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Charitable Pledges: Contracts of Confusion

William A. Drennan

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Abstract

With postmortem enlightenment, Jacob Marley's ghost sternly forewarns Ebenezer Scrooge to embrace the "business of charity," which Marley's ghost associates with mercy, forbearance, and benevolence. This Article analyzes an aspect of the business of charity tainted with stealth bordering on trickery, mandatory ingratitude, and judicial contrivances. This Article seeks to make two contributions to the important debate about the enforceability of charitable pledges. First, new empirical evidence developed for this Article indicates approximately 95 percent of charities fail to disclose in their pledge forms that the donor will be legally bound to make all the pledge payments. Despite the absence of an agreement to be bound, consideration, or substantial detrimental reliance, courts almost always enforce charitable pledges. Second, this Article proposes reforming this sullied aspect of the business of charity with a new, workable approach focusing on traditional contract rules, basic promissory estoppel doctrine, and the donor's intent.

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* William A. Drennan, Associate Professor, Southern Illinois University School of Law; New York University School of Law, LL.M. (Executive) 2013, Member, American Law Institute; Partner and Associate, Husch Blackwell Sanders LLP (1985–2005); Washington University School of Law, Adjunct Professor, Graduate Tax Program (1996–2000); Washington University School of Law, LL.M. in Intellectual Property (2003); Washington University School of Law, LL.M. in Taxation (1997); St. Louis University School of Law, J.D. (1985). Professor Drennan practiced law full-time for twenty years in the areas of tax-exempt organizations, charitable giving, tax, estate planning, and business law. Special thanks to Kyle Boose, Southern Illinois University School of Law Class of 2016, for his excellent research and editorial assistance, and thanks to Sheril Varughese, Southern Illinois University School of Law Class of 2015, for her excellent research assistance.

"The law of charitable [pledging] has been a prolific source of confusion."[1]

Imagine that Transparency-Challenged Charity ("T.C. Charity") provided its donors with a multi-year pledge[2] form that fails to state whether the pledge is legally binding. New empirical evidence devel-

1. Allegheny Coll. v. Nat'l. Chautauqua Cty. Bank of Jamestown, 159 N.E. 173, 174 (N.Y. 1927) (Cardozo, C.J.).

2. A charitable pledge, also called a charitable subscription, is a donor's written or oral promise or statement of intent to contribute money or property to a charity over a period of time, frequently three or five years. *See* King v. Trustees of Boston Univ., 647 N.E.2d 1196, 1199 n.3 (Mass. 1995) (the words "pledge" and "subscription" often are used interchangeably). The empirical evidence created for this Article indicates that standard pledge forms usually are silent regarding enforceability. *See infra* Part II.A. A pledge form could state that it is legally binding, *see infra* notes 108–110, 97–99 and accompanying text, or it could state that the donor can revoke the pledge at any time. *See* Rubin M.W. Trozpek, *Pledges: Good Understandings Make Good Gifts*, CONF. PRESENTATION PAPER (Nat'l Conf. on Philanthropic Plan., Orlando, Fla.), Oct. 13–15, 2010, at 4, 12, http://bit.ly/1VnZB5R.

oped for this Article indicates this occurs 95 percent of the time.[3] If Generous Giver ("Generous") signs the pledge form and makes the first pledge payment, in which of the following situations will Generous be legally obligated to make all of the scheduled pledge payments?

a. Investigative reports reveal that T.C. Charity officials have been billing the charity to fund their outrageously extravagant lifestyles.[4] Generous, who has supported T.C. Charity for years, feels betrayed, stops funding T.C. Charity, and begins supporting a different charity.

b. T.C. Charity owns and operates a hospital, and a new survey reveals that it provides a disturbingly small amount of charity care for the poor and aggressively tries to collect its fees from low-income individuals.[5] Generous is disappointed and would prefer to support a more merciful hospital.

c. T.C. Charity owns and operates a high school, and when Generous signed the pledge the high school was in an area accessible for inner-city youths. T.C. Charity subsequently relocates the entire high school campus to an affluent suburb miles away.[6] Generous would prefer to support a high school accessible to inner-city youth rather than supporting a high school catering to wealthy families.

d. T.C. Charity owns and operates an all-female college, and Generous made the pledge because the school did a fine job educating her eldest daughter. News reports recently reveal that many all-female

3. *See infra* Part II.A.

4. *See, e.g.*, Matthew Barakat, *Disgraced Former CEO of United Way*, CHI. SUN TIMES, Nov. 15, 2011, at 37, 2011 WLNR 23518488 ("William Aramony . . . spent the charity's money to fund a lavish lifestyle, including gifts and trips for a 17-year old girlfriend [when he was 60 years old and married]."); Anne Flaherty, Associated Press, *FTC: Family Raised $187M for Cancer, Spent It on Themselves*, ST. LOUIS POST-DISPATCH (MO), May 20, 2015, at A1, 2015 WLNR 14933562 ("his family . . . [bought] themselves cars, gym memberships and [took] luxury cruise vacations . . . in one of the largest charity fraud cases ever, involving all 50 states").

5. *See, e.g.*, Ralph Loos, *Exemption Inquiry: Congress Not Sure What Sets Apart Not-for-profits*, 35 MOD. HEALTHCARE 8 (2005), 2005 WLNR 28777879 ("The [2003] reports [from consumer groups and the media] suggested hospitals were charging 'list prices' to the uninsured and were using aggressive collection tactics against low-income patients and were not providing enough charity care."); Melissa Block, *Profile: Long Island Hospital Survey Finds Lack of Patient Access to Charity Care*, NPR ALL THINGS CONSIDERED, July 25, 2003, 2003 WLNR 16702605.

6. *See, e.g.*, Editorial, *A School Moves West*, ST. LOUIS POST-DISPATCH (MO), Nov. 13, 1998, at C16, 1998 WLNR 891888 ("With its move a connection between the school's students and the region's historical center is loosened . . . sprawl and flight from the urban center affects not just the City . . . ."); Dale Singer, *CBC Agonizes Over Impending Move: Board Is Expected to Approve It*, ST. LOUIS POST-DISPATCH (MO), Nov. 1, 1998, at C1, 1998 WLNR 891595.

colleges are welcoming transgender individuals[7] but T.C. Charity is not among them. Generous stops contributing to T.C. Charity and instead makes an identical pledge to support a more inclusive college.

e. Generous made the pledge when her youngest daughter was attending the local high school owned and operated by T.C. Charity. Subsequently, Generous' job requires that she and her family relocate. Her daughter now attends a different high school, and Generous would prefer to donate to her daughter's new high school.[8]

f. T.C. Charity's mission is to feed the poor, but a new survey reveals that T.C. Charity incurs significantly higher administrative and other overhead costs compared to other charities performing the same function. Generous would prefer that her donations support a charity providing greater benefits to the poor.

g. T.C. Charity conducts medical research on a disease, and Generous made the pledge when she was still grieving the death of her mother from that disease. Now, Generous realizes she would prefer to support a different charitable mission.

The vast majority of U.S. courts would conclude that Generous Giver is legally obligated to pay all future donations under the pledge form despite T.C. Charity's failure to disclose that the pledge is legally binding.[9] Furthermore, T.C. Charity's board of directors likely has a fiduciary duty to sue Generous in court for any missed payments.[10]

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7. *See, e.g.*, Ari Nussbaum, *Women's Colleges Adopt Transgender Admission Policies, Others Continue to Rally*, THE CAMPANIL (Nov. 4, 2014), http://www.thecampanil.com/womens-colleges-adopt-transgender-admissions-policies-others-continue-to-rally/ (reporting that "students at some women's colleges are still fighting for change"); Elizabeth A. Harris, *Barnard College Will Soon Accept Transgender Women*, BOSTON GLOBE, June 5, 2015, 2015 WLNR 16629648.

8. *See* Woodmere Academy v. Steinberg, 363 N.E.2d 1169, 1171 (N.Y. 1977), *aff'g* 385 N.Y.S.2d 549 (App. Div. 1976) (providing an example where the donor's child changed schools after the donor signed the pledge form, and the donor contributed to a different charity after the move).

9. *See* JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS 225 (6th ed. 2009) ("With great frequency, but not with complete uniformity, charitable subscriptions have been enforced in [the U.S.]."); Mary Francis Budig, Gordon T. Butler & Lynne M. Murphy, *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?* 27 U.S.F. L. REV. 47, 49–50, 53 n.3 (1992) (stating that since 1817 over 300 cases have considered the issue, and "[t]he result [generally] has been the enforcement of charitable subscriptions . . . ."); PRINCIPLES OF THE LAW OF NONPROFIT ORG. § 490, cmt. d (AM. LAW INST., Tentative Draft No. 2, 2009) [hereinafter ALI DRAFT PRINCIPLES] (providing that "ordinary disagreements over charity management would not give rise to a defense for a suit on a binding pledge").

10. *See* Budig, et al., *supra* note 9, at 50 ("[D]uties currently imposed on nonprofit directors will in many circumstances mandate them to enforce charitable pledges."); *see also* ALI DRAFT PRINCIPLES, *supra* note 9, § 490, cmt. a (providing that an attorney gen-

A U.S. court likely will enforce Generous' pledge to T.C. Charity under one or more of the following twisted[11] legal theories:

- It is a binding bilateral contract supported by consideration because under its articles of incorporation the charity must use all funds received for charitable purposes.[12]
- It is a binding bilateral contract because other donors pledged.[13]
- It is a binding unilateral contract because T.C. Charity actually used Generous' initial donation for charitable purposes.[14]
- It is enforceable under the doctrine of promissory estoppel because T.C. Charity substantially relied to its detriment on the pledge.[15]
- It is enforceable under a modified promissory estoppel theory approach in § 90 of the Restatement Second of Contracts, regardless of whether T.C. Charity relied on the pledge.[16]

This is an unfortunate result in many respects. Generous likely feels duped. The pledge form failed to honestly disclose that Generous was legally obligated, circumstances changed, and she chose to support a different charity. At the same time, T.C. Charity's governing body may feel like ingrates when suing someone who made an initial contribution and subsequently preferred not to donate because of changed circumstances. And courts frequently complain about having to apply the artificially contrived legal rules of charitable pledging which defy logic,[17] common sense, and fundamental principles of common law.[18]

This practice of U.S. courts enforcing almost all charitable pledges likely encourages charities to use laconic pledge forms that mislead do-

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eral will not sue to enforce a pledge, but an attorney general might sue the charity's governing board for breach of their fiduciary duties).

11. *See infra* Part I.B. (arguing that the normal application of these doctrines has been twisted); Dalhousie Coll. at Halifax v. Boutilier Estate, 1934 CarswellNS 43, [1934] S.C.R. 642, 3 D.L.R. 593 (Can. 1934) (WL) (stating that U.S. cases enforcing charitable pledges are "unsound in principle," the arguments for enforcement have "no basis in fact," and are "inconsistent with elementary principles").

12. *See infra* notes 63–66.

13. *See infra* notes 71–73.

14. *See infra* notes 79–81.

15. *See infra* notes 90–91.

16. *See infra* notes 97–103.

17. *See* JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS 271–72 (5th ed. 2011) (observing that English courts take a "strictly logical view" and conclude that charitable pledges are gratuitous and therefore unenforceable).

18. *See, e.g.*, Mt. Sinai Hosp., Inc. v. Jordan, 290 So.2d 484, 487 (Fla. 1974) ("To ascribe consideration where there is none, or to adopt any other theory which affords charities a different legal rationale than other entities, is to approve fiction."); *see also infra* Part I.B.

nors.[19] This Article demonstrates the prevalence of this problem with new empirical research indicating that approximately 95 percent of standard charitable pledge forms fail to clearly state whether the pledge is legally binding, and 85 percent fail to provide even a clue about whether the pledge is binding.[20]

The current U.S. approach disregards the donor's intent. This Article proposes a new approach that will enforce a charitable pledge only if: (i) it would be binding under noncharitable legal principles normally applied, specifically under contract law or the promissory estoppel doctrine; or (ii) the donor manifested an intent that the pledge would be legally enforceable by clear and convincing evidence.

Part I of this Article traces the legal fictions U.S. courts often use to enforce charitable pledges, including standard[21] charitable pledges. This discussion will demonstrate that a donor could reasonably believe that a standard pledge to make future charitable gifts would not be enforceable either as a matter of common sense or based upon an understanding of basic legal principles. Indeed, English common law and a handful of U.S. cases refuse to enforce standard charitable pledges for persuasive reasons.[22]

Part II describes new empirical evidence created for this Article that indicates approximately 95 percent of standard charitable pledge forms are sneaky; they fail to disclose that the charitable pledge is legally binding like a debt.

Part III proposes a new two-prong test for enforcing charitable pledges. Under the first prong, charitable pledges would be enforceable under normal legal rules. In the modern era of fundraising, normal contract analysis may enforce most significant dollar pledges because the donor receives valuable charitable naming rights.[23] When a transaction involves a part-bargain (such as a naming right) and a part-gift, traditional contract analysis finds sufficient consideration to enforce the entire transaction.[24] In addition, normal promissory estoppel doctrine could enforce other significant dollar pledges when the donor knew or should have known the charity was relying on the pledge in beginning construc-

19. *See infra* Part II.B.

20. *See infra* Part II.A.

21. In this Article, a "standard" charitable pledge is a pledge arrangement in which (i) the charity and the donor did not negotiate the details of the pledge, and (ii) the amount of the pledge is not material compared to the charity's overall fundraising activities. As discussed in Part III.A *infra*, negotiated and material pledges can be enforceable in many situations under normal legal principles without regard to any special rules for charities.

22. *See infra* notes 56–59 and accompanying text.

23. *See infra* Part III.A.1.

24. *See infra* notes 177–185 and accompanying text.

tion on a project or in other ways.[25] The second prong proposes a change in the law that would enforce other charitable pledges when there is clear and convincing evidence that the donor intended the pledge to be legally binding.

Part IV concludes that this Article's proposal would encourage charitable fundraisers to honestly disclose legal enforceability and reduce the current economic incentive to deceive donors. Additionally, this proposal will free charity's directors from suing donors who can realistically claim they were misled[26] and will eliminate artificial judicial concoctions[27] imposing liabilities on donors with bona fide claims of deception.

I. SURPRISE: CURRENT RULES CONTRARY TO REASONABLE EXPECTATIONS

A. Common Sense Confounded: Promise of a Gift Treated as a Debt

I promise to attend your party Saturday night.[28] I promise to take out the trash every day. "If it rains tomorrow I will pay you $10."[29] Does the law always require everyone to do what they say they will do? The answer has been an emphatic "no" even for written promises.[30] "No legal system enforces all promises . . . the coercive power of the State will not . . . [penalize] . . . the defaulting promisor unless the law deems

25. *See infra* notes 90–91 and accompanying text.

26. A draft of an ALI Principles document also focuses on this problem and considers the parties' intent in deciding if a charity's directors have a duty to sue to enforce the pledge. Unfortunately, in the ALI draft, the donor's intent to be bound is presumed in various circumstances including (i) at all times after the donor has made the initial donation, or (ii) if the charity relied to its detriment on the pledge, or (iii) if the pledge induced others to give to the charity. ALI Draft Principles, *supra* note 9, at § 490(c), *quoted in* CHARLES L. KNAPP, NATHAN M. CRYSTAL, AND HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 227 (7th ed. 2012). This Article's proposal rejects those presumptions for various reasons. *See* Part III.C *infra* (considering the ALI draft in more detail).

27. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW INST. 1981) (setting forth the American Law Institute's attempt to create a rule that would allow courts to enforce charitable pledges without the need to twist traditional contract rules); *see infra* notes 97–104 and accompanying text (discussing the ALI proposals).

28. *See* PERILLO, *supra* note 9, at 26–27 (concluding there would be no breach of contract cause of action if the promisor partied elsewhere "because it is a reasonable factual presumption that the parties intended that only a social obligation should result. The inference is that the parties did not intend legal consequences").

29. *Id.* at 156.

30. KNAPP ET AL., *supra* note 26, at 533 (stating that courts have "widen[ed] . . . the grounds for avoiding enforcement of an agreement" based on the competency of the parties, the bargaining process in reaching the agreement, and the substance of the agreement); *see, e.g.*, Dougherty v. Salt, 125 N.E. 94, 95 (N.Y. 1919) (refusing to enforce a promise even though it was evidenced by a signed promissory note).

the enforcement of the promise socially useful."[31] Despite the general recognition of the duty to read,[32] courts often refuse to enforce written promises for various reasons.[33]

Most relevant for this discussion is the question of whether to enforce promises to make future gifts. Several practical and persuasive arguments support the view that promises to make future gifts to family members, friends, and other persons should not be enforced. Often these promises are made in a highly emotional state or other transient mindset, and the recipient is, or should be, fully aware that the donor may reconsider upon returning to a more tranquil mood. Professor Eisenberg observes that it would be unfair to sue the promisor for over-enthusiasm at a time of stress, gratitude, or affection.[34] In some situations, a person might promise a gift in haste to impress others.[35] Other reasons why the promisor should be entitled to renege include the promisee subsequently demonstrating ingratitude.[36] Also, these promises frequently are made informally, and it may be too easy for a plaintiff to convince a jury, falsely, that a defendant promised to give.[37] Furthermore, in the case of gifts, "there are no significant costs on the part of the promisee and no enrichment on the part of the promisor at the expense of the promisee."[38]

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31. PERILLO, *supra* note 9, at 149.

32. *See id.* at 342 (asserting that a party who signs "may not later complain about not reading or not understanding"); *see, e.g.*, Ray v. William G. Eurice & Bros., Inc., 93 A.2d 272, 278 (Md. 1952) ("One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation." (quoting RESTATEMENT OF CONTRACTS § 70 (AM. LAW INST. 1932))).

33. For example, courts refuse to enforce promises in cases involving misrepresentation, fraud, economic duress, undue influence, and in other situations when enforcement would be inappropriate. *See* PERILLO, *supra* note 9, at 273 (economic duress), 286 (undue influence), 292 (misrepresentation), 331 (unconscionability); *see also* KNAPP ET AL., *supra* note 26, at 533. Also, courts refuse to enforce promises when there simply has been no "meeting of the minds." PERILLO, *supra* note 9, at 23 ("Usually, an essential prerequisite to the formation of a contract is an agreement—a mutual manifestation of assent to the same terms.").

34. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979) (remarking that the promisee should not have a "secure expectation" because the promisee should "realize[] the promisor may back off when a sober self returns"); *see also* Budig et al., *supra* note 9, at 59 ("Charitable solicitations are often charged with high emotions.").

35. KNAPP ET AL., *supra* note 26, at 102.

36. *Id.* at 115 (providing an example of an uncle who "promises to give [his] [n]ephew $20,000 in two years, and [the] [n]ephew . . . wrecks [the] [u]ncle's living room in an angry rage"); *see also* Eisenberg, *supra* note 34, at 5 (same hypothetical).

37. Eisenberg, *supra* note 34, at 4–5.

38. PERILLO, *supra* note 9, at 149.

Courts generally use the doctrine of consideration to refuse to enforce a promise to make a future gift.[39] The law will enforce a promise as a contract only if it is supported by consideration.[40] Consideration is a return benefit or detriment,[41] which was bargained for, and induced the promise.[42] In order to qualify a promise as an enforceable contract supported by consideration, the other party needs to promise to provide (or actually provide) a return benefit or legal detriment, and the original promisor must have bargained for that return benefit or detriment.[43]

The classic case of *Dougherty v. Salt*[44] demonstrates the failure of consideration in future gift situations. In *Dougherty*, an aunt says she intends "to take care of" her eight-year-old nephew because he is "a nice boy."[45] The nephew's guardian basically asks whether the aunt is merely making an empty promise or is willing to put her money where her mouth is.[46] The aunt responds by signing a formal promissory note, which provides for a payment of $3,000 to her nephew during her life or at her death, and the aunt delivers the promissory note to the nephew saying, "I have signed this note for you. Now, do not lose it. Someday it will be valuable."[47] After the aunt's death, when the nephew sues to collect on the promissory note, Justice Cardozo, writing for the majority, concluded that "the note was the voluntary and unenforceable promise of an executory gift."[48] Cardozo stated there was no evidence that the nephew provided a benefit to his aunt or that the nephew suffered a legal detriment.[49] The court also failed to find that the aunt bargained for anything or that her promise was induced by consideration from the nephew.[50] In concluding that the aunt's estate need not pay the $3,000

39. *Id.* ("[A]n informal, unrelied-on gratuitous promise generally will not be enforced."). *But see infra* notes 281–292 and accompanying text (describing how a promise to make a future gift may be enforced under the doctrine of promissory estoppel).

40. *See* PERILLO, *supra* note 9, at 150 ("[T]he common law usually requires that promises be made for a consideration if they are to be binding."). *But see id.* at 149 ("[D]onative promise[s] . . . may be enforced under . . . promissory estoppel.").

41. *See* Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) (describing consideration as a benefit to one party or a detriment suffered by the other party).

42. PERILLO, *supra* note 9, at 152–53.

43. *See Hamer*, 27 N.E. at 257 (enforcing an uncle's promise to pay his nephew $5,000 if the nephew "refrain[ed] from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he [attained] twenty-one years of age"); *see also* KNAPP ET AL., *supra* 26, at 109 (stating that "each party's promise and resulting performance [must] induce [] the corresponding promise and performance by the other party").

44. *See* Dougherty v. Salt, 125 N.E. 94 (N.Y. 1919).

45. *Id.* at 94.

46. *Id.*

47. *Id.* at 95.

48. *Id.*

49. *Id.*

50. *Id.*

promised, Justice Cardozo stated, "Nothing is consideration that is not regarded as such by both parties."[51]

If a person-to-person written promise of a future gift is unenforceable, common sense suggests that similar donor-to-charity promises should be unenforceable.[52] One article bluntly states, "In a typical charitable pledge, conventional consideration is absent because the charity suffers no detriment and the promisor seeks no benefit."[53] Other commentators claim, "If the bargain theory of consideration has as a principal function distinguishing [enforceable] exchanges from [nonenforceable] gifts . . . then obviously charitable gifts will generally fall on the nonenforceable side of the line."[54]

English common law[55] and a handful of U.S. cases[56] reflect this logical view that charitable gifts are unenforceable for lack of consideration and refuse to enforce standard charitable pledges. For example, in *Dalhousie College v. Boutilier Estate*,[57] in connection with a fund drive, Arthur Boutilier signed a pledge to donate $5,000 "in consideration of the [promises] of others."[58] The Canadian Supreme Court rejected several arguments by Dalhousie College and declared the pledge unenforceable.[59] Despite noting that American courts likely would enforce the pledge, the Canadian Supreme Court said that "without any deference to eminent judges who have held otherwise" we view Dalhousie College's position as "an attempt to turn a charity into something very different

51. *Id.* (citations omitted).

52. *See* WILLIAM STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL § 453 (2d ed. 1847), *quoted in* Budig et al., *supra* note 9, at 51–52.

53. Budig et al., *supra* note 9, at 51. If the charity provided a private benefit to the donor, the arrangement could jeopardize the charity's tax-exempt status under the Internal Revenue Code. *See* I.R.C. § 501(c)(3) (2013); Treas. Reg. § 1.501(c)(3)-1(c)(2) (1959) (stating that an organization will not qualify under IRC § 501(c)(3) if its earnings inure to the benefit of a private individual).

54. KNAPP ET AL., *supra* note 26, at 218.

55. *See In re* Hudson, 54 L.J. Ch. 811, 814 (1885), *cited with approval in* PERILLO, *supra* note 9, at 225 n.32 (stating that unsealed charitable subscriptions generally are not enforced in England).

56. *See, e.g.*, Arrowsmith v. Mercantile-Safe Deposit & Trust Co., 545 A.2d 674, 685 (Md. 1988) (rejecting a claimed estate tax deduction because under Maryland law a charitable pledge must be supported by consideration); Congregation Kadimah Toras-Moshe v. De Leo, 540 N.E.2d 691, 693–94 (Mass. 1989) (refusing to enforce oral pledge after donor's death); Md. Nat'l Bank v. United Jewish Appeal Fed'n, Inc., 407 A.2d 1130, 1136 (Md. 1979) (concluding that there was no consideration, no detrimental reliance, and that "settled principles" should not be disregarded); Dillard Univ. v. Int'l Longshoremen's Ass'n, 169 So. 2d 221, 224 (La. Ct. App. 1961) (finding there was no meeting of the minds because the pledge was a mere publicity "gimmick"); Mt. Sinai Hosp., Inc. v. Jordan, 290 So. 2d 484, 486–87 (Fla. 1974).

57. Dalhousie Coll. At Halifax v. Boutilier Estate, 1934 CarswellINS 43, [1934] S.C.R. 642, 3 D.L.R. 593 (Can. 1934) (WL).

58. *Id.*

59. *Id.*

from a charity [and] . . . it ought to fail, and . . . it does fail."[60] Presumably, the Canadian Supreme Court was implying that the charitable college was attempting to turn itself into a creditor enforcing a debt.

Thus, if a reasonable donor has not studied the specific U.S. laws of charitable pledges, the donor could be deceived by a pledge form that is silent about enforceability.

B. Artificial Judicial Concoctions to Enforce Charitable Pledges

The facts can vary greatly among charitable pledge cases. In some situations, the donor receives naming rights or other forms of valuable public recognition, and sometimes not. In some situations, the donor and the charity negotiate the terms of the pledge, and the donor knows that the charity relies on the pledged funds to finance a particular project, and sometimes not. Many pledges fall into a category that could be labeled "standard charitable pledges," in which no significant negotiations between the donor and the charity took place, and the dollar amounts are not material compared to the charity's overall fundraising operations.[61] Under typical legal rules, these standard pledges likely would not qualify as contracts because of the consideration requirement.[62] Additionally, under normal promissory estoppel doctrine, these standard pledges would likely be unenforceable because the charity could not prove substantial detrimental reliance. Nevertheless, courts overwhelmingly enforce even these standard pledges by bending logic, twisting legal rules, and creating legal fictions.

1. Twisting the Bilateral Contract Rules to Enforce.

A bilateral contract involves a promise in exchange for a promise.[63] Courts often use two twisted approaches to find that a standard charitable pledge is a bilateral contract.

Under the first approach, courts conclude that a pledge is a binding bilateral contract on the theory that the charity's obligation to use all contributed funds for a charitable purpose constitutes a return promise that qualifies as consideration.[64] Under its charter, articles of incorporation, or other governing document, a charity must operate for charitable purposes, both for purposes of state law[65] and tax law.[66] Some courts have

60. *Id.* (quoting the headnote from *In re Hudson*, 54 L.J. Ch. at 819).

61. *See supra* note 21 (describing a standard pledge).

62. Budig et al., *supra* note 9, at 51.

63. PERILLO, *supra* note 9, at 57.

64. *See infra* note 66.

65. *See* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 65 (10th ed. 2011) ("An organization is organized exclusively for one or more tax-exempt, chari-

concluded that the charity's obligation is a promise that qualifies as consideration.[67]

Other courts and commentators point out the logical and doctrinal flaws in this approach. For instance, the charity's obligation could only be consideration if it provides a benefit to the donor or is a detriment to the charity.[68] The charity cannot provide a private benefit to an individual donor without jeopardizing its tax-exempt status,[69] and there is no detriment to the charity in receiving money to fulfill its charitable mission. Presumably, a charity would simply reject the contribution if a donor wanted the donation to go toward a specific project that the charity did not wish to undertake. Perhaps most important, the charity already has a preexisting duty to use all funds received for a charitable purpose. Moreover, it is a cardinal principle of contract law that a promise to fulfill a preexisting duty is not consideration.[70] The Canadian Supreme Court skillfully synthesizes the fallacies in the enforcement arguments stating, "the promise implied in the acceptance involves no act advantageous to the [donor] or detrimental to the [charity], and hence does not

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table purposes only if its articles of incorporation limit its purposes to one or more exempt purposes . . . .").

66. I.R.C. § 501(c)(3) (2013); Treas. Reg. § 1.501(c)(3)-1(a)(1) (1959); *see* Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983) ("Underlying all relevant parts of the [Internal Revenue] Code is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity.").

67. *See, e.g.*, *In re* Morton Shoe Co., 40 B.R. 948, 951 (Bankr. D. Mass. 1984) ("The pledge document . . . clearly indicates that by accepting the subscription [the charity] agrees to apply the pledged amounts in accordance with the charitable purposes set forth in its charter. This is sufficient consideration to support the promise."); Estate of Couch v. Neb. Wesleyan Univ., 103 N.W.2d 274, 276 (Neb. 1960) (finding that the school's promise to carry out the donor's wishes supplied the necessary consideration when the donor made a pledge to donate a $5,000 scholarship to "worthy girls"); Central Maine Gen. Hosp. v. Carter, 132 A. 417, 420 (Me. 1926) ("[A] promise, whether express or implied, on the part of the promisee, in case of a proposed gift for a special purpose, to devote the gift when received to the purpose named . . . is a sufficient consideration to support the promise to give . . . .").

68. *See* Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891); PERILLO, *supra* note 9, at 152.

69. *See* I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(c)(2); *Id.* § 1.501(c)(3)-1(d)(1)(ii) (finding an organization will not qualify as tax-exempt under I.R.C. § 501(c)(3) unless it serves a public rather than a private interest); *see generally* HOPKINS, *supra* note 65, at 536–46 (discussing the private benefit doctrine).

70. PERILLO, *supra* note 9, at 226 ("[T]he charity has a duty to use its funds for charitable purposes, and the performance of a pre-existing duty generally does not constitute consideration."); *In re* Smith's Estate, 38 A. 66, 67 (Vt. 1897) (finding that in connection with a charitable pledge, "[d]oing, or promising to do what one is already legally bound to do, is not a sufficient consideration to uphold a contract, whether the previous obligation arises by contract or by law independently of it"); PERILLO, *supra* note 9, at 176 ("For example, [imagine] B says to A, 'If you pay me the $50 you owe me, I promise to give you a DVD worth $10.' B's promise is not enforceable because A . . . would merely be doing what A was legally obligated to do.").

involve a case of mutual promises and . . . the duty of the [charity] . . . arise[s] from trusteeship rather than a contractual promise . . . ."[71]

In a second twisted approach, courts sometimes hold that the return promise derives from other donors pledging money to the same charity.[72] In effect, this approach reasons that, because of the first donor's promise to contribute, other donors made a promise to give, which can allow the charity to fulfill some charitable project. For example, in *Congregation B'Nai Sholom v. Martin*,[73] the donor signed a pledge stating that it was made in consideration of the pledges of others, and the Michigan Supreme Court concluded that "the mutual promises between subscribers of pledges for a [legal] purpose will constitute a consideration therefor."[74]

Other courts highlight the serious logical and doctrinal deficiencies with this approach.[75] Under this approach, the donor promises to make contributions to the charity, but the charity does not incur any legal detriment or provide any benefit to the donor. If multiple donors pledge and one fails to pay, "no injury is done to the other [donors]."[76] Also, ordinarily the donor has not bargained for the contributions of others.[77] As one court observed, the donor's pledge "was utilized . . . to obtain substantial pledges from others. But this was a technique employed to raise money. It did not supply a legal consideration [for the donor's] pledge."[78] Thus, there is no consideration, and there should be no enforceable bilateral contract.

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71. Dalhousie Coll. at Halifax v. Boutilier Estate, 1934 CarswellNS 43, [1934] S.C.R. 642, 3 D.L.R. 593, 597 (Can.1934) (WL).

72. *See* 13 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 37.37, at 234 n.82 (4th ed. 2000) (listing nine cases regarding this theory).

73. Congregation B'Nai Sholom v. Martin, 173 N.W.2d 504 (Mich. 1969).

74. *Id.* at 510, *quoted in* Budig et al., *supra* note 9, at 58.

75. *See, e.g.*, Mt. Sinai Hosp., Inc. v. Jordan, 290 So. 2d 484, 486–87 (Fla. 1974) (holding pledge unenforceable even though pledge document recited that the pledge was in consideration of the subscription of others); I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532, 533 (N.Y. 1938) ("It is unquestioned that the request that other subscribers make contributions, . . . stated as a consideration in the subscription agreement, is not consideration . . . ."). *But see* PERILLO, *supra* note 9, at 226 ("If such an exchange actually is bargained for and actually occurs, consideration exists. E.g., 'I will give one million dollars to *alma mater* if you will match my gift.' This is hardly what occurs in many large fund-raising campaigns.").

76. STORY, *supra* note 52, § 453, *quoted in* Budig et al., *supra* note 9, at 52.

77. PERILLO, *supra* note 9, at 226 (observing that "[a subscription] may be motivated by [other gifts], but there is ordinarily no element of exchange between the various promisors"); MURRAY, *supra* note 17, at 272 (noting that "the typical subscriber is not bargaining for the promises of others").

78. Md. Nat'l. Bank v. United Jewish Appeal Fed'n, 407 A.2d 1130, 1138 (Md. 1979).

2. Twisting the Unilateral Contract Rules to Enforce.

A unilateral contract can arise if the promisor, namely the donor, seeks the other party's *performance* rather than a promise to perform.[79] In some cases, after the donor has made one or more contributions under the pledge, the court has found a unilateral contract because the charity used the money for charitable purposes.[80] For example, in *I. & I. Holding Corp. v. Gainsburg,*[81] the court concluded that the donor made an "offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, [became] a binding obligation."[82]

This approach violates the preexisting duty rule. The charity already is required to use the funds received for charitable purposes:[83] "That a charity's mere continuation of its activit[ies] could form the basis of a unilateral contract . . . demonstrates how far the courts [are] willing to stretch to enforce . . . pledges."[84]

3. Twisting the Promissory Estoppel Doctrine to Enforce.

Some courts use promissory estoppel to dodge the logical and doctrinal conundrums with the consideration requirement when the court wants to enforce a donor's pledge.[85]

A court can enforce a promise under promissory estoppel in the absence of consideration if three conditions are met: (1) there is a promise which the "promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person"; (2) the promise "does induce . . . the action or forbearance;" and (3) "injustice can be avoided only by enforcement of the promise."[86] A key element under promissory estoppel is detrimental reliance. The First Restatement of Contracts required "action or forbearance of a *definite and substantial*

79. *See* PERILLO, *supra* note 9, at 57 ("If A says to B, 'If you run in the New York Marathon and finish I will pay you $1,000,' A has made a promise but has not asked B for a return promise. A has asked B to perform, not for a commitment to perform.").

80. *See, e.g.*, I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532, 534 (N.Y. 1938) ("[S]uch subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation.").

81. I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532 (N.Y. 1938).

82. *Id.* at 533–34.

83. PERILLO, *supra* note 9, at 226; *see supra* notes 63–66 and accompanying text.

84. Budig et al., *supra* note 9, at 63.

85. *See* PERILLO, *supra* note 9, at 218 (crediting Samuel Williston for "pull[ing] together an assortment of cases where promises without consideration had been enforced on one theory or another" to develop the doctrine of promissory estoppel); *see also* Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents (Pt. I)*, 50 MICH. L. REV. 639, 644–53 (1952) (discussing charitable pledge cases).

86. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW. INST. 1981).

character on the part of the promisee,"[87] and the Second Restatement of Contracts employs a more flexible approach considering multiple factors including the *definite and substantial* nature of the reliance.[88]

In the family context, courts use promissory estoppel to enforce a promise to make a gift in the future if the promisee proves all three elements. For example, in *Harvey v. Dow*,[89] the father made an implied promise to give land to his daughter; the daughter built a $200,000 residence on the land with the father's assistance; and the court concluded the daughter had relied on the father's promise of a gift, vacating the lower court's judgment in favor of the father.[90]

In regard to charitable pledges, "[A]s early as 1817, [a court concluded] that persons could not withdraw their pledges after they stood by silently watching the charity incur liability without objecting."[91] Thus, when the donor promises a very large, bellwether contribution, and as a result the charity proceeds with a project, the doctrine of promissory estoppel could apply.[92]

However, when the amounts are not material, it becomes much more difficult to conclude that the donor should have foreseen the charity's reliance and that the charity relied to the extent that injustice will result if the pledge is not enforced. Leading commentators state, "in a given situation it may be difficult to discover a substantial change of posiposition on the part of the charity in reliance on one or more subscription promises[,]"[93] and charities cannot show substantial injurious reliance "in the majority of [] cases."[94] One court has even described the concoctions of other courts in this area as "legal heresy."[95]

Apparently, in an attempt to provide charities with an artificial advantage, a comment to the American Law Institute's (ALI) Second Restatement of Contracts provides that in charitable pledge cases the chari-

87. *See* PERILLO, *supra* note 9, at 219 (emphasis added).

88. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW. INST. 1981).

89. Harvey v. Dow, 962 A.2d 322 (Me. 2008).

90. *Id.* at 327; *see also* Greiner v. Greiner, 293 P. 759, 762 (Kan. 1930) (ordering a mother to give her son the deed to an 80-acre tract of land after the mother made an implied promise to give that land to the son and in reliance on that promise the son moved from another part of the state).

91. Budig et al., *supra* note 9, at 53 n.14 (citing Trs. of Farmington Acad. v. Allen, 14 Mass. 172, 175–76 (1817)).

92. *See, e.g.*, Danby v. Osteopathic Hosp. Ass'n, 104 A.2d 903, 907 (Del. 1954) (applying promissory estoppel because the charity negotiated the details with the donor, who was the president of the charity, and the donor agreed to guarantee the hospital's bank loan for up to $40,000).

93. MURRAY, *supra* note 17, at 272.

94. PERILLO, *supra* note 9, at 226–27.

95. *Danby*, 104 A.2d at 907.

ty's "reliance need not be of [a] substantial character."[96] As this Article will describe, this is just one of three instances in which the ALI has proposed special, non-intuitive rules to try to help charities enforce pledges.[97]

4. ALI Proposal to Twist Promissory Estoppel Based on Public Policy.

Perhaps recognizing that charities should not be able to use normal promissory estoppel rules to enforce most pledges, the ALI, in Restatement (Second) of Contracts, makes a more radical proposal. Although only one state has embraced the ALI's more radical proposal,[98] reviewing the proposal will further illuminate the problems addressed in this Article.

In § 90(2) of the Restatement (Second) of Contracts, the ALI proposes that, for charitable pledges (and marriage settlements), the party seeking to enforce should not have to prove that "the promise induced action or forbearance."[99] Thus, the charity still would need to prove: (1) the donor made a promise that he or she should have reasonably expected would induce action or forbearance by the charity; and (2) injustice can be avoided only by enforcing the pledge—but the charity would no longer need to prove actual reliance.[100] The ALI argues that this relaxation is appropriate because "American courts have traditionally favored charitable [pledges] . . . and have found consideration in many cases where the element of exchange was doubtful or nonexistent."[101] Although ALI's related Illustration 17 indicates that its approach is consistent with an earlier New York case,[102] and a New Jersey case subsequently has appeared to adopt a similar public policy rationale for enforcing a charitable pledge,[103] only one state has explicitly embraced the ALI proposal to date.[104]

96. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b. (AM. LAW. INST. 1981).

97. *See infra* Part III.C.

98. *See* Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974) (expressly adopting the ALI proposal); P.H.C.C.C., Inc. v. Johnston, 340 N.W.2d 774, 776 (Iowa 1983); *In re* Estate of Schmidt, No. 06-0330, 2006 WL 2561231, at *2–3 (Iowa Ct. App. 2006).

99. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW. INST. 1981).

100. *See* Budig et al., *supra* note 9, at 67.

101. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (AM. LAW. INST. 1981).

102. *Id.* at § 90 cmt. f, illus. 17 (reporter's note) (stating that "Illustration 17 is based on *In re* Field's Estate, 172 N.Y.S.2d 740 (1958)").

103. *See* Jewish Fed'n of Cent. N.J. v. Barondess, 560 A.2d 1353, 1354 (N.J. Super. Ct. Law Div. 1989); *see also* More Game Birds in Am., Inc. v. Boettger, 14 A.2d 778, 779–80 (N.J. 1940).

104. *See supra* note 98 (citing Iowa cases).

The ALI's more radical proposal again demonstrates that the enforceability of standard charitable pledges is inconsistent with traditional legal rules. In an attempt to help charities, the ALI proposes a special rule applicable only to charitable pledges and marriage settlements. This Article's proposal also includes a special rule in the case of charitable pledges based in part on a public policy rationale, but it would not apply unless there is clear and convincing evidence that the donor intended to be legally bound.[105]

II. EMPIRICAL RESEARCH ON STANDARD FORMS: DONORS LEFT IN THE DARK

Part I of this Article suggests an information imbalance. On the one hand, typical donors should not be expected to know, either by common sense or a basic familiarity with legal rules, that a charitable pledge is legally enforceable. On the other hand, those engaged in the business of raising funds for charity on a full-time basis likely are aware that charitable pledges are enforceable in the overwhelming majority of situations.[106]

Given this informational imbalance, how do charities deal with donors? Do they use their standard pledge forms to clearly describe the relationship of the parties in a spirit of transparency, honesty, and full disclosure? Or do they keep donors in the dark?

A. Only Five Percent Clearly Address Enforceability; Other Findings

Empirical research created for this Article suggests how charities and their representatives use this information advantage. In a change from prior practices, some charities are now posting their standard multi-year pledge forms on their websites. Traditionally, fundraisers preferred to personally deliver information to prospective donors, but now charities are putting more information online in response to societal expectations.[107]

A review of 57 pledge forms suggests some patterns and practices. Addendum A lists the charities using these pledge forms. In gathering pledge forms, we omitted (i) pledge forms for employee payroll deductions, (ii) perpetual credit card pledge forms,[108] and (iii) forms anticipat-

105. *See infra* Part III.B.

106. *See* Trozpek, *supra* note 2, at 1–2.

107. *See* Drew Lindsay, *YourNameHere.Org*, CHRON. OF PHILANTHROPY, June 2015, at 22 ("We are used to accessing everything online, from bank accounts to our reading materials. Why not have these marketing pieces online?") (quoting Mary Solomons, senior director of donor relations at Skidmore College discussing charitable naming rights).

108. Forms found in the process of the survey, which provided for the charity to charge the donor's credit card periodically for the lifetime of the donor, allowed the do-

ing all donations within one year. Charities and donors can use the great majority of the remaining forms at any time; most of these forms are not specifically tied to a particular fundraising campaign or capital project.

Approximately 95 percent of the pledge forms fail to clearly discuss enforceability. As examples of those disclosing enforceability, the pledge form for the Pepperdine University Women's Swimming and Diving Team states, in the preamble, "[t]his Pledge Agreement sets forth the terms and conditions of the underlying commitment and *is intended to be binding on the parties*."[109] Furthermore, the first numbered paragraph of the form provides: "The Donor hereby *irrevocably pledges* to donate the sum of _____ ($_____) each year for the next four years commencing with a gift after January 1, 2010 and before January 31, 2010."[110] The University of Miami's Agreement of Gift (Building Fund Commitment) provides in part that, "if for any reason the Gift has not been satisfied before the Donor's death, the balance shall be a *debt* of the Donor's estate and payable by the Donor's estate to the University."[111]

Another ten percent of the pledge forms arguably provide the donor with some clue that the pledge might be legally enforceable. These forms tend to fall into two groups. First, approximately five percent of the forms state that the donor "agree[s]" to pay the pledge.[112] Second, another five percent use the language found in some reported cases that the pledge is made "in consideration of the gifts of others."[113] Other

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nor to cancel with notice. *See, e.g.*, *Make a Gift*, DEPAUL UNIV., https://alumni.depaul.edu/GiveNow/Home (click on "recurring gifts" under the heading "Contribution Type") (last visited Dec. 29, 2015) (stating that the donor may change the recurring gift at any time by contacting the gift processing office);, *Gift/Pledge Form*, UNIV. OF TENN. FOUND., http://www.utfi.org/wp-content/uploads/2011/08/Gift-Pledge-FDN.pdf (stating that the donor may "stop or change the amount at any time").

109. *Pepperdine University Women's Swimming and Diving Team Campaign Pledge Commitment: December 1, 2009 to January 31, 2010*, PEPPERDINE UNIV., http://pepperdinepledge.parvesh.net/ (last visited Dec. 29, 2015) (emphasis added).

110. *Id.* (emphasis added). The Pepperdine form may be an outlier because the organization was at a crossroads. Apparently, the program needed $400,000 to continue in operation as a NCAA team. The pledge form states that if the fund drive fails to raise $400,000, the Pepperdine University Women's Swimming and Diving Program could become a campus club sport and would refund all contributions made to the donors, and the charity would cancel the balances remaining on the pledges. *Id.*

111. *Agreement of Gift (Building Fund Commitment)*, at ¶ 8, UNIV. OF MIAMI (revised Aug. 21, 2015), http://advancement.miami.edu/NetCommunity/document.doc?id=95 (emphasis added).

112. *See e.g.*, *Multi-Year Pledge Agreement*, UNIV. OF RICHMOND, http://alumni.richmond.edu/events/reunion/2015%20Reunion%20MYP%20Form.pdf; *Gifts or Pledges to the University of Iowa Foundation*, UNIV. OF IOWA, https://www.iowalum.com/dciowa/Boyd_Pledge_form.pdf.

113. *See e.g.*, *Gifts or Pledges to the University of Iowa Foundation*, *supra* note 112;

forms employ phrases that suggest some level of intent other than the simple use of the word "pledge," but on balance these forms fall short of providing the donor with a reasonable clue that the pledge might be legally binding.[114] A few are more ambiguous, such as the University of California at Berkeley's form which states, "I will use best efforts to, and fully intend to, satisfy my pledged commitment."[115]

A standard charitable pledge form typically is less than one page and covers the following topics: the gift amount, the number of donations, the timing of donations (*e.g.*, monthly, quarterly, annually), donation method (*e.g.*, check or credit card), designated purpose (*e.g.* school, campus, scholarship fund, lecture series, or other program), matching gift information, donor information (*e.g.*, name, address, phone number, email address), and publicity preference (*e.g.*, anonymous, in honor of a decedent, naming rights, or other). This study indicates the charities do not include the boiler-plate clauses usually included in a binding contract, such as a forum selection clause, choice of law clause, jurisdiction and venue clause, severability clause, waiver clause, or costs of collection and attorney fees clause.

B. Reflections on Empirical Evidence

Why do approximately 95 percent of charities reject transparency, failing to clearly inform prospective donors about enforceability? It would seem that pledge forms could include at least one sentence to make it clear to all involved whether the pledge is intended to be legally binding.[116] Presumably the overriding motive is to generate more pledges.

Independent of the substance, a short pledge form is more appealing to a donor than a long form. Keeping the form short and simple allows the donor to read and complete the form quickly. Because gifts may be

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2009-2010 Gift/Pledge Agreement, UNIV. OF PITTSBURGH-BRADFORD, http://www.upb.pitt.edu/uploadedFiles/giving/Gift.pledge.form%202009-10.pdf.

114. *See e.g.*, *Pledge Form for Outright Gift*, UNIV. OF WASH., http://depts.washington.edu/uwadv/wp-content/uploads/2012/03/pledg_SEA.pdf (mentioning "intent to contribute");

Commitment to Carolina, UNIV. OF N.C.-CHAPEL HILL, https://secure.dev.unc.edu/resources/pdf/gift/pledgeForm.pdf (mentioning "commitment");

Gift/Pledge Form, UNIV. OF TENN. FOUND., *supra* note 108 (mentioning "commitment").

115. *Making a Gift*, UNIV. OF CAL. BERKELEY, https://give.berkeley.edu/lib/pdf/UCB_PledgeCard.100108.pdf.

116. *See* ALI DRAFT PRINCIPLES, *supra* note 9, at cmt. b (advising that "the charity should endeavor to ensure that the documentation resolves doubts").

emotionally inspired,[117] a donor's inclination may change as emotions cool. From a marketing prospective, charities likely are smart to use short forms with no legalese.

Considering the substance, language such as "legally enforceable" or "legally binding" in the pledge form may inspire the donor to consult their financial advisor, reflect more carefully about the pledge, and ask questions—Am I willing to donate all this money if the charity does things I do not support?[118] If I move out of town?[119] Or if my family suffers financial reverses?[120] Furthermore, legalese within the pledge form may inspire the donor to consult an attorney, which could slow down the process and provide greater opportunities for the prospective donor's emotions to cool.

These same forces are involved with other charitable giving forms. For example, a charitable gift annuity is a rather complex financial transaction, but typical charitable gift annuity forms are very brief,[121] usually only two pages. With a charitable gift annuity, the donor contributes money or property (such as marketable securities), the charity becomes the owner of the gifted property, but the charity agrees to make a stream of fixed payments to the donor for the donor's lifetime.[122] Given that a charitable gift annuity document usually is only two pages,[123] it is not entirely surprising that charities would tend to provide donors with a laconic pledge form. Nevertheless this Article asserts that the failure to disclose the enforceability of a pledge is unfair and causes problems.[124]

The current situation is disturbing. Courts twist legal rules to help charities regardless of the language of the pledge form. Perhaps in response, charities choose not to disclose the legal consequences to prospective donors because there is no economic incentive for honesty. This Article seeks to end this unsavory relationship with a new approach discussed in the rest of this Article.

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117. *See supra* notes 34–36 and accompanying text.

118. *See supra* notes 4–7 and accompanying text.

119. *See* Woodmere Acad. v. Steinberg, 363 N.E.2d 1169, 1171 (N.Y. 1977).

120. *See* Eisenberg, *supra* note 34, at 5.

121. *See e.g., Sample Agreement Charitable Gift Annuity*, HAMPTON ROADS CMTY. FOUND. http://www.hamptonroadscf.org/advisors/forms/CharitableGiftAnnuity.pdf (two-page form); *Sample Gift Annuity Contract: Immediate Gift Annuity Contract*, SACRAMENTO REGION CMTY. FOUND., http://www.kvie.org/support/legacycircle/sample_gift_annuity_contract.pdf (two-page form).

122. *See generally* Terry L. Simmons, *Planning Opportunities with Gift Annuities*, SJ087 ALI-ABA 171, 171 (2004) (available on Westlaw; Secondary Sources database) ("Excluding will gifts, gift annuities are probably the oldest and perhaps most commonly used planned giving vehicles in existence today.").

123. *See supra* note 120.

124. *See supra* notes 17–20 and accompanying text.

III. PROPOSAL: NORMAL RULES PLUS A DONOR EXPECTATION RULE

This Article proposes that a court follow a two-step process in deciding whether a charitable pledge is enforceable. First, the court should apply normal legal rules, specifically contract law and promissory estoppel, without any special rules for charities. This Article asserts that times have changed, and courts will be able to enforce many substantial pledges without resorting to special rules or artificial concoctions. Second, if the pledge cannot be enforced under normal legal rules, the court should still enforce if the charity can prove with clear and convincing evidence that the donor intended the pledge to be legally binding.

A. First Prong: Enforcing with Normal Legal Rules

1. Charitable Naming Rights and Contract Law

This Article asserts that unlike in the past, in the modern fundraising marketplace, normal contract law[125] frequently permits enforcement of substantial pledges. A promise must be supported by consideration to be enforceable as a contract.[126] In this context, two key rules can guide the application of the consideration requirement. On the one hand, in general, the law will not question the adequacy of the consideration.[127] Thus, as long as the donor received some non-trivial benefit or the charity incurred some non-trivial legal detriment, the law will not evaluate whether the donor received equal value from the charity.[128] A popular, but misleading, phrase reflecting this principle is that valid consideration can be a "mere peppercorn."[129] On the other hand, there is a failure of

125. For purposes of this Article, "normal contract law" is contract law without special rules for charities.

126. *See supra* notes 39–43 and accompanying text.

127. *See* KNAPP, ET AL., *supra* note 26, at 121 ("It is an 'elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.' This rule is almost as old as the law of consideration itself."); *see also* PERILLO, *supra* note 9, at 154 ("Courts . . . have believed that it would be an unwarranted interference with freedom of contract if they were to relieve an adult party from a bad exchange."); Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) ("Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him.").

128. RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (AM. LAW INST. 1981) ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged.").

129. Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration Is Not Binding But Should Be*, 97 NW. U. L. REV. 1809, 1816 (2003) (stating that Professor Allan Farnsworth appears to think that nominal consideration binds a promisor).

consideration unless both parties believe the return promise or action really is consideration.[130] For a hypothetical demonstrating this second rule, imagine a father wants to make a binding promise to give his son $1,000 in the future; upon learning such a promise would not be enforceable as a contract because of lack of consideration, the parties agree that the son will give the father a book worth $1 in consideration of the father's promise.[131] In this situation, there is a failure of consideration, and therefore no enforceable contract, because neither the son nor the father believe the book is consideration for the promise.

In the past, courts often struggled to find consideration to support a charitable pledge because the charity provided no benefit to the donor and the charity incurred no legal detriment that the donor bargained for. Things have changed because donors now are buying meaningful naming rights with their substantial pledges.[132]

Traditionally, anonymous giving was the norm.[133] Big donors frequently were content with securing a place on the charity's board of directors and thereby acquiring the right to hobnob with the other swells on

130. Dougherty v. Salt, 125 N.E. 94, 95 (N.Y. 1918) (stating the test in a rather negative fashion: "Nothing is consideration that is not regarded as such by both parties").

131. RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b, Illus. 5 (AM. LAW INST. 1981); *see also* Weed v. Weed, 968 A.2d 310 (Vt. 2008) (a payment of $10 for a tract of land to a family member was not considered consideration).

132. Charities may apply special rules to enhance the naming rights available with a pledge. Specifically, some charitable pledge forms provide that all donations called for under a multi-year pledge will be aggregated in assigning rights in the first year. *See e.g.*, *Reunion Giving, Come Back, Give Back! Pledge Form,* UNIV. OF VA., http://giving.virginia.edu/reunions/wp-content/uploads/sites/7/2013/09/Pledge-Form.pdf ("The full amount of this commitment will be reflected in the class total. In addition, the donor(s) will be recognized . . . ."). In addition, employer matching gifts may be added to the donor's pledge amount to assign the public recognition. *See e.g.*, *id.* ("Gifts to the University through employer matching programs are credited to the donor and count toward eligibility in gift clubs"); *Alumni & Development, EMBA 44 Pledge Form*, WASH. UNIV.-ST. LOUIS, https://alumnissl.wustl.edu/SchoolsAndPrograms/Schools/olin/Pages/ssl_EMBA-Pledge-Form.aspx.

These special rules may allow a donor to claim naming opportunities that otherwise might be out of reach. Imagine Wake Forest University will name the primary practice tee at its golf facility for a $250,000 donation, *see* Lindsay, *supra* note 107, at 22. Duck Hook Donor might pledge $25,000 per year for five years (for a total of $125,000), and if his employer provides a dollar-for-dollar match, Duck Hook Donor could acquire the naming rights in the year when he signs the pledge form.

133. *See* Sarah Murray, *Institutional Naming Rights Gaining Favour Among Wealthy Donors*, FIN. TIMES-LONDON, (Sept. 19, 2014, 12:11 AM), http://www.ft.com/cms/s/0/5c1d62e0-3834-11e4-a687-00144feabdc0.html#axzz3vkbsyie7 (stating that donors in Europe prefer to "keep a low profile").

the board.[134] Anonymous giving was encouraged[135] and was typical.[136] Charities granted public recognition and naming rights only sporadically.[137] In Europe, anonymous giving is still the norm.[138]

But in the U.S., the popularity of charitable naming rights exploded in the mid-1990s.[139] "[D]eals involving naming rights . . . have expanded dramatically . . . in scope, creativity, number and dollar volume . . . ."[140] A study found that "[i]n the winter of 2008 . . . there were more than 50,000 naming opportunities published on the Web sites of nonprofits[,]"[141] and this may significantly underestimate the prevalence.[142] "[T]he ability to raise money through naming opportunities has become a staple tool . . . ."[143] These days, "organizations . . . cannot hope to raise the sums required for ambitious [projects] without being able to dangle the carrot of a donor's name emblazoned over the door."[144]

For some wealthy donors, charitable naming rights may be especially attractive because they establish a pecking order. A survey of 30,000 naming opportunities revealed that in "over [90] percent of [charitable naming] strategies[,] . . . . nonprofits . . . use a double-up or double-down

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134. *See* FRANCIS OSTROWER, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY 44 (1995) (discussing the link between levels of donations and obtaining positions on charitable committees).

135. *Anonymous Giving: Acts of Charity that Have No Name*, L.A. TIMES, Dec. 25, 1985, at 1, 1985 WLNR 1007541 (reporting that "anonymous philanthropy . . . in Judaism go[es] back to [12th Century Jewish philosopher Moses] Maimonides' eight levels of charity. Anonymous philanthropy . . . is the highest form").

136. *See e.g.*, Charles Isherwood, *The Graffiti of the Philanthropic Class*, N.Y. TIMES, Dec. 2, 2007, § 2, at 6.

137. One reporter discusses a "donor plaque and engraving on a Sumerian tablet . . . 5,000 years ago." Henry Goldstein, *When Wealthy Philanthropists Put Their Mouth Where Their Money Is*, CHRON. OF PHILANTHROPY, Nov. 28, 2002, at 1, *quoted in* John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. Davis L. Rev. 375, 379 n.9 (2005). Oxford University named a professorship after King Henry the VII's mother in 1502. *See* Terry BURTON, NAMING RIGHTS: LEGACY GIFTS & CORPORATE MONEY 114 (2008) (regarding the "Lady Margaret Professorship of Divinity"). In 1679, John Harvard acquired naming rights to a school in Massachusetts for 779 British pounds and 400 books. William P. Barrett, *Cash Strapped Charities Put Donors' Names On Just About Everything*, 184 FORBES 74 (Sept. 21, 2009), 2009 WLNR 17618601.

138. *See* Murray, *supra* note 133.

139. BURTON, *supra* note 137, at 49 (2008) (discussing a "groundswell of naming rights activities" since the mid-1990s).

140. Barrett, *supra* note 137, at 760; *see also* BURTON, *supra* note 137, at 50, 126 (estimating that donors paid $4 billion in naming gifts in 2007).

141. BURTON, *supra* note 137, at 169.

142. Lindsay, *supra* note 107, at 22 (quoting a researcher that when he inquires about naming rights on the telephone, frequently a charity's representative will say "'That's private information,' and just slam the phone down").

143. Robin Pogrebin, *Goodbye, Avery Fisher. Hello, Somebody Else*, N.Y. TIMES, Nov. 14, 2014, at A1.

144. *Id.* at A21.

[pricelist] when setting the ask amount for named gifts."[145] For example, a charity may design the pricelist so that a donor needs to contribute $10 million to name the building; $5 million for the lobby; $2.5 million for the conference center, and so on.[146] Thus, in a world of gray areas, where it can be difficult to determine who is the wealthiest, the most generous, the most noble, or the most powerful, charitable naming rights at the top end of a charity's pricelist give the wealthy a chance to declare their position in the pecking order among their peers, the rising stars, and the pretenders.

Charitable naming rights are not acquired by just the very wealthy top pledgers. "Modern fundraisers have aggressively expanded what can be named to include virtually every element of a capital project . . . ."[147] A few examples: Fordham University School of Law listed 250 naming opportunities in connection with its new building; the University of Rochester Medical Center listed 370 items in connection with a $58 million campaign; and the Carnegie Museum of Natural History will list the donors who contribute at least $25 to it's Adopt-a-Bone campaign to promote its dinosaur exhibit.[148] Donors have acquired charitable naming rights for individual steps on a staircase at a theater, lockers at college football stadiums,[149] park benches, trees,[150] commemorative bricks,[151] and many other items,[152] including restrooms.[153]

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145. BURTON, *supra* note 137, at 166–67.

146. *Id* at 167.

147. Lindsay, *supra* note 107, at 22.

148. *Id.* at 21 (Fordham Law School); *id.* at 20 (Rochester); Pierre Ruhe, *Rooms, bricks—you name it*, ATLANTA J. AND CONST., Apr. 12, 2008, at A1, 2008 WLNR 68675767 (regarding the Adopt-a-Bone program).

149. Eason, *supra* note 137, at 378 n.2; Eric Gibson, *Giving Without Giving a Darn Who Gets the Credit*, WALL ST. J., Aug. 3, 2001, at W13 (regarding steps on a staircase); Kathleen Teltsch, *The Memorial Alumni Boulder—Colleges Are Naming Anything and Everything to Get Donors' Bucks*, S.F. CHRON., July 4, 1993, at 5, 1993 WLNR 2607110 (the opportunity to name individual lockers in the men's football team locker room sold for $1,000); Todd D. Milewski, *45,000 Gets Football Player's Name on Locker: UW-Madison*, CAPITAL TIMES (Madison), May 8, 2013, at 23, 2013 WLNR 11346713 (discussing a campaign targeting "football alumni for donations"); *see also id.* ("Even the Pitt Law School is . . . offering nameplates on student lockers for a $1,000 donation to the Law Fellows Society.").

150. Eason, *supra* note 137, at 378 n.3.

151. *See* Bert Roughton, Jr., *Olympic Facelift: A Master Plan for Downtown; Payne Proposes "Olympic Legacy,"* ATLANTA J. CONST., Nov. 19, 1993, at A1, 1993 WLNR 2369244.

152. Murray, *supra* note 133 (discussing a community organization for homeless people in North Carolina that allows "benefactors to make small donations to name everything from dental floss to bunk beds . . . for their donation they get a certificate with an image of the object and their name or that of someone they want to honour.").

153. *See e.g.*, Murray, *supra* note 133 (donor contributed $100,000 to Harvard Law School to have a plaque with his name outside the toilets in Wasserstein Hall); Barrett, *supra* note 137, (discussing Brad Feld's $25,000 donation to the University of Colorado

Charities frequently offer naming opportunities unrelated to physical structures,[154] such as for scholarship funds or funds to endow a lecture series.[155] "Named professorships are more common than the grass in the summer."[156] Other charities offer naming opportunities to other key posts, such as the curator at the museum or the medical director at the hospital.[157] While private universities were trailblazers in offering naming opportunities to donors,[158] more recently public schools[159] and social service organizations, from the Salvation Army to the YMCA, have adopted the practice.[160]

Commentators have observed the disappearance of anonymous giving. "Whatever happened to Anonymous? . . . [W]hat became of those wealthy philanthropists who used to support . . . charitable institutions without requiring that their names be slapped somewhere—anywhere, it sometimes seems—on a building."[161] In 2007, when a group of alumni raised $85 million for a new business school at the University of Wisconsin-Madison with a stipulation that there be no naming rights, it was called "unprecedented."[162]

But does a grant of charitable naming rights or other public recognition qualify as consideration under traditional legal principles? Is the donor receiving a benefit? In 2014, the unraveling of a charitable naming rights deal highlighted their monetary value. In 1973, electronics magnate Avery Fisher donated $10.5 million to the Lincoln Center for the renovation of its New York Philharmonic Hall, and the charity agreed to rename it Avery Fisher Hall.[163] The pledge agreement stated that the

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at Boulder; the University displays the donor's name on a lavatory along with the inscription, "The Best Ideas Often Come at Inconvenient Times–Don't Ever Close Your Mind to Them"); Michael Gross, *Charities Get Inventive with Name-Dropping*, MSNBC (June 14, 2006, 2:46 PM) http://www.nbcnews.com/id/25147900/ns/us_news-giving/t/charities-get-inventive-name-dropping/ (reporting that Ellen and Jerome Stern donated $100,000 and can now "see [their] names writ large on the [New Museum of Contemporary Art's] four restrooms").

154. Murray, *supra* note 133.

155. Philip Fine, *U.S.: Naming Rights Net Millions-But at a Price*, UNIV. WORLD NEWS (Mar. 2, 2008), http://www.universityworldnews.com/article.php?story=20080228160422788.

156. *Id.*

157. BURTON, *supra* note 137, at 120.

158. *Id.* at 11, 20.

159. *See* Joseph Blocher, *School Naming Rights and the First Amendment: Perfect Storm*, 96 GEO. L.J. 1, 2 (2007) (reporting that "[s]chool boards across the country . . . [have entered] into naming rights deals [in exchange for] hundreds of millions of dollars").

160. BURTON, *supra* note 137, at xiv; *id.* at 65.

161. Isherwood, *supra* note 136, § 2, at 6.

162. BURTON, *supra* note 137, at 7–8.

163. Eason, *supra* note 137, at 449; *see also* Pogrebin, *supra* note 143, at A16 (stating that the gift was $10 million).

name Avery Fisher Hall "will appear on tickets, brochures, program announcements and advertisements and the like . . . in perpetuity . . . ."[164] When Lincoln Center later needed to renovate the philharmonic hall and advertised that they would rename the hall after a new donor, the Fisher family protested.[165] Eventually Lincoln Center paid the Fisher family $15 million to release their naming rights and agreed to publicly recognize the family in several new ways.[166] In addition, the purchase price paid for naming rights to sports venues further supports the view that naming rights have value, because commercial firms typically pay from 5 to 25 percent of the total construction cost of a stadium for the naming rights.[167] Many commentators have observed the value of reputation, whether for generosity or other valued traits.[168] Conspicuous donations signal wealth, power, and generosity to others.[169] The father of modern economics, Adam Smith, observed that the uber-rich tend to pursue even greater riches not for increased physical comfort; rather, they seek the praise of others.[170]

Strangely, the IRS consistently has declined to value naming rights.[171] Theoretically, the IRS could reduce a donor's income tax charitable deduction by the value of the naming rights received in ex-

164. Pogrebin, *supra* note 143, at A16; Eason, *supra* note 137, at 456.

165. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable Donor Standing*, 41 GA. L. REV. 1183, 1228 (2007) ("Lincoln Center likely forestalled a lawsuit from the family"); Eason, *supra* note 137, at 450, 455, 455 n.359 (describing the arguments posted on the website of the Fisher family's law firm).

166. Pogrebin, *supra* note 143, at A1, A21 (listing "a promise to feature prominent tributes to Mr. Fisher in the new lobby," and "Mr. Fisher will be inducted into a new Lincoln Center Hall of Fame [and] . . . [a] Fisher family member will serve on the Hall of Fame's advisory board . . . [and] promises to give a higher profile to the Avery Fisher Artist [awards] Program . . . .").

167. William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 63, 94–96 (2011) (including data on pro sports arena transactions).

168. *See* WILLIAM SHAKESPEARE, OTHELLO, act 3, sc. 3 ("Good name in man and woman . . . [is] the immediate jewel of their souls."); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) ("[An] important and often-neglected aspect of human motivation . . . is that . . . actors seek not an absolute end, but *relative position* among peers . . . . [w]hether it is termed 'status,' 'prestige,' or 'distinction,' people sometimes seek—*as an end in itself*—relative position . . . .") (emphasis in original).

169. Eric A. Posner, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 575–76 (1997).

170. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 112–13 (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759), *quoted in* McAdams, *supra* note 168, at 10.

171. I.R.S. Priv. Ltr. Rul. 93-50-009, 1993 WL 521475 (Sept. 14, 1993) (discussing Rev. Rul. 68-432, 1968-2 C.B. 104 and stating that public recognition has "no monetary value"); Rev. Rul. 73-407, 1973-2 C.B. 383.

change for the donation.[172] Perhaps the publicity about the $15 million sale of the Avery Fisher naming rights will inspire the IRS to reconsider its position.[173]

There are other issues in deciding whether a pledge in exchange for naming rights is a binding contract. Even if there is a benefit to the donor, did the parties intend the naming rights to be consideration?[174] Was the consideration bargained for?[175] Also, if the transaction is part- gift (without consideration) and part-sale (with consideration), is the entire transaction still an enforceable contract?

Whether the parties intend naming rights to be consideration, and whether the naming rights were bargained for, will depend on the particular facts. If the parties actually negotiated over naming rights or other public recognition, then the parties likely intended the recognition to be consideration, and the recognition induced the pledge. The inquiry may be complicated because the charity may offer the naming rights "Chinese takeout menu" style[176] on its website or otherwise in connection with the capital campaign, so there is no need for the donor to negotiate. However, in the case of a substantial pledge, the donor may want to negotiate for other public recognition rights. For example, in the case of naming a building, the donor may ask for signage of a certain size, color, and design; particular lighting on the sign; the donor's name on letterhead and business cards of employees working in the building; a mention of the donor's surname when answering the phone; or certain publicity on the charity's website. In addition, the donor may negotiate to have his or her portrait in a prominent location.

Also, the donor may contribute the exact amount necessary to acquire the naming right. For example, the charity may advertise that the naming opportunity for its meditation garden is available for a $50,000

172. United States v. Am. Bar Endowment, 477 U.S. 105, 117 (1986); Rev. Rul. 67-246, 1967-2 C.B. 104, 105; Treas. Reg. § 1.170A-1(h)(ii)(5) ex. 2 (1990).

173. *See supra* note 165 (regarding Lincoln Center's $15 million payment to the Fisher family); Linda Sugin, Opinion, *Your Name on a Building and a Tax Break, Too*, N.Y. TIMES, (Mar. 11, 2015), http://www.nytimes.com/2015/03/11/opinion/rethinking-taxes-and-david-geffens-gift-for-avery-fisher-hall.html?_r=0 (suggesting that the "Treasury Department could design a sliding scale" that would reduce a donor's income tax charitable deduction based on the duration of the naming rights; the longer the duration of the naming rights, the smaller the donor's income tax deduction).

174. Dougherty v. Salt, 125 N.E. 94, 95 (N.Y. 1919); *see supra* note 129 (regarding the view that a nominal benefit or detriment will not be consideration because the parties do not consider it consideration).

175. RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (AM. LAW. INST. 1981); *see* Meincke v. Nw. Bank & Tr. Co., 756 N.W.2d 223, 228 (Iowa 2008) ("For consideration to be 'bargained for,' the consideration must 'induce' the making of the promise.").

176. *See* Lindsay, *supra* note 107, at 23.

donation.[177] If the donor pledges exactly $50,000 and declines to give anonymously, this would be evidence that the parties intended the naming rights as consideration and that the naming rights induced the pledge. The fact that the donor never contributed such a large amount before would be further evidence of an exchange, but if the donor contributes $50,000 every few years, usually anonymously, then the naming rights are less likely to have induced the pledge.

In regard to whether the entire transaction is supported by consideration when the transaction is part-gift and part-bargain, commentators address similar situations between family members, friends, and others.[178] A court has held that if an employer amends a written employment agreement, in part as a gift to reward the employee for past services and in part for future services to be rendered, the entire amendment is supported by consideration, endorsing the principle that "a promise that is supported by a mixture of gift and bargain is supported by adequate consideration."[179]

Based on an Iowa case[180] and several cases cited therein, Professor Murray provides the following example: "If Ames has a house for sale which has a reasonable market value of $100,000, is her agreement to sell that house to her only child for $25,000 supported by consideration?"[181] Professor Murray concludes that the $25,000 is sufficient consideration to support the entire transaction because (i) the price is more than nominal, thereby distinguishing situations when the parties agree on a small amount merely to try to satisfy the consideration requirement;[182] (ii) "courts will not normally inquire into the adequacy of consideration, i.e., the relative values exchanged by the parties;"[183] and (iii) although Ames "clearly [is] . . . motivated by a desire to make a gift to her child, she also wants the payment of $25,000."[184] A comment to the ALI's Second Restatement of Contracts supports this approach stating, "Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain may nevertheless furnish consideration for

177. *Id.* at 22 (reporting that the Conway Recreation Center in South Carolina offered naming rights to its meditation garden for $50,000).

178. *See e.g.*, MURRAY, *supra* note 17, at 270.

179. Pasant v. Jackson Nat'l Life Ins. Co., 52 F.3d 94, 98 (5th. Cir. 1995), *citing with approval* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 4-7 at 200 (3d ed. 1987).

180. Fritz v. Fritz, 767 N.W.2d 420 (Iowa Ct. App. 2009) (listed in a "Decisions Without Published Opinions" table), 2009 WL 779544 (printing full opinion) ("An altruistic motive may coexist with a valid legal contract, supported by consideration.").

181. MURRAY, *supra* note 17, at 270.

182. *Id.*

183. *Id.; see also* PERILLO, *supra* note 9, at 154.

184. MURRAY, *supra* note 17, at 270.

the entire transaction."[185] The ALI supports this result even when the bargain motivation is merely incidental when compared to the gift motivation: "Unless both parties know that the purported consideration is *mere pretense*, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so."[186]

There is judicial authority that a charity's promise of naming rights can constitute consideration to make a pledge an enforceable contract. The seminal case on the enforceability of charitable pledges[187] involved a naming right, but the facts are so unusual, and Justice Cardozo's analysis is so esoteric,[188] that the opinion perhaps has created more confusion than clarity. Entire law review articles have been devoted to the *Allegheny College* opinion.[189]

Allegheny College sent Mary Yates Johnston an "appeal to contribute" as part of a drive to add $1.25 million to its endowment.[190] There is no indication that the college sent a standard pledge form; instead, Mary wrote a letter providing on the front:

> Estate Pledge . . . In consideration of my interest in Christian Education, and in consideration of others subscribing, I hereby subscribe and will pay to . . . Allegheny College . . . $5,000. This obligation shall become due thirty days after my death . . . . The proceeds of this obligation shall be added to the Endowment . . . or expended in accordance with instructions on [the] reverse side of this pledge.[191]

The reverse side stated in part, "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund . . . [and] shall be used to educate students preparing for the Ministry."[192] Although the letter provided that the pledge would be paid from her estate, Ms. Johnston paid $1,000 to the college during her lifetime, and the college "set the [$1,000] aside to be held as a scholarship fund for the benefit of [minis-

185. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (AM. LAW INST. 1981).

186. *Id.* § 81 cmt. b (emphasis added).

187. Allegheny Coll. v. Nat'l Chautauqua Cty Bank, 159 N.E. 173 (N.Y. 1927).

188. *See* Arthur B. Schwartz, Note, *The Second Circuit "Estopped:" There Is No Promissory Estoppel in New York*, 19 CARDOZO L. REV. 1201, 1217 (1997) ("*Allegheny* is quite possibly the most misunderstood case dealing with consideration theory and promissory estoppel in New York.").

189. *See e.g.*, Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149 (2005); Mike Townsend, *Cardozo's Allegheny College Opinion: A Case Study in Law As An Art*, 33 HOUS. L. REV. 1103 (1996).

190. *Allegheny Coll.*, 159 N.E. at 173–74.

191. *Id.* at 174.

192. *Id.*

try] students."[193] Eight months later, Ms. Johnston "gave notice to the college that she repudiated the promise."[194] Thirty days after her death, Allegheny College sued her estate for the $4,000 pledge balance.[195]

Justice Cardozo initially indicated that the doctrine of promissory estoppel was the likely approach for enforcing a charitable pledge.[196] As a policy argument, he quoted with approval those courts stating that to argue a charitable pledge is unenforceable for lack of consideration is a breach of "faith toward the public" and an "unwarrantable disappointment of the reasonable expectations of those interested."[197]

Although Justice Cardozo stated that the promissory estoppel cases should not be overruled in part because the consideration requirement is a "concept which . . . came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure,"[198] ultimately he did not rest the holding on promissory estoppel. Instead, Justice Cardozo concluded that the arrangement was an enforceable bilateral contract.[199] Justice Cardozo said Ms. Johnston "wished to have a memorial to perpetuate her name," and "[t]he moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary . . . in the spirit of its creation."[200] He asserted that if the college received the full $4,000 balance of the pledge, it would have a duty to publicize the Mary Yates Johnston Scholarship.[201] Justice Cardozo stressed the mutual obligations,[202] noting that if the college ever treated the $1,000 as an "anonymous donation . . . the [donor] would have been at liberty to treat this . . . as the repudiation of a duty impliedly assumed . . . justifying a refusal" to pay the $4,000 pledge balance.[203]

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193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 175, *citing with approval* Barnes v. Perine, 12 N.Y. 18 (N.Y. 1854) (asserting that "we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions.").

197. *Allegheny Coll.*, 159 N.E. at 175, *quoting with approval* Barnes v. Perine, 12 N.Y. 18 (N.Y. 1854) and other cases.

198. *Allegheny Coll.*, 159 N.E. at 175. Justice Cardozo stated that, under the traditional law of contract, "[i]f A promises B to make a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept." *Id.* at 174.

199. *Id.* at 176.

200. *Id.* at 175.

201. *Id.* at 176 (finding that "the time to affix her name to the memorial will not arrive until the entire fund has been collected").

202. *Id.* (stating that the "[o]bligation in such circumstances is correlative and mutual").

203. *Id.*

In regard to whether there is consideration in a part-gift and part-bargain transaction, Justice Cardozo had two replies. First, "[i]f a person chooses to make an extravagant promise for an inadequate consideration[,] it is his own affair . . . be it never so small, [there] is a sufficient consideration . . . ."[204] Second, "[t]he longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good."[205] In his most important conclusion on charitable naming rights, Justice Cardozo stated that the consideration requirement was satisfied here, and that the college and Ms. Johnston were parties to a bilateral contract, because "the duty assumed by the [college] to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the [pledge] within the rules that define consideration . . . ."[206]

The facts of *Allegheny College* are more complex and make the bilateral contract analysis much more difficult than with a typical, modern naming rights pledge. In *Allegheny College*, the college did not offer the naming rights to the donor; instead, the donor initiated the naming rights topic and initially referred to the pledge in a letter as either being added to the endowment, (presumably without naming rights) or creating a scholarship fund with naming rights; nothing clearly indicated how Ms. Johnston wanted to treat the $1,000 donation during her life. After the College received the $1,000 from Ms. Johnston, it apparently awarded no scholarships and provided no public recognition to Ms. Johnston until after her death, and Ms. Johnston attempted to repudiate the balance of the pledge,[207] perhaps thereby indicating she did not believe it was enforceable.

In a typical, modern naming rights situation, the charity would publicize the naming rights and the corresponding ask amounts,[208] and the donor would affirmatively fill out a pledge form (or card) and elect in writing to forego anonymity.[209] Thus, the two promises in the bilateral contract would be the charity's promise to provide the naming rights to an acceptable donor[210] submitting a pledge form, and the donor's prom-

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 174.

208. *See* Lindsay, *supra* note 107, at 20–23.

209. Standard pledge forms often provide the donor with an option to give anonymously. *See e.g., The Campaign for Saint Louis University, Pledge Form*, SAINT LOUIS UNIV., www.slu.edu/~curranwp/processes/Pledge%20Form.pdf (the section titled "Recognition" includes a box to check for "Please omit my name from donor honor rolls").

210. *See* Eason, *supra* note 137, at 394 (recommending that a charity should be cautious to avoid having one of its buildings named after a scoundrel).

ise to make the contributions under the pledge form. As a result, it would seem easier to find a bilateral contract under the typical, modern fact pattern than under the facts in *Allegheny College*.

Allegheny College draws a great deal of attention, but other cases also support the view that charitable naming rights are adequate consideration for an enforceable contract. For example, in *Woodmere Academy v. Steinberg*,[211] the donor signed a pledge to contribute $375,000, contributed $175,000, and paid no more.[212] In exchange, the school named its library after the donor's spouse. In correspondence, the school told the donor "[y]ou have our unconditional and unqualified assurance that the [library] will continue to be so [named] as long as it is a part of the school . . . ."[213] When the charity sued to enforce the pledge, the court stated that the charity "did all that the [donor] expected . . . including . . . naming [the library] after [the donor's spouse]"[214] and concluded that the pledge was enforceable as a unilateral contract.[215]

In *Stock v. Augsburg College*, the college began a $25 million fund drive to construct a new building and advertised that "[n]amed gift opportunities are numerous."[216] The college's director of alumni relations contacted Elroy Stock and "suggested that [he] donate money to construct the communications wing of the [building] and suggested that the wing could be named after [Stock]."[217] In 1986, a letter from the college's director confirmed Stock's $500,000 donation and his right to name the communications wing.[218] In February 1988, "there was a great deal of unfavorable publicity about [Stock],"[219] and the college's president and its board of regents voted *not* to name the wing after Stock, but they also voted to keep Stock's $500,000 donation.[220] In 1989, after discussions with Stock, the college "plac[ed] a plaque at the entrance of the communications wing stating Stock was a major donor."[221] Thereafter, Stock attended school functions and made donations ranging from $100

211. Woodmere Acad. v. Steinberg, 385 N.Y.S.2d 549 (N.Y. App. Div. 1976).

212. *Id.* at 550, 551.

213. *Id.* at 551.

214. *Id.* at 552.

215. *Id.*

216. Stock v. Augsburg Coll., No. C1-01-1673, 2002 WL 555944, at *6 (Minn. Ct. App. Apr. 16, 2002).

217. *Id.* at *1.

218. *Id.* at *1.

219. *Id.* at *2 (noting that according to news accounts, Stock "had for years been secretly mailing anonymous letters to families and individuals of mixed race and religion . . . denounc[ing] mixed marriages[] [and] profess[ing] a viewpoint based on racial purity"), *quoted in* Eason, *supra* note 137, at 396.

220. *Stock*, 2002 WL 555944, at *2.

221. *Id.* at *2.

to $2,000.[222] In 1999, Stock approached the college's new president about naming the communications wing after him.[223] The new president refused and told Stock not to donate any more money to the college.[224] Stock promptly sued, alleging breach of contract and misrepresentation.[225] The court agreed with Stock that there was a contract and concluded that the college breached that contract in 1989 when it completed the building and failed to name the communications wing after Stock.[226] The court rejected the college's argument that Stock made a conditional gift, saying Stock "intended that his $500,000 donation was in exchange for [the college's] promise to name the wing after him. His intent was not . . . a donation to the general building fund."[227] Nevertheless, the court held that Stock's breach of contract claim was barred by the statute of limitations.[228] As a result, the court never reached the fascinating issue of damages for breach of a naming rights deal.[229]

In the *Carson's Estate* case, a school "embarked upon an ambitious program" to raise $500,000 for multiple projects including building a new three-story auditorium and gymnasium to be named the "John F. Carson Memorial Hall" in honor of the school's founder.[230] The sister-in-law of John F. Carson signed a pledge, stating in part, "I promise to pay [the sum of $5,000] . . . as follows . . . $2,000 when construction of the John F. Carson Memorial building is begun and [the] balance at my convenience within [five] years."[231] The school raised only $95,000, paid $30,000 to a professional fundraiser, and used part of the balance to improve the existing auditorium and gymnasium.[232] The school placed an inscription over the door reading, "The John Carson Auditorium and Gymnasium," and the school sued the sister-in-law to collect the $5,000 pledge.[233] The Pennsylvania Supreme Court rejected the school's claim, stating,

> [The school] and the court below treat the [sister-in-law's] subscription as if it were an executed gift. It was a *contract*. There is no question at this time that it was a valid contract, and that it was supported by consideration sufficient to contracts of this sort. Under the con-

222. *Id.* at *2.
223. *Id.* at *3.
224. *Id.* at *3.
225. *Id.* at *3.
226. *Id.* at *4.
227. *Id.* at *7.
228. *Id.* at *4.
229. *Id.* at *7.
230. *In re* Carson Estate, 37 A.2d 488, 489 (Pa. 1944).
231. *Id.* at 490.
232. *Id.* at 490.
233. *Id.* at 490–91.

> tract both [the sister-in-law] and [the school] had mutual obligations.[234]

The *Carson* case is particularly interesting because the naming right did not publicize the donor, instead, it publicized an in-law.

Also, in *Paul & Irene Bogoni Foundation v. St. Bonaventure University*,[235] the Bogoni Foundation signed a gift commitment document providing, "We . . . agree to give . . . [$1.5 million] . . . for the following purposes: 'The Paul and Irene Bogoni Library Addition.'"[236] The Bogonis subsequently pledged an additional $500,000 and contributed $1.1 million, and the university sued to collect the $900,000 balance.[237] The court concluded the parties entered into a unilateral contract, and the university prevailed.[238]

2. Conditional Gift or Contract?

In naming rights situations, courts and commentators sometimes assert that the transaction was really a conditional gift rather than a bilateral or unilateral contract, particularly after the donor has made most or all of the pledge payments.[239] Leading authorities acknowledge the potential difficulty of distinguishing a conditional gift from a contract imposing one or more conditions.[240] Courts may find the conditional gift label attractive because the remedy is clear if the charity fails to fulfill the naming rights condition; the charity simply returns the amounts donated, perhaps with interest.[241]

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234. *Id.* at 491 (emphasis added).

235. Paul & Irene Bogoni Found. v. St. Bonaventure Univ., No. 102095/08, 2009 WL 6318140 (N.Y. Sup. Ct. Oct. 6, 2009) (order granting motion to dismiss).

236. *Id.* at 4–5 ("We recognize that [St. Bonaventure University] will rely on our gift in authorizing expenses to be paid in anticipation of the payment of our pledge and in securing any additional pledges from others.").

237. *Id.* at 1, 5.

238. *Id.* at 12, 17–18 (relying on Cohoes Mem'l Hosp. v. Mossey, 25 A.D.2d 476 (N.Y. App. Div. 1966)).

239. *See, e.g.*, Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 113 (Tenn. Ct. App. 2005); Eason, *supra* note 137, at 405 ("Once the contribution has been made and the name associated . . . .[T]he parties' relationship with regard to the contribution and enforcement of its terms is typically addressed under property-based principles.").

240. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (AM. LAW INST. 1981) (noting "the distinction . . . may . . . depend[] on the motives manifested by the parties"); *see also* Carlisle v. T & R Excavating, 704 N.E.2d 39 (Ohio Ct. App. 1997); *see also* KNAPP ET AL., *supra* note 26, at 109.

241. *See Vanderbilt*, 174 S.W.3d at 114, 119 (increasing the amount Vanderbilt University must repay "based on the consumer price index published by the [U.S.] Bureau of Labor Statistics"); Eason, *supra* note 137, at 406.

The distinction between a contract and a conditional gift is "well illustrated" by Professor Williston's story of the benevolent man and the tramp: "If a benevolent man says to a tramp,— 'If you go around the corner to the clothing shop . . . you may purchase an overcoat on my credit.'"[242] The benevolent man is making a conditional gift, and no contract is formed because "no reasonable person would understand that the short walk was requested as the consideration for the promise . . . ."[243]

Professor Williston stresses that in drawing the line between (i) a conditional gift and (ii) an enforceable contract supported by consideration, the key decisional exercise is making a *reasonable interpretation*.[244] Professor Williston describes the decision process as follows:

> Although no conclusive test exists for making the determination, an aid in determining which interpretation of the promise is more reasonable is an inquiry into whether the happening of the condition will benefit the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp suggested above, the happening of the condition not only will not benefit the promisor but is obviously for the purpose of enabling the promisee to receive a benefit (a gift), the happening of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, will not be interpreted as consideration.[245]

In applying this Williston decision model to charitable pledges, the donor takes the role of the benevolent man, as the promisor, and the charity takes the role of the tramp. The inquiry should be whether the condition, namely the naming rights or other public recognition, is more (i) in the nature of a benefit to the donor[246] or (ii) to allow the charity to receive the gift.

Focusing on the latter test first, it seems difficult to make a case that the charity's grant of naming rights was something that had to happen for the charity to receive the gift. Unlike the tramp needing to go to the clothing store or another similar establishment to receive the gift of a

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242. Pennsy Supply, Inc. v. Am. Ash Recycling Corp., 895 A.2d 595, 600 (Pa. Super. Ct. 2006) (quoting 1 SAMUEL WILLISTON & GEORGE J. THOMPSON, WILLISTON ON CONTRACTS § 112, at 380 (Rev. ed. 1936)).

243. *See Pennsy Supply*, 895 A.2d at 600.

244. 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:18, at 417–18 (Thomson West 2008) (4th ed. 1990).

245. WILLISTON & LORD, *supra* note 244, at 415–18, *quoted in* Fritz v. Fritz, No. 08-1088, 2009 WL 779544, at *5 (Iowa Ct. App. Mar. 26, 2009); *see also* PERILLO, *supra* note 9, at 157 (stating that the test is as follows: "[s]elfish benefit to the promisor is an indication of a contract-making state of mind, whereas if the benefit is merely the [result] of altruism, a gift-making state of mind may be present").

246. *See* PERILLO, *supra* note 9, at 157.

coat, the charity could accept the donor's cash or property regardless of whether the condition— specifically the granting of the naming rights— occurs. The charity would enjoy the gift whether it is anonymous, or it comes with naming rights.[247]

Under the first test, Professor Williston calls for an analysis of any benefit to the promisor.[248] This precise matter is addressed in a seminal case of contract law. In *Allegheny College*, Justice Cardozo made a rather direct response regarding naming rights and those who choose to give postmortem: "The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good."[249]

An even stronger case can be made that those who give during their lifetime benefit from charitable publicity. As discussed in Part III.A.1 *supra*, the donor's benefits may include (i) a monetary payment if the charity tries to renege on the naming rights; (ii) publicity; (iii) a reputation for wealth, generosity, and power; and perhaps (iv) inclusion on the charity's board of directors or committees and the associated opportunity to do business with high-net worth individuals and their affiliated business enterprises.

In searching for consideration, Professor Williston focuses on whether the promisor, the donor, receives a benefit, but it should also be relevant whether the promisee, the charity, incurs a non-trivial legal detriment.[250] *Hamer v. Sidway*[251] established that an agreement to do what the law does not require, such as refraining from smoking or drinking liquor, can be sufficient consideration for a bilateral contract.[252] In a naming rights transaction, the charity typically agrees either to inscribe an object with the donor's name or commission, mount, and preserve a plaque with the donor's name on its property. As a charity is not legally bound to take any of these actions, one could technically say the charity always incurs a detriment. Nevertheless, in keeping with Professor Williston's reasonable-interpretation model, it seems appropriate to inquire whether the legal detriment is merely trivial. In some situations the answer probably would be no.

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247. Perhaps an advocate of the conditional gift theory would argue that the naming rights enable the charity to receive other benefits, namely other gifts, from other donors who tend to follow the herd mentality.

248. *See* WILLISTON & LORD, *supra* note 244, at 415–18.

249. Allegheny Coll. v. Nat'l Chautauqua Cty. Bank, 159 N.E. 173, 176 (N.Y. 1927).

250. *See* Pennys Supply, Inc. v. Am. Ash Recycling Corp of Pa., 895 A.2d 595, 602 (Pa. Super. Ct. 2006) (emphasizing that the promisee incurred a detriment by collecting materials, even though the promisee paid nothing for the material).

251. Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

252. *Id.* at 544–45, 551.

Some charities have found perpetual naming rights to be a significant burden, for example, when the charity must raise funds to renovate the named property. Again, Lincoln Center paid $15 million, plus bonus recognition, for the Fisher family to relinquish their perpetual naming rights over a philharmonic hall needing renovation.[253] Only after buying off the Fisher family for $15 million could Lincoln Center obtain a $100 million donation from David Geffen to pay for the renovation.[254] Lincoln Center granted naming rights to Mr. Geffen for the renovated facility in perpetuity.[255] An astute commentator has observed that Lincoln Center likely will need to negotiate with Mr. Geffen in a few decades when the philharmonic hall needs another major renovation.[256]

Also, the charity loses the opportunity to sell the naming rights to another donor. For example, Wake Forest University advertises that a donor can acquire the naming rights to the primary practice tee at its campus golf course with a $250,000 donation.[257] If a donor pledges $250,000 and accepts the naming rights, this exchange forecloses Wake Forest from selling the naming rights to another potential donor. In contrast, if the original donor donates $250,000 anonymously, then Wake Forest University can dangle the primary practice tee naming rights as a benefit to the next potential quarter-million dollar donor. In addition, naming can be a significant burden for the charity if the donor subsequently acquires a reputation as a scoundrel.[258] Examples include Dennis Kozlowski, Ivan Boesky, and others.[259]

In contrast, the charity's legal detriment from granting naming rights may be trivial for a charitable gift establishing a scholarship fund

253. *See supra* note 165, and accompanying text.

254. David Ng, *Geffen in a Giving Mood*, L.A. TIMES, Mar. 5, 2015, at 2, 2015 WLNR 6606472.

255. *Id.* (stating that the interior renovation of the philharmonic hall is expected to cost $500 million, and Mr. Geffen donated $100 million); Robin Pogrebin, *How David Geffen's $100 Million Lincoln Center Gift Came Together*, N.Y. TIMES (Mar. 23, 2015), http://www.nytimes.com/2015/03/24/arts/music/how-david-geffens-100-million-lincoln-center-gift-came-together.html (reporting that some question whether Geffen's gift "warrant[s] the renaming of such a prominent building, given that it represents just 20 percent of the projected renovation cost," and some question granting the naming rights in perpetuity because "[t]his will not be the last renovation of Avery Fisher Hall, and when you give rights in perpetuity you make it very challenging to find the money that will be needed 20, 30, 40, 50 years from now").

256. Pogrebin, *supra* note 255.

257. *See* Lindsay, *supra* note 107, at 22.

258. *See* Eason, *supra* note 137, at 394 (discussing the "spate of corporate malfeasants who, though charitably inclined, are alleged or proven to have engaged in clearly reprehensible conduct as judged by the standards of the day").

259. *Id.* at 394, 397 (discussing Kozlowski and others); Alison Leigh Cowan, *Accounting Plan Irks Non-profits*, TULSA WORLD, Aug. 1, 1990, at 4, 1990 WLNR 4309040 (discussing Ivan Boesky's promise to donate $1.5 million to Princeton University).

or a professorship at a school. As long as there are students not receiving a scholarship and faculty members not supported by a separate fund, in general, there is no opportunity cost to granting naming rights in connection with these funds. Nevertheless, in some situations there could be added administrative costs that may make the legal detriment more than trivial with such gifts. For example, if the donor is entitled to other rights, such as having a portrait hanging in a prominent location, having his or her name publicized in the charity's newsletter and website every time a scholarship is awarded, or being entitled to special arrangements at the annual awards ceremony or banquet to publicize the donor, then the legal detriment may be more than trivial.

A dispute between Vanderbilt University and the Daughters of the Confederacy over naming rights for a dormitory highlights potential difficulties with distinguishing contracts from conditional gifts.[260] Ignoring various name changes and mergers, the Tennessee Division of the United Daughters of the Confederacy made a $50,000 donation in 1933 to fund the construction of a dormitory on Vanderbilt University's campus.[261] The pledge documents were titled as "contracts,"[262] and among other conditions, the documents required the school to place an inscription on the building naming it "Confederate Memorial Hall."[263] In 2002, Vanderbilt University announced that it would remove the inscription, change the dormitory's name to "Memorial Hall," and retain a plaque explaining the history of the naming of the building.[264] In characterizing the arrangement between Vanderbilt University and the Daughters of the Confederacy, the Tennessee Court of Appeals gave an unsatisfactory reason for concluding there was no contract, merely stating "Although all three agreements use the word 'contract,' they do not purport to establish a typical commercial arrangement in which one party provides certain goods and services in return for a sum to be paid by the other party."[265] This rationale overlooks many cases, including *Hamer v. Sidway* and *Allegheny College,* in which courts have found a contract despite the absence of a commercial transaction.[266] The Tennessee court then focused

260. Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 113 (Tenn. Ct. App. 2005).

261. *Id.* at 104.

262. *Id.* at 112 (stating that "all three agreements use the word 'contract'").

263. *Id.* at 105.

264. *Id.* at 107–108 (explaining that "Vanderbilt has changed its maps, website, and correspondence to reflect the building's new name of 'Memorial Hall' . . . [but] has not yet removed the name 'Confederate Memorial Hall' from the pediment of the front of the building but has indicated its unequivocal intention to do so").

265. *Id.* at 112.

266. *See, e.g.*, Hamer v. Sidway, 27 N.E. 256, 544–45, 551 (N.Y. 1891); *see supra* notes 187–207 and accompanying text (discussing *Allegheny College*).

on whether the relationship was (i) a conditional gift or (ii) a trust.[267] The court found no intent to create a trust[268] and concluded that the Daughters of the Confederacy made a conditional gift.[269] Because Vanderbilt failed to satisfy a condition of the gift, the court concluded that Vanderbilt must return the amount of the gift to the Daughters of the Confederacy, plus interest based on the increase in the U.S. Consumer Price Index.[270]

3. Different Fact Patterns, Contracts, and Public Recognition

Whether a particular pledge is an enforceable contract will depend on the facts, and the facts involved with naming rights and other public recognition opportunities can vary significantly. When a charity names a building, the lobby, the atrium, or other significant structural element in perpetuity, for the life of the structural element, or for a long period of time, the argument that the donor has received a benefit will be stronger. There certainly can be wide variations in these arrangements. For example, if the donor simultaneously negotiates that the charity must display a large portrait of the donor in a prominent area; must use the donor's name when referring to the building on all letterhead, business cards, phone listings, signage, and on all pages of the organization's website; and must state the donor's name when answering the phone, these factors would all indicate a greater donor benefit.

In contrast, as the public recognition becomes less prominent and more transitory, the case for consideration weakens. Thus, if the donor's name merely appears on a donor wall along with dozens of other names, or if it is on a brick among hundreds of other inscribed bricks, or in the "honor roll" section of the charity's quarterly newsletter along with hundreds of other donor names, the case becomes stronger that any benefit is trivial and the parties did not intend for the public recognition to be consideration for the contributions. But even in the honor roll-newsletter situation, if a donation qualifies for a high rank occupied only by a wealthy and generous elite—perhaps the "President's Circle" —the case for finding consideration is stronger.

Also, in particular circumstances it might be argued that the naming right or other public recognition was not bargained for or did not induce the donor to pledge. The charity might insist that the donor receive the

267. Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 113 (Tenn. Ct. App. 2005).

268. *Id.* (explaining that "[t]he mere expression of a donative intent, or a statement of the purpose for which a gift is given, does not constitute an expression of trust intent").

269. *Id.*

270. *Id.* at 119.

public recognition; the charity may provide the public recognition as a way to say "Thank You" to its donors; or the parties simply may consider it customary, with the donor feeling totally indifferent about the public recognition, and the charity providing it merely as a matter of standard procedure. Often charities seek to justify granting public recognition based on the "herd mentality" or the "bandwagon effect"—if we publicize more donors, others may feel that giving to the campaign is the norm and want to join the herd. One charity in its standard pledge form even highlights this potential when asking if the donor wishes to remain anonymous: "The gift may be publicly acknowledged to encourage the support of others."[271] There certainly can be situations when the naming likely provides no benefit to the donor but provides substantial benefits to the charity's cause, such as in the case of the Arnold Palmer Prostate Cancer Center or the Betty Ford Alcoholism Clinic.[272]

Other interesting issues arise if the donor wishes the charity to publicly recognize someone else in connection with the charitable gift. If the donor chooses to publicize the family surname, the arrangement arguably benefits the donor plus all members of the donor's family who share the surname. An arrangement that provides consideration to a third party can be a contract.[273] Nevertheless, if the third party is totally unrelated to the donor, the consideration argument becomes much more tenuous. For example, a donor may contribute the ask amount necessary for naming rights over a professorship at her alma mater, but the donor might direct that the school name the professorship after a former teacher at the school.

4. Enforcing with Normal Promissory Estoppel

The promissory estoppel doctrine grew out of dissatisfaction with the consideration requirement[274] and can be seen as fundamentally at odds with contract law.[275] Reportedly, Professor Williston declared the new doctrine after finding a series of cases in which courts enforced a

271. *The Campaign for Saint Louis University Pledge Form*, *supra* note 209 (under "Recognition" one of the optional boxes to check is "This gift may be publicly acknowledged to encourage the support of others").

272. *See Arnold Palmer Honored by Indian Wells*, DESERT SUN (PALM SPRINGS, CA), Mar. 11, 2012, 2012 WLNR 5244186; Margery Egan, *Candid Betty Broke Barriers, Won Our Hearts*, BOSTON HERALD, Jan. 3, 2007, at 6, 2007 WLNR 113256.

273. RESTATEMENT (SECOND) OF CONTRACTS § 71(4) (AM. LAW INST. 1981) ("The performance or return promise may be given to the promisor or to some other person.").

274. *See* PERILLO, *supra* note 9, at 218 ("[I]n its original formulation, it was a substitute for . . . consideration . . . ."); GRANT GILMORE, THE DEATH OF CONTRACT 80 (1995) (originally published in 1974); KNAPP ET AL., *supra* note 26, at 210.

275. GILMORE, *supra* note 274, at 79 (arguing that the "promissory estoppel principle . . . has, in effect, swallowed up the bargain principle . . .").

promise even though the consideration requirement was not satisfied, and then identifying the common circumstances in those cases.[276] Promissory estoppel is an extremely flexible doctrine. Cases hold that the detrimental reliance element is a question of fact for the jury, that the injustice element is a question of law,[277] and that equitable principles apply.[278] The three elements of a promissory estoppel cause of action reflect its flexibility: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[279] At its core, "promissory estoppel provides an additional tool for courts to reach what they consider to be equitable decisions."[280]

In the case of a pledge that is not substantial in amount, the charity could have difficulty satisfying any of the three elements of the promissory estoppel doctrine. For example, the "injustice" element poses difficulties because the charity did not earn the gift, and the proposed donor has not profited from the transaction. Also, the reliance element frequently depends on the promisee showing a "*definite and substantial* change of position which would not have occurred if the promise had not been made."[281] It may be difficult for a charity to show that it acted reasonably if it substantially changed its position based on a pledge that was not substantial in amount.

Nevertheless, promissory estoppel can help charities enforce truly significant pledges. For example, in *King v. Trustees of Boston University*,[282] Dr. Martin Luther King Jr. deposited many of his personal papers with the library of Boston University, one of his former schools.[283] Boston University paid nothing for the papers.[284] The King estate sued Boston University for conversion,[285] arguing that Dr. King's estate was the rightful owner of the papers in the University's special collection section.[286]

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276. *See* PERILLO, *supra* note 9, at 218.

277. *See* Faimon v. Winona State Univ., 540 N.W.2d 879, 883 n.2 (Minn. Ct. App. 1996) ("We note a seeming contradiction between, on one hand, cases holding that the injustice prong . . . is a question of law, and on the other hand, [a case], holding that . . . reliance . . . is a question of fact to be decided by the jury.").

278. People v. Castillo, 230 P.3d 1132, 1139 (Cal. 2010).

279. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

280. KNAPP ET AL., *supra* note 26, at 211.

281. RESTATEMENT (SECOND) OF CONTRACTS § 90, cmt. f (AM. LAW INST. 1981) (emphasis added).

282. King v. Trs. of Boston Univ., 647 N.E.2d 1196 (Mass. 1995).

283. *Id.* at 1198.

284. *Id.*

285. *Id.*

286. *Id.*

The relationship between the parties was difficult to classify as each side had taken many steps, and there were several items of correspondence regarding the collection and its display at the Boston University library.[287] At trial, the jury considered theories of contract, charitable pledge, statute of limitations, and laches.[288] The jury concluded that Dr. King's promise was "enforceable as a charitable pledge supported by consideration or reliance,"[289] but "the jury also determined that [Dr. King's] letter promising the papers was not a contract."[290] On appeal, the court emphasized that Boston University held a convocation in Dr. King's honor to commemorate receipt of the papers,[291] indexed the papers, "made the papers available to researchers, and provided trained staff to care for the papers and assist researchers."[292] The appeals court affirmed the trial court, stating that the case was properly submitted to the jury and that Dr. King's letter to Boston University about the collection could be read to contain a promise "supported by consideration or reliance."[293]

Charities may find promissory estoppel useful for substantial pledges without naming rights when the charity can show that it would not have proceeded with a current or completed building or other project without the pledge. However, the doctrine would not be helpful for smaller pledges that a charity could replace with reasonable efforts.

B. Second Prong: Enforcing Donor Expectations

As discussed above, in the modern fundraising era, charities likely can enforce many substantial pledges with no special rules. They can enforce using the same contract and promissory estoppel principles as other promisees. However, this Article acknowledges that charitable pledges are special transactions that merit a special second prong to aid enforcement for three reasons. First, charities depend on pledges to fund building projects and other long-term endeavors, and some level of certainty is appropriate if charities act responsibly. Second, charities should not face the risk vividly illustrated by the famous case of *Dougherty v. Salt*,[294] namely that a promisor will vigorously proclaim his or her commitment to be legally bound to make a gift and then escape liability because there

287. *Id.* at 1201.
288. *Id.* at 1198.
289. *Id.*
290. *Id.*
291. *Id.* at 1203 ("Dr. King spoke at the convocation.").
292. *King*, 647 N.E.2d at 1203.
293. *Id.* at 1198.
294. Dougherty v. Salt, 125 N.E. 94 (N.Y. 1919); *see supra* notes 44–51 and accompanying text (discussing *Salt v. Dougherty*).

is no consideration. Arguably, this risk should be eliminated because carrying out the expectations of the parties is a core principle of justice,[295] and freedom of contract should prevail as long as the parties' agreement does not violate public policy.[296] Third, in the absence of a special rule, charities would not have an economic incentive to clarify pledge forms and other documents. A proposal that encourages transparency on pledge forms and other documents will allow charities, donors, directors, and courts to act more respectably in these situations.

Accordingly, this Article proposes a second prong, a special rule. Under this second prong, a charity can enforce a pledge if it can prove by clear and convincing evidence that the donor intended to be legally bound. Under this prong, a charity must not simply prove that the donor intended to make the pledge payments; the charity must prove the donor intended to be legally bound.

Some existing legal authorities can help make this intent-based second prong work fairly and with reasonable certainty. For example, two cases demonstrate a mere expression of present intent to do something, rather than a manifestation of intent to be contractually bound. In *Peters v. Bowen*,[297] a developer signed a declaration that he *intended to* pave all the streets in a subdivision, and the court held this was an unenforceable statement of intent.[298] Also, in *Pappas v. Hauser*,[299] the court held that statements in a written pledge like "I intend to pay" and "I intend to subscribe" were mere expressions of intent to perform and were not legally enforceable.[300] Similarly, the mere use of the words "pledge" or "promise" should not establish that the donor intends to be legally bound. "The label 'pledge' is not self-defining; [a] pledge can be binding or nonbind-

295. *See* Brooke Adele Marshall, *Reconsidering the Proper Law of the Contract*, 13 MELB. J. INT'L L. 505, 508 (2012) ("There is but one basic policy, namely protection of the expectations of the parties.") (citations omitted); Nancy Kim, *Mistakes, Changed Circumstances and Intent*, 56 U. KAN. L. REV. 473, 479 (2008) ("[P]romulgating the 'intent of the parties' is generally agreed to be one of the primary objectives of contract law . . . ."). Specifically in regards to charitable pledges, one court has stated, "A primary concern in enforcing charitable subscriptions, as with enforcement of other gratuitous transfers such as gifts and trusts, is ascertaining the intention[s] of the donor . . . . If donative intent is sufficiently clear, we [should] give effect to that intent to the extent possible without abandoning basic . . . principles." *King*, 647 N.E.2d at 1200–01.

296. *See* Swavely v. Freeway Ford Truck Sales, 700 N.E.2d 181, 187 (Ill. App. Ct. 1998) (concluding that because public policy strongly favors freedom to contract, courts should refuse enforcement only if the contract is clearly contrary to public policy), *cited with approval in* KNAPP ET AL., *supra* note 26, at 648.

297. Peters v. Bowen, 631 So.2d 629 (La. Ct. App. 1953).

298. *Id.* at 631

299. Pappas v. Hauser, 197 N.W.2d 607, 611 (Iowa 1972); *see also* Pappas v. Bever, 219 N.W.2d 720 (Iowa 1974) (interpreting a pledge form with the same language).

300. *Bever*, 219 N.W.2d at 721, 722.

ing."[301] Also, a "promise" to make a gift in the future generally is not enforceable.[302]

In determining whether the donor intended to be legally bound, it would not be necessary for the charity to prove what the donor truly believed—the donor's *subjective* intent. Historically, such an approach has been rejected[303] because it is too difficult to prove subjective intent.[304] Judge Learned Hand stated, "[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties,"[305] and his related maxim was that it does not matter if 20 bishops are prepared to testify about what one side truly believes.[306] Instead, a party's intent would be established by objective manifestations, such as the language in the pledge form and the party's actions. Under this objective approach, a court interprets a party's words and actions as a reasonable person,[307] "understand[ing] . . . words according to the usage of [a] normal speaker of English under the circumstances."[308]

This Article's proposal does not anticipate that the pledge form would need to contain any exact formulation of terms, so-called "magic words." Language in a pledge form such as, or similar to, "shall be legally bound," "shall be legally enforceable," or "shall be binding on the donor's estate, heirs, beneficiaries, and assignees," would each be strong evidence of the donor's intent to be legally bound. Also relevant would be the presence, or absence, of certain clauses typically included in commercial or other legally binding contracts, such as forum selection clauses, consent to jurisdiction or venue clauses, clauses requiring the donor to pay interest plus attorneys' fees if a pledge payment is late, or clauses permitting the charity to assign its rights to payment to a professional debt collection agency. These enforcement and collection clauses would each indicate the parties intended the pledge to be legally binding.

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301. ALI DRAFT PRINCIPLES, *supra* note 9, at § 490, cmt. a.

302. *See supra* notes 39–43 and accompanying text (not enforceable as a contract); *see supra* notes 85–89 and accompanying text (not enforceable under promissory estoppel unless the plaintiff proves all three elements).

303. *See* PERILLO, *supra* note 9, at 24 ("[T]he mental intentions of the parties are irrelevant."); Ray v. William G. Eurice & Bros., Inc., 93 A.2d 272, 278 (Md. 1952) (stating that a party's "claimed intent is immaterial, where it has agreed in writing to a clearly expressed and unambiguous intent to the contrary.").

304. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899), *quoted in* KNAPP ET AL., *supra* note 26, at 41.

305. *Ray*, 93 A.2d at 278 (quoting Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 289, 293 (S.D. N.Y. 1911).

306. *Id.*

307. PERILLO, *supra* note 9, at 24; KNAPP ET AL., *supra* note 26, at 41 (concluding that "one is ordinarily bound . . . not by her 'secret intent' . . . but by the reasonable interpretation of her words and actions").

308. Holmes, *supra* note 304, at 419, *quoted in* KNAPP ET AL., *supra* note 26, at 41.

C. *Comparison with ALI Proposals*

The ALI has made three separate proposals to help charities enforce pledges. First, after Restatement (Second) of Contracts § 90(1) sets out the normal elements for a promissory estoppel cause of action, a comment provides that "reliance need not be of a substantial character in charitable [pledge] cases."[309] This ALI first proposal would be mooted if a court follows the ALI's more sweeping second proposal.

In the more sweeping second proposal, Restatement (Second) of Contracts § 90(2)[310] would eliminate one of the three elements. It states that "[a] charitable [pledge] is binding under [promissory estoppel] without proof that the promise induced action or forbearance."[311] While this would eliminate the second element, it may complicate the analysis under the first and third elements. Under the first element, the promisee (the charity) must prove "[a] promise which the promisor [the donor] should reasonably expect to induce action or forbearance."[312] Under the language, the donor still must foresee that the charity will rely,[313] but does that make sense if § 90(2) makes it irrelevant whether the charity actually relies? Also, the third element still requires the promisee (the charity) to prove "injustice can be avoided only by enforcement of the promise,"[314] so is it now irrelevant whether the charity actually relied on a pledge when a court makes this injustice determination? Perhaps under the ALI proposal a charity can bolster its "injustice" argument if it proves it relied to its detriment, but the absence of such evidence should not prejudice the charity's injustice argument.

While a strict reading of § 90(2) merely eliminates one element from the promissory estoppel test, the related reporter's note suggests a more fundamental change in approach. It states, "[section 90(2)] treat[s] charitable [pledges] as a *sui generis* category requiring neither consideration nor reliance."[315] Thus, although not expressly stated in § 90(2), the ALI proposal suggests eliminating any contractual analysis and simply using the artificial rules of proposed § 90(2).

In contrast to the § 90(2) approach, this Article's proposal encourages courts initially to apply the same normal contract and promissory estoppel rules to charities as customarily applied to all other situations.

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309. RESTATEMENT (SECOND) OF CONTRACTS § 90(1), cmt. b (AM. LAW INST. 1981).

310. *Id.* § 90(2).

311. *Id.*

312. *Id.*

313. *See* Budig et al., *supra* note 9, at 67 (paraphrasing § 90(1) with the second element removed).

314. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

315. *Id.* § 90, cmt. f (reporter's note).

This Article's proposal only deviates from normal rules if necessary to allow charities to enforce otherwise unenforceable pledges when clear and convincing evidence proves the donor intended to be bound.

A leading commentator summarizes the ALI's apparent policy rationale for the pro-charity approach in § 90(2), as follows:

> Our society *depends* on private charity . . . [charities] rely from year to year on the likely performance in the aggregate of the [pledges] they receive, and incur substantial contractual and other obligations in reliance on those promises; therefore the law should enforce *all such promises*, despite the difficulty of showing that any particular promise produced substantial reliance or of arguing that injustice would result if that promise alone were to go unperformed.[316]

This Article's proposal is not as deferential to charities. While our society depends on well-managed homeless shelters, food pantries, and some other charities, the level of dependence is not great for charities that fund the lavish lifestyles of their executives, incur excessive administrative expenses, or cater to the needs of the wealthy.[317] Also, this Article's proposal does not adopt the theory that the law should enforce *all* such promises; after all, promises in other situations are enforced only if the contract law or promissory estoppel tests are satisfied.

The third proposal originating with the ALI,[318] a Discussion Draft on the Principles of the Law of Nonprofit Organizations, discusses many aspects of the enforceability of charitable pledges.[319] While the Discussion Draft does not directly propose a new rule about the enforceability of charitable pledges,[320] it seems to do so indirectly in discussing when charities should sue donors to collect unpaid pledges. The Discussion Draft states, "[a] charity may seek to recover from a donor who fails to fulfill a material pledge that the parties *intended to be binding*,"[321] and "[a] donor who makes a promise in writing that declares intent of enforceability has made a binding pledge."[322] While the focus on donor in-

316. Charles L. Knapp, *Reliance on the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 60 (1981) (emphasis added).

317. *See supra* notes 4 and 6 an accompanying text.

318. Because the third proposal was part of a Discussion Draft, it may not be appropriate to describe it as an ALI proposal.

319. *See* ALI DRAFT PRINCIPLES, *supra* note 9, at, § 490(b).

320. *See id.* (not indicating when a pledge will be binding, but perhaps suggesting a limitation on damages in stating,"[t]he court will enforce a binding pledge to the extent enforcement would be fair under the circumstances"); *id.* at illus. 2 (stating that § 490(b) "provides that the charity's recovery on a binding pledge is limited to what justice requires.").

321. *Id.* § 490(a) (emphasis added). The Discussion Draft does not describe when a pledge is material.

322. *Id.* § 490 cmt. b.

tent to be bound is consistent with this Article's proposal, the Discussion Draft provides the following series of presumptions about donor intent that would greatly favor charities:

> [A] donor . . . is presumed to intend that an oral promise or an ambiguous written instrument is binding in any of the following circumstances—
>
> (1) The donor has partially performed the pledge;
>
> (2) At the time of the pledge or as a result thereof, the donor served on the governing board or as an officer of the charity;
>
> (3) The charity reasonably relied to its detriment on the donor's promise; or
>
> (4) The promise induced one or more others to give to the charity, or counted towards a matching gift.[323]

Although this Article's proposal also stresses the importance of a donor's intent to be bound, it rejects creation of presumptions in these four circumstances. First, concerning part performance, the view that one pledge payment automatically means the donor intends to make all the pledge payments will trick many donors. A donor might make an initial payment when submitting the pledge form or within a short time thereafter. The first pledge payment evidences a favorable impression about the charity at that time, but it should not automatically mean the donor intended the entire multi-year pledge to be a legally binding debt. When making the first pledge payment, the donor may be merely expressing his or her current intention, rather than making a promise to be legally bound to make all the payments in future years.[324] In considering a charity's argument that a pledge was automatically binding because the donor made part payment, the Iowa Supreme Court stated, "This is a bootstrap argument. The mere fact a person carries out in part what he said he intended to do does not convert his statement of intention into a promise."[325]

On the second presumption, a donor who is a director or officer of the charity has a greater connection with the charity, but this does not necessarily justify a presumption that the donor intends a pledge to be legally binding. Instead, the donor may consider the pledge a mere statement of present intent.

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323. *Id.* § 490(c).

324. *See supra* notes 296–302 and accompanying text (discussing legal authorities for the position that a statement of future intent is not legally binding).

325. ALI Draft Principles, *supra* note 9, at § 490, reporter's note 5 (quoting Pappas v. Bever, 219 N.W.2d 720, 722 (Iowa 1974)).

The third presumption, arising when the charity reasonably relied to its detriment on the donor's promise, certainly focuses on a key element that may help make the pledge enforceable under normal promissory estoppel analysis. However, if the other two normal promissory estoppel elements are not met, then perhaps the pledge should not be enforced. For example, if the justice element is not met, perhaps in part because the charity never told the donor that the pledge was legally enforceable, then it may be inappropriate to create a presumption that the donor intended the pledge to be binding.

The fourth presumption has two parts. The more disturbing presumption arises if the pledge counts toward a matching gift. Standard pledge forms almost always contain a box or line encouraging the donor to tell the charity whether the donor's employer has a matching gift program. The fact that the donor takes the time to provide this small bit of information should not create a presumption that the donor intends to be bound to make all the pledge payments in the same manner as if the donor was signing a promissory note to cover a bona fide debt. The donor may only intend that the employer match the contributions actually made by the donor. In regards to the other presumption, which arises if the donor's pledge induced one or more other donors to give, it is unclear why the action of another donor would indicate something about the donor's intent. Also, this presumption could place the donor at a great disadvantage if one other donor is willing to testify for the benefit of the charity that he or she contributed because of the donor's pledge. What evidence to rebut the other donor's testimony about motive is likely to prevail? How would the donor obtain that rebuttal evidence about the other donor? Thus, this Article does not endorse any of the four ALI Discussion Draft presumptions about donor intent.

D. Ripples: Estate Tax, Bankruptcy, Accounting, and Old Documents

This Article proposes changing the rules for when charitable pledges are legally binding, and such a change would have consequences in other fields.

1. Federal Estate Tax.

A decedent's estate can only claim a federal estate tax deduction for the amount of a pledge paid after the donor's death if the pledge was enforceable under applicable state law.[326] For 2015, the federal estate tax

326. *See* Estate of Levin v. Comm'r, 69 T.C.M. (CCH) 1951, 1953 (1995); *see also* I.R.C. § 2053(a)(3) (2012) (allowing a deduction from the gross estate for "claims . . . allowable [under state law]"); Treas. Reg. § 20.2053-4(a)(1) (1958) (allowing a deduction

applies to decedents with a gross estate in excess of $5,430,000.[327] Thus, a wealthy donor's estate may be more careful when honoring a pledge.

Levin v. Commissioner[328] demonstrates the worst case scenario which began with a birthday bash and ended with misfortune for the family finances. Jack Levin invited friends, family, and representatives of twenty charities to attend his ninetieth birthday party at which he "announced . . . he would establish a $10,000 charitable remainder annuity trust for each charity represented at the party . . . ."[329] Jack Levin died before establishing the charitable trusts and the personal representative of his estate honored the pledges totaling $200,000, but the IRS challenged the related estate tax deduction.[330] The U.S. Tax Court concluded that the Levin estate could not deduct the $200,000 paid on the pledges because the pledges were not enforceable under Florida law.[331] This increased the family's estate tax burden by $75,272.

The personal representative of an estate could avoid this risk by waiting for the charity to sue to enforce the pledge and also waiting for the state court to decide if the pledge was enforceable. Alternatively, the personal representative could seek a private ruling from the IRS on whether the pledge is enforceable under local law before paying the charity.[332]

2. Bankruptcy.

If a donor is bankrupt, whether the charity has an enforceable claim in bankruptcy for the amount of the bankrupt debtor's unpaid pledge depends on state law. Morton Shoe Company pledged $20,000 to the Combined Jewish Philanthropies of Greater Boston and then filed bankruptcy.[333] The corporation's pledge card stated, "the subscription is in

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if the claim "represent[s] a personal obligation of the decedent existing at the time of the decedent's death").

327. *See* I.R.C. § 2010(c)(3) (2012) (setting the "basic exclusion amount" at $5 million, adjusted for inflation in $10,000 increments); *see also* Rev. Proc. 2014-61, I.R.B. 2014-47, § 3.33 (announcing the basic exclusion amount for decedent's dying in 2015).

328. Estate of Levin v. Comm'r., 69 T.C.M. (CCH) 1951 (1995).

329. *Id.* at 1951.

330. *Id.* at 1951–52.

331. *Id.* at 1953 (stating that "[u]nder Florida law, a promise to contribute to a [charity] . . . is enforceable . . . if the promisor makes a promise which the promisor reasonably expects to induce action or forbearance of a substantial character by the promisee" (citing Mt. Sinai Hosp., Inc. v. Jordan, 290 So.2d 484, 486–87 (Fla. 1974))); *see also* Arrowsmith v. Mercantile Safe-Deposit & Trust Co., 545 A.2d 674, 683–685 (Md. 1988) (finding no estate tax deduction allowed because the charitable pledge would not be enforceable under Maryland law).

332. *See* I.R.S. Priv. Ltr. Rul. 97-18-031, 1997 WL 217758 (May 2, 1997) (explaining a favorable advance ruling from the IRS for a Florida taxpayer was honored).

333. *In re* Morton Shoe, Inc., 40 B.R. 948, 949 (Bankr. D. Mass. 1984).

consideration of the pledges of others."[334] The charity submitted a claim in bankruptcy court, and the debtor objected.[335] The bankruptcy court stated, "[t]he allowability of claims is to be determined under state law,"[336] and concluded that, "[t]he pledge document . . . clearly indicates that by accepting the subscription [the charity] agrees to apply the pledge amounts in accordance with the charitable purposes set forth in its charter. This is sufficient consideration to support the promise."[337]

Thus, if this Article's proposal would result in certain pledges not being enforceable under state law, then those charities would not be able to enforce those pledges in a bankruptcy proceeding.

In 1998, Congress enacted the Religious Liberty and Charitable Donation Protection Act,[338] which protects charities receiving certain charitable contributions. The Act eliminates arguments that the charity should have to disgorge contributions because the contributions were constructive fraudulent transfers made within one year of the donor filing bankruptcy.[339] The donation must consist of cash or a financial instrument to be protected.[340] The statute does not protect a charity against claims of actual intent to hinder, delay, or defraud creditors and does not protect donations in excess of 15 percent of the donor's gross annual income, unless the contribution was consistent with the donor's prior contribution history.[341] However, in regard to charitable *pledges*, the 1998 statute apparently provides no special protection. A commentator states, "surprisingly Congress did not protect from attack charitable pledges or the payment of pledges, since the Donation Protection Act does not preclude attacks of pledges that would be considered legitimate obligations under state law."[342]

334. *Id.*

335. *Id.*

336. *Id.* at 949.

337. *Id.* at 951. The court also discussed promissory estoppel principles, stating that the charity "substantially relie[d]," *id.*, in part because "based on the estimated amount of [pledges], [the charity] borrows money from banks so that it can make immediate distributions to recipients before obtaining the actual pledge amount." *Id.* at 949.

338. Religious Liberty and Charitable Donation Protection Act, Pub. L. No. 105-183, 112 Stat. 517 (1998).

339. J. David Forsyth, *Singing the Blues I: Bankruptcy, Insolvency, and Financial Distress of Donors and Contractors*, SH042 ALI-ABA 31, 33 (2003).

340. *See Id.*

341. *See Id.* at 33–34.

342. *Id.* at 34.

3. Accounting.

In 1993, the Financial Accounting Standards Board[343] issued Statement of Financial Accounting Standards No. 116 (FASB 116).[344] Under FASB 116, nonprofits must record the total amount of an unconditional pledge as revenue, and as an asset, on its financial statements in the year the charity receives notification of the pledge, even though payments may not be received for many years.[345] The FASB created these rules for nonprofits to be similar to "how for-profit[] [enterprises] account for long-term orders, discounting them for inflation and for doubtful accounts receivable."[346] In response to FASB 116, "there has been, and continues to be, considerable controversy surrounding the timing of the recording of different types of gifts as income."[347]

> One key component of FASB 116 is the requirement that all unconditional promises to give (pledges) . . . be recognized in the year the notification of the pledge is received. This can cause significant fluctuations in the . . . net assets of a [nonprofit]. For example, if [a charicharity] receive[s] a [$1 million] award to be paid over the next [five] years [the charity] would have to record the entire [$1 million] in year [one]. This would likely cause a large increase in net assets in year [one], however, as the funds are spent in years [two through five, the charity] would likely show a decrease in net assets. These fluctuations can be difficult to properly budget and are often confusing to the readers of [the charity's] financial statements and [IRS] Form 990.[348]

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343. *See* Matt Roush, *Accounting Rules Add Up to Non Profit Headache*, CRAIN'S DET. BUS., Oct. 21, 1996, 1996 WLNR 1159519 (reporting that the Financial Accounting Standards Board is a nongovernmental body appointed by the American Institute of Public Accountants); *see also* Cowan, *supra* note 259, at 4 (stating that the FASB is "an independent seven-member group in Norwalk, [Connecticut] . . . created in 1973 to set policy for [both] for-profit and non-profit corporations . . . that auditors could use to determine whether to sign off on a client's financial statements").

344. *See* Shawn H. Miller, *Nonprofit Accounting Basics: FAS 116*, NONPROFIT ACCOUNTING BASICS (Dec. 8, 2009), http://www.nonprofitaccountingbasics.org/contributions-financial-statementsreporting/fas-116.

345. *Id.*

346. Roush, *supra* note 343.

347. WILEY NOT-FOR-PROFIT GAAP 2013: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES: CONTRIBUTIONS, PLEDGES, AND NONCASH CONTRIBUTIONS 1, http://ifrs.wiley.com/chapters/w9781118363249c90; *see also Dumb Idea: Charity Accounting Suggestions Don't Add Up*, DALLAS MORNING NEWS, Aug. 5, 1990, at 2J, 1990 WLNR 4282789.

348. Miller, *supra* note 344 (stating that "[t]he main effect of FASB 116 was to require that [nonprofits] record all unconditional contributions as revenue when notification of the contribution is received").

Unpaid pledge amounts must be recorded if the pledge is unconditional.[349] Thus, if a condition creates a bona fide uncertainty, such as a requirement that the charity raise a significant amount of other funds, the pledge is not recorded until the condition is satisfied. On the other hand, a trivial condition will be disregarded, such as a condition that the nonprofit continue to operate until the due date of the pledge payment.[350] "The notification [of the pledge] must be in written form, [and] oral promises should not be recorded."[351] Revocable gifts are not to be recorded until they become irrevocable. Thus, if a last will and testament contains a pledge, the pledge would not be recorded on the charity's financial statements until the donor's death, when the last will and testament becomes irrevocable.[352] Charities can reduce the amounts recorded for an "allowance for uncollectible pledges."[353] Apparently this allowance can vary based on the charity's experience and expectations.[354]

Because this Article's proposal would change the test for enforceability if adopted in a state, presumably it would be appropriate for a charity in an adopting state to revise its financial accounts. If pledges would become unenforceable, presumably the charity would reverse the entries originally recording the amounts.

4. Old Documents.

This Article's proposal would change the rules on pledge enforceability, so a relevant inquiry is how to deal with old documents or arrangements. The proposal would encourage charities to communicate with donors regarding enforceability in the pledge forms and otherwise, but what about those old, ambiguous, or silent arrangements created before the change but calling for payments after the change? A commentator lists three cases that vividly demonstrate the potential problem with pledges under a last will and testament: an 1898 will that did not become effective until 1976; a 1930 will that did not become effective until 1987; and an 1885 will providing for charitable gifts extending into the

349. *Id.*

350. *Id.*

351. *Id.*

352. *See Policy on Recording Pledges*, WESLEYAN UNIV., http://www.wesleyan.edu/finance/grants/pledges.html (last visited October 16, 2015).

353. *Id.*

354. *See, e.g.*, *id.* ("The University books a 10% allowance for uncollectible pledges on the entire pledge receivable balance. This 10% is calculated on the book value amount."); *see also* Todd Wallack, *United Way Tweaked Its Financial Reports Accountants Question Charity's Methods*, S.F. CHRON., (July 20, 2003, 4:00 PM), http://www.sfgate.com/news/article/United-Way-tweaked-its-financial-reports-2602208.php (reporting that "the United Way headquarters . . . know[s] that about 6 percent of pledges on average are uncollectible").

1960s.[355] In addition to pledges under a will, other pledges often have a three or five-year duration.

There are at least two potential approaches. If a court changes the enforceability test as recommended in this Article, the court might declare that the new approach will only apply to pledges entered into, or substantially modified after, the date the court announces the change. The Supreme Court of Massachusetts used this prospective-only type approach in *Sullivan v. Burkin*[356] involving a change that impacted how estate planners used trusts.[357] Such an approach would address arguments that the judiciary changed the rules charities reasonably relied upon when soliciting pledges.

Alternatively, courts could adopt the new approach and apply it even to old documents. For pledges under decedents' wills, the charities are still likely to prevail on the clear-and- convincing-evidence-of-intent prong proposed in this Article[358] because wills are solemn documents, generally requiring the testator-donor to sign in the presence of two competent witnesses.[359] When signing a will foreseeing pledge payments after death, the donor knew that after death he or she would not be able to have a change of heart in response to new circumstances or developments. Thus, the mere fact that the donor anticipated the pledge being paid after death reflects an intent for the pledge to be legally binding after death.[360]

In regard to other pledges, such as the common three-year or five-year pledge, the charities may complain if a donor can now successfully renege under a new test, but it could be argued the charities should have been honest with their donors when the pledges were made originally. A charity should not be rewarded for using an ambiguous or silent document regarding enforceability or failing to clarify the arrangement if the donor presented the charity with an ambiguous or silent gift document. Also, there have been previous signals that charities should fully docu-

355. Eason, *supra* note 137, at 415 n.152.

356. Sullivan v. Burkin, 460 N.E.2d 572, 577–78 (Mass. 1984); *see also* Bongaards v. Millen, 793 N.E.2d 335, 340–42 (Mass. 2003).

357. The change would treat assets of certain types of trusts as part of a decedent's estate for purposes of calculating a surviving spouse's statutory share when he or she elects to take against the will of the pre-deceasing spouse. *See Bongaards*, 793 N.E.2d at 340–42.

358. *See supra* Part III.B (describing the second prong of this Article's proposal).

359. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 159–60 (9th ed. 2013); *see also* ROGER W. ANDERSON & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 117–20 (4th ed. 2012).

360. *See* Trozpek, *supra* note 2, at 4, 12.

ment the understanding with a donor.[361] For example, in 1978, the Metropolitan Museum of Art asked a New York court to enforce a $1.5 million unpaid pledge that "resulted from a casual and informal conversation between [a deceased Met board member and the president of the museum]."[362] The court enforced the pledge but strongly criticized the charity.

> Gifts to charity should not be treated in a casual manner . . . . There is no more room for casual estate planning in charitable gift-giving than there is in any other estate planning device. This warning is issued to donors and charitable donees alike. . . . These proceedings would not have been necessary if the Museum had followed reasonably prudent business methods . . . .[363]

Also, the 2009 ALI Discussion Draft on the Principles of Nonprofit Organizations stated in regards to "[d]istinguishing between binding and nonbinding pledges . . . . the charity should endeavor to ensure that the documentation resolves doubts."[364]

IV. CONCLUSION: WHY HONESTY IS A BETTER POLICY

When Ebenezer Scrooge seeks to justify prior actions, he asserts that his former partner, Jacob Marley, was "always a good man of business."[365] Marley's morally-reformed ghost wrings his hands and forcefully proclaims that charity, not banking, should have been his primary business.[366] Marley's ghost associates the business of charity with "mercy, forbearance, and benevolence."[367] Likewise, the business of charity should bring out its actors' best qualities including honesty, transparency, altruism, and empathy. If any endeavor should allow people to apply their highest virtues, it should be the business of charity. Unfortunately, the law on enforcing charitable pledges appears to foster deception, ingratitude, uncertainty, and regret, respectively, for four groups participating in the business of charity.

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361. *See* Budig et al., *supra* note 9, at 121 n.432 (discussing *In re* Payson); *see also* Carolyn Clark & Jay W. Swanson, *Promised Gifts to Museum: Monet in the Bank?* PROBATE & PROPERTY, Jan.–Feb. 1992, at 12, 12–16.

362. ALI DRAFT PRINCIPLES, *supra* note 9, at cmt. 6. (quoting *In re* Payson (Metropolitan Museum of Art), 180 N.Y.L.J. 14 (July 26, 1978) (N.Y. Surr. Ct. Nassau Co.)).

363. *In re Payson*, 180 N.Y.L.J. at 14.

364. ALI DRAFT PRINCIPLES, *supra* note 9, at cmt. b.

365. CHARLES DICKENS, *A Christmas Carol, in* A CHRISTMAS CAROL, THE CHIMES, AND THE CRICKET ON THE HEARTH 9, 24 (George Stade, ed., Barnes & Noble Classics, 2004) (1843).

366. *Id.*

367. *Id.*

First, fundraisers usually[368] hide the reality that a signed, standard pledge form is almost always a legally binding obligation.[369] Fundraisers likely have no practical choice but to be sneaky. Because courts enforce ambiguous and uninformative pledge forms in the great majority of situations, there is no financial incentive to honestly disclose. Indeed, including language about legal enforceability and clauses about collection likely would negatively impact the amount of pledges. Donors would be slower to pledge, and their enthusiasm and passion may cool in the course of discussions with attorneys and financial planners.[370] If a fundraiser is passionate about the charity's mission, we would expect the fundraiser to promote the charity's financial interests. An experienced consultant has made a similar observation about the choice between encouraging anonymous giving and selling naming rights; a charity that fails to sell naming opportunities that potentially promote donor self-aggrandizement jeopardizes its charitable mission.[371] Similarly, in the current legal climate, a charity that tells its potential donors they can expect to be sued if they miss a pledge payment may jeopardize its charitable mission, especially because other charities are not being forthright about enforceability.

Second, the charity's directors are in a very difficult position if a donor misses one or more pledge payments under the current legal approach. In the absence of legal rules, the directors might want to consider all the facts and circumstances relating to the donor's failure to contribute, such as whether the donor was told in connection with the original solicitation that the pledge was binding, whether the charity changed its methods of operations, whether the charity has failed to live up to its advertising or reputation at the time the pledge was made, and so forth. Nevertheless, the directors owe a duty to pursue the best financial interests of the charity,[372] and the current legal rules will allow the charity to collect against the donor even if the charity concealed enforceability and took actions that arguably give the donor good cause to renege.

Third, the donors making charitable pledges might appreciate full disclosure so that they know the rules. When making the pledge, if the pledge form was silent or ambiguous on the topic, the donor may have believed the pledge was a mere statement of intent, and that if circumstances changed and the poor could be helped more by the donor giving

368. *See supra* Part II.A (indicating that ninety-five percent of pledge forms fail to clearly address enforceability).

369. *See supra* Part I.B.

370. *See supra* Part II.B.

371. BURTON, *supra* note 137, at xvi–xvii.

372. *See supra* note 10 and accompanying text.

elsewhere, the donor would be free to try to do the most good by reallocating future donations to another charity. Donors, and society in general, should be disappointed if charitable dollars cannot do the most good possible, and tricky charities should not be rewarded for their lack of transparency.

Fourth, the courts have complained bitterly about the role they play in the charitable pledge business. Courts say they have committed "legal heresy"[373] and created "legal . . . fiction."[374]

This Article's empirical evidence indicates that the legal rules fail to promote honesty, transparency, certainty, and fair dealing in the business of charity. This Article's proposal seeks to make the charitable pledging business the sort of activity a reformed Ebenezer Scrooge should pursue.

ADDENDUM: STANDARD PLEDGE FORMS

Note: The pledge forms were gathered in 2015 by visiting the websites of organizations listed in three U.S. News & World Reports lists (law schools, hospitals, and children's hospitals). We did not use any pledge forms that required a representation that we were going to make a contribution or pledge. We excluded forms that anticipated pledges through payroll deductions, or that anticipated perpetual contributions from a credit card. The pledge forms for the institutions listed below are on file with the author. Any parenthetical notes following an institution's name indicates a provision in the form that was unusual or indicated enforceability.

•Arizona State University ("I hereby indicate my intent to make a gift to ASU")

•University of California at Berkeley ("I will use best efforts to, and fully intend to, satisfy my pledged commitment")

•Brooklyn Law School

•Case Western University

•Catholic University of America (you can stop a "perpetual gift" at any time you choose)

373. Danby v. Osteopathic Hosp. Ass'n of Del., 104 A.2d 903, 907 (Del. 1954).
374. Mt. Sinai Hosp., Inc. v. Jordan, 290 So.2d 484, 487 (Fla. 1974).

•Children's Hospital of SW Florida – Capet

•Children's Healthcare of Atlanta Foundation

•Children's Hospital of Wisconsin

•Cincinnati Children's Hospital Colorectal Center

•University of Colorado—Boulder

•University of Denver

•DePaul University (you can cancel your recurring gift at any time by contracting the department)

•Drake University
•Emory University

•University of Florida—College of Agriculture and Life Sciences

•Georgetown University

•Gonzaga University

•Indiana University Foundation (Indianapolis)

•University of Iowa Foundation ("In consideration of the gifts of others")

•University of Iowa Foundation – Kidsight Excellence Fund ("I hereby subscribe and agree to pay . . . .")

•University of Kentucky College of Medicine

•Lewis & Clark College

•University of Miami Agreement of Gift ("the balance shall be a debt of the donor's estate")

•Museum of Science & Industry (Tampa, FL)

•University of North Carolina at Chapel Hill ("Commitment to Carolina")

•University of North Carolina at Chapel Hill – Division of Clinical Laboratory Science

•Northwestern University

•Pepperdine University Women's Swimming and Diving Team Campaign Pledge Commitment 12/1/2009 to 1/31/2010 ("This pledge agreement sets forth the terms and conditions of the underlying commitment and is intended to be binding on the parties")

•University of Richmond ("I agree to make the contributions listed below . . . I may elect to accelerate my contributions")

•University of Rochester Medical Center –Caroline Breese Hall MD Endowment for Infectious Diseases

•San Francisco State University Aaron Anderson Fund

•Santa Clara University-Pause for Coz Scholarship

•Seattle University

•SMU Second Century Campaign ("It is my intention to fulfill this commitment with a gift of $_____")

•South Carolina State University

•University of South Carolina

•St. Jude Children's Research Hospital Sickle Cell Disease Program

•St. Louis University Campaign ("This gift may be publicly acknowledged to encourage the support of others")

•Temple University School of Medicine

•Temple University-Martin Whitaker Jr. Memorial Endowed Scholarship

•University of Tennessee Foundation

•Texas Children's Hospital

•UCLA David Geffen School of Medicine

•Upstate Medical University Foundation

•University of Utah Law School Building Justice Capital Campaign Pledge Form

•University of Virginia

•University of Virginia Class Reunion Pledge Form

•Villanova 2015 Staff Giving Form

•Wake Forest Baptist Medical Center

•Washington & Lee
•University of Washington ("I confirm my intent to contribute a total of . . . .")

•University of Washington School of Law

•Washington University in St. Louis Law School Class Giving Campaign

•Washington University in St. Louis EMBA 43 Pledge Form

•University of Washington Medical School

•University of Wisconsin

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