

# “LAW &” GRATUITOUS PROMISES

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*The refusal to enforce gratuitous promises absent consideration is one of the foundations of contract law. The rationales with which courts and scholars supported this traditionalist view—the evidentiary, cautionary, and channeling functions of consideration—have been framed and analyzed in terms of law and economics. However, even when framed in economic terms, these traditionalist arguments are less than persuasive because they assume that certain factors that limit rational human decision making apply only to gratuitous promises and not bargained-for commercial promises.*

*This article attempts to analyze the refusal to enforce gratuitous promises from a behavioral law and economics perspective. Behavioral law and economics tends to show that the same limits on rational human decision making that apply to gratuitous promises also apply to bargained-for commercial exchanges. The article argues that although behavioral law and economics analysis of the traditional arguments does not support differential treatment of gratuitous and bargained-for promises, it fails to provide a rationale for overturning the common law’s refusal to enforce gratuitous promises.*

## I. INTRODUCTION

The “first great question of contract law” is why some agreements are enforced and others are not.<sup>1</sup> Professor Posner has claimed that economic reasoning provides the best approach for analyzing such questions, and that cognitive and emotional considerations that lie near the heart of behavioral law & economics (BLE) should be discarded.<sup>2</sup> This article evaluates both the traditional analysis of this great question, which predated law & economics (LNE), and subsequent economic analyses. It

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1. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 1 (1979).

2. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 46 (2000) (claiming “that rational choice theory can shed light on social norms by focusing on the reputational source of behavioral regularities to the exclusion of their cognitive and emotional sources”). Because another Posner, Richard A., has many important things to say about the topics addressed in this article, I intend to refer to Eric Posner as “Professor Posner” and Richard Posner as “Judge Posner.”

then contributes one of the first BLE analyses of gratuitous promises in an attempt to evaluate the accuracy of Professor Posner's assertion.<sup>3</sup>

For most of its existence, legal commentary thrived without the use of ampersand-based scholarship. Then, in an arguably salutary development, scholars began importing into legal analysis the wisdom of other disciplines. Soon, law & economics, law & psychology, law & literature, law & evolutionary biology, and a raft of related interdisciplinary approaches to legal analysis erupted. Law & economics is no doubt the most influential of all these interdisciplinary approaches.<sup>4</sup> Wielding such simplifying economic assumptions as rational choice theory (RCT) and the efficient market hypothesis (EMH), LNE scholars have cut a wide swathe through most legal disciplines over the past thirty years, often adding insight and beneficial rigor to previous analysis of important issues. Although only a decade or so old, behavioral law & economics<sup>5</sup> has achieved a fair degree of prominence itself, attempting to replace some of LNE's assumptions regarding human behavior with more descriptively accurate premises. BLE draws its inspiration not from simplifying assumptions but from the empirical findings generated by behavioral psychology, cognitive psychology, evolutionary psychology, cognitive science, and related fields.<sup>6</sup>

Before LNE and BLE arrived on the scene to supplement traditional analysis, the general rule that mere gift promises will not be enforced because they lack consideration evolved, and remains, in American law.<sup>7</sup> Of course, two major exceptions—charitable subscriptions<sup>8</sup> and

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3. This article is a substantial extension of the only other BLE examination of this issue of which the author is aware. See LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION ch. 3 (2006) (chapter written by this author).

4. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 142 (2003) (terming law & economics "the dominant theoretical paradigm for understanding and assessing law and policy").

5. This movement has several other names including behavioral decision theory (my personal favorite) and legal decision theory.

6. This article draws a fairly clean distinction between LNE and BLE. Most analysis of gift giving by economists has been done by LNE scholars in the traditional economic mold described herein. However, as economists increasingly adopt the experimental methods of psychologists and other social scientists, see, e.g., VERNON L. SMITH, PAPERS IN EXPERIMENTAL ECONOMICS (1991), coauthor with researchers from these other fields, see, e.g., Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 EVOLUTION & HUM. BEHAV. 153 (2003) (authors include economists and an anthropologist), and as behavioral economics, see, e.g., ADVANCES IN BEHAVIORAL ECONOMICS (Colin F. Camerer et al. eds., 2004), and neuro-economics, see, e.g., Ernst Fehr et al., *Neuroeconomic Foundations of Trust and Social Preferences: Initial Evidence*, 95 AM. ECON. REV. 346 (2005), gain increasing purchase among academic economists, that distinction will become less and less clear.

7. 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, 1810 (2003).

8. See RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1979). The strong enforcement language of section 90(2) has been expressly adopted by only one jurisdiction, but the general rule remains, in varying forms from jurisdiction to jurisdiction, that gratuitous promises to charities will generally be enforced. See James E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations*, 36 GEO. WASH. INT'L L. REV. 317,

promises fulfilling the elements of promissory estoppel<sup>9</sup>—and several minor exceptions<sup>10</sup> significantly qualify this oft-stated rule. Absent one of these exceptions, a gratuitous promise will not be enforced, even if it is indisputable that its maker well considered and seriously intended it.<sup>11</sup> But *should* the notion of exchange that underlies the consideration doctrine “set the boundaries of the law of contract?”<sup>12</sup>

Because the question of whether gratuitous promises should be enforced lies at the very core of contract theory, it provides a useful theatre for comparing and contrasting the contributions and implications of law & economics analysis and behavioral law & economics.<sup>13</sup> In the debate regarding why the legal system refuses to enforce gift promises and whether it should do so, four primary questions have been asked:

- First, why do people make gifts?
- Second, might people wish to make enforceable gift promises?
- Third, are gifts and gift promises valuable?
- Fourth, should the law enforce serious, but unrelieved-upon, gift promises to entities other than charities?

The traditional, LNE, and BLE schools of thought all have contributions to make to the analysis of these questions.

## II. WHY DO PEOPLE MAKE GIFTS?

### A. *Traditional Analysis*

Traditional analysis has paid little attention to the *why* of gift giving. People in all societies everywhere have given gifts to some extent,<sup>14</sup> and traditional analysts have taken it as a given that gifts will be made. In the

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351 (2004) (noting that American courts “have shown a willingness to construe liberally the requirement for consideration in an effort to enforce promises to charity”).

9. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

10. A minor exception is promises made under seal. See *id.* § 95. Such promises can still allow enforcement of some gift promises in England, but promises made under seal are largely extinct in the United States. See Kevin Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 314 (2002).

11. In America, this rule comes partially from the courts that have demanded consideration’s presence in order to enforce promises, and partially from state legislatures that have abolished the use of a seal as a formal mechanism for making gift promises enforceable. See MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 170 (1993) (noting this change in the law).

12. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 135 (2d ed. 1977).

13. See Eisenberg, *supra* note 1, at 1 (noting that gratuitous promises “present in an easily accessible way many of the important and difficult issues that unfold from” the question of which promises the law should enforce).

14. See MAURICE GODELIER, *THE ENIGMA OF THE GIFT* 1 (1999) (noting that “gift-giving exists everywhere, even if it is not the same everywhere”).

classic articles on the enforceability of gift promises,<sup>15</sup> authors have given short shrift to the question “why?”

### B. Law & Economics

Economists have also paid relatively little attention to gift giving.<sup>16</sup> But LNE scholars who have analyzed gift-giving activity have necessarily confronted the “why” question because, on its face, giving a gift or making a gratuitous promise seems inconsistent with the “first principle of Economics . . . that every agent is actuated only by self interest.”<sup>17</sup> That man is a rational, self-interested wealth maximizer is the essence of rational choice theory, a core assumption of LNE analysis.<sup>18</sup> It seems irrational for self-interested, wealth-maximizing *homo economicus* to give gifts.<sup>19</sup> For that reason, the fact of gift giving and existing gift-giving practices “are a little puzzling to economists.”<sup>20</sup>

But clearly gifts are given, so an economic explanation must exist, and economists have exhibited some creativity in this regard. Some

15. See, e.g., Eisenberg, *supra* note 1; Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

16. DAVID HEMENWAY, PRICES AND CHOICES: MICROECONOMIC VIGNETTES 59 (2d ed. 1988) (noting that “[e]conomists have largely ignored the phenomenon of gift giving”); Viviana A. Zelizer, *Enter Culture*, in THE NEW ECONOMIC SOCIOLOGY: DEVELOPMENTS IN AN EMERGING FIELD 101, 116 (Mauro F. Guillen et al. eds., 2002) (illustrating the point that economists have generally “excluded cultural processes from their vision” by pointing to the process of gift giving).

17. FRANCIS Y. EDGEWORTH, MATHEMATICAL PSYCHICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES 16 (1881), quoted in Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 317 (1977).

18. See Gregory S. Crespi, *Does the Chicago School Need to Expand Its Curriculum?*, 22 L. & SOC. INQUIRY 149, 150 (1997) (observing that the two core assumptions of law & economics are that decision makers are rational actors and that the appropriate goal of policy is wealth maximization); see also DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 8 (2000) (“The fundamental assumption of the economic approach, to law and everything else, is that people are rational.”).

19. See Robert H. Frank, *Departures from Rational Choice: With and Without Regret*, in THE LAW & ECONOMICS OF IRRATIONAL BEHAVIOR 13, 22 (Francesco Parisi & Vernon L. Smith eds., 2005) (noting that “[m]oral sentiments and other non-self-interested motives figure prominently in economic and social life,” but “[t]he traditional law and economic model ignores such motives”); Bradley J. Ruffle & Todd R. Kaplan, *Here’s Something You Never Asked For, Didn’t Know Existed, and Can’t Easily Obtain: A Search Model of Gift Giving* (Jan. 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=257616> (noting that “[f]or economists gift giving presents a puzzle: it persists in modern society despite the claim that in-kind gifts are necessarily inefficient and welfare reducing”); see also KRISTEN RENWICK MONROE, THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY 137 (1996) (“No matter how infrequently it occurs, the mere existence of altruism presents an important theoretical challenge for economic theory.”).

20. Colin Camerer, *Gifts as Economic Signals and Social Symbols*, 94 AM. J. SOC. S180, S180 (1988). Rabin notes that “[a] remarkable amount of energy ha[s] been devoted [by economists] to giving self-interested explanations for laboratory behavior that seems to be a departure from self-interest.” Matthew Rabin, *A Perspective on Psychology and Economics* 15 (Univ. of Cal. Berkeley Econ., Working Paper No. E02-313, 2004), available at <http://papers.ssrn.com/abstract=713862>.

As an example of the failures of the standard economic model, Professor Posner suggests that rational utility-maximizing people acting consistently with the standard economic model would agree not to exchange Christmas gifts. He admits that such agreements are rare, calling into question the standard model. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 572–73.

economists jettison the self-interest element of the RCT paradigm and embrace altruism as the motivation for acts of private charity.<sup>21</sup> Other economists maintain the self-interest element of the RCT model, but simply scrap wealth maximization as the basic yardstick of utility, concluding that people give gifts in order to maximize their utility in the form of a “warm glow” derived from the act of giving.<sup>22</sup> That warm glow may come from helping others, from being public spirited, or from following the rules of society or of morality.<sup>23</sup> If wealth maximization is replaced with a warm-glow measuring stick, no matter the origin of the glow, giving will increase the donor’s utility pretty much by definition.<sup>24</sup> An elaboration of this point notes that because most gifts are made to family members, the welfare of giver and receiver are “enmeshed”; that is, they have interdependent utility functions.<sup>25</sup> Thus, the donor obtains utility by increasing the donee’s utility.<sup>26</sup>

Professor Posner supplements this economic analysis by consulting social sciences literature more in the domain of BLE<sup>27</sup> that suggests that although some gift givers are motivated by altruism, there are many other reasons for gift giving.<sup>28</sup> Professor Posner suggests two primary additional motivations that are primarily self-serving: (a) to increase the status of the donor,<sup>29</sup> and (b) to create and enhance trust relations.<sup>30</sup>

Although “classical economic theory is not terribly useful for understanding the role of gifts in society,”<sup>31</sup> by relaxing traditional assumptions of the RCT model and consulting the types of interdisciplinary literature more commonly accessed by BLE adherents, economists produce plausible explanations for the phenomenon of gift giving, a phenomenon that was substantially ignored by traditional scholars.

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21. See Russell D. Roberts, *A Positive Model of Private Charity and Public Transfers*, 92 J. POL. ECON. 136, 136 (1984) (stating that “[p]rivate charity is motivated by altruism”).

22. See James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464 (1990).

23. See Robert Sugden, *On the Economics of Philanthropy*, 92 ECON. J. 341, 349 (1982).

24. See Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE 3, 33 n.1 (Herbert Gintis et al. eds., 2005) (noting that any act of voluntary altruism will increase the donor’s subjective utility).

25. Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 695.

26. Judge Posner has also embraced the notion that some people gain nonmonetary utility from acting altruistically. See Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 411–12 (1977).

27. See B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841, 842 (1994) (“Although many economists have acknowledged the potential importance of social and cultural influences [on human behavior] in passing, few have examined these factors formally.”).

28. See Posner, *supra* note 20, at 572–80 (noting that altruism “is an insufficient explanation for gift-giving behavior”).

29. *Id.* at 574–77.

30. *Id.* at 577–82.

31. HEMENWAY, *supra* note 16, at 58–59.

### C. Behavioral Law & Economics

Scholars in the BLE tradition are deeply interested in the empirical evidence regarding how people actually make decisions and why they make the decisions they do. Therefore, they necessarily consult the psychological, sociological, and anthropological literature that gives context to human decision making. That literature provides empirical support for many of the economists' relaxed assumptions discussed in the previous Section.

Regarding the "why" of gift giving, BLE need not suspend any of its core assumptions to recognize altruism. Much gift giving is expressive in nature, rather than embodying an instrumental exchange as traditional economics assumes.<sup>32</sup> Literature arising from psychology and related disciplines demonstrates that people frequently give gifts even when they do not expect something in return.<sup>33</sup> Humans—who are often concerned with other-serving values such as justice, fairness,<sup>34</sup> and cooperation with others<sup>35</sup>—clearly can be altruistic.<sup>36</sup> Thus, much everyday gift giving seemingly involves altruistic motives.<sup>37</sup> Apparent examples are blood

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32. See Russell W. Belk & Gregory S. Coon, *Gift Giving as Agapic Love: An Alternative to the Exchange Paradigm Based on Dating Experiences*, 20 J. CONSUMER RES. 393, 412–13 (1993). Belk and Coon reject the prominent economists' view that shoehorns all gift-giving activity into an economic exchange model. *Id.* at 401.

33. Aafke E. Komter, *The Disguised Rationality of Solidarity: Gift Giving in Informal Relations*, 25 J. MATHEMATICAL SOC. 385, 398 (2001) (noting that research on why people give gifts refutes the core assumption of rational choice theory that actors assess their actions according to expected utility outcomes).

34. See Truman Bewley, *Fairness, Reciprocity, and Wage Rigidity, in MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE*, *supra* note 24, at 303, 331 (surveying numerous cross-disciplinary studies indicating that humans "urgently desire fairness"); Vincy Fon & Francesco Parisi, *Revenge and Retaliation, in THE LAW & ECONOMICS OF IRRATIONAL BEHAVIOR*, *supra* note 19, at 141, 143 (noting that evolutionary biologists, social biologists, evolutionary psychologists, and Darwinian anthropologists all agree that "humans have developed an innate sense of fairness").

35. See Dominique de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCI. 1254, 1254 (2004) ("Humans cooperate with genetically unrelated strangers, often in large groups, with people they will never meet again, and when reputation gains are absent."); Mizuho Shinada et al., *False Friends Are Worse Than Bitter Enemies: "Altruistic" Punishment of In-Group Members*, 25 EVOLUTION & HUM. BEHAV. 379, 380 (2004) ("One of the most critical features of human society is the pervasiveness of cooperation in social and economic exchanges.").

36. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 15 (1988) ("Charitable institutions . . . exist on a far grander scale than would ever be predicted by self-interest models."); Kevin J. Haley & Daniel M. T. Fessler, *Nobody's Watching? Subtle Cues Affect Generosity in an Anonymous Economic Game*, 26 EVOLUTION & HUM. BEHAV. 245, 246 (2005) ("Humans are remarkable for the extent of their cooperation with, and altruism toward, unrelated individuals."); Mary Ann Lamanna, *Giving and Getting: Altruism and Exchange in Transplantation*, 18 J. MED. HUMAN. 169, 174 (1997) (finding substantial evidence of altruism in organ donation); Jane A. Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27 (1990) (reviewing the literature and finding that "theory and data now being advanced are those compatible with the view that true altruism—acting with the goal of benefiting another—does exist and is part of human nature").

37. Camerer, *supra* note 20, at S181 (noting that it is "especially misleading to assume that modern gift-giving must be reciprocal").

donations<sup>38</sup> and the outpouring of support for victims of the Pacific tsunami in 2004, Hurricanes Katrina and Rita in 2005, and the terrible earthquake centered in Pakistan, also in 2005.<sup>39</sup>

That said, it is also true that even when donors are consciously acting altruistically, part of their subconscious motivation often may be to derive social approval.<sup>40</sup> Although mainstream economic thought has not been substantially moved by this consideration,<sup>41</sup> substantial psychology research demonstrates that it is important because people seem to be genetically hardwired to desire being the objects of others' positive emotions.<sup>42</sup>

According to the behavioral literature, the desire for social approval is reinforced by the conformity bias, the tendency of decision makers to take their cues as to proper behavior in most social contexts from the actions of others.<sup>43</sup> If people believe that their peers are donating to charities, for example, they will tend to donate more themselves.<sup>44</sup> Experi-

38. See RICHARD TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 88–89 (1971) (noting the altruism of volunteer blood donors).

39. See ROBERT H. FRANK, *WHAT PRICE THE MORAL HIGH GROUND? ETHICAL DILEMMAS IN COMPETITIVE ENVIRONMENTS* 110 (2004) (“In 1992 alone, for example, Americans gave more than \$250 billion, an average of more than \$2000 per family, a figure that includes an estimate of the value of time spent in volunteer activities.”); U.S. STATE DEP’T, *AMERICANS GAVE MORE TO CHARITIES IN 2004*, <http://usinfo.state.gov/eur/Archive/2005/Oct/25-687896.html?chanlid=eur> (stating that Americans gave \$248.5 billion in cash donations to U.S. nonprofit groups in 2004).

40. Jeroen van de Ven, *The Economics of the Gift* 7 (July 2000) (unpublished manuscript), available at <http://ssrn.com/abstract=244683> (noting that the “warm glow,” which some have hypothesized often motivates donors, emanates from “the social approval received and not so much by the giving itself. That is, the gift is a means to get a warm glow and has no intrinsic value in its own in this respect.”).

Adam Smith recognized the “warm glow” effect long ago, noting that “[w]e are pleased to think that we have rendered ourselves the natural objects of approbation, . . . and we are mortified to reflect that we have justly merited the blame of those we live with.” ADAM SMITH, *THEORY OF MORAL SENTIMENTS* 115–16 (6th ed. 1790).

41. Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives* 25 (IZA Discussion Paper No. 507, 2002), available at <http://ssrn.com/abstract=294287> (noting that “mainstream economics” has been “relatively unmoved” by the attempt of some economists to introduce social approval into models of human behavior).

42. See Heinz Holländer, *A Social Exchange Approach to Voluntary Cooperation*, 80 *AM. ECON. REV.* 1157, 1159 (1990).

43. Asch’s famous experiments found that when asked to tell which of three lines is the same length as a fourth line, subjects have no difficulty except when placed in an experimental condition in the presence of six of the experimenter’s confederates who first gave obviously wrong answers. Most subjects then found it very difficult to give the obviously correct answer. SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* 457–59 (1952). The conformity bias is also known as “social proof,” the tendency of people to look to other people’s behaviors to determine if their own is correct. See ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 114–66 (3d ed. 1993).

44. See, e.g., Nicholas Bardsley & Rupert Sausgruber, *Conformity and Reciprocity in Public Good Provision*, 26 *J. ECON. PSYCHOL.* 664, 665–67 (2005) (reporting results of experiment finding that conformity contributes substantially to people’s decisions to make contributions to public goods); Urs Fischbacher et al., *Are People Conditionally Cooperative? Evidence from a Public Goods Experiment*, 71 *ECON. LETTERS* 397, 401 (2001) (reporting results of experiment indicating that approximately half of people are “conditional cooperators” who will contribute more to a public good if they see others contributing more); Dan M. Kahn, *The Logic of Reciprocity: Trust, Collective Action, and Law, in MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE*, *supra* note 24, at 339, 343 (“If individuals can be made to believe that others are in-

ments show that if people even think about the kind of person who is altruistic, they will tend to act more altruistically themselves.<sup>45</sup> Thus, where economic theory would predict that a gift recipient might well reciprocate with a gift of lesser value, if at all, “the desire to conform to social rules overrides natural acquisitiveness,” causing the initial recipient to tend to be generous when reciprocating.<sup>46</sup>

Along this line, psychological, anthropological, and related evidence indicates that while altruism is common, a majority of gift giving is prompted by a reciprocity norm that traditional economic theory has tended to ignore.<sup>47</sup> Anthropologist Marcel Mauss’s foundational study noted the strong reciprocal element of gift giving in primitive societies.<sup>48</sup> Gift relationships, according to Mauss, contain three obligations: to give, to receive, and to make a return.<sup>49</sup> Therefore, even if donors consciously give gifts altruistically, the ultimate effect will often be to promote their self-interest, even if unintentionally.<sup>50</sup>

Psychological studies of the reciprocity norm demonstrate that if *A* does a small, unsolicited favor for *B* and then asks *B* to buy some raffle tickets for a charitable event, *B* will buy, on average, twice as many tickets as he would have if the favor had not been performed.<sup>51</sup> Charitable

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clined to contribute to public goods, they can be induced to contribute in turn, even without recourse to incentives.”)

On the other hand, “precious little altruism is found in cultures that do not encourage it.” FRANK, *supra* note 36, at 40.

45. DAVID BERREBY, *US AND THEM: UNDERSTANDING YOUR TRIBAL MIND* 5 (2005).

46. Timothy L. Fort & James J. Noone, *Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 CORNELL INT’L L.J. 515, 535 (2000) (citing BRONISLAW MALINOWSKI, *ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA* 96 (1922)).

47. See PETER J. RICHEYSON & ROBERT BOYD, *NOT BY GENES ALONE: HOW CULTURE TRANSFORMED HUMAN EVOLUTION* 4 (2005) (noting that most economists pay little attention to culture’s role in shaping human behavior); Pier Luigi Sacco et al., *The Economics of Human Relationships*, in 1 HANDBOOK OF ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY 695, 697 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006) (noting that “[e]conomists’ attention has been historically devoted more to market and state than to reciprocity, which, in turn, has been at the center of anthropologists’ investigations for a long time”). Economists have also been among the last social scientists to realize the importance of norms. See Ernst Fehr & Urs Fischbacher, *Third Party Punishment and Social Norms*, 25 EVOLUTION & HUM. BEHAV. 63, 66 (2004).

48. MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 10–11 (Ian Cunnison trans., Norton 1967); see also van de Ven, *supra* note 40, at 2 (noting that “factually gifts have strong, reciprocal properties”).

49. See MAUSS, *supra* note 48, at 37; see also PAUL SEABRIGHT, *THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE* 148–49 (2004) (discussing Mauss’s findings and the differences between primitive and modern societies in the relative roles of gift giving in the exchange of goods).

50. Komter, *supra* note 33, at 398.

51. See Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 627, 628–29 (1971). In the 1970s, Hare Krishnas would frequent airports and give flowers to unsuspecting passersby, which had the effect of inducing many of those passersby to give donations to the Krishnas that they would not have given had they not been moved by the reciprocity instinct. See CIALDINI, *supra* note 43, at 22–24.

organizations recognize this fact and often boost donations by mailing small gifts to potential donors.<sup>52</sup>

So, BLE demonstrates that although gift givers often act through consciously altruistic motives, the act of giving frequently brings about self-serving benefits<sup>53</sup> that may be unanticipated and unintended by the giver.<sup>54</sup> Such activity can be evolutionarily beneficial and, indeed, evolutionary psychology has produced a strong literature in reciprocal altruism—the tendency to do something for another person with the implicit expectation of receiving reciprocity in the future.<sup>55</sup> Wright observes that reciprocal altruism “is fundamental to life in all cultures.”<sup>56</sup>

In summary, traditional theorists did not give much thought to why people give gifts, but economists have felt constrained to address the question because the standard economic model did not account for such behavior. By relaxing traditional assumptions and consulting non-economic literature, LNE scholars have produced a range of helpful explanations for why people give gifts. BLE incorporates empirical psychological evidence that creates an even richer understanding. There is altruism, yes, but the reciprocity instinct is exceedingly important in any

52. See Armin Falk, *Charitable Giving as a Gift Exchange: Evidence from a Field Experiment 5* (IZA Discussion Paper No. 1148, 2004), available at <http://ssrn.com/abstract=461281> (reporting on a field experiment where including a small gift improved a charity’s response and including a larger gift improved it even more); see also Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159, 161 (2000) (noting that “[u]ninvited favors, in general, are likely to create feelings of indebtedness obliging many people to repay the psychological debt”).

Similar studies show that businesses can profit by giving gifts to consumers who will then be more likely to purchase the businesses’ products and services. See H. Onur Bodur & Bianca Grohmann, *Consumer Responses to Gift Receipt in Business-to-Consumer Contexts*, 22 PSYCHOL. & MARKETING 441, 453 (2005) (reporting results of study indicating that “[c]onsumers respond particularly positively to business gifts when they have a relatively strong relationship with the business or when the request for reciprocation associated with the gift is implicit”).

53. Just as emphasizing fairness and justice can promote efficiency, so can giving gifts promote self-interest and, ultimately, perhaps efficiency as well.

The collective result of people’s gift giving behavior does reflect the way in which purely rational egoists would have acted. By means of giving gifts to those who will give in return, and by preferring one’s own family and close relatives over other social relationships (such as friends) when giving care and help is concerned, individuals seem to enhance their own life chances as well as those of their near relatives, not only in terms of heightening their chance to receive in return but also with respect to being embedded in social networks. A second implication of our findings is therefore that a still more fundamental assumption of rational choice theory, summed up by Coleman and Fararo (1992) as *optimization*, does seem to be confirmed by our data.

Komter, *supra* note 33, at 398 (citing RATIONAL CHOICE THEORY: ADVOCACY AND CRITIQUE (James S. Coleman & Thomas J. Fararo eds., 1992)).

54. See Sacco et al., *supra* note 47, at 20 (noting that in a cooperative context, an altruist’s “donations may be reciprocated, so that it is easy to imagine possible scenarios where the norm turns out to be both (subjectively) highly satisfactory and (objectively) materially rewarding”).

55. See ROBERT WRIGHT, *NONZERO: THE LOGIC OF HUMAN DESTINY* 22–23 (2000) (noting that “natural selection, via the evolution of ‘reciprocal altruism,’ has built into us various impulses which, however warm and mushy they may feel, are designed for the cool, practical purpose of bringing beneficial exchange”). Wright has also observed that the ubiquity of reciprocal altruism in various cultures is a strong sign that the phenomenon has deep evolutionary roots. ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 202 (1994) [hereinafter WRIGHT, *THE MORAL ANIMAL*].

56. WRIGHT, *THE MORAL ANIMAL*, *supra* note 55, at 202.

attempt to account for gift-giving activity. Ultimately, both LNE and BLE usefully contribute to answering this important question, one which traditional analysis largely ignored.

### III. MIGHT PEOPLE WISH TO MAKE ENFORCEABLE GIFT PROMISES?

There are actually two questions subsumed within this broader question. First, why do donors make promises to give gifts in the future rather than just giving the gifts now? Second, why might donors wish to have such promises be enforceable?

#### A. *Traditional Analysis*

##### 1. *Why Do Donors Make Promises to Give Gifts Rather than Just Giving the Gifts Now?*

If *A* wishes to give something to *B*, why not just give it to him? Why confer only a promise of a future gift upon *B*? The most prominent of the traditional theorists, Fuller, did not expressly address this question, but several potential, nonexclusive reasons present themselves.

First, donors may not yet have the money or cannot easily do without it at the moment. Or, donors may be currently enjoying use of the object that they intend to give, but want the donee to have it at a future time when the donor dies or moves into a retirement home and no longer needs it.

Second, donors may wish to influence donees' behavior, and to actually transfer the promised money or object forfeits any leverage the donors have over the donees. As an example, elderly parents often wish to purchase their children's' attention. Studies indicate that there is a correlation between bequeathable wealth and the amount of contact between children and elderly parents.<sup>57</sup>

Third, donors may believe that donees would waste some of the money if given it all in one lump sum or before the donees have gained more maturity. Therefore, donors may promise to parcel the money out over time or to transfer it at a future date.

Fourth, and most important, donors may wish to enable the donees to plan.<sup>58</sup> Donees may plan their own expenditures and other activities much more efficiently if they know that a future infusion of income is on the way. If Sally knows that Aunt Ethel has promised to soon give her a house, she need not buy one herself. If Norm knows that his rich uncle

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57. B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045, 1058 (1985).

58. Harold C. Havighurst, *Consideration, Ethics, and Administration*, 42 COLUM. L. REV. 1, 16 (1942) (noting that "[t]he purpose of enabling the prospective donee to make plans is probably the most important" reason to make a donative promise).

has promised to pay for his college, he may stop mowing lawns and devote his free time to studying for the SAT.

2. *Why Might Donors Wish to Have Such Promises Be Enforceable?*

It is fairly obvious why donees would like to have gratuitous promises enforced by the courts, but why might *donors* wish such promises to be enforceable (as they are not under current law absent foreseeable donee reliance or a charitable donation)? Eisenberg offered four plausible suggestions: (1) permitting the promisee to make reliable plans based on the promise, (2) ensuring performance by the estate if the donor dies before completing performance, (3) deriving “the satisfaction of having made an effective disposition,” and (4) protecting “his present aspirations against defeat by a less worthy future self.”<sup>59</sup>

Certainly all four reasons cited by Eisenberg are advantages that making a present promise to give a future gift enjoys over simply waiting to give the gift in the future. Although even an unenforceable gift promise would advance a couple of these goals, a promise that the law treated as enforceable would advance each of them more certainly.

Therefore, traditional analysis recognized various advantages that could flow to the donor as well as the donee from the law’s treating gratuitous promises as enforceable.

B. *Law & Economics*

1. *Why Do Donors Make Promises to Give Gifts Rather than Just Giving the Gifts Now?*

Judge Posner presents the most comprehensive economic analysis of the questions addressed here, focusing primarily upon the benefits of enforceability. In his analysis, Judge Posner pays little attention to the matter of why the donor would not just give the gift today rather than promise to give it later, even though to do so would seemingly be more efficient than having the law treat such a promise as enforceable. Other economists criticize Judge Posner’s analysis for missing the obvious point that the main reason to make an advance promise is to enable the donee to plan.<sup>60</sup>

2. *Why Might People Wish to Have Such Promises Be Enforceable?*

Why would economic man, who chooses for whatever reason to make a promise of a gift rather than just transferring the gift immedi-

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59. Eisenberg, *supra* note 1, at 8.

60. Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401, 408 (1991).

ately, desire the law to treat that promise as binding? Judge Posner hypothesizes:

[S]uppose A promises to give \$1000 a year for the next 20 years to the B symphony orchestra. The value of the gift to B is the discounted present value of \$1000 to be paid yearly over a 20-year period in the future. Among the factors that will be used by B in discounting these expected future receipts to present value is the likelihood that at some time during the 20-year period A will discontinue the annual payments. Depending on B's estimation of A's fickleness, income prospects, etc., the present value of the gift of \$1000 a year may be quite small; it may not be much more than \$1000. But suppose the gift is actually worth more to B because A is certain to continue the payments throughout the entire period, though this fact is not known to B. If A can make a binding promise to continue the payments in accordance with this intention, B will revalue the gift at its true present worth. The size of the gift (in present-value terms) will be increased at no cost to A. Here is a clear case where the enforcement of a gratuitous promise would increase net social welfare.<sup>61</sup>

This analysis helps explain how enforcing gift promises could increase economic welfare, although it seems implausible as a description of actual donors' thought processes, rendering this benefit of enforcing gift promises more theoretical than real. Judge Posner arguably reaches the correct conclusion (that in certain circumstances donors can benefit both donees and themselves by being able to make a binding promise to give gifts in advance), but for an implausible reason. The most important reason surely is to allow the donees to plan with more certainty than they can plan if the promises are not enforceable, even if donees seldom explicitly resort to net present value (NPV) calculations.

### C. Behavioral Law & Economics

#### 1. *Why Do Donors Make Promises to Give Gifts Rather than Just Giving the Gifts Now?*

Behavioral law & economics provides no basis to challenge the four reasons for making promises of future gifts suggested by traditional analysis, nor to challenge the conclusion that according donees the opportunity to plan is the most important of the four. BLE does offer a fifth reason that likely abides in some situations. Donors may promise to give the gift in the future, rather than just waiting to surprise the donee, so that they can enjoy the immediate gratification of giving a gift, yet postpone the actual pain of delivery.<sup>62</sup> While the RCT model assumes

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61. Posner, *supra* note 26, at 412.

62. See Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. L. REV. 103, 103 (1999) (noting that "[p]eople are impatient—they like to experience rewards soon and to delay

decision-maker rationality, which has as one of its aspects time-consistent preferences,<sup>63</sup> most people frequently prefer to advance gains and delay costs.<sup>64</sup> Why not savor the joys of giving by announcing the gift today while delaying the pain of actually delivering the gift until later?<sup>65</sup>

This practice also allows the donee to enjoy the pleasure of anticipating the gift, which will, in turn, presumably increase the donor's short-term utility as well. This is significant, as demonstrated by an experiment in which subjects who won the right to eat a great meal at a fancy restaurant and to choose the date typically did not choose immediate consumption or the next day.<sup>66</sup> Rather, they tended to choose to eat the meal about a week later so that they could enjoy the anticipation of the wonderful experience.

## 2. *Why Might People Wish to Have Such Promises Be Enforceable?*

BLE's precepts can be used to criticize the descriptive accuracy of Judge Posner's theory—that donors will prefer that their promises be binding so that the donees will not have to discount the NPV of pledges they are given—as not embodying a plausible description of how most people think. There are, of course, some “masquerading” donors in the world who do not intend to live up to the gift promises they make. However, the vast majority of those who make gratuitous promises intend to fulfill them<sup>67</sup> and believe that they will do so.

costs until later”); Manuel A. Utset, *Time-Inconsistent Management & the Sarbanes-Oxley Act*, 31 OHIO N.U. L. REV. 417, 430 (2005) (noting that people's long-term “best intentions are always up for reconsideration, particularly when they stand in the way of immediate gratification”).

63. See O'Donoghue & Rabin, *supra* note 62, at 103 (noting that “[e]conomists almost always capture impatience by assuming that people discount streams of utility over time exponentially,” but that this model of time-consistency “ignores the human tendency to grab immediate rewards and to avoid immediate costs in a way that our ‘long-run selves’ do not appreciate”); Rabin, *supra* note 20, at 18 (noting that “the exponential form of discounting [assumed by most economists] has a special property [time-consistent preferences] that has been shown repeatedly to be false” because the behavioral evidence “overwhelmingly and incontrovertibly shows that people exhibit *present-biased preferences*”).

64. See Rabin, *supra* note 20, at 18 (“People like to experience pleasant things soon and to delay unpleasant things until later.”).

65. See generally O'Donoghue & Rabin, *supra* note 62, at 103–05, 118–20 (discussing the impact of many peoples' tendencies toward irrationally accelerating rewards and benefits and delaying punishments and costs).

66. See DANIEL GILBERT, *STUMBLING ON HAPPINESS* 17 (2006) (discussing study).

67. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1273 (1980) (noting that “[w]hen a promise is made in good faith, the promisor presumably believes that he is likely to perform”). Goetz and Scott go on to point out, however, that “many good-faith promisors would acknowledge the possibility that events may arise that cause them to regret having made the promise.” *Id.*

There will always be people who “masquerade” by making gift promises with no intention of fulfilling them. This does not seem to be a major problem, but courts and legislatures could consider adopting the tort of promissory fraud to punish such behavior. See Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507, 522–23 (generally supporting recognition of such a tort, including in cases where the promise, such as a gift promise, would be unenforceable due to lack of consideration).

Unlike commercial promisors, who are often in an adversarial relationship with the party to whom they make promises, most gratuitous promise makers are kindly disposed toward their intended donees and desire to make them happy. Like most people in most settings, the donors' natural undue optimism<sup>68</sup> and overconfidence<sup>69</sup> render it unlikely that many of them will seriously consider failure when they make gift promises.<sup>70</sup> They intend to live up to their promises, believe that they will, and therefore likely do not give serious thought to the legal consequences should they breach.

Donees, on the other hand, could still benefit by the law's making gratuitous promises enforceable. They could plan more firmly if they knew that donor pledges were enforceable. However, it is also true that donees typically will be optimistic about the donor's intent and ability to live up to even unenforceable promises,<sup>71</sup> so the benefit of enforceability as argued by Judge Posner might be relatively small.

Behavioral law & economics would focus on Eisenberg's suggestion that some donors might promise now to perform later not just because of worries about the self-control of donees, but also due to concerns about their own self-control.<sup>72</sup> Not all people are irrationally optimistic in all circumstances. Some realize that they may not have the self-control needed to act in such a way in the short term as to realize their long-term goals. Such donors might promise to give a gift in advance in order to discipline themselves to avoid wasting the funds before the donee reaches age twenty-one or some other milestone.

Eisenberg intuited this point when he observed that a donor might wish to make a present donative promise enforceable to protect "his present aspirations against defeat by a less worthy future self."<sup>73</sup> The behavioral literature strongly supports Eisenberg's surmise, recognizing that many people have significant problems with impulse control even though

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68. See Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 (1998) (noting implications of people's tendency to be overly optimistic in a wide range of settings). If people are generally unduly confident, they may well have too much confidence in their ability to fulfill gift promises.

69. As well, if people are overconfident in their abilities to drive, to teach, and the like, see generally Dan N. Stone, *Overconfidence in Initial Self-Efficacy Judgments: Effects on Decision Processes and Performance*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 452 (1994), then likely they are also overconfident regarding their ability to fulfill gift pledges.

70. Goetz and Scott believe that because of extralegal sanctions, gift promises are *more* likely to be performed than commercial promises. Goetz & Scott, *supra* note 67, at 1304.

71. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 625-26 (1999) ("[M]ost people in intimate relationships characterized by a high degree of trust will assume that people whom they love keep their promises out of love, not out of fear of enforcement. . . . [P]romisees would assume altruistic or loving motives for performance of gratuitous promises even if the law enforced those promises. The promisee's assessment of the promisor's character, not the law, determines what motivations the promisee will ascribe to the promisor.").

72. See *supra* note 59 and accompanying text.

73. Eisenberg, *supra* note 1, at 8.

the law & economics literature “leaves little room even to acknowledge impulse-control problems in mature adults.”<sup>74</sup>

Rational economic man would have no need to join a Christmas club in order to save money for Christmas presents, but many real people do. Real people also pay good money to attend weight-loss camps that will prevent them from overeating. Therefore, they may also pledge to give gifts at some appointed date in the future in order to prevent themselves from wasting the funds.<sup>75</sup> Being able to make an enforceable gift promise would significantly strengthen such attempts at self-control.

To sum up, traditional analysis proffers four reasons why donors make promises to give gifts in the future rather than just giving the gifts now, and four more reasons why it might be beneficial to the donor if the law made those promises binding. LNE adds marginally to our understanding of why it can be beneficial for donors to be able to bind themselves to gift promises. BLE adds additional plausible insights to the discussion of both questions. All three approaches lead to the same conclusion: if the law enforced gift promises, both donors and donees could derive at least some benefits in many situations.

#### IV. ARE GIFTS AND GIFT PROMISES VALUABLE?

It is well and good to have an accurate view of why people give gifts and whether making gift promises enforceable can enable donors to more effectively realize their goals. However, if gifts are simply wasted exchanges and if gift promises are merely harbingers of inefficient transactions, then there would be no reason for the law to encourage either.

##### A. *Traditional View*

One prominent traditional view is that gift promises are not worthy of enforcement, at least not when compared to bargained transactions supported by consideration. The leading traditionalist commentator, Lon Fuller, quoted Bufnoir’s characterization of a gift as a “sterile transmission,”<sup>76</sup> in contrast to a bargained transaction containing consideration, which “involves an exchange of economic values, and falls there-

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74. FRANK, *supra* note 36, at 25.

75. See Nava Ashraf et al., *Tying Odysseus to the Mast: Evidence from a Commitment Savings Product in the Philippines 2* (Yale Univ. Econ. Growth Ctr., Discussion Paper No. 917, 2005), available at <http://ssrn.com/abstract=770387> (noting that people who voluntarily engage in commitment devices to control their later behavior “may improve their welfare”); see also BRUNO S. FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION 122 (1997) (“Persons who are aware that under particular conditions they fall prey to a temptation, can try to evade the trap by binding themselves. An example is Ulysses, who had himself fastened to the mast of his ship in order not to succumb to the sirens’ chant.”).

76. Fuller, *supra* note 15, at 815 (quoting CLAUDE BUFNOIR, PROPRIÉTÉ ET CONTRAT 487 (2d ed. 1924)).

fore in a field appropriately left to private autonomy in an economy where no other provision is made for the circulation of goods . . . .”<sup>77</sup>

Fuller did not take Bufnoir’s statement literally, noting that even gifts often contain an element of reciprocity, which is the foundation of consideration.<sup>78</sup> Nonetheless, he noted and seemed sympathetic to the view that “the enforcement of gratuitous promises is not an object of sufficient importance to our social and economic order to justify the expenditure of the time and energy necessary to accomplish it.”<sup>79</sup>

Eisenberg similarly observed that “it is far from clear that any independent social interests are implicated by” gift promises<sup>80</sup> and also quoted Bufnoir’s “sterile transmission” language.<sup>81</sup> Although Eisenberg observed that Bufnoir’s statement “is probably an oversimplification,”<sup>82</sup> he recognized as useful gift giving’s redistribution of wealth, which, even if it were a proper goal of contract law, would feature donative promises as “a relatively trivial instrument for achieving that end.”<sup>83</sup>

### B. Law & Economics

Standard economic theory is consonant with the “sterile transmission” characterization of gifts, assuming them inefficient and therefore unworthy of being encouraged by the law.<sup>84</sup> Unsurprisingly, then, many economists are deeply skeptical of the value of gifts,<sup>85</sup> and in perhaps the most prominent empirical study of the issue, Waldfogel concludes that the giving of Christmas presents creates a tremendous drag on the economy because most givers pay a higher value for the gifts they give than the recipients would have paid themselves.<sup>86</sup>

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77. *Id.*

78. *Id.* at 815 n.23 (noting that “the practice of exchanging goods has commonly emerged in primitive societies out of a system of donations with, as Llewellyn says, ‘a felt obligation to reciprocate’”).

79. *Id.* at 799.

80. Eisenberg, *supra* note 1, at 4.

81. *Id.*

82. *Id.*

83. *Id.*

84. See Ruffle & Kaplan, *supra* note 19, at 18 (“Standard economics claims that unless a gift that costs the giver  $p$  dollars exactly matches the way in which the recipient would have spent the  $p$  dollars, the gift is [suboptimal].”); Joel Waldfogel, *The Deadweight Loss of Christmas: Reply*, 88 AM. ECON. REV. 1358, 1358 (1998) (noting that “it is difficult to reconcile value creation through gift-giving with conventional economic theory”).

85. See POSNER, *supra* note 2, at 49 (noting that “hard-nosed economists . . . habitually underestimate the importance of gift-giving in daily life”).

86. Waldfogel has argued that in 1992 the giving of Christmas gifts in America caused a deadweight loss of between \$4 and \$13.3 billion because his surveys showed that people put monetary values on the gifts they received of less than what it cost the givers to buy them. Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328, 1328 (1993). The study obviously does not take into account the nonmonetary value of gifts and is therefore incomplete and probably misleading. See Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 199–200 (1988–1989) (“Wealth consists of more than commodities . . . . Only if wealth is defined solely in terms of commodities is it fair to characterize a gift as a ‘sterile transmission.’”).

One reason economists are dubious about the value of gifts is that most gifts are nonmonetary, and standard microeconomic theory concludes that “except for strictly monetary presents, the custom [of gift giving] is economically inefficient.”<sup>87</sup> However, Hemenway points out that this conclusion is based upon at least four questionable assumptions.

First is the assumption that the donee’s consumption pattern does not affect the giver’s utility.<sup>88</sup> This presupposition is unrealistic, for people often give gifts because they gain utility by having such an effect. For example, a mother gives her daughter a membership at a fitness gym, hoping to improve the daughter’s health.<sup>89</sup> When both the daughter’s utility (better health) and the mother’s utility (fewer worries about her daughter’s health) are added together, they may well exceed the gap between the monetary cost of the gym membership to the mother and what the daughter would have been willing to pay.<sup>90</sup>

Second, the traditional view assumes negligible transaction costs, but traveling donors often find items unavailable to the donee or cheaper than those available to the donee, and bring them back home as souvenir gifts.<sup>91</sup> Or donors may live in areas where items unavailable in the donee’s locale are plentiful and easily obtained. Or the donor may be facile at winning auctions on e-Bay and therefore able to easily obtain

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Other economists, using similar evidence, have strongly disputed the point. For example, Sara Solnick and David Hemenway replicated Waldfogel’s survey and found that Christmas gifts produce not a loss, but a 214% welfare gain. Sara J. Solnick & David Hemenway, *The Deadweight Loss of Christmas: Comment*, 86 AM. ECON. REV. 1299, 1303 (1996). John List and Jason Shogren’s similar study also found a welfare gain, derived from the fact that the average study in their subject valued his gifts at “121 to 135 percent of the cost to the giver.” John A. List & Jason F. Shogren, *The Deadweight Loss of Christmas: Comment*, 88 AM. ECON. REV. 1350, 1350 (1998). A more recent study using slightly different methodology also found significant deadweight gains. See H. Kristl Davison et al., *Deadweight Loss of Gift-Giving 11* (Aug. 29, 2003) (unpublished manuscript), available at <http://ssrn.com/abstract=442600>.

Even Waldfogel concedes that his argued inefficiency relates to the objects given, not the act of giving itself. Waldfogel, *supra* note 84, at 1358. In particular, Waldfogel admits that a recipient’s taking into account the sentimental value of a gift might imbue it with more value than the donor parted with to acquire it. Joel Waldfogel, *The Deadweight Loss of Christmas: Reply*, 86 AM. ECON. REV. 1306, 1308 (1996).

87. HEMENWAY, *supra* note 16, at 9.

88. *Id.*

89. Sometimes parents are serving their own purposes more than their children. Economists have pointed out an insurance function deriving from gift giving to children. Parents may give gifts to their children in the hope that the children will care for the parents when they grow old. Ruffle & Kaplan, *supra* note 19, at 4.

90. See David S. Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations* 11 (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 62, 2006), available at <http://ssrn.com/abstract=801567> (“Even if the donee values the gift below its cost, the combination of the donor’s satisfaction and the gift’s value to the donee may exceed the gift’s cost.”).

91. HEMENWAY, *supra* note 16, at 60. Others have observed that the donor may be able to find a suitable match between the gift and the recipient more efficiently than the donee can do. See Ruffle & Kaplan, *supra* note 19, at 5 (noting that “[a] receiver cannot always easily or cheaply obtain the good he desires, or may not even know it exists”).

items that the computer-illiterate donee would like to have but cannot acquire himself.<sup>92</sup>

The third assumption of the standard microeconomic view is that individuals always know their own preferences best and act rationally with respect to them.<sup>93</sup> As Hemenway indicates, and an impressive amount of behavioral research establishes, this is not necessarily the case. So, for example, a donor may present a donee with a gift of food or fuel, knowing that the donee would waste a cash gift on alcohol or drugs. Or, a donor may give a donee a useful appliance, knowing that the donee has irrationally failed to acquire such an appliance, viewing it as an unnecessary luxury.<sup>94</sup>

Finally, and most importantly, Hemenway notes the standard economic assumption that the donee gains utility only from the object itself, and not from the donor's act of caring and giving.<sup>95</sup> As Hemenway points out, this is simply "incorrect in that it ignores the essential social nature of gift giving."<sup>96</sup>

Some economists are willing to abandon a strictly monetary yardstick for measuring utility and take the view that altruistic gifts may add value because they "make the donor and donee better off without making third parties worse off. They make the donee better off because the donee prefers the gift to nothing; and they make the donor better off because the donor derives utility [warm glow?] from the donee's increase in utility."<sup>97</sup>

Among economists who have addressed the matter, Professor Posner is especially skeptical regarding the value of gift-giving activity when it is contrasted to commercial activity.<sup>98</sup> Regarding altruistic gifts, Professor Posner points out that they may be inefficient when they harm third parties, as when the head of a family gives a gift to a paramour and thereby reduces the pool of family assets.<sup>99</sup> Surely this example represents a tiny subset of gift-giving activity. Furthermore, the family head might just as well contract to buy an expensive painting from an art gallery featuring the paramour's work, despite the fact such a painting gives the family head utility only because of an emotional attachment to the

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92. The author is the computer-illiterate in this example. He has benefited often from the charity and e-Bay prowess of a close friend. As another example in this vein, Gretchen Herrmann found, in a study of garage sales, that people often know items that their friends want or need and buy them as gifts for the friends when they run across them at such sales. See Gretchen Herrmann, *Women's Exchange in the U.S. Garage Sale*, 10 GENDER & SOC'Y 703, 720 (1996).

93. HEMENWAY, *supra* note 16, at 59-60.

94. See generally *id.* at 58.

95. *Id.* at 59.

96. *Id.*

97. Posner, *supra* note 20, at 585 (noting this view but disagreeing with it).

98. Andrew Kull, on the other hand, argues that "[n]othing authorizes the conjecture that a gratuitous transfer produces less economic utility than an otherwise comparable transaction in a bargain context. Unless a voluntary transaction is beneficial to the parties, it will not take place." Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 49 (1992).

99. Posner, *supra* note 20, at 586.

artist. He might buy securities from the paramour for which the paramour receives higher than normal commissions, even though the securities do not seem to be a good investment. Or he might buy expensive meals and leave large tips in the restaurant where the paramour works. He might sign a contract to lease an apartment where the paramour can live. The law would enforce these contracts and the standard economic model would assume they have value. Therefore, there seems little reason to distinguish gifts and bargained-for transactions on this ground.<sup>100</sup>

Turning to status-enhancing gifts,<sup>101</sup> Professor Posner argues that donors' competition for status can resolve into a prisoner's dilemma; if one donor's gifts are not larger than others' gifts, no particular status is gained.<sup>102</sup> However, many bargained-for contracts to buy cars, homes, and vacation lodges are part of the same sort of prisoner's dilemma.<sup>103</sup> People are more likely to consume their way into bankruptcy than to give their way into bankruptcy.<sup>104</sup> The law enforces extravagant consumption contracts, and the standard economic model would assume they have value, so again it is difficult to distinguish between giving and consuming on this ground.<sup>105</sup>

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100. Professor Posner suggests that gift giving is more effective than commercial transactions for altruists. *Id.* at 583. This is not a reason to distinguish between the two types of promises for purposes of enforceability, and it is not necessarily true. The psychology literature makes it clear that gifts can make people feel poor or demeaned. To purchase a paramour's painting or to buy goods from a paramour's boutique can effect a transfer of wealth in a setting that makes the recipient feel better about the transaction both in terms of how it might look to third parties and how the recipient feels about herself.

101. Donors may use gift giving to gain various types of status. See Bernheim, *supra* note 27, at 841 (constructing a model indicating that people may make gifts to gain status by signaling their generosity); Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1019 (1996) (arguing that people often give donations to gain status by signaling their wealth).

102. Posner, *supra* note 20, at 589.

103. See generally TERESA A. SULLIVAN, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000) (discussing spending problems, particularly credit card debt, of American consumers); Jonathan A. Parker, *Spendthrift in America? On Two Decades of Decline in the U.S. Saving Rate* (Nat'l Bureau of Econ. Research, Working Paper No. 7238, 1999) (explaining the recent boom in consumer spending and concomitant decline in savings).

104. Until 1998, the courts were split, but many allowed bankruptcy trustees to recover charitable donations, including tithes, as fraudulent transfers under the Bankruptcy Code. Congress then passed the Religious Liberty and Charitable Donation Protection Act of 1998, which protects religious and charitable contributions from various provisions of the Bankruptcy Code. 11 U.S.C. § 544 (2000).

Of course, the biggest single reason for individuals filing bankruptcy stems not from profligate spending or giving, but from uninsured medical expenses. See David U. Himmelstein et al., *Illness and Injury as Contributors to Bankruptcy* (Feb. 8, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=664565>.

105. Again, Professor Posner has suggested that gifts are a more effective means of enhancing status. See Posner, *supra* note 20, at 583–84. This is neither grounds for distinguishing between gift promises and bargained-for promises in terms of enforceability nor necessarily true. Professor Posner suggests that buying an expensive yacht in order to signal one's wealth is inefficient because the signal is fuzzy due to the fact that observers do not know whether the tycoon is rich or just really loves yachting. *Id.* But when the same tycoon gives money to his local university's athletic department, observers cannot know if he is really rich or just crazy about Fighting Beaver football. Professor Posner also notes that people can cheaply mimic conspicuous consumption by renting a yacht rather than purchasing it. *Id.* But by always giving the minimum amount, boosters can also get into a university's charita-

Finally, regarding gifts for the purpose of trust cultivation, Professor Posner also notes that people may give very expensive gifts to signal that they are trustworthy,<sup>106</sup> and in some societies, people may ruin themselves in an attempt to meet gift-giving obligations under social norms.<sup>107</sup> Professor Posner cites as an example some dowry practices in India.<sup>108</sup> However, because he does not point to any such practices common in modern America, he again provides no persuasive economic reason to presume commercial bargains to be more efficient (or less wasteful) than gift transactions.<sup>109</sup>

### C. Behavioral Law & Economics

The evidence from psychology and related fields allows a BLE scholar to make a stronger case for the value of gift-giving activity than traditionalists and many economists embrace. Note first that more gifts will be given by people with greater wealth to people with less wealth than vice versa. The literature of hedonic psychology notes that the relatively poor enjoy more utility per dollar than the relatively rich, so based on this fact alone, gifts should increase overall social welfare.<sup>110</sup>

Additionally, there are items that people would not buy for themselves—due to self-management<sup>111</sup> or other considerations—that they would be pleased to receive as gifts.<sup>112</sup> Whereas economists tend to treat monetary units as fungible,<sup>113</sup> people often create “mental accounts” in which they treat monetary units differently. For example, Thaler ob-

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ble functions designed primarily to honor much larger donors and may hobnob with those donors and shine in their reflected glory.

106. *Id.* at 603.

107. *Id.* at 590.

108. POSNER, *supra* note 2, at 62.

109. Professor Posner suggested that gift giving is more effective than commercial transactions in establishing trust. *See* Posner, *supra* note 20, at 584. Again, this is neither necessarily true nor grounds to enforce commercial promises but not gift promises. *A* can certainly signal to *B* that he wishes to enter into a trust relationship by buying *B* a drink, as Professor Posner suggests. But a more effective signal is probably sent by entering into a small-scale commercial relationship and honoring commitments in order to cultivate a long-term and perhaps larger-scale relationship.

110. *See* RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 136 (2005) (noting that extra dollars bring more happiness to poor people than to rich people). Layard notes that modern psychology gives us the tools to measure this happiness differential, which should be useful in shaping all sorts of policies, including tax policies. *Id.* However, it is fair to say that in the great scheme of things more money is not greatly correlated to more happiness for most people. *See* DANIEL NETTLE, *HAPPINESS: THE SCIENCE BEHIND YOUR SMILE* 70–78, 152–58, 176 (2005).

111. *See* THOMAS C. SCHELLING, *CHOICE AND CONSEQUENCE* 57–63 (1984) (discussing self-management issues and explaining how people hoping to lose weight or to kick bad habits often take steps to discipline themselves that are hard to account for with RCT).

112. *See* Russell W. Belk, *Materialism and the Making of the Modern American Christmas*, in *UNWRAPPING CHRISTMAS* 75, 93–94 (Daniel Miller ed., 1993) (noting that “another function of routinized gift-giving among adults is to acquire luxuries (as gifts) without suffering the concomitant guilt of self-indulgence that might accrue from buying these same things for ourselves”).

113. Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1192 (1997) (“A simple and apparently uncontroversial assumption of most economists is that money is fungible. But the assumption is false.”).

serves that people who would feel bad buying a particular object for themselves, often feel glad when they are given it as a present, even if their spouse purchased it for them out of joint funds.<sup>114</sup> Therefore, people often accord higher utility to items that they have been given as gifts than to the same items they have bought themselves. In other words, a potential purchaser may feel that the cost of a motorcycle plus the guilt he would feel if he bought it outweigh the utility of owning the motorcycle. If the motorcycle is a gift, however, the guilt disappears and now the joy of owning the motorcycle outweighs the monetary cost (even if it was paid for out of the gift recipient's joint funds).

More than that, Drazen Prelec and George Loewenstein demonstrate that due to a phenomenon they call prospective accounting, “consumption that has already been paid for can be enjoyed as if it were free and . . . the pain associated with payments made prior to consumption (but not after) is buffered by thoughts of the benefits that the payments will finance.”<sup>115</sup> Prospective accounting helps account for Club Med's success—people pay one price up front and then can enjoy the benefits of the resort relatively pain-free during their stay instead of wincing each time they have to pull out their wallets to pay for a new service they wish to consume.<sup>116</sup>

So, the pain of handing over cash or writing a check for an item may outweigh the anticipated enjoyment to be derived from owning and using the item. But if a person receives the item as a gift and someone else has already paid for it, then the pain of payment substantially disappears even if it was paid for out of the recipient's funds. Also, the joy the donor derives from buying the gift presumably outweighs the donor's pain at making the payment.<sup>117</sup> Gift giving can thus mitigate substantially both the guilt and the pain associated with purchasing an item, thereby increasing the donee's utility in at least two ways.

The traditionalists' “sterile transmission” characterization and the standard economic account both ignore these considerations of non-monetary utility. Furthermore, donors feel joy when giving gifts to friends or relatives, and the recipients enjoy knowing that someone cared enough to give a gift. One reason recipients feel joy, of course, is that

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114. See Richard H. Thaler, *Mental Accounting and Consumer Choice*, 4 *MARKETING SCI.* 199, 200 (1985) (noting that this fact violates microeconomic principles). Another aspect of this mental accounting is that Christmas spending accelerated when businesses began to give Christmas bonuses, “so the money spent on Christmas gifts was not ordinary (profane) money, but special sacred money.” Belk, *supra* note 112, at 90.

115. Drazen Prelec & George Loewenstein, *The Red and the Black: Mental Accounting of Savings and Debt*, 17 *MARKETING SCI.* 4, 4 (1998).

116. *Id.* at 19.

117. David Cheal notes that Durkheim believed that “in the long run the most lasting sense of purpose is that provided by the indefinite extension of personal attachments into the future, in the form of service to members of the next and succeeding generations . . . [and that] one of the principal conventional forms that this interest has taken is the hereditary transmission of property.” See DAVID CHEAL, *THE GIFT ECONOMY* 169 (1988) (citing EMILE DURKHEIM, *SUICIDE* (1951)).

gifts usually signal affection and commitment to a relationship by the giver.<sup>118</sup>

Whereas standard economic theory treats money as the perfect gift,<sup>119</sup> in real life, money is often the *least* acceptable gift.<sup>120</sup> To look only at monetary value misses the point rather badly.<sup>121</sup> Even some economists note O. Henry's *The Gift of the Magi* as an illustration of how a facially inefficient gift exchange can create immense welfare for the parties involved.<sup>122</sup>

Emotions, which both traditionalists and standard economic theory have largely ignored,<sup>123</sup> are a part of almost every psychological theory of gift giving and should not be discounted.<sup>124</sup> Any purely RCT account "ignore[s] the fundamental human impulse to display, to share, to bestow" and "ignore[s] the deep tendency to create social ties through exchange of gifts."<sup>125</sup>

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118. See Camerer, *supra* note 20, at S199.

119. Solnick & Hemenway, *supra* note 86, at 1303 ("According to economic theory, money is the perfect gift."). Nor can standard economic theory explain various other standard gift-giving practices. See, e.g., Thaler, *supra* note 114, at 212 (1985) (discussing gift giving for departing coworkers).

120. See MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS: TOWARDS AN ANTHROPOLOGY OF CONSUMPTION* 38 (1996) (noting that social sanctions protect the boundary between cash and noncash gifts); Paul Webley & Richenda Wilson, *Social Relationships and the Unacceptability of Money as a Gift*, 129 J. SOC. PSYCHOL. 85, 89 (1989); Paul Webley et al., *The Unacceptability of Money as a Gift*, 4 J. ECON. PSYCHOL. 223 (1983).

Thaler also notes that "people may sometimes prefer to receive a gift in kind over a gift in cash, again violating a simple principle of microeconomic theory." Thaler, *supra* note 114, at 213. As an example, he notes that the National Football League for many years had trouble getting players to come to the year-end all-star game (the Pro Bowl), but solved the problem by switching the game to Hawaii and offering a free trip for each player's wife or girlfriend. The players had no trouble turning down large sums of money, but had more trouble turning down the free trips. *Id.*

121. See Bradley J. Ruffle, *Gift Giving with Emotions*, 39 J. ECON. BEHAV. & ORG. 399, 414 (1999) (noting that the practice of bringing home trinkets from vacations abroad and giving them to friends is common, and "although these souvenirs may be monetarily welfare-reducing[,] they are welfare-improving" because of the joy givers feel and the appreciation that receivers feel).

122. See Ruffle, *supra* note 121, at 414 n.16; Jared R. Curhan et al., *The O. Henry Effect: The Impact of Relational Norms on Negotiation Outcomes* (Harvard PON Working Paper No. 04-122, 2004), available at <http://ssrn.com/abstract=321448> (performing experiments indicating that the sacrifice of instrumental value can heighten relational satisfaction). Gift giving can create trust by indicating a desire to establish a relationship. In this context, Camerer points out, inefficient gifts may work the best. Camerer, *supra* note 20, at S199.

123. See Gerald L. Clore, *For Love or Money: Some Emotional Foundations of Rationality*, 80 CHI.-KENT. L. REV. 1151, 1152 (2005) (noting that standard economic models suffer a "conceptual dead end" by their tendency to ignore emotional factors in human decision making); see also FRANK, *supra* note 36, at 14 (noting that "[e]nvy, guilt, rage, pride, love, and the like typically play no role [in the standard economic self-interest model]"); W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 3 (2002) ("The economic mode of analysis has an almost pathological aversion to explanations that appeal to values, commitments, loyalties, relationships, or emotions.").

124. Ruffle, *supra* note 121, at 400 (noting that although "strategic considerations" play a role in some gift-giving decisions, "emotions enter all of them").

125. MALINOWSKI, *supra* note 46, at 175. Although Malinowski was discussing primitive societies, "gift giving's place in commercial relations is no less central" in modern economies. Ruffle, *supra* note 121, at 400. Ruffle notes that "(over)spending on Christmas gifts, wedding and birthday presents, charitable donations, and bequests all testify to the central role gifts continue to play in modern society." *Id.* at 416.

The most critical point in evaluating the potential benefits of gift giving, however, is to look beyond the relationship between donor and donee to the broader cultural and societal impact of the practice.<sup>126</sup> It is well recognized that

[i]t is the social aspects of gift giving that most differentiate it from market transactions. Among other things, gifts can serve to express affection, promote fellowship and solidarity, and reaffirm social worth. Such social effects are largely absent in market transactions, in which parties to the exchange are playing economic rather than social roles.<sup>127</sup>

Gift-giving activity helps create the sort of society that people sensibly desire to live in. It does so by creating and solidifying ties not only between specific individuals,<sup>128</sup> but also among members of society more broadly.<sup>129</sup> Gifts serve important social functions in ways that bargained-for commercial exchanges cannot,<sup>130</sup> primarily because bargained-for exchanges focus upon the value of the items exchanged while gifts are “primarily about relations between people.”<sup>131</sup> In short, “cultural, sociopsychological, and other noneconomic considerations” ensure that the benefits of Christmas giving, for example, outweigh the deadweight loss posited by Waldfogel.<sup>132</sup>

Evolutionary theory helps explain the contribution that gift giving makes to trust relationships necessary for long-term cooperation.<sup>133</sup> The institutionalization and ritualization of gift giving played a key role in

126. Mauss termed gift a “total social phenomenon . . . at once legal, economic, religious, aesthetic, morphological and so on.” MAUSS, *supra* note 48, at 76.

127. HEMENWAY, *supra* note 16, at 58.

128. It is interesting that marriages are happier for both parties when they are based on the notion of giving rather than a quid pro quo arrangement. Bernard I. Murstein et al., *A Theory and Investigation of the Effect of Exchange-orientation on Marriage and Friendship*, 39 J. MARRIAGE & FAM. 543, 546 (1977). Further, a spouse derives more satisfaction from giving a gift to his/her partner when there is no direct reciprocity than when there is such reciprocity. LAYARD, *supra* note 110, at 105.

129. See Michael G. Flaherty, *The Gift Economy*, 68 SOC. FORCES 650, 650 (1989) (book review) (noting that the gift economy “is a moral economy in that gift transactions constitute a fundamental medium for the social construction of intimacy and community in modern society”); see also GODELIER, *supra* note 14, at 1 (noting that gift giving “is a gesture of solidarity between human beings”); DAVID GRAEBER, TOWARD AN ANTHROPOLOGICAL THEORY OF VALUE 32 (2001) (“Gifts act as a way of creating social relations.”); HEMENWAY, *supra* note 16, at 67 (“In all societies, gift exchange is a powerful force helping to bind social groups together.”); LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 66–67 (1983) (“Because of the bonding power of gifts and the detached nature of commodity exchange, gifts have become associated with community and with being obliged to others, while commodities are associated with alienation and freedom.”); Aafke Komter & Wilma Vollebergh, *Gift Giving and the Emotional Significance of Family and Friends*, 59 J. MARRIAGE & FAM. 747, 747 (1997) (“Gift giving is the cement of social relationships.”).

130. Komter, *supra* note 33, at 389 (noting that “gifts given in informal relationships invariably affect human solidarity, whereas goods exchanged on the market don’t”).

131. GRAEBER, *supra* note 129, at 32 (characterizing the argument of Arjun Appadurai).

132. MILAN ZAFIROVSKI, MARKET AND SOCIETY: TWO THEORETICAL FRAMEWORKS 280 (2003).

133. See H. Lorne Carmichael & W. Bentley MacLeod, *Gift Giving and the Evolution of Cooperation*, 38 INT’L ECON. REV. 485, 485 (1997). There is substantial controversy as to the exact mechanism that translates a “selfish gene” into a selfless individual. See BERREBY, *supra* note 45, at 304–20 (discussing different views).

enabling many primitive societies to move from predation to cooperation,<sup>134</sup> and the continuing importance of trust to the growth of modern economies is also well documented.<sup>135</sup>

Thus, BLE emphasizes that the critical value of gift giving is not the immediate economic gain in utility that may arise from a donor transferring an asset to a donee. Rather, most of the value of gift giving flows from the long-term personal, social, and cultural gains.<sup>136</sup> Gift giving creates and cements desirable relationships and thereby creates an atmosphere in which efficient economic transactions can flourish.

In summary, traditional analysis labeled gifts as “sterile transmissions,” with minor qualifications. The standard economic account deems them inefficient, though many economists have persuasively departed from that version.<sup>137</sup> Of the three major frameworks, BLE makes the strongest case for the inherent economic and especially noneconomic value of gratuitous transactions.

## V. SHOULD THE LAW ENFORCE GIFT PROMISES?

Even if gift promises are largely sterile transmissions, there still could be ample reason to enforce them. On the other hand, even if gift promises tend to create substantial economic and noneconomic value, the disadvantages of enforcement might still outweigh that value. Therefore, more analysis is needed to determine whether the law should do what it does not do today—enforce seriously considered gratuitous promises that are not made to charities and do not involve donees’ foreseeable reliance.

### A. Traditional View

Why does the law not enforce mere gratuitous promises? The most famous traditional answer was penned by Lon Fuller, who noted that the consideration requirement that distinguishes enforceable bargained-for transactions from unenforceable gift promises has both a *substantive* and a *formal* rationale.<sup>138</sup>

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134. See Robert Rider, *A Game-Theoretic Interpretation of Marcel Mauss’ ‘The Gift,’* 35 SOC. SCI. J. 203, 209 (1998).

135. See Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. ECON. 1251, 1283 (1997) (finding in cross-national study that trust has a significant impact on aggregate economic activity and that trust is higher in countries that effectively enforce contract rights); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295, 317 (2001) (finding in cross-national study that trust has a substantial positive influence on growth rates).

136. Solnick & Hemenway, *supra* note 86, at 1301.

137. See Dipankar Purkayastha, *A Theory of Reciprocal Gifts*, 32 ATLANTIC ECON. J. 312, 313 (2004) (“People recognize that gifts are somehow worth more than their intrinsic worth in money: gifts may be valued even if they are useless otherwise, and even if we can buy the gifts more easily (or at a lower cost) ourselves.”).

138. Fuller, *supra* note 15, at 799.

Regarding form, and analogous to other formal requirements such as the statute of frauds, the consideration requirement first provides reliable *evidence* that a promise was truly made.<sup>139</sup> Second, enforcement of gratuitous promises is denied as a *cautionary* matter to encourage proper *deliberation* by promisors.<sup>140</sup> Finally, as a formal matter, consideration serves a *channeling* function by aiming donors toward a means of indisputably signaling intent. Such indisputable intent could be signaled by putting the promise under seal in former days, or setting up an irrevocable trust in more recent times. Going through the formality of either would both caution donors to be sure they were expressing their true intent and provide concrete evidence of that intent.<sup>141</sup>

In applying substantive criteria to the subject of gift promises, Fuller argued that the formality of consideration “must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.”<sup>142</sup> In this regard, Fuller observed, “on ‘substantive’ grounds the balance already inclines away from judicial”<sup>143</sup> enforcement because he was sympathetic to the view that if gratuitous promises are not wholly sterile transmissions, they are not far from it.

Turning to the considerations of form noted earlier, Fuller argued that “a lack of evidentiary and cautionary safeguards is obvious” with gift promises that are not under seal.<sup>144</sup> Furthermore, he stated, gift promises tend to be “made in a field where intention is not naturally canalized [and t]here is nothing . . . to effect a neat division between tentative and exploratory expressions of intention, on the one hand, and legally effective transactions, on the other.”<sup>145</sup> In summing up, Fuller stated:

Where the element of exchange is removed from a case, the appeal to judicial intervention decreases both in terms of form and of substance. The appeal is diminished substantively because we are no longer in the field which is in modern society the most obviously appropriate field for the rule of private autonomy. From the formal standpoint, when we lose exchange, we lose the formal guaranties which go with the situation of exchange.<sup>146</sup>

So, for both substantive and formal reasons, the traditional view supports American courts’ practice of refusing to enforce unrelieved-upon gratuitous promises not made to charities. In the intervening sixty years

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139. *Id.* at 799–800.

140. *Id.*

141. *Id.* The seal is abolished now, but donors can often achieve the same end by resorting to formal trusts or wills, and the consideration requirement channels them in that direction.

142. *Id.* at 805.

143. *Id.* at 815.

144. *Id.*

145. *Id.*

146. *Id.* at 819.

much has been written about Fuller's reasoning. Professor Havighurst quickly criticized Fuller for both "armchair theorizing"<sup>147</sup> and producing analysis that was "characterized by a greater degree of neatness than life ordinarily allows."<sup>148</sup> Fifty years later, Professor Kull lodged many of the same criticisms.<sup>149</sup> Both responders raised persuasive challenges to Fuller's rationale.

Fuller's conclusion that gratuitous promises do not generate enough social benefit to justify the costs of enforcement is plausible.<sup>150</sup> But, as Kull points out, it is "no more obviously correct" than the contrary conclusion. It is nothing more than an assumption that is neither empirically verified nor particularly persuasive on its face.<sup>151</sup> Because the "sterile transmission" characterization of gifts and gift promises substantially underestimates their personal, social, and cultural value, Fuller's surmise in this regard is particularly questionable.

Fuller also overstated the *evidentiary* value of consideration, which "is a relatively poor way to preserve proof."<sup>152</sup> Additionally, by accepting the rationale that the consideration requirement is needed to eliminate the hazards of perjured testimony, Fuller implicitly assumes both that plaintiffs are more likely to lie in gift cases than in exchange cases<sup>153</sup> and that judges and jurors are more likely to be deceived in such cases.<sup>154</sup> He provides no evidence regarding either assumption. To the contrary, Kull notes that "[a] plaintiff who attempts to recover on the basis of a promise that is a figment of his imagination, in the absence of either objective proof or corroborating circumstances, is unlikely to succeed; and the difficulty is the same whether he has imagined a bargain promise or a gift."<sup>155</sup> There is no persuasive reason to believe that a lying plaintiff will have more success convincing a jury regarding an imagined gift promise ("She promised to give me Blackacre.") than regarding an imagined commercial transaction ("She promised to sell me Blackacre."). Indeed,

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147. Havighurst, *supra* note 58, at 6.

148. *Id.*

149. Kull, *supra* note 98, at 46–55.

150. *Id.* at 52.

151. See Havighurst, *supra* note 58, at 9 (criticizing Fuller's logic on this point in some detail).

152. Gamage & Kedem, *supra* note 90, at 9 (noting this is true because "a promisee's delivery of a nominal sum to the promisor can be easily denied—leaving the parties in precisely the same position as if no consideration for the promise existed. And when the consideration for one promise is another promise, as if often the case, no evidence of the transaction is preserved."); see also Kull, *supra* note 98, at 53 (noting that "it is difficult to think of any respect in which [problems of proof] are necessarily exacerbated if the promise is gratuitous rather than compensated").

153. Fuller, *supra* note 15, at 799; see also *id.* at 815 (stating that it is "obvious" that a gratuitous promise lacks evidentiary safeguards); Posner, *supra* note 26, at 418–19 (intimating that gift promises are likely to be a figment of the promisee's imagination).

154. See Fuller, *supra* note 15, at 815.

155. Kull, *supra* note 98, at 53. Havighurst also challenged Fuller's assumption, observing that "[i]t is perfectly clear that a perjurer stout enough to snatch a verdict by swearing to a false [gratuitous] promise would not have the slightest difficulty in snatching one by swearing also to a false counter-promise [in an exchange setting]." Havighurst, *supra* note 58, at 7.

it seems that a bare gift promise in and of itself will often be less credible to a fact finder than an exchange promise.<sup>156</sup>

In cases involving deceased donors, several states have Dead Man’s statutes that bar plaintiffs from testifying, making it particularly unlikely that dissemblers will be able to recover an imaginary gift.<sup>157</sup> However, most states have repealed their Dead Man’s statutes on grounds that support rejecting the evidentiary rationale for the consideration requirement as well.<sup>158</sup> Regarding Dead Man’s statutes, Professor McCormick notes the same point that Kull made about the consideration requirement for gift promises—that “[t]he temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard.”<sup>159</sup> Therefore, McCormick argues that simple exclusion of all such testimony is a “blind and brainless” technique that creates more injustice than it prevents.<sup>160</sup>

Nor is providing evidence of true intent even a purpose of the consideration doctrine, for “[n]o matter how unequivocally the parties communicate a desire to be bound, the [consideration] doctrine calls for ignoring the parties’ declared wishes unless consideration is present.”<sup>161</sup> And this is true even if the parties shout their intentions “to the rooftops.”<sup>162</sup>

Regarding the *cautionary* function of consideration, Kull observes that once again Fuller’s notion that people are more likely to make gift promises than bargained-for promises while in a highly emotional state is nothing more than an unproven assumption.<sup>163</sup> Consider how excited people can get at a live auction, yet they are still bound by their bids just as if the deal had followed weeks of negotiation.<sup>164</sup>

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156. For example, there would be no particular reason to disbelieve *A* if he testified that *B* agreed to sell him his car. However, if *A* testified that *B* promised to give him a family heirloom, and *A* is not closely related to *B*, psychological evidence makes this promise very unlikely, for people impute a special meaning to various cherished possessions that become *inalienable* wealth in that they become objects that must stay in the family. See generally Carolyn Folkman Curasi et al., *How Individuals’ Cherished Possessions Become Families’ Inalienable Wealth*, 31 J. CONSUMER RES. 609 (2004).

157. See, e.g., IND. CODE ANN. § 34-45-2-4 (LexisNexis 1998); TENN. CODE ANN. § 24-1-203 (2000). A Dead Man’s statute generally prohibits the admission of a decedent’s statements as evidence under certain circumstances and are typically used to exclude the testimony of parties to a lawsuit who have a pecuniary interest in its outcome. See generally MCCORMICK ON EVIDENCE § 65, at 250 (John William Strong et al. eds., 4th ed. 1992).

158. E.g., MISS. CODE ANN. § 13-1-7 (repealed 1991); N.H. REV. STAT. ANN. § 516:25 (repealed 1994); see Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man’s Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75, 100–03 (2005–2006).

159. MCCORMICK ON EVIDENCE, *supra* note 157, § 65, at 251.

160. *Id.* See generally Wallis, *supra* note 158, at 76 (arguing that Dead Man’s statutes “are unfairly prejudicial to those truly honest people who have valid claims but are nevertheless prevented from testifying in court” and noting that a strong majority of states have repealed them for that reason).

161. Gamage & Kedem, *supra* note 90, at 30.

162. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1480–81 (2004).

163. Kull, *supra* note 98, at 53–54.

164. *Id.* at 54.

In refuting Fuller's assumption in this regard, Havighurst cited the memorable *Higgins v. Lessig*,<sup>165</sup> where, in a fit of anger over the theft of a \$15 harness, a farmer shouted to a crowd of people that he would give \$100 to whoever located the thief. The farmer was later excused from his promise on grounds that his "explosion of wrath" did not constitute a serious offer, but there can be no doubt that there was consideration present. Havighurst also noted a sample of 183 cases that he studied where promises were denied enforcement for lack of consideration; in only three did absence of deliberation appear to play a role.<sup>166</sup> Thus, lack of deliberation is not the reason the law refuses to enforce gift promises and it does not provide a policy basis for such a rule.

Regarding the *channeling* function, Eisenberg took Fuller's argument that nothing inheres in the gratuitous promise to "effect a neat division between tentative and exploratory expressions of intention on the one hand, and legally effective transactions, on the other,"<sup>167</sup> to mean that "in a context that involves neither formality nor explicit reciprocity, it may be difficult to distinguish a promise from a statement of present intent."<sup>168</sup> But Havighurst argued that Fuller's argument was "simply a distortion of experience to make it fit a preconceived theory,"<sup>169</sup> challenging the notion that it is easier to determine when a businessperson is serious about making a deal than when another person is serious about making a gift.<sup>170</sup>

Kull levels a strong concluding blast at the traditional rationale for not enforcing gratuitous promises by noting:

The foregoing objections in terms of evidentiary, cautionary, and channeling safeguards share a common defective premise. The argument for formalism is that the presence of a seal constitutes a highly efficient proxy, being both accurate and inexpensive to administer, for the absence of certain underlying evils—roughly identifiable (to paraphrase Fuller) as promises that were not made (evidentiary), should not have been made (cautionary), or were not intended to be made (channeling). Part of Fuller's argument was that the presence of consideration—the fact that a promise is made in the context of a bargain—serves as a comparable if less efficient proxy for the same favorable characteristics. Supposing this observation to be true (though it rests on assumptions that may surely be doubted), it contributes something to explaining and justifying a rule by which bargain promises are made presumptively enforce-

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165. 49 Ill. App. 459 (1893).

166. Havighurst, *supra* note 58, at 9 & n.23.

167. Fuller, *supra* note 15, at 815.

168. Eisenberg, *supra* note 1, at 5.

169. Havighurst, *supra* note 58, at 7.

170. *Id.*; see also Kull, *supra* note 98, at 54 ("The gratuitous promisor has at his disposal precisely the same means as the commercial negotiator to distinguish a promise from a statement of intent: the vast resources of the spoken and written language. Ambiguous statements not corroborated by action are unlikely to establish a promise in either case.").

able. But the converse proposition does not follow. To justify, in terms of these administrative factors, a rule by which a gratuitous promise is presumptively unenforceable, one must argue that the absence of consideration is so efficient a proxy for the presence of the underlying evils (perjured, incautious, and unintended promises) that they may be presumed to exist where consideration is absent; in other words, that a direct inquiry into their presence or absence is not worth undertaking. But these inferences, plainly stated, cannot plausibly be drawn from the absence of consideration.<sup>171</sup>

Kull's argument is potent. When Aunt Mabel writes a letter to nephew Sam, telling him that she promises to give him \$10,000 next year in order to defray his expenses at Harvard, where he has just enrolled, what reason exists to think that the promise was not made? Was made incautiously? Or was unintended? The promise was definitely made; we have the letter in Aunt Mabel's handwriting. The promise was more reasonably and seriously made than a variety of oral commercial promises that the law would enforce. It seems less incautious on its face than many impulse purchases that are commonly made and that result in contracts that the courts would honor.<sup>172</sup> It clearly seems even more intended than a variety of commercial promises, especially those that the law would enforce with little question despite their basis on provisions of form contracts that people sign every day without reading.<sup>173</sup>

Traditional analysis, without the intrusion of LNE or BLE, can lead to either of two contradictory conclusions—Fuller's and Kull's. Both positions can be argued persuasively. Can LNE or BLE resolve the issue more definitively?

### B. Law & Economics

Judge Posner's primary contribution to the question of whether the law should enforce gratuitous promises is his restatement of Fuller's arguments in economic terms. Assuming that enforcement of gratuitous promises can help realize value for both donor and donee, the key economic question, in Judge Posner's view, becomes whether the size of the net social gain from enforcing gratuitous promises exceeds the social

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171. Kull, *supra* note 98, at 54–55.

172. See *infra* notes 216–60 and accompanying text for discussion of impulse buying.

173. Most people do not read most of the form contracts they sign. See Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 157 (1970) (“Many people don't read contracts at all . . . . [S]ome people would sign a contract even if ‘THIS IS A SWINDLE’ were embossed across its top in electric pink.”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (noting that a taker of a form contract “is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. Virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion, and the few empirical studies that have been done have agreed.”).

burden of enforcement.<sup>174</sup> Gratuitous promises “should not be enforced where the enforcement cost—to the extent not borne by the promisor—exceeds the gain from enforcement.”<sup>175</sup> Judge Posner identifies two types of such social costs.

First, there are administrative costs of enforcement, largely borne by society.<sup>176</sup> While this is a sensible consideration, Judge Posner’s analysis cannot help determine whether gratuitous promises, as opposed to commercial promises, should be enforced. Judicial resources are expended in either case.<sup>177</sup> If gift promises can create economic value (which Judge Posner seems to believe) as well as nonmonetary forms of value (as the behavioral literature demonstrates), why subject them to a cost-benefit analysis in situations where commercial promises go unscrutinized?

Wishing generally to support the courts’ common law rules as efficient, Judge Posner further rationalizes the general rule of nonenforceability of gratuitous promises by assuming that “gratuitous promises tend both to involve small stakes and to be made in family settings [e.g., a husband’s promise to take his wife out to dinner] where there are economically superior alternatives to legal enforcement.”<sup>178</sup> Judge Posner concludes that there is no economic difference between gratuitous and bargained-for promises in this setting.<sup>179</sup> The real key is that because so little is at stake in the hypothetical gratuitous promise, the husband knows the wife will not sue him if he breaches. Therefore, he cannot truly make a binding promise in advance of the gift, even if the promise is legally enforceable, because it is not enforceable as a practical matter. Because the costs of enforcement would easily outstrip the promisee’s loss, the promise is illusory. Why make a promise legally enforceable in theory if it is not enforceable in fact? While there is theoretical value to a promisor who can bind himself to a gift promise, practically this value cannot be realized because so little is at stake.

But Judge Posner’s reasoning applies to many bargained-for contracts in the workaday world.<sup>180</sup> Because of enforcement costs, is ABC Co. really likely to sue XYZ Co. when XYZ delivers \$50 of plywood that did not meet the specifications that ABC set out over the phone? Will

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174. Posner, *supra* note 26, at 414.

175. *Id.*

176. *Id.* at 414–15.

177. Gamage and Kedem suggest that “administrative costs may be particularly high for non-commodifiable promises” that, they suggest, may evolve into matters of principal where the parties are willing to “invest more in the lawsuits than the amount of the recovery can justify.” Gamage & Kedem, *supra* note 90, at 48 n.157. This is certainly possible, but Gamage and Kedem provide nothing more than speculation to support their guess that litigation over gratuitous promises will be more resource-intensive than litigation over commercial promises.

178. Posner, *supra* note 26, at 417. Those alternatives include the wife refusing to perform services in the future in exchange for the husband’s promises.

179. *Id.*

180. See Goetz & Scott, *supra* note 67, at 1301 (noting that “it is no less expensive to litigate most small contracts”).

tourist Sam from New York really sue the rental car agency in San Francisco that charged him \$25 more than represented when Sam made a reservation? If the simple pragmatics of enforcement costs were truly the reason that the law refuses to enforce gratuitous promises, there would be no basis for the law to refuse to enforce the promise of an uncle to lavish a \$250,000 gift to a nephew.

Enforcement costs, therefore, are not a promising way to determine either why the courts do not enforce gift promises or whether they should do so. This approach does not distinguish between, for instance, a man's promise to take a woman to dinner on a date and a pizza restaurant's implied promise to deliver all the food ordered for home delivery. One should not expect a lawsuit in case of a breach in either situation, both because of the *de minimis* rule<sup>181</sup> and because the costs of litigation should discourage plaintiffs in both scenarios from filing suit.<sup>182</sup>

Judge Posner is doubtless on safe ground in assuming that the case for legal enforcement will be stronger when the gratuitous pledge is for a relatively large amount because it is then more likely that the social benefit from enforcing the promise will outweigh the costs of legal enforcement.<sup>183</sup> However, it seems impractical to make this determination on a case-by-case basis<sup>184</sup> and the assumption logically applies equally to bargained-for promises as well.

If one takes seriously Judge Posner's sensible concern for conserving judicial resources, a reasonable rule of thumb might well be to refuse to enforce any promise, commercial or gratuitous, involving less than, say, \$350. In other words, because Judge Posner identifies no reason to enforce commercial promises but not gift promises other than presumed average size, why not cut a horizontal line at the \$350 mark? Rather, he cut a vertical line, dividing promises into those we should enforce no matter how large or small (commercial promises) and those we should not enforce no matter how large or small (gift promises). Judge Posner simply gives small commercial promises an exemption from his test, apparently satisfied to expend judicial resources inefficiently in order to enforce them.

For little reason other than that he supposes, perhaps wrongly and certainly with many exceptions,<sup>185</sup> that most gratuitous promises are for

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181. Under the *de minimis non curat lex* doctrine, “[t]he law is not concerned with trifles.” *BALLENTINE'S LAW DICTIONARY* 331 (3d ed. 1969). Therefore, judges may dismiss claims that do not involve significant injuries to plaintiffs. *See e.g.*, *Raymon v. Alvord Indep. Sch. Dist.*, 639 F.2d 257, 258 (5th Cir. 1981) (dismissing a federal claim as *de minimis*).

182. *See Eisenberg, supra* note 1, at 8 n.17 (noting that “the doctrine of *de minimis* and the transaction costs of litigation would adequately screen out [gift] promises involving small stakes without the need for any special contract-law rules”).

183. Posner, *supra* note 26, at 415.

184. *Id.*

185. For example, at one stage of the tortuous litigation surrounding Anna Nicole Smith's marriage to her slightly older and richer husband, a court held that she was entitled to recover \$449.8 million that her deceased husband had wished to give her. *See Glen Flanagan, The Tale of Anna Nicole*

very small amounts, Judge Posner concludes that the law's refusal to enforce any of them is correct.<sup>186</sup> When one considers how many times during the day most people contract to buy things for relatively small amounts, this supposition is questionable.<sup>187</sup>

David Gamage and Allon Kedem attempt to extend the administrative costs argument. They claim that administrative costs may be particularly high for noncommodifiable promises because such promises will often involve personal relationships that have soured and parties who may be willing to fight for a matter of principle and "invest more in lawsuits than the amount of the recovery can justify."<sup>188</sup> This contention is certainly plausible, but Gamage and Kedem are only speculating.<sup>189</sup> However angered individual parties may become, they typically will not have the resources for a long struggle in court, unlike companies involved in commercial litigation. Intercorporate litigation can also become bitter, with decisions made as a matter of principle and precedent setting, not out of the litigants' concern for preserving judicial resources.<sup>190</sup> Studies indicate that it is companies, not individuals, that have been more frequently punished by federal courts for pursuing frivolous claims.<sup>191</sup>

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*Smith's Legal Triumph*, TORONTO STAR, Mar. 13, 2002, at EN05. That judgment did not endure, but the case gained additional notoriety for its tragic central figure by going to the Supreme Court on a procedural issue. *Marshall v. Marshall*, 126 S. Ct. 1735 (2006).

Mark Wessman notes that a parent's promise to pay for a child's medical school education would be far from trivial, and concludes that the assumption that donative promises are too financially trivial to enforce is "empirically suspect." Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 819–20 (1996).

186. To draw an analogy, let us say that the National Basketball Association (NBA) wishes to expend money to train promising young players from abroad. The league's experience tells it that players under six feet tall seldom succeed in the league and are therefore a bad investment. Rather than setting up a rule that it will not spend money on any player under six feet tall, the NBA establishes a policy that *assumes* that the average person in Mexico is shorter than the average person in Lithuania, and therefore provides that no players from Mexico will be accepted into the program while players from Lithuania, even if under six feet tall, will be accepted into the program. If the NBA wishes to avoid a case-by-case examination, it can go with either a not-under-six-feet-tall rule or a no-Mexico rule. If the judicial system wishes to avoid spending too much enforcing small promises, it can go with a not-under-\$350 rule or a no-gratuitous promises rule. Posner seems to choose the latter.

187. See Eisenberg, *supra* note 1, at 8 n.17 (noting that "it is not clear that donative promises involve smaller average stakes than bargains when consumer transactions are taken into account—or, for that matter, smaller average stakes than libel or trespass as a class").

188. Gamage & Kedem, *supra* note 90, at 48 n.157.

189. Gamage and Kedem cite a Marc Galanter article as authority, but it supports their claim in only the most general way. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 24–25 (1983).

190. See, e.g., Yvette Kantrow, *Nah Nah*, DAILY DEAL, Sept. 27, 2004, at 49 (noting "bitter litigation" between the State of Connecticut and Forstmann Little & Co.); Bruce McMichael, *Security of Energy Supply Tops the Agenda: Rationale for Expanding US Production Must be Clarified*, LLOYD'S LIST, Apr. 29, 2004, at 10 (describing "a number of bitter litigation battles" between oil companies and contractors); *Microsoft to Drop Passport Service Due to Lack of Interest*, IRISH TIMES, Jan. 7, 2005, at 6 (noting "bitter litigation" between Microsoft Corporation and Sun Systems).

191. PUB. CITIZEN, FREQUENT FILERS: CORPORATE HYPOCRISY IN ACCESSING THE COURTS 11 (2004), available at [http://www.citizen.org/documents/Frequent\\_Filers\\_FINAL.pdf](http://www.citizen.org/documents/Frequent_Filers_FINAL.pdf) (finding that businesses were 69% more likely than individual tort plaintiffs to be sanctioned under Rule 11 of the Federal Rules of Civil Procedure for engaging in frivolous litigation).

The second type of cost that Judge Posner identifies springs from Fuller’s evidentiary concern—the costs of legal error, where the focus is on the promisor’s cost of defending a groundless suit and incurring litigation costs that have no social value.<sup>192</sup> Like Fuller, Judge Posner assumes that gratuitous promises are more likely to be the subject of lawsuits by perjuring plaintiffs than are commercial promises.<sup>193</sup> Like Fuller, he offers neither empirical evidence to support this assumption, nor a rational explanation for it.

Judge Posner additionally notes that the cost of legal errors will be high in promises involving social relationships, such as a man’s promise to take a woman to dinner, “because of the difficulty of distinguishing in casual social relations between a mere present intention, subject to change at will, and a promise intended to be binding on the promisor.”<sup>194</sup> Judge Posner, like Fuller, presumes that gift promises will be more difficult to differentiate from mere statements of intent than commercial promises. As noted earlier, by fully utilizing the King’s English, gift promisors can deliver their promises with varying degrees of certitude, just like commercial promisors.<sup>195</sup> There is no reason why the promises of donors need be any less clear than those of commercial actors.

Judge Posner recently rendered an opinion in such a case, wherein he decided that the learned trial judge and a jury had completely misunderstood the intent behind a commercial e-mail.<sup>196</sup> In the context of a promissory estoppel claim, Judge Posner also recently discussed the fact that a speaker in a commercial context has the ability to make his statements sufficiently precise so that listeners can discern whether he is making promises or mere statements of intention.<sup>197</sup> Potential donors have the same ability.

Judge Posner attempted to clinch his argument by noting that the law refuses to enforce trivial social promises “where an additional factor, pointing in the same direction, is the existence of an inexpensive alternative to legal enforcement: refusal to engage in promissory transactions in

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192. Posner, *supra* note 26, at 415.

193. In discussing cases of moral consideration such as *Webb v. McGowin*, 168 So. 196 (Ala. 1935), Judge Posner argues that the fact that a promise has allegedly been made after the promisee has done something for the promisor (such as rescue him from danger) makes it less likely that the promise is a “figment of the promisee’s imagination. . . . Stated otherwise, the legal-error costs of enforcing the promise are lower in the rescue case.” Posner, *supra* note 26, at 419. Because it is natural for family members to make gifts to one another, the risk of legal error is also lower in the context of gift promises made to family members.

194. Posner, *supra* note 26, at 417.

195. Kull, *supra* note 98, at 54.

196. *PFT Roberson, Inc. v. Volvo Trucks N. Am., Inc.*, 420 F.3d 728, 729 (7th Cir. 2005) (holding that no reasonable person could believe, as the trial judge and jury had, that an e-mail constituted an intent to contract); *see also Price v. Highland Cmty. Bank*, 722 F. Supp. 454, 458–59 (N.D. Ill. 1989) (upholding a jury verdict as based on substantial evidence regarding the intent of a promisor, even though Judge Posner, sitting by designation, explicitly disagreed with the jury’s conclusion).

197. *See Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 703 (7th Cir. 2004) (noting that “the vaguer the alleged promise the less likely it is to be found to be a promise”).

the future.”<sup>198</sup> In other words, the courts should stay clear of gratuitous promises because when a man refuses to live up to a promise to take a woman to dinner, she can refuse to accept any date offers from him in the future. But does the same rationale not apply to many commercial promises? If Merchant *A* stiffes Merchant *B*, can Merchant *B* not refuse to do business with Merchant *A* in the future? Again, Judge Posner’s reasoning is a more persuasive argument for distinguishing between large and small promises rather than between commercial and gratuitous promises.<sup>199</sup>

Overall, Judge Posner’s argument that the common law distinction between gratuitous promises and commercial promises can be justified on efficiency grounds is interesting and helpful, but not compelling.<sup>200</sup> Judge Posner ultimately fails to provide a convincing economic rationale for distinguishing bargained-for from gratuitous promises.

Gamage and Kedem extend Judge Posner’s argument by pointing out, with a passing reference to transaction cost economics, that the type of relationship that often spawns gift promises may readily include other mutually understood obligations that are never stated explicitly by either party. They argue that “[t]o enforce only the explicitly promised obligations would risk imposing an undue burden on the promisor, as her explicitly articulated obligations would become enforceable but any unarticulated return obligations of the promisee would remain unenforced.”<sup>201</sup> This argument is fine as far as it goes; however, it should be remembered once again that we are looking for a justification for distinguishing gift promises from bargained promises. Given that increasing amounts of commercial contracting occur on a relational level<sup>202</sup> and that

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198. Posner, *supra* note 26, at 417. Presumably Judge Posner is referring to social promises that are trivial, but not so trivial that they would already be dismissed on the basis of *de minimis non curat lex*.

199. Judge Posner was also making the point that disappointed recipients of gratuitous promises are more likely to seek informal redress, even if litigation were available to them. *Id.* This is true, but similarly applies to recipients of bargained-for promises. Businesspeople seldom sue each other for breach of contract, in part because there are many forms of nonlegal sanction available to them. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963).

200. Kull notes:

[O]f the various legal rules that might plausibly be thought to have been shaped by judicial concern for efficiency, the doctrine of consideration must be one of the least promising candidates. Consideration, both historically and (in a theoretical sense) even today, is a mere substitute for the primary validating formality of the seal; yet the seal validates all promises alike, without regard to the costs and benefits of enforcement. The convoluted state of modern doctrine resulted when consideration ceased to be a sufficient reason for enforcing a promise and became, with few exceptions, the only recognized reason. Whatever the causes of this development, it seems unlikely to have resulted from a judicial concern with efficiency.

Kull, *supra* note 98, at 56.

201. Gamage & Kedem, *supra* note 90, at 48.

202. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 190 (2005) (noting that “an increasing amount of contract activity arguably takes place on a relational level that promotes a continuing basis of interaction extending across the boundaries of such discrete contractual interactions”).

most explicit contracts are, contrary to economic theory, not particularly detailed,<sup>203</sup> this observation is just as relevant for commercial promises as gratuitous promises and provides no strong basis for distinguishing between the two.

Charles Goetz and Robert Scott also lodge an economic argument against enforcing gratuitous promises, focusing on the benefit that a promisor can give a promisee by announcing a gift ahead of time, such as the ability to plan. Unfortunately, they argue, the benefit of this early announcement flows entirely to the promisee (if one ignores Judge Posner’s argument that a promisor also gains utility by ensuring that the gift has added value to the promisee), while the detriment would fall entirely upon the promisor if such promises were enforced. Goetz and Scott observe, as does Judge Posner, that if there are effective extralegal sanctions, then legal enforceability is not needed.<sup>204</sup> If the promisor is sure to perform, then legal enforceability will give extra assurance to the promisee without injuring the promisor.<sup>205</sup> And if the promisor acts in bad faith and is sure not to perform, then legal enforceability creates value by deterring such hollow promises.<sup>206</sup> Ultimately, Goetz and Scott claim, “[t]he social desirability of enforcement . . . depends upon whether those gains [created by enforceability in the in-between cases where it is not clear whether the promisor will perform] are offset by corresponding costs.”<sup>207</sup> This economic reasoning leads to no clear conclusions because it is very difficult to know when extralegal sanctions will be effective, when the promisor is sure to perform, when the promisor is acting in bad faith, and how much promissory reliance has occurred.<sup>208</sup>

Assuming that enforcing gift promises will discourage their making, Goetz and Scott embrace the common law rule refusing enforcement:

*The only alternative to announcing a narrow promise may be forgoing any announcement at all.* If donative promises are not enforced, promisees will adapt to the risk of a regret contingency by self-protective limitations on their beneficial reliance. These adjustments generally will be more precise and less costly in reduced reliance than the solely-quantitative precautionary adjustments available to promisors reluctant to impair the social relationship. Thus, the legal enforcement of donative promises may produce an excessively costly precautionary reduction in the quantity of future promis[es].<sup>209</sup>

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203. Whereas self-interest models formulated by traditional economic theorists predict that principals will prefer explicit contracts, in real life most contracts between employers and employees (as well as between other economic actors) are incomplete because the parties prefer implicit contracts featuring reciprocity. See Fehr & Gächter, *supra* note 52, at 168.

204. Goetz & Scott, *supra* note 67, at 1278.

205. *Id.* at 1286–87.

206. *Id.* at 1287.

207. *Id.* at 1278.

208. *Id.* at 1321–22 (noting that “promissory reliance is particularly impervious to measurement”).

209. *Id.* at 1305 (emphasis added).

This seems wrong. First, Goetz and Scott simply assume that enforcing gift promises will discourage the making of all such promises, not just fraudulent gift promises. This outcome is possible, but far from certain. Second, they assume that the only alternative to announcing a gift promise is to not announce a gift promise at all. But, as Kull notes, the real alternative is not between a gift promise and no gift promise; it is between “a gratuitous promise and some appropriately qualified undertaking: a conditional promise or a statement of intention, more or less emphatic.”<sup>210</sup> In other words, promisors can protect themselves from the consequences of the enforcement of donative promises by simply wording them more precisely in order to make their meaning clear. Donees, on the other hand, can protect themselves only by accurately guessing the true intent and ability of the donor to live up to a promise. Absent a crystal ball, this prognostication will not be easy. The more precise adjustments can be made by the gratuitous promisor (who need only be careful in her wording) not the promisee (unless the promisee can read minds).

For these reasons, Kull, disagreeing with Judge Posner and with Goetz and Scott, suggests that enforcing gift promises need not significantly reduce their total number:

The only gratuitous promises that will be discouraged by a rule of enforceability are those to which the promisor is unwilling to attach a full warranty. Rather than being suppressed, however, most such promises will simply be restated more accurately—as conditional promises or as statements of intention . . . . This greater precision must enhance, not diminish, the net social gain from beneficial reliance.<sup>211</sup>

At the end of the day, LNE scholarship produces conclusions that primarily reinforce Fuller’s sixty-year-old traditional analysis. Traditionalists had already concluded that due to problems of proof and deliberativeness, purely gratuitous promises are poor candidates for enforce-

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210. Kull, *supra* note 98, at 57–58.

211. *Id.* Kull noted that a donor simultaneously gives up some freedom while conferring benefits upon the donee by moving from a mere statement of intention, to a qualified promise, to an unqualified promise. A donor is presumptively willing to forfeit increasing amounts of freedom in order to confer upon the donee an increasing ability to rely upon the promised gift. “If contract law exists to extend the potential reach of private action, rather than to protect individuals against the consequences of their own acts, gratuitous promises (seriously intended) should plainly be enforced.” *Id.* at 61.

From this rule, Kull exempted promises regarding social engagements and “many intrafamily” promises on grounds that they are not “seriously intended.” *Id.* at 40 n.3. But why are they not seriously intended? Is it because they know the law will not enforce them? Kull doubted it. *Id.* at 62 (“It is difficult to feel assured . . . that makers and recipients of gratuitous promises have any common understanding about their legal effect.”). Eisenberg agrees. Eisenberg, *supra* note 1, at 3 n.7 (“My judgment is that most donative promisees do not know whether a donative promise is legally enforceable.”).

Kull concluded that “[i]f people who make gratuitous promises are presumed to be as rational as those who make bargain promises and no more in need of special protection, then their promises have no less claim on the social resources devoted to enforcement.” Kull, *supra* note 98, at 64–65.

ment.<sup>212</sup> LNE scholars reached the same conclusion for similar reasons. Neither the traditional case nor the LNE case for these conclusions is overwhelmingly persuasive.

### C. Behavioral Law & Economics

As noted earlier, BLE considerations recognize more strongly the value of gifts and gift promises to modern society than do competing modes of analysis. Several other behavioral factors that should be considered also tend to make a stronger case for enforcing gift promises than is recognized by the traditional and LNE schools of thought. But will the case ultimately be strong enough to tip the balance against the current requirement of consideration?

#### 1. The Endowment Effect

There is no strong reason to enforce gratuitous promises if no harm results from their breach. Both traditionalists and economists have generally assumed that this proposition is true, absent reliance by the donee that would give rise to a promissory estoppel claim. Eisenberg, for example, dismisses “the psychological state aroused by a donative promise [which] is often closer to hope than to anticipation.”<sup>213</sup> In other words, everyone knows gift promisors can change their minds, so don’t get your hopes up. And if you’re disappointed by a gratuitous promisor’s breach, get over it!

The psychological evidence is not so dismissive, however. Because of the endowment effect, people value things more once they consider them part of their “endowment” than they did before. Importantly, much evidence indicates that actual ownership is not necessary for the endowment effect to attach.<sup>214</sup> Simply thinking of an item as yours can make it seem more valuable. Once people partially adapt to the possession of a good, their reference point shifts, and failing to acquire the item is not affectively neutral, but actually feels like a loss.<sup>215</sup> Thus, once *A*

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212. See, e.g., Eisenberg, *supra* note 1.

213. *Id.* at 3.

214. See Ziv Carmon et al., *Option Attachment: When Deliberating Makes Choosing Feel like Losing*, 30 J. CONSUMER RES. 15, 25 (2003) (showing that just thinking about buying an object can cause people to increase their attachment to it); Jeff T. Casey, *Predicting Buyer-Seller Pricing Disparities*, 41 MGMT. SCI. 979, 983 (1995) (noting that an individual’s “perceived status quo can include an asset not in his possession”); Sankar Sen & Eric J. Johnson, *Mere-Possession Effects Without Possession in Consumer Choice*, 24 J. CONSUMER RES. 105, 113 (1997) (showing that possession of a mere coupon for an item can cause endowment and other related effects similar to possession of item itself); James R. Wolf et al., *Is Overbidding in Online Auctions the Result of a Pseudo-Endowment Effect?* 7 (Nov. 3, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=735464> (noting that “factual ownership is not a prerequisite for people to be affected by the endowment effect”).

215. See Carmon et al., *supra* note 214, at 16 (noting that when one has developed a prefactual sense of ownership when considering buying a good, a decision not to buy it will cause a sense of loss manifested by feelings of discomfort); Stephen J. Hoch & George F. Loewenstein, *Time-inconsistent Preferences and Consumer Control*, 17 J. CONSUMER RES. 492, 495–96 (1991).

promises to give his house to *B* a year hence, *B* will tend to include that house in his psychological endowment; and if *A* does not fulfill his promise, *B* will feel a psychological loss. Although from an economic point of view *B* has not changed position, from a psychological point of view *B* has sustained a loss.

Although this feeling is not the type of injury that the law currently recognizes as compensable, it is nonetheless real and nontrivial, and should not be completely ignored in a policy analysis.

## 2. *Emotions and Decision Making*

As noted earlier, Fuller suggested that the consideration requirement serves the cautionary role of ensuring that the parties have considered their situation with some deliberation before entering into a binding contract. Fuller was worried that gift promises may be made impulsively,<sup>216</sup> and some economists have embraced this argument as grounds for refusing to enforce gratuitous promises.

Because BLE emphasizes that people have a tendency to make decisions that are not entirely rational,<sup>217</sup> its empirical evidence could be marshaled to support the view that the law can serve cautionary and channeling functions in the context of gift promise making.<sup>218</sup> For example, psychological studies show that good moods lead to generosity.<sup>219</sup> So a person in a good mood on a particular day may make a gratuitous promise that she would not have made on another day. A few days later, when she is not in as good a mood, she may not wish to fulfill that promise.

However, the key BLE point is that, although the traditional and LNE conclusion that gift promises may be made irrationally is accurate, there seems little if any reason to distinguish between gratuitous promises and exchange promises in this regard. Fuller, and most economists,<sup>220</sup> have simply assumed that while gratuitous decisions are often made emotionally, decisions in the market are made rationally. To the

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216. Fuller, *supra* note 15, at 806–07, 812–15.

217. See, e.g., REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 7 (2001) (noting that people, instead of acting as a hypothetical rational human, tend to use certain heuristics that “can systematically lead us to make poorer judgments and choices than we would by thinking in a more controlled manner about our decisions”).

218. See Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 758 (2000).

219. Arno Riedl & Ronald Bosman, *Emotions and Economic Shocks in a First-Price Auction: An Experimental Study* 4–5 (Tinbergen Inst., Discussion Paper No. 2003-056, 2003), available at <http://ssrn.com/abstract=417660> (citing Georg Kirchsteiger et al., *Your Morals are Your Moods* (2001) (unpublished manuscript, on file with the University of Vienna and Tilburg University)).

220. See George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. L. REV. 426, 426 (2000) (noting that neoclassical economists have generally “sought to expunge the utility construct of its emotional content”); Riedl & Bosman, *supra* note 219, at 1 (noting that “there has not been much economic work that deals with emotions explicitly”).

contrary, the behavioral evidence indicates that bargained-for decisions are subject to just as much emotion and irrationality as gift decisions, and thus there is little basis for distinguishing between them on this ground.<sup>221</sup>

Indeed, even the most significant market decisions are often heavily influenced by emotion.<sup>222</sup> Some psychological research indicates that visceral factors are more important in shaping human behavior than higher level cognition.<sup>223</sup> As noted earlier, Kull describes how excited people get at auctions.<sup>224</sup> Although this may have been a casual observation on his part, and although the economic literature has generally ignored the role of emotions and other nonrational factors in studying auctions,<sup>225</sup> empirical evidence generated by psychologists supports the observation that emotions impact the rationality of behavior in both live auctions and internet auctions.<sup>226</sup> “Auction fever” causes people to bid more than they intended to,<sup>227</sup> but their competitive drive causes them to be happy to have won the auction even if they could easily have bought the item cheaper elsewhere.<sup>228</sup>

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221. See Gamage & Kedem, *supra* note 90, at 9–10 (noting that “there is little reason to believe that rash donative promises are any more common than rash purchases”).

222. See also Hoch & Loewenstein, *supra* note 215, at 492 (noting that a complete understanding of consumer behavior must take into account short-term emotional factors); George F. Loewenstein et al., *Risk as Feelings*, 127 *PSYCHOL. BULL.* 267 (2001).

223. See Loewenstein, *supra* note 220, at 427 (noting also that economists only rarely incorporate visceral factors into their models of human behavior).

224. Kull, *supra* note 98, at 54.

225. See, e.g., Min Ding et al., *Emotional Bidders—An Analytical and Experimental Examination of Consumers’ Behavior in a Priceline-Like Reverse Auction*, 51 *MGMT. SCI.* 352, 363 (2005) (finding that “the classic economic model did not capture the empirical behavior of bidders”); Gillian Ku et al., *Towards a Competitive Arousal Model of Decision-Making: A Study of Auction Fever in Live and Internet Auctions*, 96 *ORG. BEHAV. & HUM. DECISION PROCESSES* 89, 90 (2005) (noting that “[w]ith few exceptions, research in economics has presumed bidder rationality”).

226. In live and Internet auctions, numerous studies have found irrational overbidding. See, e.g., Dan Ariely & Itamar Simonson, *Buying, Bidding, Playing, or Competing? Value Assessment and Decision Dynamics in Online Auctions*, 13 *J. CONSUMER PSYCHOL.* 113, 121 (2003) (finding that consumers in online auctions overpay for widely available goods); Ku et al., *supra* note 225, at 101 (noting several examples of irrational overbidding in auctions).

Emotions often play a role in irrational behavior in auctions. See, e.g., Ding et al., *supra* note 225, at 363 (finding that “emotions are an integral component of a bidder’s decision state and bidding strategy”); Ku et al., *supra* note 225, at 101–02 (reporting evidence from both live and Internet auctions and noting the “excited, frantic rush of urgency that accompanies the final moments of an auction” and that may lead to irrational bidding); J. Keith Murnighan, *A Very Extreme Case of the Dollar Auction*, 26 *J. MGMT. EDUC.* 56, 64 (2002) (illustrating how auction bidding can be influenced by “surging emotions”); Riedl & Bosman, *supra* note 219, at 17 (finding that the emotional state of auction bidders systematically influences bidder behavior).

227. See Wolf et al., *supra* note 214, at 4–5 (discussing auction fever generally).

228. See Ku et al., *supra* note 225, at 98 (surveying winners of real auctions who overpaid and finding them quite happy with their purchases); Murnighan, *supra* note 226, at 58 (indicating how, when competitive juices start to flow, bidder rationality can fly out the window); see also Sharon Ann Dunn, *Do Losers Matter? An Experimental Look at the Impact of Control and Scarcity on Satisfaction with an Online Buying Experience* 59 (May 2002) (unpublished Ph.D. dissertation, University of Texas) (on file with author) (finding that auction participants derive utility from winning, from out-bidding competing bidders for a scarce item, above and beyond the utility of simply obtaining the desired item).

This should not be surprising, for the evidence is clear that emotions also shape decisions regarding risk. Loewenstein et al., *supra* note 222, at 271. For example, people in positive emotional states tend

Although the auction context has unique characteristics, most of the shortcomings of rational decision making that are evident in auctions also exist in regular consumer decision making,<sup>229</sup> including the impact of competitive drives.<sup>230</sup> “When people are in transient emotionally or biologically ‘hot’ states, they sometimes make decisions that are costly or even impossible to reverse.”<sup>231</sup> Thus, emotions often cause people to make consumption decisions that are inconsistent with their more rational, long-term preferences.<sup>232</sup> Marketers recognize this phenomenon and the goal of much advertising is to induce customers into entering a “hot” state in which emotions will heavily influence contracting decisions.<sup>233</sup> The law likewise recognizes this phenomenon and, in a variety of circumstances, provides cooling-off periods during which consumers can unwind their commercial bargains.<sup>234</sup>

Numerous studies from psychology show that commercial decisions are affected by emotions and feelings such as fear,<sup>235</sup> guilt,<sup>236</sup> pride,<sup>237</sup> and

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to have high expectations and to make optimistic judgments and choices including taking more risks. *Id.*

229. See Ariely & Simonson, *supra* note 226, at 121 (noting that participants in online auctions are also consumers in other contexts and their main characteristics and preferences are likely to apply in both settings); Ku et al., *supra* note 225, at 102 (discussing how the key elements of some aspects of irrational bidding in auctions can surface in other decision making contests as well); Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 292 (1992) (finding examples of nonrational consumer behavior in nonauction setting).

230. Psychologists have found evidence of “competitive altruism,” the fact that competition for scarce reputational benefits can spur altruism toward groups and charities. See Pat Barclay, *Trustworthiness and Competitive Altruism Can Also Solve the “Tragedy of the Commons,”* 25 EVOLUTION & HUM. BEHAV. 209, 217 (2004); Manfred Milinski et al., *Reputation Helps Solve the “Tragedy of the Commons,”* 415 NATURE 424, 426 (2002). Economists agree. See John Duffy & Tatiana Kornienko, *Does Competition Affect Giving? An Experimental Study* (July 15, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=762544> (finding that competitive urges can encourage or frustrate altruistic behavior, depending on how activities are framed).

231. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1238 (2003) (noting that sometimes “[p]eople buy cars they cannot quite afford after breathing in the intoxicating new-car smell during a test drive”).

232. See Jeremy A. Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 IND. L.J. 155, 233 (2005) (noting that “a number of reasons exist to believe that decisions in a ‘hot’ emotional state may be suboptimal, or at least inconsistent with an agent’s more reasoned, long-term preferences”).

233. The psychological literature indicates that it is relatively easy to affect consumers’ behavior, even with subconscious primes. For example, playing German music in a wine store can influence consumers to buy more German wine than French wine even when the consumers generally prefer French wine and will buy more French than German wine when French music is being played. Adrian C. North et al., *In-Store Music Affects Product Choice*, 390 NATURE 132, 132 (1997); see also Chris Janiszewski & Stijn M. J. van Osselaer, *Behavior Activation is Not Enough*, 15 J. CONSUMER PSYCHOL. 218 (discussing the theory behind nonconsciously mediated behavior); Lucy Johnston, *Behavioral Mimicry and Stigmatization*, 20 SOC. COGNITION 18, 18, 31 (2002) (reporting results of experiments indicating that people’s consumption can be affected by “preconscious priming”).

234. See George Loewenstein et al., *Projection Bias in Predicting Future Utility*, 117 Q.J. ECON. 1209, 1229–30 (2003); see also Peter H. Huang, *Regulating Irrational Exuberance and Anxiety in Securities Markets*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR, *supra* note 19, at 501, 504 (giving numerous examples of existing legal doctrines that make provision for protecting people from emotional consumption decisions they have made).

235. See Peter C. Verhoef & Kristine Vlagsma, *Explaining Choice and Share of Category Requirements of Biologic Meat* 10–11 (Erasmus Research Inst. of Mgmt. Report, Working Paper No.

distress.<sup>238</sup> Simply being in a good mood affects consumption decisions,<sup>239</sup> just as it affects generosity. Studies from behavioral finance indicate that investors' decisions are influenced by their moods,<sup>240</sup> which can be affected by factors as mundane as the weather<sup>241</sup> and change of seasons.<sup>242</sup> Investors' decisions are also influenced simply by whether investors like or dislike a company.<sup>243</sup>

A discussion of all the irrational aspects of individual decision making in the commercial world would be exceedingly lengthy, but consider just one more—impulse buying. Over the past century, shopping in developed economies has changed from a way of acquiring necessities to a “means of acquiring and expressing a sense of self-identity.”<sup>244</sup> Although traditional economics does not take into account self-esteem or self-image,<sup>245</sup> some shoppers “buy not so much to obtain utility or service from a purchased commodity as to achieve gratification through the buying process itself.”<sup>246</sup> That Americans now spend more time in shopping

ERS-2003-093-MKT, 2003), available at <http://ssrn.com/abstract=496702> (explaining why people choose to consume organic meat).

236. See John C. Birkimer et al., *Guilt and Help from Friends: Variables Related to Healthy Behavior*, 133 J. SOC. PSYCHOL. 683, 690 (1993) (reporting results of survey indicating that guilt had an impact on consumer decisions to purchase tobacco products).

237. See Maria J. Louro et al., *Negative Returns on Positive Emotions: The Influence of Pride and Self-Regulatory Goals on Repurchase Decisions*, 31 J. CONSUMER RES. 833, 839 (2005) (reporting results of study indicating that consumer pride can affect purchase decisions).

238. See Julie Anne Lee & Stephen J. S. Holden, *Understanding the Determinants of Environmentally Conscious Behavior*, 16 PSYCHOL. & MARKETING 373, 384 (1999) (reporting results of experiment regarding factors that shape environmentally conscious consumer behavior).

239. See Harper A. Roehm, Jr. & Michelle L. Roehm, *Revisiting the Effect of Positive Mood on Variety Seeking*, 32 J. CONSUMER RES. 330, 335 (2005) (reporting results of experiments on impact of mood on consumer variety seeking); Catherine W. M. Yeung & Robert S. Wyer, Jr., *Affect, Appraisal, and Consumer Judgment*, 31 J. CONSUMER RES. 412, 417, 420 (2004) (reporting results of two experiments on affect's impact on consumer judgment).

240. See Brian M. Lucey & Michael Dowling, *The Role of Feelings in Investor Decision-Making*, 19 J. ECON. SURV. 211, 217–18 (2005) (citing studies).

241. See Edward M. Saunders, Jr., *Stock Prices and Wall Street Weather*, 83 AM. ECON. REV. 1337, 1344–45 (finding evidence that weather affects investors' moods, which, in turn, affects stock prices).

242. See Mark J. Kamstra et al., *Winter Blues: A SAD Stock Market Cycle*, 93 AM. ECON. REV. 324, 340 (2003) (“[T]he preponderance of the evidence in this paper supports the existence of an important effect of seasonal affective disorder on stock market returns around the world.”).

243. See, e.g., Donald G. MacGregor, *Imagery and Financial Judgment*, 3 J. PSYCHOL. & FIN. MARKETS 15, 15–16 (2002) (finding that investment decisions are influenced by whether investors like or dislike companies). Even professional investors' judgment is affected by their image of a company. Hersh Shefrin, *Do Investors Expect Higher Returns from Safer Stocks Than from Riskier Stocks?*, 2 J. PSYCHOL. & FIN. MARKETS 176, 179 (2001).

244. Michael Neuner et al., *Compulsive Buying in Maturing Consumer Societies: An Empirical Re-Inquiry*, 26 J. ECON. PSYCHOL. 509, 511, 517 (2005) (studying the mechanisms of compulsive buying in maturing societies, with special emphasis on Germany, and concluding that “compulsive buying has increased markedly in Germany between 1991 and 2001”); see also HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS: TO HAVE IS TO BE* 4 (1992).

245. FREY, *supra* note 75, at 19 n.4 (“Self-esteem is not a category used in economics, but is taken to be of central importance for human beings by many scholars outside economics.”).

246. Thomas C. O'Guinn & Ronald J. Faber, *Compulsive Buying: A Phenomenological Exploration*, 16 J. CONSUMER RES. 147, 147 (1989) (referring to “compulsive buyers”); see also Junghyun Kim & Robert LaRose, *Interactive E-Commerce: Promoting Consumer Efficiency or Impulsivity?*, 10 J. COMPUTER-MEDIATED COMM. (2004), [http://jcmc.indiana.edu/vol10/issue1/kim\\_larose.html](http://jcmc.indiana.edu/vol10/issue1/kim_larose.html) (dividing

malls than any other place except work or home<sup>247</sup> indicates that if Professor Posner is worried about consumers' attempts to "keep up with the Joneses," he should be substantially more concerned with bargained transactions than gift transactions. As in donative giving, mood is a very important influence upon impulse buying.<sup>248</sup>

If Professor Posner is worried about people engaging in too much giving to facilitate trust relationships, he should be just as concerned about impulse buying, where the motivation is often to enjoy the attention of salespeople, whom compulsive shoppers may view as friends.<sup>249</sup> Impulse buying "can be motivated by generosity. Examples [include] buying a gift for a sick friend or suddenly deciding to pick up the tab for a meal."<sup>250</sup> Compulsive buyers often buy gifts hoping to gain friends or strengthen friendships.<sup>251</sup> They frequently are buying attention and support, rather than trust.<sup>252</sup>

Impulse buying currently constitutes a substantial and growing segment of purchasing behavior, and "compulsive buying" (impulse buying to excess)<sup>253</sup> is on the increase, affecting a substantial percentage of adults.<sup>254</sup> Even items as large as cars and houses are often purchased impulsively.<sup>255</sup> Impulse buying is scarcely rational and "has been linked to postpurchase financial problems, product disappointment, guilt feelings, and social disapproval."<sup>256</sup>

Although standard economic theory cannot adequately account for impulse buying,<sup>257</sup> the psychological theory of symbolic self-completion suggests that people often acquire material objects to compensate for

internet shoppers into those with a convenience orientation and those with a recreational orientation who view "shopping as a form of recreation and often make impulse buys").

247. Helga Dittmar et al., *Objects, Decision Considerations and Self-Image in Men's and Women's Impulse Purchases*, 93 ACTA PSYCHOLOGICA 187, 188 (1996).

248. *See id.* at 203.

249. O'Guinn & Faber, *supra* note 246, at 154.

250. Geoff Bayley & Clive Nancarrow, *Impulse Purchasing: A Qualitative Exploration of the Phenomenon*, 1 QUALITATIVE MARKET RES. 99, 101 (1998); Dennis W. Rook & Robert J. Fisher, *Normative Influences on Impulsive Buying Behavior*, 22 J. CONSUMER RES. 305, 305 (1995).

251. *See* O'Guinn & Faber, *supra* note 246, at 154.

252. *See id.* at 155.

253. "Impulse buying" may be defined as "a novelty or escape purchase that breaks the normal buying pattern," whereas "compulsive shopping" is "similar in quality to impulsive buying, but to excess." Dittmar et al., *supra* note 247, at 189.

254. *See* Cathy J. Cobb & Wayne D. Hoyer, *Planned Versus Impulse Purchase Behavior*, 62 J. RETAILING 384, 390 (1986) (noting research indicating that "[t]here appears to be a high level of impulse purchasing in today's marketplace . . . [that] is not confined to any one type of produce or outlet"); Dittmar et al., *supra* note 247, at 188.

Although almost everyone engages in impulse buying from time to time, people who are low cognition/high affect do so more often than people with other combinations of those two characteristics. *See* Jane Z. Sojka & Joan L. Giese, *Using Individual Differences to Detect Customer Shopping Behavior*, 13 INT'L REV. RETAIL, DISTRIBUTION & CONSUMER RES. 337, 348 (2003).

255. Bayley & Nancarrow, *supra* note 250, at 111.

256. Rook & Fisher, *supra* note 250, at 306; *see also* O'Guinn & Faber, *supra* note 246, at 147 (noting that compulsive buying can lead to economic and emotional problems for the debtor as well as problems for creditors).

257. *See* Dittmar et al., *supra* note 247, at 188-89.

perceived inadequacies in their self-concept.<sup>258</sup> In fact, the best evidence indicates that the types of goods that are most likely to be purchased impulsively are those that project a person's self-image.<sup>259</sup> The entire shopping process is for many consumers “a significant element in the construction and maintenance of [their] self-identities, in the attainment of social status, and in attempts to make oneself ‘feel better.’”<sup>260</sup> In short, emotions affect all manner of human decisions, and BLE indicates that there is no particular reason to use emotions as grounds for distinguishing between gift promises and bargained-for promises, as traditionalists and economists do.

### 3. *Intertemporal Inconsistencies*

Farnsworth noted the precautionary function of the law's decision to simultaneously refuse to enforce a gift promise on the one hand, yet refuse to undo a completed gift transaction on the other.<sup>261</sup> Once a gift is delivered, the object becomes the property of the donee.<sup>262</sup>

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258. See *id.* at 190; see also Richard Elliott, *Addictive Consumption: Function and Fragmentation in Postmodernity*, 17 J. CONSUMER POL'Y 159, 168–69 (1994) (finding that prime motives for addictive shoppers are to match perceptions of socially desirable or required appearances and to repair their mood); O'Guinn & Faber, *supra* note 246, at 155–56 (finding that enhanced self-perception is an important short-term gratification gained by compulsive buyers).

259. See Dittmar et al., *supra* note 247, at 189.

260. *Id.* at 190.

261. See generally Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341 (1926) (evaluating the delivery requirement).

Professor Posner suggests that any adequate explanation for the current state of the law must explain why the law refuses to enforce gratuitous promises, but refuses to undo gratuitous transfers. Posner, *supra* note 20, at 592–93. Professor Posner suggests an economic rationale that, he concludes, shows “that the law could sensibly provide more protection for transferees than for promisees.” *Id.* at 595. It seems likely that the endowment effect and the related concept of the status quo bias may well play a role here. Because of the endowment effect, people react more negatively to being deprived of something that they have possessed than something that they have never possessed. Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1318–19 (1998). Because of the endowment effect, it is much more significant to take back a gift once given than to simply never give a promised gift in the first place. It has been hypothesized that the endowment effect might help explain the (very) roughly analogous notion of adverse possession. See Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989).

Similarly, because of the status quo bias, people tend to prefer what they perceive to be the current state of affairs to a different state of affairs, see, e.g., Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 25–26 (1995) (discussing the phenomenon of myopia, in which individuals attend to their present welfare to the detriment of their long-term welfare), contrary to traditional economic assumptions that people have well-defined utility preferences. See Katharine K. Baker, *Gender, Genes, and Choice: A Comparative Look at Feminism, Evolution, and Economics*, 80 N.C. L. REV. 465, 485–87 (2002) (noting that traditional economics assumes that people maximize their utility from a stable set of preferences and reviewing some of the extensive empirical literature that falsifies that assumption).

Thus, while the endowment effect indicates that once the donor has made a gift promise, the donee may begin thinking of the item as part of her endowment, after the gift transaction has been completed, the status quo bias means that the world begins to think of the item as the donee's. That is the new status quo. Other people, such as judges and jurors, will tend to favor that status quo over alter-

[B]ecause of the requirement of delivery, a gift speaks to the present. A gift of \$50,000 would be complete on delivery. The wrench of delivery would have brought home to Jack the finality of the transaction in a way that no promise could have done. If Jack gives Peter \$50,000 right now he is likely to be more reflective than if he promises to give Peter \$50,000 upon his death. *It is an appealing notion that we are more competent in ordering our present actions than our future ones.* If, then, we are less able to protect ourselves against the possibility of “second thoughts” in cases of promises to make gifts than in cases of present gifts, paternalism may seem more justifiable in cases of promises.<sup>263</sup>

In other words, because people tend to think more carefully about a decision to give a gift today than about a promise to give a gift in the future, they will tend to regret the former less often than the latter. Behavioral research indicates that this “appealing notion” is, in fact, accurate. Whereas traditional economic theory assumes that decision makers have time-consistent preferences,<sup>264</sup> in real life people tend to “systematically mispredict their own future preferences . . . underappreciat[ing] the extent to which their preferences may change over time due to a variety of influences” other than just new information.<sup>265</sup> The BLE literature strongly indicates that Jack’s conclusion that he wishes to give Peter \$50,000 today is, in fact, more sound than Jack’s conclusion that he will wish to give Peter \$50,000 a year from today.<sup>266</sup>

Again, however, this intertemporal phenomenon is just as applicable to commercial bargains as to gift decisions. While it may justify treating completed gift transfers differently from gift promises (as the law, in fact, does), it cannot justify treating gift promises differently from commercial promises. People are more likely to lightly make a promise to pay for a good at some point in the future than they are to actually pay

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native states absent good reason to reverse it. Good reasons might include fraud, but likely would not include the donor simply having changed his mind.

262. David Bryden suggests that the delivery requirement is based, in part, on “a psychological insight: Sometimes, at least, one does not truly know one’s intentions until the time comes to cross the Rubicon. Action is the crucible of intention.” David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 384 (2000). In other words, the delivery requirement can be viewed primarily as serving an evidentiary role—providing strong proof that the donor truly meant the gift.

263. E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 397–98 (2000) (emphasis added).

264. See GARY S. BECKER, ACCOUNTING FOR TASTES 10–11 (1996).

265. Manuel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329, 1334 (2003); see also Daniel Kahneman & Jackie Snell, *Predicting Utility*, in INSIGHTS IN DECISION MAKING: A TRIBUTE TO HILLEL J. EINHORN 295, 304–07 (Robin M. Hogarth ed., 1990) (finding that people’s preferences change over time and that there is virtually no correlation between how people predict their preferences will change over time and how they do change); see also Steven R. Grenadier & Neng Wang, *Investment Under Uncertainty and Time-Inconsistent Preferences* (Stanford Graduate Sch. Bus. Working Paper Group, Paper No. 1899, 2005), available at <http://ssrn.com/abstract=766804> (noting that “virtually every experimental study on time preferences suggests that the assumption of time-consistency is unrealistic”). See generally Utset, *supra* note 62.

266. See generally GILBERT, *supra* note 66, at 104–08 (discussing intertemporal inconsistencies).

for it today because of the pain of writing the check or handing over the cash. And people are just as likely to contract to sell an antique they will later regret having sold as they are to promise to give away a family heirloom antique they will later regret having gifted. There is no apparent reason based on intertemporal inconsistencies to enforce commercial promises that people may later regret, but not gift promises when the making of each is similarly affected by people's inability to forecast future desires.

Many economists assume that monetary units are fungible, but the discomfort of writing a check or handing over cash is more direct and painful than that of swiping a credit card. Therefore, people predict they will give more to charity, and in fact do so, in the presence of stimuli that remind them of the availability of credit cards.<sup>267</sup> When simply prompted to consider the availability of credit cards, people thus become more generous in their charitable giving, though they may regret that generosity later when they have to write a check to cover the credit card bill.

As before, this intertemporal inconsistency is not confined to gratuitous transactions. Numerous experiments show that people are more likely to purchase an item and are willing to pay more for it when they pay with a credit card than when they pay by cash.<sup>268</sup> Indeed, one experiment showed that willingness to pay rose dramatically when experimenters simply displayed credit card logos.<sup>269</sup> If, short of bankruptcy proceedings, the law does not allow consumers to escape the enforceability of their credit card purchases, neither is there an obvious reason to allow donors who make regrettable gift pledges to escape enforceability on account of this intertemporal glitch in rational decision making.

A related form of intertemporal miscalculation stems from humans' frequent desire for immediate gratification, a phenomenon noted above.<sup>270</sup> A hypothetically rational person might treat a gift of \$5000 in a year roughly the same as a gift of \$5000 today (after making some NPV calculations). However, many real people would like to enjoy the feeling of giving a promise of a gift today, and defer the pain of actually giving the gift to some time in the future. Due to the mismatch of intertemporal calculations, they may not realize that the future pain of actually giving the \$5000 will be just as intense as it would be if they gave the gift today.

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267. Richard A. Feinberg, *Credit Cards as Spending Facilitating Stimuli: A Conditioning Interpretation*, 13 J. CONSUMER RES. 348, 353–54 (1986). Feinberg also found that people leave larger tips (arguably a form of gift) when they pay with credit cards than when they pay with cash. *Id.* at 349.

268. Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, 12 MARKETING LETTERS 1, 6–8 (2001); Dilip Soman, *Effects of Payment Mechanism on Spending Behavior: The Role of Rehearsal and Immediacy of Payments*, 27 J. CONSUMER RES. 460, 460–61 (2001) (“The paying mechanism has no role to play in a rational, economic evaluation of a purchase opportunity . . . . Yet there is substantial evidence to suggest that consumers who predominantly use credit cards overspend relative to those who do not.”).

269. Feinberg, *supra* note 267, at 350.

270. See *supra* note 62 and accompanying text.

If they understood that fact and had sufficient self-discipline, they might not make the promise today.<sup>271</sup>

Simply put, our long-term desires are often undermined by more immediate temptations.

[People] want to be relatively patient in future periods, but they become increasingly impatient the closer that they get to incurring an immediate cost or receiving an immediate reward. From a long-term point of view, people tend to have the best intentions for their long-run selves: they make plans to start diets, stop smoking, finish writing papers, and so on. However, when the time to act arrives, the chocolate cake trumps the diet, the Camel prevails, and finishing the paper gives way to going to the movies. In the end, our best intentions are always up for reconsideration, particularly when they stand in the way of immediate gratification.<sup>272</sup>

Obviously, this desire to accelerate benefits and delay burdens is not limited to gratuitous promises. Consumers may put a purchase on a credit card, overestimating their ability or willingness to pay off the monthly balance, and therefore come to regret that purchase decision.<sup>273</sup> There is a “pain of paying” that must be experienced if we write the check today.<sup>274</sup> If a consumer commits to buy a new flat-screen television on “no down payment and no payment for a year” terms, and in a year decides that he has “misunderestimated” the pain of actually paying, the law will still enforce the promise to pay. Why should the law let a mistaken gift promisor off the hook for the same reason?

#### 4. *Intrinsic Motivation*

A key substantive question in the debate over the proper enforceability of gratuitous promises regards whether enforcing such promises will result in a reduction in the number made. Judge Posner and Goetz and Scott assume that should the law enforce gift promises to charities, fewer such promises would be made. Kull assumes the opposite. LNE has not settled this issue.

Intrinsic motivation, the notion that some activities have motivations of their own that are independent of any reward, is an important concept in cognitive psychology.<sup>275</sup> Whereas traditional economic theory

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271. See Huang, *supra* note 234, at 505 (“A difficulty with anticipated emotions is that people may systematically make prediction errors regarding their future interim or ex post feelings.”).

272. Utset, *supra* note 62, at 429–30.

273. See Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 75–76 (1991) (finding evidence that “many consumers are insensitive to interest-rate differentials because they believe they will pay within the grace period (although they repeatedly fail to do so)”).

274. See Prelec & Loewenstein, *supra* note 115, at 25 (noting the “pain of paying”).

275. See Uri Gneezy & Aldo Rustichini, *Incentives, Punishment, and Behavior*, in ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 6, at 572, 574.

tends to overlook nonpecuniary motives,<sup>276</sup> psychological studies indicate that often when rewards are given for an activity that previously had been done voluntarily, the amount of the activity that people are willing to do actually declines, contrary to the standard economic account.<sup>277</sup>

So, for example, when blood banks begin to pay for blood donations, the volume of donation tends to go down as intrinsic motivation is “crowded out.”<sup>278</sup> When direct incentives are added, volunteer work is often reduced.<sup>279</sup> Intrinsic motivation studies have implications for the study of gift-giving activity, for they demonstrate that nonpecuniary motives can affect behavior in a way that standard economic models cannot explain.<sup>280</sup> In the gift-giving setting, it is worrisome that the act of enforcing donor promises might undermine the intrinsic motivation to make such promises in the first place,<sup>281</sup> supporting the view espoused by Judge Posner as well as Goetz and Scott. They were speaking of charitable gift promises, which the law does, in fact, enforce. That charities seldom sue to enforce gift promises may be an indication that they share this economic surmise. Few charities seem to think that the publicity or other yield from suing donors to enforce gift promises would be positive.<sup>282</sup>

276. Fehr & Falk, *supra* note 41, at 1 (“By neglecting these [nonpecuniary] motives [like the desire to reciprocate or the desire to avoid social disapproval] economists may fail to understand the levels and the changes in behaviour.”).

277. FREY, *supra* note 75, at 83 (noting that standard economic theory suggests that if blood banks pay for blood donations, more people will donate, which is not the case); *see also id.* at 84 (“Standard economics offers no explanation of why simpler monetary rewards are not used as an inducement [by blood banks] instead of juice and sandwiches.”); Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory: A Survey of Empirical Evidence* 3 (Ctr. for Econ. Studies & Ifo Inst. for Econ. Research, Working Paper No. 245, 2000), available at <http://ssrn.com/abstract=203330> (noting that the “crowding out” effect “is one of the most important anomalies in economics as it may reverse the most fundamental economic ‘law,’ namely that raising monetary incentives increases supply”).

In one experiment involving collecting money for charities, members of one group were told that they should collect as much money as possible for the good of the charities, while members of two other groups were similarly exhorted but also promised rewards of 1% and 10%, respectively, of the amounts they collected (to come from a separate pot of funds). The first group that was not promised a reward collected substantially more funds than either group that was promised a reward. Gneezy & Rustichini, *supra* note 275, at 579.

278. FREY, *supra* note 75, at 83.

279. Frey & Jegen, *supra* note 277, at 13 (citing Bruno S. Frey & L. Göette, *Does Pay Motivate Volunteers?* (1999) (unpublished manuscript, on file with the University of Zurich)). Conversely, studies indicate that when small punishments are commenced to deter negative activity, the amount of that activity often actually increases. *Id.* at 13–14.

280. *See* Fehr & Falk, *supra* note 41, at 10 (noting that “in the presence of non-pecuniary motives there are important and, relative to the predictions of the economic model, unexpected interactions between material incentives and non-pecuniary motives”).

281. *See* Gneezy & Rustichini, *supra* note 275, at 573 (noting that many people consider blood donation to be a community duty that one should perform, if possible, but that perception is often undermined when donors receive monetary compensation).

282. *See* Havighurst, *supra* note 58, at 18 (noting that “the necessity of retaining the good will of the community provides a pressure for the release of claims on subscriptions that can be counted upon in every instance where there is even a question of hardship”); Richard B. Schmitt, *Donations Left Unpaid Erode Spirit of Charity*, *TIMES UNION* (Albany, N.Y.), Aug. 6, 1995, at G1 (noting that “charities rarely sue their donors while they are still alive and able to personally defend themselves”).

It is true that lawsuits by charities against donors’ heirs seem to have increased in recent years. The typical scenario involves a donor who has passed away without completing a bequest and then a law-

However, if one changes the focus to the most common type of unenforced gratuitous promises, those made by family members (and to a lesser extent close friends),<sup>283</sup> there are at least three solid reasons to think that enforcing gratuitous promises in this setting will not significantly reduce the number that are seriously made. First, “philanthropic particularism,” the tendency for people to give most of their gifts to relatives, has strong social and evolutionary roots.<sup>284</sup> Such gifts and gift promises are made because of a perceived familial obligation and reciprocity concerns that likely would be largely unaffected by litigation involving other people.

A substantial proportion of gift-giving activity in modern nations is not, as economists suppose it to be, a model of individual choice, rationally made. Rather, “presents are not spontaneous expressions of sentiment but are recurrent, predictable and socially regulated.”<sup>285</sup> Social norms establish to a large extent existing gift practices: who gives to whom,<sup>286</sup> cash or noncash, wrapped or unwrapped, small or large, to be reciprocated or not, on which occasions, and so forth.<sup>287</sup> Informal social rules regarding Christmas gift giving, for example, are broadly followed despite having “no explicit form or institutional backing or moral support.”<sup>288</sup> Those informal norms will exert substantial influence over po-

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suit against heirs who decide they would rather keep the money for themselves. This setting allows the charity to sue without looking ungrateful by framing the lawsuit as a means of protecting the true objects of the deceased’s beneficence from his greedy relatives. *See id.* (quoting Northwestern University’s general counsel as arguing that filing such lawsuits “tells our donors that we are serious about the stewardship over our assets”); *see also* TREBILCOCK, *supra* note 11, at 176 (noting that in Anglo-Canadian jurisdictions where a promise under seal is available, charities rarely seek to use that device as an enforcement means perhaps because “they believe that they are likely to raise more donations on net by giving donors the ability to terminate pledges if a donor’s changed circumstances or a donee’s conduct render this expedient”).

283. Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1907 (2001) (noting that most gratuitous promises that are not enforced on a promissory estoppel or gift-to-charity basis are informal intrafamilial promises, where suits are typically brought after the donor has died).

284. Philanthropic particularism is the tendency of people to give gifts primarily to those with whom they most identify, principally family members. LESTER M. SALAMON, *PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE* 45–46 (1995) (noting that in the area of nonprofits, “philanthropic particularism” is “the tendency of voluntary organizations and their benefactors to focus on particular subgroups of the population”). For this reason, people who do not have families receive comparatively fewer gifts than others. *See* Komter, *supra* note 33, at 396.

285. JAMES G. CARRIER, *GIFTS AND COMMODITIES: EXCHANGE AND WESTERN CAPITALISM SINCE 1700*, at 145 (1995).

286. For example, heirloom items will usually be given only to other family members. *See* Linda L. Price et al., *Older Consumers’ Disposition of Special Possessions*, 27 J. CONSUMER RES. 179, 190 (2000) (“Cultural norms have a powerful impact on the disposition of special possessions. Across our data, the desire to ‘keep things in the family,’ which is the way that cultural norms are articulated, is pervasive.”).

287. *See* Theodore Caplow, *Rule Enforcement Without Visible Means: Christmas Gift Giving in Middletown*, 89 AM. J. SOC. 1306 (1984) (surveying various Christmas gift-giving norms); Lee Cronk, *Strings Attached: On Human Nature*, THE SCIENCES, May–June 1989, at 2, 3 (noting the power of gift-giving norms in both primitive and modern societies).

288. Caplow, *supra* note 287, at 1317.

tential donors' behavior regardless of whether gift promises are enforceable in courts.<sup>289</sup>

These norms are particularly strong within families, where most gifts are given. Professor Leslie has pointed out that while courts in wills cases tend to speak in terms of carrying out the testator's intent, what they appear to do in many cases is enforce societal norms of reciprocity.<sup>290</sup> If the courts believe that relatives have fulfilled their informal social duty by caring for the testator, they tend to find ways to overturn wills where the testator failed to live up to his end of the reciprocity norm.<sup>291</sup> Such a strong motivation, forged in the kiln of societal expectations, is unlikely to be crowded out by court enforcement of others' gratuitous promises.<sup>292</sup> In other words, Mary is unlikely to decide not to live up to societal expectations that she should leave her estate to her loving and faithful children just because she reads in the newspaper an article

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289. An interesting illustration of the power of social norms relates to organ donations. When *A* needs a kidney transplant and close relative *B* is identified as a promising donor, typically *B* will volunteer to donate nearly instantaneously. Donors usually do not deliberate. They do not seem to believe that a choice is even present. Norms require them to give the gift of life. See HYDE, *supra* note 129, at 65 (discussing organ donation).

290. Leslie, *supra* note 71, at 551.

In studying Christmas giving in America, Caplow found a reciprocity norm that could be stated thusly: participants in this gift system should give (individually or jointly) at least one Christmas gift every year to their mothers, fathers, sons, daughters; to the current spouses of these persons; and to their own spouses. Caplow, *supra* note 287, at 1315. Subjects of his study conformed to this norm approximately 90% of the time. *Id.*

291. Leslie, *supra* note 71, at 634. Leslie explains that “when a testator's will appears to fly in the face of the reciprocity norm, courts commonly honor that norm by invalidating the will, often by finding that the testator-beneficiary relationship was ‘confidential’ and created a presumption of undue influence.” *Id.* at 592. She notes that “[t]he assumption that family members who have conformed with the reciprocity norm will inherit is so strong that it is akin to an implied promise.” *Id.* at 571; see also ROBERTA G. SIMMONS ET AL., GIFT OF LIFE: THE SOCIAL AND PSYCHOLOGICAL IMPACT OF ORGAN TRANSPLANTATION 431 (1977) (noting that among kidney donors, “[t]he obligation to sacrifice for one's family was widely accepted as legitimate”).

Professor Posner notes that “[o]ne can conceptualize the donation [by a head of family to a paramour or a charity] as a violation of a long-term contract between the donor and his family for support. The court voids the transfer because it violates the donor's obligations to his family.” Posner, *supra* note 20, at 596.

292. Behavioral decision theorists would likely accept as both descriptively accurate and normatively correct Professor Leslie's conclusion that this analysis of will cases can bring insight to contract law issues:

In contracts cases, courts understand that parties engaged in interdependent, long-term relationships are unable or unwilling to spell out in advance the legal ramifications of every act that may occur as the relationship evolves. The higher the level of trust, the more likely each party is to accept oral assurances and to rely on implicit representations made by the other. And trust-based relationships often are the best and most efficient way of maximizing benefits to both parties and to society as a whole. When one party to a trust-based relationship benefits from the other party's response to an implied understanding, courts will enforce the understanding.

Leslie, *supra* note 71, at 635.

Professor Posner notes that a problem with such an approach “is that it interferes with the donee's reliance on gratuitous transfers.” Posner, *supra* note 20, at 596. A possible response is that the paramour's reliance is arguably unreasonable, especially in this country where it is common knowledge that a strong norm is that heirs should inherit. Professor Posner admits that different rules could evolve in different jurisdictions, *id.*, because there is no way to tell whether the paramour's reliance interest outweighs the family members' interests.

about a judge ordering Sue to fulfill a gift promise she had made to her family.

Giving a gift sends a message to the donee and to observers regarding the relationship between the donor and donee. More to the point, the absence of a gift also sends a strong message. Thus, in his study of Christmas gift giving in "Middletown," Caplow observed that many people find themselves compelled to give Christmas gifts [for example] to their close relatives, lest they inadvertently send them messages of hostility. In this community, where most people depend on their relatives for emotional and social support, the consequences of accidentally sending them a hostile message are too serious to contemplate, and few are willing to run the risk.<sup>293</sup>

It seems unlikely that a change in the rules regarding enforceability of gratuitous promises would have a substantial impact in the face of this strong norm.

Second, court enforcement is unlikely to significantly reduce the promises family members make to each other because these promises are almost always made with the intention, perhaps influenced by overconfidence and undue optimism, of carrying them out. Donors typically like donees. They want to help them, or they would not make the promise in the first place. Just as promisees in family and other intimate relations assume that promisors will fulfill their promises out of love and duty and not because of the law,<sup>294</sup> so promisors, unless they are masquerading,<sup>295</sup> intend to fulfill their promises without regard to the legal system.<sup>296</sup>

Third, because of the factors discussed in the previous paragraph, most people, when considering such transactions with family members in the role of either donor or donee, do not consider legal doctrine and would not be noticeably affected by it if they did.<sup>297</sup> Legal enforceability is not an important element of their decisional calculus. For that reason, Professor Posner is probably wrong when he argues that enforcing gratuitous promises would be inefficient because it might encourage promisees to "overrely."<sup>298</sup>

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293. Caplow, *supra* note 287, at 1321.

294. See Leslie, *supra* note 71, at 557.

295. Although there are, no doubt, masqueraders in society, there is little evidence that they are a particular problem. Less odious than masqueraders, and perhaps more plentiful, are people who will buy good will by making conditional promises that they hope they will not have to live up to. Drazen Prelec and Ronit Bodner found that people asked to make contingent charitable pledges were relatively more generous when the probability that they would be asked to donate was smaller. See Drazen Prelec & Ronit Bodner, *Self-Signaling and Self-Control*, in *TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE* 277, 296 n.6 (George Loewenstein et al. eds., 2003).

296. BLE scholars Goetz and Scott believe that most intrafamily donors will try their best to fulfill gift promises, regardless of legal enforcement, because "the promisor may regard costs suffered by the promisee as equivalent to costs suffered by himself." Goetz & Scott, *supra* note 67, at 1304.

297. Leslie, *supra* note 71, at 622.

298. See Posner, *supra* note 20, at 594.

### 5. *Fairness*

Thus far, BLE’s insights have all undermined the case made by traditional and LNE analysis for refusing to enforce gift promises. Were BLE to clinch the case for enforcing gift promises, its considerations of fairness would require some limitations on that rule.

A very important part of behavioral law & economics relates to how considerations of fairness affect decision making,<sup>299</sup> and those considerations necessarily have a substantial impact on the debate regarding enforceability of gratuitous promises. Should the law enforce a person’s promise to donate a kidney to a distant relative if the donor has changed his mind? Should the law enforce an uncle’s promise to give a gift to a nephew if the nephew has since committed a crime, bringing shame to the family? Should the law enforce the uncle’s gift promise if the nephew has begun acting in a rude and ungrateful way toward the uncle?<sup>300</sup> Should the law enforce the uncle’s gift promise if the nephew has received another inheritance or won the lottery so that the uncle’s fiscal needs are now greater than the nephew’s? Fairness considerations counsel a negative answer to these questions, whereas most exchange bargains under similar conditions would likely be enforced by contract law.

To be palatable in light of these fairness concerns, a rule enforcing gratuitous promises should recognize at least two defenses. First, no promisor should be required to perform a gratuitous promise if the promisee has demonstrated significant ingratitude.<sup>301</sup> Second, no promisor should be required to perform a gift promise if he has suffered a serious financial setback and is barely able to provide for himself and his family.<sup>302</sup> These two factors should be considered implied conditions of enforcement, analogous to the Uniform Commercial Code’s requirement that parties act in good faith toward one another.<sup>303</sup>

No reasonable donee and no objective third party would expect a gratuitous promisor to fulfill a gift promise if either of these conditions (donee ingratitude or donor reversal of fortune) obtained.<sup>304</sup> Eisenberg

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299. See, e.g., Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking Entitlements in the Market*, in CHOICES, VALUES, AND FRAMES 317 (Daniel Kahneman & Amos Tversky eds., 2000) (noting many ways in which considerations of fairness account for commercial practices that are inconsistent with classical economic theory).

300. Our reaction to the nephew’s ingratitude emphasizes the genuine if implied exchange underlying most gift transactions. If, on the other hand, the nephew had lived up to his familial obligations as established by social norms, the law would likely enforce such a promise at least in a wills case. See Leslie, *supra* note 71, at 633.

301. Eisenberg, *supra* note 1, at 5–6.

302. *Id.*; see also Havighurst, *supra* note 58, at 12 (“A man who suffers a severe financial reverse may still be regarded as morally bound to pay his grocer, but under no duty, ethically speaking, to fulfill a pledge to his alma mater.”).

303. U.C.C. § 1-304 (2004); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (imposing a duty of good faith and fair dealing in the performance and enforcement of all contracts).

304. Eisenberg notes that France and Germany enforce certain donative promises, but include these exceptions. Eisenberg, *supra* note 1, at 14.

has pointed out that the common law already has analogous rules in place, permitting revocation of completed gifts made in the expectation of imminent death by a donor who miraculously recovers and revocation of gifts made in connection with an engagement that is then broken without cause by the donee.<sup>305</sup>

Eisenberg agrees with the suggested form of the rule, but argues that these necessary conditions would lead to such subjective fact finding by courts that costs of enforcement would rise to an unacceptable level.<sup>306</sup> This seems unlikely, however. First, for the reasons stated earlier it seems unlikely that many such cases will be brought to court in the first place. Moreover, judges and juries often make findings of this type. It is, indeed, the bread and butter of the American legal system to decide similar subjective questions, such as whether defendant acted reasonably, whether a contracting party was under duress, whether a defamation defendant acted with malice, and the like.<sup>307</sup>

## VI. THE ULTIMATE CONCLUSION

Even if we conclude that (a) gratuitous promises generally carry substantial value to promisor, promisee, and to society in general; (b) traditional and economic rationales for distinguishing between gratuitous and bargained-for promises are fairly weak; (c) it seems unlikely that enforcing such promises will substantially reduce their number; and (d) implicit conditions could be placed upon enforcement to neutralize fairness concerns, the big-picture question of whether the law should enforce them is still not definitively resolved. Consideration of two more factors is required.

### A. *The Role of Gift Promises*

So far, the BLE evidence has indicated that there is little reason to distinguish between gratuitous and bargained-for promises in ways that traditionalists and economists have assumed. To slightly change the focus, consider Fuller's primary substantive policy argument for not enforcing gratuitous promises—the formality of consideration should be re-

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305. *Id.* at 17 n.55.

306. *Id.* at 15.

307. Wright has noted in this connection:

But judges and juries can be trusted, I hope, to deal wisely where gratuitous promises are alleged. They have often to handle much more difficult questions of intention or mental state, *e.g.*, in cases of fraud or mistake. In adjudicating on a contract, they start with the objective basis of what the parties said or did, their words, written or spoken and their conduct: they have all the surrounding circumstances and relationships. There is no reason why they should be less successful in deciding if there is contractual intention than courts which know not consideration in our sense.

Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1253 (1936).

served for important transactions, not relatively sterile gift transactions.<sup>308</sup>

Although Fuller underestimated the value of gifts to society, he was in the right neighborhood. The key point is not that gifts are unimportant. Any such conclusion is dreadfully inaccurate, necessarily underestimating the economic, social, and cultural impact of gifts. Rather, the crucial point is that enforcement of gift promises is simply not necessary for gifts to continue to play their role in modern economies and contemporary societies. Gifts are important; gift promises . . . not so much.

First, note that while gifts have a large impact on the economy,<sup>309</sup> as Christmas gift giving practices illustrate,<sup>310</sup> “donative psychology” provides that most gifts are given as surprises.<sup>311</sup> Thus, while unexecuted commercial promises are an important part of the bargained-for economy, gratuitous promises play a much less significant role in the gift economy.<sup>312</sup> The important distinction is not the size of gift promises, as concluded by Judge Posner, but the relatively small number of them.

A second aspect to keep in mind regarding gift promises is that an important reason to enforce commercial promises is simply that modern economies depend upon people entering into them. The law enforces commercial promises so that people, especially strangers, will be willing to do business with one another. And it must do so. The inability of commerce to flourish in nations without working contract law regimes substantiates this point.<sup>313</sup> It is relatively easy for humans to trust those they know well, but modern economies require that strangers be able to trust one another. That is where the importance of contract law and the judicial machinery to implement it comes to the fore.

But while contract law is particularly important for inducing strangers to deal with one another, most gifts are given to people the donors know and like. Strangers Sam and Tim will be supremely reluctant to exchange commercial promises in a regime where the law will not en-

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308. Fuller, *supra* note 15, at 805.

309. See HEMENWAY, *supra* note 16, at 64 (noting that “perhaps 10 percent of all retail sales in the United States are related to gift giving”).

310. See Teresa F. Lindeman, *Laying It on the Line: Christmas is When Retailers Find Out if Their Plans and Investments Were Worth It*, PITTSBURGH POST-GAZETTE, Nov. 26, 1998, at C-1 (noting that the National Retail Federation estimates that nearly a quarter of all sales of general merchandise, apparel, and furniture come during the holiday season).

311. Havighurst, *supra* note 58, at 15–16 (“As to the matter of creating anticipation, donative psychology, if the practice at Christmas and on birthdays is an indication, seems to place more stress upon surprise as a means of adding to the delectation of the recipient.”).

312. See *id.* at 15 (suggesting that the reason there are few reported cases in which promises prompted by affection were denied enforcement because of lack of consideration is that “such promises are seldom made”).

313. See Hugh T. Scogin, Jr., *Between Heaven and Man: Contract and the State in Han Dynasty China*, 63 S. CAL. L. REV. 1325, 1326 (1990) (noting that China responded to its need for economic development by promulgating a body of contract law); Stephen J. Toope, *Legal and Judicial Reform Through Development Assistance: Some Lessons*, 48 MCGILL L.J. 357, 364 (2003) (noting the importance that the World Bank places upon development of contract and other law as a prerequisite to economic development).

force them. On the other hand, for all the reasons noted in Part V regarding social norms and giving, no body of enforceable contract law is needed either to induce an aunt to make a gift promise to a favored nephew or to induce the nephew to accept the promise.

Nor is there typically a need for a body of contract law to induce an aunt to follow through with her promise. Daniel Markovits has noted:

It is common to observe that although there exist only weak reasons for making a promise, there are strong reasons for keeping the promise once it has been made. A person has only a weak reason to assure her friend that she will collect him at the airport, for example; but once the assurance has been given she has a much stronger reason to follow it through.<sup>314</sup>

The aunt still likes her nephew and will try to live up to the promise if she can, with or without legal enforcement.

### B. Giftness

Having just made the point that gift promises are not as important to the gift economy as commercial promises are to the bargained-for economy, and that the law need not enforce gift promises for donors to continue to make them and donees to continue to agree to accept them, it is now time to concur with traditionalists that enforcing gift promises would likely be counterproductive in important ways. In examining this issue, we address a subset of other authors' attempts to delineate the proper way to handle the inevitable mixture of intimate relationships and economic transactions that occur in a broad range of situations.

Jane Baron accurately notes the important societal benefits of gifts and compares the reciprocity aspect of gift giving to that of bargained-for promises. She therefore argues that gift promises should be enforced because to do otherwise signals that “[g]ifts are uncommon, untrustworthy, and unimportant.”<sup>315</sup>

Eisenberg certainly agrees with Baron regarding the societal value of gift giving, but this causes him to draw precisely the opposite conclusion. He takes the view that donative promises should go unenforced not because they are less valuable than bargain promises, “but because they are more important. The world of gift is a world of our better selves, in which affective values like love, friendship, kindness, gratitude, and comradeship are the prime motivating forces.”<sup>316</sup> Eisenberg wins this debate

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314. Markovits, *supra* note 162, at 1438.

315. Baron, *supra* note 86, at 200. Baron also notes that “[i]f, as social scientists claim, there are equally strong and established expectations with respect to giving [as there are in conventional market bargains], it is not immediately obvious why these expectations should not be protected as well.” *Id.* at 199.

316. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 849 (1997). Eisenberg notes:

We use gifts to indicate our favorites—if we choose to withdraw our affections, then we should not be forced into making the transfer nevertheless. The forced transfer is no longer an indica-

by arguing convincingly that it would spoil the “giftness” of a gift if the law enforced gift promises.<sup>317</sup> Baron herself admits that in reciprocal gift situations, which is to say most gift situations, “[r]eciprocation can never be assured or enforced, but instead is a matter of trust.”<sup>318</sup>

Eisenberg’s conclusion is the prevailing view of several other scholars who have addressed this question. Frank Cross has established that in the large impersonal marketplace, law can facilitate and stimulate trusting activity.<sup>319</sup> But in more intimate settings, such as family units where most gift promises are made, trust comes naturally<sup>320</sup> and legal enforcement can crowd out trust.<sup>321</sup> Jeanne Schroeder agrees that once coercion is introduced, a gift is no longer a gift.<sup>322</sup> And Hemenway notes that “[t]he social aspects of gift exchange are of utmost importance. The content of a present is generally subordinate to its significance as a token of the social relationship.”<sup>323</sup> Enforcement can transfer only the content; it likely destroys the social and cultural aspects of gift giving and, thereby, the practice’s primary benefit.<sup>324</sup>

This conclusion reflects the fact that most gifts involve families, and “family members do not look to the law because doing so would destroy the familial relationship.”<sup>325</sup> Nor do they typically sue other family mem-

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tion of our feelings—it is a redistribution without social meaning. The enforcement (against the will of the giver) of a gift removes all characteristics of its “gift-ness” except the transfer of ownership. If a gift loses its “gift-ness” when litigation occurs, then that seems to be a reason to minimize the presence of law in the gift-giving and -receiving process.

*Id.* at 848 (quoting Thomas Mayhew, Discussion Questions for Seminar in Contracts Theory (unpublished paper, on file with Eisenberg)).

317. In part, Eisenberg is correct in criticizing Baron’s emphasis on the reciprocity of gifts: Baron’s point that gifts often involve an element of exchange or reciprocity is true and important (although Baron somewhat overemphasizes that element by stressing anthropological studies of cultures in which ritual gift exchanges play a crucial social role). However, while gifts often involve an element of exchange or reciprocity, gifts are not bargains. Our culture distinguishes between gifts and bargains not only legally, but socially.

*Id.* at 842.

318. Baron, *supra* note 86, at 196.

319. See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457 (2005).

320. BERNARD BARBER, *THE LOGIC AND LIMITS OF TRUST* 26 (1983) (noting that “the family is the primordial source and location of trust”).

321. See Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990) (noting that “the great lesson for the courts is that any effort to judicialize these social rules will destroy the very informality that makes them so effective in the first instance”).

322. Jeanne L. Schroeder, *Pandora’s Amphora: The Ambiguity of Gifts*, 46 UCLA L. REV. 815, 837 (1999) (quoting various sources).

Schroeder points out that there are many affective relationships that involve legal enforceability. For example, the law requires “dead-beat parents” to support their children. She suggests that introducing this element of legal enforceability does not undermine the fact that most parents will continue to support their children out of love. *Id.* at 890. It does seem unlikely that enforcing particular gift promises will infect the entire world of gifts, but much more likely that it will undermine the “giftness” of the particular gift that is enforced.

323. HEMENWAY, *supra* note 16, at 65.

324. See HYDE, *supra* note 129, at 86 (noting that when contract law is induced into the sphere of the gift, the emotional, spiritual, and other noneconomic aspects of the gift relationship are jettisoned).

325. Leslie, *supra* note 71, at 557.

bers until “the relationship is beyond repair.”<sup>326</sup> Similarly, as noted earlier, charities can enforce donative promises, but normally do not do so against the original donors. Charities usually sue only the donor’s heirs who have reneged on the donor’s promises. Both practices are consonant with the view that social norms are generally violated by an attempt to enforce gift promises.

This position is bolstered by Professor Hasday’s recent *Harvard Law Review* article examining the interplay of economic exchange and intimate relationships in a broad variety of settings.<sup>327</sup> In this article, Hasday argues that “[t]he law’s regulation of economic exchange between intimates, which restricts but does not bar economic transfers, helps to define and construct the legal understanding of intimacy, and to mark the dignity and specialness of intimate relationships.”<sup>328</sup> By refusing to enforce gift promises between relatives and friends, the law properly protects the uniqueness of those relationships and distinguishes them from mere economic transactions between strangers. Professor Zelizer’s recent book, *The Purchase of Intimacy*, sketches out in some detail the tremendous lengths to which both individual social actors and the law go to gain a proper match between economic transactions and intimacy, and how important it is to get that match right.<sup>329</sup> Refusing to enforce gratuitous promises, which would destroy their “giftness,” gets the match right in this setting.

Most of the reasons provided by traditional and economic analyses for why the legal system does not and should not enforce gratuitous promises are not very persuasive. BLE analysis makes it clear that evidentiary, cautionary, and channeling considerations do not provide a compelling basis for refusing to enforce gratuitous promises at the same time that bargained-for promises are enforced. Moreover, behavioral analysis supports some arguments in favor of enforcing gift promises by stressing their importance to individual relationships and society at large, by noting that the endowment effect means that most donees who are victimized by unrealized gift promises will suffer a meaningful loss, and by indicating that enforcing gift promises would most likely not substantially reduce the number that are made.

In the final analysis, however, traditionalists, economists, and behavioralists must all recognize that the real reasons the law does not and should not enforce gift promises are (a) that while gifts are exceedingly important in modern society, gift *promises* do not play the same crucial role in the gift economy that exchange promises do in the commercial economy, and (b) that to enforce gift promises would destroy their “giftness,” thus neutralizing the nonmonetary individual benefits and the so-

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326. *Id.* at 556.

327. Jill E. Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005).

328. *Id.* at 493.

329. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 307 (2005).

cietal advantages that come from gift giving, thereby eviscerating the most important reasons to encourage the practice.

## VII. CONCLUSION

A foundational question in contract law is whether the law should enforce gratuitous promises. The answer given by the courts and traditional scholars over the centuries is reasonably persuasive, but hardly compelling. Although there has been disagreement among economists who have addressed the issue, at least some law & economics scholars have added insight to this longstanding debate by framing many of the traditional arguments in economic terms.

This article presents a BLE analysis of the issue, adding substantially to an understanding of why people give gifts, adding modestly to preexisting explanations of how enforcing gift promises could enhance value to donor and donee, and making a much stronger case than traditional or economic analysis for the value of gift giving to modern society.

Even though LNE and BLE enlighten the debate over these subsidiary issues, the overarching policy question remains, even given the value of gift giving, whether the reasons to enforce gratuitous promises outweigh the reasons to refuse to do so. Importantly, BLE analysis helps debunk the most prominent arguments of traditionalists and economists for refusing to enforce gratuitous promises. The evidentiary, cautionary, and channeling functions articulated by Lon Fuller more than fifty years ago and framed in economic terms more recently by various LNE scholars are simply not very persuasive, especially because they assume that various limitations on human rationality in decision making (such as emotions and intertemporal inconsistencies) apply only to gratuitous promises, whereas the BLE literature convincingly demonstrates that they apply equally to bargained-for commercial promises.

Although BLE analysis makes a very forceful case that the traditional arguments, even as enhanced by economic understanding, cannot justify treating gratuitous promises differently from bargained-for promises, BLE ultimately does not justify overturning the common law's time-honored conclusion that gift promises should not be enforced. First, although the gift economy is an important part of the modern economy as well as of modern society more generally, enforcement of gift *promises* is not an integral part of the gift economy. For strangers to do business with one another in the commercial economy, bargained-for promises must be enforced by a reasonably efficient contract law regime. However, donative psychology indicates that most gifts are given as surprises; no promise precedes them. Not only are relatively few gift promises made, but most gifts are given to close friends and relatives pursuant to social norms that would not be strengthened by legal enforcement of donative promises. Regardless of whether the law enforces gratuitous

promises, the social science literature indicates strongly that family members and friends will continue to give gifts, thereby advancing the economy and, more importantly, fortifying societal ties.

Second, the psychology literature bolsters the traditionalist argument that enforcing gratuitous promises destroys the “giftness” of the transactions and thereby extinguishes the primary benefits of gift-giving activity. The predominant value of most gift-giving activity is that it binds family and friends together socially. Introducing legal enforcement into that setting would not just be inefficient (as economists point out), it would actually destroy value. It has been said that jokes are like frogs—they die if you try to dissect them. Just as dissection kills a joke, enforcement of a gift promise kills the gift. Few of the most important benefits of a gift can survive legal enforcement.

Although Professor Posner contends that LNE is superior to BLE as a method of investigating the law,<sup>330</sup> his ultimate conclusion—that any judicial decision to enforce more gratuitous promises than are currently enforced “should occur only with circumspection”<sup>331</sup>—was not an especially helpful one. This article demonstrates that BLE is at least as useful as LNE in developing insights into this critical question of contract law. However, like LNE, BLE fails to provide a rationale for overturning the common law rule. Perhaps law & economics, behavioral law & economics, and other “law &” forms of analysis, are destined to more frequently enrich controversial debates over legal policy than to settle them.

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330. Posner, *supra* note 20, at 568. Interestingly, in his discussion, Professor Posner draws substantially from a leading figure in the behavioral economics movement, Colin Camerer. *See id.* at 579 (citing Camerer, *supra* note 20, at S180, S180–91).

331. Posner, *supra* note 20, at 606.