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## Considering Affective Consideration

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# ARTICLE

## CONSIDERING AFFECTIVE CONSIDERATION

*HILA KEREN*<sup>1</sup>

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<sup>1</sup> Associate Professor of Law, Hebrew University of Jerusalem. Most of the research concerning this work has been done while I was a visiting professor of law at UC Berkeley School of Law and I am grateful to my hosts, colleagues, and students for inspiring times. Special thanks to Professor Kathryn Abrams for endless support, and for co-developing, co-writing and co-teaching the ideas of law and the emotions. More thanks to Professor Abrams, Professor Daphna Lewinsohn-Zamir and Professor Eyal Zamir for reading earlier drafts of the piece and making priceless suggestions, to Professor Melvin Eisenberg for discussing his views with patience and care, to Professor Gregory Klass for sharing his important research and ideas with regard to contractual intention, to Professor Jody Kraus for valuable comments, and to Professor Hadar Aviram for elaborated discussion of substance and method. The paper was presented at the Fourth International Conference on Contracts (2007), hosted by Pacific McGeorge School of Law in Sacramento, and I thank all my contract law colleagues for opening their minds to the emotions and for helpful comments. It was also presented at faculty seminars at Chicago-Kent College of Law, University of Miami School of Law, University at Buffalo Law School, Golden Gate University School of Law and Hofstra University School of Law, and I thank the participants for sharing their thoughtful responses with me. This Article was recently presented in an international conference dedicated to interdisciplinary approaches to contract theory held in Jerusalem in June 2009, and I am grateful to the conference's participants for their insights. Finally, I am especially indebted to my beloved ones, from whom I learned that *giving is receiving*.

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## INTRODUCTION

Souls are mixed with things; things with souls. Lives are mingled together, and this is how, among persons and things so intermingled, each emerges from their own sphere and mixes together. This is precisely what contract and exchange are.<sup>2</sup>

Are souls mixed with things, as anthropologist Marcel Mauss argued in his eminent *The Gift* book, or are our commodified lives neatly separated from our affective lives? When it comes to law, does our legal system validate and protect affectively motivated promises?<sup>3</sup> For example, does our law support a father's explicit and intentional promise to his son to give him valuable bonds?<sup>4</sup> The conventional legal response is a definite negative answer: American contract law has been described as having an "apparent prejudice against gratuitous transfers,"<sup>5</sup> regardless of "how well-evidenced the promise is and no matter how serious the promisor was."<sup>6</sup> From here we can go on to the normative question of *should* promises of this kind be enforceable? And indeed, legal scholars have never stopped debating the enforceability

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<sup>2</sup> MARCEL MAUSS, *THE GIFT* 20 (W. D. Halls trans., W. W. Norton & Co. 2000) (1950).

<sup>3</sup> In this article, I use the term "affective" interchangeably with "emotional." This draws on the definition of "affective" as "relating to, arising from, or influencing feelings or emotions." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 21 (11th ed. 2004), available at <http://www.merriam-webster.com/dictionary/affective>. This is not, of course, the only way one could define "affect." See, e.g., KEITH OATLEY, DACHER KELTNER & JENNIFER M. JENKINS, *UNDERSTANDING EMOTIONS* 29 (2d ed. 2006) (defining "affective" as comprehending a larger domain including emotions, moods and dispositions).

<sup>4</sup> These were the basic facts of the case of *Young v. Young*, 80 N.Y. 422 (1880).

<sup>5</sup> Joseph Siprut, *The Peppercorn Reconsidered: Why a Promise To Sell Blackacre for Nominal Consideration Is Not Binding, but Should Be*, 97 NW. U.L. REV. 1809, 1835 (2003).

<sup>6</sup> Melvin A. Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 822 (1997); see also ROY KREITNER, *CALCULATING PROMISES* 56-67 (2007) (discussing the refusal to enforce donative promises and citing *Beaver v. Beaver*, 22 N.E. 940, 941-42 (N.Y. 1889), in which the court held: "The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be even so formally executed by the donor . . . or there may be the most explicit declaration of an intention to give . . . yet, unless there is delivery, the intention is defeated."). In the classic case of *Dougherty v. Salt*, for example, Judge Cardozo held that an aunt's promise to pay her nephew \$3,000 was unenforceable even though she had filled out and signed a printed form of promissory note for that amount and handed it to him. See *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919).

question. Most of them end up explaining and justifying the mystery of the current refusal to legally acknowledge promises to give gifts. The automatic refusal to enforce such promises has an enigmatic aura because other Western legal systems do not hesitate to enforce similar promises, and even Anglo-American law enforced them in the past. What happened, then, and why is it that we feel unsure about the appropriate legal meaning of promises to give gifts?

In the intense debate over this question,<sup>7</sup> Professor Melvin Eisenberg suggests one leading explanation.<sup>8</sup> To him, we hold to an unenforceability rule (and should continue it) because promises to give gifts are fundamentally different from other contractual promises. In fact, Eisenberg goes as far as to suggest that common contractual promises and promises to give gifts belong to two different *worlds* that *are not* fused and *should not* be mixed. He argues that “[a]ffective values like love, friendship, affection, gratitude and comradeship,” rather than common self-interested incentives, typify the world of gift and the altruistic promises that are made in the intimate sphere.<sup>9</sup> The affective roots of those promises stand at the core of their unenforceability and have led Eisenberg and others to define them as a special kind of gratuitous promises entitled “donative promises.”<sup>10</sup>

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<sup>7</sup> While modern Anglo-American law is famous for denying the enforceability of promises to gift, scholars have never stopped searching for explanations for this rule. Their continuing questions have produced a scholarly counterpoint that is almost as old as the rule itself. Professor Eisenberg refers to this growing body of literature that calls for enforcement as the “third wave” of gift scholarship. He cites fourteen articles that directly discussed the issue between 1988 and 1997. *See* Eisenberg, *supra* note 6, at 831 & n.34. The debate has intensified in recent years, as several newer arguments have sought to defend the rule and even more frequently to contest it. *See, e.g.*, Robert A. Prentice, “Law &” *Gratuitous Promises*, 2007 U. ILL. L. REV. 881 (2007) (a critical analysis from the perspective of Behavioral Law and Economics).

<sup>8</sup> Eisenberg, *supra* note 6, at 831.

<sup>9</sup> *Id.* at 849.

<sup>10</sup> Since the goal here is to directly address the kinds of promises that present the most serious challenge to enforceability, and to deal with the most forceful contemporary arguments against enforceability, this Article refrains from analyzing gratuitous promises made in the business setting, or charitable contributions made for self-commemoration. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981), which recommends a rule of enforcement of charitable subscriptions. Instead, this Article will focus on gratuitous promises that are motivated by emotion and are made in relatively intimate settings. Therefore, if there is sufficient ground to enforce these highly affective promises, then justifying the enforcement of all less-affective gratuitous promises should become a straightforward move.

While adopting Eisenberg's descriptive explanation, this Article looks critically at the normative argument that follows it in order to justify a rule of unenforceability. Although donative promises are based on emotions and are fundamentally different from common market promises, it still does not necessarily follow that only the latter promises should be legally binding. This Article challenges the inherent conflict between law and emotions by utilizing the new perspective of law and the emotions to reevaluate the contemporary arguments against enforceability.<sup>11</sup> One of this Article's central

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<sup>11</sup>Legal actors have traditionally assumed that emotions, believed to be irrational, devoid of thought, and potentially dangerous, should remain outside the legal sphere. See, e.g., Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 438 (2005) ("Historically, emotions were thought to be states of the mind that caused one to deviate from purely rational calculation . . .").

This view is starting to change, and an increasing number of legal scholars have begun to explore the role of emotions in the law and the impact law has over the emotions. While most of this work has focused on the criminal law, some works have explored the role of certain emotions in non-criminal contexts such as alternative dispute resolution and administrative, securities, tort, employment, and constitutional law.

For works in the criminal area, see, e.g., JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989); Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 655 (1989) (discussing emotions and criminal sentencing). For works out of the criminal area, see, e.g., ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005); Neal R. Feigenson, *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, 27 FORDHAM URB. L.J. 1633 (2000); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. 237 (2002); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000); Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059 (2003); Owen D. Jones, *Law, Emotions, and Behavioral Biology*, 39 JURIMETRICS J. 283 (1999); Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231 (2005); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2095-100 (1998); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002); R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003).

This diverse body of work has been described as an emerging field of

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goals is to inform the lingering scholarly debate with some essential non-legal knowledge about the relevant concrete emotions that play a role in the “world of gift.” With no effort made to learn about affective dynamics in gift situations, the unenforceability rule seems grounded only in a general belief that the law should avoid affectively laden problems.<sup>12</sup> The need to further justify an unenforceability rule or to revise it arises from the fact that adhering to the rule is not cost-free.<sup>13</sup> Similar to market promises, both the initial will of the promisor and the initial expectation of the promisee are at stake here. The legal system has to carefully consider a denial of legal protection for both parties, especially if such denial may denote that keeping such promises is less significant.

Since the idea of changing the unenforceability rule may seem drastic, a few words about the scope of the discussion are in order. The focal point of this Article is the freedom *to* contract: the freedom of making legally binding donative promises and enabling reliance on them. This Article is not considering legal intervention with people’s relationships or emotions when their wish is to stay away from the law and make promises that would be subject only to moral and social norms. Both in the business arena and outside of it, people

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scholarship called “law and emotions.” *See, e.g.*, Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 119-20 (2006) (“‘Law and emotion’ . . . might now be added to a family of interdisciplinary approaches that includes . . . law and economics and feminist jurisprudence.”).

<sup>12</sup> In this respect, it is worth noting that harmonious intimacy may characterize the birth of a donative promise, and the generous promisor usually does not breach the promise. Instead, the promisor’s heirs initiate the breach, as they tend to care more about their financial self-interests and far less about the wishes of the promisor or the valid expectations of the promisee. In other words, by the time the law has to speak, many of the original emotions are gone and the breach that calls for legal response is no longer that different from any other breach. *See, e.g.*, Eisenberg, *supra* note 6, at 822-23; E. Allan Farnsworth, *Promises To Make Gifts*, 43 AM. J. COMP. L., 359, 363 (1995); MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACT 20-21 (2006); ROY KREITNER, CALCULATING PROMISES 45 (2007) (“Litigation over the validity of gifts arises almost exclusively after the donor has died.”).

<sup>13</sup> Note that this argument presupposes that enforceability has a distinct value. Legal enforceability is taken here as supporting the non-legal human behavior of promising by an external mechanism supplied by society. This process has value beyond the increase of the practical probability that the promise will be kept. It also reflects society’s belief in the importance, morality and value of the supported promise. All this is currently withheld from donative promises, a point that will be further developed throughout the third Part of this Article.

should enjoy the recently acknowledged freedom *from* contract.<sup>14</sup> The only question raised here is whether both spheres allow people to enjoy similar levels of freedom to create a contract, if they so wish.<sup>15</sup> This last question goes back to Williston's days,<sup>16</sup> and it has not been answered. But it has been repeated by such contemporary legal actors as Judge Richard Posner:<sup>17</sup> if a promisor wishes to make a legally binding promise to give a gift, why shouldn't the law support her?

The question whether to enforce donative promises is theoretically meaningful and pragmatically significant. On the theoretical level, it is connected to the larger question of the boundaries of contract law: which promises should be enforced and which should not? Is it up to the parties to decide whether contract law will be applied to their relationship, or is it up to the legal system to decide, as matter of public policy, whether parties are allowed to create legally binding promises? More pragmatically, the question is a pressing one. Despite the long reign of the unenforceability rule and several legal alternatives,<sup>18</sup> people continue to engage in making donative

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<sup>14</sup> The symposium titled "Freedom from Contract" took place at the University of Wisconsin Law School on February 7, 2004, and the papers were later published in a symposium issue (2004 WIS. L. REV.). For a discussion of freedom *of* contract as consisting of at least three different freedoms – the freedom *in*, *from* and *to* contract – see Hila Keren, *We Insist! Freedom Now: Does Contract Doctrine Have Anything Constitutional To Say?* 11 MICH. J. RACE & L. 133, 168-79 (2005).

<sup>15</sup> This Article challenges the traditional belief that the difference between commercial promises and donative promises requires contrasting legal regimes. It will be later argued that in those respects that should matter to contemporary contract law, the two kinds of promises share sufficient structural similarities to merit comparable treatment. However, it does not deny the affective background or the special, valuable character of donative promises. To the contrary: it insists on developing a nuanced understanding of the distinctiveness of gift promising, in order to better evaluate the question of its enforcement.

<sup>16</sup> Melvin Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 659 (1982) (citing Williston, who wrote, "[A] person ought to be able . . . if he wishes to do it . . . to create a legal obligation to make a gift. Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so.").

<sup>17</sup> Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977).

<sup>18</sup> The main alternatives are trusts and wills, which are much less intuitive, far more costly, cannot be created without professional help, require coping with formalities, and are highly time-consuming. All of these factors render trusts and wills far less attractive devices for making promises to give gifts. See James Gordley, *Enforcing Promises*, 83 CALIF. L. REV. 547, 570-71 (1995) ("By a trust, one can give away any type of property by declaring that one holds it in trust for the donee. The



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promises in a contractual manner, which seems to presuppose the assistance of contract law.<sup>19</sup> The gap between such promising patterns, on the one hand, and the refusal of the legal system to enforce the promises, on the other, gives the ongoing scholarly debate a practical edge and further justifies efforts to resolve the problem of enforceability – a task that this Article seeks to accomplish.

Focusing on the interaction of law and emotions, this Article unfolds in three parts.<sup>20</sup> Part I illuminates the connection between the affective background of donative promises and their modern unenforceability. It hypothesizes that rejecting promises that are not supported by consideration can be seen as an effort to distance law from any association with irrational decisionmaking and to disassociate it from “emotional” spheres.

Part II seeks to correct the erroneous way affective giving has been perceived by law in the gifts context. The law must carefully analyze each relevant emotion concretely and separately, rather than treating emotion as an undifferentiated aggregate. This part is dedicated to an interdisciplinary investigation of the leading emotions that play a role in the context of gifts and altruistic behavior: empathy and gratitude.

Part III integrates the knowledge gained in Part II with the normative question of the desirable rule for donative promises. It suggests that given the special function of empathy and gratitude in the gift setting, the main justifications for the enforcement of bargained-for promises support the enforcement of donative promises. Part III concludes with the suggestion that enforcement should not be dependent on the motives that led to promising and instead

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trust is then irrevocable if the donor so declares, and the intention to create an irrevocable trust will usually be found even without such a declaration.”).

<sup>19</sup> See, e.g., *Levine v. Estate of Barton (In re Barton)*, No. W2004-02913-COA-R3-CV, 2005 Tenn. App. LEXIS 825 (Tenn. Ct. App. Dec. 28, 2005).

<sup>20</sup> Those parts correspond to three dimensions of law-and-the-emotions scholarship as they have been recently defined. See Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions* 94 MINN. L. REV. (forthcoming 2010) (arguing that the above three dimensions can be marked by three alliterative terms: Illumination, Investigation and Integration. “Illumination” stands for the task of clarifying the often unacknowledged but significant role played by emotions in a particular legal setting, “Investigation” stands for the interdisciplinary effort to better understand the specific emotions at hand, and “Integration” stands for the normative challenge of going back to law and reformulating it based on the new emotion-oriented insights).

would depend on the *intention* of promisors to be legally bound by their promises. It is suggested that the freedom *to* make legally binding promises would be afforded to players in all spheres of life and less biased toward profit-seeking activities. The Article ends with a concrete suggestion to move from total refusal to enforce donative promises to a cautious willingness to enforce them “consciously”: only in cases of provable intention to create legally binding promises.

#### I. ILLUMINATING THE PLACE OF EMOTIONS IN THE ENFORCEMENT DEBATE

The unenforceability of donative promises is often explained by the fact that such promises typically emerge in the intimate sphere and are motivated by strong affective connection between the promisor and the promisee.<sup>21</sup> In contrast to transactions made at the core of the market at arm’s length, they are not aimed at maximizing the revenues of the parties and the contractual connection between the parties does not start the relationship, but is the result of the relationship’s existence. Furthermore, counter to short-term market promises, the relationship usually lasts long after the promise has been made.<sup>22</sup>

Despite those apparent dissimilarities, there is nothing inherent in donative promises to render them unenforceable. In many ways they are not that different from market promises: their monetary value, their importance to the lives of the parties, and their clear articulation are often comparable to those of more common promises. Moreover, the common law itself enforced donative promises in the past. Primarily, these were subject to satisfying formal requirements such as the use

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<sup>21</sup> Eisenberg, *supra* note 6. For an explanation of the decision to focus on promises with such background, see note 10, *supra*.

<sup>22</sup> The above-mentioned case of *Levine* can demonstrate those main features of a donative promise. *Levine*, 2005 Tenn. App. LEXIS 825, at \*20. In this case, the promise was made (in writing) by a lover to his beloved one in the course of an intimate relationship that lasted twenty-three years, until the death of the promisor. *Id.* at \*2. Mr. Barton promised Ms. Levine ongoing financial support, emphasizing his long-term intentions. *Id.* He wrote, “I’m not talking about the short term but the long term, until to (sic) are settled comfortably financially. (However long that takes.)” *Id.* However, upon his death his heirs refused to keep the promise, and Ms. Levine had to sue. *Id.* at \*4. She failed, as donative promises are not enforceable. *Id.* at \*14-18.

of a seal,<sup>23</sup> and sometimes by appearing to accept feelings like love as consideration that justified enforcement.<sup>24</sup> Comparatively, donative promises have enjoyed many years of enforceability under other Western legal systems without presenting any special problems.<sup>25</sup>

The fact that enforceability could have been a valid possibility for donative promises makes the modern Anglo-American unenforceability rule a matter of choice, or preference, to disassociate them from the law of contracts. The decision to separate donative promises and deny them enforcement, therefore, calls for a more careful examination: one that focuses on law's complex relationship with the emotions.

#### A. HISTORICAL BACKGROUND OF THE UNENFORCEABILITY OF DONATIVE PROMISES

Despite periods of enforcement, an increasing reluctance to enforce promises to gift developed throughout the second half of the nineteenth century in a process that can best be understood by contextualization. It is deeply intertwined with other legal developments of the era that have produced what is known as the classical doctrine of contract law. Contemporary scholarship has already illuminated an essential part of the context by pointing to the reformation of the consideration doctrine during this period of time. In his 2001 article entitled *The Gift Beyond the Grave*,<sup>26</sup> Professor Kreitner convincingly explains how classical contract-law theorists had intentionally isolated donative promises and classified them as non-enforceable in an effort to create a new focal point for contract law around the question of "which promises the law should

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<sup>23</sup> Joseph Siprut, *supra* note 5, at 1811-15 (tracing the history of the seal and of comparable formalities and demonstrating that in the past such formalities were used to make gratuitous promises binding).

<sup>24</sup> See Mark K. Moller, *Sympathy, Community, and Promising: Adam Smith's Case for Reviving Moral Consideration*, 66 U. CHI. L. REV. 213, 214 (1999) (describing how "courts held that a donative promise, absent any bargain or promise in exchange, became enforceable in 'affective' relationships").

<sup>25</sup> JOHN P. DAWSON, *GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED* (1980).

<sup>26</sup> Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876 (2001).

enforce.”<sup>27</sup> In his words:

Classical theorists revolutionized consideration and contract generally, primarily by redefining it as the legal category dealing with enforceable promises. Part of this redefinition and categorization entailed burying the gift.<sup>28</sup>

Kreitner’s article offers an elaborated historical description of the deep “cleansing”<sup>29</sup> work that was needed to accomplish the goal of reshaping the consideration doctrine and to portray contract law as the law that enforces free choices.<sup>30</sup> The new and purified version of the consideration doctrine had the role of a gate keeper – letting into contract law the valuable bargained-for promises while leaving other matters out.<sup>31</sup> As part of this process, contract-law theorists had deliberately made gratuitous promises an unwelcome guest in the house of contracts.<sup>32</sup> As Kreitner explains, the “*clean up project*” meant, *inter alia*, setting a limitation on the freedom of contract of those who were engaged in gift giving and receiving as it denied them state enforcement that was available in the past.<sup>33</sup>

Kreitner’s rhetoric of cleansing is important for our discussion. While his analysis of the past remains “hygienic” and focuses on the positive and constructive purpose of the cleansing project,<sup>34</sup> I want to add the mirror image: the negative and destructive side of the same reform; the ideological background that had led to the treatment of donative promises as if they were, to continue with the sanitization metaphor, *waste*.

The argument that the disposal of donative promises was a chief means to the goal of the classical effort to redefine the consideration doctrine is well grounded in writings of the

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<sup>27</sup> *Id.* at 1882.

<sup>28</sup> *Id.* at 1879.

<sup>29</sup> *Id.* at 1844.

<sup>30</sup> *Id.* at 1895.

<sup>31</sup> *Id.*

<sup>32</sup> Kreitner, *supra* note 26, at 1895.

<sup>33</sup> *Id.* at 1884-95.

<sup>34</sup> Generally, Kreitner argues that the reformulation of the consideration doctrine was aimed at “the constitution of a calculating individual subject, whose actions would be open to objective economic analysis, or economic rationality.” *Id.* at 1877-78.

time.<sup>35</sup> For example, Ballantine notes:

The underlying principle of consideration would seem to be negative — *a denial* that ordinarily there is *sufficient reason* why gratuitous promises should be enforced.<sup>36</sup>

Ballantine's words reveal a search for "sufficient reason" for enforcement and express the idea that without consideration there is no such reason and therefore "a denial" of enforcement follows. Yet, readers may ask *why* a "sufficient reason" is being required from donative promises, while the enforcement of bargained-for promises does not necessitate any special "reason" beyond the making of a promise. Reading more of Ballantine's text tells a bit more about the source of reluctance as he explains:

From *a nude pact* no obligation arises. The courts have not felt impelled to extend a remedy to one who seeks to get *something for nothing*.<sup>37</sup>

Ballantine's reasoning is based on the lack of consideration; on the notion that making a promise to give something without receiving a reward in return can create nothing and is no more than "*a nude pact*." Why does the law have no "sufficient reason" for enforcement and why do the courts feel "impelled?" At first glance, it seems as if the reluctance had to do with the promisees who "seek to get something for nothing." Yet, in an enforcement regime promisees are reasonable to expect a fulfillment of promises given to them regardless of whether they have given something (of monetary value) in return. This suggests that the problem may reside elsewhere. What may have made the enforcement seem unreasonable is not so much receiving something for nothing, but probably the opposite of it: the *giving* of "something for nothing." In other words, the general misunderstanding, suspicion and undervaluation of giving behavior stand at the core of the classical decision to deny enforcement from donative promises. From a logical point of

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<sup>35</sup> *Id.* at 1898 & n.51.

<sup>36</sup> Henry Winthrop Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 121 (1914) (emphasis added).

<sup>37</sup> *Id.* (emphasis added).

view, enforcing a deal that is being perceived as “something for nothing” is an irrational act. However, basing a special unenforceability rule for donative promises on the lack of “sufficient reason” to enforce them is quite a tautological argument. The question is, therefore, what had the classical theorists seen in gift promising that had made them worried enough to engage in redefining the boundaries of contract law in a way that leaves them out?

As we shall now see, the classical resistance to donative promises can be explained by at least three accompanying ideological processes that took place at the times of the establishment of classical contract doctrine. Those three developments turned any link between contract law and intimate emotions into a threat to the status of contract law.

### 1. *Law as Science*

[I]t [i]s indispensable to establish at least two things:  
first, that law is a science . . . .<sup>38</sup>

The decisive quoted sentence, famously coming from Christopher Columbus Langdell, is one key to understanding the growing rejection of donative promises. Leading American legal education into its golden days, Langdell worked first and foremost to establish the profile of law-as-science.<sup>39</sup> Contract law was one of the main vehicles through which Langdell made his scientific point. As Langdell explained:

Law, considered as a science, consists of certain principles and doctrines. . . . It seemed to me, therefore, to be possible

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<sup>38</sup> Christopher Columbus Langdell, Professor Langdell’s Address *in A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE* 85 (1887), *quoted in* GRANT GILMORE, *THE DEATH OF CONTRACT* 109-10 (1974).

<sup>39</sup> Langdell, one of the founding fathers of our jurisprudence, was an admired Dean of Harvard Law School and the author of the first modern case book. Generally, his belief in law as a rational science and his efforts to shape it as such were highly influential. See Wai Chee Dimock, *Deploying Law and Legal Ideas in Culture and Society: Rules of Law, Laws of Science*, 13 *YALE J.L. & HUMAN.* 203, 204-05 (2001); Brett G. Scharffs, *Law as Craft*, 54 *VAND. L. REV.* 2245, 2257-58 (2001). In the introduction to Langdell’s book on contracts, he wrote, “It is indispensable to establish at least two things, first that law is a science; secondly that all the available materials of that science are contained in the printed books.” See GILMORE, *supra* note 38, at 12; Kreitner, *supra* note 26, at 1896.

to take such *a branch of the law as Contracts, for example*, . . . and to select, classify and arrange all the cases which had contributed . . . to the growth, development, or establishment of any of its essential doctrines.<sup>40</sup>

The choice of contract law to spread the “law as science” message was not accidental, but deliberate. Contemporary commentators do not always remember that contract, as a distinct and paradigmatic field of law, was launched by Langdell.<sup>41</sup> Writing the first modern casebook, devoted to a field of law that was not yet defined, allowed Langdell more freedom to construct a doctrine that would support his argument that law is indeed a science. Importantly to our focus on gifts, *one third* of the new book was dedicated to establishing the consideration doctrine and at the same time presented a prime example of “law as science.”<sup>42</sup> It demonstrated that legal actors could construct doctrine by a process as systematic and logical as that by which scientists cull and analyze relevant data. As chemists work in their laboratories, legal scientists work – as Langdell did – in the law library,<sup>43</sup> where they “select, classify and arrange all the cases” in order to define or discover a more general principle or doctrine.<sup>44</sup>

The rebirth of consideration as a scientific doctrine and as part of the broader Langdellian project of marketing the “law as science” idea left little room for emotionally related promises such as donative promises. To appreciate the conflict between the emerging classical contract law, on the one hand, and gift-promising with its emotional associations, on the other, it is important to understand that Langdell’s definition of “science” was especially unwelcoming to emotions. Not trained in any of

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<sup>40</sup> GILMORE, *supra* note 38, at 12 (emphasis added).

<sup>41</sup> *Id.* at 9-14 (describing the emergence of Contract Law as a field of law not in existence earlier and attributing the creation of “general theory of Contract” to Langdell – who launched the idea – and his successors Holmes and Williston, who “pieced it together”).

<sup>42</sup> Langdell’s book had three chapters: Mutual Assent, Consideration and Conditional Contracts. *See id.* at 13.

<sup>43</sup> The comparison of laboratories and law libraries belongs to Langdell himself, who said, “The library is the proper workshop of professors and students alike; . . . it is to all of us all that the laboratories of the university are to the chemists and physicists . . .” *See id.* at 109 (quoting Langdell’s speech from 1886).

<sup>44</sup> *Id.*

the then-acknowledged sciences, he held to a narrow – one might say “impoverished” – view of science.<sup>45</sup> To him science was an intellectual process of deduction and induction resulting from textually based acts of reading and writing: the ultimate expression of abstract logic and reason. Langdell saw law as “as an entirely self-contained geometric system of axioms, theorems, and proofs, generated by constructing the simplest and most elegant internally consistent set of principles . . .”<sup>46</sup> and, to him, logical consistency was what made law scientific. Such a process has the advantage of producing a set of concepts that in turn allow law to be and appear “rational,” i.e. reason-based and predictable rather than arbitrary and uncontrolled.<sup>47</sup>

Furthermore, as a person, Langdell has been described as cold and distanced from his own emotions,<sup>48</sup> which perhaps made it natural for him to establish a doctrine that is aimed at detaching contract law from emotion-laden contexts such as promises to give gifts. It is of little wonder, therefore, that Langdell produced a view of contract law as “a remote, impersonal, bloodless abstraction,”<sup>49</sup> and that eventually classical doctrine proved hostile to the highly personal and affectively motivated behavior of gift-promising.

## 2. *Objective Theory*

The law moved from “subjective” to “objective,”

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<sup>45</sup> Dimock, *supra* note 39, at 215-18 (discussing critical views of Langdell’s perception of science).

<sup>46</sup> Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 819 (1989).

<sup>47</sup> As a result, one was to adhere to the rules almost regardless of the consequences. Dimock, *supra* note 39, at 214. In a recent work, Professor Kimball has suggested that in reality Langdell’s mode of reasoning was far more complex and less mathematical, but even according to his original analysis, Langdell is described as avidly promoting an appearance of law as science for the sake of keeping and restoring legal authority. See Bruce Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 395 (2007).

<sup>48</sup> Jerome Frank, *Why Not a Clinical Lawyers-School?* 81 U. PA. L. REV. 907, 908 (1933). Frank portrayed Langdell as a bizarre character with “an obsessive and almost exclusive interest in books . . . . The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries, . . . [were] virtually unknown (and [were] therefore meaningless) to Langdell. . . . The so-called case system . . . was the expression of the strange character of a cloistered, retiring bookish man.”

<sup>49</sup> GILMORE, *supra* note 38, at 13.



from “internal” to “external”  
from “informal” to “formal”<sup>50</sup>

Langdell’s contractual ideas were further developed by Oliver Wendell Holmes. To the pillars of logic and rationality coming from the “scientific” conceptualization of contract law Holmes added a new emphasis on objectivity.<sup>51</sup> The shift away from subjectivity was quite remarkable: from the sixteenth to the early nineteenth century, contract formation depended upon the notion of a subjective “meeting of the minds.” However, by the middle of the nineteenth century, in the same period that theorized the rejection of donative promises, “the tide had turned in favor of an objective theory of contract.”<sup>52</sup>

Importantly for our purposes, it was the newly defined doctrine of consideration that facilitated the move from subjectivity to objectivity. Langdell was probably the first to make the effort to disconnect law from subjectivity, clarifying:

*In order to eliminate the parties’ subjective motives, . . . “benefit to the promisor is irrelevant to the question of whether a given thing can be made the consideration” and that a “detriment to the promisee is a universal test of the sufficiency of consideration.”*<sup>53</sup>

Holmes had followed Langdell by distinguishing an additional requirement as a condition for enforceability. Under what is known as “the bargain theory,” Holmes had clarified that the mere presence of consideration will not suffice for enforcement. To belong with contract law and to be enforced, a promise should be bargained-for, i.e. *induced* by the consideration. Combined, those two points present a legal approach that disregards any subjective goal that may have

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<sup>50</sup> *Id.* at 41 (quoting Holmes’s words in his famous 1888 printed collection of lectures, “The Common Law”).

<sup>51</sup> Holmes is known for his critique of the Langellian idea of “law as science.” However, his analysis drew heavily on Langdell’s logic-oriented analysis to the point of “borrowing.” See Kimball, *supra* note 47, at 367 (“One reason for the borrowing is that Holmes needed the expertise, not having carefully studied the subject of contracts. Another reason is that, in summer 1880, he was under ‘deadline pressure for his contract lectures’ scheduled for late fall.”).

<sup>52</sup> See Allan Farnsworth, “*Meaning*” in the Law of Contracts, 76 YALE L.J. 939, 945 (1967).

<sup>53</sup> Kimball, *supra* note 47, at 370 (citing CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 71 (1880)) (emphasis added).

driven the promisor in making her promise. Instead, according to the newly developed approach, all that should matter is the presence of formal consideration, taken as an objective measure. Naturally, such an approach distances contract law from the parties' beliefs, intentions and feelings and shifts the legal attention away from everything they wished for or had in mind. It is almost needless to note how negative and unwelcoming to donative promises contract doctrine became after adopting such a formal and objective approach.

### 3. *Market Economy*

The law of contract is, therefore, roughly coextensive with the free market.<sup>54</sup>

The exclusion of donative promises from contract law should also be considered in relation to the major effort made by classical contract theorists at the same time to connect their (new) field with the market world and distance it from the domestic arena. Creating an affinity between contract law and the market was an independent goal that made contract law far less receptive to donative promises, as the latter often originated far from the core of the market and in any case were clearly distinguishable from the stereotyped market behavior.

The conceptualization of the modern market as a social institution remote from home is a relatively recent development; the segregation is accepted as one of the main consequences of the industrial revolution.<sup>55</sup> Historically, the transition to an industrial society controlled by a market economy has been an onerous process. It has brought about, to name only a few obvious detriments, harsh competition, instability, long hours of commute and work, growing social alienation, and weakening of familial and communal supportive systems.<sup>56</sup>

The legal response to this harsh reality was part of a larger ideological effort to reduce people's mounting anxieties

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<sup>54</sup> LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965).

<sup>55</sup> ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 46 (1986); see also Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 *HARV. L. REV. F.* 19 (2005).

<sup>56</sup> See, e.g., Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF THE LAW* 497 (David Kairys ed., 3d ed. 1990).

mainly by socializing them to develop a new belief in free-market values. Under a wide, liberal pro-capitalist campaign, aimed at selling the market idea with its laissez-faire philosophy, it was claimed that what felt like alienation should be accepted as valuable self-interested individualism and that what was experienced as cruel competition is a logical and rational tactic that would eventually lead to economic success. In this nineteenth-century effort, classical contract law had an important role to play: on the one hand, by increasingly focusing on commercial transactions, it could signal a strong belief in the centrality of the market. On the other hand, by denying attention to “domesticity,” it could portray the world of family and friends as a warm shelter and a kind of consolation to those daunted by the impersonal market.

One immediate, practical way to adjust the legal message to the spirit of the period was by discriminating against promises less associated with the values of the profit-oriented and self-interested free market. The promises to give gifts, with their altruistic nature and their affinity to the domestic and personal spheres, were the first to stand in opposition to the stereotype of market behavior and as such to invite rejection. The process was figuratively described by Professor Friedman as a process of *exclusion*:

Contract law expanded and narrowed its applicability to human affairs primarily through a process of *inclusion and exclusion*. The rules themselves changed less than the areas covered by them.<sup>57</sup>

In this atmosphere promises typical to the domestic, relational and intimate setting became unworthy of legal attention, underscoring the point that contract law’s focus was on the market. Accordingly, attaching separate legal meanings to promises happening within the different spheres — the enforcement of commercial (bargained-for) promises versus the nonenforcement of non-economic (donative) promises — had an important role. It worked in chorus with the ideology of the day — both reflecting and reinforcing the newly drawn line between the spheres. When courts and theorists had later to explain the difference, their rhetoric highlighted a need to

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<sup>57</sup> FRIEDMAN, *supra* note 54, at 20-24 (emphasis added).

respect the relational-domestic sphere and to protect it from the coldness of the law.<sup>58</sup> However, as scholars in general and feminists in particular have argued, such “protection” from law actually worked in the opposite direction: it served to fortify the market at the expense of other arenas of human activity that were exposed to “lawlessness” and neglect.<sup>59</sup>

#### 4. *Summary*

At the end of the nineteenth century and the beginning of the twentieth century, the three separate ideas of linking law with science, objectivism and the market had reinforced each other and had resulted in an accumulative negative impact on the legal status of donative promises. Unquestionably, the leading classical contract theorists, such as Langdell, Holmes and Williston, created and formulated a contract doctrine that influenced generations to come. At the beginning of the twentieth century it was explicitly admitted that one of the goals of this new contract doctrine was to educate lay people *to behave rationally*.<sup>60</sup> Promises to give that are not supported by expectations of tangible consideration were perceived as totally *irrational* and, in the spirit of the time, were denied the support of contract law and deemed unenforceable. However, the exclusion that resulted from a set of nineteenth-century ideologies survived the changes that were brought by the twentieth century, and new justifications for the unenforceability rule began to emerge. The coming section moves from the past to the present to discuss those more-recent explanations.

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<sup>58</sup> In the famous case of *Balfour v. Balfour*, the court said: “Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. . . . In respect of these promises each house is a domain into which the King’s writ does not seek to run, and to which his officers do not seek to be admitted.” *Balfour v. Balfour*, [1919] 2 K.B. 571, 579.

<sup>59</sup> Marjorie M. Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 58-59 (1991).

<sup>60</sup> Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law*, 63 U. CIN. L. REV. 269, 301 & n.115 (1994) (maintaining that “Justice Holmes said that citizens should be educated to ‘rational’ behavior and racial division” and quoting him as saying in one of his public speeches, “If I am right it will be a slow business for our people to reach rational views, assuming that we are allowed to work peaceably to that end.”).

## B. CURRENT VIEWS

With some important exceptions,<sup>61</sup> most of the contemporary works that have explored the classical unenforceability of donative promises have ended up offering arguments in support of the status quo that are grounded in the disadvantages of enforcement. Even scholars who have admitted the value of legal enforcement of donative promises were reluctant to go as far as to recommend a reform and a move to an enforcement regime.<sup>62</sup> How much of such enduring resistance to the enforcement of donative promises is still connected to their association with the relational and affective aspects of life?

1. *The Anti-Enforcement Arguments*

Along the years many arguments against enforcement have been raised, ranging from the most procedural to the more substantive. Yet, each of the many anti-enforcement arguments shares the assumption of *difference*: donative promises are so different from “normal” promises that the “regular” norm of enforceability cannot fit them. The literature concerning the unenforceability rule is vast and elaborate and does not seem to call for yet another summary. Alternatively, the chart below and the following analysis are aimed at reclassifying the leading existing arguments against enforceability of donative promises and connecting them to the traditional resistance toward the emotions. The main arguments against enforcement can be divided into those that are made on behalf of the world of contracts and those that are

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<sup>61</sup> See, e.g., Jane B. Baron, *Gifts, Bargains and Form*, 64 IND. L. J. 155 (1989); Mark B. Wessman, *Recent Defenses of Consideration: Commodification and Collaboration*, 41 IND. L. REV. 9 (2008); Carol M. Rose, *Giving, Trading, Thieving and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992); Carol M. Rose, *Giving Some Back -- A Reprise*, 44 U. FLA. L. REV. 365 (1992).

<sup>62</sup> A good example is a recent analysis by Professor Prentice, who has used Behavioral Law and Economics to illuminate the behavior of giving gifts and promising to give them. Although Professor Prentice is quite sympathetic to gift-giving and clearly appreciates its logic, he still concludes that even his analysis does not call for legal reform. Robert A. Prentice, *“Law &” Gratuitous Promises*, 2007 U. ILL. L. REV. 881 (2007). See also Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contracts*, 89 YALE L.J. 1261 (1980).

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made on behalf of the world of gift. They can then be summarized as follows:

	A.	B.
	Protecting the <u>World of Contract</u>	Protecting the <u>World of Gift</u>
1)	Donative promises are minor and not important.	A risk of imposed contract (donative promises are not intended to be legally binding).
2)	Donative promises are too ambiguous.	A risk of damaging the world of gift.
3)	Donative promises are impulsive and not well considered (impulsive).	
4)	Donative promises are subjective, hard to prove, and easy to fabricate or manipulate. <sup>63</sup>	

Examination of the chart can highlight an interesting phenomenon: the arguments made from the perspective of the world of contract, while appearing to care about the value of this world, are in fact arguments regarding the problematic nature of the gift. Conversely, the arguments coming from the standpoint of the world of gift, while seeming to worry about this world, are in reality arguments about the nature of the opposite world, that of contract. Despite Eisenberg's rhetoric, it also seems evident that what he has entitled as the "world of contract" can be more precisely described as the "world of law." For example, looking at cell A(3) it seems clear that it is the law (of evidence), and not the contract, that has problems of proof. Similarly, as far as cell B(1) is concerned it is law rather than contract that is imposing itself when there is no indication of intention to be legally bound. Replacing the term "contract" with the term "law" can be a revealing exercise as it uncovers some of the tautological character of the arguments against enforceability. One may ask how the difference between the world of law and the world of gift can offer a satisfactory justification for the refusal of law to apply itself to gifts.

The chart enables us to see that six main parameters are

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<sup>63</sup> Eisenberg, *supra* note 6, at 827.

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used to make the case for a fundamental difference between donative promises and commercial promises. Gifts are described as different from contracts by size [A(1)], clarity [A(2)], deliberativeness [A(3)], provability [A(4)], legal intention [B(1)] and vulnerability to law [B(2)]. Nevertheless, those six parameters produce no clear line between the two groups of promises. Promises from both groups often reflect the same dollar value, enjoy similar – written – clarity, are based on analogous deliberativeness, present similar amenability to proof, and reflect a comparable intention to be legally binding. What remains is only the question whether the touch of law is going to damage the world of gift [B(2)].<sup>64</sup> To return to the five other parameters, it seems clear that promises from the “world of contract” and promises from the “world of gift” can be so similar that scholarly insistence on differentiation becomes baffling. Is it possible, then, that in fact these are *not* the relevant sources of difference or parameters for comparison?

The standard arguments against donative promises – which suggest the impulsiveness, ambiguity, and unreliability of such promises – seem to apply less to actual examples of such promises (which can be, as shown in the case of *Levine v. Barton*,<sup>65</sup> very deliberative and carefully defined) and more relevant to the emotions that are presumed to animate and underlie them. According to common myths, emotions – which are often, and erroneously, treated in the aggregate – are conceived as impulsive, transient, immature, and generally inferior as compared to deliberative, mature cognitive thinking. Such a view is prevalent among jurists, who have frequently contrasted such traits with their idealized view of the legal world. Richard Posner, for example, has bluntly argued:

The less experienced a person is at reasoning through a particular kind of problem, the more likely that person is to “react emotionally,” that is, to fall back on a more primitive mode of reaching a conclusion, the emotional. . . . Emotions, like sex, are something that we have in common with animals, who, having smaller cortexes than humans, rely more heavily than humans do on emotions to guide their

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<sup>64</sup> See *infra* Part III.

<sup>65</sup> *Levine v. Estate of Barton (In re Barton)*, No. W2004-02913-COA-R3-CV, 2005 Tenn. App. LEXIS 825 (Tenn. Ct. App. Dec. 28, 2005).

actions.<sup>66</sup>

The denial of legal recognition of promises to give gifts may thus be seen as a variation of the old resistance to the place of emotions in legal decisionmaking. Clearly, to some legal minds the status of contract law is still threatened by an association with the image of the emotions, much as it was in the days of Langdell.

Taken together, the four arguments on the left side of the chart seem to protect contracts by portraying them as rational and not “emotional” (to use Posner’s derogatory term). That message is communicated by rejecting donative promises which function in this context as a symbol of emotionalism. By refusing to enforce ostensibly impulsive promises, for example, the law denies its own uncontrolled dimensions and underscores its attributes of objectivity and reason. Such a structure suggests that the line between commercial promises and donative promises, and the following contract/gift dichotomy, are in fact rooted in a deeper dichotomy between law with its veneration of reason, on the one hand, and emotion, on the other.

A similar reference to the dichotomies of contract/gift and reason/emotion is more directly made in the two arguments on the other side of the chart. While the question whether a promisor of a gift meant to be legally bound by her promise is a factual one, the argument that donative promises *generally* lack such intention seems to rest on an assumption that the affective origins of such promises render them innately non-legal. The coming section discusses the dichotomous view created by these arguments against enforceability, to better understand what stands at the core of the durable resistance to donative promises.

## 2. *The Dichotomies in Context*

The dichotomies of contract/gift and reason/emotion that animate the enduring separation between bargained-for promises and donative promises should not be seen in isolation. They follow from and rely on a series of other fundamental

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<sup>66</sup> Richard A. Posner, *Emotions vs. Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 311 (Susan A. Bandes ed., 1999).



dichotomies that shape the liberal world and, working together, they all reinforce each other to create a reality almost axiomatic. Bargained-for promises are usually made in a *commercial* sphere and away from the *domestic* arena; their content is *tangible*, and—far from being *elusive*—they have *economic* worth and not some *personal* value; this worth is *definite* and not *vague*, as it is perceived as being *objectively* dictated by the *public market* and not as *subjectively* determined by a *private individual* promisee; bargained-for promises are assumed to be a product of *arm's length negotiation* rather than of *intimate* and *informal communications*; those promises are motivated by *individualism* and *self-interest* and far less by *communitarism* and *caring for others*; and, having all those characteristics, bargained-for promises are often believed to be *rational* and not so *emotional*. Importantly, as one may immediately notice, bargained-for promises are much closer to the conventional image of law, where “reason in all its splendor”<sup>67</sup> supposedly presides.<sup>68</sup>

This concert of dichotomies has a powerful effect. It makes the division appear natural and inevitable, and it conceals the intentional normative choice that courts have made. It also produces the strongest anti-enforcement argument left on the table in contemporary debates – Eisenberg’s metaphor of two opposed worlds. Such a strong metaphor neatly captures the idea that, due to many dichotomies working in chorus, we are witnessing a gap far deeper than what can result from a mere difference – one which cannot, and, more significantly, *should not* be bridged.

It is important to note that the “two worlds” idea essentially encompasses *three* layers of assumptions about human beings, their psychology and behavior, and the link between their lives and legal norms. At the *first* and most immediate level it suggests a *substantial difference* between the worlds. The two types of promises, it is argued, are dramatically different internally and externally. Internally, the promises differ in what motivates the promisor. While

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<sup>67</sup> See Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789 (1990).

<sup>68</sup> Note the correlation of all these dichotomies to the basic dichotomy of man v. woman. Bargained-for promises fit the masculine image while donative promises have qualities usually attached to the feminine.

bargained-for promises are made out of self-interest to earn a tangible reward, promises to gift result from the opposite motivation: an other-oriented decision to give up something valuable without expecting a reward. Externally, the entire *context* within which the promises are made is utterly disparate. Both in terms of location and atmosphere, the two sets of promises emerge in highly differentiated spheres – one in the market and the other far away from the market, one could say at “home.”

Such a stark difference is then followed by a *second*, less recognized,<sup>69</sup> layer of *rivalry and mutual threat*. The worlds are so different that any connection between them may endanger their existence. The point, which may be called “the contamination risk,” is not only that the worlds are separated but that they should remain apart to avoid damage. Professor Eisenberg is vividly making the point by describing the danger to the world of gift:

[M]uch of the world of gift is driven by affective considerations like love, affection, friendship, gratitude and comradeship. That world would be *impoverished* if it were to be collapsed into the world of contract.<sup>70</sup>

In the *third* layer the gap between the “opposed worlds” has a vertical dimension of *hierarchy*: the worlds are not only different and hostile but also unequal in their status. This vertical structure is quite expected since whenever a dichotomous separation is defined, the human instinct responds by establishing a hierarchy.<sup>71</sup>

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<sup>69</sup> Highlighting this under-acknowledged point is especially important because it tends to be more resilient to critique. See, e.g., Joan Williams & Viviana Zelizer, *To Commodify or Not To Commodify: That Is Not the Question*, in *RETHINKING COMMODIFICATION* 362, 364 (Martha M. Ertman & Joan C. Williams eds., 2005).

<sup>70</sup> Eisenberg, *supra* note 6, at 847 (emphasis added).

<sup>71</sup> This was, for example, the ground for the political and legal rejection of “separate but equal” throughout the era of *Brown v. Board of Education*, 347 U.S. 483 (1954). According to postmodern philosophy the move from difference and separation to hierarchy is automatic and unavoidable. Once the human mind is differentiating experience, it immediately and compulsively turns to classify them as superior and inferior. See, e.g., GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END*, 117-18 (1995). For a similar point made with regard to the rejection of exchanges made in the intimate sphere, see Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 *HARV. L. REV. F.* 19 (2005).

Professor Eisenberg's professed object of protecting the beauties of the world of gift from the impoverishing impact of the world of contract suggests a greater appreciation and care for the special world of gifts.<sup>72</sup> However, in reality the rule of unenforceability produces the opposite hierarchy, which favors the world of contract. While it seems true that the rule aspired to sustain or enhance a simple separation between the two groups of promises, its vindication of that goal was not neutral in its effects. By excluding donative promises and denying their contractual validity the law has pronounced them inferior to "normal" promises, those made for recognized consideration and outside the familial/relational context. The legal refusal to enforce donative promises simultaneously serves as a sign of a general social devaluation of the world of gifts and an independent cause for such marginality.<sup>73</sup>

As long as commercial promises are considered as purely logical acts, and donative promises are seen as emotional acts, the above hierarchy will continue to be highly impoverishing. If this is true, then the harm can be mitigated only by blurring the lines between reason-directed and affect-motivated exchanges. To accomplish that, it is essential to put aside the old assumptions about the emotions.

### 3. *Law-and-the-Emotions Ideas Applied*

As we have so far seen, the deliberate distancing of donative promises from contract law is a product of the fundamental belief in the estrangement of law and the emotions. It is at this point that the pioneering works done in the emerging field of "law and the emotions" offer a strong challenge to contract doctrine. Those works introduced the idea that emotions have a vital role to play in the legal world. This radical claim confronted a long intellectual tradition that dichotomized reason and emotion,<sup>74</sup> and which construed legal

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<sup>72</sup> See also Posner's argument that donative promises do not call for much legal enforcement, as they can rely on moral sanctions that are far less effective in the commercial world. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 622 (1983) (noting that contract law singles out the realm of love and affection for special treatment, based on the assumption that family and friendship "neither need much law nor are capable of tolerating it").

<sup>73</sup> Jane B. Baron, *Gifts, Bargains and Form*, 64 IND. L. J. 155, 180-81, 189 (1989).

<sup>74</sup> See, e.g., Angela P. Harris & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1775 (1993)

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thought as a professionally instilled cognitive process that could be powerfully unsettled by affective response. Law, it has been recently argued, is infused with emotions and has immense influence over people's emotions. Contrary to traditional belief, law cannot do justice without paying close attention to the affective dimension of life. Without taking emotions seriously, without understanding what may create and direct human feelings, and without dealing with the emotional consequences of legal actions, no "rational" decisionmaking is possible. Just as individuals without access to affective knowledge ("emotional intelligence") are limited by having misguided judgment, so too is the law. Affect-oriented understanding is vital, and the entire legal enterprise is at risk of being irrelevant and even harmful without it.

From the perspective of the first current of law-and-the-emotions scholarship, with its forceful call for legal attention to the emotions, the legal decision not to enforce promises to gift due to their affective "nature" is extremely problematic. After years of loyalty to a legal regime that is premised on an erroneous conception of the emotions, it is imperative to engage in an effort to better understand the affective structure of giving behavior, a proposition that is further discussed in the next Part.

## II. INVESTIGATION OF EMPATHY AND GRATITUDE

### A. EMPATHY AND ALTRUISM: GENERAL REVIEW

This Part seeks to better understand the affective dimensions of gift promising. A promise to give a gift to another appears to be an unselfish gesture that suggests care for the promisee's welfare. On the face of things, it is an act of *altruism*: the promisor does not require any material reward from the promisee, and the decision to make the promise cannot be explained by traditional cost-benefit analysis. Earlier we have seen how contract law treats such altruistic behavior with great suspicion, as it directly conflicts with its rational-choice theory, according to which people are motivated by the desire to maximize their economic self-interests. But

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("Law schools operate at the junction of the academy and the legal profession. Both realms tend to polarize reason and emotion and to elevate reason.")

perplexity in the face of altruism is not unique to law: such other-oriented behavior, sometimes also referred to as “help,” or “care,”<sup>75</sup> has been a source of puzzlement in other disciplines too. Darwin, for example, was driven “half-mad” by the challenge that the altruistic behavior of bees in hives presented to his theory of evolution by natural selection.<sup>76</sup> The altruistic behavior of the sterile bees who risk their lives in defense of the hive “would seem to be precisely the sort of trait that natural selection should operate against, and Darwin knew it.”<sup>77</sup> Scholarly efforts to explain the altruistic behavior of animals and human beings has resulted in a monumental literature. As with Darwin in biology, anthropologists, psychologists, philosophers and other scholars have been challenged by patterns of behavior that do not seem to follow egoistic patterns. Is it possible that there is something beyond “The Selfish Gene”?<sup>78</sup>

One skeptical explanation is that what seems to be altruistic behavior is in fact an egoistic pattern in disguise. This approach, sometimes called “universal egoism,” denies the possibility of “true altruism” or “pure altruism” and argues that the motivation for any behavior arises from the exclusive prospect of self-benefit.<sup>79</sup> For example, we help a family member not because we care for her, but because we expect to benefit from keeping a good relationship with her, or because we anticipate a counter-favor of similar or larger value. The

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<sup>75</sup> Moving on from the discussion of legal doctrine to the investigation of emotions requires some change of tone or tuning of language. In many non-legal disciplines the state of not knowing, or not knowing for sure, is much more typical and tolerable, and one of the consequences is that terminology and arguments tend to be more open-ended. Furthermore, the interdisciplinary nature of this investigation project demands navigation between different concepts while bridging gaps between dissimilar academic styles. It requires, for example, a discussion of results of a psychological experiment in concert with findings from brain-lab research and articulations of philosophical arguments. To enable free motion in such a diverse scholarly space, some preparation is in order.

<sup>76</sup> LEE ALAN DUGATKIN, *THE ALTRUISM EQUATION: SEVEN SCIENTISTS SEARCH FOR THE ORIGINS OF GOODNESS* 5-6 (2006).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> RICHARD DAWKINS, *THE SELFISH GENE* (1976). Professor Dugatkin has said that Dawkins chose the metaphor to emphasize that genes that code for any trait that benefits the species as a whole are doomed for not maximizing their (“selfish”) chances of being passed to the next generation. See DUGATKIN, *supra* note 76, at 4.

<sup>79</sup> C. Daniel Batson, Nadia Ahmad, David A. Lishner & Jo-Ann Tsang, *Empathy and Altruism*, in *THE HANDBOOK OF POSITIVE PSYCHOLOGY* 485-86 (C. R. Snyder & Shane J. Lopez eds., 2002).

universal-egoism approach has had a vast influence over many disciplines of scholarship: at least one scholar admitted that “[t]he flint-eyed researcher fears no greater humiliation than to have called some action altruistic, only to have a more sophisticated colleague later demonstrate that it was self-serving.”<sup>80</sup>

An opposing argument is that altruism does truly exist, and human behavior cannot always be explained by selfish motives. At least outside the law, there appears to be a “paradigm shift” away from the earlier position that egoistic motives are the true explanation for every form of behavior that appears to be altruistic.<sup>81</sup> The more recent view is that true altruism is an integral part of human nature.<sup>82</sup> This is not a universal approach but a more pluralistic one: it acknowledges the place of self interest but also grants that true altruism is “within the human repertoire”<sup>83</sup> and has important value for both individuals and society.

To return to the legal question of donative promises, accepting the universal-egoism approach could have made the argument in favor of enforceability both easy and immediate. If every promise of a gift is actually a selfish transaction in disguise, then there should be no reason to distinguish these promises from their more conventional contractual counterparts or to see them as “unreasonable.” According to the universal-egoism approach, Ballantine was wrong when he wrote that a gratuitous promise is about giving “something for nothing,”<sup>84</sup> because there is always “something” that is being expected by the promisor in return for her promise. Furthermore, the (selfish) benefits that motivated the promisor

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<sup>80</sup> ROBERT H. FRANK, *PASSIONS WITHIN REASON* 21 (1988).

<sup>81</sup> Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27, 27 (1990). “The flint-eyed researcher fears no greater humiliation than to have called some action altruistic, only to have a more sophisticated colleague later demonstrate that it was self-serving.” FRANK, *supra* note 80, at 21.

However, this simple strategy of reducing all pro-social behavior to a more or less sophisticated form of egoism is nowadays much less popular than it used to be. Psychologists have collected convincing evidence for the existence of a genuine feeling of empathy, i.e., concern for others, in human beings.

<sup>82</sup> For additional discussion of this point, see *infra*, Part II.B.

<sup>83</sup> Batson et al., *supra* note 79, at 486.

<sup>84</sup> Henry W. Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 121 (1914).

can also satisfy the consideration requirement as they represent the required benefit to the promisor. Even the fear of contaminating the “world of gift,” which was raised by Professor Eisenberg, becomes irrelevant if one believes that in reality there is no such beautiful and vulnerable world that is moved by the care of human beings for each other. The egoistic approach cannot therefore offer justification for a rule of unenforceability.

The status of promises to gift appears different, of course, if one pursues the more plural approach. In recognizing that at least partial altruism is possible, and may be elicited by a significant, genuine kind of other-oriented motivation, this approach suggests that the question of donative promises is more complex. It demands a better understanding of altruistic behavior and the emotions that may instigate it.

From early philosophers such as David Hume<sup>85</sup> and Adam Smith,<sup>86</sup> to current psychologists such as Martin Hoffman<sup>87</sup> and Daniel Batson,<sup>88</sup> scholars have pointed to the set of emotions, loosely captured by the word “empathy” and sometimes jointly called the “empathetic emotions,” as the possible basis for the altruistic behavior.<sup>89</sup> Under different names, including “empathy,” “sympathy,” “compassion,” “tenderness,” “pity,” and the like (hereinafter termed empathy or empathic emotion), scholars have emphasized an emotional response that is sincerely *other-oriented* and is elicited by and congruent with the perceived welfare of someone else.<sup>90</sup> In recent years, scholars have become deeply engaged in researching empathy,

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<sup>85</sup> DAVID HUME, A TREATISE ON HUMAN NATURE 316 (Selby-Bigge ed., 1896) (“No quality of human nature is more remarkable . . . than that propensity we have to sympathize with others.”); DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 90, 92 (App. 2) (Tom L. Beauchamp ed., Oxford University Press 1998) (1751) (rejecting the argument that “all benevolence is mere hypocrisy” and pointing to the existence of affections of “love, friendship, compassion [and] gratitude.”).

<sup>86</sup> ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 1 (Anthony Finley 1817) (1759) (writing about “sympathy” and opening the discussion by arguing: “How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.”).

<sup>87</sup> MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE (2000).

<sup>88</sup> C. DANIEL BATSON, THE ALTRUISM QUESTION (1991) (reviewing the literature and suggesting the Empathy-Altruism Hypothesis).

<sup>89</sup> Batson et al., *supra* note 79, at 486.

<sup>90</sup> *Id.*

animated and assisted by two important developments. The first is a growing interest in positive emotions, and a corresponding investigation into their individual and social value and importance. The second is a body of technological advances that have allowed neuroscientists to link feelings of empathy with certain recognizable activity in the brain.<sup>91</sup>

In many of the works dedicated to empathy, the line between altruistic behavior and the emotion(s) that motivate it has been blurred. In some cases, no clear distinction has been made between feeling empathy and acting in an altruistic way. Some theorists define the empathic emotion itself as including several dimensions, the last of which is *motivational* and is taken as leading directly to a behavioral effort to help or benefit another.<sup>92</sup> Others, often more focused on altruism, seem to view the altruistic motivation as an external result of experiencing empathetic emotions. In any case, there seems to be considerable evidence that feeling empathy increases altruistic behavior.<sup>93</sup> *The Empathy-Altruism Hypothesis* of Batson is a frequently cited explanation for the direct and causal connection between the empathic emotion and the readiness to help others. Batson argued that, from traditional philosophy to recent psychology, “the most frequently mentioned possible source of altruistic motivation is an other-oriented emotional reaction to seeing another person in need.”<sup>94</sup> He then suggested a model that outlines three paths that lead from empathy to the end result of helping behavior. Two of the three paths are indeed induced by empathy but are still *egoistic* and therefore – as in the universal egoism analysis – point toward treating donative promises as bargains. If, for example, as Batson’s model suggests, one may selfishly decide

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<sup>91</sup> See, e.g., Stephanie D. Preston & Frans B. M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 *BEHAV. & BRAIN SCI.* 1 (2002), and the many responses to that article written by leading scholars in the field of empathy and published by the same journal in the same volume.

<sup>92</sup> See, e.g., ROBERT C. SOLOMON, *A PASSION FOR JUSTICE* 230-31 (1990) (arguing that compassion is not just a feeling but also a motive for acting).

<sup>93</sup> See, e.g., R. Buck & P. Ginsburg, *Emotional Communication and Altruism: The Communicative Gene Hypothesis*, in *ALTRUISM: REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY: VOL. 12* 149 (M. S. Clark ed., 1991); Nancy Eisenberg & Paul Miller, *The Relation of Empathy to Pro-Social and Related Behaviors*, 101 *PSYCHOL. BULL.* 91 (Jan. 1987).

<sup>94</sup> Batson et al., *supra* note 79, at 486.



to help in order to get a personal reward,<sup>95</sup> then the way to finding consideration that will allow enforcement does not seem to be too long. The third path in Batson's model is the empathy-altruism hypothesis, "the hypothesis that feeling empathy for a person in need evokes altruistic motivation to help that person"<sup>96</sup> and that "the greater the empathic emotion the greater the altruistic motivation."<sup>97</sup>

It is beyond the scope of this Article to catalogue the knowledge gained in a range of disciplines concerning empathy and its role in motivating altruistic behavior. Instead, the framework of law and the emotions will be used. Focusing on the "law" component, the structure of the discussion will follow the leading legal arguments against enforcement. Then, these arguments will be linked (the "and" component) to the emotions throughout exploration of some relevant sections of the non-legal understandings of empathy.<sup>98</sup> As we shall now see, the non-legal information tends to undermine the common objections to enforceability.

## B. EMPATHY IS NATURAL

Donative promises seem to conflict with the concept of "the Selfish Gene" and with the widespread assumption that people are motivated only by their self interests and that true altruism is an illusion. This conflict was transformed by some jurists into a general disbelief toward donative promises and a grave suspicion that they are "exceptionally easy to fabricate."<sup>99</sup> In contrast to such disbelief, non-legal research consistently suggests reasons to trust such promises as natural and

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<sup>95</sup> This is part of Batson's first path. *Id.* In addition to an anticipated reward and included in the first path, one may selfishly help to avoid a sanction. *Id.* The second path is helping out of a selfish goal of reducing the distress caused to the helper from witnessing the suffering of another. *Id.* This path may lead to helping behavior, but it may also lead to detachment that seeks to avoid the situation altogether (no helping behavior). *Id.*

<sup>96</sup> C. DANIEL BATSON, *THE ALTRUISM QUESTION* 74 (1991).

<sup>97</sup> Batson et al., *supra* note 79, at 488.

<sup>98</sup> This pragmatic choice will admittedly leave out some important questions that are the main focus of empathy scholars but I hope that it will contribute more to the subject at hand.

<sup>99</sup> Eisenberg, *supra* note 6, at 827 & n.22. (presenting the common argument that "donative promises are exceptionally easy to fabricate" as made in Lon L. Fuller, *Consideration and Form*, 41 U. COLO. L. REV. 799 (1941), and in other works cited in note 22 of his article).

authentic. For example, Dacher Keltner has compellingly argued that as human beings we have a *compassionate instinct*, which manifests itself in many nonverbal and spontaneous manners: through the expressions of our face, the beat of our heart, the levels of our hormones and even the activity in our brain.<sup>100</sup> Apparently, young children show a particular facial expression (oblique eyebrows, concerned gaze) when they empathize with another. Similarly, the heart rate of people who feel empathy goes below its baseline level and the levels of a special hormone (Oxytocin) increases when people behave in a caring way. And, perhaps most exciting, the brain shows demonstrable neurological reaction in response to others – both relatives and strangers – who are in need. Furthermore, the empathic emotion is not only deeply rooted in the brain and in the body but can also be communicated, i.e., both expressed and understood, without words, by a simple touch of hands.<sup>101</sup> This last point suggests that the empathic emotion is something people are capable of feeling, conveying and comprehending even before language or texts, i.e., as a part of human nature.

The inclination to feel and show empathy gains additional support from scholarship on moral development, which demonstrates that feelings of empathy are not only natural but also inevitable. Psychologist Martin Hoffman has pointed to the existence of five distinct modes of empathic arousal. According to Hoffman the first three modes are “preverbal, automatic and essentially involuntary.”<sup>102</sup> Recognizing those involuntary modes here is important not because they can explain a decision to give a gift or promise it. They cannot. Those three preverbal modes are apparently too automatic and too cognitively underdeveloped to lead to such behavior. Recognizing those involuntary modes is important, however, since it shows that humans are built in such a way that not

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<sup>100</sup> Dacher Keltner, *The Compassionate Instinct*, in *THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS* 9-11 (Dacher Keltner, Jeremy Adam Smith, & Jason Marsh eds., 2010); Stephanie D. Preston and Frans B. M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 *BEHAV. & BRAIN SCI.* 1 (2002).

<sup>101</sup> *Id.* at 12 (describing an experiment in which two strangers were put in a room where they were separated by a barrier, and reporting that “people in these experiments reliably identified compassion . . . from the touches to their forearm.”).

<sup>102</sup> MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE* 5 (2000).

only *enables* them to emotionally respond to the needs of others but also *compels* them to do so.<sup>103</sup>

Finally, the conceptualization of empathy and altruistic motives as normal and natural can also get support from looking at the flip side of the coin. In the world of psychiatry, which struggles with defining “abnormalities,” the inability to feel empathy and/or to communicate such emotion is a significant indication of certain personality disorders. The symptoms of a narcissist personality disorder, as a prime example, are defined by the most recent Diagnostic and Statistical Manual (DMS) – IV and they explicitly include “lack of empathy.”<sup>104</sup> As Professor Nussbaum reminds us, having empathy is the normal state while “typically we will be right to find a person without empathy frightening and psychopathic.”<sup>105</sup>

### C. EMPATHY IS COGNITIVE

As mentioned earlier, one explanation for the unenforceability of donative promises is that they are considered to be too impulsive,<sup>106</sup> rashly made,<sup>107</sup> ill-considered,<sup>108</sup> and lacking proper deliberation.<sup>109</sup> These assumptions are rarely explained, but rather are presented as if they reflect a basic truth, one that does not call for demonstration or proof. As a threshold matter, these assumptions rely on an image of emotions as if they were

<sup>103</sup> *Id.*

<sup>104</sup> P. J. Watson, Stephanie O. Grisham, Marjorie V. Trotter & Michael D. Biderman, *Narcissism and Empathy: Validity Evidence for the Narcissistic Personality Inventory*, 48 J. PERS. ASSESS. 301 (June 1984).

<sup>105</sup> MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 334 (2001).

<sup>106</sup> Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799 (1941) (“Again, it is said that enforcement is denied gratuitous promises because such promises are often made impulsively and without proper deliberation.”).

<sup>107</sup> Geoffrey Mead, *Free Acceptance: Some Further Consideration*, 105 L.Q.R. 460, 466 (1989) (“The courts will not normally enforce a gratuitous promise unless the promise is made under seal. A plausible rationale of this rule is that there is thought to be a risk that *gratuitous promises might be made rashly and on the spur of the moment, without careful thought.*”) (emphasis added).

<sup>108</sup> ALLAN FARNSWORTH, CONTRACTS 52 (3d ed. 1999).

<sup>109</sup> Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 53-54 (1992) (“[G]ratuitous promises *in general* are made without proper deliberations . . . .”) (emphasis added).

impulses, an image whose general flaws were discussed earlier. Yet, with regard to the connection between the emotions and law, the more central question is whether the concrete emotion of empathy, which is considered to be the chief motivator for gift promising, truly fits with such an impulsive image.

Recent years have seen a major change in the way scholars view emotions. The view of emotions as connected to cognition – as shaped by thoughts and as influencing judgments – has been ascendant in many recent efforts to theorize the emotions.<sup>110</sup> Academic and more-popular works reflect a growing understanding that, without the information coming from our emotions, no intelligent decisionmaking is even possible.<sup>111</sup> Now supported by contemporary research of the brain, this emerging view departs sharply from the impulsive profile assumed by scholarship.<sup>112</sup> As Kahan and Nussbaum make clear, such cognitive notions should be understood against the backdrop of a long debate occurring in different disciplines about the nature of emotions. What they call “the mechanistic view” holds that “emotions are forces more or less devoid of thought or perception” and that emotions are “impulses or surges.”<sup>113</sup> Obviously, that is the view which correlates with the current resistance to the enforcement of donative promises, which are accepted as affectively motivated. The opposite view, often named “the evaluative view,”<sup>114</sup> sees the lines between emotions and cognition as blurred: it emphasizes that emotions are shaped by preexisting cognitive appraisals and – at the same time – shape people’s (cognitive) evaluations going forward.<sup>115</sup>

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<sup>110</sup> Richard Lazarus, *Thoughts on the Relations Between Emotions and Cognition*, 37(9) AM. PSYCHOL. 1019, (1982).

<sup>111</sup> DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1996).

<sup>112</sup> KEITH OATLEY, DACHER KELTNER & JENNIFER M. JENKINS, *UNDERSTANDING EMOTIONS* 21 (2d ed. 2006) (explaining that “[m]ost researchers now assume that emotions follow appraisals of an event, a view similar to Aristotle’s idea of emotions as evaluations”).

<sup>113</sup> Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 277-78 (1996). For a more elaborate discussion by Nussbaum, see MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 19-79 (2001).

<sup>114</sup> Kahan & Nussbaum, *supra* note 113, at 277-78.

<sup>115</sup> Law-and-the-emotions scholars have used those ideas to argue that if some emotions have the structure of cognition, and cognition itself often functions in an intuitive, affective way, then bringing the two together by recognizing the place of

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In *Descartes' Error*, for example, Antonio Damasio points to the imprecise and misleading character of the reason/emotion dichotomy.<sup>116</sup> To him emotions are forms of intelligent awareness: “just as cognitive as other percepts.”<sup>117</sup> Once the sharp distinction is removed, two arguments unfold. On the one hand, works by scholars such as Martha Nussbaum demonstrate that many emotions have a cognitive structure: they embody judgments about the objects to which they respond that have a kind of logical structure.<sup>118</sup> On the other hand, psychologists such as Jonathan Haidt describe the process of cognitive decisionmaking as embodying vital affective components.<sup>119</sup> In one experiment, for example, people who received a gift while shopping in a mall became happier, and without being aware of it, evaluated their cars as performing better than control subjects who had received no gift.<sup>120</sup>

This general appreciation of the cognitive dimensions of emotion is particularly relevant to the empathetic emotions that motivate gift-promising. Emotion theories that distinguish emotions as “basic” versus “non-basic” classify empathy as a non-basic emotion.<sup>121</sup> Comparing empathy with

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emotions in law does not seem anomalous after all. See OATLEY ET AL., *supra* note 112, at 21; Kahan & Nussbaum, *supra* note 113, at 277-78; MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 334 (2001). For a review of the development of that argument in law-and-the-emotions scholarship, see Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?* 94 Minn. L. Rev. (forthcoming 2010).

<sup>116</sup> ANTONIO R. DAMASIO, *DESCARTES' ERROR* xv (1994).

<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 334 (2001); ANDREW ORTONY ET AL., *THE COGNITIVE STRUCTURE OF EMOTIONS* (reprint 1990) (1988); Richard Lazarus, *Universal Antecedents of the Emotions*, in *THE NATURE OF EMOTION* 163-64 (Paul Ekman & Richard J. Davidson eds., 1994) (arguing that emotions consist of “motivational, cognitive, and coping activities that orient . . . creatures selectively to relevant features of their environments”).

<sup>119</sup> Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108(4) PSYCHOL. REV. 814, (2001) (explaining how cognition works on two tracks, one that functions instantaneously and intuitively, and another that proceeds through conscious, temporally sustained, logical operations).

<sup>120</sup> The experiment was made by Alice Isen and colleagues. OATLEY ET AL., *supra* note 112, at 24. Remarkably, the positive emotion induced by the gift regularly increased the subjects' inclination to sympathize or provide help, a point that will be further discussed here. See *infra* Part II.E (discussing gratitude and reciprocity).

<sup>121</sup> LAUREN WISPÉ, *THE PSYCHOLOGY OF SYMPATHY* 89-92, 161,177 (1991). For a

archetypal “basic” emotions such as fear or anger, such theories describe empathy as more cognitive, more conscious, and less intense than those emotions.<sup>122</sup> To feel empathy or sympathy in a manner developed enough to motivate an altruistic response, one must have experienced substantial, sophisticated cognition.

Hoffman’s five modes of empathic arousal (mentioned earlier) demonstrate the fashion in which cognition plays a role in the development of empathy in children. According to his studies, the first three modes which are preverbal and involuntary are followed by two additional “higher-order cognitive modes.”<sup>123</sup> His developmental scheme emphasizes how the kind of empathy that can motivate helping behavior requires cognitive processes that exist only in advanced stages of development.<sup>124</sup> Observing the growth of a sense of a separated self in young children, Hoffman describes several phases of progress. He explains how children start with experiencing the needs and distresses of others as if they were their own; then they begin to realize the distress is not their own but still try to help the others by doing what would soothe *them*.<sup>125</sup> Only later in life, when children reach more cognitive maturity, can they see beyond themselves and recognize the separate condition of the others and the distinct ways to help them.<sup>126</sup> In those higher phases of development children need to draw, not only on their affective response, but also on verbal information regarding the other, their knowledge about the other’s life condition, and general information they have acquired about the world.<sup>127</sup> The complex cognitive process that

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discussion of basic (or primary) emotions, see, e.g., ROBERT PLUTCHIK, *THE PSYCHOLOGY AND BIOLOGY OF EMOTION* 53-64 (1994); RICHARD LAZARUS, *EMOTIONS AND ADAPTATION* 79-82 (1991). For a critical view of such classification of the emotions, see, e.g., Paul Ekman, *All Emotions Are Basic*, in *THE NATURE OF EMOTION* 15-19 (Paul Ekman & Richard J. Davidson eds., 1994).

<sup>122</sup> See, e.g., Nancy Eisenberg & Richard A. Fabes, *Empathy: Conceptualization, Measurement and Relation to Prosocial Behavior*, 14 *MOTIVATION AND EMOTION* 131, 144 (1990) (arguing that “caring, compassion, sympathy and pity are seen as somewhat lower in intensity”).

<sup>123</sup> MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE* 5 (2000); see also WISPÉ, *supra* note 121, at 132-33 (discussing the relationship of affect and cognition in sympathy).

<sup>124</sup> HOFFMAN, *supra* note 124, at 6.

<sup>125</sup> *Id.* at 63-71 (describing the first few stages of development, which do not allow (yet) for an other-focused empathetic act).

<sup>126</sup> *Id.* at 71-80.

<sup>127</sup> *Id.* at 80-92.

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is required in those more advanced stages is a precondition for fully developed acts of empathy to benefit another.<sup>128</sup>

In her seminal book, *Upheavals of Thought*, Martha Nussbaum reviews and analyzes the cognitive requirements for having the empathic emotions (which she terms “compassion”).<sup>129</sup> Her approach offers philosophical grounding to Hoffman’s developmental argument. Drawing on Aristotle, who originally defined the cognitive requirements for an empathic motivation, she explains that this emotion has *three cognitive elements*:

the judgment of *size* (a serious bad event has befallen someone); the judgment of *nondesert* (this person did not bring the suffering on himself or herself); and the *eudaimonistic judgment* (this person, or creature, is a significant element in my scheme of goals and projects, an end whose good is to be promoted).<sup>130</sup>

Nussbaum’s approach, like Hoffman’s, suggests that the evolution of an empathic emotion involves cognitive reactions that make it less a burst of feeling than a gradual, controlled, sustained, logical process. With respect to Nussbaum’s second cognitive dimension, for example, the empathic person is engaged in an elaborate analysis of the question of fault in an effort to make sure the potential beneficiary of his help is indeed worthy of receiving it. “Insofar as we do feel compassion,” explains Nussbaum, “it is either because we believe the person to be without blame for her plight or because, though there is an element of fault, we believe that her suffering is out of proportion to the fault.”<sup>131</sup> The exercise is almost a mathematic one and “[c]ompassion then addresses itself to the nonblameworthy increment.”<sup>132</sup>

Convincing support for this calculating view can be found in Candace Clark’s sociological research on American approaches to empathic feeling (which she terms

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<sup>128</sup> *Id.* at 7, 90.

<sup>129</sup> MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 334 (2001).

<sup>130</sup> *Id.* at 321.

<sup>131</sup> *Id.* at 311.

<sup>132</sup> *Id.*

“sympathy”).<sup>133</sup> Based on numerous qualitative interviews, Clark describes “our sympathy logic” as one that includes a culpability analysis.<sup>134</sup> “The sympathy a person feels,” she argues, “is contingent on where on the luck-responsibility continuum he or she assigns the other’s problem.”<sup>135</sup> For example, her interviewees had almost no doubt that hurricane victims deserve sympathy but were more ambivalent with regard to the miseries of an alcoholic law student and even less empathic when thinking about an employee who stole a chicken from her boss.<sup>136</sup> Clark explains that in the evaluation process people “must weigh responsibility against luck and against severity”<sup>137</sup> and she reports that “some . . . respondents who ultimately sympathized explained that the severity of the problem outweighed the characters’ culpability (e.g., ‘She probably shouldn’t have talked to the guy in the bar, but no one deserves to be beaten.’).”<sup>138</sup> Overall, Clark’s findings correlate with Hoffman’s and Nussbaum’s views and indicate a complex assessment process in which cognition is an indispensable part of the development of an empathic emotion.

The strong cognitive dimensions of empathic emotion elaborated above call for reconsideration of the assumption that donative promises are made impulsively. Moreover, the investigation of empathy suggests an even stronger challenge to the classic impulsive explanation of the unenforceability rule. Perhaps counter-intuitively, research shows that impulsiveness is more related to *refraining* from altruistic behavior than to *engaging* in it. Having uncontrolled feelings of empathy due to empathic over-arousal (or under-regulation) may cause a shift of attention from the other, whose condition had triggered the emotion, to the empathetic self who feels severe distress. That shift, in turn, may lead to a self-interested motivation for detachment aimed at relieving the anxiety by *ignoring* rather than by *acknowledging* the other’s condition. It is true that, at least according to Batson, some altruism is motivated by an effort to relieve the distress by ending the suffering of the other. However, Batson himself, as

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<sup>133</sup> CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE (1997).

<sup>134</sup> *Id.* at 100.

<sup>135</sup> *Id.* at 101.

<sup>136</sup> *Id.* at 103-04.

<sup>137</sup> *Id.* at 105.

<sup>138</sup> *Id.*



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well as others, has also argued that when possible a more common response would be to escape the situation altogether, i.e., not to respond to the other's needs. Interestingly, and significantly to the current context, researchers have found that it is the ability *not to be impulsive* that underlies acts of giving, while the impulsive response may direct people to avoid the other rather than to relate to her problems. Indeed, "people who are skilled at regulating their emotion and behavior are not only more likely to feel concern for [others], but also are relatively likely to help others."<sup>139</sup>

Finally, even beyond this general cognitive profile of empathy, the promises to give gifts that have occupied courts seem especially distant from impulsive response. First, as promises that anticipate the act of giving (while postponing the actual giving behavior), they are imaginative acts that require futuristic planning and elaborated thought. Second, being verbally articulated and often written or even legally framed by professionals, such promises involve cognitive processes beyond the level required for developing empathy. And third, at least in the case of written promises, the length of time and the level of awareness that are necessary for the completion of the task offer little justification for seeing the promise as impulsive.

## D. EMPATHY IS REWARDING

Part of the suspicion directed toward donative promises is based on the belief that they are promises to give "something for nothing"<sup>140</sup> and as such fail to provide any logic for the desire to give. And yet, at least outside the law, scholars increasingly understand that the notion that givers get "nothing" in return is nothing but a myth. What are the rewards attached to feeling and expressing empathy?

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<sup>139</sup> Nancy Eisenberg, Claire Hofer & Julie Vaughan, *Effortful Control and Its Socioemotional Consequences*, in HANDBOOK OF EMOTION REGULATION 287, 299 (James Gross ed., 2007).

<sup>140</sup> Ballantine, *supra* note 84, at 121. Ballantine wrote: "From a nude pact no obligation arises. The courts have not felt impelled to extend a remedy to one who seeks to get something for nothing. English law accordingly will not usually enforce a promise unless it is given for value, or the promise of value."

### 1. *Egoistically Motivated Rewards*

An obvious case of benefit is where the reward for the promised gift is tangible. A giver also may promise to donate with an expectation, not necessarily phrased as a precondition, that her gift will become known to the world and will thereby increase her reputation. The world of charitable subscriptions, for example, is full of donors' names on walls, on chairs, in programs, on banners – all of which celebrate, and publicize, virtues of the donors. Publicizing a donation sends out a clear double message: first, that the donor is capable of giving; and second, that the donor is moral, generous and honorable. A similar mechanism is at work when the gift is promised to accomplish the promisor's goal of establishing or strengthening a relationship with the promisee.<sup>141</sup> The reward in those cases cannot be clearer.

Batson's empathy-altruism hypothesis underscores such obvious rewards and points to two additional forms of return. One may promise to give in order to satisfy a social norm, in an effort to avoid the social cost of nonconformity. For example, parents or grandparents may promise to fund their offspring's college tuition out of an anxiety that refusing to pay for higher education will negatively mark them in their community. Avoiding this social cost may be experienced as the reward. A similar logic is present in the second path described by Batson: one may promise to give in order to relieve the distress caused by empathic arousal in response to the needs (or even misery) of others.

The three rewards discussed so far – from seeking more reputation, through attempting to satisfy a social norm, to looking for a sense of relief – are all egoistically motivated,<sup>142</sup>

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<sup>141</sup> See, e.g., Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 603-06 (1997) (observing that many promises are made to initiate or further trust-based relationships). The case of *Levine v. Estate of Barton* is a possible example, as Mr. Barton's promise to his beloved Ms. Levine reads as aimed to help *her* but also suggests that Mr. Barton was interested in having her closer to him after a period of long-distance relationship. *Levine v. Estate of Barton (In re Barton)*, No. W2004-02913-COA-R3-CV, 2005 Tenn. App. LEXIS 825 (Tenn. Ct. App. Dec. 28, 2005).

<sup>142</sup> These three rewards are nevertheless different in their connection to empathy. While observable rewards have nothing to do with feeling empathy, the reward coming from the saving of social costs is a case of responding to the social *scripting* of empathy and pretending to feel it without having enough of the actual sentiment. The effort to relieve self-distress reflects a problem of *managing* empathy that is actually felt but is

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in that the satisfaction of the needs of the giver – and not the needs of the recipient – is the main source of the reward. This is obvious if the reward is evident, as in the case of making a gift public, but even in the more implicit cases, the promisor is aiming at satisfying her own self-interest and the benefit conferred on the promisee is merely a side effect. It can also be said that the recipient's well-being is being used as a means to benefit the donor: in agreeing to receive the gift, the promisee enables the giver to receive something in exchange, be it increased reputation, social conformity or emotional relief. Overall, these three situations do not fit the formula of "something for nothing," and in fact have a better correlation with the conventional "quid pro quo" formula.

## 2. *Beyond Egoistic Rewards*

Even when feeling empathy motivates a truly altruistic form of behavior (Batson's hypothesis) there may still be rewards to the giver, often quite significant. Those rewards are of two main kinds: independent rewards that spring irrespective of reciprocity, and rewards that are "paid back" by the recipient. The reciprocal rewards will be discussed below;<sup>143</sup> here the focus will be on the reward that comes from the pleasure of giving. This autonomous and independent reward is sometimes captured by the maxim "giving is receiving"; it suggests that an important form of reward inheres in the act of giving itself.

The pleasure of giving is familiar to anyone who has ever given a present. It simply feels good. The good feeling usually extends beyond the moment of giving: it begins with contemplating the giving, progresses to the preparation of the gift, and reaches a zenith when the actual giving is taking place, especially if the gift is well received. The pleasure may

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not well-regulated. On scripting emotions, see Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW* 217 (Susan Bandes ed., 1999). A vivid description of the altruist script can be found in a New York Times article: "We preach altruism to our children and occasionally even practice it ourselves. Viewers of 'American Idol' were not surprised to see even Simon Cowell sounding like Albert Schweitzer when he visited sick children in Africa; *we expect at least a show of altruism from everyone.*" John Tierney, *Taxes a Pleasure? Check the Brain Scan*, N.Y. TIMES, June 19, 2007 (emphasis added) (reporting an Oregon University experiment discussed in the text accompanying note 15049 *infra*).

<sup>143</sup> See *infra* Part II.E.

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also last long after the giving moment (or fade and then reappear), warming the heart of the giver when pleasant memories surface. The warmth associated with giving has been described as coming *from within* and therefore as different from the externally derived rewards discussed earlier. Researchers report that the altruistic behavior is accompanied by “feelings of self-satisfaction and . . . a rise in . . . self-esteem.”<sup>144</sup> Some works have used the term “warm glow” – “the joy of giving” – in reference to such internal rewards.<sup>145</sup>

In the *Levine v. Estate of Barton* case, the promise of Mr. Barton to his lover included a direct reference to the pleasure of giving.<sup>146</sup> His note to Ms. Levine said:

If your desire is to move back to Memphis or any other part of the country, please do not hesitate because of financial concerns. Knowing this would be extremely hard for you to do, *it would give me a great deal of pleasure to know I helped in some small way.*<sup>147</sup>

Recent works in the field of neuroscience provide confirming evidence of the pleasure that arises from giving. Reporting on research by Professors Rilling and Berns,

<sup>144</sup> Daniel Bar-Tal, R. Shaharabany & A. Raviv, *Cognitive Basis for the Development of Altruistic Behavior*, in COOPERATION AND HELPING BEHAVIOR: THEORIES AND RESEARCH 387 (Derlega & Grzelak eds., 1982).

<sup>145</sup> Adam Smith recognized the “warm glow” effect long ago, noting that “[w]e are pleased to think that we have rendered ourselves the natural objects of approbation, . . . and we are mortified to reflect that we have justly merited the blame of those we live with . . . .” ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 117 (Grin Verlag 2009) (1759). However, the term “warm glow” is sometimes used as including a mixture of external and internal rewards. See, e.g., Robert A. Prentice, “Law &” *Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 885 (2007) (arguing that “warm glow may come from helping others, from being public spirited, or from following the rules of society or of morality”); James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464 (1990). As a result of this broad definition of the warm glow, it is sometimes interpreted as a selfish motivation for an altruistic behavior. For example, the first path of Batson’s model seems to include, as equally egoistic, both the reward of gaining social approval (external reward) and the reward of seeing oneself as a good person (internal reward). C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARD A SOCIAL PSYCHOLOGICAL ANSWER* 77 (1991). At points Batson appears to be even more extreme in arguing that even the anticipation of internal rewards without additional external rewards can render an act egoistic rather than altruistic.

<sup>146</sup> *Levine v. Estate of Barton (In re Barton)*, No. W2004-02913-COA-R3-CV, 2005 Tenn. App. LEXIS 825 (Tenn. Ct. App. Dec. 28, 2005).

<sup>147</sup> *Id.* at \*2 (emphasis added).

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Professor Keltner has concluded that “[h]elping others triggered activity in the caudate nucleus and anterior cingulate, portions of the brain that turn on when people receive rewards or experience pleasure.”<sup>148</sup> In a more-recent experiment, students at the University of Oregon got \$100 and were asked to make decisions about whether to give money to a local food bank.<sup>149</sup> They were also asked to respond to mandatory, tax-like transfers of their money to the same food bank. Throughout the process the students’ brain activity was measured by using functional magnetic resonance imaging (fMRI).

Earlier studies had shown that activity in certain areas of the brain (ventral striatum and the insulae) is correlated with the pleasure of getting rewards. Those studies have shown similar brain activity – located in the reward-processing areas in the mid-brain – in response to monetary rewards (receiving money) and the personal satisfaction derived from donating to charities.<sup>150</sup> The Oregon study confirmed those findings, which strongly support the notion that humans are “hard-wired to be altruistic.”<sup>151</sup> In addition to these important findings, the Oregon study added other interesting results. It demonstrated that, even if the giving is mandatory rather than voluntary, givers still experience a sentiment of pleasure from helping a good cause. Importantly, subjects who gained some degree of pleasure were later more willing to donate – voluntarily – to

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<sup>148</sup> Dacher Keltner, *The Compassionate Instinct*, in *THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS* 8, 10 (Dacher Keltner, Jeremy Adam Smith, & Jason Marsh eds., 2010); see also Ernst Fehr et al., *Neuroeconomic Foundations of Trust and Social Preferences: Initial Evidence*, 95(2) *AM. ECON. REV.* 346 (2005) (reporting neurological evidence that reciprocated acts of cooperation generate pleasure). See generally *THE SOCIAL NEUROSCIENCE OF EMPATHY* (Jean Decety & William Ickes eds., 2009).

<sup>149</sup> William T. Harbaugh, Ulrich Mayr & Daniel Burghart, *Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations*, *SCIENCE*, June 15, 2007.

<sup>150</sup> *Id.* at 1622 (reporting that “other studies have shown that activity in the ventral striatum and the insulae is correlated with more abstract rewards, including . . . voluntary contributions to charities” and referring to the following studies: (1) J. Moll et al., *Human Fronto-Mesolimbic Networks Guide Decisions About Charitable Donation*, *PROC. NAT’L ACAD. SCI. U.S.*, Oct. 17, 2006, at 15623; and (2) D. Tankersley, C. J. Stowe & S.A. Huettel, *Altruism Is Associated with an Increased Neural Response to Agency*, 10 *NAT. NEUROSCI.* 150-51 (2007).

<sup>151</sup> See Nicholas D. Kristof, *Our Basic Human Pleasures: Food, Sex and Giving*, *N.Y. TIMES*, Jan. 16, 2010, available at <http://www.nytimes.com/2010/01/17/opinion/17kristof.html>.

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the food bank. This part of the Oregon study suggests that altruistic giving is indeed motivated by the anticipation of pleasure. It also may suggest a form of rational decisionmaking: indeed, the Oregon experiment was later described as demonstrating that “the neural basis of charitable giving decisions is consistent with a rational choice model where people make their giving decisions by comparing the utility they get from spending money on themselves with the utility they get from seeing the charity have more resources to devote to the public good.”<sup>152</sup> As psychologist Ulrich Mayr has said:

The most surprising result is that these basic pleasure centers in the brain don't respond only to what's good for yourself. They also seem to be tracking what's good for other people, and this occurs even when the subjects don't have a say in what happens.<sup>153</sup>

Beyond the evidence coming from the brain, there is growing evidence that empathy-induced altruism can contribute to the altruists' psychological and even physical health. One survey of over 1,700 women involved regularly in helping others, for example, has shown that these women reported “feeling a ‘high’ while helping – a sense of stimulation, warmth, and increased energy – and a ‘calm’ afterward – a sense of relaxation, freedom from stress, and enhanced self-worth.”<sup>154</sup> Other studies further suggested that empathy-induced altruism may bring physical changes in heart rate and blood pressure and, according to one researcher, may even reduce the risk of heart disease. All in all, then, it is not surprising that researchers of different disciplines have

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<sup>152</sup> Ulrich Mayr, William T. Harbaugh, & Dharol Tankersley, *Neuroeconomics of Charitable Giving and Philanthropy*, in *NEUROECONOMICS: DECISION MAKING AND THE BRAIN* 303, 311 (Paul W. Glimcher, Colin Camerer, Russell Ernst Fehr & Alan Poldrack eds., 2008). I thank Professor Mayr for his generous assistance with regard to the challenging experience of engaging in interdisciplinary work and knowledge for non-legal complex disciplines. This difficulty is inherent to working with the law-and-the-emotions perspective. It is especially severe while doing the (second dimension) work of “investigation,” i.e., the effort to gain much non-legal knowledge about the relevant emotion/s.

<sup>153</sup> John Tierney, *Taxes a Pleasure? Check the Brain Scan*, N.Y. TIMES, June 19, 2007.

<sup>154</sup> C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARD A SOCIAL PSYCHOLOGICAL ANSWER* 222 (1991).

developed a growing belief that doing good for others may do good for the altruist.<sup>155</sup>

### 3. “The Hedonistic Paradox”

The recent evidence that the very act of giving produces pleasure may revive what is sometimes called “the hedonistic paradox”:<sup>156</sup> the idea that a psychic or affective “reward” experienced by the giver renders the act of giving an egoistic one. In one sense, the question of whether the rewards gained by expressing empathy disqualify the behavior from being purely altruistic is not relevant to the legal-enforcement debate. Indeed, the presence of reward could make it easier to argue that promises of gifts are simply supported by consideration (i.e., the promisor’s pleasure) and therefore are eligible for enforcement.

On the other hand, seeing the pleasure as comparable to monetary consideration may reinforce Eisenberg’s argument that the “world of gift” may be threatened by the application of bargaining-like discourse. To deal with such concern it is important to separate the rewarding pleasure from the core motivation for acting. Although the pleasure of giving creates brain activity akin to that produced by the gain of monetary rewards, it does not follow that gifts lose their noble traits. Despite the pleasure it produces, the gift may still be motivated

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<sup>155</sup> *Id.* at 222-23.

<sup>156</sup> SERGE-CHRISTOPHE KOLM & JEAN MERCIER YTHIER, THE HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY: FOUNDATIONS 134-35 (2006) (discussing the “so called hedonistic paradox” as follows: “if a person is motivated to increase another’s welfare, he is pleased to attain this desired goal and therefore his apparent altruism can also be seen as a product of egoism.”); C. Daniel Batson, *Altruism and Pro-Social Behavior*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 282-316 (Gilbert ed., 1998); see also C. Daniel Batson, *Empathy-Induced Altruistic Motivation* (2008), available at <http://portal.idc.ac.il/en/Symposium/HerzliyaSymposium/Documents/dcBatson.pdf> (explaining the paradox: “The argument goes as follows: Even if it were possible for a person to have another’s welfare as an ultimate goal, such a person would be interested in attaining this goal and would experience pleasure on doing so; therefore, even this apparent altruism would actually be a product of egoism.”). A more popular expression of the paradox was reported recently by the New York Times when Brian Mullaney, co-founder of Smile Train, which helps tens of thousands of children each year who are born with cleft lips and cleft palates, was quoted saying: “The most selfish thing you can do is to help other people.” See Nicholas D. Kristof, *Our Basic Human Pleasures: Food, Sex and Giving*, N.Y. TIMES, Jan 16, 2010, available at <http://www.nytimes.com/2010/01/17/opinion/17kristof.html>.

by a non-selfish goal that is triggered by feelings of empathy; in that way the special spirit of the gift does not have to be submerged by the logic of bargains.<sup>157</sup>

The hedonistic paradox is therefore resolvable when we go beyond the benefit of the promisor, to take account of her intentions and human will. To avoid losing the spirit of the gift, as an act that reflects human care, the question should not simply be “was there a benefit to the promisor?” but also “in what way did the promisor gain such benefit?” If a promisor was mainly focused on her own interests, such as earning social respect, then the act is not altruistic and we have enough “regular” consideration to enforce the promise. On the other hand, if the promisor was focused on making another person better, then her pleasure from accomplishing that goal should not interrupt the moral and personal value of her giving. Recognizing the pleasure inherent in giving, without surrendering to the hedonic paradox, makes other-oriented promising an activity that bears important similarities to material exchanges yet is not detached from its altruistic roots.

#### E. GRATITUDE AND “AFFECTIVE CONSIDERATION”

The pleasure of the giving promisor may not be enough to justify enforceability, as it shows a benefit that is not necessarily connected to dynamics of exchange. The traditional bargaining theory leads to the exclusion of donative promises because it perceives the process as a one-sided, voluntary flow of benefits that occurs without reference to the recipient’s response.<sup>158</sup> Careful attention to the emotions involved, however, can tell a different and more reciprocal story.

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<sup>157</sup> An interesting explanation for the inclination to see a conflict between gifts and pleasure can be seen in the puritan Christian tradition that expects people to give selflessly. However, many believe today that it is inaccurate to conclude that helping another and feeling good about oneself are incompatible. See C. R. SNYDER & SHANE J. LOPEZ, *POSITIVE PSYCHOLOGY: THE SCIENTIFIC AND PRACTICAL EXPLORATIONS OF HUMAN STRENGTHS* 270 (2006); COLIN GRANT, *ALTRUISM AND CHRISTIAN ETHICS* 77-79 (2000).

<sup>158</sup> Jane B. Baron, *Gifts, Bargains and Form*, 64 *IND. L.J.* 155, 156 (1989) (arguing as follows: “[G]ifts 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.”) (emphasis added).



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The emotions that motivate the promising of gifts are seldom unreciprocated. And yet this reciprocity does not mean “bargaining” but rather is an *affective reciprocity*. An expression of empathy and compassion – as in the case of promising a gift – elicits many emotions in the recipient, most notably a strong sentiment of gratitude. The word *gratitude* comes from *gratia* (favor) and *gratus* (pleasure) in Latin; its roots connect it to ideas of “kindness, generousness, gifts, the beauty of giving and receiving, or getting something for nothing.”<sup>159</sup> The engagement with gratuitous promises has therefore tight linguistic ties with the dynamics of gratitude. Accordingly, any investigation of these promises can benefit from learning more about the way gratitude operates.

As an emotion, gratitude had until recently been understudied and almost neglected, a fact that is often explained by the difference between gratitude and some accepted basic emotions such as fear, anger or even happiness.<sup>160</sup> Hume, for example, defined gratitude as a “calm passion,” as it seldom bursts or gushes, as do the more “basic” emotions.<sup>161</sup> Recent studies of gratitude have classified gratitude as a higher-level moral emotion that involves both social and cognitive processes.<sup>162</sup> Moreover, some emotion theorists have connected each emotion with a distinct “dramatic plot” or “core relational theme.”<sup>163</sup> In such theories the “plot” of gratitude is highly reciprocal: it is triggered when one person gives something that promotes the well-being of another, who in return becomes grateful and is motivated to express her gratitude, whether in words or by another act of giving. When gratitude produces counter-gifting, the work of the renowned anthropologist Marcel Mauss, whose words

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<sup>159</sup> Robert A. Emmons, *The Psychology of Gratitude: An Introduction*, in THE PSYCHOLOGY OF GRATITUDE 4 (Robert A. Emmons & Michael E. McCullough eds., 2004) (quoting P. W. PRUYSER, THE MINISTER AS DIAGNOSTICIAN 69 (1976)).

<sup>160</sup> Robert C. Solomon, *Foreword*, in THE PSYCHOLOGY OF GRATITUDE at v-vi; Emmons, in THE PSYCHOLOGY OF GRATITUDE at 3-4.

<sup>161</sup> Robert C. Solomon, *Foreword*, in THE PSYCHOLOGY OF GRATITUDE at vi.

<sup>162</sup> Ross Buck, *The Gratitude of Exchange and the Gratitude of Caring: A Developmental-Interactionist Perspective of Moral Emotion*, in THE PSYCHOLOGY OF GRATITUDE at 101.

<sup>163</sup> Michael E. McCullough & Jo-Ann Tsang, *Parent of the Virtues? The Prosocial Contours of Gratitude*, in THE PSYCHOLOGY OF GRATITUDE at 124 (explaining the theory and referring to R. S. LAZARUS & B. N. LAZARUS, PASSION AND REASON: MAKING SENSE OF OUR EMOTIONS (1994)).

opened this Article, comes to mind.<sup>164</sup> Mauss suggested that the whole idea of a free gift is based on a misunderstanding, and in fact many societies can be described as based on a system of reciprocal gift-exchange.<sup>165</sup> Such a system is comparable to the now more acknowledged system of market-exchange and, remarkably, Mauss has even argued that gift exchanges are “*the archaic forms of contract.*”<sup>166</sup>

While direct application of Mauss’s exchange arguments can offer support to the idea of enforcing donative promises,<sup>167</sup> it also triggers the fear of too commercialized a view of gifts, a fear which has been used as an argument against enforcement.<sup>168</sup> Paying special attention to the reciprocity of the emotions that motivate gifting behavior, rather than to the reciprocity of the behavior itself, may be valuable in coping with this concern. It associates such promises with reciprocity, without undermining their distinctive non-market character.

For this reason, it is important to note that gratitude is not simply an automatic response to receiving a benefit from another; the dynamics of exchange here depend on the existence of specific affective features, mainly the right intentions. Adam Smith may have been the first to argue that, in order to feel and express gratitude, people must believe that their benefactors *intended to benefit them.*<sup>169</sup> This approach tightly connects gratitude with empathy and creates “an economy of gratitude,” where gratitude is taken as a known and expected response to an expression of empathy.

The last idea is especially relevant to the unenforceability

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<sup>164</sup> For a thorough discussion of the principal of reciprocity and Mauss’s work, see Serge-Christophe Kolm, *Reciprocity: Its Scope, Rationales, and Consequences*, in HANDBOOK ON THE ECONOMICS OF GIVING, RECIPROCITY AND ALTRUISM FOUNDATIONS VOLUME 1, 371 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006), available at <http://www.sciencedirect.com>.

<sup>165</sup> Mary Douglas, *Foreword: No Free Gifts*, in MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* xii to xviii (W.D. Halls trans., W. W. Norton & Co. 2000) (1950).

<sup>166</sup> MAUSS, *supra* note 2, at 5.

<sup>167</sup> Jane B. Baron, *Gifts, Bargains and Form*, 64 IND. L.J. 155, 194-95 (1989) (relying on Mauss’s exchange analysis to justify the enforcement of gratuitous promises).

<sup>168</sup> Eisenberg, *supra* note 6, at 841-44 (responding to Baron’s reliance on Mauss’s arguments).

<sup>169</sup> Michael E. McCullough & Jo-Ann Tsang, *Parent of the Virtues? The Prosocial Contours of Gratitude*, in THE PSYCHOLOGY OF GRATITUDE 124 (Robert A. Emmons & Michael E. McCullough eds., 2004).

discussion since contractual promises to give gifts are by nature a result of an intended effort, evidenced by the fact that the promisor has articulated and sometimes has written a clear promise to benefit the promisee. Consequently, those promises can be understood, as Smith suggests, as part of the economy of gratitude in which the donative promise, as an empathic act of the promisor, is reciprocated by the promisee's feelings of gratitude. Furthermore, under the same "economic" logic, gratitude is not only a typical response to empathy, but a reaction which is expected by society. And yet, despite the use of a "cost-benefit" logic, the economy of gratitude is different from the economy of goods ("a bargain"), as it is based on good will and social care rather than on utility analysis. Therefore, in recognizing the affective reciprocity that is elicited by donative promises, it is possible to see their parallel to bargained-for promises without damaging the uniqueness of the affective domain.<sup>170</sup>

Furthermore, the plot of gratitude tends to perpetuate empathic affects which in turn motivate more gifting behavior and additional gratitude, creating a cycle of empathy and gratitude. Such circularity lends gratitude both its individual value and its pro-social importance and, as we shall see, it offers a new normative reason for the enforcement of donative promises.<sup>171</sup>

However, notwithstanding their harmonious value, the cycles of empathy and gratitude also expose the fact that, as with bargained-for promises, donative promises may also entail a burden on the promisee. Even though the burden is not material, but rather affective, it still may be seen as detrimental for the recipient. Indeed, socio-psychological studies show that some people associate gratitude with dependency and even some degree of humiliation, as the emotion suggests they cannot be totally autonomous and self-sufficient. Interestingly, those studies also show that such a

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<sup>170</sup> See Baron, *supra* note 167, at 194 (maintaining that "[f]or non-lawyers gifts are exchanges").

<sup>171</sup> See *infra* Part III (arguing that to individuals gratitude contributes mental and physical progress that in turn allows grateful people to give even more and by that to invite more empathy, and discussing the social value of the empathy-gratitude "chain of reciprocity"); see also Aafke Elisabeth Komter, *Gratitude and Gift Exchange*, in *THE PSYCHOLOGY OF GRATITUDE* 195 (Robert A. Emmons & Michael E. McCullough eds., 2004).

view of gratitude is culturally contingent. Apparently, the level of tendency to admit, express, or even to discuss gratitude varies from one culture to another and is especially low in cultures where capitalistic and individualistic ideas prevail. For example, studies have found that, when compared to other societies, Americans and especially American men reported much more discomfort with regard to feeling and showing gratitude and tended to view the experience of gratitude as unpleasant and even humiliating.<sup>172</sup> As Robert Solomon explained: “Gratitude presupposes so many judgments about debt and dependency that it is easy to see why supposedly self-reliant American males would feel queasy about even discussing it.”<sup>173</sup> This uneasiness with gratitude was nicely captured in a scene from *The Simpsons*, in which Bart Simpson refuses to say grace at the family dinner table and instead sends out a self-reliant message, saying, “Dear God, we paid for all this stuff ourselves, so thanks for nothing.”<sup>174</sup>

The view of gratitude as a possible burden inflicted on the recipient by the giver’s expression of empathy is not new and can be traced back to Aristotle.<sup>175</sup> Later, in the nineteenth century, Ralph Waldo Emerson made a similar point with regard to law and gifts, emphasizing the cost of gratitude by saying, “The law of benefits is a difficult channel. . . . It is not the office of a man to receive gifts. How dare you give them? We wish to be self-sustained.”<sup>176</sup> Emerson’s words suggest that

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<sup>172</sup> See S. Sommers & C. Kosmitzki, *Emotion and Social Context: An American-German Comparison*, 27(1) BRIT. J. SOC. PSYCHOL. 35-49 (1988) (comparing Americans to Germans and Israelis). There is also some empirical evidence that gratitude is associated with feminine gender-role stereotypic traits. In the above study, for example, not even one woman said that it was difficult for her to openly express gratitude. See also Leslie R. Brody, *On Understanding Gender Differences in the Expression of Emotion*, in HUMAN FEELINGS: EXPLORATIONS IN AFFECT DEVELOPMENT AND MEANING 87 (S. Ablon et al. eds., 1993).

<sup>173</sup> Robert Solomon, *The Cross Cultural Comparison of Emotion*, in EMOTIONS IN ASIAN THOUGHT: A DIALOGUE IN COMPARATIVE PHILOSOPHY 282 (J. Marks & R. Ames eds., 1995).

<sup>174</sup> ROBERT EMMONS, THANKS! HOW THE NEW SCIENCE OF GRATITUDE CAN MAKE YOU HAPPIER 8 (2007).

<sup>175</sup> Emmons, in THE PSYCHOLOGY OF GRATITUDE at 8 (discussing Aristotle’s reasoning for not including gratitude among the virtues. According to Aristotle, magnanimous people “insist on their self-sufficiency and therefore find it demeaning to be indebted and thus grateful to others”).

<sup>176</sup> EMMONS, *supra* note 174, at 130. The full text of Emerson’s essay is available at <http://www.blupete.com/Literature/Essays/Best/EmersonGifts.htm> (last visited Mar. 31, 2010).

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gratuitous promises may be seen as creating affective consideration not by producing affective benefit to the promisor but by generating an “affective detriment” to the promisee. Such detriment is grounded in the emotions, but it is structurally similar to the detriment that normally satisfies the consideration requirement and allows enforceability.

The fact that gratefulness does not enrich the promisor or that feelings of gratitude are actually positive and healthy does not necessarily conflict with finding a detriment in making someone obliged to feel gratitude. Revisiting the infamous case of *Hamer v. Sidway* can further clarify the point.<sup>177</sup> In this case an uncle promised a gift to his nephew: \$5,000 to be given to the nephew after he attained age twenty-one, if he would refrain from smoking, drinking and playing cards or billiards for money.<sup>178</sup> The lower court found no consideration and refused enforcement, classifying the uncle’s promise as gratuitous.<sup>179</sup> According to that court, the uncle was not enriched by his nephew’s good behavior, and as far as the nephew was concerned such good behavior was actually beneficial and not detrimental.<sup>180</sup> On appeal, however, Judge Parker explained that it is much easier to satisfy the consideration requirement, and detriment should be broadly construed to include any restriction of a lawful freedom.<sup>181</sup> Since the nephew had the right to smoke, giving up smoking in exchange for the promise of money was a detriment that established consideration and therefore allowed enforceability.<sup>182</sup> Applying the broad reading of “detriment” in *Hamer v. Sidway* to our discussion makes it possible to point to an affective detriment when donative promises elicit counter gratitude.

### III. INTEGRATION: AFFECTIVE CONSIDERATION WITH INTENT TO BE LEGALLY BOUND

In Part I we have seen that the classical doctrine has

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<sup>177</sup> *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

<sup>178</sup> *Hamer v. Sidway*, 11 N.Y.S. 182, 182-84 (N.Y. Sup. Ct. 1890), *rev’d*, 27 N.E. 256 (N.Y. 1891).

<sup>179</sup> *Id.* at 185-86.

<sup>180</sup> *Id.*

<sup>181</sup> *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891).

<sup>182</sup> *Id.*

adopted an unenforceability rule for donative promises due to their affective nature and as a way of reinforcing an association between law and contracts on the one hand and rational choices on the other. Part II then explored the primary emotions that operate in gift situations and their interaction. It will now be useful to return to law and to ask the normative question: should the law of contracts enforce donative promises? The coming analysis will review the leading justifications for enforcing bargained-for promises and will suggest that each of them is relevant to the enforcement of donative promises, not *in spite of* their distinctiveness, but precisely *because of* their affective dimensions.

#### A. THE WILL THEORY AND THE POWER OF PROMISES

According to the will theory of contract, a promise merits enforcement because of the expressed will of the promisor to be bound by it. The theory focuses on such will as “something inherently worthy of respect,”<sup>183</sup> and it is informed and influenced by Kantian philosophy.<sup>184</sup> The theory stems from the liberal notion that all human beings are autonomous moral agents, obliged to keep those promises they freely undertake. By legally compelling promisors to live up to their obligations, therefore, society values their contractual agency. The freedom *to* contract, meaning the basic ability of individuals to engage themselves in contractual relationships and receive the support of law through contractual enforcement, is therefore of utmost importance under this approach.<sup>185</sup> Promises that are made *intentionally* are central to will theories: the very act of articulating a promise is taken as an extension of the human will that triggered it as well as an expression of a free choice that was made; both giving the promise the highest moral status. To the individual value of enforcing promises, “will theorists” add a *social* dimension. From their point of view, keeping promises is the key to the ability of humans to trust each other, which makes promises a vital foundation of a healthy society and further justifies investing social resources

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<sup>183</sup> Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933).

<sup>184</sup> DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 9-11 (2003).

<sup>185</sup> Hila Keren, “*We Insist! Freedom Now?: Does Contract Doctrine Have Anything Constitutional To Say?*” 11 MICH. J. RACE & L. 133, 172 (2005).

in their enforcement.<sup>186</sup>

From this perspective, the free choice of a donor to express her empathy and care for another via a promise to give a gift should mean that she is no longer free to break that promise. This is particularly true in the many cases in which promisors have made palpable efforts to be legally bound by their promises. Efforts such as writing down the promise, framing it in legal language, and especially taking pains to try to nominally satisfy the consideration requirement in order to win enforceability (the “peppercorn” practice)<sup>187</sup> all suggest increasing degrees of a will to be legally bound and an intention to create an enforceable promise.

The current regime of unenforceability of donative promises has been linked to a view of those promises as expressing a will that is “damaged” or “unreal.” This view derives from the assumption that the gift situation reflects a severely imbalanced exchange (the promisor being seen as “giving something for nothing”), one that probably was not rationally and freely chosen. Meaningfully, under a true understanding of the will theory, no similar reservation exists with regard to business promises.<sup>188</sup> The research into empathy and altruistic behavior discussed above challenges the legal assumption that there is something wrong with the will to give gifts. The significant nonmonetary rewards that flow from giving – such as the pleasure that is evidenced by specific brain activity in the giver, or the gratitude of the recipient – frame the choice to give as a natural and very common form of human will, and leave no reason to suspect the intentions of generous promisors.

Consequently, from the will-theory perspective, a refusal to enforce donative promises severely limits people’s freedom to

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<sup>186</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 13 (1981).

<sup>187</sup> Joseph Siprut, *The Peppercorn Reconsidered: Why a Promise To Sell Blackacre for Nominal Consideration Is Not Binding, but Should Be*, 97 NW. U.L. REV. 1809, 1810 (2003) (showing that “under existing law, promisors are powerless to make a binding gratuitous promise no matter how strong the desire or how clear the intention” and arguing for a reform).

<sup>188</sup> See Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 104 (2007). According to the will theory, the contractual liability stems from the intrinsic moral force of the promise regardless of its content, and the adequacy of the exchange (like many other utilitarian and consequential matters) should not matter.

contract, disrespects their autonomy, and in the long run endangers the status of promises altogether. As argued by the eminent American “will theorist” Professor Charles Fried, “If we decline to take seriously [the obligatory power of the promise] . . . to that extent we do not take [the promisor] seriously as a person.”<sup>189</sup>

## B. CONSEQUENTIALIST CONSIDERATIONS

Consequentialist views (including economic-efficiency analysis) suggest that bargained-for promises deserve enforcement because they advance the well-being of both promisor and promisee, and therefore in the aggregate contribute to society as a whole. A bargained-for promise is considered to be socially “productive,” or to be an efficient way to achieve wealth-maximization.<sup>190</sup>

From this perspective, the unenforceability rule of donative promises may arise from the assumption that they are – from a utilitarian point of view – “sterile,” “nude,” or non-productive. The idea was bluntly expressed by Professor Fuller, who wrote:

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.”<sup>191</sup>

However, the economic focus on wealth-maximization is only one way of evaluating the consequences of a certain rule. Other, broader consequentialist theories are possible. A consequentialist moral theory requires the promotion of favorable outcomes and entails a choice between different legal rules according to the goodness of their resulting states of affairs. But a consequentialist framework is not committed to any particular theory of the good. It can encompass anything that would improve individual or social outcomes including “desires, . . . beliefs, *emotions*, . . . the climate, and everything

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<sup>189</sup> FRIED, *supra* note 186, at 20-21.

<sup>190</sup> This kind of analysis assumes the rationality of human beings and their ability to engage in self-interested cost-benefit analysis to maximize their own wealth.

<sup>191</sup> Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941); *see also* ALLAN FARNSWORTH, *CONTRACTS* 52 (3d ed. 1998) (arguing that “[g]ifts are not necessarily productive”).



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else.”<sup>192</sup> For instance, one may claim that the appropriate criterion of well-being is a favorable mental state, rather than the maximization of wealth or the satisfaction of selfish preferences. A famous example of such a possibility is Jeremy Bentham’s utilitarian conception of welfare, which equates well-being with happiness.<sup>193</sup>

Any consequentialist approach that is broader than the efficiency theory associated with traditional forms of law and economics would give significant weight to affectively related outcomes of enforcing promises to give gifts.<sup>194</sup> Indeed, some outcomes are desirable even from the narrow perspective of law and economics, although they have not led to a normative call for enforcement. Writing about the issue at hand, Richard Posner, for example, explained that the value of a donative promise to both the promisor and the promisee is higher under an enforceability regime, where the keeping of the promise enjoys higher probability.<sup>195</sup> Similarly, Professor Eisenberg admits that, counter to conventional belief, donative promises have some redistributive outcomes that may enhance utility.<sup>196</sup>

Applying law-and-the-emotions perspective to the consequentialist analysis can offer a greater awareness of those outcomes that concern the *affective* aspects of our well-being. These outcomes arise from the individual and social value of positive emotions in general, and particularly from the emotions of empathy and gratitude, which dominate the gift domain. In his famous lecture “Rational Fools,” economist and philosopher Amartya Sen argued that we cannot normatively evaluate an act or a rule “without mentioning the sympathetic

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<sup>192</sup> DEREK PARFIT, REASONS AND PERSONS 25 (1984) (emphasis added).

<sup>193</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-12 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1780).

<sup>194</sup> See Prentice, *supra* note 7, at 881 (a recent broad approach coming from within law and economics, namely from the emerging “behavioral law and economics”).

<sup>195</sup> Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 412 (1977) (arguing and explaining how making a donative promise has the effect of “increasing the present value of an uncertain future stream of transfer payments”).

<sup>196</sup> Eisenberg, *supra* note 6, at 828-29. Eisenberg argues, however, that such utilitarian value is offset by the possibility that enforcement will decrease the amount of gifts. *Id.* For an illuminating analysis of the utilitarian value of redistributive voluntary transfers, see Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326 (2006).

concern people have for the good of others, as a factor independent of their concern for their own satisfactions.”<sup>197</sup> A law that supports and validates expressions of “sympathetic concern” is, from this consequentialist perspective, a proper law because it promotes the well-being of the promisor (the giver). This promotion of well-being occurs when the law respects the promisor’s choice to have less money and more satisfaction of her concern for others. The same logic of enforcing a bargained-for promise is useful here too: the voluntary promise to transfer wealth should be taken as evidence of the promisor’s set of preferences, where preferences – according to utilitarian theories – should be followed because they represent the best available way to enhance the welfare of the promisor (and thus of society at large).

Under an inclusive definition of goodness, there are a place and a need to take into account all the valuable influences of feeling empathy and acting altruistically. As we have seen in the previous Part, feeling and expressing empathy are highly rewarding from the perspective of the promisor, who may experience everything from pleasure to better health, better self-image, more social respect and less anxiety. Indeed, such an abundance of rewards creates incentives to engage in empathy-induced altruism, and supporting such altruism by legal enforcement facilitates more positive outcomes of the same sort.

Beyond these individual gains, the relationship between empathy and altruistic behavior (Batson’s hypothesis) can also enhance collective well-being. The pro-social acts that arise from feeling and expressing empathy have an immense potential for improving society at large. For this reason, for example, scientists and psychologists have recently directed growing efforts to the project of cultivating empathy in children and adults.<sup>198</sup>

We have discussed above the fact that empathy often elicits gratitude in a self-reinforcing cycle. If we are concerned about social outcomes, there is a clear benefit in offering legal

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<sup>197</sup> MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 391 (2001).

<sup>198</sup> DACHER KELTNER, *The Compassionate Instinct*, in *THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS* 14-15 (Dacher Keltner, Jeremy Adam Smith, & Jason Marsh eds., 2010); C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARD A SOCIAL PSYCHOLOGICAL ANSWER* 224-29 (1991).

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support to a process of gift-promising that not only expresses empathy but also fosters feelings of gratitude. On the individualistic level gratitude permits the grateful to “experience a variety of measurable benefits: psychological, physical and social,”<sup>199</sup> sometimes to a point that it “can measurably change people’s lives.”<sup>200</sup> In addition, research demonstrates that gratitude has an extremely beneficial *social role*. In the words of one scholar, “its sociological importance can hardly be overestimated” and without it society would break apart.<sup>201</sup> Gratitude, which forms a critical link between receiving and giving, moves recipients to share and increase what they have received. It thereby serves as “a pivotal concept for our social interactions.”<sup>202</sup> Grateful people engage in more supportive, kind, and helpful behaviors (e.g., loaning money and providing compassion, sympathy, and emotional support) than do their less-grateful peers.<sup>203</sup> As individuals and as a society, therefore, we enhance human well-being by supporting gratitude.

Even more generally, empathy, as a positive emotion, is directly connected to personal growth. Positive emotions, argue contemporary psychologists and theorists of emotion, “widen the array of thoughts and actions that come to mind” (the broadening effect) and then develop people’s enduring personal resources (the building effect).<sup>204</sup> Therefore, under almost any consequentialist approach, society gains by nurturing the positive emotions in general and empathy in particular.

As psychologist Barbara Fredrickson emphasized:

Positive emotions also produce flourishing. Moreover, they do so not simply within the present, pleasant moment but over the long term as well. The take-home message is that

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<sup>199</sup> Robert A. Emmons, *Pay It Forward*, THE GREATER GOOD, Summer 2007, at 12-13.

<sup>200</sup> *Id.* at 13.

<sup>201</sup> Georg Simmel, *Faithfulness and Gratitude*, in Kurt H. Wolff, THE SOCIOLOGY OF GEORG SIMMEL (Free Press, 1950), at 387.

<sup>202</sup> Robert A. Emmons, *Pay It Forward*, in THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS 77-85 (Dacher Keltner, Jeremy Adam Smith, & Jason Marsh eds., 2010).

<sup>203</sup> Emmons, *supra* note 199, at 14.

<sup>204</sup> Barbara L. Fredrickson, *Positive Emotions*, in THE HANDBOOK OF POSITIVE PSYCHOLOGY 120, 125 (C. R. Snyder & Shane J. Lopez eds., 2002).

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positive emotions are worth cultivating, not just as end states in themselves but also as a means to achieving psychological growth and improved well-being over time.<sup>205</sup>

For consequentialists, then, the contribution of positive emotions such as empathy to personal well-being and social welfare should make an enforceability rule more appealing than the current unenforceability.<sup>206</sup>

## C. FAIRNESS

The discussion above also points to a fairness concern that supports enforceability. In the debate over the question of donative promises, it is common to argue that the unenforceability principle does not usually damage the promisee and therefore enforceability is not justified.<sup>207</sup> If any damage was caused, it is further argued, enforcement will follow not from the mere breaking of the promise but from the protection granted to promisees in cases of justified reliance. As clarified in the well-known case of *Ricketts v. Scothorn*, for example, promises that are relied upon by the donee to her detriment will be enforced on that ground, even though consideration is lacking, under the promissory-estoppel doctrine.<sup>208</sup>

Despite this ostensibly comforting consensus, the knowledge about gratitude as an immediate and unavoidable response to empathetic giving exposes a possible problem not covered by the conventional protection of reliance. The problem arises from the immediate and unavoidable traits of gratitude. Only a potential recipient who *rejects* the gift is immune from feelings of gratitude, and indeed for the most part a reluctance to experience gratitude – with all its meanings – is the primary reason for rejecting a gift in the first place. Conversely, recipients who have not rejected the gift will

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<sup>205</sup> Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology*, 56(3) AM. PSYCHOL. 218, (2001).

<sup>206</sup> Chris Hann, *The Gift and Reciprocity: Perspectives from Economic Anthropology*, in HANDBOOK ON THE ECONOMICS OF GIVING, RECIPROCITY AND ALTRUISM FOUNDATIONS VOLUME 1, 207-23 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

<sup>207</sup> Eisenberg, *supra* note 6, at 822; MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACT 20-21 (2006).

<sup>208</sup> *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

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almost inevitably feel gratitude and often express it. In such cases the promisee's sense of gratitude can be seen as an act of special reliance. If later on the promise is broken, this gratitude cannot be taken back, and it becomes an affective cost suffered by the promisee. Admittedly, in the atypical case in which the original promisor is the one who reneges, the problem may be of modest scope, as the feelings of disappointment or even anger of the promisee may balance the gratitude earlier "given." And yet, in most cases it is not the original promisor who experiences a change of mind. As mentioned earlier, the common case is one in which the promisor is no longer alive and the promise is broken by relatives who are interested in the promised gift for themselves. This situation creates an irreversible harm in the promisee, as the fundamental affective exchange (empathy for gratitude) has already happened: the original promisor took with her the gratitude and all it may generate – from loyalty to care and love – and the disappointed promisee is impoverished without compensation for what may be seen as "affective reliance."

In this situation, fairness concerns call for protecting the grateful promisee. The law can best do this by acknowledging the importance of gratitude, categorizing it either as an affective detriment suffered by the promisee or as an affective reliance on her part. Either way, enforceability seems a more appropriate legal response.

#### D. THE RISK OF "COMMODIFICATION"

A final argument, framed by Professor Eisenberg, is that enforcement would have the effect of "commodifying the gift relationship."<sup>209</sup> As Eisenberg<sup>210</sup> and others<sup>211</sup> have acknowledged, this argument is at least rhetorically different from other objections to enforcement. It attempts to deny legal enforcement not because of the inferiority of gifts, but due to their supposed superiority.

Eisenberg's "commodification" argument is actually made

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<sup>209</sup> Eisenberg, *supra* note 6, at 848.

<sup>210</sup> *Id.* at 849.

<sup>211</sup> Mark B. Wessman, *Recent Defenses of Consideration: Commodification and Collaboration*, 41 IND. L. REV. 9 (2008).

out of two arguments: the first is the presumption that legal enforcement means commodification, and the second is the contention that commodification is a negative process (impoverishing). Both sub-arguments are tightly connected by Eisenberg himself to the evaluation of a prospective encounter between law and emotions – a moment about which Eisenberg is fairly pessimistic. His approach therefore invites a response that would be especially attentive to the interrelation of law and the emotions in this context of gifts.

With regard to the presumption that enforcement means commodification, it should be noted from the outset that Eisenberg's is an uncommon use of the notion. At the very minimum it requires more explanation than has so far been offered: in what way does enforcing a promise transform the promise into a commodity?

The term "commodification" is usually used to describe a process of placing a price tag on something that did not have a price before or that is not usually associated with commercial trade. The concept is, of course, deeply connected to the idea of the market, where things are being bought and sold, and to the belief that some things "are not for sale."<sup>212</sup> In the commodification literature the concept of "contested commodities" is reserved for a long list of "things" – such as babies, women, body organs, sex, care, and so on – that "challenge us to try to understand the appropriate scope of the market."<sup>213</sup> Conceptualizing such things as commodities creates some degree of discomfort as "we experience personal and social conflict about the process and the result."<sup>214</sup>

However, this common meaning of commodification is not really relevant to the current enforceability debate, which makes the use of the term "commodification" in this context

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<sup>212</sup> Martha Ertman & Joan Williams, *Preface: Freedom, Equality and the Many Futures of Commodification*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 1* (Martha Ertman & Joan Williams eds., 2005).

<sup>213</sup> Margaret Jane Radin, *Contested Commodities*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 81* (Martha Ertman & Joan Williams eds., 2005); *see also* Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 *ARIZ. L. REV.* 599 (2007), which argues that social justice can be better achieved through regulated markets for organs, ova, and even hair. In the absence of regulated markets, black markets and coercive, fraudulent secondary regimes will develop (and have developed) alongside altruistic procurement strategies; these are more oppressive than their regulated counterparts.

<sup>214</sup> Radin, *supra* note 213, at 81.

problematic. Most donative promises already come with a price tag attached. Indeed, in most of the cases the litigation in courts has involved donative promises to transfer particular sums of money and/or assets that have a well-defined and not-contested *market* value. Moreover, with respect to many contested commodities, the legal approach is to allow – and even encourage – free and donative transfers precisely out of anti-commodification motives. Supporting donations (“gifts”) is thus the main legal way of *resisting* commodification and preventing recourse to the market. Primary examples can be found in legal regulation of organ donations combined with prohibition of their sale, as well as in allowing surrogacy agreements but barring payment to the surrogate mothers.<sup>215</sup>

Donative promises are, by definition, different from commercial exchange – they are not aimed at selling and buying, and their entire separate existence depends on recognizing that fact.<sup>216</sup> It is hard therefore to see what can be the contested commodity or the subject of commodification in the case of such promises.

The last point is not only semantic, as rhetoric can be powerfully misleading. The use of the term “commodification” in such an idiosyncratic manner is far from a neutral phrasing. It has the power of educing strong anti-commodification sentiments, normally reserved for the most challenging dilemmas, such as the sale of babies, and directing them at another context without any clear justification. The remainder of this discussion will consequently refrain from using this loaded term.

The risk ascribed by Eisenberg to legal enforcement is more connected to a concern about applying legal norms to

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<sup>215</sup> See, e.g., Peter Halewood, *On Commodification and Self-Ownership*, 20 YALE J.L. & HUMAN 131, 133 (2008) (citing Richard Titmuss’s classic work, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971) as offering “the essential anti-commodification thesis that body products ought to be allocated by gift or donation only, not through sale, because market exchanges of these products would commodify human beings in ways incompatible with human dignity.”); *Commodification and Women’s Household Labor*, in *RETHINKING COMMODIFICATION*, at 299-300 (critiquing from a feminist perspective, the conventional separation between allowed gifts and forbidden sales in the context of surrogacy).

<sup>216</sup> See, e.g., Lee Anne Fennell, *Unpacking the Gift: Illiquid Goods and Empathetic Dialogue*, in *THE QUESTION OF THE GIFT: ESSAYS ACROSS DISCIPLINES* 85, 93-94 (Mark Osteen ed., 2002) (arguing that gift-giving differs from market exchange because, through gifts, each party engages in “imaginative participation in the life of the other,” helping to cement relationships).

spheres that are considered to be remote from law because of their relational, intimate and affective profile. Since contract law is traditionally connected with the market, this worry is also linked to the fear of blurring the lines between market and non-market domains.<sup>217</sup> This fear is described by Eisenberg as the fear of impoverishing the non-legal world of gifts as a result of contaminating it with legal and market-born ideas.<sup>218</sup>

It is not clear what the grounds for Eisenberg's contamination concerns are, since he does not offer any example of similar processes where the touch of law has destroyed non-legal dynamics. This is not a marginal point because, as mentioned earlier, there are many other Western legal systems that do enforce donative promises without any reported damage to the world of gift.<sup>219</sup> In any case, even assuming that such harm is possible, our analysis of the affective dynamics can offer some comfort. There is no doubt that an enforcement rule may lead to litigation, and litigation can trigger negative emotions that conflict with the positive cycle of empathy and gratitude. Yet it is important to note that the interruption of affective harmony does not originate in the chosen rule of law. Whenever a promise is not kept, negative emotions are likely to arise, either for the promisee (if the promise is not enforced) or for the promisor (if it is enforced). Once self-interests override empathic altruism and take over, gratitude and trust turn into disappointment and frustration, while harmony is severely interrupted. In other words, much of the damage is done regardless of the availability of legal response. In contrast, life in the shadow of the law, where legal

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<sup>217</sup> A similar argument has been used for decades to justify unenforceability of economic promises that were made in the intimate sphere where restrictions of enforceability were explained as a way "to mark the dignity and specialness of intimate relations." See, e.g., Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005). For a critique of Hasday's analysis from a feminist perspective, see Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19 (2005).

Since Eisenberg's definition of donative promises locates them as part of the intimate sphere, the connection between the debates is more than accidental. In both cases it is hard to accept that the denial of law from the allegedly non-legal spheres (the domestic arena and the world of gifts, respectively) stems from a belief in their superiority.

<sup>218</sup> Eisenberg, *supra* note 6, at 847.

<sup>219</sup> JOHN P. DAWSON, *GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED* (1980).



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remedies are available, may turn out to be more respectful to the original feelings and may deter people from changing their mind after promising while surrendering to their more-selfish inner voices.

Professor Eisenberg further argues that, under an enforceability rule, the recipient won't be able to know whether the promise was kept for the right reasons (the original care for the other) or for the wrong reasons (the fear of legal sanction) and that such ambiguity would destroy the spirit of the gift.<sup>220</sup> However, as we have seen, the affective response of the promisee, the feeling of gratitude, emerges in response to the original expression of empathy by the promisor. At this early phase the law is remote and has no bearing on the situation unless it is invoked by the parties. The positive intentions of the promisor in the moments of promising then cannot be obscured by the possibility of enforcement and cannot deprive the promise of its generous character. Quite to the contrary: a promise that is accompanied by a special intentional effort to make it legally binding may communicate more care and empathy and more commitment to the giving than a promise that is made carelessly or in a fashion that avoids the law.

Moreover, market atmosphere is not innately threatening. Sometimes it is the denial of legal or market tools that can be weakening, while their availability may become empowering and liberating.<sup>221</sup> Blurring the lines between markets and gifts can help rather than harm the world of gifts by emphasizing rather than obscuring the importance and the distinct affective value of the gift. Consider, for example, the flourishing market in gift cards. Many people invest time and energy in exchanging money for a colorful plastic card that has the same or similar value. What can explain this behavior is a need to distinguish the gift-ness of the thing that is going to be transferred and differentiate it from a payment of money. Although not always the most personal or creative gifts,<sup>222</sup> gift

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<sup>220</sup> Eisenberg, *supra* note 6, at 847.

<sup>221</sup> Compare to the feminist concerns with regard to the absence of law from the domestic sphere. *See, e.g.,* Hasday, *supra* note 217, at 517 (arguing that unenforceability of intimate agreements "appear[s] to have systematically adverse distributional consequences for women and poorer people, maintaining and increasing distributive inequality.").

<sup>222</sup> Donative promises of the kind discussed here should not be compared to creative gifts such as hand-made unique pieces of jewelry. For the most part the

cards at least offer people a way of marking the nature of their giving by relying on the market. The market then does not ruin the spirit of the gift, as suggested by Eisenberg, but rather is assisting people in calling attention to the fact that what they are giving is a thing that carries something in addition to its monetary value.

Even if there is no ground for actual contamination, can it be that the risk still exists at a more symbolic level? Can it be that merely thinking about law and emotions in tandem can impoverish the world of gift by having a weakening impact over the affects that structure this world? Not according to law-and-the-emotions scholarship. As argued in previous work, law can engage the emotions in quite a few distinctive ways, either purposely or inadvertently,<sup>223</sup> and its interaction with emotions is so complex that it cannot be assumed that applying law will always harm the emotions. The law can, for example, express emotions, channel them, and even foster and cultivate them.<sup>224</sup> It is, therefore, far too simplistic to assume that applying law to an affect-laden context will necessarily have a negative effect.

Furthermore, a negative impact of law may be a product of particular legal norms, for example when legal rules isolate prisoners and thereby harm their sense of hope. However, the view that the law will have such a negative impact just because of its supposed inherently rational nature seems to be unsound. Similarly, the argument that the prospect of future enforcement can color or obscure emotions that arise in the present is equally doubtful. Consider, for example, the fact that the law is available to enforce prenuptial agreements and to preside over the process of divorce, yet that legal presence does not impoverish people's love life during the marriage. Law is also capable of intervention in cases of adoption and

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promises discussed here are to transfer money or tangible assets that have relatively clear monetary value. In general, money gifts are viewed by many as sending out a weaker message of care than a purchased gift, and even more so if compared to handmade gifts. See David Cheal, "Showing Them You Love Them": *Gift Giving and the Dialectic of Intimacy*, in *THE GIFT: AN INTERDISCIPLINARY PERSPECTIVE* 95 (Aafke E. Komter ed., 1996). In this sense, donative promises can be seen as occupying a hybrid space with elements of gift and of market to begin with.

<sup>223</sup> Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions*, 94 *Minn. L. Rev.* (forthcoming 2010).

<sup>224</sup> *Id.* (suggesting "A Framework for Analyzing Law's Relations to the Emotions").

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custody, yet this does not corrode the richness of emotions that are associated with parenthood. Correspondingly, there is no apparent reason to believe that applying law to donative promises will cause, in and of itself, a weakening of the empathy, care, love, and gratitude that are associated with the giving and receiving of gifts. Additionally, even if *some* price has to be paid in this regard and there is some affective cost attached to legal intervention, it does not follow that promises of gifts should not be enforced. Notably, there is no evidence that family relations or friendships are stronger in the United States than in countries that enforce promises of gifts.

## E. A SUGGESTED REFORM: “CONSCIOUS ENFORCEMENT”

After considering the affective benefits and detriments that play a role in the donative-promises arena, it is no longer clear what may justify a sweeping unenforceability rule. The doubt and the need for change are especially significant when the promisor’s intention to make a legally binding promise is evident, such as when that intention is expressed in explicit words or by an effort to artificially satisfy the conventional consideration requirement. However, American contract law “close[s] the door on enforcement entirely, *whether the parties intended legal liability or not.*”<sup>225</sup> Section 21 of the Second Restatement of Contracts generalizes the rule that applies to all promises – bargained-for as well as donative – and clarifies: “Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract.”<sup>226</sup> For the most part this section works to release commercial promisors from the extra burden of documenting intent and therefore it makes it easier for parties to exercise their freedom *to* contract.<sup>227</sup> And yet, when applied to donative promises the section has the opposite effect: it means that parties who want to create a legally binding donative promise cannot – under the current regime – enjoy the freedom to do so and cannot create an affectively based contract. One way to understand the

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<sup>225</sup> Gregory Klass, *Intent To Contract*, 95 VA. L. REV. 1437, 1494 (2009) (emphasis added).

<sup>226</sup> RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

<sup>227</sup> One exception within the market world is the requirement that the enforcement of preliminary agreements depends on the parties’ intention to be legally bound. *See* Klass, *supra* note 225, at 1494.

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notion that the intent of the parties is irrelevant in a contractual system that is supposed to be grounded on their will is to recognize that, as far as the commercial sphere is concerned, the existence of intent is inferred from the existence of consideration. A promise given for consideration enjoys a *presumption* that it is intended to be legally binding. This is a strong and unmitigated presumption and thus no further evidence is needed or, if offered, can change the result of enforceability. A similarly total presumption seems to apply to a donative promise, where the supposed lack of consideration is taken as an absence of an intention to create a legally binding promise. Here, too, no additional evidence is required in order to show the lack of intention, nor does it matter if the promisee can offer evidence that such intention did exist.

It is at this point that the affective analysis offered here can have normative significance, as it undermines the conclusion that the lack of conventional consideration necessarily means that intention is absent. As we have seen throughout the discussion, people have serious reasons to promise gifts that carry legal consequences, for example in order to allow the persons they want to benefit to fully rely on their promises and/or to allay concerns that they will not be alive long enough to perform the promises and that their heirs will try to breach. Accordingly, a rule could have been adopted that donative promises will be enforced in the same manner that bargained-for promises are being enforced, i.e., irrespective of intention. However, respecting the emotions of empathy and gratitude seems to require more sensitivity, not in order to totally deny the enforceability of donative promises, but in order to verify that their enforcement is truly what the parties wished for and relied on.

To encompass the importance of the freedom to have a contract in the affective domain, on the one hand, and the distinctive character of donative promises and the “world of gift,” on the other hand, it is proposed to design a special rule of enforcement. The suggested rule would require courts to be more conscious and sensible about the decision to enforce donative promises and it therefore it can be referred to as a rule of “conscious enforcement.” It would refrain from automatically denying the enforcement of donative promises but, at the same time, would not apply the opposite rule of unlimited enforcement. Instead, it would seek an intermediate

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norm that is set somewhere on the spectrum between the high level of enforcement granted to market promises and the non-enforcement currently applied to donative promises.

To accomplish such a goal we can adopt any of several variations of conscious enforcement, which differ by their distance from the now-existing unenforceability rule. Generally speaking, it is possible to tailor a rule of contingent enforceability under which donative promises will be enforced provided that they were *intended* to be legally binding. Such special and limited enforceability can be phrased in several ways to reflect different degrees of legal support. It is viable, for example, to design a relatively conservative rule that deviates only slightly from the current unenforceability regime, by setting unenforceability as the default norm unless a clear intention of the promisor to make a legally binding promise can be shown. Such variation may be shaped in an extremely restrictive way, such as by adding a requirement that the legal intention be explicitly stated in writing, or in a more flexible form where counter-intention can be shown in more than one way. Another alternative is to further highlight the potential legal meaning of a donative promise by adopting a rule that renders it *enforceable* if it contains an expression of the promisor's intent to make it legally binding.<sup>228</sup> One major difference between the alternatives is symbolic: while the first variation marks donative promises as generally *unenforceable*, the second underscores their potential to become enforceable.

Choosing between the two main models of conscious

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<sup>228</sup> Some formal requirements may be added here, such as the need for a written or even signed statement of the promisor. One possible model can be found in Pennsylvania, where a written gratuitous promise is enforceable if it "contains an additional express statement, in any form of language, that the signer intends to be legally bound." 33 PA. STAT. ANN. § 6 (1997). I thank Professor Gregory Klass for this reference. The background of the Pennsylvania rule adds a practical dimension to the theoretical uneasiness that accompanies the dichotomy of bargained-for/gratuitous promises. See James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283, 311-12 (1991) (describing the history of the act as follows: "in 1925 the National Conference of Commissioners on Uniform State Laws proposed the Model Written Obligations Act. The Act provides that a signed written promise shall not be unenforceable for lack of consideration if the writing contains 'an additional express statement, in any form of language, that the signer intends to be legally bound.' Only Pennsylvania and Utah adopted it, however, and Utah later repealed it. Other states were reluctant to adopt the Act because such a clause could be inserted into the body of an unread printed form, and therefore the express statement of an intention to be bound did not ensure that the intention really existed. At the same time, the form could leave the other party's performance optional.")

enforceability and deciding about the particulars of their internal design does not seem necessary at the moment, although the analysis of the social value of empathy and gratitude does suggest that the latter model, which is a pro-enforcement rule, might fit better with public-policy goals such as fostering positive emotions.<sup>229</sup> Nonetheless, even a more-moderate reform could contribute immensely to the freedom to contract, namely the freedom to make legally binding donative promises, and can more appropriately indicate the individual and social value of affectively motivated promises.

Finally, conscious enforcement of donative promises will not only benefit the world of gift, it can also enrich the world of contracts and the law. If donative promises are taken to be honest expressions of empathy and altruism, rather than selfish bargains in disguise, then the legal support of such promises by means of contractual enforcement may develop new capacity within contract law. By offering enforceability to donative promises, the law may be seen as playing a new role: helping the promisor to express and communicate her feelings about the promisee and their relationship. It would also support and foster the existence of empathy and gratitude in society. In this respect it is imperative to remember the symbolic power of law. For most people who live in the shadow of the law, the ability to enforce a promise signifies the investment of social resources in the promise and, by extension, its social importance.<sup>230</sup>

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<sup>229</sup> The concrete design of a conscious enforceability rule can benefit immensely from taking into account two separate questions that are defined by Professor Klass. The first is whether to adopt an enforcement or nonenforcement interpretive default. The second relates to the way to prove non-default intentions (opting out) where the main alternatives are burdening the party who wants to opt out to express her intention in a certain way or to rely on a court's determination of the promisor's intention (based on the available evidence). For an illuminating discussion of those questions, see Klass, *supra* note 225, at 1494.

<sup>230</sup> Seeing law as actively facilitating these affective dimensions of human interaction is a novel idea that has recently been framed and endorsed by law-and-the-emotions scholars. It descriptively acknowledges that law participates in affective processes, and it normatively supports this possible contribution. It also views the integration of law and the emotions with caution – being attentive to the possibility of concrete undesirable outcomes. To take another example connected to the intimate sphere, one can think about the role of contract law in facilitating cohabitation agreements between same-sex partners. On the one hand, the law of most states prevents such partners from using marriage as a way of expressing feelings of long-term love, mutual commitment and trust. On the other hand, by utilizing contract law, with all its rituals and formalities, the law can help the same parties to convey their

## CONCLUSION

The law can relate to people's emotions in many sensible and subtle ways – it does not have to be crude. Therefore, the question of donative promises that lack a conventional sort of consideration should not be limited to a *Hamlet*-style query: to enforce or not to enforce. Instead, we should ask about the appropriate legal response to the similarities and differences between donative promises and bargained-for promises.

This Article demonstrated that those similarities and differences do not support the existing reflexive denial of enforcement, but rather justify some form of legal recognition. It concluded with a concrete suggestion to move from total refusal to enforce donative promises to a cautious willingness to enforce them “consciously” in cases of existing intention to create legally binding promises. Yet, the Article's sustained examination of empathy and gratitude may prompt questions that reach beyond the enforceability debate. For example, understandings of gratitude may make us consider adding a legal mechanism that ensures that the potential promisee is willing to accept the emotional consequences (or costs) of a donative promise. Similarly, it may lead us to allow the promisor to revoke his promise in circumstances that reflect a severe lack of gratitude.<sup>231</sup> In other words, the nuanced work of *how* to enforce donative promises in a way that responds to their special affective dimensions is a challenge that awaits the attention of future law-and-the-emotions scholars.

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emotions – toward each other and toward the larger world. Law, as seen from this new perspective, becomes capable of closing the gaps between traditionally segregated worlds. Importantly, it does that not by imposing itself or limiting people's freedom (as law does when it bans marriage) but rather by offering them the benefit of its potential effect on the emotions.

<sup>231</sup> Such as in cases of a cruel treatment of the donor.