1992

His to Give; His to Receive; Hers to Trust: A Response to Carol M. Rose

Mary Louise Fellows
University of Minnesota Law School, fello001@umn.edu

HIS TO GIVE; HIS TO RECEIVE; HERS TO TRUST: A RESPONSE TO CAROL M. ROSE

*Mary Louise Fellows**

Professor Carol Rose's essay shows that "exchange depends at some deep level on giving"[1] by identifying how an "initial act of giving ripens into reciprocal exchange"[2] and how contract law is itself the product of "gift-giving."[3] In this regard, Professor Rose provides legal scholars and practitioners yet another analytical technique for taming, if not bursting, the legal categories of contract, gift, and larceny.[4] The purpose of my commentary is to elaborate further on the inadequacy of these legal categories. The need for further elaboration stems, in part, from Professor Rose's initial creation of a taxonomy of gifts, exchanges, and larceny that reinforces, rather than weakens, the traditional legal categories. Professor Rose considers the legal categories noncontextually rather than through the rich detail found in reported cases. What I hope to accomplish is to deter the superficial reader of Professor Rose's essay from having a cynical and contemptuous view of gifts and a romanticized and idealistic view of exchange. Also, I hope to deter the reader from thinking that gifts can be usefully distinguished from exchanges for legal purposes.

To examine the inadequacy of the legal categories of gift and exchange, I am going to center my analysis on two common types of situations: (1) *Donative promise*: one person makes a promise to another, which is unsupported by consideration; and, (2) *Gratuitous services*: one person performs services that benefit another, without having obtained a promise of compensation or any other form of consideration. Cases often arise in which one party makes a promise, the

---

*Everett Fraser Professor of Law, University of Minnesota School of Law. I want to thank Beverly Balos, Jane Baron, and Gerald Torres for their helpful comments on earlier drafts of this article.

1. Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 316 (1992).

2. *Id.* at 315.

3. *Id.*

4. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 32-36, 146-67, 224-28 (1991); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

other party provides services, and the court is asked to decide if the acts are independent and thus gratuitous or part of an integrated bargain. If a court deems the parties' acts not to constitute an exchange, the recipient of a donative promise cannot recover against the promisor and the provider of services has no right to recover against the recipient of the services,[5] unless reliance on the promise can be shown.[6]

Traditional legal analysis easily reconciles these two legal conclusions. The legal concepts of bargain and consideration provide the short-hand explanation for the two results. The law will not use its power to require a promisor to perform a promise unless the promise is a product of the parties' intent to bargain, that is, unless the promisor was induced by something (consideration) into making the promise. The donee's disappointment is understandable and regrettable, but unremediable, because generosity will not be commanded by the law. If a person provides services without first bargaining for compensation, that is, without obtaining a promise to pay (consideration) as a *quid pro quo* for performing the services, the law will not use its power to require the recipient of those services to compensate the donor. The law will not command a donee to pay the donor, but will leave an act of generosity where it finds it.

Professor Rose's essay provides a fresh way of looking at these two types of situations; she identifies generosity "at the center of quite normal kinds of exchanges."[7] She explains that "the bottom line . . . is that somebody, sometime, has to make something like a gift. . . . I just have to trust you, with no very logical reason to expect reciprocity."[8] The essay can be read as a celebration of acts of trust, contract law, and law-givers. Looking at cases involving donative promises and gratuitous services, however, suggest that *who* is doing the trusting and the context under which trusting occurs may matter. These concerns may temper any celebration of acts of trust and the law of contracts.

This commentary first will show, through examination of cases raising the issues of donative promises and gratuitous services, that the court decisions systematically operate against white women and

---

5. *See* Roznowski v. Bozyk, 251 N.W.2d 606, 608 (Mich. Ct. App. 1977).
6. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).
7. *See* Rose, *supra* note 1, at 311.
8. *Id.* at 313.

in favor of white men.[9] The donative promises and gratuitous services cases provide a good analytical framework for demonstrating the complex dynamics underlying the concepts of gift, exchange, and trust. The legal doctrines are easily accessible and the power differentials between the parties are easily identifiable and generally uncontestable. This commentary then will extend its gender-based analysis of donative promises and gratuitous services to show how Professor Rose, through her analysis of gift, exchange, larceny, and trust, may reinforce power differentials embedded in United States society. The crucially important message I hope to convey is that, regardless of how apparently benign the doctrine or legal category, when it is applied in a setting riddled with inequalities that are left unacknowledged and unscrutinized, it is likely to aggravate, rather than alleviate, the inequalities.[10]

Although the bargain and consideration explanation has provided generations of law students comfort and predictability, the results for donative promises and gratuitous services are unsettling and worth exploring. Why does the law enable a person who makes a generous promise to change her or his mind, but prevent a person who makes a generous transfer of services from having a change of heart and demanding payment? One answer to the question is that courts are sometimes uneasy about resting on doctrinal logic and manipulate the doctrine or develop other dissident doctrine to avoid the prescribed results.[11] To hope to prevail under these alternative doctrines, the donee of a donative promise and the donor of services must act in trust. In the donative promise situation, the promisee must believe the promisor and take actions in trust that the promisor will perform in the future. In the gratuitous services situation, the donor must take the first step in trust that she or he will get a reciprocal relation-

---

9. The cases cited uniformly fail to indicate the race of the parties. Discrimination against women and men of color has kept them off state benches and, therefore, it is a fair assumption that the opinions were probably written by white judges. It also is a fair assumption that these white judges failed to mention the race of the parties because they were white and, therefore, from their standpoint, the race of the parties was not viewed as a relevant factor.

10. Professor Rose acknowledges the effects of power differentials in her recently published article, Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992).

11. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a & b (1979) (discussing express, implied, and quasi-contracts); *id.* § 90 (describing promissory estoppel).

ship going.[12] The central issues I want to address are *who* does the trusting and *why* are they trusting.

First, consider cases having to do exclusively with donative promises and the question of whether the promisee relied. Many of the cases characterizing the communications between the parties as donative promises have one common feature: the promisor can dictate the terms of the promise because of the parties' relative economic wealth or familial relationship or both.[13] This feature raises two related questions: (1) Are promises made in an unenforceable manner because promisors have the power to avoid bargaining and to force promisees to accept donative promises? and (2) Are promisees *choosing* to trust donative promises or are their actions an inevitable consequence of the power differential between the parties; that is, do they have no alternative but to trust the promisor?

Ervin v. Ervin[14] is a good case for examining these questions. A father, responding to an inquiry by his divorced wife and mother of his child, wrote a letter to her stating in part:

> Concerning saving for Michael's college education — as his father, of course I'll see that he gets to college. How I handle my finances to achieve this is strictly my affair. An inflexible arrangement such as you suggest is unacceptable. . . . [Y]ou have nothing to be concerned about as to Michael's being able to attend college, even if I have to borrow the money.[15]

Twelve years later the father petitioned the court to terminate his child-support payments and resisted his divorced wife's motion to increase her alimony to help pay for their son's college education.[16] At the time of this hearing, the father had a weekly net income of approx-

---

12. *See* Rose, *supra* note 1, at 313.

13. *See, e.g.*, Trantham v. Trantham, 252 S.W.2d 401, 402 (Ark. 1952) (describing agreement by father, evidenced by promissory notes, to pay his son $500); Dougherty v. Salt, 125 N.E. 94, 94 (N.Y. 1919) (explaining how "a boy of eight years, received from his aunt, a promissory note for $3,000, payable at her death or before"); Alden v. Presley, 637 S.W.2d 862, 863 (Tenn. 1982) (noting that Elvis Presley made a promise to his fiancee's mother that he would pay all of her expenses incurred in a divorce proceeding, advance her the money to purchase her husband's equity in the couple's home, and liquidate the remaining mortgage indebtedness on her home).

14. 458 A.2d 342 (R.I. 1983).

15. *Id.* at 343.

16. *Id.*

imately $650 and $30,000 of investments. The mother had weekly income of only $175.[17] The court followed precedent and held that, in the absence of a binding agreement concerning a child's college education, a father's responsibility for the support of his children terminates once they attain the age of majority.[18] Furthermore, even if the contents of the letter constituted a promise to provide for the son's college education, "the evidence in the record was completely insufficient to support any allegation that the plaintiff detrimentally relied on the promise."[19]

The mother's inquiry about her son's college education and the father's reply apparently occurred after they were divorced. Did her legal and economic situation make it difficult for her to engage her divorced husband in a bargain? Did his letter suggest he understood that? Perhaps her only hope was to persuade her former husband to plan for their son's education. When he resisted by saying "trust me," she might have been without recourse. After receiving his "assurances" in the letter, all she could do was what was otherwise expected of her — to continue to raise her child and provide him the necessary support and encouragement to continue his education. Those actions did not constitute sufficient reliance to trigger the law's enforcement of the promise because they were not taken as a result of the promise, but because she loved her child.[20]

Some would argue this decision was correct. The mother's problem was a consequence of her failing to include a provision for college education for her child in the original divorce settlement, and the court did nothing more than give the father the benefit of his earlier negotiated contract. However, a dynamic similar to that which enabled this father to say "no" politely to a request to plan for his son's college

---

17. *Id.*

18. *See id.* at 344; Calcagno v. Calcagno, 391 A.2d 79, 82 (R.I. 1978).

19. *Ervin*, 458 A.2d at 345.

20. The following passage from the court's opinion reveals the narrowness of its inquiry on the question of reliance:

> There was no testimony to indicate that the plaintiff enrolled her son because of the defendant-petitioner's letter. Therefore, the plaintiff did not show that she suffered an injustice because of any good faith reliance on the defendant-petitioner's alleged promise. Although her income and expenses showed that she was unable to provide for the cost of the son's education, this alone was insufficient to meet her burden.

Id. at 345.

education post-settlement may have been operating at the property settlement. To rely on the property settlement to determine the correctness of this decision is essentially a call for blind faith in the fairness of bargaining and contracting. Without knowing more about the circumstances surrounding the divorce and the relative financial situations of the mother and father at the time of the divorce, fairness is impossible to judge. What is clear is that the court relied on legal rules to leave in place whatever power imbalance existed between the parents. This failure to inquire operated to the detriment of the mother and the child.

Ricketts v. Scothorn[21] provides an interesting contrast to *Ervin*. Although it held the promisor to his promise, by finding the promisee had relied on it, its analysis in many ways reinforced the power imbalance in the promisor's and promisee's relationship. In *Ricketts*, a grandfather executed a demand note for $2000 in favor of his granddaughter. According to the testimony of witnesses, the grandfather gave it to her saying, "I have fixed out something that you have not got to work any more."[22] Upon receipt of the note, the granddaughter trusted that her grandfather would keep his promise and she quit her job as a bookkeeper, for which she was earning $10 per week.[23] She stopped working for a little more than a year, but her grandfather paid only the interest on the note, not any principal.[24] Eventually, she secured another bookkeeping position with the help of her grandfather.[25] The grandfather died without having paid the balance of the note, apparently because he did not have the cash to do so.[26] The court held that the grandfather's estate was equitably estopped from asserting lack of consideration because the grandfather's promise induced a change of position by his granddaughter.[27] Although the court found for the granddaughter, the decision underscores the grandfather's control and power and her lack of it.

The opinion first considers whether the grandfather and grand-

21. 77 N.W. 365 (Neb. 1898).
22. *Id.* at 366.
23. *Id.* at 366-67.
24. *Id.* at 366.
25. *Id.*
26. *See id.*
27. *Id.* at 367.

daughter entered into an enforceable contract and decides that they did not. It found that:

> [The grandfather] made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity, and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle as she might choose. The abandonment of [the granddaughter] of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit, being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named.[28]

At the same time that the court described the granddaughter as an autonomous actor capable of making a choice between work and idleness, it denied that she actually bargained for the note by choosing not to work. Rhetorically, this portrait functions to flatter the grandfather as a loving and generous man whose only purpose was to "place [his granddaughter] in a position of independence."[29] It also functions to conceal the fact that the grandfather was acting on behalf of himself.

Having denied that she was in fact an equal bargaining partner with her grandfather, the court then decided that the promise induced her to quit her job and was, therefore, enforceable under equitable estoppel theory.

> Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect, he suggested that she might abandon her employment, and rely in the future upon the bounty which he promised. He doubtless desired that she should give up her occupation, but, whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift.[30]

---

28. *Id.* at 366.
29. *Id.*
30. *Id.* at 367.

Because the court found for the granddaughter under equitable estoppel rather than contract, the generosity of the grandfather remains unquestioned. Notwithstanding the court's reference to her "independence," it treated the granddaughter as a dependent and under the influence of her grandfather.

The court's analysis left the grandfather's reputation intact as a generous man interested in providing for his family, but the court could have easily marshalled the facts to show the grandfather to be a bad actor. For some reason it bothered the grandfather that his granddaughter was working. It may have been because her working indicated publicly that he was not financially able to provide for his family, or it may have been because he knew she was unhappy having to work, or both. In any case, he was willing to intervene in her life by offering her financial security, which it appears he did not have the means to provide. In other words, the facts indicate that he may have attempted to wield financial power that he appeared to, but did not, have as a means of securing a position of respect within his family and community. Presumably, he recognized his misplaced pride when he helped his granddaughter secure another job a year after he executed the note.

A mother's trust of a promise-making father in *Ervin* proved to be a futile act of desperation. A granddaughter's trust of her grandfather in *Ricketts* also proved to have been misplaced. However, the granddaughter in *Ricketts* found legal protection.

Traditional analysis would say the cases are reconcilable on the basis that an act of trust (reliance) is identifiable in *Ricketts* and unidentifiable in *Ervin*. The different results can also be explained on a slightly less traditional basis by arguing that the court manipulated the doctrines to further what they believed to be the promisor's donative intent.[31] In *Ricketts*, the court apparently was convinced that the grandfather wanted his granddaughter to receive the money. In *Ervin*, the court had the father's clear statement that he did not want to be under any obligation to pay for his son's college education.

An even less traditional analysis that reconciles the cases explains the courts' actions as resulting from the courts' failure to scrutinize the power differentials between the parties. Instead of considering

---

31. *See* Mary Louise Fellows, *Donative Promises Redux*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 27, 36-37 (Peter Hay & Michael Hoeflich eds., 1988).

the women's actions in the context of the power imbalance, the courts rely on their expectations of female behavior to explain the women's acts in these cases.[32] However, the courts' expectations are not necessarily shared by the women promisees in these two cases or by most other women. Nor do these expectations necessarily reflect the reality of most women's lives. Attributing to the courts this stereotypical thinking about women's acts helps reconcile the cases discussed above.

In *Ricketts*, the court likely would expect, especially in the late nineteenth century, that a white middle-class woman would welcome the opportunity to be idle and dependent upon her grandfather's generosity.[33] The granddaughter in *Ricketts* acted in a manner consistent with those expectations. Her actions happened to qualify as detrimental reliance, and, therefore, she prevailed against her grandfather's estate.

In *Ervin*, the court likely would expect a mother to love, support, and maintain custody of her son regardless of any promises made by his father.[34] Some evidence that this stereotyping may have occurred is found in what the court did not say. It did not explore the possibility that the mother's continuing efforts to rear her child and to prepare him for college were done in reliance on the father's promise to pay for his college education.[35] In addition, it never acknowledged the peculiar context in which reliance had to occur in this case. The mother had already accepted primary responsibility for rearing the child. The benign doctrine of reliance would seem to operate unfairly if it meant requiring her to somehow manifest an even greater commitment to the child to demonstrate her trust in the father's promise.

---

32. *Cf.* Rose, *supra* note 10, at 442. Professor Rose states:

> Louise [a hypothetical wife] is looking more and more stuck: her willingness to take the short end of the stick — or, more accurately, the belief in her willingness to do so — ultimately puts up a barrier to her independence and further limits her alternatives. The belief that she will stand back and make sacrifices for others finally may mean that she has little choice but to do so, whatever her real taste may be.

Id.

33. *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 47-49 (1984) (discussing the development of the "cult of the lady" in the nineteenth century).

34. *See* ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 41-55 (1986).

35. To be fair, one must admit that the mother probably did not make this argument to the court.

The following review of several cases involving gratuitous services is useful in furthering an understanding of how power differentials based on gender and related gender-based stereotyping operate systematically against women promisees and interferes with their ability to recover against donative promisors. *Dewein v. Estate of Dewein*[36] helps clarify how stereotypical thinking might influence a court in determining whether a promisee has taken sufficient actions in trust. In *Dewein*, an adult woman, who was trained as a nurse, lived with her parents and looked after them and their property for twenty-seven years until their deaths.[37] Her brother died a year and a half after their mother, the last surviving parent.[38] The sister made a claim against her brother's estate for $10,000 based on a statement he had made to her about five months before their mother's death.[39] At that time he said: "Sis, I am so greatful [sic] you are taking care of mother, and I am certainly going to see you are taken care of for life, you deserve it."[40] The lower court denied the claim based on this promise and the appellate court affirmed the judgment.[41] The appellate court held that the quoted remarks lacked the essential elements of a contract.[42]

> Certainly, the quoted remarks regarding some provision for the care of plaintiff in her declining years, so that she need not worry about the future, are very far from an agreement to pay the reasonable value of nursing services over a period of 27 years. Doubtless the persons present were assuming that plaintiff would continue to care for the woman [their mother] . . . . Yet the [brother's] statement contained no such condition nor any request in that regard, nor was there any indication by plaintiff that she would do so because of the [brother's] promise. Plaintiff did not give up any proposition of her own, nor change her position in any way, but simply continued for a few more months that which she had been doing of her own accord for many years.[43]

---

36. 174 N.E.2d 875 (Ill. App. Ct. 1961).
37. *Id.* at 876.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 876-77.

The court went on to hold that the doctrine of promissory estoppel was inapplicable:

> The testimony in this case fails to support the claim that plaintiff "acted in reliance upon the [brother's] promise to her." There is no indication that she had ever intended to act otherwise than the way she did. Surely, there can be no presumption or inference that after living with her mother for so many years, she was now about to desert her in the time of her greatest need, but was persuaded to stay "in reliance on promises made to her."[44]

The court seems to have viewed the daughter's life of nursing and managing the property of her parents as a natural state of affairs. That viewpoint easily led the court to deny that she relied on her brother's promise by continuing to perform these duties after he promised her future financial security. The court seems to go even further and suggests that her continuing services to her parents were expected of her.

In this regard, the decisions in *Ervin* and *Dewein* can be subjected to a similar analysis. The opinions can be explained by reference to stereotypical expectations about how a mother is supposed to care for her son and a daughter is supposed to care for her parents. In *Ervin*, the mother's love, support, and care for her son apparently were not considered acts in reliance on the son's father's promise to pay for the son's college education, but were expected. In *Dewein*, a daughter's love and care for her parents apparently were not considered acts in reliance on her brother's promise to provide her financial security, but were expected. Is it possible that the mother in *Ervin* and the sister in *Dewein* manifested trust in their respective promisors in a manner that should have been recognized as reliance by the courts? Two other cases suggest that the answer to this question is yes.

First, consider the court's analysis in *Klockner v. Green*.[45] It not only suggests a way to find detrimental reliance in *Ervin* and *Dewein*, it also reinforces the observation that the doctrine of reliance, as applied by the courts, operates systematically against women. In *Klockner*, a stepson and his daughter attended to the needs of his

---

44. *Id.* at 877.
45. 254 A.2d 782 (N.J. 1969).

stepmother after his father's death.[46] He would visit her frequently during the week and his daughter would spend nights with her stepgrandmother when the latter was afraid to be alone and would accompany her on trips.[47] Some time after these services had been provided, the stepmother told her stepson that she wanted to compensate him and his daughter for their help by leaving them her estate.[48] The evidence indicated that she failed to execute a will so providing because of her superstitions about will executions.[49]

Testimony showed that the stepson and stepgranddaughter would have continued to perform the services for decedent even if she had not made the promises to compensate them.[50] The court held that although performance by the stepson and stepgranddaughter "need not have been induced solely by the offer of compensation. . . . We . . . find no reason on the present record for penalizing plaintiffs because of their professed willingness to serve the widow."[51] It further held that specific performance was an appropriate remedy because of the uniqueness of their services:

> Plaintiffs were not related to decedent and, therefore, had no obligation, either morally or legally, to serve her as they did. Nonetheless, in addition to the numerous instances when plaintiffs rendered services to decedent, they also bestowed upon her the care, affection, society and companionship one would expect from a close blood relative.[52]

Can the court's receptiveness to the stepson's and stepgranddaughter's claims be explained through gender-based stereotyping? Perhaps the court viewed the stepson's attentiveness to a stepmother to be *unexpected* and, therefore, worthy of compensation. If so, this stereotyping worked to the advantage of the promisee in this case in contrast to its working to the disadvantage of the promisees in *Ervin* and *Dewein*.[53]

---

46. *Id.* at 783.
47. *Id.*
48. *Id.*
49. *Id.* at 784.
50. *Id.* at 784-85.
51. *Id.*
52. *Id.* at 785.
53. Another factor that undoubtedly was operating was that the court had substantial evidence that enforcing the promise was consistent with the promisor's intent. In this regard, *Klockner* is similar to *Ricketts*. *See supra* text accompanying note 31.

The decision in *Teason v. Miles*[54] also provides an interesting contrast to *Ervin* and *Dewein*. In *Teason*, a son remained on the family farm after his father's death.[55] He continued to work on the farm as well as to maintain outside employment.[56] He paid no room or board and kept all the farm profits, but he also paid for all the expenses of the farming business and most of the household expenses for his mother and himself.[57] The court held that the mother's oral promise to give him a part of the farm if he remained with and cared for her during her life was enforceable.[58] The court did not inquire as to the likelihood of the son abandoning his mother and the farm in the absence of this promise.[59] In fact it emphasized that "in fact, [the son] remained with and cared for his mother until she died."[60] One explanation for the court's enforcement of the promise is that the evidence showed that the mother probably wanted her son to receive a part of the farm.[61] A competing explanation is that a son is not expected to care for his mother to his financial detriment.[62] *Klockner* and *Teason* show how gender-based stereotyping might be operating to the advantage of men promisees and, in contrast, *Dewein* shows how gender-based stereotyping might be operating to the disadvantage of a woman promisee. At the same time, *Klockner* and *Teason* show how the courts in *Ervin* and *Dewein* could have used the doctrine of reliance on behalf of the promisees.

The case of *In re Schoenkerman's Estate*[63] provides yet another possible theory on which to find reliance. In this case a woman and her daughter moved to another city and into the home of the woman's son-in-law at his request, after the death of his wife.[64] The son-in-law asked his mother-in-law to take care of him and his children.[65] After the mother-in-law had taken care of the son-in-law's home and children

54. 118 N.W.2d 475 (Mich. 1962).
55. *Id.* at 476.
56. *Id.* at 478.
57. *Id.*
58. *Id.* at 478-79.
59. *See id.*
60. *Id.* at 478.
61. *See supra* text accompanying note 31.
62. *See supra* text accompanying note 32.
63. 294 N.W. 810 (Wis. 1940).
64. *Id.* at 811.
65. *Id.*

for ten years, the son-in-law executed a promissory note to his mother-in-law and another to his sister-in-law.[66] He died a year later without having liquidated the notes.[67] The court held that the notes were enforceable stating:

> [The notes] recite that they were executed for "value received." There is a presumption that they were given for a consideration. As a moral obligation existed to pay for the great excess of value of the services received by the [son-in-law] over the value of the board and lodging received from [him] by the claimants, that moral obligation will be presumed to be the consideration of the notes. The notes therefore became a legal obligation, as distinguished from a mere unexecuted promise to make a gift of money.[68]

In some respects, this case is a counter-example to the stereotype theme otherwise developed in this commentary. The court ruled in favor of women promisees, and rewarded their care and nurturing of the son-in-law's family rather than viewing it as their obligation. I suggest that three critical facts might have kept the court from treating these women's services as within the arena of expected, and therefore noncompensable, behavior. First, the mother-in-law moved to another city upon the son-in-law's request. Second, whatever might be expected behavior for a mother-in-law and grandmother, it is unexpected for a sister-in-law and aunt to make this level of sacrifice. Finally, the stereotype of an interfering and critical mother-in-law was dislodged by this family's situation, and thus the court could see the reality of what these women had done over the years.

This case is very instructive in answering the question posed above: Is it possible that the mother in *Ervin* and the daughter in *Dewein* manifested trust such that courts could recognize their reliance? The court in *Schoenkerman's Estate* took into account acts of the promisee that occurred prior to the promise to determine whether the promisee detrimentally relied. At first glance, that idea might seem illogical and absurd. However, in considering the dynamics within a family, the economic differentials between the parties, and the selfless and

66. *Id.*
67. *Id.*
68. *Id.* at 812.

nurturing role accorded women, an act of reliance and trust before the articulation of a promise makes sense.

Is it so unlikely, within the familial setting, that the mother in *Ervin* might have trusted that if she assisted her son in a variety of ways to be successful in school, his father might then view her as having *earned* his assistance in their son's college education? Similarly, is it so unlikely that the daughter in *Dewein* might have trusted that if she cared for her parents well, her brother might believe that she *earned* the right to a secure financial future? Within the roles available to these women and within the context of their love for the relatives they cared for, they can be understood to be maximizing the possibility of being treated fairly by doing what was expected of them and more. What the courts in these cases failed to appreciate is that the power differential between family members creates significant pressures for the least powerful family member to act in trust rather than on rights. On the other side, the courts failed to appreciate that the promisors, the father in *Ervin* and the brother in *Dewein*, had no need to bargain or even to create an incentive by expressing their gratitude early through a donative promise, because the women in their lives were likely to do what the men wanted done anyway. Taken together these cases suggest that, within familial and hierarchal settings, the courts' refusal to scrutinize the inequalities embedded in the parties' relationships serves to aggravate those inequalities. In addition, these cases suggest that the failure to scrutinize the inequalities creates the serious risk that gender bias will operate in what might otherwise appear to be a neutral application of the concept of reliance.

One question which arises from application of this power imbalance/stereotyping analysis to Professor Rose's insights is whether finding trust and generosity in exchange may be all good. Although all the cases discussed above involve family settings, and Professor Rose's essay mainly concentrates on market exchanges, it would seem that the need for inquiry into power differentials is the same. If the party who is providing the ingredient of trust to get the exchange relationship started is continually shown to be the party under the greatest economic stress, then the act of trusting may be little more than an act of surviving. The crucial empirical inquiry is whether economically strong parties consistently use their relative power on their own behalf or on the behalf of their counterparts to an exchange. If economically strong players generally act like bullies, the investigation must then turn to how trusting and generosity in exchange operate as market coping strategies.

A second, less direct, implication of the power imbalance/stereotyping analysis in considering Professor Rose's imaginative approach to

gifts, exchanges, larceny, and trust involves her general approach and her particular explanatory techniques. The inequality analysis shows the danger of discussing legal concepts outside of any context. One possible risk of abstraction is that it leaves unchallenged existing social hierarchies. For example, throughout the piece Professor Rose uses "us" and "we" and "our" when referring to understandings, imaginings, believings, and sayings.[69] On the one hand, that language can be seen as inclusive and as conveying the message that each person that is subject to the law has a stake in designing and controlling it. On the other hand, that language obscures real differences about how the law operates among dissimilar persons in diverse contexts.

An example of how abstractions can leave power differentials among the parties largely unexamined is found in the following passage:

> [The larger subject of contract law] includes the vast majority of contracts, where promises are indeed more or less equal and reciprocal. Thus by contrast to the category of gift, which can be seen as dissolving almost completely into exchange on the one hand or larceny on the other, the category of exchange seems to be a thoroughly sturdy one in legal thinking. Only the unusual and idiosyncratic *un*equal exchanges fade off into the categories of gift or theft.[70]

For comparison, consider the following description of a "sturdy exchange":

> On my street there are lots and lots of mercenary mothers, black women mostly, pushing white children in strollers, taking them to and from school. They are modern mammies who give up their own families to tend to the modern master's brood, just as slave mothers became mothers to whatever child was at hand. The black nanny is the direct descendant of the mammy described by W.E.B. DuBois "as 'one of the most pitiful of the world's Christs. . . . She was an embodied Sorrow, an anomaly crucified on the cross of her own neglected children for the sake of the children of masters

---

69. *See, e.g.*, Rose, *supra* note 1, *passim*.

70. *Id.* at 309.

71. WILLIAMS, *supra* note 4, at 20 (quoting Eugene Genovese, *Don't Mess With Mammy*, WASH. POST, Oct. 27, 1974, at C5 and Theresa Laurino, *I'm Nobody's Girl*, VILLAGE VOICE, Oct. 14, 1986, at 18).

> who bought and sold her as they bought and sold cattle.'" This exploitation persists today, in the familiar image of grossly underpaid but ever-so-loved black female "help." The going rate for black female full-time live-in babysitter/maids in New York City is as low as $150 a week. "Haitians come cheaper. Their starting salary ranges from $100 to $125 a week. . . . A Hispanic woman . . . is likely to start at $200 a week, since she's white."[71]

These common childcare contracts make it more difficult to have confidence in Professor Rose's claim that contract law "assures a regime of greater wealth and gains through exchange."[72] "[P]romises are indeed more or less equal"[73] may not mean, as Professor Rose suggests, that the marketplace contains instances of equality. Instead, the market price may only reflect inequalities embedded in the society and its marketplace.

Further, Professor Rose's discussion of the Native American practice of "potlatch"[74] exemplifies her inclination toward the theoretical and abstract and her failure to challenge existing social hierarchies. She relies on the scholarly works of anthropologists and economists to explain potlatch. The effect left by her references and her discussion is that Native Americans and their practices are archaeological mysteries. Left unacknowledged within this discussion is that Native Americans are vigorously maintaining the vitality of their respective tribal cultures. Also left unacknowledged is the possibility that a non-Native American scholar, regardless of discipline, may easily misunderstand and misinterpret a practice that has its source outside the legal and economic framework in which it is being studied. This acknowledgment would have served to underscore the differences and challenge Eurocentric and econocentric thinking.

I want to make clear that I am not suggesting that Native Americans should not have been included in the essay. What I am saying is that, in an essay about gift, exchange, larceny, and trust, a discussion of the treaties between the United States and the sovereign tribes would have been more useful. That investigation could focus on the element of trust represented in the making of promises through these treaties. The experience of the United States and the tribes living

---

72. Rose, *supra* note 1, at 314.
73. *Id.* at 309.
74. *Id.* at 299.

under the treaties also has important implications for the "law-giving" phenomenon that Professor Rose identified as being located in exchange. Treaty promises broken under the color of United States law raise questions about the make-up of the community who makes the laws and the make-up of the community who is subject to those laws. In sum, an analysis of treaty making and treaty breaking might have gone far toward reconfiguring Professor Rose's conclusions and, ultimately, shifting the legal foundations upon which gift, exchange, larceny, and trust are built.[75]

In my view, one of the most important reasons for continued reexamination and reconstruction of legal categories is that, in the shifting of legal ground, opportunities arise for women and men who identify themselves as members of outsider groups to use the law on their own behalf.[76] To the extent a legal change signifies a legal response to the needs of an outsider group, over time that legal response is likely to prove inadequate. It is likely to be construed and applied in a manner that reinforces existing social categories. Therefore, it will fall short of meeting its full potential of making a difference for members of the targeted outsider group. By continuing to reexamine legal categories, legal scholars, and Professor Rose in particular, play a significant role in creating the perception that law is flawed and fluid. They help to keep those of us who are part of the legal system and those of us who live under the system from relying merely on existing law. They keep us receptive to further changes.

From the outsider-opportunities perspective, Professor Rose's essay is not as useful as it might be. On her way to showing how one legal category "leaks" into another she may have ossified the categories. The effect of that ossification is that the outsider opportunities provided by her analysis are necessarily circumscribed. In addition, by not fully exploring the complex power dynamics that provide the context for these legal transactions, Professor Rose misses an occasion to challenge head-on existing social hierarchies.

---

75. *See generally* WARD CHURCHILL, FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS (M. Annette Jaimes ed., 1992) (focusing on Euroamerican techniques used to obliterate Native American culture and people or to assimilate them into the Euroamerican society).

76. *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989) (the term "outsider" is borrowed from this work).