

## ARTICLES

### RECENT DEFENSES OF CONSIDERATION: COMMODIFICATION AND COLLABORATION

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## INTRODUCTION

Occasionally, the disputes of contract theory begin to appear very old, and each succeeding wave of scholarship seems to be little more than dressing up old ideas in new disguises and rehashing old disputes in new jargon. One cure for this academic variety of *Weltschmerz* is to encounter and address truly novel arguments about thoroughly familiar issues. In this Article, I wish to respond to two such novel efforts, the first by one of our most eminent and prolific contracts scholars, Melvin Aron Eisenberg,<sup>1</sup> and the second by a relatively more recent arrival, Daniel Markovits.<sup>2</sup>

The subject of the innovations introduced by Professors Eisenberg and Markovits is the so-called “requirement” of consideration, although in each case the treatment of the doctrine of consideration is part of a larger project. My own interest in the subject goes back to a study of over 300 consideration cases I published as a pair of articles in the 1990s.<sup>3</sup> I argued that, while the majority of applications of the doctrine of consideration are redundant, the doctrine nevertheless still has more than rhetorical bite, i.e., it still is outcome-determinative in a range of cases.<sup>4</sup> I further argued that contract law, on the whole, would be better off without it.<sup>5</sup> On the positive side, I argued that the reasons commonly advanced in favor of enforcing bargain promises—the facilitation of exchange, the protection of expectations or reliance, or respect for autonomy—could also be mustered in support of the enforcement of promises traditionally classified as gratuitous.<sup>6</sup> On the negative side, I argued that the reasons traditionally advanced for the claim that gratuitous promises are somehow suspicious and unworthy of enforcement were all inadequate.<sup>7</sup> In so

1. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997) [hereinafter Eisenberg, *Contract and Gift*].

2. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

3. Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993) [hereinafter Wessman, *Gatekeeper I*]; Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996) [hereinafter Wessman, *Gatekeeper II*].

4. Wessman, *Gatekeeper I*, *supra* note 3, at 52-114; Wessman, *Gatekeeper II*, *supra* note 3, at 717-817.

5. Wessman, *Gatekeeper I*, *supra* note 3, at 116-17; Wessman, *Gatekeeper II*, *supra* note 3, at 816-45.

6. Wessman, *Gatekeeper II*, *supra* note 3, at 817-25.

7. *Id.* at 826-44. The reasons for withholding enforcement that I examined, and ultimately rejected, included (a) the claim that “gratuitous promises are too trivial to merit enforcement”; (b)

arguing, I endeavored to examine all the *traditional* arguments in favor of and against the requirement of consideration, most of which had been made by multiple authors over a period of decades.<sup>8</sup> Each contribution to the discussion of the issues in question moved the argument to a new stage, but the issues themselves have been contested among scholars for a long time. Accordingly, though I continue to adhere to the views expressed in the earlier articles, I do not propose to revisit them here. Instead, I wish to focus on two quite innovative, albeit partial, defenses of the requirement of consideration.

As it turns out, the set of arguments that can be mustered on either side of contentious issues is never really closed. In an article published in 1997, Professor Eisenberg introduced an argument with no prior analogue of which I am aware. Specifically, he argued that at least one class of gratuitous promises—simple, affective donative promises—should remain unenforceable, as the doctrine of consideration dictates.<sup>9</sup> One reason is that a regime of enforcement would “commodify” donative promises and thereby impoverish what he calls the “world of gift.”<sup>10</sup> Another is that a regime of enforceability could not, in principle, accommodate the full range of moral excuses for breaking such promises.<sup>11</sup>

More recently, Professor Markovits has suggested that the traditional requirement of consideration finds some support in a philosophical concept he calls “collaboration.”<sup>12</sup> That concept is the most important element in a Kantian reconstruction and justification of the making and keeping of contracts,<sup>13</sup> a reconstruction that draws on more general Kantian foundations to account for both the moral obligation to keep promises and the legal obligations surrounding them.<sup>14</sup> The notion of “collaboration” upon which he elaborates is a technical one, and it has no antecedent of which I am aware in previous debates on the doctrine of consideration.

Ultimately, in my view, neither Professor Eisenberg’s argument on the basis of “commodification” nor Professor Markovits’s argument on the basis of “collaboration” provides a satisfactory defense of the traditional requirement of consideration. My response to their arguments will proceed as follows. In Part I, I examine and respond to Professor Eisenberg’s views. After an initial and

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the claim that gratuitous promises are too likely to be “impulsive or imprudent”; (c) the claim that gratuitous promises are “too easily fabricated”; (d) the claim that enforcement of gratuitous promises would result in excessive “inadvertent contracting”; (e) the claim that gratuitous promises are subject to a “range of excuses” not easily captured by our legal system; and (f) the claim that enforcement of gratuitous promises would cause “unpredictable strains” and undesirable consequences elsewhere in our system of law. *Id.*

8. *Id.* at 817-44.

9. Eisenberg, *Contract and Gift*, *supra* note 1, *passim*.

10. *Id.* at 823, 847-49.

11. *Id.* at 823, 828-29, 831 n.32, 849-50.

12. Markovits, *supra* note 2, at 1474-91.

13. *Id.* at 1446-74.

14. *Id.* at 1422-46.

more detailed summary of his argument,<sup>15</sup> I proceed to a more articulated analysis of the concept of commodification on which it depends.<sup>16</sup> I examine several possible meanings of the term “commodification” and several corresponding versions of the claim that enforcement of donative promises would commodify them.<sup>17</sup> I argue that none of them provides the defense of the requirement of consideration to which Professor Eisenberg aspires.<sup>18</sup> I then examine, and ultimately reject, two possible interpretations of his claim that a system which enforced donative promises could not successfully accommodate the range of moral excuses to which such promises are subject.<sup>19</sup>

In Part II, I turn to Professor Markovits’s argument based on the concept of collaboration. It is necessary to begin with a rather extended summary of his argument,<sup>20</sup> as it is both innovative and complex. After articulating the moral ideals of respectful community and collaboration that Professor Markovits uses as the basis of promise and contract, respectively,<sup>21</sup> I summarize his argument that the collaborative ideal supports the requirement of consideration in the law of contract.<sup>22</sup> My criticism of that argument proceeds in the following stages. Initially, I observe that, even if one accepts the value of the collaborative ideal, it provides, at best, an argument in favor of granting enforcement to bargain promises, but not an argument for withholding it from donative promises.<sup>23</sup> To the extent Professor Markovits presents a distinct argument for withholding legal sanctions from donative promises, it appears to rely on a claim that the presence of a “passive promisee” destroys the prospect for collaboration.<sup>24</sup> I then dissect his notion of a passive promisee and argue that it is too weak to support that claim<sup>25</sup> and can only be strengthened by maneuvers that ultimately make his argument question-begging.<sup>26</sup> Finally, I argue that, from materials found in Professor Markovits’s own theory, one can construct an argument that moral ideals other than collaboration, but at least as valuable, support the enforcement of donative promises at least as well as the notion of collaboration supports the enforcement of bargain promises.<sup>27</sup>

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15. *See infra* Part I.A.

16. *See infra* Part I.B.1.

17. *See infra* Parts I.B.2.a-e.

18. *See infra* Parts I.B.2.a-e.

19. *See infra* Part I.B.3.

20. *See infra* Part II.A.

21. *See infra* Parts II.A.2-3.

22. *See infra* Part II.A.4.

23. *See infra* Part II.B.1.

24. *See infra* Part II.B.2.

25. *See infra* Part II.B.2.

26. *See infra* Part II.B.3.

27. *See infra* Part II.B.4.

## I. PROFESSOR EISENBERG ON COMMODIFICATION

A. *Professor Eisenberg's Argument*

Initially, Professor Eisenberg distinguishes very carefully between the aspects of the classical doctrine of consideration<sup>28</sup> that he wishes to defend and those he does not.<sup>29</sup> In particular, he draws a definitional line between gratuitous promises and donative promises, with the latter being a subset of the former.<sup>30</sup> He uses the term “gratuitous promise” to refer to any “nonreciprocal or apparently nonreciprocal” promise, and the term would thus seem to encompass any promise that did not meet the classical requirement of bargained exchange.<sup>31</sup> Gratuitous promises thus encompass some promises, including uncompensated promises to hold an offer open for a fixed period of time or one-sided contractual modifications, that lie in the “hard-headed world of contract,” in the sense that they are ancillary or related to bargains.<sup>32</sup> These sorts of promises violate the classical doctrine of consideration and were traditionally unenforceable, but Professor Eisenberg has consistently recognized the propriety of enforcing them.<sup>33</sup>

A “donative promise,” on the other hand, is a promise to make a gift.<sup>34</sup> A “gift,” in turn, is defined as “a voluntary transfer that is made, or at least purports to be made, for affective reasons like love, affection, friendship, comradeship, or gratitude, or to satisfy moral duties or aspirations like benevolence or generosity, and which is not expressly conditioned on a reciprocal exchange.”<sup>35</sup> The paradigm cases of donative promises would thus seem to fall into two categories: (1) gift promises between family members, friends, or other close associates; and

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28. Generally speaking, the requirement of consideration may be formulated as the rule that a promise is not enforceable unless it is a component of a bargain. A transaction is a bargain, in turn, if and only if it is an exchange of promises or performances and each side of the exchange is the inducement for the other. Wessman, *Gatekeeper I*, *supra* note 3, at 49; Wessman, *Gatekeeper II*, *supra* note 3, at 804. However, it is generally recognized that the so called “doctrine” of consideration is actually not one rule, but a set of rules. The set includes the general requirement of bargained exchange, as well its purported corollaries, the pre-existing duty rule, the rule that illusory promises cannot be consideration, the requirement of mutuality of obligation, the rules that past consideration and moral consideration are insufficient, the full revocability of offers other than paid options, and a few special rules relating to covenants not to compete and employment not terminable at will. Wessman, *Gatekeeper I*, *supra* note 3, at 49-50; Wessman, *Gatekeeper II*, *supra* note 3, at 713-14.

29. Eisenberg, *Contract and Gift*, *supra* note 1, at 824-25.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 832-23; Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 653-56 (1982) [hereinafter Eisenberg, *Principles*].

34. Eisenberg, *Contract and Gift*, *supra* note 1, at 825.

35. *Id.* at 823.

(2) charitable (and perhaps political) pledges.<sup>36</sup> Collectively, gift promises and actual gifts constitute the “world of gift,” which Professor Eisenberg distinguishes from the “world of contract.”<sup>37</sup> The latter term is confined to commercial agreements, and so includes most conventional bargains as well as those nonreciprocal business promises ancillary to bargains that do not qualify as gift promises.<sup>38</sup>

There are two further limitations on the territory Professor Eisenberg wishes to defend. First, he recognizes that a donative promise (in his sense) may be enforceable on a theory of promissory estoppel because of the promisee’s justifiable reliance.<sup>39</sup> He therefore coins the term “simple donative promise” to refer to any donative promise, the enforcement of which cannot be justified by appeal to reliance or some other previously recognized substitute for consideration,<sup>40</sup> and confines his thesis to the claim that *simple* donative promises are, and should be, unenforceable.<sup>41</sup>

Second, though it is not as obvious at first glance, he appears to exclude charitable subscriptions from the scope of his thesis. He seems to approve of the rule recommended in section 90(2) of the *Restatement (Second) of Contracts*<sup>42</sup> that charitable subscriptions be enforced without proof of consideration or reliance, although he is quite aware of that rule’s mixed reception in the courts.<sup>43</sup> A charitable subscription could thus qualify as a simple donative promise, and yet its enforcement might be justified on public policy grounds. Thus, the most precise formulation of Professor Eisenberg’s view might be to say that simple, *affective* donative promises are, and should be, unenforceable. This, I think, is the full specification of what Professor Eisenberg calls the “donative promise principle.”

He is, of course, quite aware that the claim he is making is not a terribly broad one—certainly nothing like the breadth of the classical requirement of consideration.<sup>44</sup> However, he nonetheless regards it—rightly, in my view—as extremely significant.<sup>45</sup> Given the trend in modern contract law to enforce all

36. *Id.* at 823-24 n.14.

37. *Id.* at 823-24.

38. *Id.* at 823-25.

39. *Id.* at 822, 834, 851.

40. *Id.* at 822.

41. *Id.* at 822-23. At times, Professor Eisenberg uses the phrase “donative-promise principle” to refer more narrowly to the descriptive claim that simple donative promises are not, in fact, enforceable under our system of contract law. *Id.* at 822. However, he also clearly endorses the normative claim that simple donative promises should not be enforced (i.e., that the descriptive donative promise principle is justified), *id.* at 847-49, and I shall sometimes use the term to refer collectively to both the descriptive and normative claim.

42. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(2) (1981).

43. Eisenberg, *Contract and Gift*, *supra* note 1, at 852, 861.

44. *Id.* at 822-23.

45. *Id.*

commercial promises—even though some are technically gratuitous—the donative promise principle is the new doctrinal fault line between contract (properly understood) and promises that fall on the wrong side of the doctrine of consideration.<sup>46</sup>

Professor Eisenberg's method for establishing the donative promise principle is essentially a balancing process in which the reasons for and against enforcing simple donative promises are weighed.<sup>47</sup> The range of relevant reasons is subdivided into substantive reasons and process reasons.<sup>48</sup> While Professor Eisenberg recognizes that there are some *substantive* reasons to enforce simple donative promises, he regards those reasons as either weak or indeterminate and heavily outweighed by serious *process* reasons not to enforce donative promises and, even more importantly for purposes of this Article, decidedly stronger *substantive* reasons not to do so.<sup>49</sup>

Professor Eisenberg identifies two substantive reasons in favor of enforcing simple donative promises.<sup>50</sup> First, like any other promise, a simple donative promise creates an expectation in the promisee, and the promisee suffers a disappointment of that expectation if the promise is not kept.<sup>51</sup> However, Professor Eisenberg argues, that expectation is likely to be weak and the disappointment correspondingly slight.<sup>52</sup> Second, “donative promises as a class

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46. *Id.*

47. *Id.* at 825.

48. *Id.* at 828.

49. *Id.* at 823.

50. *Id.* at 828.

51. *Id.*

52. *Id.*; see also Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 3 (1979) [hereinafter Eisenberg, *Donative Promises*]. It is possible to question the accuracy of this claim, which is essentially an empirical premise. Recall that the subject under discussion is the simple, *affective* donative promise, which, by definition, is made between family members, friends, or others in a similarly close relationship. It seems to me that, at least in some instances, the disappointment suffered by a donative promisee is likely to be far more intense than that suffered by a bargain promisee. If the new computer I order from an online vendor fails to perform as warranted in our bargain, my disappointment will amount to annoyance, perhaps even serious annoyance. However, if my father had promised to finance my college education and then reneged, the intensity of disappointment would have risen to the level of heartbreak, precisely because of the affective relationship. In some instances, at least, bargain promisees may feel merely disappointed, while donative promisees feel betrayed.

Nevertheless, I think Professor Eisenberg is right that the promisee's disappointment is probably not a sufficient reason to enforce donative promises, although I also think disappointment of expectations in that sense is not the reason we enforce bargain promises, which Professor Eisenberg seems to regard as generating stronger expectations. The problem with discussions of “compensating disappointed expectations” is that there is a danger of equivocating between two senses of the word “expectation.” I assume most promisees (of whatever variety) subjectively anticipate that their promisors will perform, and it is natural to characterize that subjective anticipation as “expectation.” If the promisor breaks his promise, the disappointment of that

probably tend to move assets from persons with more wealth to persons with less.”<sup>53</sup> Professor Eisenberg thus rejects the view that donative promises do not or cannot enhance utility.<sup>54</sup> However, he emphasizes that the overall economic effects of making simple donative promises enforceable are indeterminate.<sup>55</sup> The prospect of enforcement might result in more performance of donative promises, with a resulting increase in the number of completed gifts and gravitation of the subjects of gifts to users who value them more highly.<sup>56</sup> On the other hand, prospective gift promisors’ concerns about possible regret contingencies might result in less gift promising, fewer completed gifts, and a consequent reduction in efficiency.<sup>57</sup>

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subjective anticipation is a form of emotional or psychic harm. However, that is not the sense of “expectation” relevant to contract law. If the reason we enforced promises was to compensate for disappointment *qua* psychic injury, our remedial scheme would be strangely incoherent. The general rule is that, absent exceptional circumstances, we do not award damages for emotional injury resulting from the breach of a contract. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS: LOSS DUE TO EMOTIONAL DISTURBANCE § 353 (1981). It would be impossible to explain that rule if the general reason for enforcing promises were a concern for psychic harm. I agree with Professor Eisenberg that the reasons we enforce promises at all are relevant to our choice of remedies and vice versa. *See Eisenberg, Donative Promises, supra*, at 1-2; Eisenberg, *Principles, supra* note 33, at 640. Accordingly, the rather inflexible limitation on emotional distress damages suggests to me that “subjective anticipation” has little to do with our grounds for enforcement of promises. In the sense in which “expectation” is relevant to contracts, it refers to a hypothetical state of affairs that would have been obtained had the breaching promisor performed instead of breaching. When we speak of “protecting expectations,” we are generally referring to awards of expectation damages that reproduce, insofar as money can do so, the economic equivalent of that hypothetical state of affairs. While compensation for any emotional distress might theoretically be a component of that expectancy, we decline to include it, presumably for reasons Professor Eisenberg would classify as process reasons. There are, of course, many respects (e.g., attorneys’ fee limitations, the limit of foreseeability) in which we do not provide full compensation for the expectancy in the second sense.

53. Eisenberg, *Contract and Gift, supra* note 1, at 828; *see also* Eisenberg, *Donative Promises, supra* note 52, at 4.

54. Eisenberg, *Contract and Gift, supra* note 1, at 829.

55. *Id.* at 828.

56. *Id.*; *see also* Eisenberg, *Donative Promises, supra* note 52, at 4.

57. Eisenberg, *Contract and Gift, supra* note 1, at 828. Indeed, there are other relevant economic factors as well. For example, as Professor Eisenberg observes, the donative promise principle seems to be the last component of the doctrine of consideration that scholars are prepared to defend. *See id.* at 828-31. Yet the rules relating to consideration are alive in the courts and form an extraordinarily complex doctrinal edifice. It is arguable that enforcing simple donative promises would permit the abandonment of that old edifice with consequent improvement in judicial efficiency. *Id.* More fundamentally, however, one must ultimately agree with Professor Eisenberg’s claim that the economic effect of making simple donative promises enforceable is indeterminate in the sense that one cannot predict with certainty whether enforcing them would, on the whole, enhance or diminish efficiency. This, however, is by no means a problem peculiar to

Against these weak substantive reasons in favor of enforcing donative promises, Professor Eisenberg initially musters some process reasons not to enforce them.<sup>58</sup> Donative promises generally are too easy to fabricate, and *affective* donative promises, which by definition arise in a close relationship, are far too likely to be made without adequate deliberation.<sup>59</sup> Furthermore, enforcement of donative promises would require adjustments elsewhere in our system of contract law that would render it excessively messy and complicated.<sup>60</sup> For example, in civil law systems, where donative promises are sometimes enforced, there are special defenses (e.g., improvidence and ingratitude) that

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the question whether donative promises should be enforced. As Professor Eric Posner has observed, indeterminacy seems to be a pervasive problem with economic models of contract law sufficiently sophisticated to take account of the full range of variables and incentives that may be affected by legal rules. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 838, 853-54 (2003). Posner's best example, in my view, is his discussion of the continuing controversy among economics scholars over the question of which remedy—expectation damages, reliance damages, or specific performance—is the most efficient contract remedy. *Id.* at 834-39. The relevant range of variables for analysis includes the incentive to breach or perform, the incentive to invest in reliance, the incentive to search for optimal partners, the incentive to reveal information, the incentive to take precautions against breach, the incentive to renegotiate after information is revealed, the possibilities for contract design, and the ability of courts to acquire or verify relevant information. *Id.* Any single remedial rule may have adverse economic effects on one or two of these incentives and variables and desirable effects on others. *Id.* One can draw conclusions of relative efficiency only by isolating one or two variables and drawing very cautious conclusions. *Id.* Aggregating all the variables and drawing an overall conclusion concerning efficiency appears impossible in the absence of a vast amount of empirical information that is unknown and, as a practical matter, impossible to gather. *Id.* No one, of course, should draw the conclusion that the economic analysis of law should be abandoned simply because it has not produced a comprehensive theory of contract in the mere thirty years Posner identifies as the period of its existence. *Id.* However, Posner's analysis does suggest that the indeterminacy in the economic effects of providing a remedy for simple donative promises should not count for much either in favor of or against enforcing them. *See id.* at 854-55.

58. Eisenberg, *Contract and Gift*, *supra* note 1, at 828.

59. *Id.* I have previously expressed my skepticism concerning the adequacy of this explanation for refusing to enforce donative promises. Wessman, *Gatekeeper II*, *supra* note 3, at 828-29. Although it is impossible to prove, it seems likely that there are more imprudent bargains than imprudent gift promises. *Id.* Yet contract law neither refuses to enforce bargain promises on that ground nor overtly polices bargain promises for impulsiveness or imprudence. *Id.* Indeed, the instances of people donating themselves into insolvency are extremely rare, although there is one recent and rather spectacular example. *See* James B. Stewart, *The Opera Lover: How Alberto Vilar's Passion for Philanthropy Landed Him in Jail*, NEW YORKER, Feb. 13, 2006, at 108 (recounting the story, and ultimate financial collapse, of philanthropist who made charitable donations of nearly 300 million dollars between 1996 and 1999). However, such instances are newsworthy precisely because they are so unusual.

60. Eisenberg, *Contract and Gift*, *supra* note 1, at 828-29.

must be developed in order to tailor the system to the morality of gift promises.<sup>61</sup> Those defenses require resolution of issues that would strain the capacity of our system.<sup>62</sup>

The process concerns identified by Professor Eisenberg have been the subjects of extensive scholarly debate. Because, in previous work, I have examined those process concerns and sided with those who regard them as either exaggerated or best remedied by devices other than the retention of a requirement of consideration,<sup>63</sup> the most important arguments made by Professor Eisenberg, in my view, are the more novel ones that come next. Specifically, he argues that there are two substantive reasons not to enforce simple donative promises. The more easily comprehensible of the two builds on the third process concern he identified earlier. Close attention to the morality of gift promises, he argues, reveals a problem even deeper than the need to import special legal defenses to which our system is unaccustomed and ill-adapted.<sup>64</sup> Donative promises, as part of the world of gift, are subject to an extremely “fluid” range of implied moral excuses. Indeed, the implication seems to be that the range of excuses is so “fluid” that it could never be specified completely.<sup>65</sup> Tailoring our legal system to the morality of gift promises and their corresponding excuses is more than asking our system to do something for which it is ill-qualified; it is asking our system to do the impossible. Indeed, the range of legitimate excuses for refusing to perform donative promises is so extensive that the disappointed promisee is normally morally obliged to release a repenting promisor.<sup>66</sup> Failure to do so is to be ungenerous, and we should not give “legal muscle” to ungenerous donative promisees by making simple donative promises enforceable.<sup>67</sup>

Judging by the time he spends on it, Professor Eisenberg regards the other substantive objection to enforcing simple donative promises as even more serious. It is also a bit more difficult to restate. Invoking his metaphor of the “world of gift,” Professor Eisenberg argues that the world of gift would be “impoverished” if simple donative promises were subjected to a regime of legal enforcement.<sup>68</sup> This impoverishment would result from the “commodification” of the gift relationship.<sup>69</sup>

While the concept of “commodification” is neither specifically defined nor intuitively transparent, it seems to refer to some form of degradation of the particular functions of gifts and gift promises caused by enforcing the latter, presumably with an award of money damages. Gifts and gift promises are motivated by affective considerations, and they have an expressive or “totemic”

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61. *Id.*

62. *Id.* at 829.

63. Wessman, *Gatekeeper II*, *supra* note 3, at 828-31, 836-40.

64. Eisenberg, *Contract and Gift*, *supra* note 1, at 829, 831 n.32, 849-50.

65. *Id.* at 829.

66. *Id.* at 849-50.

67. *Id.* at 850 n.70.

68. *Id.* at 847-49.

69. *Id.*

function, in that a gift “reflects or manifests the relationship with the donee.”<sup>70</sup> Gifts are one way we “indicate our favorites.”<sup>71</sup> That is why, even if a gift is a gift of a commodity with monetary value, the commodity is not its main point, and its value is not exhausted by the value of the commodity.<sup>72</sup> To subject gift promises to legal enforcement would be to debase them by clouding the promisor’s motives at the time of performance (from both the donor’s and donee’s perspectives),<sup>73</sup> converting the gift promise into a “cash equivalent” or a “bill of exchange,”<sup>74</sup> and submerging “the affective relationship that the gift was intended to totemize.”<sup>75</sup> We should avoid thus degrading the world of gift because the “world of gift is a world of our better selves, in which affective values like love, friendship, affection, gratitude, and comradeship are the prime motivating forces.”<sup>76</sup> The somewhat ironic consequence is that donative promises should remain unenforceable, not because they are too trivial to merit enforcement, but because they are too important to be subjected to a legal regime.<sup>77</sup>

### B. Criticism

1. *The Complicated Concept of Commodification.*—I shall first address Professor Eisenberg’s argument based on the concept of “commodification,” as it seems to be the laboring oar among his substantive reasons for the donative promise principle. In order to evaluate the argument, it is necessary, as an initial matter, to explore in more detail what it means to “commodify” something and why (or when) “commodification” results in the degradation or debasement of the thing commodified.

That initial step is not entirely easy. The terms “commodify” and “commodification” are somewhat slippery and have been used in a variety of ways.<sup>78</sup> In invoking the notion of commodification, Professor Eisenberg expressly attributes the concept to a path-breaking article on the subject by Margaret Jane Radin.<sup>79</sup> Radin, in turn, discusses what “commodification” means

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70. *Id.* at 844.

71. *Id.* at 848.

72. *Id.* at 844.

73. *Id.* at 848.

74. *Id.*

75. *Id.*

76. *Id.* at 849.

77. *Id.*

78. Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification*, in *RETHINKING COMMODIFICATION* 1, 2-5 (Martha M. Ertman & Joan C. Williams eds., 2005) (distinguishing different meanings of “commodification”); Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 *HARV. L. REV.* 689, 689-90 (2003) (same).

79. Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987), cited in Eisenberg, *Contract and Gift*, *supra* note 1, at 847 n.64.

in some detail.

The term is obviously derived from the noun, “commodity,” and Professor Radin describes a commodity as having three essential characteristics. First, it is “monetizable”; it has an “exchange value” that can be expressed in monetary terms.<sup>80</sup> Second, it is fungible; it is interchangeable with any other commodity, and any individual should be indifferent amongst the possession of the particular commodity, a commodity of equivalent value, or the sum of money it is worth.<sup>81</sup> Finally, it is detachable from the individual who owns or possesses it and, in principle, fully alienable.<sup>82</sup>

In a narrow sense, to say that something is “commodified” is simply to say that it is the sort of thing bought and sold in a recognized market.<sup>83</sup> Even in a narrow sense, saying that something is commodified can imply quite a lot—“supply and demand pricing, brokerage and arbitrage, advertising and marketing, stockpiling, speculation, and valuation in terms of the opportunity cost of production.”<sup>84</sup> In the broader sense (with which she is even more deeply concerned), Radin speaks of “commodification” as the use of *market rhetoric* and *market methodology* to characterize social interactions.<sup>85</sup>

The use of “market rhetoric” is the conceptualization of all interactions as sales and includes thinking of all the things people desire, aspire to, or need as if they all were ordinary fungible goods, i.e., commodities.<sup>86</sup> Goods to be bought and sold thus include not only bushels of wheat, but also “the functions of government, wisdom, a healthful environment, and the right to bear children.”<sup>87</sup> “Market methodology” consists primarily of the use of cost-benefit analysis to evaluate interactions in terms of potential gains from trade.<sup>88</sup>

It bears emphasis that neither Professor Eisenberg nor Professor Radin believes that nothing should be “commodified.” Indeed, there is nothing to suggest that either has any objection in principle to the very large, well-organized markets for ordinary goods or more intangible property that characterize the current economy. Professor Radin’s target, in particular, is not commodification as such, but “universal commodification,” the view that all things and all interactions are appropriately characterized in market rhetoric and evaluated by market methodology.<sup>89</sup> What then, one might ask, should not be commodified? The short answer seems to be that things that are “personal” should not be.<sup>90</sup> “Personal” things, in this specialized sense, are things that are integral to the self

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80. *Id.* at 1857, 1859 n.44.

81. *Id.* at 1859-60 n.44.

82. *Id.* at 1859-60 n.44, 1881.

83. *Id.* at 1859.

84. *Id.* at 1855.

85. *Id.* at 1859.

86. *Id.*

87. *Id.* at 1860.

88. *Id.* at 1859, 1861.

89. *Id.* at 1861.

90. *Id.* at 1880-81.

and to a proper conception of human flourishing.<sup>91</sup> They include personal attributes (bodily integrity, sexuality),<sup>92</sup> relationships (family, love, friendship, and religion),<sup>93</sup> moral and political aspirations,<sup>94</sup> and even some intersections with the social and physical world (one's work, one's home).<sup>95</sup> Although it is difficult to articulate precisely, the "personal" seems to consist of all those attributes and things with which we identify, both in the sense that they are part of our self-image and in the somewhat deeper sense that they are part of who we are (or choose to be, to the extent we can create ourselves).

What, then, is the harm of commodifying the personal? In part, the harm is a form of error risk.<sup>96</sup> Cost-benefit analysis, and its attendant assumptions that everything is monetizable and fungible, tends to undervalue components of human well-being that people hold dear but that are difficult to evaluate in terms of money.<sup>97</sup> This sort of systematic undervaluation can lead to poor social decisionmaking. More fundamentally, however, universal commodification distorts, and even insults, personhood.<sup>98</sup> To speak of rape or prostitution in market terms, for example, is to treat bodily integrity as an object that can be owned and as something monetizable and fungible.<sup>99</sup> It degrades the value of the attribute commodified and insults the person whose bodily integrity is at stake.<sup>100</sup> Taken to an extreme, it reduces the self to an empty, ghostly possessor of detachable, fungible objects, entirely devoid of any individuating characteristics.<sup>101</sup> Finally, and perhaps most importantly for Radin, the way humans conceptualize the world—and here, I think, she is primarily talking about the social world—changes the world.<sup>102</sup> The complete dominance of market rhetoric and market methodology would lead to an inferior conception of what it is to be human and what it is for a human being to flourish.<sup>103</sup>

Commodification is obviously a complex concept, and the implications of its application to any particular phenomenon or interaction cannot be expected to be straightforward. In particular, it is not clear how much of Radin's rather expansive notion of commodification is implicitly incorporated into Professor Eisenberg's objection to the enforcement of simple donative promises. Accordingly, it is now necessary to take a closer look at his argument and analyze which aspects of the notion of commodification are implicated in any

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91. *Id.* at 1881, 1884-85.

92. *Id.* at 1879-81.

93. *Id.* at 1906.

94. *Id.*

95. *Id.* at 1918-20.

96. *Id.* at 1878.

97. *Id.*

98. *Id.* at 1879-81.

99. *Id.* at 1880.

100. *Id.* at 1881.

101. *Id.* at 1881, 1885.

102. *Id.* at 1881-86.

103. *Id.*

possible enforcement of simple donative promises and why those aspects of commodification would be objectionable.

2. *Possible Implications of Commodification*—

a. *Market trading*.—Initially, it is reasonably clear that by claiming that enforcement of simple donative promises would commodify them, Professor Eisenberg is *not* confining the notion of commodification, or his objection to it, to Radin's narrowest sense of commodification, in which something is commodified if it is actually bought and sold in a market.<sup>104</sup> To be sure, in specifying the essential differences between bargains and gifts, he does point out that, in a bargain transaction, it is considered perfectly permissible for the party who is promised delivery of a particular commodity to resell it immediately in the market.<sup>105</sup> In contrast, the recipient of a simple donative promise to give the same commodity would insult the donor by immediately reselling it.<sup>106</sup> A gift or gift promise, he contends, has an expressive or "totemic" function that manifests the affective relationship between the donor and donee, and bargain transactions characteristically do not.<sup>107</sup> It is this expressive function of the gift promise (or, for that matter, the completed gift) that seems somehow incompatible with resale.<sup>108</sup>

Nevertheless, it would be a mistake to assume Professor Eisenberg objects to enforcing donative promises out of fear that enforcing them would facilitate a secondary market in gift expectancies. There does not seem to be much of a market for promisees' interests under simple donative promises at the moment, and that may be due, at least in part, to the fact that such promises are unenforceable under current law. If they were enforceable, it might be easier to develop a market for them. Even if such a market were deemed undesirable, however, it would seem easy enough to prevent it without banning enforcement of gift promises entirely. The common law judges were, after all, able to devise limits on assignment and delegation in *bargain* transactions where it seemed desirable because of the personal character of the performance to be rendered by

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104. *Id.* at 1859.

105. Eisenberg, *Contract and Gift*, *supra* note 1, at 844.

106. *Id.*

107. *Id.*

108. Specifying the nature of the incompatibility and its strength, on the other hand, is somewhat difficult. In particular, I am not certain there would be universal agreement on the question whether a donee or donative promisee who resold the subject of a gift had committed an offense to etiquette or an offense to morals. Moreover, if one expands the discussion to donative transfers generally, social attitudes toward alienation and resale, and the legal responses to those attitudes, begin to appear more complicated. Bequests, of course, are a form of donative transfer, and they share a certain degree of insecurity with donative promises, in that there is nothing to prevent a testator from changing his will. Yet pledges or sales by potential beneficiaries of expectancies under wills have a long, if somewhat colorful, history. These complications, however, are not material to the present discussion. We may agree that it is generally regarded as, at the very least, supremely tacky to resell one's birthday gifts.

either party.<sup>109</sup> If restrictions on assignments of gift promises are even more broadly desirable, a blanket (or presumptive) prohibition of such assignments would seem to be an obvious (and even more administrable) judicial response. In principle, of course, a statutory restriction of such assignments is also possible.

It is extremely unlikely, at the outset, that Professor Eisenberg's objection to enforcing simple donative promises could be answered so easily. One may infer, therefore, that he is really arguing that enforcing simple donative promises would commodify them in Professor Radin's second, broader sense.<sup>110</sup> However, the exact mechanisms by which this commodification would take place and by which it would cause harm are not fully explained. In my view, the best way to explore what he means to say is to isolate and analyze specific strands of his argument that correlate to elements of Professor Radin's more expansive and systematic exposition of the meaning and implications of "commodification."

*b. Monetization.*—Initially, it is possible that Professor Eisenberg's objection to enforcing simple donative promises is an objection to the "monetization"<sup>111</sup> entailed by commodification. Presumably, if we were to enforce such promises, we would do so by providing a damage remedy, just as we do in the case of bargain promises. Absent the special circumstances that justify a decree of specific performance in the case of bargains, the typical judgment in a successful action on a simple donative promise would be an order that the defendant pay a specific sum of money. Some scholars have suggested that monetization itself is one evil of commodification, an expression of the value of something belonging to one sphere in terms of a metric appropriate to an entirely different, and incommensurable, sphere.<sup>112</sup> Such an interpretation of Professor Eisenberg's argument is suggested by his division of the transactional world into two "worlds," the world of contract and the world of gift.<sup>113</sup> It is also suggested when he observes that, though a gift may be a gift of a commodity, the commodity does not exhaust the value of the gift and is not even its most important aspect.<sup>114</sup>

It is quite clear that Professor Eisenberg adopts the view that an affective gift, properly understood, can never really be completely monetized, in the sense

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109. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 317-19 (1981) (summarizing common law limits on assignment of contractual rights, delegation of contractual duties, and delegation of performance of conditions).

110. See Radin, *supra* note 79, at 1859 (distinguishing narrow and broad senses of "commodification.")

111. *Id.* at 1857, 1859 n.44.

112. See Ertman & Williams, *supra* note 78, at 4 (describing the conventional assumption of "hostile worlds" formed by the economic arena and the arena of intimacy and altruism); see also Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION*, *supra* note 78, at 8, 15-16 (describing and critiquing Michael Walzer's conception of separate "spheres"); Note, *supra* note 78, at 690-93 (attributing the view to Cass Sunstein, Andrew Kimbrell, and Elizabeth Anderson).

113. Eisenberg, *Contract and Gift*, *supra* note 1, at 823-24.

114. *Id.* at 844.

that there is residual value in a gift after one has completely expressed the monetary value of the commodity (if any) that is the subject of the gift.<sup>115</sup> He may also accept the view that this residual value is not properly or completely measurable in monetary terms. Both of those positions seem to me to be unassailable. However, even if one accepts them, it does not follow that simple donative promises should be unenforceable.

The reason that conclusion does not follow is that the assignment of a market value to a particular thing does not necessarily degrade or debase it. Professor Radin makes several observations in this regard that are instructive. There are some instances in which the mere assignment of a price to something is itself insulting or morally offensive.<sup>116</sup> To use two of her recurring examples, nearly everyone cringes at the mention of the market price of a healthy baby<sup>117</sup> or the costs (as opposed to the benefits) of rape.<sup>118</sup> However, not everything personal falls into this category.<sup>119</sup> Indeed, there are some things essential to the self-definition of most people that clearly have ascertainable market values but are neither insulted nor debased by monetary valuation.

Unless one finds one's job particularly loathsome, for example, one is likely to regard one's work as "part of who I am." It also seems plausible to say that most people in our culture regard their homes as, in some sense, expressions of themselves and as repositories of memories and experiences that cannot be quantified. Yet the market for labor is quite robust, and we often speak of the "going rate" for particular work. The market for houses rises and falls, but the real estate appraisers seem not to go hungry. The existence of the labor market offends no one but the few remaining committed Marxists,<sup>120</sup> and absent state or military control of the housing supply, it is difficult to understand how housing could be allocated except by sale and rental markets. More importantly, the existence and vigor of those markets misleads very few into thinking that the value of work is exhausted by wages or that the value of a home is exhausted by its price.<sup>121</sup> Such assumptions would be mistakes, perhaps even offensive ones, but we do not typically make them.

Similarly, it does not seem likely that providing a damage remedy for breach of a simple donative promise would deceive anyone into believing that the sum awarded in damages exhausted the value the promisee would have derived from the gift had it been completed. To be sure, individuals sometimes refer to

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115. *Id.*

116. Radin, *supra* note 79, at 1880-81.

117. *Id.* at 1925-28.

118. *Id.* at 1879-81.

119. *Id.* at 1906, 1908-09.

120. We may, I think, safely ignore both of them.

121. The examples of work and home are drawn from Radin, who uses them as examples of "incomplete commodification," i.e., things that have a market value but whose value to most people is not exhausted by value in the market. Radin, *supra* note 79, at 1914, 1918-21. Indeed, she concedes them to be examples of instances in which partial commodification of a thing does not have a domino effect leading to elimination of the non-commodified version of the thing. *Id.*

expectation damages as the monetary “equivalent” of performance or as putting the aggrieved party in the “same position” as full performance. When we are careful, however, we are compelled to admit that such statements are exaggerations, a sort of shorthand expression of our primary remedial goal without all its qualifications.

We may start with a presumption that an aggrieved plaintiff in contract is to be given the “value of the promised performance.” However, there are more specific rules that chip away at the potential recovery and deny the plaintiff the full equivalent of the performance of the promise. Some rules, like the refusal to shift the victorious party’s attorneys’ fees to the loser, amount to a refusal to award perfectly quantifiable forms of loss for reasons of policy, including the policy in favor of facilitating resort to the courts.<sup>122</sup> The duty to mitigate damages sometimes dictates that quantifiable losses, though actually suffered and easily calculated, may not be recovered in order to serve a policy in favor of minimization of the costs of contractual failure.<sup>123</sup> Other rules, such as the prohibition of the recovery of damages for emotional distress in an action on a contract, seem to be motivated, at least in part, by the very difficulty of quantification.<sup>124</sup> Indeed, most courses in contract law probably include some consideration of a case or two in which, even when the court is trying to compensate the plaintiff in full for breach of an ordinary bargain promise, it falls short because some component of “personal” value is neglected.<sup>125</sup> No serious student of common law contractual remedies would be tempted to infer from the provision of a damage remedy that the remedy was the *full* equivalent of the value of the promise. There are a variety of ways in which our damage remedies, for reasons of social policy, fail to provide the full value of the broken promise (or its hypothetical performance). However, there is nothing about that fact that insults or debases the interest we are trying to compensate. It merely reflects the fact that multiple policies are at work in our system of contract remedies, and we sometimes are required to make trade-offs among them.

In sum, Professor Eisenberg may be perfectly correct in asserting that a damage remedy for breach of gift promises would, as a practical matter, provide incomplete compensation because gifts are not fully monetizable. However, it does not follow that the incompleteness of the remedy distorts our perceptions of the value of gifts in general or particular gift transactions. Nor does it follow that no remedy at all is superior to incomplete compensation. We certainly do not accept that conclusion in the case of bargain promises, and Professor

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122. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14.35 (4th ed. 1998) (“The apparent rationale is that a contrary rule would discourage impecunious plaintiffs from prosecuting meritorious claims.”).

123. RESTATEMENT (SECOND) OF CONTRACTS: AVOIDABILITY AS A LIMITATION ON DAMAGES § 350(1) cmt. a (1981); 3 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 12.12 (3d ed. 2004).

124. 11 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 59.1 (rev. ed. 2005) (“Mental distress is not itself a pecuniary harm, and it can scarcely be said to be measurable in terms of money.”).

125. *See, e.g.,* *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962).

Eisenberg has not supplied persuasive reason to accept it in the case of donative promises.

*c. Fungibility.*—Further strands of Professor Eisenberg’s argument require exploration because they suggest he may be focusing on other elements of the notion of commodification. At one point, he argues that enforcing donative promises would degrade donative promises into bills of exchange and the performance of donative promises into the redemption of bills.<sup>126</sup> This somewhat hyperbolic argument is reminiscent of a second aspect of commodification identified by Professor Radin. Specifically, to “commodify” something is to imply or accept the view that it is fungible, in the sense that one who holds it should be indifferent amongst holding that thing, an equivalent sum of money, or another thing with the same monetary value.<sup>127</sup> In a similar vein, other scholars have suggested that the vice of commodification goes beyond confusing spheres of valuation by “monetizing” something that cannot be valued in money. It consists also in the *assertion of equivalence* between the incommensurable spheres of valuation that have been confused.<sup>128</sup> If this is the aspect of commodification Professor Eisenberg wishes to incorporate, his argument is that the existence of a damage remedy for a broken donative promise would not only fail to capture important but unquantifiable elements of the value of the promise, but also generate some sort of implication that the remedy had, contrary to fact, captured all that there is to capture.

Assuming that Professor Eisenberg is thus making an argument based on the undesirability of false implications of fungibility, there is at least one intuitive objection to his argument. Assume that there are incommensurable spheres of valuation and that the assertion of equivalence between things that inhabit different spheres is at least deceptive and perhaps degrading to one sphere. Would one not intuitively suspect that the primary culprit in generating such an implication of equivalence would be the voluntary *exchange* transaction, not the voluntary gift or the forced transfer by way of legal remedy?<sup>129</sup>

If we believe the economists (or indulge their assumptions), each party to an exchange transaction values what she receives more highly than what she gives up.<sup>130</sup> We may infer that, in some range of exchange transactions involving things of incommensurable value, at least one party is making a false assumption of equivalence. To use the obvious example, if a market for babies is permitted

126. Eisenberg, *Contract and Gift*, *supra* note 1, at 848.

127. Radin, *supra* note 79, at 1859-60 n.44.

128. See Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in RETHINKING COMMODIFICATION, *supra* note 78, at 122, 124 (describing the “assumption that informs much market-oriented thinking” that “all goods are commensurable, that all goods can be translated without loss into a single measure or unit of value”); see also Note, *supra* note 78, at 703-10 (articulating and exploring the ramifications of transactions expressive of value equilibrium).

129. Note, *supra* note 78, at 705-07 (arguing that gifts, compensatory damages, and life insurance do not express value equilibrium).

130. Eisenberg, *Principles*, *supra* note 33, at 643.

and a baby is sold to adoptive parents, one fears that at least one party undervalues the baby, not in the sense that she demands or pays the wrong price, but in the sense that she mistakenly assumes babies can be valued in money.<sup>131</sup> However, it is difficult to see why or how gift transactions or promises could generate the same kind of undesirable implications.

Even if one accepts the notion that a trade “implies” that the things traded are commensurable and equivalent (or that the parties to the trade believe that they are), gifts and donative promises, by definition, are not trades, as Professor Eisenberg rightly emphasizes.<sup>132</sup> Therefore, his argument must be that the provision of a damage remedy for a broken donative promise is, in effect, a forced sale of the promise for the “price” of the damage award and that the forced sale generates the implication that: (a) the value of the donative promise (or the completed gift it might have become) is appropriately expressed solely in monetary terms; and (b) that the damage award exhausts that value.

Yet the *coercive* character of legal remedies seems incompatible with any such “implication.” Part of what makes it plausible to assert that parties to trades “imply” that the things traded are commensurable and equivalent in value is that the parties to a trade *agree* to it. That is why it makes sense to suppose the trade reflects their value judgments. It is difficult to imagine, however, how or why the same implications should arise if a disappointed donative promisee is able to harness the coercive mechanisms of the state to force the defaulting promisor to pay whatever the state, through its courts, deems appropriate. Why should it be assumed that, by invoking the damage remedy, the promisee reflects his belief that the damage award is just as valuable as the completed gift would have been

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131. The inference is far from iron-clad. There is the theoretical possibility that the seller only cares about money, and the buyer only cares about children. In that event, both will be willing to make the sale, but neither asserts nor implies that it is an exchange of equivalents. A more realistic possibility is that neither the buyer nor the seller believes babies can be valued in money, but the seller is compelled by dire poverty to sell the baby anyway. Some scholars object to commodification precisely on the grounds of its potentially coercive and adverse distributional effects. See Radin & Sunder, *supra* note 112, at 11 (noting that “[u]nequal distributions of wealth make the poorest in society, with little to offer in the marketplace, more likely to commodify themselves”); Sandel, *supra* note 128, at 122-23 (distinguishing commodification arguments from coercion from commodification arguments from corruption); Note, *supra* note 78, at 690-91 (articulating further variations in arguments from coercion). Because this strain of commodification theory does not feature in Professor Eisenberg’s discussion of donative promises, I have ignored it for purposes of this Article. More pertinent for purposes of this Article is a rather large and obvious class of common transactions that involve exchanges without any implication of equivalence. If I buy a life insurance policy or an accidental death and dismemberment policy, I do not thereby accept or imply that my life or limbs are only as valuable as the sum for which they are insured, or even that they can be valued in money. All I imply, if anything, is that there would be adverse economic consequences if I lost them and that I want to guard myself or my loved ones from those potential consequences. Thus, even observable *voluntary* exchange transactions do not *necessarily* involve an implication of equivalence.

132. Eisenberg, *Contract and Gift*, *supra* note 1, at 841-46.

or his indifference between the two?

Although Professor Eisenberg does not, Professor Radin provides the building blocks of an argument that the provision of a judicial damage remedy generates an implication of equivalence between the money damages and the subject matter of the promise or contract for which the damages are a remedy.<sup>133</sup> She suggests, for example, that even if the government decriminalizes prostitution, it should not provide a contractual damage remedy in the event of a refusal to perform.<sup>134</sup> Such a damage remedy would be “tantamount to complete commodification” of sexuality because an “official entity” would place a “fungible value” on the promised performance.<sup>135</sup> She does not specifically say why an “official” pronouncement would be particularly conducive to complete commodification, either generally or with respect to sexuality in particular. However, she argues that one of the dangers of market rhetoric and methodology is that it sometimes has a domino effect, in that the commodified version of a thing or attribute can crowd out the more desirable, non-commodified version.<sup>136</sup> She also regards sexuality as particularly vulnerable to the domino effect.<sup>137</sup>

Whatever one thinks of the foregoing argument as applied to the somewhat special case of sexuality, a certain degree of general skepticism concerning the commodifying effect of “official” acts or pronouncements is warranted. Are we really to suppose that, if a damage remedy is available for breach of a gift promise, people will begin to believe that damages are equivalent in value to a completed affective gift (including its “totemic” aspects) or that they will be indifferent between the two? It certainly would not be a *rational* inference for them to draw, given the fact that the damage remedies in contract law, in some respects, provide less than full compensation even for elements of loss that are quantifiable.

Is there some reason to suppose people will draw such inferences irrationally, as a kind of subliminal effect of the availability of damages? It is difficult to see why they would. Particularly in the field of torts, in which there are damage remedies for all sorts of injuries that are difficult to quantify, there are no apparent subliminal effects of that kind. Someone who recovers damages in battery for a beating or for intentional infliction of emotional distress is not likely to conclude that the value of bodily integrity or emotional well-being is completely expressed in money and that the money is just as satisfactory. Nor does it seem plausible to suppose that jurors or other outside observers would draw such a conclusion. State-mandated worker’s compensation schemes provide detailed (some would say ghoulish) schedules of “benefits” for specific types of injury, and no one seems to conclude that the monetary amounts specified are interchangeable with body parts. One may doubt that the provision

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133. Radin, *supra* note 79, at 1923-25.

134. *Id.* at 1924.

135. *Id.*; see also Margaret Jane Radin, *Contested Commodities*, in *RETHINKING COMMODIFICATION*, *supra* note 78, at 81, 90-91 (articulating a similar argument more recently).

136. Radin, *supra* note 79, at 1912-13.

137. *Id.* at 1922.

of a damage remedy even *expresses* some sort of public judgment of fungibility. More importantly, it seems unlikely that the public at large would be deceived or confused by the “official” pronouncement of equivalence, even if it existed.

Thus, there is little reason to believe that enforcing simple donative promises would lead to undesirable monetization or assumptions of fungibility, as Professor Eisenberg suggests. However, there is still more to his argument than has been articulated up to this point. Specifically, there are two more strands of his argument that find parallels in Professor Radin’s extended analysis of the concept of commodification.

*d. The transformative power of commodification: Epistemic uncertainty.*—Professor Eisenberg makes two arguments that are reminiscent of Professor Radin’s claim that market rhetoric and methodology have a kind of transformative power—a power to change the social phenomena they are used to describe and analyze. Eisenberg first argues that if a damage remedy were available for simple, affective donative promises, the resulting commodification would disable the promisee (and perhaps even the promisor) from knowing whether the promisor’s performance was motivated by the same love, friendship, or affection that generated the promise in the first place, or whether it was motivated by a desire to discharge a legal obligation or avoid a lawsuit.<sup>138</sup> At the point at which the promisor is called upon to perform, his motives would inevitably be mixed.<sup>139</sup> The ambiguity in the promisor’s actual and apparent motives would effectively degrade the gift, as it would no longer be, or be perceived to be, an expression of the affective relationship between the donor and donee.<sup>140</sup>

It is important, at this point, to distinguish the subtle claim Professor Eisenberg is making from a more obvious one upon which he does not rely. He is not simply arguing that a donative promisor who must be sued and coerced into paying a judgment is no longer acting out of love. The motives of such a promisor are quite transparent. Rather, Professor Eisenberg is arguing that even the theoretical availability of a damage remedy clouds the motives of a donative promisor who, in fact, performs voluntarily.

This argument exaggerates both the difficulty of assessing the motives of others and the importance of being certain about them. We do not directly perceive the thoughts, feelings, and motives of other human beings in the immediate way we experience our own. If the requisite kind of knowledge is Cartesian certainty, it must be conceded that a donative promisee will not “know” what precisely moves the promisor to keep his promise. However, that is true whether the donative promise is legally enforceable or not. There are, after all, a range of motives to keep a donative promise, even if it is not enforceable and even if the promisor secretly would prefer not to perform. The promisor might perform out of a desire to avoid a confrontation with the promisee, out of a desire to avoid a loss of reputation among other friends or family members, or simply

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138. Eisenberg, *Contract and Gift*, *supra* note 1, at 848.

139. *Id.*

140. *Id.*

out of a desire to preserve a self-image as a person of his or her word. The promisor's motives can never be fully transparent, and the cloud of our ignorance of them is not made materially darker or lighter depending on whether or not the promise in question carries a legal remedy.

Though troubling to philosophers, this kind of theoretical uncertainty is not of great practical importance. Normally, we do not require Cartesian certainty. If it becomes important to us to ascertain the motives of another person, we make judgments about those motives based upon what the person says, what she does, what gestures she makes, what we have learned over time about her character, and a variety of other factors. To be sure, those judgments are at best educated guesses from a strict philosophical point of view. They serve our purpose despite their status as educated guesses, presumably because they are the best that we can do. Thus, even assuming it is important to the preservation of the peculiar character or "totemic" aspects of gifts and gift promises that the promisor's motives for performing be assessed, the myriad factors that make such assessments practically possible are available whether the promise is enforceable or not.<sup>141</sup> Indeed, since the prototypical cases of simple donative promises are those between family, friends, and other close associates, the cues we usually use to interpret motives (especially those based on long familiarity) would seem to be more readily available precisely because of the affective relationship.

*e. The transformative power of commodification: Poisoning the well.*—Closely on the heels of the argument just discussed, Professor Eisenberg makes a second, conceptually distinct claim about the way in which enforcing donative promises would commodify them and thereby transform and degrade them as social phenomena. Gifts and gift promises, it should be recalled, express the donor's relationship with and affection for the donee.<sup>142</sup> Affection of that kind, once withdrawn, cannot be restored by compulsion.<sup>143</sup> However, if there is to be a damage remedy for the breach of a donative promise, it must take the form of a forced transfer. The problem is that a compelled "gift" has lost its "gift-ness."<sup>144</sup> It no longer performs the expressive function it might have, i.e., it no longer reflects and expresses the affective relationship between promisor and

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141. Indeed, there is nothing unique about gift promises in this respect. Even the recipient of an ordinary bargain promise may have every bit as good a reason as the recipient of a donative promise to want to know what moves the promisor to perform. Continuing relationships and trust play an important role in the business world. The parties to recurring bargain transactions might be dramatically more comfortable if each believes the other performs for reasons other than the fear of legal sanctions. If that is sometimes important, however, the fact that legal sanctions have long been available for bargain promises does not seem to prevent the parties to bargains from determining that performance actually occurs for more noble reasons.

142. Eisenberg, *Contract and Gift*, supra note 1, at 844.

143. *Id.* at 848.

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

promisee.<sup>145</sup> Enforcement of the gift promise effectively destroys the gift.<sup>146</sup>

The argument has great intuitive appeal, largely because most of its premises are true. A compelled gift is indeed no gift at all. Legal remedies are not and cannot be anything but a form of compulsion by the state. Nevertheless, the argument is mistaken.

It may be observed, initially, that providing a legal remedy for breach of a bargain promise destroys the underlying bargain in the same sense in which enforcing a donative promise destroys the gift. A bargain transaction is a voluntary transaction *by definition*, just as a gift transaction is. If Leviathan enforces a bargain promise by compelling the payment of damages, the party compelled to pay is no longer willingly fulfilling a voluntary bargain.

Although there seems to be universal agreement that we should (and do) enforce bargain promises, there remains much disagreement about the reasons why. Some argue that we should enforce them because enforcing exchange promises enhances utility or social and economic coordination,<sup>147</sup> while others argue that enforcement serves moral ideals such as autonomy.<sup>148</sup> Whatever the true or best reasons are, however, one thing is clear: we do not enforce bargain promises because we are under an illusion that a transfer forced by the state can recreate the halcyon days when the two parties to a bargain contemplated and agreed on a voluntary exchange. However, the destruction of the bargain *qua* voluntary transaction actually precedes the intervention of the state. One party's decision to *breach* is what really puts an end to the underlying, voluntary bargain. We attach a legal sanction because doing so fits our best conception of sound morals or good social policy.

Similarly, in the case of a donative promise, the promisor's decision to break the promise destroys the contemplated gift, in that it represents (or may represent)<sup>149</sup> a withdrawal of affection. If we make a social decision to provide the disappointed promisee a damage remedy, it is not because we believe we can turn back the clock and restore the affective relationship or the voluntary character of the gift. That means that there is an important sense in which damages are incomplete. However, if, as I (and many others) have argued at length elsewhere,<sup>150</sup> the very reasons that support enforcing bargain promises support enforcing gratuitous promises as well, the fact that the remedy must take the form of a forced transfer should be no barrier to enforcement in either case.

Thus, when one separates the strands of Professor Eisenberg's argument and

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145. *Id.*

146. *Id.*

147. Professor Eisenberg has long held this view. Eisenberg, *Contract and Gift*, *supra* note 1, at 835-36; Eisenberg, *Principles*, *supra* note 33, at 643, 652.

148. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1-6 (1981); see also Lon L. Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799, 806-10 (1941).

149. The qualification is necessary, because a donative promisor who breaks his promise because it is simply impossible to keep does not signal a withdrawal of affection from the promisee.

150. See Wessman, *Gatekeeper II*, *supra* note 3, at 715-16, 819-26.

unpacks the concept of “commodification,” that concept provides little direct support for a substantive argument against enforcing simple donative promises.<sup>151</sup> Professor Eisenberg’s second substantive argument against enforcement must now be addressed.

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151. The qualifier “direct” must be added because a brand-new form of commodification argument appeared very recently in David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299 (2006). The authors develop an argument for the conclusion that the presence of at least nominal consideration should be both “a necessary and sufficient condition” for the enforcement of a promise. *Id.* at 1367. They do so, in part, by appealing to what they call “anticommodification norms.” *Id.* at 1302. Such norms, they argue, prevent potential promisors and promisees from resorting to the expression of merely nominal consideration in certain social contexts. *Id.* at 1299. The social contexts in question include a range of gift promises.

Gift promisors and promises cannot resort to nominal consideration as a device for making a gift promise enforceable (when it otherwise would not be) because anticommodification norms prevent them from speaking in such terms. *Id.* at 1328. They further argue that such gift promises should not be made enforceable through the provision of some other legal device that the parties might deliberately invoke. *Id.* at 1337. Providing a mechanism for legal enforcement could generate an inefficient signaling spiral, as promisors in such transactions invoked the mechanism in order to signal their reliability to promisees. *Id.* at 1343-44. The spiral, in turn, could reduce overall welfare, both by binding promisors who really did not wish to be bound and by causing promisors to reduce the “size” (i.e., value) of what they promised to suboptimal levels. *Id.* at 1346. The details of the argument are intriguing and very complex. For present purposes, however, it is sufficient to emphasize that it is a very different kind of commodification argument than that made by Professor Eisenberg.

Professor Eisenberg’s appeal to the notion of commodification is both normative and direct. He believes that commodification is bad and that enforcing simple donative promises would commodify them. Eisenberg, *Contract and Gift*, *supra* note 1, at 848-49. Therefore, according to Eisenberg, we should not enforce them. *Id.* In contrast, one might say that Professor Gamage and Mr. Kedem appeal to the notion of commodification indirectly and descriptively. Although one gets the impression that they do, in fact, subscribe to anticommodification norms, nothing about their analysis requires them to do so.

For their analysis, the significance of anticommodification norms derives from the status of those norms as empirical social facts. Gamage & Kedem, *supra*, at 1358. In our culture, people believe in anticommodification norms, and certain factual consequences follow. Given further hypothetical facts (in this case, an option to make gift promises legally enforceable), certain other factual consequences might follow, and if they did, those consequences would be undesirable. However, the reason they would be undesirable is because they reduce *welfare*. *Id.* at 1355-56. The norm that really drives the analysis of Professor Gamage and Mr. Kedem is welfare maximization/efficiency, placing them comfortably in the tradition of law and economics. Instead of making a direct ethical appeal to norms against commodification, the authors use them as causal links in a chain leading to inefficient outcomes.

In part because the argument is so different from Professor Eisenberg’s, and in part because of its complexity, evaluating and responding to the Gamage-Kedem analysis would require a separate article. I hope to write such an article, but I will not attempt to do so here.

3. *The Range of Excuses for Not Performing Donative Promises.*—The second argument relies on certain premises about the “fluid” range of moral excuses for failing to perform a donative promise.<sup>152</sup> The argument is slightly ambiguous because the critical premise appears to have two versions, a strong thesis and a more moderate thesis.

The strong thesis is the proposition that there are so many excuses for failing to perform a donative promise that a donative promisee is always, or almost always, morally obliged to release a promisor who wishes to be released.<sup>153</sup> Accordingly, donative promises should not carry a legal remedy because any time a donative promisor has a reason not to perform he has no moral obligation to do so. Conversely, if the donative promisee needs the compulsion of the state to secure performance, or its monetary equivalent, it should not be available to him. Attaching legal sanctions to promises that are not even morally binding cannot be justified.<sup>154</sup>

The strong thesis is thus a claim that few, if any, donative promises are morally binding in circumstances in which the promisor would not want them to be. One must concede that, if the strong thesis were true, it would provide a reason not to enforce the simple donative promise. However, if the strong thesis is tested against our shared moral intuitions, I suggest there is little reason to believe it to be true. For example, consider the case of a mother who promises to finance her daughter’s medical school education. Most people would agree that the mother has a moral excuse for breaking the promise if she falls seriously ill and incurs crippling medical expenses or if she suffers severe financial reverses that make her unable to perform except by rendering herself destitute. The same is probably true if the daughter physically assaults the mother or libels her publicly. Professor Eisenberg might add that the mother is excused if she finds she needs the money to start her own new business.<sup>155</sup> Surely, however, it matters very much *why* the mother wants to break the promise, and there are certain reasons that most people would find unacceptable. If the mother wishes to renege because, for example, it would interfere with her fondness for whisky

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152. Eisenberg, *Contract and Gift*, *supra* note 1, at 829.

153. “It may be wrong for a donative promisor to break a donative promise but also wrong for the promisee to insist on performance, because under the morality of *aspiration*, where a donative promise is made for affective reasons the donative promisee is normally obliged to release a repenting promisor.” *Id.* at 849 (emphasis added).

154. There is a certain irony in this argument. Traditionally, scholars have emphasized that moral obligation is not alone a *sufficient* reason to enforce a promise. See, e.g., Eisenberg, *Principles*, *supra* note 33, at 640 (“A promise, as such, is not legally enforceable.”); *id.* at 643 (“As a substantive matter, the state . . . may justifiably take the position that its compulsory processes will not be made available to redress the hurt caused by every broken promise, but only to remedy substantial injuries, prevent unjust enrichment, or further some independent social policy, such as promotion of the economy.”) The suppressed premise of Professor Eisenberg’s more recent argument is that moral obligation, nevertheless, is or should be a *necessary* condition of enforcement.

155. Eisenberg, *Contract and Gift*, *supra* note 1, at 829.

or casino gambling or her desire to amass a fleet of sports cars, most people probably think she would wrong her daughter by breaking the promise.<sup>156</sup> The strong thesis thus exaggerates the range of moral excuses available to the donative promisor.

In part for that reason, it seems more plausible to attribute the moderate thesis to Professor Eisenberg. The moderate thesis is not a claim about how many or how few donative promises are morally binding, but is rather a claim about our ability to *describe* which ones are binding. More specifically, the moderate thesis is the claim that donative promises are subject to a broader range of moral excuses than other kinds of promises and, most importantly, that the range of moral excuses can never, even in principle, be completely specified.<sup>157</sup> Professor Eisenberg does not say why the range of excuses can never be a closed set, but it may have something to do with the restricted range of promises upon which he is concentrating his attention. Once charitable subscriptions are placed to one side,<sup>158</sup> the category of simple donative promises reduces to promises (without accompanying reliance) among family, friends, and close associates. The dynamics of such relationships are notoriously complicated. He may be arguing that no matter how comprehensive our list of moral excuses appeared to be, we could always imagine some interaction between donor and donee that could change the circumstances enough to generate an additional excuse.<sup>159</sup> The range of relevant factual variations defies any simple formulation of a rule on excuses. Accordingly, it is better to refuse enforcement of simple donative promises than to permit enforcement subject to a range of excuses we cannot ever really capture.

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156. Between the extremes of clearly meritorious excuses and clearly unacceptable ones, it is possible to imagine borderline cases upon which reasonable people might disagree. For example, if a mother wishes to break her promise to finance her daughter's medical school education to enable her to finance the law school education of a more devoted niece instead, there would probably be some disagreement about whether she was justified in doing so.

157. The moderate thesis may be what Professor Eisenberg means by the statement, "It is doubtful whether the formal legal system could deal adequately with the fluid nature of these excuses, because the equilibria of affective relationships are too subtle to be regulated by legal rules." Eisenberg, *Contract and Gift*, *supra* note 1, at 829. The moderate thesis is also suggested by his discussion of the claim by Professors Goetz and Scott that the terms of a donative promise, and particularly the regret contingencies that would cause a donative promisor to wish to renege, are normally incompletely specified in the promise. *See id.* at 830-31 (discussing Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980)).

158. Professor Eisenberg approves of enforcing promises to donate to charities on grounds of public policy. *See supra* note 43 and accompanying text.

159. For example, if Leviathan had decided that donative promisors were excused from performing in cases of donee assault on the donor, donee libel of the donor, the donor's financial reverses, the donee's ingratitude, destruction of the donor's property by the donee, etc., Leviathan would still have to decide how to respond to an entirely new type of interaction, e.g., if the donee simply refused to communicate with the donor for several months.

So interpreted, the moderate thesis sounds plausible, at least initially. Friendships and family relationships are indeed complex, and the moral implications of various possible interactions are quite fact-dependent. However, it does not follow that we should provide no remedy at all for the breach of a simple donative promise. It may mean that an action for breach of such a promise must be subject to at least one defense that is expressed as a *standard* rather than a *rule*, but there is nothing remarkable or unusual about that.<sup>160</sup> Contract law as a whole is full of norms expressed as standards rather than rules. One could borrow language from the unforeseen circumstances exception to the pre-existing duty rule and refer to “circumstances not anticipated by the parties at the time of the promise that make performance substantially more onerous.”<sup>161</sup> Alternatively, if it is not deemed necessary that the circumstances be unforeseen, one could use language like the “material adverse change of circumstances” clauses that appears in acquisition agreements. At an even greater level of generality, one could use language analogous to that of section 90 and authorize a court to refuse enforcement or limit remedies “as justice requires.”<sup>162</sup> I do not now wish to argue that any *one* of these formulae could capture the range of excuses to which simple donative promises should be subject. I am more inclined to believe that a group of them would be required. My present point, however, is that our inability to predict comprehensively and in advance all the facts that might conceivably generate an excuse is not an insuperable obstacle to an enforcement regime with appropriate defenses. List-making is not the only form of lawmaking.

In the end, therefore, Professor Eisenberg’s second substantive reason for refusing to enforce donative promises proves to be inadequate. If he is relying on the strong thesis as his premise, the premise itself is doubtful. If he is relying on the moderate thesis, the premise is more plausible, but it does not entail his conclusion that donative promises should not be enforced. I turn now to the very different argument in support of that conclusion developed by Professor Markovits.

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160. Indeed, the mother of all standards, the unconscionability defense to a contract, is responsive to precisely the same sort of problem. It is impossible to specify in advance all the forms that bargaining unfairness and economic overreaching may take, at least if we try to use the simple, empirically verifiable descriptions characteristic of rules. Nevertheless, leaving such forms of bad conduct entirely unregulated is not our only option. The use of an admittedly vague standard permits judicial oversight with sufficient flexibility to permit legal evolution.

161. Cf. RESTATEMENT (SECOND) OF CONTRACTS: MODIFICATION OF EXECUTORY CONTRACT § 89(a) (1981) (“A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.”).

162. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(1) (1981) (“The remedy granted for breach may be limited as justice requires.”).

## II. PROFESSOR MARKOVITS ON COLLABORATION

A. *Professor Markovits's Argument*

1. *The Scope of the Argument.*—In contrast to Professor Eisenberg's article, the question whether simple, affective donative promises should be enforced is not the principal focus of Professor Markovits's article. Indeed, one should observe at the outset that Professor Markovits's article is a remarkably ambitious one. It purports to be a moral and philosophical theory of promising that not only accounts for the commonly experienced features of promising in practice, but also explains the moral desirability of promising as an institution and the moral obligation to keep particular promises.

The theory traces its roots to Kant's third formulation of the categorical imperative, but it does not purport to be utterly faithful to, or a simple exegesis of, Kant.<sup>163</sup> Rather, it purports to be a further articulation of, and an advancement beyond, strictly Kantian ideals.<sup>164</sup> Along the way, Professor Markovits claims to resolve traditional philosophical puzzles concerning promising, including: the reasons why we do not have a duty to *make* any particular promise,<sup>165</sup> the reasons why keeping promises appears to be a stronger obligation than making them in the first place,<sup>166</sup> why an act of will should be sufficient to generate a moral obligation,<sup>167</sup> why promises change the logical structure of our practical reasoning,<sup>168</sup> and why a promise should bind the promisor morally even in the absence of reliance by the promisee.<sup>169</sup> He then refines the general moral theory of contract to articulate the more particular form of moral ideal—collaboration—that explains the desirability of contracting and the obligation to perform one's contracts.<sup>170</sup> This is all very heady stuff, and the project is carried out at a fairly high level of abstraction. It is only toward the end of the article that Professor Markovits, in an effort to show that his theory fits well with the institution of contract he is trying to explain and justify, contends that it explains and justifies the traditional doctrine of consideration.<sup>171</sup>

My focus in this Article on Professor Markovits's contentions concerning the doctrine of consideration is thus a concentration on matters that, for him, are undoubtedly subsidiary points. Moreover, his defense of the doctrine of consideration is engaged and disputed here without mounting a broad refutation of his overall account of promising and contract. Indeed, a thorough evaluation of his philosophical model of promising and contract would require an article of

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163. Markovits, *supra* note 2, at 1424.

164. *Id.*

165. *Id.* at 1435-38.

166. *Id.* at 1438-41.

167. *Id.* at 1442-46.

168. *Id.* at 1440-41.

169. *Id.* at 1439, 1443-46.

170. *Id.* at 1446-74.

171. *Id.* at 1474-91.

far greater length than I am prepared to write and far more philosophical training and experience than I have. Accordingly, although I have (and will occasionally articulate) some reservations about it, I propose to assume that his general theory of promising is largely accurate and illuminating. What I propose to dispute is that the traditional requirement of consideration follows from that theory.

2. *Promissory Obligation.*—It is necessary to begin by articulating in more detail Professor Markovits's theory of the moral obligation that arises from a promise. The foundation of the theory is Kant's fundamental moral principle, the categorical imperative, and, in particular, the version of the principle called the "Formula of the End in Itself."<sup>172</sup> That principle is, "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."<sup>173</sup> The principle is, in Professor Markovits's view, not one command, but two.<sup>174</sup> First, one should never use persons merely as a means; second, one should always treat them as ends in themselves.<sup>175</sup> He asserts this pair of commands expresses a moral ideal of respectful community that ultimately will prove to be the moral foundation for promising and contract.<sup>176</sup>

Initially, the dual commands embodied in the "Formula of the End Itself" explain why it is wrong to lie and, in particular, why it is wrong to engage in the form of promise-breaking that is a subset of lying.<sup>177</sup> The false promise, as opposed to the honest but broken one, is a promise that the promisor never intends to keep, even at the moment it is made. For example, suppose a person borrows money that he knows he will be unable to repay (and intends never to repay), but promises to repay within a fixed span of time.<sup>178</sup> The lying promise violates the first command because it treats the promisee as a mere means.<sup>179</sup> The promisee cannot accept the promisor's ends, as she has not been invited to, but has instead been deliberately kept in the dark and manipulated.<sup>180</sup> She is an object of the promisor's plan—not a participant.<sup>181</sup> However, even if the promisee is not deceived, and is both aware of the promisor's deceptive intent and quite willing to give him the money outright, the promisor has failed to treat

172. *Id.* at 1424.

173. *Id.* (quoting IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 429 (H.J. Paton trans., Harper & Row 1964) (1785)).

174. *Id.*

175. *Id.* The first command prohibits actions according to "maxims" that those affected could not accept and thus treating them merely as things, not as persons. *Id.* at 1425. The second command prohibits actions in pursuit of ends that the persons affected could not share. *Id.* The relation between persons that results from violation of the "Formula of the End in Itself" is estrangement, the opposite of respectful community. *Id.* at 1426.

176. *Id.* at 1420, 1424.

177. *Id.* at 1424-28.

178. *Id.* at 1426.

179. *Id.* at 1427.

180. *Id.*

181. *Id.*

the promisee as an end.<sup>182</sup> The promisee may have avoided being treated merely as a means because she has not been deceived.<sup>183</sup> Nevertheless, even if her end and that of the promisor *coincide*, they are not *shared*.<sup>184</sup> Her acquiescence in his receipt and retention of the money does not generate a relation of respectful community.<sup>185</sup> The lie prevents the sharing of ends that a community requires.<sup>186</sup>

It is probably safe to assume, however, that most ordinary promise-breaking involves breaking honest promises, in the sense that the breaching promisor honestly intended to keep the promise when he made it. Further articulation of the theory of promising is therefore necessary, and Professor Markovits supplies it. The honest promisor who breaches does not deceive or coerce the promisee and thus does not treat her merely as a means to his own ends.<sup>187</sup> Such a promisor does, however, violate the second command of the "Formula of the End in Itself."<sup>188</sup> Specifically, he fails to treat the promisee as an end in herself by pursuing an end she cannot share.<sup>189</sup> The result is one of several possible forms of estrangement.<sup>190</sup>

Why is breaking an honestly-made promise a failure to treat the promisee as an end in herself? The answer begins with a more complete analysis of the notion of *promise-making*.<sup>191</sup> When a person makes a promise, he adopts an end or ends that are specified in the content of the promise.<sup>192</sup> Those ends are available to the promisee, and she normally adopts them as well.<sup>193</sup> However, further features of the promise make the overlap of ends more than merely coincidental.<sup>194</sup> The promisor also intends to "entrench" the ends specified by the promise and refuse to defect from the ends unless released from them by the

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1427-28.

186. *Id.* at 1428. In a further elaboration of the ideal of respectful community generated by the "Formula of the End in Itself," Professor Markovits later specifies two components of the ideal. "First, the basis of respectful community must be free," in the sense that the parties to the community must enter it willingly. *Id.* at 1429. This is not possible if one party manipulates the other through deception or coercion, which amounts to treating the other as a means. *Id.* at 1429-30. Treating another as a means thus generates one form of estrangement. *Id.* "Second, the basis of respectful community must be shared," in the sense that the participants must pursue ends they adopt together. *Id.* at 1429. A second form of estrangement thus arises if one pursues ends in which the other, though implicated in them, cannot participate. *Id.* at 1429-30.

187. *Id.* at 1431.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1431-33.

192. *Id.* at 1431-32.

193. *Id.* at 1431.

194. *Id.* at 1432.

promisee.<sup>195</sup> The promisor gives the promisee authority over his ends and subordinates his own ends to her will.<sup>196</sup> The sharing of ends in this very strong sense creates the relation of respectful community between promisor and promisee.<sup>197</sup>

If the promisor then breaks the honest promise, he abandons the ends specified by the promise and adopts ends that, with respect to the promised performance, are inconsistent with those of the promisee.<sup>198</sup> In so doing, the promisor does something far worse than merely abandoning the community the promise had created and returning to the status of a stranger to the promisee.<sup>199</sup> The breach of promise, by its adoption of ends contradictory to those of the (formerly shared) ends of the promise, is a *betrayal* of the community initially created by the promise.<sup>200</sup> It puts the promisor and promisee in a relationship of estrangement or enmity.<sup>201</sup> Such estrangement is the evil that makes breaking even an honestly-made promise wrong.<sup>202</sup>

3. *Collaboration and Contractual Obligation.*—The justification of the institution of contract, and for keeping the contracts one makes, takes the analysis a step further in specificity. Contracts are, among other things, a subset of the broader category of promises,<sup>203</sup> and so we may expect Professor Markovits to find the moral foundation for contract in the ideal of respectful community entailed by the “Formula of the End in Itself.” He fulfills that expectation by defining a particular kind of respectful community he calls “collaboration” and arguing that this more particular ideal explains and justifies contract as a specific variety of promising.<sup>204</sup>

Like many of the concepts Professor Markovits uses, the notion of collaboration is a complex one, and he constructs it in stages. Initially, collaboration is a form of “joint intentional activity.”<sup>205</sup> To describe coordinated activity as “joint intentional activity” entails at least the following elements:

- (a) the parties intend to engage in coordinated action,<sup>206</sup>

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 1433.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1448.

204. *Id.* at 1448-51.

205. *Id.* at 1452-56. Professor Markovits borrows the term and much of its analysis from philosopher Michael Bratman. *Id.* at 1451 n.70 (citing MICHAEL E. BRATMAN, *SHARED COOPERATIVE ACTIVITY IN FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 93 (1999)).

206. *Id.* at 1452. Coordinated action, as opposed to merely correlated action, requires that the actions in question not be coincidental, but rather that each party’s actions “‘have a reference to’” the other’s. *Id.* (quoting DAVID HUME, *Of Morals*, in *A TREATISE OF HUMAN NATURE* 455, 490

- (b) the parties “specifically intend to perform the actions according to meshing subplans”,<sup>207</sup>
- (c) the parties intend to act, and actually act, in mutually responsive ways, so that each participant adjusts his or her subplans and actions to those of the others,<sup>208</sup> and
- (d) the intentions reflected in (a)-(c) “be common knowledge among the participants.”<sup>209</sup>

The performance of a contract, according to Professor Markovits, characteristically involves just such joint intentional activity,<sup>210</sup> although an explanation of the institution of contract in terms of joint intentional activity alone is essentially incomplete.<sup>211</sup> Joint intentional activity requires only that each participant have intentions in favor of the *activity*, not intentions in favor of the other *participants*.<sup>212</sup> In order to obtain a satisfactory account of contract, it seems we must add the element of *promise* and the implications of the earlier analysis of that practice.<sup>213</sup> Specifically, a contractual promisor, in addition to having the intentions just mentioned, intends not to abandon the promised performance (and so defect from the joint intentional activity) unless released by the promisee.<sup>214</sup> In harboring this intent not to be the first to defect, the promisor grants the promisee authority over the promisor’s intentions and will (or, looking at it another way, subordinates his own ends to those of the promisee).<sup>215</sup> The promisor thus treats the promisee as an end in herself, and this creates a morally

(Oxford Univ. Press 2d ed. 1978) (1739-40)).

207. *Id.* at 1453.

208. *Id.* at 1453-54. Mutually responsive activity is distinguished from prepackaged coordination, which involves joint planning but separate action. *Id.* The latter can succeed, in the absence of mutual responsiveness, only if the meshing subplans are complete at the outset and every possible detail is specified and every possible contingency is anticipated. *Id.* at 1454.

209. *Id.* at 1455. This means that the intentions of the participants are interlocking. *Id.* Each agent treats the “intentions of the other . . . as end-providing for herself,” in that each intends that the relevant intentions of the other succeed. *Id.* (quoting BRATMAN, *supra* note 205, at 93). However, joint intentional activity need not contain the further elements necessary for “shared cooperative activity.” *Id.* The latter requires that each participant have the additional intention that, in at least one circumstance in which one participant requires help to perform the joint task, the other participant is willing to help without the first participant offering any further inducement for the requisite assistance. *Id.*

210. *Id.* at 1456-57. Despite this claim, Professor Markovits emphasizes that parties to contracts need not be committed to shared cooperative activity, i.e., to mutual uncompensated support. *Id.* at 1457. Each party to a contract commits not to be the first to defect from the joint intentional activity. *Id.* at 1458. However, though he may do so, he need not commit to compensating for the other party’s shortcomings. *Id.* at 1457-58.

211. *Id.* at 1458.

212. *Id.* at 1460.

213. *Id.* at 1458-63.

214. *Id.* at 1460.

215. *Id.* at 1460-61.

valuable relationship of respectful community.<sup>216</sup> In contrast, a promisor's breach of the contract treats the promisee as something other than an end in herself, destroys the community, and results in estrangement.<sup>217</sup>

Professor Markovits calls the relationship of respectful community characteristic of contract "collaboration," and he is careful to distinguish it from the more supportive relationship of "cooperation."<sup>218</sup> The latter relationship implies patterns of "reciprocal concern" and "mutual aid" that *may* be present in contractual relationships, but are by no means *essential* to contract.<sup>219</sup> On the contrary, the parties to contracts may pursue their own interests quite selfishly, even in the context of the contract.<sup>220</sup> "Collaboration" requires only that the parties each agree not to be the first to defect from the joint project defined by the terms of the contract.<sup>221</sup> Nevertheless, even this thinner relationship of collaboration is a form of respectful community,<sup>222</sup> and both making and keeping one's contracts are justified by appeal to it.

4. *Consideration.*—Now that the central features of Professor Markovits's moral theory of contract have been outlined, the remaining expository task is to explain his view that this theory supports certain features of the traditional doctrine of consideration. In his view, the central task for a contract theorist seeking to explain the doctrine of consideration is to explain two aspects of it that appear to be in tension.<sup>223</sup> Contract law traditionally requires, as a condition of enforcement, the fact of bargain—i.e., that each party to the contract provides or promises something in exchange for the other's promise or performance and that each side's promise or performance induces the other's.<sup>224</sup> Yet contract law is largely indifferent to the fairness or adequacy of the bargain.<sup>225</sup> In effect, the scholar's task is to explain why the fact of bargain is so important that the law insists on it, while the specific terms and fairness of the bargain are so unimportant that they may be ignored in all but exceptional cases.

Professor Markovits contends that his analysis of contract in terms of the collaborative ideal explains and justifies both aspects of the doctrine of consideration.<sup>226</sup> Actual bargains are illustrations of joint intentional activity that

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216. *Id.* at 1463.

217. *Id.*

218. *Id.* at 1460-62.

219. *Id.* at 1462.

220. *Id.* at 1461. Professor Markovits recognizes that there are forms of contracts that generate even stronger bonds of community, and he gives as examples contracts that create fiduciary duties among partners or joint venturers, as well as "relational contracts" among regular suppliers. *Id.* at 1449-50 & n.68 (citing IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 10 (1980)). However, he insists that the discrete self-interested contract is the conceptually primary one. *Id.*

221. *Id.* at 1460-61.

222. *Id.* at 1461.

223. *Id.* at 1477.

224. *Id.* at 1477-78.

225. *Id.*

226. *Id.* at 1481-87.

involve collaboration as a form of respectful community.<sup>227</sup> In the ordinary bargain, each party, by virtue of his own promise, subjects his own intentions to that of the other, grants her authority over them, and thus treats her as an end in herself.<sup>228</sup> A bargain is thus an instance of the establishment of a morally valuable relationship of respectful community between the parties.<sup>229</sup> Moreover, because collaboration is a “thinner” ideal than “cooperation,” the bargain *form* alone creates this form of community, as long as it is a real bargain.<sup>230</sup> *What* the parties to a bargain promise each other is (or may be) a matter of indifference. Collaboration arises from the mere fact that each grants the other authority over her ends as specified in the respective promises.<sup>231</sup> The nature of those ends and the content of each party’s promise are irrelevant, in the sense that we may conclude a valuable relationship has arisen from the fact of bargain, without knowing what the terms of the bargain are.<sup>232</sup>

### B. Criticism

1. *Refining the Scope of the Defense.*—If one accepts Professor Markovits’s general theory of the value of collaboration, as well as the premise (implicit throughout his article) that the moral value of a relationship created by promising (or, for that matter, some other action) could justify the imposition of legal sanctions, then one might conclude that he has provided some justification for the doctrine of consideration—up to a point. It should be recalled that the “doctrine” of consideration is not one rule, but a cluster of several related rules.<sup>233</sup> If one

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227. *Id.* at 1482-83.

228. *Id.* at 1483.

229. *Id.* at 1482.

230. *Id.* at 1483.

231. *Id.*

232. At this point, a fairly obvious objection comes to mind. Everyone knows that there are a lot of morally bad bargains in the world. Some of them are bad because the assent of one party is obtained by fraud, duress, or some other improper means. These pose no difficulty for Professor Markovits’s theory, as they do not even generate collaborative relationships, in his sense. A person who obtains the assent of another to a bargain through force or fraud not only fails to treat the other as an end in herself, but actually uses her as a mere means. There are, however, other bad bargains that do not fall into this category. The mutual promises of a group of bank robbers or between a drug dealer and his own supplier form genuine bargains, but the transactions in question are universally regarded as morally vile. The total independence of the valuable relationship (collaboration) from the substantive terms of a bargain may thus be doubted. One assumes that Professor Markovits could respond to this objection by agreeing that collaboration arises in such cases, but denying that collaboration is the only morally relevant feature of the transaction. He never asserts that collaboration is the only relevant moral value, and it is thus open to him to conclude that, in such transactions, other moral values outweigh whatever minimal value the collaborative relationship between robbers or drug dealers may have.

233. See Wessman, *Gatekeeper I*, *supra* note 3, at 49-50; Wessman, *Gatekeeper II*, *supra* note 3, at 713-14.

accepts Markovits's premises, he has so far justified, at most, two of them: (a) the rule that the fact of bargain is *prima facie* a *sufficient* reason to enforce the constituent promises of the bargain; and (b) the rule that, absent exceptional circumstances, the courts do not inquire into the adequacy of consideration (i.e., the underlying fairness of the bargain). However, what has been said so far does not justify the traditional rule in which I am most interested, the rule that the fact of bargain (or some substitute for it) is a *necessary* condition of promissory enforcement, i.e., the rule that gratuitous promises should not be enforced. In other words, showing that the ideal of collaboration makes bargains valuable enough to merit enforcement does not establish that *only* bargains are valuable enough to justify legal sanctions.

It is clear, however, that Professor Markovits accepts at least a weak version of the latter claim, although like Professor Eisenberg, he does not wish to defend the claim that all promises traditionally classified as gratuitous should be unenforceable. Requirements, output, and best efforts contracts, for example, have sometimes run afoul of the consideration requirement, and one-sided modifications of bargains have often run afoul of the pre-existing duty rule.<sup>234</sup> Yet Professor Markovits regards them as promises that can support collaborative relations and so regards them as proper exceptions to the requirement of consideration.<sup>235</sup> The bargain form is thus a proxy for the presence of collaboration, although an imperfect one.<sup>236</sup> He also suggests that promises enforceable on the basis of promissory estoppel might be similarly justified, although he insists that such promises be classified as *noncontractual* collaborative arrangements.<sup>237</sup>

Although the contours of the consideration requirement he wishes to defend are not entirely clear, it appears that Professor Markovits's primary candidate for the quintessentially unenforceable promise is what Professor Eisenberg would call the simple donative promise, although Professor Markovits refers at various times to "personal" promises, promises motivated by "benevolence," and "donative" promises.<sup>238</sup> Why should such promises be denied enforcement? The general answer seems to be that such promises involve *passive* promisees, and passive promisees make collaboration impossible.<sup>239</sup>

2. *The Problem of the Passive Promisee.*—At this point, however, the argument becomes a bit murky. There are two obvious questions in need of answers: (a) What precisely is a "passive promisee"? and (b) Why does the presence of a passive promisee destroy any prospect for collaboration? The answers to these questions appear to vary somewhat at different points in Professor Markovits's paper. At one point, he describes the passive promisee as

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234. Markovits, *supra* note 2, at 1488-89.

235. *Id.*

236. *Id.* at 1488, 1491.

237. *Id.* at 1488 n.168.

238. *Id.* at 1486-87, 1490.

239. *Id.*

“a promisee who simply waits for the promisor unilaterally to make her gift.”<sup>240</sup> At another, he describes the passive promisee as one “who does not exercise her ownership of the promissory obligation, who remains disengaged from the promise and does not interfere in the promised performance, either to command or to release it.”<sup>241</sup> Collaboration requires that a promisor intend to give the promisee authority over his own intentions and ends and, apparently, that the promisee *exercise* that authority.<sup>242</sup> Absent the promisee’s exercise of the authority granted by the promisor, not only has the promisee not “engaged” the promisor, but the promisor cannot “engage” the promisee and treat her as an end in herself.<sup>243</sup>

Initially, it is not entirely clear why mere inaction by the *promisee* should prevent a *promisor* from treating the promisee as an end in herself.<sup>244</sup> Whatever the explanation, however, one’s most immediate intuitive reaction is that Professor Markovits’s “passive promisees” are so utterly passive that there cannot be very many of them in the real world. Calling them “catatonic promisees” might have been more accurate. Indeed, it appears that all a donative promisee must do to avoid becoming a passive promisee is exhort the promisor to perform and, if the promisor appears ready to renege, insist firmly on performance.<sup>245</sup> If so, Professor Markovits’s defense of the requirement of consideration reduces to something of a caricature. It is as if we are being told that a donative promise should not be enforced—unless of course, the promisee wants it enforced. The promisee’s exhortation or insistence prevents her from being passive, establishes collaboration, and justifies enforcement. To put it another way, enforcement of donative promises would be justified precisely in all those cases in which it was sought, and the “requirement” of consideration would only be a true requirement if the donative promisee did not object to it.

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240. *Id.* at 1489-90.

241. *Id.* at 1486.

242. This seems implicit in Professor Markovits’s reference, at one point, to the “promisee’s management of the promise.” *Id.*

243. *Id.*

244. I will simply note in passing that I cannot see how Professor Markovits’s last conclusion follows from his earlier, more general theoretical account of the value of promising and keeping one’s promises. The earlier account suggests that the promisor treats the promisee as an end in herself simply by *keeping* the promise made to her. While it is perhaps intelligible why an utterly passive promisee may fail to treat the promisor as an end in herself, that does not explain why or how she also keeps the *promisor* from treating the promisee herself as an end. How a passive promisee prevents the promisor from treating the passive promisee as an end in herself thus remains mysterious. However, because I find this notion of a passive promisee so odd, I do not dwell on this point.

245. This interpretation of what it means to be, or avoid being, a passive promisee is suggested by Professor Markovits’s characterization of the passive promisee as one who neither “commands nor releases” the promised performance, and by his claim that bargains are distinguished from “passive” transactions by the fact that each party to a bargain intends to “actively insist” on performance when it is due. Markovits, *supra* note 2, at 1486-87.

Since it is doubtful that Professor Markovits intended to defend such a pale ghost of the traditional common law requirement of consideration, one must assume that he believes that a promisee, in order to avoid the status of passive promisee, must do something more than simply exhort or insist upon performance. Indeed, this is suggested by his insistence that the promisee's mere *acceptance* of a promise cannot be sufficient to establish collaboration.<sup>246</sup> One may ask, however, what else is required, and why does its absence preclude collaboration (in the morally valuable sense)? Professor Markovits does not, as far as I can tell, provide an answer.

3. *A Potential Reconstruction: Joint Intentional Activity.*—One may *construct* a possible answer out of materials he provides, although I hesitate to attribute it to him, as it ultimately begs the question. If one returns to one of the building blocks of Professor Markovits's account of contract—specifically the notion of joint intentional activity—one is struck by the examples of such activity he uses. He refers specifically to a couple taking a walk together, two people rowing a boat together, and two musicians singing a duet together,<sup>247</sup> and the last of these examples is the one that recurs the most often.<sup>248</sup> They are all examples in which both of the participants in a joint endeavor are “active” in a strong sense of the word. Each participant must exert physical effort in a performance involving physical motion. Perhaps Professor Markovits intends to confine the notion of “joint intentional activity” to these sorts of active examples and to define “contract” in terms of agreements for joint intentional activity in this restricted sense.<sup>249</sup> If one adopts such a set of definitions, of course, a requirement of bargained consideration seems to be a logical consequence. Any agreement in which two people agree that each of them will render this kind of active physical performance will qualify as an agreement for an *exchange* of performances, and we have thus built the notion of exchange into the very definition of “contract” (via the definition of “joint intentional activity”). Donative promises will be excluded by definition, and only exchange promises can possibly qualify.<sup>250</sup>

However, by simply adopting such definitions arbitrarily, we have not really accomplished anything or illuminated theoretical questions of contract law. The decision to define “joint intentional activity” in terms of dual active physical

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246. *Id.* at 1487 n.167.

247. *Id.* at 1452.

248. *Id.* at 1452-55.

249. The possibility that Professor Markovits may be adopting this strategy (and I emphasize the word “may”) is suggested by his statement: “The special relation whose value underlies the morality of contract therefore cannot possibly be constructed out of a contractual promisor’s participation standing alone, but must instead look to the promisee’s *activities* as well.” *Id.* at 1487 (emphasis added).

250. Indeed, on the plausible assumption that Professor Markovits’s definition of “joint intentional activity” implies that the activities and intentions of each party *induce* those of the other, only bargain promises will qualify for enforcement. Exchange and mutual inducement are the defining features of a bargain.

performances seems arbitrary. One suspects that the average speaker of the English language would regard two people watching television together as engaged in joint intentional activity, as long as it was not accidental that they did so. The same is presumably true of one person sitting and listening to the other play the tuba.

Moreover, even if one decides to adopt such a strong or “activist” definition of “joint intentional activity” for general purposes, it seems equally arbitrary (and question-begging) to decide at the outset that contract is to be defined as “joint intentional activity” in this rather strong sense. To be sure, one can thereby define contract in a way that entails a requirement of consideration and disqualifies donative promises from enforcement. But arriving at the latter conclusion by smuggling it in with a restrictive set of definitions that itself has nothing obvious or independent to recommend it would seem to beg the *normative* question of whether donative promises should be enforced. If we simply *define* contract as bargain, the more interesting normative question just reappears as the question of why promissory liability should be confined to “contract” in the arbitrarily defined sense. Conquest by definition does not amount to justification.<sup>251</sup>

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251. Indeed, there are a number of features of Professor Markovits’s article that suggest he is ultimately constructing a technical, philosophical model of contract that, whatever its other merits, is far from coextensive with the notion of contract employed by most practitioners and scholars of contract law. For example, his account of promising and contract is founded on the morality of relations between individuals, and he concedes that it does not apply to contracts among business organizations (or between individuals and such organizations) “in any straightforward way.” Markovits, *supra* note 2, at 1464. However, he insists that contracts formed by promises between individuals constitute the “essence” or “conceptual core” of contract, and he appears to accept the conclusion that contracts between business organizations must have some other form of justification. *Id.* at 1464-67. Contracts between corporations, however frequent they may be, thus become derivative cases. Similarly, although Professor Markovits clearly recognizes the existence (and perhaps the frequency) of relational contracts, they are likewise removed from contract’s conceptual core, which consists of the discrete, self-interested exchange. *Id.* at 1449-50. Finally, although he appears to have no quarrel with enforcing promises on the basis of promissory estoppel, he suggests reliance-based liability must be understood as a form of *noncontractual* obligation. *Id.* at 1488 n.168. Apparently, the essence of contract is the proverbial one-time sale of gasoline to a through traveler on the New Jersey Turnpike. It is, of course, open to Professor Markovits to define “contract,” for purposes of his article, in any way he likes. However, three points must be emphasized. First, the more his notion of “contract” becomes a technical term by excluding or marginalizing cases that contract lawyers and scholars regard as rather ordinary contracts, the less satisfactory it becomes as a *general* theoretical explanation of contract. Second, to the extent his use of the word “contract” is a technical one, it prompts the question of why liability on promises should be confined to cases encompassed by his technical sense of “contract.” Third, even if one accepts his view that the discrete, self-interested exchange is the “conceptual core” of contract, in the sense that it is the simplest or “plain vanilla” example of a contract, it does not follow that promise-based liability, or even contract liability proper, should be exhausted by or confined to the plain vanilla cases. There are a lot more flavors than vanilla. Some of them may even be better.

4. *A Closer Look at Collaboration and Benevolence: The Moral Value of Donative Promises.*—

a. *The value of benevolence.*—Thus, even if one assumes that Professor Markovits's collaborative ideal provides a satisfactory explanation and justification for enforcing bargain promises, he has not provided either a satisfactory elaboration of what it means to be a "passive promisee" or an explanation for the claim that donative promisors and promisees cannot (or do not) collaborate. He has therefore not yet explained why enforcement should be granted in the case of bargain promises and withheld in the case of donative promises.

Indeed, at one point, he seems to concede that donative promisors and promisees can and do collaborate, at least sometimes.<sup>252</sup> Specifically, in the case of "personal promises,"<sup>253</sup> the promisor is motivated to promote the promisee's interests, and "this benevolence may . . . underwrite the respectful relation upon which promissory morality depends."<sup>254</sup> The "promisee's interests may assert themselves even without the promisee's active participation," as the promisor's benevolence operates as "a stand in for the promisee's management of the promise."<sup>255</sup> The content of the concept of benevolence employed at this point is not articulated in any detail,<sup>256</sup> but it appears that a benevolent promisor, by making and keeping a promise, either engages in actual collaboration with the promisee or else creates some equally valuable form of respectful community.<sup>257</sup>

b. *The argument based on indifference to motive.*—Does it follow that some or all "personal promises" should be enforced? Professor Markovits never quite says so. He does suggest that the modern trend toward enforcement of charitable subscriptions and marriage settlements, even without proof of consideration or reliance,<sup>258</sup> may be accommodated to his collaborative view of contract by reading into the law a presumption that charitable subscriptions are benevolently motivated.<sup>259</sup> He regards such a presumption, however, as "ideological and

252. *See id.* at 1486.

253. Professor Markovits does not define the term "personal promise," but it is probably safe to assume he intends it to refer to promises between family members, intimates, friends, or other close associates.

254. Markovits, *supra* note 2, at 1486.

255. *Id.*

256. This is not intended as a criticism of Professor Markovits. The lack of detail is deliberate (presumably because benevolent promises are only of secondary interest to him), and he suggests that an account of personal promises based on benevolence could be developed by articulating the form of benevolence at issue and distinguishing it from false or depraved variations. *Id.* at 1486 n.166.

257. *Id.* at 1486.

258. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(2) (1981).

259. Markovits, *supra* note 2, at 1490 n.173. My own views on charitable subscriptions are closer to Professor Eisenberg's than Professor Markovits's. In my view, the reasons such promises should be enforced have less to do with the benevolence that may (or may not) motivate them than

absurd,"<sup>260</sup> and he regards the suspicion with which the common law views donative promises as justified.<sup>261</sup> Moreover, he suggests, at one point, the fact that benevolent promises may generate collaboration will not support enforcement of promises generally "[b]ecause the law declines to inquire into a promisor's motives."<sup>262</sup>

The last suggestion, in my view, is a non sequitur, for two reasons. First, in referring to the law's alleged indifference to the promisor's motives, Professor Markovits is presumably appealing to part of his previous description of the peculiarity of the requirement of consideration. The doctrine of consideration requires that each party to a contract manifest an intention to induce, and be induced by, the other party's return promise or performance.<sup>263</sup> The reference to inducement might tempt us to conclude that consideration doctrine not only concerns motivation, but makes it central. However, following Holmes, Professor Markovits identifies the requisite inducement as "reciprocal conventional inducement."<sup>264</sup> The law focuses on the *manifestation* of intention to induce or be induced and does not require that the bargained-for consideration be the sole, actual motive for the promise at issue.<sup>265</sup> The distinction is a familiar, if somewhat slippery, one. However, if it is tenable to draw a distinction between actual and manifested motive or intention in the case of the doctrine of consideration, there is no reason the same distinction could not be drawn in the case of whatever class of donative promises we choose to enforce. Assuming there are normative reasons to enforce donative promises (like the presence of benevolence), we could enforce promises that reflect a *manifested* intention of benevolence, and spare the courts the evidentiary burden of ascertaining the promisor's "true" motive, just as we do in the case of bargains.

More fundamentally, however, even if it is true that indifference to motive is one aspect of the doctrine of consideration, that provides no support for refusing to enforce benevolent promises if (a) benevolent promises generate collaboration (or some equivalent form of respectful community); and (b) the moral value of a relationship engendered by a promise is or may be a sufficient

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the fact that, in the United States, much good (including much that is done by government in other societies) is accomplished by charitable organizations. Moreover, even if it is not always or often possible to prove specific reliance by a charity on an individual promise, charitable organizations rely in a general way on the stream of income generated by pledges collectively.

260. *Id.*

261. *Id.* at 1489.

262. *Id.* at 1490 n.173.

263. *Id.* at 1477 (citing RESTATEMENT (SECOND) OF CONTRACTS: REQUIREMENT OF EXCHANGE; TYPES OF EXCHANGE § 71 (1981)); *id.* at 1483 (citing RESTATEMENT (SECOND) OF CONTRACTS: CONSIDERATION AS MOTIVE OR INDUCING CAUSE § 81 cmt. a (1981)).

264. *Id.* at 1477 (emphasis added) (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 293-94 (Dover Publications, Inc. 1991) (1881)).

265. *Id.* at 1477, 1483, 1490; *see also* RESTATEMENT (SECOND) OF CONTRACTS: CONSIDERATION AS MOTIVE OR INDUCING CAUSE § 81 (1981).

reason to enforce it.<sup>266</sup> Whether the doctrine of consideration should continue to pose an obstacle to the enforcement of donative promises is *precisely what is at issue*. If propositions (a) and (b) are true, there is reason to enforce donative promises, and the doctrine of consideration, including its apparent indifference to motive, can be jettisoned if it gets in the way.

c. *Benevolence, cooperation, and comparing distinct moral ideals in deontological theory.*—The last observation leads quite naturally to my most fundamental objection to Professor Markovits's claim that his Kantian account of promising and contract vindicates the requirement of consideration, at least insofar as the latter prohibits enforcing donative promises. Keeping the promises one makes is, in his view, morally valuable because the promise-keeper treats the promisee as an end in herself and thus enters a relationship of respectful community with the promisee.<sup>267</sup> Moreover, the general account of promising suggests that this is true even if the promissory relationship is one-sided, i.e., if the promisee makes no return promise. Bargains, of course, are morally valuable because they are reciprocal promissory arrangements in which each side treats the other as an end and so creates the more specialized relationship of community called "collaboration."<sup>268</sup> The obvious question, however, is why collaboration is regarded as better than one-sided respectful community or as so much better that legal sanctions should attach to the former, but not the latter?<sup>269</sup> In my view, Professor Markovits never provides an answer to this question, and so never provides a justification for drawing the boundary of legal enforcement where the doctrine of consideration does.

At this point, Professor Markovits (or the reader) might be tempted to respond to my question as follows:

Are you stupid, or just confused? If two parties are collaborating in a bargain relationship, each is treating the other as an end, as the "Formula of the End in Itself" requires. In the one-sided promissory relationship characteristic of donative promises, only one party is treating another as an end. The former is obviously better than the latter, for the simple reason that two is a larger number than one. *Quod erat demonstrandum.*

In spite of its intuitive appeal, however, it seems to me that this is precisely the sort of argument that one pursuing the very ambitious project set out by Professor Markovits may not make. Recall that Professor Markovits purports to be providing a Kantian, deontological theory of promising and contract. He

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266. Professor Markovits admits (a). Markovits, *supra* note 2, at 1486. He seems committed to (b) by his justification of enforcing bargains by appeal to the value of collaboration. *Id.* at 1458-63.

267. *Id.* at 1431-35.

268. *Id.* at 1458-63.

269. At least, the question is obvious to those of us who, in contrast to Professor Markovits, are primarily interested in the implications of his theory for the requirement of consideration and the enforcement of donative promises.

disclaims any intent to base the moral or legal obligation to keep promises on reliance, harm, or welfare.<sup>270</sup> He specifically adopts the view that promises change our reasons for action in ways that may prevent the overall balance of utility from being decisive in a particular instance.<sup>271</sup> For someone who starts from such premises, comparative assessments of moral value cannot simply be matters of “bean counting,” as the argument of the previous paragraph suggests. The question whether it is better that one party treat another as an end in herself, or that two do so reciprocally, cannot be dismissed as nonsensical at the outset.

To illustrate the point, it might be helpful to consider an example. I think we may all agree that Bill Gates has accomplished a great deal in his life thus far. He amassed the world’s greatest fortune largely by living in the “world of contract.” He created operating systems and software that generated massive sales to hardware suppliers and the public at large.<sup>272</sup> He now also is rather prominent in the “world of gift.” He is giving away a lot of money (and/or pledging to give it away).<sup>273</sup> Some of his pledges are promises to provide money for research on and/or delivery of drugs and vaccines for the disease-ravaged populations of third-world countries.<sup>274</sup> Assuming the resulting research proves successful in the long run, we could ask whether it was and is morally better for him to make (and keep) his bargain promises or his donative promises.

It is fairly obvious, in principle, how the classical utilitarians or their modern cousins, the law and economics scholars, would go about answering the question. The inquiry is essentially quantitative, at least theoretically. One would

270. He does not, of course, deny that considerations of reliance, harm, or utility can generate moral or legal obligations. See Markovits, *supra* note 2, at 1419. He does, however, deny that such considerations explain what is distinctive about promising in general and contracting in particular. *Id.* at 1419-20.

271. *Id.* at 1440.

272. *Bill’s Billions: Microsoft’s Dividend*, ECONOMIST, July 24, 2004, at Leader; David Gelernter, *Software Strongman*, TIME, Dec. 7, 1998, at 200; *Microsoft: Peaks, Valleys and Vistas*, ECONOMIST, Jan. 20, 2007, at 2.

273. I am obviously ignoring the fact that much of Gates’s wealth was generated by a legally distinct entity (Microsoft, the corporation) and that many of “his” donations and donative promises are actually those of an equally legally distinct foundation. I disregard the legally distinct entities because I am reasonably confident he has actual control of both the corporation and the foundation, and nothing much turns on it for present purposes.

274. Amanda Bower, *Bill & Melinda Gates: Giving Money and Hope to the World*, TIME (SPECIAL ISSUE), May 8, 2006, at 63; Warren E. Buffet, *Bill Gates: Billionaire Philanthropist*, TIME, Apr. 26, 2004, at 60; Kerry Capell, *GlaxoSmithKline: Getting AIDS Drugs to More Sick People*, BUS. WK., Jan. 29, 2007, at 60; Celia W. Dugger, *Gateses Give \$47 Million to Bolster Coordinated Assaults on Diseases*, N.Y. TIMES, Dec. 20, 2006, at A5; Gloria Galloway, *Gates Joins Canada in AIDS Fight: Microsoft Founder Kicks in \$28-Million; Ottawa Donates \$111-Million for Research*, GLOBE & MAIL (Can.), Feb. 21, 2007, at A4; Daniel Gross, *Giving It Away, Then and Now*, N.Y. TIMES, July 2, 2006, § 3, at 4; Christopher Mason, *World Briefing Americas: Canada: Gateses Join in AIDS Vaccine Search*, N.Y. TIMES, Feb. 21, 2007, at A6; Peter Singer, *What Should a Billionaire Give—and What Should You?*, N.Y. TIMES, Dec. 17, 2006, § 6 (Magazine), at 58.

presumably total the benefits to both sides of each of Gates's myriad contracts, as well as the external benefits to non-parties. The latter would, of course, be quite substantial, as the advances reflected in the software Gates created and sold made the personal computer widely available, and so affected nearly everyone's life for the better—a little better in some cases, a lot better in others. On the other side of the ledger, one would total the benefits produced by help in the form of pledges and gifts of food, medicine, or other supplies to those desperately in need of them. On the way to drawing the comparative conclusion, one would have to solve some theoretical problems. One would need to determine whether interpersonal comparisons of utility are really possible and how the relative happiness of different individuals can be made commensurable. Once those problems were solved, the calculation could prove quite interesting, as it seems plausible to say that the Gates's bargains benefited a huge number of people—although the benefits may have been small in most instances—while the Gates's donations benefited a smaller number of people—but the benefits to each were quite dramatic. In the end, however, the process of arriving at the conclusion would amount to comparing the results of two extremely complicated mathematical sums.

Such a process is most emphatically not the approach Professor Markovits adopts in trying to explain and justify promising and contract in general or in trying to resolve specific moral questions. He purports to justify the making and keeping of promises and contracts in terms of the relationships between persons that they create.<sup>275</sup> It is the moral character of those relationships that performs the theoretical work for him, and the analysis appears to be inescapably qualitative, not quantitative.<sup>276</sup> He thus may not regard it as *axiomatic* that collaboration, in which each of two people treats the other as an end, is morally better than the respectful community generated by making and keeping a donative promise, in which only one party treats the other as an end.

Indeed, it is not at all obvious to me that he believes the latter proposition to be true. In particular, two suggestions he makes, in somewhat different contexts, indicate a certain degree of admiration for examples of self-sacrificing, generous, benevolent, or “other-regarding” behavior. First, as noted above, he recognizes a class of “personal” promises in which the benevolence of the promisor towards the promisee overcomes the lack of any return promise on the part of the promisee and permits the relation of collaboration to arise.<sup>277</sup> At least some donative promises, therefore, are “just as good” as bargain promises.

Second, he specifically distinguishes collaboration from cooperation and describes the latter as a “thicker” form of community.<sup>278</sup> Collaboration is perfectly compatible with each party acting in primarily self-interested ways.

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275. Markovits, *supra* note 2, at 1419-20.

276. The concepts to which he appeals in characterizing the moral value of the relationship created by promises are notions such as “recognition,” “respect,” and “community.” *Id.* at 1420, 1428-35. Such concepts appear to defy any sort of straightforward quantitative treatment.

277. *Id.* at 1486.

278. *Id.* at 1457-58, 1461-63, 1483.

Collaborative promisors need only treat each other as ends by committing not to be the first to defect from the joint project defined by the promises. Within those bounds, however, each may seek to extract maximum benefit from the other. Those who are to be characterized as cooperative, on the other hand, must, in addition, commit to at least some support of the other without new reciprocal compensation—in effect, to engage in behavior that is, at least within the microcosm of the community between them, *donative*. In characterizing cooperation as a “thicker” form of community than collaboration, Professor Markovits does not quite say that it is morally *better*, but it is tempting to draw the conclusion that he believes it is. Benevolence thus seems to have its own independent moral value, which should surprise no one.

It thus seems at least open to Professor Markovits to conclude, in response to my hypothetical question, that Gates is more morally commendable for making and keeping his donative promises than his bargain promises (though he is to be congratulated for keeping both sets). Moreover, that is probably in accord with the well-considered moral judgments of most people,<sup>279</sup> or at least those who do not believe that morality is exhausted by the utilitarian calculus. There is something morally appealing about one-sided generosity or benevolence that is absent in collaboration for mutual benefit, commendable as the latter may be. One is tempted to conclude, with Professor Eisenberg, that “the world of gift is [indeed] a world of our better selves.”<sup>280</sup> If that is the case, however, then it would seem that the more generic relation of respectful community created by making and keeping a donative promise is (or, at least, may be) as valuable as the collaborative relation created by the mutual promises required by the doctrine of consideration. For a theorist like Professor Markovits, for whom the foundation of contract and promising generally is a moral one, it therefore seems impossible to dismiss donative promises as unworthy of enforcement because they are not (or are not always) instances of collaboration. Indeed, if values other than collaboration, including “benevolence,” “cooperation,” or even “respectful community” generically, are of a dignity equal to (or even greater than) collaboration, they provide as much reason to enforce donative promises as collaboration provides for bargain promises.

### CONCLUSION

This Article has required a detailed examination of two rather complex concepts, commodification and collaboration. Both are thoroughly normative. To those who use the term, “commodification,” it describes an evil that is, at least sometimes, important to avoid. Why it is evil, the degree to which it infects society, and the forms of it that must be avoided are all subjects of some dispute,

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279. Like Professor Radin, I know of no ultimate way to test a theory such as that proposed by Professor Markovits other than by spinning out its implications and testing them against our considered moral judgments. See Radin, *supra* note 79, at 1904 n.208. Such a pragmatic approach seems to me to be virtually inevitable in the community of legal scholars we have.

280. Eisenberg, *Contract and Gift*, *supra* note 1, at 849.

and I have not attempted to resolve those disputes. Rather, my effort in response to Professor Eisenberg has been to show that no objectionable form of commodification would result from the enforcement of simple, affective donative promises.

Collaboration, on the other hand, is an ideal to which Professor Markovits urges us to aspire. My effort in response to his use of the concept has been to show that, even if he is correct that collaboration has some role in the justification of contract, it does not support drawing the boundary of enforcement at the same point as the traditional doctrine of consideration.

