra* note 4, at 4; *see also* Mechem, *supra* note 4, at 349 ("[T]he fact of delivery gives the donee . . . at least prima facie evidence in favor of the alleged gift.").

70. Gulliver & Tilson, *supra* note 4, at 4-5.

71. *See, e.g.*, E. CLARK, L. LUSKY & A. MURPHY, *supra* note 62, at 265-69; J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 183-85 (3d ed. 1984); E. SCOLES & E. HALBACH, DECEDENTS' ESTATES AND TRUSTS 131-34 (4th ed. 1987).

72. *See, e.g.*, Browder, *Giving or Leaving—What is a Will?*, 75 MICH. L. REV. 845 (1977); Langbein, *The Nonprobate Revolution*, *supra* note 7; McGovern, *The Payable on Death Account and Other Will Substitutes*, 67 Nw. U.L. REV. 7 (1972).

1. Ritual

“People are often careless in conversation and in informal writings.”⁷³ It is to prevent such carelessness, wrote Gulliver and Tilson, that ritual is needed. Mechem agreed: “The *wrench* of delivery . . . is an important element to the protection of the donor. If . . . he hardly understands himself just what he means . . . he cannot fail to understand . . . when he hands over the property.”⁷⁴ “[A] moment’s acute consideration” is necessary to protect the “thoughtless and hasty” donor from improvidence.⁷⁵

The picture is clear. People “are” imprudent and careless. Without an external check, our decisions to give are hasty and unconsidered. A ceremony is needed to safeguard us from our apparent propensity for unexamined generosity.

2. Evidence

Since most disputes concerning donative transfers arise after the death of the alleged donor,⁷⁶ the best source of evidence concerning the transaction is invariably unavailable. We are forced in contested cases to rely on evidence of circumstances and on the testimony of witnesses. Mechem and Gulliver and Tilson found this reliance to be problematic for several reasons.

First, our own conduct as donors is difficult to interpret. “What did the donor say? What did he mean? . . . Perhaps he hesitated and contradicted himself so that the outcome of his thought was not readily to be ascertained by witnesses in the flurry of the moment.”⁷⁷ An act “readily and naturally susceptible of but one” interpretation is necessary to settle the “many doubts” witnesses would otherwise have.⁷⁸

The inherent ambiguity of our conduct is perhaps the least troubling part of the problem. More serious is the fact that, as witnesses, we forget and we lie. Gulliver and Tilson put it in gentle terms:

[T]he inaccuracies of oral testimony owing to lapse of memory, misinterpretation of the statements of others, and the more or less unconscious coloring of recollection in the light of the personal interest of the witness or of those with whom he is friendly, are very prevalent; and the possibilities of perjury and forgery cannot be disregarded.⁷⁹

73. Gulliver & Tilson, *supra* note 4, at 3.

74. Mechem, *supra* note 4, at 348 (emphasis in original).

75. *Id.*

76. *Id.* at 350 n.23; Gulliver & Tilson, *supra* note 4, at 4 n.4.

77. Mechem, *supra* note 4, at 349.

78. *Id.*

79. Gulliver & Tilson, *supra* note 4, at 4.

Mechem found the delivery requirement particularly apt as an antidote to donee perjury: "It is easier to fabricate a story than to abstract the property."⁸⁰

Again the picture is clear. At best, people "are" equivocal in their words and conduct; at worst, people "are" prone to be forgetful, inaccurate, and potentially dishonest. Reliable objective evidence is needed because those who survive the donor cannot be trusted to recount faithfully or truly what the donor said and did. We cannot be trusted, this vision implicitly asserts, because we "are" selfish. We will misinterpret, misremember, and misrepresent to obtain more for ourselves and our friends.

3. Protection

The selfishness that makes us unreliable as witnesses could have even worse consequences. We might seek to impose our will on the testator to compel a disposition in our favor. Some of the formal requirements applicable to will execution are, "according to judicial interpretation," meant to protect testators from such imposition.⁸¹ Gulliver and Tilson were openly skeptical about the protective function on multiple grounds. The protective formalities had too often been used to invalidate wills that were not in fact "improper or suspicious"; they were of only doubtful effectiveness, and they were anomalous in that no similar formalities applied to inter vivos transfers.⁸² Yet if the formalities designed to ensure protection of testators were unnecessary, it was not because imposition was actually unlikely. Rather, it was because circumstances suggested that testators "as a class" were in an excellent position to resist pressure. "[A]s the owners of property, earned or inherited, they are likely to be among the more capable and dominant members of our society."⁸³ Gulliver and Tilson's ultimate rejection of the protective function was thus consistent with the view that, as donees, people "are" selfish and grasping.

4. Ability to Understand One Another

The assumptions thus far identified pertain primarily to the "private" side of formalities; they focus on those aspects of human nature that threaten clear expression of the donor's individually chosen ends. The arguments of Mechem and Gulliver and Tilson also reflect assumptions about the difficulties of reliable communication between individuals in society. These difficulties pose problems for the judicial implementation

80. Mechem, *supra* note 4, at 349 (citation omitted).

81. Gulliver & Tilson, *supra* note 4, at 9.

82. *Id.*

83. *Id.* Moreover, wills can be revoked. *Id.*

and administration of gifts, and thus pertain to the "public" side of formalities.⁸⁴

When Mechem proposed that donor conduct was ambiguous,⁸⁵ he highlighted not only the equivocation of donors but the difficulties faced by witnesses confronted with equivocal conduct. Delivery, he said, does more than "mak[e] vivid and concrete to the donor the significance of the act he is doing"⁸⁶; "the act of manual tradition is as unequivocal to actual witnesses of the transaction as to the donor himself."⁸⁷ Without unequivocal, objective acts, people "are" doomed to misunderstand each other.

Gulliver and Tilson were more optimistic about the possibility of accurate interpretation of face-to-face interactions: "If all transfers were required to be made before the court determining their validity, it is probable that no formalities except oral declarations in the presence of the court would be necessary. The court could observe the transferor, hear his statements, and clear up ambiguities by appropriate questions."⁸⁸ Yet however accurately a court might interpret events if it had firsthand knowledge of them, such knowledge is unavailable as a practical matter. "Our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so must accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified"⁸⁹ The human propensity to err or to lie is not alone the problem; it is the court's inability to explore errors and falsifications that necessitates objective evidence substituting for these inquiries.

From quite divergent starting points, Mechem and Gulliver and Tilson end up in a similar place, agreeing that an individual donor's true intentions are—either inherently or structurally—inaccessible to courts in the absence of the tangible evidence formalities produce. This observation is important in light of a second, independent, observation: "The inventiveness and variety of inclination of human beings often produce situations not readily identifiable in terms of recognized legal patterns."⁹⁰

84. The last three sections have focused on the "private" side of the ritual, evidentiary, and protective functions—on the needs and attributes that threaten the formulation and expression of individual intent. The three functions previously discussed have a "public" dimension as well. Society as a whole presumably benefits if individuals' decisions are carefully deliberated and made without pressure, and judicial administration is simplified if evidence is clear and reliable. To the extent that the evidentiary function in particular is justified in terms of these "public," administrative concerns, it relies upon the same assumptions as are identified here with reference to the channelling function.

85. See text accompanying note 77.

86. Mechem, *supra* note 4, at 348.

87. *Id.* at 349.

88. Gulliver & Tilson, *supra* note 4, at 3.

89. *Id.*

90. *Id.* at 1.

Fortunately, “[s]ome human actions fit rather neatly into legal categories”⁹¹ For example, Mechem suggested that “under normal circumstances” the idea of a gift includes the idea of transfer of possession,⁹² and it was, he argued, for that reason⁹³ that delivery was required “[i]n the ordinary case.”⁹⁴ Similarly, Gulliver and Tilson suggested that it was because of “the usual custom in a literate era of signing documents with a complete name” that the wills acts required signatures.⁹⁵

Yet both articles recognize that “exceptional”⁹⁶ cases frequently occur. Indeed the purpose of each article was to argue that the formal requirements so apt in the “normal” cases should not be inflexibly applied to these atypical circumstances, i.e., that since many human actions do not fit neatly into legal categories, the courts should avoid over-reliance on formal classification.

Both articles thus assume that while legal rules can and often do reflect the way people commonly behave, they do not invariably do so. The latter situation is particularly troubling in light of the inability of courts under the best of circumstances to gain an accurate view of individual intentions. Though neither article specifically discussed the channelling function of formalities,⁹⁷ their assumptions demonstrated the need for “uniformity” and “standardization”⁹⁸ of donative transfers in order to eliminate inevitable judicial confusion. Because people “are” unpredictable and only sometimes capable of conforming their behavior to legal categories, courts need formalities if they are to understand us.⁹⁹

C. *Some Reasons to Question the Functionalists’ Assumptions*

The functionalists argue that the formalities of donative transfers are in most instances rational responses to real human needs, to the way people “are.”¹⁰⁰ The needs are seen as pre-existing the formal rules, which function

91. *Id.*

92. Mechem, *supra* note 4, at 347.

93. *Id.* at 346, 349, 353.

94. *Id.* at 353.

95. Gulliver & Tilson, *supra* note 4, at 7.

96. Mechem, *supra* note 4, at 353.

97. Fuller, *supra* note 8, at 801-03; Langbein, *supra* note 4, at 493-94.

98. Langbein, *supra* note 4, at 494.

99. The channelling function does not serve a solely “public” function; it also effectuates the donor’s intent. *See id.*

100. It bears repeating that the functionalists’ primary aim was not to set forth a vision of human nature, but rather to propose a sound policy to guide the application of the formal rules of donative transfers. *See supra* text accompanying notes 66, 96. It was only in the course of explaining the relevant policies that they identified behavioral traits making the rules (or some substitute for the rules) necessary. Yet the traits to which they refer are treated as given: For example, no citation is offered to support Gulliver and Tilson’s assertion that

to meet (or neutralize) them. Whatever the historical origin of the rules, they have survived because of the needs, and if we had different needs—if the rules did not respond to the way people “are”—we would surely have different rules.

The functionalists’ assumptions can be questioned. For one thing, they are difficult to reconcile with one another. On the one hand, in connection with the ritual function, people are seen as prone to quick, unconsidered generosity. Simultaneously, on the other hand, in connection with the evidentiary function, they are seen as selfish and grasping.¹⁰¹ The latter vision is difficult to reconcile not only with the former, but also with the familial context in which gifts are often presumed to be made. The family setting has traditionally been associated with values of sharing and sacrifice, not with self-interest.¹⁰²

More important, intriguing evidence from the social sciences suggests that the functionalist account is simplistic and misleading. Take, for example, the assumption that people “are” selfish. Psychologists have grappled repeatedly with the observation that “for most adults in our society the

“[p]eople are often careless in conversation and in informal writings.” Gulliver & Tilson, *supra* note 4, at 3.

It could be argued that, in identifying the human qualities with which the rules were concerned (carelessness, selfishness, unpredictability and the like), the functionalists were focusing on the behavior not of all or most people but a few “irresponsible” or “unscrupulous” persons. That is, it is possible that the functionalists were arguing (or should be understood to be arguing) that the functions of form are necessary in light of problems that arise at the margin due to the behavior of an unrepresentative subset of the population.

Of course, this is not what the functionalists said; their assertions about “people,” “donors,” and “witnesses” tend to be unqualified, as is illustrated by the quotation from Gulliver and Tilson above. See also Mechem, *supra* note 4, at 348 (describing attributes of “*the lay . . . proposition that a gift has been made*”) (emphasis supplied). To the extent that they considered the matter at all, the functionalists seem to view the behavioral traits they identified as temptations or errors to which all persons are susceptible even if all do not succumb. See, e.g., text accompanying note 79.

The bleakness of the picture of human nature emerging from the functionalist account is not significantly reduced by characterizing the human qualities necessitating formal rules as “potential” rather than “actual.” In any event, if the formalities are directed at a small subgroup of the general population, they seem obviously overbroad. For example, they have the potential to bar enforcement of carefully considered as well as impulsive gifts, or to prevent the receipt of honest as well as perjured testimony.

101. Impulsiveness and selfishness are not necessarily inconsistent; impulsive acts of generosity may be motivated by selfish expectations of some future gift in return. See *infra* text accompanying note 105. Yet the functionalists seem to assume, in connection with the ritual function, that donors, unless restrained, will give too much away without devoting sufficient thought to the matter. That assumption seems at odds with the assumption of selfishness because at least one understanding of what it means to be selfish is that the selfish person never gives without considering “what’s in it for me.”

102. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983). As Olsen points out, this characterization of family life may be extremely questionable. The point here is that there is a gap between the functionalists’ assumptions about human nature in giving and commonly held (albeit possibly inaccurate) views of family life.

greater part of their efforts are designed manifestly to benefit others . . . ,"¹⁰³ by giving to the poor, caring for children, risking their lives in war, helping fellow shoppers who have dropped their grocery bags, or the like.¹⁰⁴ It is perfectly possible, of course, that we "are bad," at least in some measure, and yet for various independent reasons "do good." Indeed, it is often suggested that generous acts are performed for what are, at bottom, purely or truly selfish reasons.¹⁰⁵ Yet the fact that, "for the most part, people do not act in obviously self-serving ways . . ."¹⁰⁶ is problematic for the assumption that people "are" basically selfish, and the view that self-regarding motives are the real source of altruistic behavior is, in the end, "just an ad hoc hypothesis, not evidence . . ."¹⁰⁷

In fact, empirical "evidence"¹⁰⁸ derived from studies of kidney donations raises substantial questions concerning the functionalists' assumption that people "are" selfish.¹⁰⁹ The studies were undertaken in the context of considerable medical skepticism that donors would freely choose, absent intense family pressure or guilt, to threaten their own health and safety in the interest of others.¹¹⁰ They found, however, that a "surprisingly large percentage of all persons who could have volunteered to donate a kidney, actually did offer to do so."¹¹¹ The conclusion of the studies' authors was

103. Lerner & Meindl, *Justice and Altruism*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 213, 220 (J. Rushton & R. Sorrentino eds. 1981) (emphasis in original).

104. *Id.* at 213.

105. See Cohen, *Altruism: Human, Cultural, or What?*, in ALTRUISM, SYMPATHY, AND HELPING: PSYCHOLOGICAL AND SOCIOLOGICAL PRINCIPLES 79, 82-83 (L. Wispe ed. 1978) (noting a "hedonistic paradox": "even the most unselfish act may produce a psychological reward for the actor"); Lerner & Meindl, *supra* note 103, at 213 (the conventional explanation of acts that help others is that they are performed out of self-interest, with the benefits to others being secondary and incidental); Hoffman, *The Development of Empathy*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 41 (J. Rushton & R. Sorrentino eds. 1981) ("The doctrinaire view in psychology has long been that altruism can ultimately be explained in terms of egoistic, self-serving motives.").

106. Lerner & Meindl, *supra* note 103, at 220 (emphasis in original).

107. Hoffman, *supra* note 105, at 41. Because altruistic acts are so difficult to square with the theory that individuals are basically selfish, psychologists have struggled to explain them. We need these explanations only if the acts themselves are puzzling.

108. I refer here not to psychological experiments, but to studies of actual patterns of giving. In addition to the studies discussed below, see J. ROSENFELD, *THE LEGACY OF AGING: INHERITANCE AND DISINHERITANCE IN SOCIAL PERSPECTIVE* (1979); R. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

109. R. FOX & J. SWAZEY, *THE COURAGE TO FAIL: A SOCIAL VIEW OF ORGAN TRANSPLANTS AND DIALYSIS* (1974); R. SIMMONS, S. KLEIN & R. SIMMONS, *GIFT OF LIFE: THE SOCIAL AND PSYCHOLOGICAL IMPACT OF ORGAN TRANSPLANTATION* (1977) [hereinafter R. SIMMONS]; Fellner & Marshall, *Kidney Donors*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 269 (J. Macaulay & L. Berkowitz eds. 1970).

110. R. SIMMONS, *supra* note 109, at 153.

111. *Id.* at 203. The actual number was 57%. See also Fellner & Schwartz, *Altruism in Disrepute*, 284 NEW ENG. J. MED. 582 (1971) (suggesting that a surprisingly high number of strangers would volunteer to donate kidneys as well).

that "individuals find meaningful altruistic acts deeply rewarding intrinsically."¹¹²

Not only did the studies show a surprisingly unselfish willingness to give, they also revealed a noteworthy absence of pressure to donate. Only a small percentage of donors reported feeling direct family pressure,¹¹³ and though reports of more subtle pressure were common, for most donors that pressure seemed to make the decision to give easier rather than harder: "The obligation to sacrifice for one's family was widely accepted as legitimate among those donors"¹¹⁴ These findings are problematic for the assumption, underlying the protective function, that donees will seek to grasp by possibly illegitimate means what would not otherwise be willingly given. Donees and their families were not grasping, and even in the face of those pressures that were exerted, donors did not feel that they donated under duress.¹¹⁵

In addition to raising questions about the functionalists' assumptions of selfishness and pressure, the studies of kidney donors also suggest questions about the assumption of over-zealous giving which underlies the ritual function. The studies did confirm that rather than making "an objective and impartial evaluation of the merits of the alternatives," kidney donors "made an immediate major decision, before even inquiring into the possible consequences for themselves"¹¹⁶ Yet they also found that "most donors themselves feel comfortable, probably more comfortable, without extensive deliberation"¹¹⁷ and that few donors experience significant regrets afterward.¹¹⁸ Rather, donors' happiness and self-esteem rise after donation.¹¹⁹ These findings suggest that even if people "are" as impulsive as the functionalists assumed, that impulsiveness may not pose the sort of "danger" or "threat" worth averting.¹²⁰

112. R. SIMMONS, *supra* note 109, at 445.

113. *Id.* at 431.

114. *Id.*

115. *But see* Simmons, Hickey, Kjellstrand & Simmons, *Family Tension in the Search for a Kidney Donor*, 215 J. A.M.A. 909 (1971), suggesting that the decisionmaking process of eligible donors who did not choose to donate was much less smooth than that of those who did choose to donate.

116. Fellner & Marshall, *supra* note 109, at 278; *see also* R. SIMMONS, *supra* note 109, at 283-84 ("[T]he majority of donors (61%) appear to have known instantaneously that they would give the gift, and they report no conscious period of deliberation.').

117. R. SIMMONS, *supra* note 109, at 285.

118. *Id.* at 431; Fellner & Marshall, *supra* note 109, at 276.

119. R. SIMMONS, *supra* note 109, at 432; Fellner & Marshall, *supra* note 109, at 279.

120. In the functionalists' view, the ideal decision to give is made deliberately and without any pressure; the emphasis is on individual freedom. The findings that actual donors made their decisions immediately in response to pressures perceived to be legitimate suggests that donors experience their decisions neither as totally free nor as theirs alone to make; the emphasis, for some, is on community or familial obligation. In this context, the ritual and protective formalities may operate to isolate donors from ties that are important to them—a

In light of these findings, the studies' authors questioned whether the physician's obligation to obtain informed consent, which—like the ritual function of formalities—is designed to force donors to consider carefully the act they are about to undertake, was properly tailored to donors' actual decision-making processes.¹²¹ The questions the studies raised have implications not only for the need for ritual, but also for the functionalists' assumptions concerning the need for channelling. The functionalists argued that channelling is required because courts will otherwise have difficulty sorting complicated human behavior into proper legal categories. The channelling function recognizes that human behavior will not always fit neatly into legal categories, but it assumes that one or another of the available categories will correspond in reasonable measure to most individuals' intentions; channelling forces individuals to denote clearly which category they have chosen. The studies' results, however, suggest that the legal categories into which conduct is sought to be channelled may not correspond in any meaningful fashion to the way in which that conduct is experienced by the actors involved. In such circumstances, channelling will compound, not resolve, problems of communication between individuals and courts by forcing individuals to opt among legal categories that do not in fact reflect their intentions.

The studies of kidney donations were not designed to prove or disprove broad claims about giving or human nature generally. However, their findings suggest that there is a reality other than that described by the functionalists—that, at least in some contexts, people “are” quite different from the way the functionalists saw them. These findings are significant because they go to the root of the functional justification of form. If humans do not have the needs identified by the functionalists, then what purpose do the formalities serve?

These observations form an important backdrop for the second ground on which the functionalists' assumptions can be challenged. Even without contesting the existence of the needs the functionalists described, it is important to question their vision that the needs pre-exist and give rise to the formal rules. An alternative view is that legal rules do not simply reflect reality—the way things or people “are”—but help to create it by limiting what we can imagine about ourselves and what is possible for us.¹²² The

function of debatable value. The idea that formalities and the functions of form may not merely reflect the “reality” of individual decisionmaking but help to create it is developed *infra* at text accompanying notes 122-35.

121. Fellner & Marshall, *supra* note 109, at 280.

122. See generally Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281, 287 (D. Kairys ed. 1982) (“Law, like religion . . . , is one of these clusters of belief . . . that convince people that all the many hierarchical relations in which they live and work are natural and necessary.”); Gordon, *Critical Legal Histories*, 36

functional justification of formalities can be understood as a "structure of consciousness," i.e., "a shared vision of the social universe that underlies a society's culture and also shapes the society's view of what social relationships are 'natural' and, therefore, what social reforms are possible."¹²³

There is some empirical evidence to suggest that this is more than a theoretical possibility. In a pioneering study contrasting the safety and frequency of blood donation in England and the United States,¹²⁴ Richard Titmuss concluded that "[t]he forms and functions of giving embody moral, social, psychological, religious, legal and aesthetic ideas They may contribute to integrative processes in a society (binding together different ethnic, religious and generational groups) or they may spread, through separatist and segregationist acts, the reality and sense of alienation"¹²⁵

The voluntary donation of blood is, in Titmuss' view, "the closest approximation in social reality to the abstract concept of a 'free human gift,'"¹²⁶ undertaken without contract or compulsion, without expectation of reward or penalty, and without knowledge of the beneficiary.¹²⁷ Titmuss found disturbing differences between patterns of blood donation in England, where donation is made on a voluntary basis through the National Health Service, and in the United States, where "the trend appears to be markedly in the direction of increasing commercialization of blood and donor relationships."¹²⁸ American systems of paid donations and commercial blood banking result, Titmuss found, in a disproportionately poor and unskilled donor population,¹²⁹ a less safe blood supply,¹³⁰ and in greater shortages of blood.¹³¹ On this basis, he roundly criticized a market system for blood¹³² and praised the National Health Service,¹³³ concluding that "the ways in which society organizes and structures its social institutions—and particularly

STAN. L. REV. 57, 111 (1984) ("[T]he legal forms we use set limits on what we can imagine as practical options [They] condition not just our power to get what we want but what we want (or think we can get) itself."); see also Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 999 (1985) ("Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority Since our stories influence how we imagine, as well as how we describe, our relationships, our stories also limit who we can be.") (citation omitted).

123. Olsen, *supra* note 102, at 1497-98.

124. R. TITMUSS, *supra* note 108.

125. *Id.* at 71.

126. *Id.* at 88.

127. *Id.* at 88-89.

128. *Id.* at 119.

129. *Id.*

130. *Id.* at 143-57.

131. *Id.* at 157.

132. *Id.* at 198-99, 213, 242. Economists have challenged Titmuss' critique of the market. See, e.g., Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343 (1972); Kessel, *Transfused Blood, Serum Hepatitis, and the Coase Theorem*, 17 J. L. & ECON. 265 (1974); Solow, *Blood and Thunder*, 80 YALE L.J. 1696 (1971).

133. R. TITMUSS, *supra* note 108, at 225.

its health and welfare systems—can encourage or discourage the altruistic in man; such systems can foster integration or alienation”¹³⁴

Like the studies of kidney donations, Titmuss’ study was confined to a relatively narrow context and may be an inappropriate basis for generalizations concerning the way people “are.”¹³⁵ Yet his conclusions have powerful implications for the functionalists’ assumptions. While the functionalists assert that the human needs they described exist prior to and as a basis for the rules that serve them, Titmuss’ study suggests that, at least in some situations, those rules may have a hand in defining or creating those needs. Formalities make giving more difficult; by discouraging giving, they may encourage the very selfishness they are, in the functionalists’ view, designed to combat. Of course, it is no more fair to say that people “are” altruistic in the absence of formal rules than it is to say that people “are” selfish in the absence of formal checks. The point is that it may be impossible to say anything very credible about the way people “are” in the abstract because part of what determines how and what we “are” is the rules to which we are subject.¹³⁶

As the functionalists themselves acknowledged,¹³⁷ our legal system is committed, at least ostensibly, to permitting individuals to decide whether and to whom they should give. Other systems are possible. The civil law regime of forced heirship limits owners’ freedom to make gifts,¹³⁸ and one could imagine a society in which property owned at death was collected by the state for distribution to the needy rather than distributed in accordance with individuals’ wills.¹³⁹ The private decisions to which our legal system

134. *Id.* Titmuss’ conclusions that the market system produces less safe blood and discourages altruism have been challenged, as have some of the empirical data on which he based those conclusions. See *supra* note 132.

The empirical questions concerning the accuracy of Titmuss’ data now seem somewhat moot. When Titmuss wrote, the chief threat to the safety of donated blood was hepatitis, and his study of donors concentrated on the risk factors associated with that disease. Any accurate account of the safety of donated blood today would presumably focus primarily on the risk factors associated with AIDS.

The challenges to Titmuss’ conclusions concerning the market have raised the possibility that commercialism is not necessarily antithetical either to a safe blood supply or to altruism. Those who argue, contrary to Titmuss, that markets facilitate—or at any rate do not reduce—altruism implicitly concede Titmuss’ claim that there is a connection between social institutions and altruism. The economists seem to disagree with Titmuss only about *which* social institutions (the market versus voluntarism) *best* promote altruism.

135. Titmuss believed his conclusions had implications in other contexts. See R. TITMUSS, *supra* note 108, at 215, 221, 224.

136. See Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (examining the relationship between rules of law and private preferences).

137. Gulliver & Tilson, *supra* note 4, at 2; Langbein, *supra* note 4, at 491; Mechem, *supra* note 4, at 350.

138. See *infra* text accompanying notes 206-16.

139. Whether complete abolition of the power of testation would be upheld under the United States Constitution is another question. Compare *Hodel v. Irving*, 107 S. Ct. 2076,

chooses to give effect can have a significant economic impact on the allocation of wealth; consider, for example, the testator whose primary asset consists of a controlling block of shares in a major corporation.¹⁴⁰

It is in this context that the questions raised above about the functionalists' assumptions must be understood. In a system committed to freedom of disposition, why should we assume, as the functionalists do, that decisions to give are suspect? In such a system, why should we impose requirements that have the potential to frustrate individuals' wishes to give? A contract may be made orally,¹⁴¹ but a gift cannot.¹⁴² If the legal system is prepared to leave important wealth allocation decisions in private hands—as it purports to be with respect to contracts and donative transfers alike—the functionalists do not explain convincingly why the law imposes the particular requirements it does in the case of decisions to make gifts, or why it should impose different requirements for gifts than it does for contracts. These issues are explored in Part II.

II. GIFTS AND CONSIDERATION

It has become commonplace to define gifts as transfers without consideration.¹⁴³ It is only when consideration is absent that the formalities of delivery or of the wills acts are required; if consideration is present, the transfer is by definition not a gift, and a different set of doctrinal requirements (looking to offer, acceptance and the like) applies. The consideration doctrine is thus critical in demarking the line between gifts and bargains, and the justifications offered for it shed light on the way in which the law conceptualizes gifts.

Conventional approaches to the consideration doctrine seek to justify consideration in terms of the larger goals of contract law. Like the law of donative transfers, the law of contracts accords to individuals, in some

2084 (1987) (“[C]omplete abolition of both the descent and devise of a particular class of property may be a taking . . .”) with *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (“Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”).

140. The extent to which donative transfers have economically significant effects on the distribution of wealth is a matter of some dispute. See *infra* text accompanying note 174. The issue has been explored primarily in the context of donative promises. See *infra* text accompanying notes 173-78. See also Fellows, *Donative Promises Redux*, in *PROPERTY LAW AND LEGAL EDUCATION 27* (P. Hay & M. Hoeflich eds. 1988).

141. Except, of course, for contracts within the Statute of Frauds.

142. R. BROWN, *supra* note 15, § 7.2, at 78.

143. See, e.g., *Almeida v. Almeida*, 4 Haw. App. 513, 669 P.2d 174 (1983); *Stone v. Lynch*, 312 N.C. 739, 325 S.E.2d 230 (1985); *Matter of Estate of Carr*, 99 A.D.2d 390, 473 N.Y.S.2d 179 (1984); *In re Baptist Fellowship of Randolph Inc.*, 144 Vt. 636, 481 A.2d 1274 (1984). For additional cases with similar definitions of “gift,” see 38 AM. JUR. 2D *Gifts* § 1 nn.1, 3, 4 (1968); 38 C.J.S. *Gifts* § 1 n.1 (1943).

measure, the power to determine their obligations to others,¹⁴⁴ and, as is true of the law of donative transfers, it must decide whether legal effect should be given to all or only some of these individual determinations. That decision depends on a combination of two factors: the ease and reliability with which the court can ascertain what the private decision was (a matter of form) and the social and economic importance the court accords to the private decision (a matter of substance).¹⁴⁵

In the law of donative transfers, the decision to give effect to private decision-making is said to be based primarily on form; a will not violative of public policy is valid, regardless of the nature or wisdom of the testator's wishes, as long as it is executed in compliance with the wills act.¹⁴⁶ However, contract law approaches private decision-making differently. It classifies promises on substantive grounds first, differentiating between individual decisions with important social or economic consequences and decisions without such importance. The former are deemed to merit enforcement without regard to form; the latter merit enforcement, if at all, only if made formally.

The substantive function of the consideration requirement, in this view, is to mark off acts and promises of sufficient inherent importance to warrant legal intervention, regardless of form, from acts and promises which lack such importance.¹⁴⁷ Executory bargains are said to be in the first category, promises of gifts in the second. The justification of consideration in substantive terms thus reflects the view not only that promises of bargains and of gifts are fundamentally different, but also that the former are more important than the latter.

If the substantive insignificance of gift promises explains why they should be denied enforcement when made informally, it does not conclude the question whether promises of gift should be enforced when their form reliably establishes that they have actually been made. At least in theory, formality can provide an independent, nonsubstantive ground for the enforcement of such promises, just as formality determines the enforceability

144. On contracts as private law-making, see Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933); Fuller, *supra* note 8, at 806; Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 729 (1931). On wills as private law-making, see *supra* notes 4, 62. Private law-making power is not absolute. It is limited, *inter alia*, by statutes designed to protect the family (e.g., the elective share), by doctrines designed to prevent unfairness (e.g., unconscionability), and by considerations of public policy.

145. Fuller, *supra* note 8, at 799; Mason, *supra* note 2, at 832; von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1016-17 (1959).

146. See, e.g., E. CLARK, L. LUSKY & A. MURPHY, *supra* note 62, at 1. For a suggestion that courts may, in fact, be influenced by their perception of the wisdom of the testator's wishes when they assess mental capacity, see Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043 (1987).

147. Fuller, *supra* note 8, at 808-09.

of donative transfers. In the eyes of some, consideration can, in addition to its substantive role, function as a formality, rendering otherwise unimportant gift promises enforceable. Not all consideration theorists agree that formality ought to substitute for substantive importance as a basis for enforcing gift promises. Yet their debate with those who would enforce formally made gift promises is to some extent moot. The courts have viewed the doctrine of "nominal consideration," in which consideration is used as a form, with some skepticism, and most agree that no alternative formality has been developed in the area of gift promises.

This section examines traditional understandings of the consideration doctrine in light of their implications for the gift/bargain dichotomy. Part A explores why executory bargains are considered substantively more important than promises of gifts. The explanations of why informal bargains are more deserving of legal intervention than informal gifts rely on a clear vision of the necessity and primacy of the market as an allocator of social utility in a commercial society. Part B explores why gift promises are thought to merit enforcement on the basis of form alone. The relaxation of requirements for the seal is thought to have rendered that device useless, and in the absence of an accepted new formal mechanism there is some doubt among commentators as to whether gift promises can be made with the requisite formality. Part C analyses the interrelationship between consideration's substantive and formal functions as well as its implications for our understanding of what gifts are. The discussions of consideration suggest that when we say gifts are not bargains we also say a good deal more; we say, in effect, that they are rare, suspect, and trivial.

A. *The Substantive Dimension of Consideration*

In its substantive dimension, consideration enables courts to decide which promises most deserve legal attention. "The law does not make contracts out of all promises The legal enforcement of all promises is expensive. No more expense should be incurred for the enforcement of promises than the needs of our social order make imperative."¹⁴⁸

The "costs" of (over)enforcing promises are two-fold. There are, first, administrative costs, "the social effort expended in the legal procedure

148. Willis, *Rationale of the Law of Contracts*, 11 IND. L.J. 227, 230 (1935). See also Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 852 (1941) ("There is no sound a priori reason for assuming that all assurances intended to be promises should be enforced When a court acts, it should be to advance some interest of the social organization of which it is a part."); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 942 (1958) (Not every promise, even though it may arouse some expectation, should be legally enforceable.).

necessary to enforcement.”¹⁴⁹ The second cost is “less tangible and more important.”¹⁵⁰ “There is a real need for a field of human intercourse freed from legal restraints, for a field where men may without liability withdraw assurances they have once given.”¹⁵¹

In light of these costs, judicial intervention should be reserved for promises serving “some socially useful purpose.”¹⁵² The affirmative social purpose of the consideration requirement derives from the role of the market in the allocation of wealth in modern industrial society:

In a modern “free enterprise” society of the eighteenth to the twentieth centuries, economic institutions supported and economic processes depended upon the market . . . and the practice or habit of promise-making became a pattern of our culture. Since this promise-making occurred as a part of bargains, and as a means of controlling the future, a legal rule that bargained-for promises are enforceable serves to support and to reenforce the use of contract as an economic device, and thus serves the needs of society.¹⁵³

Related to consideration’s role in responding to the needs of the market is its function of protecting expectations in a society accustomed to market norms. In a commercial, credit economy, where wealth “is made up largely of promises,”¹⁵⁴ reliance on promises “is a matter of tacit presupposition.”¹⁵⁵ In such a society, a “claim or want or demand . . . that promises be kept . . . , a social interest in the stability of promises as a social and economic institution, becomes of the first importance.”¹⁵⁶ The consideration doctrine,

149. Fuller, *supra* note 8, at 813. See also Eisenberg, *supra* note 2, at 2 (“[C]ontract rules must reflect considerations of administrability . . . as well as considerations of substance.”). To the extent that the social effort is expended merely in establishing that a promise was made, that expenditure can be reduced if promises are made formally. The issue then becomes whether some promises are sufficiently important to warrant the social effort that the absence of form will necessitate. See *infra* text accompanying notes 152-77.

150. Fuller, *supra* note 8, at 813.

151. *Id.* (citation omitted). See also Willis, *supra* note 148, at 230 (“If social control was applied to all promises there would be very little opportunity left for self-control. So far as it is possible the making and performance of promises should, therefore, be left to personal liberty.”).

152. Hays, *supra* note 148, at 852.

153. Patterson, *supra* note 148, at 945 (citation omitted); see also Fuller, *supra* note 8, at 809 (“In modern society the most familiar field of regulation by private autonomy is that having to do with the exchange of goods and services”); Hays, *supra* note 148, at 853 (“[T]he effective operation of the going community plainly requires enforcement [of business exchange promises.]”); Llewellyn, *supra* note 144, at 717 (“Bargain is then the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U.S.S.R.) for apportionment of productive energy and of product.”).

154. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

155. Llewellyn, *supra* note 144, at 709. See also Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 784 (1941) (“Business calculations assume inevitably the dependability of undertakings about future conduct.”).

156. R. POUND, *supra* note 154, at 237.

properly applied,¹⁵⁷ ensures enforcement of those promises which are reasonably understood to be binding and which are customarily relied on under prevailing "business morals."¹⁵⁸

Like the functional justification of the formalities of donative transfers, the justification of consideration on the substantive ground that it affirmatively promotes social utility rests on noteworthy assumptions. The notion that the law should enforce those promises that contribute to market processes assumes that the market is a necessary and valuable device for the creation as well as the allocation of wealth. The notion that the law should enforce those promises by which business people customarily expect to be bound assumes a distinct market morality in which ordinary reliance ought to be fostered. It is not just that reliance on business promises is commonplace, but that it ought to be commonplace. As business life requires trust, business promises ought to be kept.¹⁵⁹ Just as the functionalist assumption that people are selfish in giving seems at odds with the altruistic, familial context with which gifts are usually associated, the assumption that business people trade on trust seems at odds with the self-interested, arm's length context with which bargains are usually associated. Nonetheless, the prevalence and importance of market bargains is seen to make enforcement of those bargains essential.

If consideration serves one social purpose by affirmatively promoting enforcement of those informal, business promises which reasonably produce expectations in a market society, it serves an equally important social purpose in the negative, by preventing enforcement of informal promises whose social utility does not justify the costs of enforcement. Consideration theorists recognized that "the characteristic effects of the doctrine of consideration are to be seen only where consideration is lacking, never where it is present."¹⁶⁰ In this light, the consideration requirement is seen as serving the "deterrent" policy of rendering unenforceable "transaction types considered suspect or of marginal value," at least in the absence of formal safeguards.¹⁶¹ The type of promise most frequently cited as being in this

157. Those who wrote about consideration were aware that the doctrine was (and is) not always consistently or rationally applied. Indeed, like the functionalists, their effort was to define the appropriate scope and application of the doctrine.

158. R. POUND, *supra* note 154, at 281.

159. See Pound, *Promise or Bargain?*, 33 *TUL. L. REV.* 455, 455-56 (1959):

In civilized society men must be able to assume that those with whom they deal in the general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto.

160. Mason, *supra* note 2, at 831.

161. von Mehren, *supra* note 145, at 1017.

category is the gratuitous promise, the promise to make a gift.¹⁶²

The reasons offered to explain why consideration should be used to bar enforcement of promises to make gifts portray giving and bargaining as almost totally distinct activities. While business promises are everyday occurrences, "personal altruism is rare and from strangers even rarer,"¹⁶³ so promises prompted by affection¹⁶⁴ "are seldom made."¹⁶⁵ In contrast to business bargains, where considerations of self-advantage put parties in a "circumspective frame of mind,"¹⁶⁶ gift promises "are frequently made in highly emotional states brought on by surges of gratitude, impulses of display, or other intense but transient feelings."¹⁶⁷

Just as donors tend to make gift promises casually and without deliberation,¹⁶⁸ donees tend to take such promises less seriously than business promises.¹⁶⁹ Whereas reliance on business bargains is a matter of tacit presupposition, reliance on gift promises is foolhardy: "Things being what they are (and apparently always have been), only a fool would rely on a promise that voices a sudden affection."¹⁷⁰

162. See, e.g., Ballentine, *Mutuality of Consideration*, 28 HARV. L. REV. 121, 121 (1914) ("The underlying principle of consideration would seem to be negative, a denial that ordinarily there is sufficient reason why gratuitous promises should be enforced."); Fuller, *supra* note 8, at 815 ("[G]ratuities . . . do not present an especially pressing case for the application of the principle of private autonomy . . .").

163. Stoljar, *A Rationale of Gifts and Favours*, 19 MOD. L. REV. 237, 249 (1956).

164. Charitable subscriptions are in a different category. They are often seen as being motivated not by benevolence, but by pressure or a desire to increase one's status. See, e.g., Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 17 (1942); Stoljar, *supra* note 163, at 241.

165. Havighurst, *supra* note 164, at 15. See also Hays, *supra* note 148, at 860-61 (remarkably few cases involving gift promises reach the courts).

As is pointed out *infra* note 176, commentators who spoke of the rarity of gift promises also tended to speak of alternative devices (e.g., delivery or wills) for making gifts. It is thus not clear that they were prepared to argue that gifts were, in absolute terms, uncommon. In most instances, their arguments were cast in relative terms: Compared to executory bargains, gift promises are rare; compared to business transfers, gift transfers are unlikely to require legal attention. The claim that gifts are uncommon must, then, be understood to be made in these comparative terms.

166. Fuller, *supra* note 8, at 816 n.27 (quoting Austin, *Fragments—On Contracts*, 2 LECTURES IN JURISPRUDENCE 939, 940 (4th ed. 1873); see also Hamson, *The Reform of Consideration*, 54 LAW. Q. REV. 233, 246 (1938) ("[T]he fact of the bargain . . . is calculated to put the parties on their guard."); cf. Llewellyn, *supra* note 144, at 743 ("[T]he existence of a bargain equivalency does indeed commonly evidence positively that a promise was deliberate, . . . reduces the danger from possible perjury," and suggests that expectations are reasonable.)

167. Eisenberg, *supra* note 2, at 5.

168. See, e.g., *id.*; Hamson, *supra* note 166, at 246; Patterson, *supra* note 148, at 949; Sharp, *supra* note 155, at 788.

169. R. POUND, *supra* note 154, at 280-81; Hamson, *supra* note 166, at 246.

170. Stoljar, *supra* note 163, at 249 (citation omitted); see also A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. 1, ch. II at 19 (5th ed. 1811) ("Nobody but a beggar chooses to depend chiefly on the benevolence of his fellow citizens."); Hamson, *supra* note 166, at 246 (Promisees know that gratuitous promises are not to be construed in the same way as bargains); Patterson, *supra* note 148, at 943 (Gift promises are

The assessment of gift promises also raises factual and administrative problems not encountered with respect to bargains. "[T]he obligation created by a donative promise may be excused by acts of the promisee amounting to *ingratitude*, or by personal circumstances of the promisor that render keeping the promise *improvident*."¹⁷¹ Yet, "what constitutes ingratitude and improvidence is very difficult to determine, particularly in the context of the intimate relationships that often give rise to donative promises, and this difficulty would add substantially to the problem of administration."¹⁷²

The most important respect in which gift promises are said to differ from the executory bargains enforced under the consideration doctrine is that they do not involve exchanges. In respect of consideration, "our 'archetype' is the business trade of economic values in the form of goods, services, or money. To the degree that a particular case deviates from this archetype, the incentives to judicial intervention decrease . . ."¹⁷³ The business trade is the archetype because "the great bulk of the more important promises are made for the purpose of securing something in exchange."¹⁷⁴ Gift promises are less important because in that context "[the donee] seeks to get something for nothing."¹⁷⁵ While the market could not function to meet society's needs without business promises, "it seems doubtful that there is any substantial need for making gift-promises enforceable in view of the facilities for making a present and final gift and the availability of testa-

vague and tend to be subject to a variety of unspecified excuses). Moreover, in the absence of reliance, the donee's injuries are likely to be slight. Eisenberg, *supra* note 2, at 3.

If the donee does rely, incurring costs or conferring benefits on the donor, that reliance or unjust enrichment may be an independent substantive ground for enforcing the promise. Fuller, *supra* note 8, at 810-13; Havighurst, *supra* note 164, at 16.

171. Eisenberg, *supra* note 2, at 5 (emphasis in original). See also Havighurst, *supra* note 164, at 16 (Where gift promises are not performed, it is probably because "circumstances have changed since the making of the promise, either with respect to the financial status of the promisor or with respect to the needs of other natural objects of bounty.") (citation omitted).

172. Eisenberg, *supra* note 2, at 6 (citation omitted). Essentially the same point has been made in ethical terms. The moral obligation to fulfill promises is qualified by "vague and unspecified excuses" such as "change of circumstances" or "unforeseen disadvantages." Because the expectations reasonably created by promises are so varied, expectation provides only an uncertain basis for deciding which promises to enforce. Patterson, *supra* note 148, at 943.

173. Fuller, *supra* note 8, at 818.

174. Havighurst, *supra* note 164, at 14. See also Ballentine, *supra* note 162, at 134 (The law enforces "executory two-sided bargains" and not "one-sided or gratuitous promises" because "[w]ithout some . . . legal guarantee that reciprocal bargains are binding, men would be unable to do business . . .").

175. Ballentine, *supra* note 162, at 121. See also *id.* at 134 ("Where by the terms of the bargain the plaintiff does not make any reciprocal undertaking and promises nothing definite or certain in return . . . we have an entirely one-sided proposition."). Compare A. СМТН, *supra* note 170, at 19 ("Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want . . .").

mentary disposition."¹⁷⁶ Ultimately, business trades have an economic and social utility that gifts simply lack: "While an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is . . . a 'sterile transmission.'"¹⁷⁷

B. *Gift Promises and Form*

However unimportant or unwise gift promises might be, donors may still wish to make them.¹⁷⁸ The question then arises whether, in light of gift promises' lack of social utility, there are any circumstances under which such promises should be given effect.¹⁷⁹ The answer to this question depends on whether the formality of a gift promise can compensate for its substantive unworthiness.

Some believe that only those promises "significant either to the economic or the moral organization of society" warrant enforcement, and that "deliberation, seriousness of purpose, intent to be legally bound, even if they [are] actually indicated by [a] formal device, are not, in themselves and

176. Patterson, *supra* note 148, at 955 (citation omitted). See also Havighurst, *supra* note 164, at 15 ("If the prospective donor's purpose is to distribute property with death in mind, the will, the trust, or more rarely, the executed gift are the natural devices to employ.") (citation omitted); Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 417 (1977) (Gift promises "tend both to involve small stakes and to be made in family settings where there are economically superior alternatives to legal enforcement.").

As many commentators have noted, gratuitous declarations of trust are enforceable without formality notwithstanding their functional similarity to (unenforceable) promises to make a gift. See, e.g., Fellows, *supra* note 140; Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309 (1978). Thus, such trusts offer an easy alternative to the donor who desires, in effect, to make a gift promise. It has been pointed out, however, that "[i]n practical terms, . . . the law never suffers the inconsistency of revocable donative promises and irrevocable self-declared trusts because irrevocable self-declared trusts in which the donor reserves an income interest usually will not make good planning sense." Fellows, *supra* note 140, at 34-35 (citation omitted).

177. Fuller, *supra* note 8, at 815 (quoting BUFNOIR, PROPRIETE ET CONTRAT (2d ed. 1924)). See also Eisenberg, *supra* note 2, at 4 (It is not clear that "independent social interests are implicated" by gift promises; even if redistribution of wealth were an appropriate goal of contract law, "the enforcement of donative promises would be a relatively trivial instrument for achieving that end."); Sharp, *supra* note 155, at 788 (Gift promises "are of limited practical importance.").

On the continental suspicion concerning gifts, see von Mehren, *supra* note 145, at 1017 n.34, and for a more elaborate treatment, J. DAWSON, GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED (1980).

178. Posner, *supra* note 176, at 412-14.

179. As noted, *supra* note 170, unjust enrichment of the promisor or reliance by the promisee are substantive factors which could justify enforcing promises that otherwise would lack the desirability of exchanges. The remainder of the discussion here assumes neither of these factors is present. For a discussion of detrimental reliance as a basis for enforcing gift promises, see Eisenberg, *supra* note 2, at 18-31; Fellows, *supra* note 140, at 37-41.

apart from other factors, proper grounds for enforcing promises."¹⁸⁰ Others, focusing on the factual and administrative complexity of gift promises, assert that even if formalities "address the problems of deliberative intent and evidentiary security," they cannot alone "meet the problems of improvidence and ingratitude."¹⁸¹

For many, however, the relative administrative complexity and economic unimportance of gift promises weighs against enforcing only informal promises of gifts. A gift promise whose form denotes deliberation and provides evidentiary reliability can, in this view, be enforced on the basis of its form alone. Gift promises do not, in general, "present an especially pressing case for the application of the principle of private autonomy."¹⁸² Yet, "the greater that assurance" that the functions of form have been satisfied, "the larger the scope we may be willing to ascribe to private autonomy."¹⁸³ A highly formal gift promise thus may qualify for enforcement.¹⁸⁴

The question then of course becomes whether any formality providing the necessary safeguards can be found. At one time, the seal could serve as the requisite formality,¹⁸⁵ but its reduction to a printed "L.S." is widely agreed to render it ineffective for this purpose.¹⁸⁶ The failure of reforms such as the Uniform Written Obligations Act¹⁸⁷ suggests that the need for a form to replace the seal still exists.¹⁸⁸

180. Hays, *supra* note 148, at 852-53. See also Patterson, *supra* note 148, at 941 ("The notion that a promise should be either legally or ethically binding on the promisor *merely* because it expresses his will to be bound, or his serious intention to assume a legal obligation, seems entirely unfounded (although his will or his intention is a relevant fact).") (emphasis in original) (citation omitted).

181. Eisenberg, *supra* note 2, at 13.

182. Fuller, *supra* note 8, at 815. Compare *id.* at 809 ("[T]he most familiar field of regulation by private autonomy is that having to do with the exchange of goods and services.").

183. *Id.* at 814.

184. See, e.g., Sharp, *supra* note 155, at 790 ("It should . . . be possible to make promises of gifts which will be enforceable"; gift promises should be enforced only if "solemnized by some such form as the use of clear words of promise, or some other more elaborate modern formal safeguard.").

185. See, e.g., Patterson, *supra* note 148, at 934-35, 943, 949; von Mehren, *supra* note 145, at 1052.

186. See, e.g., Hays, *supra* note 148, at 851; Patterson, *supra* note 148, at 949.

187. As originally drafted, Section 1 of the Act provided that "[a] written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." S. WILLISTON, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 584 (1925). According to the author, Professor Samuel Williston, the Act's purpose was "to make as a substitute for the very technical and easily substituted [seal], an expression which nobody can misunderstand, which clearly indicates that it is intended to create a legal obligation." *Id.* at 196 (comments of Professor Williston before the 35th Annual Conference of Commissioners on Uniform State Laws, 1925).

For criticisms of the Act, see Reeve, *The Uniform Written Obligations Act*, 76 U. PA. L. REV. 580, 585 (1928); Stimson, *The Uniform Written Obligations Act—A Written Instrument as Presumptive Evidence of Consideration*, 30 OR. L. REV. 78, 81 (1950).

188. Patterson, *supra* note 148, at 934, 957-60; von Mehren, *supra* note 145, at 1076; see generally, Willis, *supra* note 148, at 233.

Some of the early writers on consideration believed that, in addition to its substantive role, consideration could play a formal role to help solve this problem. The doctrine of "nominal" consideration, whereby a gift promise is made binding through the payment of a trivial sum such as a dollar or a cent, was seen as a formality serving ritual, evidentiary and channeling functions.¹⁸⁹ Curiously, even this proposed use of consideration as a form assumes the primacy of two-sided bargaining over one-sided giving. It was "the fact that the parties have taken the trouble to cast their transaction in the form of an exchange" that helped to satisfy the "desiderata underlying the use of formalities."¹⁹⁰

The doctrine of nominal consideration has never fulfilled the promise these writers saw in it. Not being a "natural formality,"¹⁹¹ it has never been widely adopted by courts as a test of enforceability.¹⁹² To the contrary, and perhaps for good reasons, courts have instead been wary of the potential of nominal consideration to serve as a screen for fraud and overreaching.¹⁹³ For these reasons, even those who believe that form constitutes an independent basis for the enforcement of gift promises have been frustrated by the lack of a readily available formality suited to promises of gifts.¹⁹⁴

C. Form, Substance, and Gifts

The conventional understanding of consideration helps create a dichotomy between gifts and bargains by treating them as transfers that are different both in kind and in importance. It teaches that because gift transfers are socially uncommon and economically insignificant, they warrant less legal attention than bargains. The frequency and economic necessity of bargains is thought to justify routine legal intervention to determine whether a

189. Fuller, *supra* note 8, at 820; see also Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611, 613 (1930):

Probably the doctrine of consideration has some utility. Just as oral gifts are invalid without delivery, so promises not under seal are invalid unless there is an exchange given for them. The aims in both cases are to make more certain that the transaction was seriously intended and to make more difficult the fabrication of a gift or a contract.

Cf. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1115 (1984) (The doctrine of nominal consideration satisfied the needs of the classical school of contract law for "standardization and rigorous objectivity.").

190. Fuller, *supra* note 8, at 820. See also von Mehren, *supra* note 145, at 1053 ("The essence of nominal consideration is the introduction of a contrived element of exchange into the transaction.").

191. Fuller, *supra* note 8, at 815.

192. Eisenberg, *supra* note 189, at 1113 n.15; von Mehren, *supra* note 145, at 1053-55.

193. von Mehren, *supra* note 145, at 1054-55. See also Llewellyn, *supra* note 144, at 744 ("[W]hen the courts . . . recognize in general language the adequacy of thoroughly formal consideration, they obscure the problem . . . of discrepancy in bargaining power and semi-dress in fact.").

194. See, e.g., Sharp, *supra* note 155, at 790.

contract has been made; exchange is said to be a ground for enforcement even in the absence of formality. Yet in the case of gifts, where there is said to be no exchange, legal intervention is not considered warranted except on formal grounds. It is for this reason that, in the absence of a formality which can perform for gift promises the functions of the delivery and wills acts requirements, gift promises fail altogether. In the end, the enforceable executory bargain has no counterpart in the law of gifts. If a gift is not executed by delivery it is of no legal effect at all.

The doctrinal distinction between (enforceable) executed gifts and (unenforceable) informal promises to make gifts makes sense only if merely promising and actually delivering reflect real differences in donative intention. It is not clear, however, that the intent underlying a donative promise is always or necessarily distinct in fact from that underlying an executed gift: "Property owners make donative promises that they do not execute prior to death that, nevertheless, reflect their final donative intent."¹⁹⁵ Rather than developing criteria to ascertain *which* donative promises reflect final donative intent, the consideration theorists sought reasons to deny enforceability to *all* gift promises. Ultimately, they argued that, due to gifts' substantive unimportance, the enforcement of informal gift promises was not worth the cost.¹⁹⁶

It could, of course, be argued that as long as a gift can be made, the distinction between bargains (enforceable even if executory and informal) and gifts (enforceable only if formally executed) is not terribly meaningful. Yet the significance of the differential treatment of gifts and bargains emerges clearly if it is viewed in connection with the functionalist account of the channelling function. In that account, channelling is valued for its efficiency. Where, as the functionalists assumed, courts can ascertain individuals' intentions only with great difficulty, the standardization produced by form reduces confusion and its resulting administrative costs. Following this view, enforcement of only those gifts which are formally executed keeps legal involvement to a minimum. The question of the existence of a gift and of its terms can alike be resolved by a simple search for external signs.

When the accounts of the functions of consideration and of form are combined, they send a single message. Gifts are marginal. Socially uncommon, economically unimportant, morally unworthy, gifts can claim little on their own behalf. The weakness of their claim justifies the law in treating them with only the greatest reluctance and suspicion.

195. Fellows, *supra* note 140, at 36.

196. For recent arguments to the same effect, see Eisenberg, *supra* note 2; Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980). For a critique of these arguments and a proposal to make gift promises enforceable in some circumstances, see Fellows, *supra* note 140.

III. WHAT IS A GIFT?

Discussions of consideration and of the functions of form both envision gifts and bargains as distinct kinds of transfers, differing in practical and therefore in legal importance. Yet in the 19th century at least, commentators tended to emphasize the similarities, not the differences, between these two apparently disparate categories of transfers. They pointed out, for example, that "[t]he idea of gift embraces both giver and taker . . .," and thus "gifts are in the nature of, or at least originate in, a mutual undertaking."¹⁹⁷ Not only did both categories of transfer involve relations between two or more parties, but agreement between those parties was seen as critical in both cases: "[I]t requires the assent of both minds to make a gift as it does to make a contract."¹⁹⁸ On the basis of these observations, Kent and others argued that gifts were contracts.¹⁹⁹ The consideration requirement rendered such contracts unenforceable while executory,²⁰⁰ but they were contracts nonetheless.

To those trained to think of contracts as those obligations the law will enforce, there is not much to be said for Kent's view that a gift not yet delivered was a form of contract. Nor was the view of gifts as a species of often-unenforceable contract inconsistent with later understandings of consideration's substantive purpose. In terms of social utility, it makes little difference whether gift promises are denied enforcement on the ground that they are ineffective executory contracts or on the ground that they are not contracts at all.

Yet the 19th century notion of gift as a form of contract is worth bearing in mind because it contrasts sharply with the competing view that gifts and contracts are absolutely different things. In 1884, one commentator was confident that "[t]he best authorities of the present day . . . treat the element of consideration as a nonessential for classifying [gifts and contracts], though practically an essential when it comes to the matter of legal enforcement."²⁰¹ By 1914, things had changed. A new treatise explained

197. 2 J. SCHOULER, *A TREATISE ON THE LAW OF PERSONAL PROPERTY* § 57, at 60 (2d ed. 1884).

198. *Hill v. Wilson*, 8 L.R. 888, 896 (Ch. App. 1873); see also 2 J. KENT, *COMMENTARIES* *438 (A gift requires "the mutual consent and concurrent will of both parties."). Assent is required because a gift cannot be effective without acceptance by the donee. See, e.g., *Hill*, 8 L.R. at 896; R. BROWN, *supra* note 15, at 127-28; W. THORNTON, *supra* note 63, at 68.

199. 2 J. KENT, *COMMENTARIES* *438 ("[E]very gift which is made perfect by delivery, and every grant, are executed contracts; for they are founded on the mutual consent of the parties, in reference to a right or interest passing between them."); 2 J. SCHOULER, *supra* note 197, § 57, at 60-61 ("A gift, then, is a contract, or originates in a contract . . . and at all events imports an agreement, because it is founded in the convention of two or more parties . . .").

200. 2 J. SCHOULER, *supra* note 197, § 57, at 61. See also *Gray v. Barton*, 55 N.Y. 68, 72 (1873) ("To make . . . [a gift] valid, the transfer must be executed, for the reason that, there being no consideration therefor, [sic] no action will lie to enforce it.").

201. 2 J. SCHOULER, *supra* note 197, § 57, at 60 (citation omitted).

that "[o]ne of the most essential elements of a gift is the absence of consideration. If a consideration appears, the transaction is not a gift"202 The latter view prevailed; a leading modern treatise states: "A gift is distinguished from other voluntary transfers primarily by its gratuitous character. If there be valid legal consideration for the transfer, then the transaction is of the nature of a contract or a sale and is governed by the particular rules applicable thereto."²⁰³

Those who pointed out the substantive function of consideration implicitly explained why gifts and contracts should be treated as fundamentally separate categories. Contracts are exchanges; gifts are not.²⁰⁴ In a donative transfer, the donee "seeks to get something for nothing";²⁰⁵ he or she "alone stands to gain";²⁰⁶ and the donor, rather than thinking of him or herself, "tends to look mainly to the interests of" the donee.²⁰⁷

This vision of giving as involving one-sided donation in opposition to two-sided exchange contrasts sharply with the earlier notion of giving as involving mutual undertakings and mutual assent. This section explores whether it might be misleading to think of giving as being one-sided. Part A examines civil and early common law definitions of gifts, none of which sharply differentiate gifts from exchanges. Part B reviews nonlegal views of giving; these views tend to emphasize the rewards to donors, rather than the benefits to donees, in explaining gifts. Part C suggests that the vision of gifts as one-sided transfers may, like the functional justification of form, be a "structure of consciousness."

A. *Civil Law and Early Common Law Definitions of Gifts*

The definition of a gift as a transfer without consideration can only be adopted in a legal system employing the consideration doctrine. The Western European civil law systems, which do not have a consideration requirement,²⁰⁸ define gifts quite differently. The French Civil Code, for example,

202. F. CHILDS, *PRINCIPLES OF THE LAW OF PERSONAL PROPERTY* 293 (1914). See also *Jackson v. Twenty-third St. Ry. Co.*, 47 N.Y. Super. 85, 88 (1881), *rev'd*, 88 N.Y. 526 (1882) ("A gift, as implied by its definition, must be without consideration."); W. THORNTON, *supra* note 63, at 3 ("In fact, if there be a consideration the transaction is no longer a gift, but a contract.").

203. R. BROWN, *supra* note 15, § 7.1, at 76-77 (citation omitted).

204. See *supra* text accompanying notes 173-77. Many of those who contrasted business exchanges and gifts recognized that some reciprocities were involved in gift transfers, but distinguished those reciprocities from "exchange[s] of values." See, e.g., Fuller, *supra* note 8, at 809; Patterson, *supra* note 148, at 946.

205. Ballentine, *supra* note 162, at 121. See also *id.* at 132 (contrasting executory two-sided bargains to one-sided or gratuitous promises).

206. Hamson, *supra* note 166, at 255.

207. Eisenberg, *supra* note 2, at 5.

208. See, e.g., J. DAWSON, *supra* note 177; Mason, *supra* note 2; von Mehren, *supra* note 145.

defines a gift as "an instrument through which the donor divests himself now and irrevocably of the thing given, in favor of the donee who accepts it."²⁰⁹ An early civil law treatise described an inter vivos gift as "a contract made by a reciprocal consent" between the donor and the donee,²¹⁰ and the current French Civil Code imposes numerous requirements that under the common law are associated with contracts: "An inter vivos gift does not bind the donor and produces no effect until the day when it is accepted in express terms . . .,"²¹¹ and "[a] gift duly accepted is perfected by the sole consent of the parties . . ."²¹² A leading contemporary commentator has summarized the matter as follows: "In what might be called the Romanesque tradition, a gift is conceived as a two-sided transaction, a contract which, like any other contract, requires mutual assent and is discussed, if trouble comes, with the vocabulary of the law of contract."²¹³

The difference between the civil and common law conceptions of gifts cannot fairly be attributed to obvious cultural disparities between Western European and Anglo-American societies. Rather, the difference derives from the fact that the two systems have quite divergent concerns in respect of donative transfers. The common law, as we have seen, considers judicial intervention to be warranted only in the case of bargains, not executory gifts; the common law is thus concerned to separate gifts from exchanges. The civil law's concerns with respect to gifts are quite different; they pertain to the effects of gifts on the scheme of forced heirship which guarantees close relatives a share of a decedent's estate.²¹⁴ In such a system, the focus is not on the difference between gifts and bargains, but on the difference between gifts that threaten to deplete the estate and gifts that do not.²¹⁵ Unlike the common law system, in which "most promises of gifts are wasted words, and it is only their performance that counts,"²¹⁶ the civil law denies enforcement of only those gift promises which threaten forced heirship, and it routinely invalidates completed gifts which reduce an heir's inheritance.²¹⁷

209. C. Civ. art. 894 (Fr.); see also C. Civ. art. 895 ("A testament is an instrument through which the testator disposes, for the time when he will no longer exist, of all or part of his property, and which he may revoke."). Illustrations of the modern civil law view of gifts will be taken from the French Civil Code. The particular translation of the code used in the preparation of this article is *THE FRENCH CIVIL CODE* (J. Crabb trans. 1977). The particular aims of this section do not include a comprehensive study of all modern civil law jurisdictions, though it is anticipated that examples from other jurisdictions whose law is modeled upon the Roman civil law would result in definitions of a gift closely analogous to the modern definition in France.

210. J. DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* § 918 (W. Strahan trans. 1850).

211. C. Civ. art. 932.

212. C. Civ. art. 938.

213. J. DAWSON, *supra* note 177, at 2.

214. *Id.* at 224-25. On the system of forced heirship in the civil law, see *id.* (*passim*).

215. J. DAWSON, *supra* note 177, at 65-67, 116-17, 224-25.

216. *Id.* at 2.

217. *Id.* at 65-67, 116-17, 224-25; Eisenberg, *supra* note 2, at 14-15.

This simple contrast between the civil and common law treatment of gifts²¹⁸ suggests that a legal system's definition of gifts will reflect that system's substantive preoccupations, not some immutable "nature" that gifts have. This point is reinforced by a view to how gifts were treated by common law writers prior to the development of the consideration doctrine.²¹⁹ Drawing no clear lines between gifts and exchanges, Glanville wrote of an owner's freedom to "give" a part of a freehold estate "to any person . . . in remuneration of his services . . .";²²⁰ what was critical to the enforceability of the gift was not bargain or exchange, but the transfer of seisin.²²¹ Treatises in the following centuries emphasized "the full intention that the thing . . . not return to the donor and . . . [the] full intention on the part of the receiver to reclaim the thing entirely as his own . . .";²²² the focus was on the need for a transfer causing property "to belong effectively to the recipient"²²³ so that the gift could not be revoked.²²⁴ It is not until late in the 18th century²²⁵ that Blackstone and others began to

218. No attempt is made here to detail all the ways in which the civil law regulation of gifts differs from common law regulation. For an analysis of the civil law regulation of gifts, see J. DAWSON, *supra* note 177. Among the ways in which the civil law system differs most notably from the common law system are the former's requirement of notarial registration for gifts and the revocability of gifts for ingratitude.

219. See O. HOLMES, *THE COMMON LAW* 289-97 (1923); E. JENKS, *THE HISTORY OF THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW* (1892); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); Barton, *The Early History of Consideration*, 85 *LAW. Q. REV.* 372 (1969); Henry, *Consideration in Contracts*, 26 *YALE L.J.* 621 (1917); Holmes, *Early English Equity*, 1 *LAW. Q. REV.* 162 (1885); Salmond, *The History of Contract*, 3 *LAW. Q. REV.* 166 (1887).

220. R. GLANVILLE, *A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND* 114 (J. Beames trans. 1900).

221. *Id.* ("[I]f . . . a Donation should not be followed up by seisin, nothing can, after the death of the Donor, be claimed . . . in virtue of it . . . ; because such a disposition is usually interpreted . . . rather as a naked promise, than a real promise or donation.").

222. 1 *BRITTON* 220 (F. Nichols trans. 1865).

223. 3 *FLETA* 5 (Selden Society Vol. 89 1972).

224. *Id.* See also 1 *BRITTON*, *supra* note 222, at 220.

225. As late as 1743, "gift" was defined as "a conveyance which by either lands or goods are passed; and it is a larger extent than a grant, it being applied to things movable and immovable." *JACOB'S NEW LAW DICTIONARY* (London 1743). Two components critical to Blackstone's definition of a gift are conspicuously lacking from Jacob's definition. First, although Jacob notes that a gift "may be good without consideration," *id.*, he does not require that a gift be without consideration. *Contra* 2 *W. BLACKSTONE, COMMENTARIES* *440. Second, Blackstone's proposed distinction between gifts and grants—that the former are without consideration and the latter are founded upon consideration—appears nowhere in Jacob's definitions of either a "gift" or a "grant." *Compare* 2 *W. BLACKSTONE* *440 with *JACOB'S NEW LAW DICTIONARY* (London 1743).

This evidence, in addition to the fact that definitions of gifts and grants closely resembling Blackstone's appear in later editions of Jacob's dictionary antedating the publication of *Blackstone's Commentaries*, suggests that it was not until Blackstone that the distinctions between gifts and contracts, and between gifts and grants, were defined in terms of a presence or absence of consideration. See, e.g., *JACOB'S NEW LAW DICTIONARY* (Philadelphia & New York 1811).

define gifts as gratuitous and to contrast them to contracts or other transfers made upon consideration.²²⁶ By that time, of course, the consideration doctrine had undergone significant development.²²⁷

Just as the modern civil law definition of a gift reflects that system's preoccupation with heirs' forced shares, the early common law definitions reflect a feudal preoccupation with seisin and the finality of transfers. The divergence among the various definitions suggests that the legal context in which any definition of a gift is formulated affects the terms in which a gift is defined. At any rate, there is nothing inevitable about the now-accepted definition of a gift as a transfer without consideration; the civil law has never defined a gift in that way, and the common law did without such a definition for centuries.

B. Some Contrasting Views of Giving

The subject of giving has fascinated many in such nonlegal disciplines as anthropology, sociology, and psychology.²²⁸ Within these fields, there is no lack of controversy concerning the prevalence, sources, and patterns of what is sometimes called "altruistic" behavior. To a lawyer, however, what is striking about these varied accounts is the extent to which, despite internal disagreements, they collectively reflect a vision of giving quite different from the legal view of gifts as transfers distinguishable from bargains. For non-lawyers, gifts are exchanges. They are not necessarily exchanges of goods, and they are distinct in important ways from the conventional exchanges of the market, but they are exchanges nonetheless.

In a seminal essay written in 1925, the French sociologist/anthropologist Marcel Mauss suggested that in the "primitive" or "archaic" societies that anthropologists had theretofore studied, patterns of giving which seemed voluntary, disinterested and spontaneous were in fact obligatory and interested.²²⁹ In such societies, where groups exchange not only goods but also "courtesies, entertainments, ritual, military assistance, women, children, dances, and feasts,"²³⁰ gift-exchanges constitute "total social phenomena, [in which] all kinds of institutions find simultaneous expression: religious,

226. 2 W. BLACKSTONE, COMMENTARIES *440; 2 J. KENT, COMMENTARIES *354.

227. See *supra* note 219.

228. I do not pretend to be an expert in any of these fields. The following account is based on resources studied in the course of a reasonably thorough search of materials available in my university's main research library. My goal is not to provide a detailed account of anthropological, sociological, or psychological theories, or of the differences between them. Rather, it is to point up the ways in which all of these theories diverge from the legal understanding of gifts.

229. M. MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES 1 (I. Cunnison trans. 1954).

230. *Id.* at 3.

legal, moral, and economic."²³¹ This system of "total prestation" involves three interdependent obligations—to give, to receive, and to repay.²³² Compliance with these obligations establishes the relative power and status of groups and clans.²³³

The idea of giving as interested and obligatory has been enormously influential. In sociology, for example, it has been used to support the theory that social interaction is an economy of non-material as well as material goods, in which "[p]ersons that give much to others try to get much from them, and persons that get much from others are under pressure to give much to them."²³⁴ While there is some disagreement as to whether or not the exchange process results from an internalized "norm of reciprocity,"²³⁵ there is widespread agreement that an unreciprocated gift creates an imbalance of social power between the donor and the donee.²³⁶ To prevent or rectify such imbalances, gifts are reciprocated.²³⁷

To see gifts as exchanges—and not as the one-sided transactions depicted in legal discussions—is not necessarily to see gifts as "bargains." Beyond the fact that gift-exchange may involve non-material goods as opposed to commodities, social scientists see significant distinctions between purely economic transactions and gift exchanges.

First, whereas economic transactions are exchanges of equivalents, the reciprocal gift is never the precise equivalent of what was initially given.²³⁸

231. *Id.* at 1.

232. *Id.* at 10-11.

233. *Id.* at 4.

234. Homans, *Social Behavior as Exchange*, 63 *AM. J. SOC.* 597, 606 (1958). See also P. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 89 (1964) ("An individual who supplies rewarding services to another obligates him. To discharge this obligation, the second must furnish benefits to the first in turn.")

235. Compare, e.g., Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *AM. SOC. REV.* 161 (1960) with P. BLAU, *supra* note 234, at 92.

236. See, e.g., P. BLAU, *supra* note 234, at 108 (A gift to one who cannot reciprocate is a source of superordination over others.); Schwartz, *The Social Psychology of the Gift*, 73 *AM. J. SOC.* 1, 4 (1967) (Individuals maintain ascendancy by regulating the indebtedness of others to them.). See also W. DILLON, *GIFTS AND NATIONS: THE OBLIGATION TO GIVE, RECEIVE AND REPAY* 73 (1968) (suggesting that in international technical assistance programs between nations, "the donor nation incurs the hostility of people in the receiver nation to the extent that the donor frustrates the discharge of their felt obligation") (citation omitted); R. EMERSON, *Gifts*, in *THE ESSAYS OF RALPH WALDO EMERSON* 309, 311 (Mod. Libr. ed. 1944) ("It is not the office of a man to receive gifts. How dare you give them? We wish to be self-sustained. We do not quite forgive a giver."); Amundsent & Ferngren, *Philanthropy in Medicine: Some Historical Perspectives*, in *BENEFICENCE AND HEALTH CARE* 1, 5 (E. Shelp ed. 1982) (suggesting that in the classical world philanthropy gave rise to an obligation on the part of the poor to reciprocate through public recognition of the donor's benefaction; the desire to receive enhanced status was a chief motivation for philanthropy).

237. See, e.g., P. BLAU, *supra* note 234, at 16; Gouldner, *supra* note 235, at 171; Homans, *supra* note 234, at 606.

238. See, e.g., L. HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 9 (1979) ("A market exchange has an equilibrium or stasis: you pay to balance the scale."); P.

The equivalent return required in an economic transaction is explicitly bargained for, is stipulated in advance, and is externally enforced, usually by the law.²³⁹ While a non-economic exchange involves "a general expectation of some future return, its exact nature is definitely *not* stipulated in advance."²⁴⁰ Moreover, "the nature of the return cannot be bargained about but must be left to the discretion of the one who makes it."²⁴¹ Reciprocation can never be assured or enforced, but instead is a matter of trust or gratitude.²⁴²

Second, the absence of commodity exchange in non-market transfers has important implications for the interpersonal effects of gift exchange. Where the objectively equal is given for the objectively equal, "man himself is really irrelevant"; personal interaction recedes into the background, while goods gain a life of their own.²⁴³ A gift, in contrast, "establishes a feeling-bond between two people."²⁴⁴ By engendering feelings of personal obligation, gratitude, and trust, gifts can act as a bridge or connection between individuals.²⁴⁵ The personal, connected quality of giving may require the donor to employ modes of thinking quite different from those appropriate to the market. Some believe that economic transfers call for detached, analytic deliberation in quantitative, cost-benefit terms which are inappropriate to the emotional and moral realm of gifts.²⁴⁶

BLAU, *supra* note 234, at 93 ("The basic and most crucial distinction [between social and strictly economic exchange] is that social exchange entails *unspecified* obligations."); Gouldner, *supra* note 235, at 172 (The return required under the norm of reciprocity is not the objective equivalent of the thing given.).

Thus, a return of the exact equivalent breaks the rule of approximate reciprocity and, by changing the relationship to an economic one, expresses unfriendliness. Schwartz, *supra* note 236, at 5-6.

239. P. BLAU, *supra* note 234, at 93 (The prototypical economic exchange rests on a formal contract stipulating the exact quantities to be exchanged.); Simmel, *Faithfulness and Gratitude*, in *THE SOCIOLOGY OF GEORG SIMMEL* 379, 387 (K. Wolff ed. 1950) ("In all economic exchanges . . . the legal constitution enforces and guarantees the reciprocity of service and return service . . .").

240. P. BLAU, *supra* note 234, at 93.

241. *Id.*

242. *See id.* at 94 ("Since there is no way to assure an appropriate return for a favor, social exchange requires trusting others to discharge their obligations."); Simmel, *supra* note 239, at 387 (In relations to which the legal form does not apply, "enforcement of the equivalence is out of the question. Here gratitude appears as a supplement. It establishes the bond of interaction, of the reciprocity of service and return service, even where they are not guaranteed by external coercion.").

243. Simmel, *supra* note 239, at 388. *See also* P. BLAU, *supra* note 234, at 112 ("The taboo on explicit bargaining in the exchange of gifts is designed to protect their significance as tokens of friendship . . . from being obliterated by the inherent value of the objects themselves.").

244. L. HYDE, *supra* note 238, at 56.

245. *See, e.g., id.*; P. BLAU, *supra* note 234, at 94; Simmel, *supra* note 239, at 388.

246. L. HYDE, *supra* note 238, at 62-66. *See also* P. BLAU, *supra* note 234, at 112 ("Social exchange . . . is an intermediate case between pure calculation of advantage and pure expression of love."); G. PALMER, *ALTRUISM: ITS NATURE AND VARIETIES* 60 (1920) ("Gifts come from a region outside claims, outside rational justification Were there legitimate grounds for my pretended gift it would be merely the payment of a debt and would afford no such pleasure as the over-and-above of a gift . . .").

The significance of these differences between economic transactions and gift exchanges is the subject of some dispute. To the extent that gifts can be used to enhance status and power, gift-exchange can be characterized as a non-commodity market which functions in the affective realm in much the same way as commodity markets function in the conventional economic realm. Both markets are driven by egoism, and while the participants in the gift-exchange process may deal with one another on an emotional and not arm's length basis, there is nothing transformative about their emotional dealings. They are no less fundamentally hostile to one another after their exchanges than they were before.²⁴⁷

However, many argue that gift-exchange dissolves hostility and creates community bonds. The gift-exchange process may begin with an egoistic expectation of return advantage, but it utilizes or channels that self-interest in a way that ultimately enhances the social and emotional connections between individuals.²⁴⁸ The donor may give only in hope of return, and the donee may reciprocate only in the interest of continuing to receive the donor's benefaction, yet each must trust the other to fulfill his or her unspoken obligation. Thus a process of exchange that begins in pure self-interest may generate trust in social relations.²⁴⁹

247. See M. SAHLINS, *STONE AGE ECONOMICS* 170 (1972) ("Reciprocity is a 'between' relation. It does not dissolve the separate parties within a higher unity, but on the contrary, in correlating their opposition, perpetuates it."); see also G. PALMER, *supra* note 246, at 61 ("A gift has always something disparaging about it The giver is the . . . man of power . . . , the receiver confessedly the man of need, passive to another's will. The very attempt, then, that I make to raise him up . . . sets him beneath me. He lacks, I abound."); Schwartz, *supra* note 236, at 4-5 (In exchanging gifts, individuals maintain ascendancy by regulating the indebtedness of others to them.)

Those who view gift-exchange as a form of non-commodity market describe human behavior in somewhat the same way as did the functionalists; in both instances, for example, it is assumed that human beings "are" selfish and self-interested. It is questionable whether the sociologists' assumptions about the way humans and the market "are" are any more accurate than the functionalists' assumptions. Market systems need not necessarily rely on or call forth only selfishness. See, e.g., Coase, *Adam Smith's View of Man*, 19 *J.L. & ECON.* 529 (1976); G. PALMER, *supra* note 246, at 77-87. The social scientists' statements about human behavior in markets thus may themselves be caricatures or stereotypes.

However, to the extent that the vision of gift-exchange as a non-commodity market assumes that people "are" selfish, then there is a curious incongruity between the legal requirements applicable to gift-exchanges on the one hand and conventional market bargains on the other. The selfishness that is said to make formality necessary in the gift context is said to render formality unnecessary in the bargain context. See *infra* text accompanying notes 251-54.

248. See, e.g., P. BLAU, *supra* note 234, at 92 ("Exchange processes utilize . . . the self interests of individuals to produce a differentiated social structure within which norms tend to develop that require individuals to set aside some of their personal interests for the sake of those of the collectivity."); Gouldner, *supra* note 235, at 173 (Reciprocity's processes "mobilize egoistic motivations and channel them into the maintenance of the social system."); Simmel, *supra* note 239, at 389 (Gratitude is a "powerful means of social cohesion.").

249. P. BLAU, *supra* note 234, at 94. See also Levi-Strauss, *The Principle of Reciprocity*, in *SOCIOLOGICAL THEORY: A BOOK OF READINGS* 63, 66 (L. Coser & B. Rosenberg 4th ed. 1976) (The custom of pouring wine in one's neighbor's glass at provincial French restaurants

Though there may be no consensus on whether the process of giving merely prevents social fragmentation or affirmatively promotes community, the adherents of each view agree that giving is exchange. Whether or not donors are motivated by the expectation of reward, they are rewarded.²⁵⁰ The one-sided transfer of benefits that defines a gift in the law's eyes is not what social scientists have discovered in their studies of gifts.

C. *Some Implications of the View that Gifts are Exchanges*

If gifts are exchanges rather than one-sided transfers, should the law treat them differently than it currently does? This question can be approached in two ways. First, we might ask whether, if this alternative view of giving is accepted, formalities and the functional explanation which has been offered for them would seem as necessary as they now do. Second, we might ask whether, if gifts are exchanges, there is any persuasive reason to treat gifts differently than we do conventional economic bargains.

Assuming gift-exchange merely replicates in social or affective terms the self-interested struggle of the commodities markets,²⁵¹ the need for formalities becomes questionable. If the donor, like the contract promisor, acts out of self-interest and in expectation of future gain, his or her gift is a calculated act; if a gift is by hypothesis the product of deliberation, the donor needs a separate ritual to underscore the significance of his or her act no more than a market participant does. Nor is evidentiary reliability necessarily of greater concern in gift-exchange than in market-exchange. The selfish urge toward perjury is prevalent in respect to contracts as well as gifts, yet the Statute of Frauds provisions applicable to the former impose requirements considerably less onerous than those applicable to the latter.²⁵²

is "an affirmation of good grace which dispels . . . reciprocal uncertainty . . . [and] substitutes a social bond for mere physical juxtaposition"; acceptance of the offered wine authorizes an offer of conversation. "Thus a number of minute social bonds are established by a series of alternating oscillations, in which a right is established in the offering and an obligation in the receiving.").

250. Psychologists disagree on why people give, some arguing for the primacy of situational factors and others offering normative or cultural explanations. For a variety of views, see the essays in *ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES* (J. McCauley & L. Berkowitz eds. 1970); *ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES* (J. Rushton & R. Sorrentino eds. 1981); *ALTRUISM, SYMPATHY, AND HELPING: PSYCHOLOGICAL AND SOCIOLOGICAL PRINCIPLES* (L. Wispe ed. 1978). Whether or not they see the psychological rewards to the giver as the primary motivating factor in gift-giving, all agree that there are such rewards.

251. See *supra* text accompanying note 247.

252. Contracts within the Statute of Frauds need only be in writing and signed by the party to be charged, whereas nonholographic wills must be witnessed and, in some states, signed at the end.

If a simple signed writing meets the problem in the one case, why is more needed in the other?²⁵³

As we have seen, not everyone shares the view that gift-exchange is truly analogous to market exchange.²⁵⁴ Yet even for those who view gift-exchange as a process by which egoistical, self-interested motivations are channelled in ways that ultimately connect individuals more closely to one another, the utility of formalities is questionable. To the extent that formalities foster deliberation, calculation, precision and quantification, they are at odds with the spirit of giving. Gifts are socially important precisely because they are spontaneous, approximate and unspecifiable. Why should the law impose requirements which are inconsistent with these attributes and which seek to make gifts like bargains?

The question whether the law ought to retain the formalities currently applicable to gifts is related to another, more important question: Is there a reason to treat conventional market bargains as more worthy of legal intervention than gifts? In the consideration context, as we have seen,²⁵⁵ the affirmative justification for enforcing bargains is to protect the social interest in securing the commonly-held expectations customarily engendered by business promises. If, as social scientists claim, there are equally strong and established expectations with respect to giving, it is not immediately obvious why these expectations should not be protected as well.

One answer, of course, is that the economic expectations produced by market bargains are easily distinguishable from the imprecise, non-quantifiable expectations involved in gift-exchange. Yet it is not entirely clear why the expectations of gift-exchange should be any less important for being non-economic. Wealth consists of more than commodities.²⁵⁶ Objects can be valuable not just as means of producing additional material rewards but because "they are part of the way we constitute ourselves as continuing personal entities in the world."²⁵⁷ The giving of objects can be part of this process of self-definition.²⁵⁸ Are these social and personal attributes of gift-

253. There are many who argue, with respect to contracts, that the protections provided by the Statute of Frauds are not worth the problems the statute causes. *See, e.g., Wyndham v. Chetwynd*, 96 Eng. Rep. 53, 55 (K.B. 1757). Whether or not the requirements of the Statute of Frauds are warranted in the case of contracts, some writings should be required in the case of wills because the testator's death otherwise will render perjury impossible to combat.

254. *See supra* text accompanying notes 243-44.

255. *See supra* Part II.

256. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988); W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953).

257. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (arguing that property more closely connected with personhood exerts a stronger claim of entitlement than fungible property).

258. *See T. SHAFFER, DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH* 77-78 (1970) ("Property is part of personality, and personality is involved with property in the life

exchange necessarily of less dignity than the economic attributes of market bargains? Only if wealth is defined solely in terms of commodities is it fair to characterize a gift as a "sterile transmission."²⁵⁹

Yet even conceding the importance of the non-economic values of gift-exchange, there might nonetheless be reasons for the law to minimize its involvement in donative transfers. If in fact the obligations of gift-exchange are satisfied through the non-legal pressures exerted by trust, gratitude and the like, legal intervention may be both unnecessary and inappropriate. In any event, the law may be unsuited to engaging in the complicated emotional and social calculus of the gift-exchange process.

None of these arguments seems compelling. The business-related, non-legal pressures that cause most market participants to fulfill their bargains voluntarily are not thought to eliminate the need for judicial involvement in contracts;²⁶⁰ why should the social or psychological pressures that underlie gift-exchange require a different approach for donative transfers? Moreover, the notion that the law should avoid entanglement with gifts because its enforcement mechanisms—awards of damages and the like—are ill-suited to the connected, socially cohesive qualities of gifts suggests that the law should not involve itself with gifts at all; that suggestion conflicts with our legal system's ostensible commitment to lend its power to private decisions in the field of donative transfers. Finally, our legal system is not always adverse to tackling questions of enormous social and emotional complexity. In areas such as family law and reproductive rights it takes on such questions routinely.²⁶¹

In the end, the persistence of formal requirements for donative transfers and the reluctance to enforce such transfers except on purely formal grounds carries a message. Gifts are uncommon, untrustworthy, and unimportant. The formalities and the differential treatment of gifts and bargains have been justified as responses to "real" phenomena: the "needs" of individuals, of the economy, and of the judicial system. There is, however, reason to

of a wills client. His seeing death in relation to property and the survival of property-personality robs death of some of its stark power."); Schwartz, *supra* note 236, at 2 ("The act of giving is self-defining . . . Men tend to confirm their own identity by presenting it to others in objectified form."). See also M. MAUSS, *supra* note 229, at 10 (In the system of gift exchange, "[O]ne gives away what is in reality a part of one's nature and substance, while to receive something is to receive a part of someone's spiritual essence.").

259. See *supra* note 177 and accompanying text.

260. See Havighurst, *supra* note 164, at 14 ("[T]he great bulk of the more important promises are made for the purpose of securing something in exchange, and the great bulk of all promises are performed."). See also Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Law, *Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461 (Legal rules may be marginal to the keeping of business promises.).

261. See, e.g., *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988); *Roe v. Wade*, 410 U.S. 113 (1973).

question whether these needs “really” exist or, if they do, whether they exist—at least in part—because of the system of legal rules that has been adopted. The legal rules now in effect treat “gifts” as distinct from “bargains.” The qualities shared by these two “kinds” of transactions—including the possibility that they both involve exchange—are submerged, hidden in the very structure of distinction. We are thereby encouraged to think of donative and commercial transfers as being “truly” distinct, and to act accordingly. It is possible to ask whether the divergent mores and norms we bring to gifts and to bargains are not in some degree a product of that consciousness.

CONCLUSION

There is a stereotypical quality to much of the thinking that has been done about gifts and bargains. The functionalists portray individuals as both grossly impulsive and selfish; the consideration theorists portray the market as an almost divinely apt ordering process; the social scientists portray economic transactions as hostile exchanges of exact equivalents. These pictures no doubt contain a germ of truth; how else can their persistence and influence be explained? Yet as with any caricature, that truth is only partial. Sometimes individuals are generous, the market fails, and business people forego immediate advantage.

Skepticism seems an appropriate response to any attempt to define or even describe how people or societies “are.” Still, it is worthwhile to try to expose the exaggerations in the caricatures of gifts and bargains because they suppress the respects in which these transactions can be or feel alike. That suppression can have two consequences. It may cause an individual whose responses to giving or trading do not fit the stereotyped picture to feel he or she is acting wrongly or inappropriately. It may also make existing legal procedures and requirements seem necessary and thus mask the possibility that transactions can be structured and regulated in entirely different ways.

There is nothing immutable about our patterns of giving. Changes in social context—such as the fact that the elderly increasingly spend their last years in institutions or retirement communities rather than with their families—have led to changes in patterns of testamentary disposition.²⁶² Changes in the nature of wealth—from land or other goods to financial assets and skills—have increased the importance of lifetime transfers and decreased the importance of wealth transfer on death.²⁶³

Like these social and institutional phenomena, law is among the forces in response to which individuals structure their lives. The legal requirements

262. J. ROSENFELD, *supra* note 108, at 62.

263. Langbein, *supra* note 256, at 722-23.

applicable to giving may affect how much and to whom we give. More importantly, they may affect how we understand our own generosity—whether we see it as “natural” or “proper,” as “like” or “unlike” other activities in which we frequently engage.

The formalities now required for giving and the distinction between gifts and bargains are part of this process. They may cause us to view generosity as suspicious and trading as necessary or to assume that our motives must be different in each context. They may thereby help create the reality to which they pretend to respond.

It is not at all clear that we would “be” different were the legal requirements for giving to change. Yet it is also not at all clear that we “are” the careless, deceitful creatures the formalities seek to restrain, or that gifts and bargains “are” different in any way that matters. There is thus no reason to assume that the legal rules that now regulate donative transfers are the only ones possible or desirable.

If there is any truth to the view that gifts create social bonds as important in their way as the economic bonds of market exchanges, we might still choose to retain a regime of formalities for donative transfers, but on quite different grounds than those conventionally offered. We might, for example, value the evidence formality supplies not because it combats likely perjury, but because it demonstrates tangibly a social commitment that might otherwise be invisible. Similarly, we might value the ritual of formality not because it corrects impulsiveness, but for its own sake, as an expression of “the fundamental human need for . . . ceremony.”²⁶⁴

Nonetheless, there is a case to be made for abandoning the formal rules that presently govern donative transfers. They do not come to us new; they come freighted with a baggage of justification that may prevent us from according to gifts the social and emotional significance non-lawyers have seen in them. They are associated, ideologically, with questionable distinctions between giving and bargaining and equally questionable assumptions about how individuals do or ought to behave in either variety of exchange. Whether we can retain the rules without also retaining the distinctions and assumptions that have grown up around them is an open question; until it is resolved, there is something to be said for abandoning them all.

One thing is certain. The goals of the law of donative transfers are far less clear than they are often made to appear. The law is outwardly committed to the effectuation of individual intent with respect to gifts as well as contracts. Yet it appears to value market exchanges, which are perceived to create wealth, over gifts, which are perceived merely to redistribute wealth. The law’s relatively low regard for gifts makes it difficult to carry out its commitment to them. Given this confusion, it is not

264. Cohen, *supra* note 144, at 582.

surprising that, despite its ostensible commitment to gifts, the law adopts intent-defeating requirements for donative transfers.

