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Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract

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ENFORCING FAMILY PROMISES: RELIANCE, RECIPROCITY, AND RELATIONAL CONTRACT

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Courts are willing, in commercial contexts, to enforce promises even without consideration when enforcement supports a norm of reciprocity—a norm which recognizes that promises are seldom totally gratuitous, but are often made in furtherance of reciprocal, long-term, trust-based relationships. In this article, Professor Leslie argues that relational contract principles are firmly embedded in wills law. Courts enforce the reciprocity norm in the family context just as they do in commercial contexts; this enforcement is seen, however, not in breach of promise suits, which occur rarely between family members, but rather in will contests. Despite the prevalent ideology of wills law, in which the testator's intent is paramount, Professor Leslie argues that courts bend doctrinal rules to validate wills that comply with the reciprocity norm and to invalidate those that do not. Finally, Professor Leslie examines whether courts are justified in implicitly reinforcing the norm. She concludes that implicit enforcement rewards family members who have relied on trust, while avoiding commodification that might occur at the margins if the enforcement rule were made explicit.

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INTRODUCTION

In the ideology of American wills law, the testator is a rugged individualist. He owes no duties to family or friends. He generally is free to distribute his estate to whomever he pleases, subject only to a limited duty to his spouse. His motives, whether benevolent or spiteful, are of no concern. His estate is responsible for his torts and bound by his express contracts, but any other expectations he may have fostered during his life are irrelevant. If his will devastates family members, that is entirely beside the point. Who deserves to share in his estate is his decision alone to make.[1] The testator is the

1. *See, e.g.*, Fischer v. Heckerman, 772 S.W.2d 642, 645 (Ky. Ct. App. 1989) (emphasizing that "[t]he right of a testator to make a will according to his own wishes is jealously guarded by courts, regardless of a particular court's view of the justice of the chosen disposition"); *In re* Estate of Herz, 651 N.E.2d 1251, 1254 (N.Y. 1995) (stating that "a court may not undo the will merely because the testator's desire does not comport with others' notions of fairness or equity"); *In re* Will of Smoak, 334 S.E.2d 806, 811 (S.C. 1985) (emphasizing that the " 'right to make a will, is the right to make it according to the

model of the Marlboro Man: free, unencumbered, independent, autonomous.

Outside of wills law, legal doctrine has long abandoned (if it ever fully embraced) the "Marlboro Man" model of the legal person. Instead, law—in particular, contracts law—treats the individual as a complex, socially situated person, enmeshed in a number of long-term, interdependent relationships that both exact costs and bestow benefits. Autonomy remains important, but an individual's autonomy is defined, in large measure, by the obligations and commitments she creates within relationships.[2]

Modern scholarship increasingly has recognized that promises are often gestures in furtherance of long-term, interdependent

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testator's pleasure—judiciously or capriciously—justly or unjustly—at absolute discretion, subject only to the restraints upon the power of disposition which the law has imposed' " (quoting Means v. Means, 36 S.C.L. (5 Strob.) 167, 191 (1850))); Daugherty v. Daugherty, 784 S.W.2d 650, 653 (Tenn. 1990) (noting that "[i]t is the absolute right of the testator to direct the disposition of his property and the Court's [sic] are limited to the ascertainment and enforcement of his directions"); *In re* Estate of Malloy, 949 P.2d 804, 806 (Wash. 1998) (noting that "[a] basic principle underlying any discussion of the law of wills is that an individual has the right and the freedom to dispose of his or her property, upon death, according to the dictates of his or her own desires" (citing *In re* Estate of Hastings, 567 P.2d 200 (Wash. 1977))).

Most scholars agree that giving effect to testamentary intent is the primary objective of wills law. *See, e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) (stating that "[o]ne fundamental proposition is that, under a legal system of recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of courts should favor giving effect to an intentional exercise of that power"); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 3 (1987) [hereinafter Langbein, *Excusing Harmless Errors*] (stating that "[t]he Wills Act is meant to assure the implementation of [the testator's] testamentary intent at a time when he can no longer express himself by other means"); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) [hereinafter Langbein, *Substantial Compliance*] (stating that "virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life"); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 546 (1990) (arguing that attestation requirements should be abolished because "[t]he law should set requirements at a level that tends to enforce the testator's intent, not frustrate it"); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 39 (1985) (criticizing courts for invalidating defectively executed wills "even when no one questions that the will represents the wishes and intent of the testator"); *see also* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 33.1 cmts. d, g (1992) (emphasizing that a policy objective of the Restatement is better effectuation of a testator's intent; noting that law reform organizations, some legislatures, and commentators support use of the harmless error rule; and recommending use of the substantial compliance doctrine to effectuate better the testator's intent).

2. *See infra* Part IV.

relationships.[3] Even when promises are not made as part of an express bargain, they are seldom purely gratuitous.[4] The promisor may reap value from the promise in two senses. First, she may benefit from the promisee's reaction to a specific promise, even when that reaction does not fit the classical definition of detrimental reliance.[5] Second, she may derive future benefits because the promise may instigate or strengthen a long-term relationship.[6]

When parties have an ongoing relationship, casual statements or actions alone may amount to enforceable promises.[7] When the norms of the relationship, considered against the backdrop of the larger subculture in which the relationship operates,[8] suggest that the

3. *See, e.g.*, Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 844-46 (1997) (noting that promises within "affective" relationships serve to strengthen and define the relationship itself); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 914-29 (1985) (discussing the role promises play in long-term, interdependent, trust-based commercial relationships); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090 (1981) (noting that "[p]arties frequently enter into continuing, highly interactive contractual arrangements" that "diverge so markedly from the classical model [of contract] that they require separate treatment"); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467-68 (noting that "[e]ven discrete transactions take place within a setting of continuing relationships and interdependence"); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 487 (observing that "discrete exchanges are always relatively rare compared to patterns of relational exchange"); Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 603-06 (observing that many promises are made to initiate or further trust-based relationships); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 235 (1979) (noting that many contractual relations are not described by the classic "discrete-transaction paradigm"). For an extended exploration and economic critique of courts' approach to relational contract cases, see Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992).

4. *See, e.g.*, Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 190-98 (1989); Farber & Matheson, *supra* note 3, at 925-29; Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 295-308 (1992).

5. *See* Farber & Matheson, *supra* note 3, at 928-29 (suggesting, for example, that an employer might promise to extend a benefit in order to increase employee morale and decrease the employee turnover rate); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 59-64 (1992).

6. *See* Farber & Matheson, *supra* note 3, at 924-29; *see also* Macaulay, *supra* note 3, at 467 (noting that business people "perform disadvantageous contracts today because often this gains credit that they can draw on in the future").

7. *See, e.g.*, D & G Stout, Inc. v. Bacardi Imports, Inc., 805 F. Supp. 1434, 1444-45 (N.D. Ind. 1992) (finding that heavily conditioned, oral statements amounted to an enforceable promise); Wachovia Bank & Trust Co. v. Rubish, N.A., 306 N.C. 417, 429, 293 S.E.2d 749, 757 (1982) (holding that prior conduct amounted to an implied promise to waive a writing requirement for a tenant's renewal of a lease).

8. *See, e.g., D & G Stout, Inc.*, 805 F. Supp. at 1451 (emphasizing that the promisee

parties intended to create an obligation, courts often impose liability even when the promisee cannot establish actual, detrimental reliance.[9] Often, courts accomplish this result by stretching the doctrines of promissory estoppel or consideration to fit their holdings within the structure of classical contract doctrine.[10]

Thus, contracts law and scholarship have progressed steadily toward a view of the individual as grounded in a context—specifically, the context of relationships. Increasingly in contracts law, courts take relationships seriously. When a promisor's statements or actions benefit the promisor, the promisor bears responsibility for the effects that her statements or actions have on other parties with whom the promisor has an ongoing relationship. She cannot simply change her mind when change proves convenient.

Notwithstanding relational contract theory, commentators who argue that courts generally enforce "gratuitous" promises hesitate when they consider whether and to what extent courts enforce gratuitous promises made within personal, especially family, relationships.[11] This tentativeness may stem from the dearth of cases

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reasonably interpreted the promisor's conditional statements as a binding promise given the "informal" nature of the liquor distribution industry and the industry's general reliance on trust); *see also* Farber & Matheson, *supra* note 3, at 914-17 (suggesting that courts determining whether a promise was made pay attention to the context of the relationship); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 930 (1990) (suggesting that courts should consider the norms of the relationship). *See generally* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980) (explaining relational contract theory); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974) (same).

9. *See* Farber & Matheson, *supra* note 3, at 907-15; Kull, *supra* note 5, at 40-45; *see also* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing that courts enforce gratuitous promises that inspire no reliance under the rubric of promissory estoppel).

10. *See* Kull, *supra* note 5, at 40-45.

11. For example, Daniel Farber and John Matheson argue that, even absent reliance, courts enforce gratuitous promises made in business contexts. *See* Farber & Matheson, *supra* note 3, at 937-38. They expressly limit their argument to commercial promises, however, suggesting only that their thesis might support a reexamination of the traditional nonenforcement approach to gratuitous promises in the family context. *See id.* Andrew Kull, who argues that all clearly expressed, seriously intended promises are enforceable, hints that his argument falters as a descriptive matter when family promises are at issue, although he cannot explain why. *See* Kull, *supra* note 5, at 40 (hypothesizing that courts may be reluctant to enforce informal family promises because the parties did not contemplate that the promise would be legally enforceable and noting that courts occasionally refuse to enforce written promises between family members, but offering no explanation as to why). Eric Posner acknowledges and appears to justify judicial enforcement of some gratuitous promises. *See* Posner, *supra* note 3, at 606 (noting, and seeming to endorse, courts' willingness to enforce firm offers and requirement contracts). He suggests that his analysis of gifts and gratuitous promises applies both in personal and commercial contexts, but his examples either lack context or concern only business

involving intra-familial suits for breach of promise. The sample is too small to enable one to generalize about how courts treat those promises. The scarcity of cases involving breach of promise within intimate relationships reflects two factors: the often indefinite nature of personal agreements and the unwillingness of parties to sue until the relationship is beyond repair.

Even if one family member wanted to sue another for breach of promise, it would be hard to isolate particular promises and acts of reliance within the relationship. Very few cases would display the easy clarity of the rare, but often cited, war horses like *Hamer v. Sidway*,[12] in which a nephew sued his uncle for breaching an express promise to pay the nephew if he forswore drinking and swearing.[13] Agreements within long-term, intimate relationships are most often implicit and multifaceted. The relationships themselves are premised on reciprocity, constructed of a multitude of mutual and simultaneous promises and actions generated, at least in part, by reliance on those promises. The closer and more interdependent the parties, the less likely promises and agreements will be isolated and clearly spelled out,[14] because the parties operate in accordance with implied understandings, and because the value generated by those implied understandings is greatly enhanced if the reciprocal nature of the duties within the relationship is left unspoken.[15] The relationship simply cannot be diagrammed as a series of discrete transactions that fit neatly into the classical contract paradigm of bargained-for exchange, nor should it be.

Of course, indefiniteness alone is not an adequate explanation

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relationships. *See id.* at 603 (discussing relationships between a university and a faculty member and between law firms and summer associates); *id.* at 604 (considering a relationship between a faculty member and a university).

12. 27 N.E. 256 (N.Y. 1891).

13. As Andrew Kull points out, even these classic types of "gratuitous" promises are generally enforced. *See* Kull, *supra* note 5, at 42-43.

14. Hegel stated that "the precise nature of marriage is to begin from the point of view of contract—i.e.[,] that of individual personality as a self-sufficient unit—*in order to supersede it.*" G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 203 (Allen W. Wood ed. & H.B. Nisbet trans., Cambridge Univ. Press 1991); *cf.* Farber & Matheson, *supra* note 3, at 925 (discussing informal arrangements in commercial contexts); Goetz & Scott, *supra* note 3, at 1091 (describing a relational contract as one in which "the parties are incapable of reducing important terms of the arrangement to well-defined obligations," which would be "impracticable because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance").

15. *Cf.* Eisenberg, *supra* note 3, at 847-49 (arguing that enforcement of gratuitous promises within personal relationships would commodify the relationship and devalue the performance of the promise).

for family members' reluctance to resort to legal process. After all, courts have become increasingly willing to enforce indefinite agreements in the commercial context.[16] More importantly, family members do not look to the law because doing so would destroy the familial relationship. Personal interdependent relationships are most often characterized by a high degree of trust. When trust disintegrates, it does so slowly, and disappointed parties generally harbor hopes that a disintegrating relationship will improve. In family relationships especially, strong psychological ties often inspire the promisee to hope for reconciliation. Moreover, the promisee would prefer that the promisor's performance be voluntary rather than coerced; the performance is valuable, in large measure, because it is motivated, or appears to be motivated, by love rather than self-interest. The disappointed promisee will abandon hope only when the relationship clearly is beyond repair, and the promisee is sufficiently angered by the promisor's betrayal that she is willing to sever the relationship entirely. Short of that, there will be no lawsuit because the promisee knows that a suit would quickly and finally destroy whatever trust is left. Often, family relationships end only at divorce or death.[17]

When a family member dies, the decedent's will becomes critical. If the will prefers the testator's closest family members, those relatives will have little reason to seek enforcement of lifetime obligations left outstanding. On the other hand, if the will disinherits one of the testator's closest family members, that relative may interpret disinheritance as a final breach of the decedent's implied agreement to reciprocate for support and care furnished during decedent's lifetime. Social norms reinforce the idea that family members who are caring and supportive can expect and rely upon an inheritance; the vast majority of testators do in fact devise their estates to their closest family members.[18] Only when a family relationship has seriously deteriorated do most testators disinherit these family members.[19]

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16. *See, e.g.*, Posner, *supra* note 3, at 606 (noting courts' increased willingness to enforce certain types of "vague" promises).

17. Indeed, Kull notes that a defining characteristic of the non-commercial gratuitous promise cases that he studied is that all but one involved a lawsuit brought against the *estate* of the promisor. *See* Kull, *supra* note 5, at 44-46.

18. *See* JEFFREY P. ROSENFELD, THE LEGACY OF AGING: INHERITANCE AND DISINHERITANCE IN SOCIAL PERSPECTIVE 91-93 (1979); MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 118-20 (1970).

19. *See* ROSENFELD, *supra* note 18, at 91-93; SUSSMAN ET AL., *supra* note 18, at 118-20.

A family member who feels wrongly disinherited has two options at the testator's death: He can file a creditor's claim for breach of an implied agreement (although it is not clear whether such a claim would be successful), or he can contest the will. The family member is unlikely to file a creditor's claim for several reasons. Most obviously, our culture views family relationships as based on love and altruism, not self-interest. Filing a creditor's claim requires the family member to "tote up" what he provided to the testator and ask for "compensation." He must commodify acts that were, at least in part, performed out of love. He thus cheapens the relationship, reveals self-interested motives, and risks that others will judge him greedy or ungrateful. Moreover, a breach of promise claim highlights the testator's rejection of the aggrieved family member. It is a stark admission that the testator did not appreciate the claimant as much as the claimant had hoped. Finally, even a successful claimant receives cold comfort—he receives payment, but he knows that the decedent did not provide it voluntarily.

The same family member faces no such concerns if he simply contests the decedent's will. In a will contest, the family member is ostensibly acting on behalf of the testator. If he contests the will for failure to comply with formalities, he argues that the proffered document does not represent the final, deliberate intent of the testator. Similarly, a challenge on the grounds of lack of capacity or undue influence allows the contestant to argue for the disposition that the testator would have made had she been able to freely express her intentions. After a successful contest, the family member can believe that he has effectuated the testator's true intent. Thus, the will contest often is the perfect vehicle for assuaging disappointed expectations while upholding the value of the completed gift.

As a result, wills law provides a wealth of information—perhaps far more than contracts law—regarding how courts approach promises within personal relationships. After all, wills law pits the testator's closest relatives against one another, or against a non-relative will beneficiary with whom the testator had a relationship. This Article argues that relational contract principles are firmly embedded in wills law. Specifically, courts and juries resolving will contests approach those cases in much the same way that modern courts approach contracts cases. They take into account the quality of the testator-contestant relationship and larger social norms.[20] If

20. *Cf.* Farber & Matheson, *supra* note 3, at 914-17 (describing how courts take these factors into account in contracts cases); Jay M. Feinman, *The Last Promissory Estoppel*

the contestant appears to have been actively involved in the testator's life, the fact-finder is apt to set aside the will to enable the contestant to receive a share of the testator's estate. This outcome reflects the fact-finder's understanding that families operate in accordance with implicit understandings. Courts do not expect families to articulate those understandings expressly because the bargaining process would devalue relationships. On the other hand, if the contestant was generally unavailable to meet the testator's needs, both the dynamics of the relationship and larger cultural norms indicate that the testator is not guilty of breach of an implied promise. In that case, the court admits the will to probate.[21]

The role that reciprocity plays in wills law is obscured by the prevalent ideology of donative transfers, including testamentary ones, as unilateral transactions.[22] Once a donative transfer is conceptualized as unilateral—the donor is giving away her property—it naturally follows that the court should simply ensure that the gift is validly made, determine its terms, and give it effect. This description precludes considering whether a testamentary transfer is in satisfaction or in breach of a previously made promise. Consequently, successful will contests are rationalized as upholding testator's intent or dismissed as wrongly decided. Further obscuring the key role that family reciprocity plays in wills law is the fact that most testators act in accordance with the reciprocity norm and leave the bulk of their estates to their closest family members. In reality, then, most cases that validate wills are over-determined: Courts justify their decisions as effectuating testamentary intent, but the family reciprocity norm provides an alternative basis for the same result. Because the role of the family reciprocity norm is obscured, neither courts nor commentators have examined it as a justification for denying effect to the testator's will.[23]

This Article undertakes that examination. Part I illustrates the

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Article, 61 FORDHAM L. REV. 303, 309 (1992) (arguing that "[i]n neoclassical [contract] law, liability can arise from something less than an explicit assumption of it and it may be shaped by background assumptions, such as trade usage and the relational liabilities imposed on certain types of activity").

21. *See infra* Part III.A., for a discussion of why courts might presume that a non-relative will beneficiary has a weaker claim on testator's assets than the family member-contestant.

22. *See, e.g.*, *supra* note 1 (citing cases and commentary).

23. Eric Posner has recognized that family members cannot protect themselves by reducing understandings to express contract and notes that courts in other countries often invalidate wills disinheriting family. He suggests that such wills violate a "long-term contract between the donor and his family for support." Posner, *supra* note 3, at 596. Posner seems to assume that this phenomenon does not exist in U.S. wills law.

illusory nature of the gift/exchange dichotomy. Part II develops that theme, showing how long-term, interdependent relationships are characterized by a norm of delayed, though mandatory, reciprocity. Part II then establishes that the reciprocity norm is especially strong in the family setting and that family members view intra-familial inheritance as a final act of reciprocity in an intimate, trust-based relationship. This understanding regarding the entitlement to an inheritance is so strong as to amount to an implied promise that will be broken only when the expectant beneficiary has himself failed to honor the reciprocity norm. Part III argues that courts understand and apply these normative concepts to will contests, stretching to validate wills that comply with the reciprocity norm and to reject wills that violate it. In doing so, courts implicitly give effect to implied promises in the family context. Part IV argues that will contest decisions mirror the approach courts take to contract disputes involving implied promises made within long-term, trust-based relationships.

Finally, in Part V, I address the obvious question: Are courts justified in enforcing implied understandings in the family context? In exploring that issue, I address recent scholarship discussing the enforceability of gratuitous promises.[24] I argue that, as applied to the question of implicit family promises, the arguments of these commentators share a common flaw—they fail to appreciate the role of trust within personal relationships. Instead, they assume that when family members and close friends act towards one another they consider, at least subconsciously, the applicable legal rules. I argue that family members rarely consider the legal rules when evaluating the motives of loved ones or determining whether to rely on them for support. Rather, an assessment of trustworthiness and an awareness of cultural norms inform those decisions. Only when trust is lacking and self-interest substantially dominates altruism will family members worry about the legal enforceability of family obligations.

The legal rule, therefore, is likely to influence behavior only at the margins. A rule expressly enforcing implied family understandings might, at the margins, cheapen relationships by encouraging commodification. Courts deciding will contests avoid this problem by cloaking their decisions in the garb of traditional intent-effectuating doctrines and de-emphasizing the importance of the reciprocity norm.

24. In particular, I examine the recent work of Goetz and Scott, Farber and Matheson, Eric Posner, and Eisenberg. *See infra* Parts V.A. & V.B.

I. FALSE DICHOTOMIES: BEQUEST/CONTRACT AND GIFT/EXCHANGE

A. *Bequest v. Contract*

Legal doctrine segregates contracts from wills, insisting on two rigid, air-tight categories that do not overlap. While A is alive, contracts law determines whether her voluntary words and acts create enforceable obligations.[25] A court might ask a variety of questions about a particular transaction between A and B: Was there a clear agreement? Was there consideration?[26] If not, did A, by her words and actions, induce reliance by B?[27] Given the context, should A have foreseen that B would rely?[28] Was B's reliance reasonable?[29] Even if B's reliance was unreasonable, did B nevertheless confer some benefit on A for which B deserves to be reimbursed?[30] In short, the court considers what rights and liabilities arise from both parties' words and actions within the context of the parties' *relationship*.

Compare that process to the one contemplated by the statute of wills. Suppose A's will leaves nothing to her daughter, C, who feels entitled to a portion of her mother's estate and contests the will. In resolving the dispute, the court might consider a variety of issues that have at their core one question: What did A intend, as evidenced by the document purporting to be her will? According to popular lore, the relationship between A and C during A's life is, for the most part, irrelevant. The only relevant inquiries must concern A's state of mind: Did A intend this document to be her will?[31] What did A intend to communicate by her choice of certain words?[32] And finally, does A's intended plan violate some well-established policy, such as the rule against perpetuities?[33] If all or part of A's will is invalid, C might take by default as an intestate heir, but not because a determination was made that the relationship between A and C gave rise to an obligation on A's part to make a bequest to C.

Thus, the focus in the contract case is on the relationship

25. Of course, the law of tort also plays a role, but a discussion of tort law is beyond the scope of this Article.

26. *See, e.g.*, Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

27. *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898).

28. *See, e.g.*, Hunter v. Hayes, 533 P.2d 952 (Colo. Ct. App. 1975).

29. *See, e.g.*, State Bank v. Curry, 500 N.W.2d 104 (Mich. 1993).

30. *See, e.g.*, Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245 (N.Y. 1983).

31. *See, e.g.*, *In re* Estate of Smith, 862 P.2d 509 (Or. Ct. App. 1993); Draper v. Pauley, 480 S.E.2d 495 (Va. 1997).

32. *See, e.g.*, *In re* Marine Midland Bank, N.A., 547 N.E.2d 1152 (N.Y. 1989).

33. *See, e.g.*, Cook v. Horn, 104 S.E.2d 461 (Ga. 1958).

between two or more parties, while the focus in the will case is on the intent of a single individual. The result is a dramatic difference in the way B and C are forced to characterize their legal claims. Because the relationship between A and B is the seed from which contractual liability flows, B can argue that certain words or actions of A, or their absence, gave rise to liability, despite the absence of an express agreement. The law provides B with several ways to characterize his claim: breach of an implied contract, unjust enrichment, promissory estoppel, quantum meruit.

C will have a more difficult time making a comparable claim against A's estate. As a threshold matter, a court generally assumes that A had the right to dispose of her property as she saw fit and that only A's will can determine whether and to what extent C is entitled to a portion of A's property.[34] Thus, C must use entirely different concepts to articulate a claim; her approach must focus on whether A actually formulated and properly expressed her intentions.

Of course, C is not precluded from making a contract claim against A's estate, provided she can produce a valid written contract that complies with the statute of frauds or convince the court to exercise equitable powers to give effect to a clear oral promise to devise. A few courts have recognized claims against an estate involving quantum meruit or reliance,[35] but heirs rarely advance those claims.[36] In the main, legal doctrine assumes that A was in the best position to determine whether and to what extent C deserved a distribution and that A's valid will is dispositive evidence of her decision.[37] Thus, if A made an express, gratuitous promise to devise her estate to C, C generally has no cognizable claim if A fails to perform. Whatever A may have promised during her life, whatever reliance A might have induced or benefits she may have incurred, and whatever disappointment her will might engender is supposedly

34. There are, of course, certain statutory exceptions that curtail free testation, such as the elective share and pretermitted child statutes. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW §§ 5-1.1-A, 5-3.2 (McKinney 1981 & Supp. 1998).

35. *See, e.g.*, Slawsby v. Slawsby, 601 N.E.2d 478, 479 (Mass. App. Ct. 1992) (granting the son of the decedent the value of his services for relying on oral promises made by the decedent that the son would inherit one-eighth of his father's real estate company only if the son worked and stayed with his father's supermarket business); *In re* Estate of Bush, 908 S.W.2d 809, 810 (Mo. Ct. App. 1995) (granting the brother-in-law of the decedent, who died testate, quantum meruit relief as compensation for care he provided the decedent for the last three years of his life).

36. *See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1306 (1980); *see also supra* text following note 19 (detailing reasons why heirs rarely advance contract claims against an estate).

37. *See supra* note 1 (citing cases).

of no concern to the probate court.[38]

B. *Gift v. Exchange*

The unidimensional approach of wills law stems from the threshold characterization of a testamentary transfer as a gift rather than an exchange.[39] Gratuitous promises are unilateral and, according to conventional lore, unenforceable. The well-accepted general rule—that most gratuitous promises are unenforceable—has been justified on various grounds, most notably that the costs of enforcement would far exceed the value that gratuitous promises create.[40]

As Jane Baron, Carol Rose, and others have suggested, the rigid distinction between gift and exchange is misguided.[41] Baron notes that the distinction is a twentieth-century construct that was a drastic departure from established common-law principles and a distinction at odds with the way most cultures, past and present, conceptualize gifts.[42] Rose demonstrates that gift and exchange exist on a continuum, and each usually contains an element of the other.[43] Thus, a gratuitous promise ripens into an enforceable obligation when it motivates reasonable reliance, even though the parties did not agree upon an exchange at the outset. Further down the spectrum towards "gift," we find elements of exchange: Even gratuitous promises that do not induce reliance are seldom motivated by "sheer niceness."[44] It is the rare gift that does not contain some element of exchange. If it does not, Rose wryly argues, we are more

38. One justification for this dichotomy might be that A's moral obligations evaporate at A's death—how can a deceased person still "owe" a duty to another? But that view is inconsistent with the way wills law generally views the decedent. A substantial body of doctrine is devoted to the project of determining A's intent and carrying out her wishes, even though she is dead and would not be damaged if her wishes were frustrated. The law creates an obligation to honor the deceased by continuing to act as though she is alive.

39. *See* Baron, *supra* note 4, at 190-91. Jane Baron establishes that the rigid gift/exchange distinction is a phenomenon of the early twentieth century. Specifically, Baron notes that nineteenth century commentators emphasized the similarities, rather than the differences, between gift and exchange, and that some viewed gifts as a subset of contracts, rather than as a separate type of transfer. *See id.*

40. *See, e.g.*, Goetz & Scott, *supra* note 36, at 1304-05; Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 414-17 (1977).

41. *See* Baron, *supra* note 4, at 190-98; Rose, *supra* note 4, at 296-98.

42. *See* Baron, *supra* note 4, at 190-98.

43. *See* Rose, *supra* note 4, at 296 (stating that "the unilateral aspects of gift transfers blur into the reciprocal aspects of exchange transfers, and vice versa").

44. *See id.* at 298.

inclined to label the transfer "larceny";[45] people do not generally make a transfer unless they experience some benefit. The act of giving might be a step toward forming a new relationship or strengthening an established one, or the act might simply confer a boost to the self-image or an increased sense of well-being.[46] The same could be said for promises to make a future gift.

C. *Reciprocity in Gift-Giving*

Scholars in other fields who have studied gift-giving view reciprocity as an essential component of the practice. As Jane Baron has observed, anthropologists agree that a dominant form of exchange in primitive cultures was a system of reciprocal transactions that were conceptualized as "gifts."[47] A fundamental, though unexpressed, aspect of this system was its obligatory nature. Marcel Mauss defines the essential features of the gift transaction as: (1) an obligation to give; (2) the obligation to receive; and (3) the obligation to reciprocate for a gift given.[48] While gift transactions furthered the

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45. *See id.* at 297. To elaborate, even transfers that might appear on their face to be purely gratuitous often involve elements of exchange. For example, I might have mixed motives for sending a wedding gift: I may be motivated in part by a feeling of affection, and in part by a desire to reciprocate for the wedding gift the bride-to-be sent to me on the occasion of my own wedding. Both motives have reciprocal elements; if the recipient is a friend, the gift recognizes reciprocal affection. If she is a business associate, the gift is in appreciation for the benefits gained from our relationship to date and in furtherance of the relationship in the future.

46. *See id.* at 313-16; *see also* Baron, *supra* note 4, at 196-98 (establishing that giving establishes emotional relationships); *id.* at 172-75 (discussing studies of kidney donors establishing that donors' "happiness and self-esteem" rise after donation).

47. *See* Baron, *supra* note 4, at 194-98. Arjun Appadurai wrote that "[m]any essays in this volume, as well as my own argument here, are designed to show" that the contrast between gift and exchange of commodities is a "simplified and overdrawn series of contrasts[,]" and when dealing with specific examples such as the Melanesian kula, wrote that these examples "show[] us the difficulty of separating gift and commodity exchange even in preindustrial, nonmonetary systems, and [they] remind[] us of the dangers in correlating zones of social intimacy too rigidly with distinct forms of exchange." Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, *in* THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE 3, 12, 22 (Arjun Appadurai ed., 1986); *see also* CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 52-68 (Rodney Needham ed. & John Richard von Sturmer trans., Beacon Press 1969) (establishing that reciprocity in gift-giving was mandatory in primitive cultures); BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC 167 (1922) (stating in his conclusion that among Trobriand Islanders, reciprocal giving is "one of the main instruments of social organisation, of the power of the chief, of the bonds of kinship and of relationship in law"); MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (W.D. Halls trans., W.W. Norton 1990) (establishing that reciprocity in gift-giving was mandatory in primitive cultures).

48. *See* MAUSS, *supra* note 47, at 13-14; *see also* LEVI-STRAUSS, *supra* note 47, at 54 (quoting Edward William Nelson, *The Eskimo About Bering Strait*, *in* EIGHTEENTH

economic interests of individuals and groups, they also facilitated personal and inter-group relationships,[49] determined status,[50] and symbolized spiritual concepts.[51] Thus, gift exchange was "what [Mauss] aptly calls 'a total social fact,' that is, an event which has a significance that is at once social and religious, magic and economic, utilitarian and sentimental, jural and moral."[52]

A key feature of the gift transaction was the denial of self-interested motives. Although individual motives were a complex and varying mixture of generosity and self-interest (with self-interest often predominating), the social behavior accompanying the gift transaction created the illusion of pure generosity and altruism.[53] "Gifts" were never the subject of bargain.[54] The norm of delayed reciprocity, which discouraged an immediate exchange for the gift given, obscured the mandatory nature of obligation to return the gift and facilitated the notion that generosity rather than self-interest

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ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION, 1896-1897, pt. 1, at 3, 309 (describing a typical gift transaction containing all three elements)).

49. *See* LEVI-STRAUSS, *supra* note 47, at 55.

50. *See* D. Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. LEGAL STUD. 41, 54 (1986).

51. *See* MAUSS, *supra* note 47, at 10-13.

52. LEVI-STRAUSS, *supra* note 47, at 52. The relative importance of the various functions performed by the gift economy is a matter of some dispute. For example, Levi-Strauss notes that the "assumption is found everywhere that reciprocal gifts ... are not offered principally or essentially with the idea of receiving a profit or advantage of an economic nature." *Id.* at 53. Often, there was no increase in wealth as a result of the exchange; neither party was better off than they were before. *See id.* Similarly, Mauss emphasizes that the objects of exchange were

> not solely property and wealth, ... and things economically useful. In particular, such exchanges [were] acts of politeness: banquets, rituals, military services, women, children, dances, festivals, and fairs, in which economic transaction is only one element, and in which the passing on of wealth is only one feature of a much more general and enduring contract.

MAUSS, *supra* note 47, at 5.

David Bruce Johnsen, on the other hand, insists that the economic function was predominant, and that the other functions evolved to enforce compliance with the reciprocity norm and thereby discourage free-riding. *See* Johnsen, *supra* note 50, at 62-63. Specifically, Johnsen argues that the purpose of the potlatch of the Southern Kwakiutl Indians—an elaborate festival where goods and services of all kinds were exchanged, *see, e.g., id.* at 53-55—was to establish and maintain property rights in their principal asset, the salmon fishery. *See id.* at 58-61. Johnsen's view is that the potlatch both redistributed wealth and provided insurance in times of scarcity, thus eliminating the need for warfare over scarce assets. *See id.* at 64.

53. Mauss concludes that "the present [is] generously given even when, in the gesture accompanying the transaction, there is only a polite fiction, formalism, and social deceit, and when really there is obligation and economic self-interest." MAUSS, *supra* note 47, at 3.

54. *See, e.g., id.* at 10-11, 33.

motivated the transaction.[55] The submergence of self-interested motives maximized the value of the functions performed by the gift transaction.[56]

Cultures encouraged individuals to honor the duties to give and to reciprocate by equating status with generous giving. The more one gave, the greater his standing.[57] Between groups, the group that provided the most lavish and frequent feasts established social dominance over other clans. Conversely, failure to give and reciprocate for gifts received resulted in social condemnation.[58] According to one theory, this social policing device discouraged free-riding and stabilized relationships between individuals and groups, thus promoting further giving in reliance on the understanding that other individuals and groups would comply with norms.[59]

In modern times, institutionalized markets have assumed many of the economic functions of the primitive gift economies. Nonetheless, gifts and giving behavior continue to play important roles in human society.[60] For one, certain necessities are more valuable if they are acquired as gifts rather than through market exchange.[61] In the case of such necessities, it is more important than

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55. *See, e.g.*, Paul Bohannan, *Some Principles of Exchange and Investment Among the Tiv*, *in* ECONOMIC ANTHROPOLOGY: READINGS IN THEORY AND ANALYSIS 300, 300, 303 (Edward E. LeClair, Jr. & Harold K. Schneider eds., 1968). For the same reason, Jane Baron has noted, a donee rarely reciprocates by making a precisely equivalent gift. *See* Baron, *supra* note 4, at 195-96 & n.238.

56. Anthropologist Karl Polanyi emphasizes the importance of denying the mandatory nature of reciprocity. He notes that some "element of antagonism, however diluted," must be present in bargaining. Karl Polanyi, *The Economy as Instituted Process*, *in* ECONOMIC ANTHROPOLOGY, *supra* note 55, at 122, 131. Thus,

> [n]o community intent on protecting the fount of solidarity between its members can allow latent hostility to develop around a matter as vital to animal existence and, therefore, capable of arousing as tense anxieties as food. Hence the universal banning of transactions of a gainful nature in regard to food and foodstuffs in primitive and archaic society.

Id.

57. Eric Posner notes that the practice of giving to enhance status is prevalent in modern culture. *See* Posner, *supra* note 3, at 574-77.

58. *See* HELEN CODERE, FIGHTING WITH PROPERTY: A STUDY OF KWAKIUTL POTLATCHING AND WARFARE 61, 119 (1950); MAUSS, *supra* note 47, at 8, 42.

59. *See* Johnsen, *supra* note 50, at 42, 62-64.

60. *See* DAVID CHEAL, THE GIFT ECONOMY 22 (1988) (maintaining that gifts constitute symbolic management of relationships) (citing ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 194-99 (1971)); Baron, *supra* note 4, at 196 (noting the role that gift-giving plays in establishing personal relationships); Barry Schwartz, *The Social Psychology of the Gift*, 73 AM. J. SOC. 1, 1-4 (1967) (claiming that gift-giving behavior generates identity and is used to control the behavior of others, among other things).

61. *See infra* notes 78-80 and accompanying text.

ever to conceal the gift transaction's compulsory nature—admission of the compulsory nature of the gift would destroy some of its value. Consequently, we characterize market activity as blatantly self-interested, in contrast with family life and personal relationships, which supposedly are completely supportive and dominated by acts of altruism and generosity. This well-accepted picture of two distinctly separate environs has been reinforced by the traditional legal description of contracts and gifts—the first belongs to the market, the second to the realm of interpersonal relationships.[62] Categorizing transfers in this way has obscured both the relevance of gifts in modern culture and the continuing strength of the norm of obligatory reciprocity.

Indeed, anthropologists who study contemporary culture recognize the vital role that the reciprocity norm continues to play in gift-giving behavior.[63] For example, in some poor African-American

62. For an extended analysis and critique of the "exaggeration and reification" of the distinction between gift and commodity in anthropological writing, see THE SOCIAL LIFE OF THINGS, *supra* note 47.

63. *See, e.g.*, CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 32-44 (1974) (describing the vital role that the reciprocity norm plays in the social life of a poor, African-American community). Paul Bohannan, who has studied the Tiv of Nigeria (a culture with an established market system), concludes that the gift transaction in Tiv culture also is characterized by the mandatory aspect of delayed reciprocity. Again, the self-interested aspects of the gift, along with the mandatory duty to reciprocate, is denied. *See* Bohannan, *supra* note 55, at 300, 303. Mauss and Levi-Strauss, however, fail to grasp the important cultural role gift practices play in societies with institutionalized market systems. Although Mauss recognizes the norms of the gift culture at work in contemporary society, he sees gift practices as decidedly less relevant than market transactions. As he puts it, "[t]he themes of the gift, of the freedom and the obligation inherent in the gift, of generosity and self-interest that are linked in giving, are reappearing in French society, as a dominant motif too long forgotten." MAUSS, *supra* note 47, at 68. Levi-Strauss characterizes modern gift rituals as "diverting survivals which engage the curiosity of the antiquarian." LEVI-STRAUSS, *supra* note 47, at 61.

Applying David Bruce Johnsen's thesis to contemporary gift practices, one might be tempted to assume that the norm of mandatory reciprocity that characterized pre-market gift practices vanished as the institutionalized market took control of all economic activity. *See* Johnsen, *supra* note 50, at 58-67; *supra* note 52 (summarizing Johnsen's thesis). But that conclusion does not necessarily follow. If gifts and giving behavior are used to establish and strengthen relationships, which then provide a safety net of support and fulfill numerous other crucial psychological and emotional functions, then the need to discourage free-riding still exists.

Some sociologists have suggested that the inability to recognize the continuing resonance of the gift transaction in modern culture might be the result of sexism. In the modern world, women have been primarily responsible for relationship management and gift transactions, with the result that the important role it continues to play has not been studied or understood. *See* CHEAL, *supra* note 60, at 8 (discussing the work of feminist Nancy Hartsock). Certain of Levi-Strauss's observations about modern gift practices, which view women as a commodity capable of being the subject of a gift, lend credence to Cheal's and Hartsock's theses. *See* LEVI-STRAUSS, *supra* note 47, at 67-68.

communities, a norm of mandatory, reciprocal gift-giving establishes strong social relationships that provide insurance against destitution—in short, continuous giving between friends creates a "safety net."[64] The community ensures compliance with the reciprocal giving norm by greeting those who free ride with vehement disapproval and loss of reputation.[65] In more affluent economies, giving is less a matter of compensating for an inability to engage in market transactions and more a means of managing relationships to provide necessary emotional and psychological support.[66] Sociologists have documented that, in the United States, disinheritance occurs when testators perceive that heirs have failed to provide that support and, consequently, the testator believes she has been relieved of the duty to reciprocate by leaving an inheritance.[67] In short, the reciprocity norm polices behavior to ensure the provision of a wide variety of necessities that are not obtainable from the market for one reason or another. Thus, even in modern times, the distinction between gift and exchange is murky at best.

Political economists also understand gifts as involving elements of exchange. Although they sharply disagree regarding whether and to what extent gifts are motivated by altruism or self-interest, at a base level political economists conceptualize gratuitous transfers as reciprocal in nature. Some economists interpret empirical evidence as consistent with a model of gratuitous transfers as motivated by strategic concerns.[68] According to this model, the ability to make gratuitous transfers, and, more importantly, to *promise* to make such transfers, is a tool that the donor uses to obtain desired intangible "goods" or "services" for which there is no comparable market

64. Carol Stack's study of life in a poor, midwestern African-American community reveals a complex pattern of reciprocal giving that mirrors Mauss's classic description of giving as obligatory and reciprocation as mandatory. *See* STACK, *supra* note 63, at 32-43.

65. *See id.* at 34. Although Stack sees this emphasis on giving as specific to the culture of poverty, other studies suggest that norms of giving have force throughout various classes in modern cultures with established markets. *See id.* at 43.

66. David Cheal, for instance, argues that although the principal function of gift-giving among the middle class may no longer be to provide mutual economic aid, giving continues to serve the crucial function of establishing and maintaining the emotional aspects of social relationships. *See* CHEAL, *supra* note 60, at 18-19.

67. *See* ROSENFELD, *supra* note 18, at 91-93; SUSSMAN ET AL., *supra* note 18, at 118-20.

68. *See, e.g.*, B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045, 1045 (1985) (presenting econometric and other evidence that "bequests are often used as compensation for services rendered by beneficiaries"); Donald Cox, *Motives for Private Income Transfers*, 5 J. POL. ECON. 508, 540-41 (1987) (focusing on motives for inter vivos transfers and concluding that patterns for inter vivos transfers are more consistent with exchange-related motives).

substitute.[69] Peter Blau, for one, has argued that social behavior that appears to be motivated by altruism is actually only "apparent altruism"—that is, giving is motivated by the expectation of some reward, whether that award is power over another or something less tangible, such as social approval.[70]

Other economists disagree and forcefully argue that gifts and promises to make them are motivated predominately by altruism.[71] Yet, the definition of altruism they employ does not preclude an understanding of gratuitous transfers as exchange-based. Specifically, if Donor D is altruistic, her utility function contains a component that is equal to the utility function of another person, say A. Thus, a transfer to A that increases A's well-being will, by definition, increase D's well-being. In this model, D will not make the transfer unless D believes that the transfer will actually increase A's well-being. Even an altruistic transfer, therefore, is reciprocal in nature—a transfer to A directly benefits D.

More importantly, whether D's utility function contains a component equal to A's utility function is itself a result of reciprocity, or a lack thereof. The reciprocity is inherent in the relationship itself, rather than in a particular transaction. Altruism on D's part will arise only where D finds her relationship with A sufficiently rewarding, which will usually occur when D's and A's utilities are interdependent, but may also occur under other circumstances. If, over time, D receives nothing D values from A, D's altruism towards A will decline accordingly.[72] In this event, D may form other attachments that better fill her needs.

Of course, both strategic and altruistic models of interpersonal behavior can be criticized for assuming that personal relationships

69. For example, some donors use gift-giving as a tool for influencing children's behavior. *See* Bernheim et al., *supra* note 68, at 1046 (showing that bequests are often used to influence the behavior of potential beneficiaries). *But see* Andres G. Victorio & Richard J. Arnott, *Wealth, Bequests and Attention*, 42 ECON. LETTERS 149, 150 (1993) (arguing that a positive relationship between children's attention to parents and parental health is not bequest-motivated).

70. *See* PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 17 (1964); CHEAL, *supra* note 60, at 7 (citing BLAU, *supra*).

71. *See* Gary S. Becker, *A Theory of Social Interactions*, 82 J. POL. ECON. 1063, 1090-91 (1974) (concluding that altruism motivates transfers); *see also* James D. Adams, *Personal Wealth Transfers*, 95 Q.J. ECON. 159, 161 (1980) (asserting that "persons who transfer wealth ... are motivated by altruism"). According to this view, parents maximize a utility function in which the utility of their children also enters, but they engage in no strategic behavior.

72. As Gary Becker puts it, altruism may decline if the object of the altruism fails to supply "merit goods." GARY BECKER, A TREATISE ON THE FAMILY 10 (1991).

mirror market transactions.[73] But it is not necessary to adopt a market model to understand that interdependent relationships contain elements of reciprocity, emotional and otherwise. One can reject the description of interpersonal relationships as based purely on exchange and still understand that people invest in long-term, reciprocally-based relationships for mutual support and aid.

In sum, most gratuitous promises implicate notions of reciprocity. The reciprocal benefit may be a direct one; that is, the promisor may incur an immediate benefit from the act of making the particular promise. That benefit may be in the form of the promisee's response to the promise or in the promisor's increased well-being. Or, the promisor may receive nothing immediate or tangible in exchange for a particular promise but may make the promise in furtherance of an interdependent or long-term relationship, from which the promisor has benefited in the past and/or expects to benefit in the future. Here, the element of reciprocity is inherent in the context of the relationship in which the promise is made rather than in an isolated transaction.

II. RECIPROCITY AND THE FAMILY

Giving behavior is informed by a cultural norm of mandatory reciprocity. Giving is distinct from bargaining, because both the giver and the donee deny the reciprocal nature of the gift. Yet the strength of the reciprocity norm stands as evidence that gifts cannot properly be viewed as one-shot, unilateral acts. Rather, gifts occur within a context of exchange.

This Part develops this argument further. First, it explores the crucial role that reciprocity plays in the establishment and maintenance of trust-based relationships. It shows that the parties' willingness to acknowledge explicitly the mandatory nature of the reciprocity norm, and its influence on the relationship, declines as trust increases. This Part also explains why family relationships are often the most stable and long-term relationships in which individuals

73. *See* CHEAL, *supra* note 60, at 8. Cheal comments that:

> Nancy Hartsock has pointed out that grand theories derived from the political economy of market relations have not paid sufficient attention to the experiences of women within the sexual division of labor.... "[O]ne could begin to see the outline of a very different kind of community if one took the mother/infant relation rather than market exchange as the prototypic human interaction."

Id. (citation omitted) (quoting NANCY HARTSOCK, MONEY, SEX, AND POWER 41-42 (1983)).

are engaged. Finally, it shows how family members view inheritance as a final act of giving that flows naturally from the reciprocal, trust-based relationships that family members enjoyed during life. In accordance with the reciprocity norm, family members expect that testators will disinherit closest family members only when those family members have themselves failed to comply with the reciprocity norm, and when non-relatives have stepped in to fulfill the role that family ordinarily would provide. The assumption that family members who have conformed with the reciprocity norm will inherit is so strong that it is akin to an implied promise.

A. Family Relationships: Trust and Reciprocity

1. The Role of Trust

Individuals cannot develop, thrive, or function effectively without a variety of human interactions. Most obviously, we must interact to meet our basic material needs for food, clothing, and shelter—few of us could provide these necessities in sufficient quantities acting alone. In addition, we rely on ideas and knowledge gained from others to pursue various life projects, whether they be acquiring specialized job skills or more creative endeavors. Without the knowledge derived from others, each individual would be forced (perhaps literally) to reinvent the wheel.[74] Finally, and most importantly, we rely on interaction with others to satisfy a variety of fundamental psychological and emotional needs.[75] For example, early interaction with a loving parental figure is an essential component for healthy infant development.[76] Furthermore, most people need various types of emotional support throughout different periods in their lives.

If human interaction is necessary to satisfy most basic human needs, what form does such interaction take? Over time, established market systems have evolved to satisfy certain categories of needs, most notably economic ones. It *is* fairly clear that in our complex and

74. Jeanne Schroeder, invoking Hegel, has noted that "[t]he individual cannot exist except through concrete relationships with other individuals." Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolate Feminine Body*, 79 MINN. L. REV. 55, 136 (1994).

75. *See* STEVE DUCK, UNDERSTANDING RELATIONSHIPS 2 (1991) (stating that research shows that "[t]he support of friends, neighbours and relatives is a social support that acts as an important safeguard against occupational stress, psychological illness, unhappy life events and the like").

76. *See generally* ANNA FREUD & DOROTHY BURLINGHAM, INFANTS WITHOUT FAMILIES (1944) (discussing the role child-parent bonding plays in infant development).

specialized society certain tangible needs are best satisfied through participation in arms-length, market-based transactions.[77] Thus, we obtain clothing from retail stores, food from the grocer, and medical care from our doctor. We obtain knowledge and information by paying college tuition, participating in employee-training programs, paying for Internet access, or consulting a physician. We bury our dead by obtaining the services of a mortuary. The market has become the primary means for satisfaction of most material needs.

But what of the other needs that must be fulfilled by human interaction? For example, how do we ensure that we will obtain the emotional support that we may require? It goes without saying that we do not look to the market for fulfillment of many fundamental needs. Certain specific needs cannot be satisfied in the market because those needs cannot, and indeed should not, be commodified. For other needs, market exchange is a sub-optimal means of satisfaction—put differently, although there may be market-based options for need fulfillment, greater value can be attained if those needs are satisfied outside of the market.[78] For that category of needs, we seek market solutions only when other avenues are foreclosed.[79]

The market is simply not capable of satisfying certain basic needs. For example, suppose Sheila loses her job when her company "downsizes." During the difficult period before she finds another job, she may desire a heightened amount of emotional support. She might need someone to listen to the story of the horrible interview she had that day; she might seek advice regarding how she is perceived by others to enable her to interview more effectively; or she might simply want some company after a bad day. Obviously, Sheila will not advertise for and contract with someone to fill those needs. What she seeks is a human response based on love, and love is not inspired by money. Certainly, one might be induced to feign love if the price is right, but the very fact that this supportive behavior was purchased in the market exposes the false character of the expression. The act of commodification strips the exchange of its

77. Mauss viewed the modern separation of market transactions and moral and spiritual principles as impoverishing. *See* MAUSS, *supra* note 47, at 66-77.

78. *See* DUCK, *supra* note 75, at 21 (noting that although services may be " 'purchased' by means other than friendship . . . [o]ne reason why many rich people feel friendless is precisely because they get used to buying help with money rather than by bartering their love or services in return").

79. For one scholar's conceptualization of these categories, see Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1855 (1987).

value.[80]

Further, most market transactions cannot act to define self-image and affect reputation as fully as non-market gestures can. If—as some social scientists suggest—self-image and reputation are constructed, to some extent, by social interaction,[81] the modern marketplace is a limited avenue in which to make the requisite expressions. For example, when I purchase bread at the grocery store, I attach no moral significance to the transaction—the act of paying for the bread has no added dimension. I make no statement, to the cashier or to myself, regarding my character. I do not attempt to define the terms of an interpersonal relationship between us or set the stage for future interactions. I do not suppose that the act of paying for the bread in any way affects my reputation within some larger community. The transaction is exactly what it purports to be—a purchase of bread. The only statement I make is: "I have the money for the bread and I am willing to give you that money if you give me the bread." In short, there is no recognized moral component attached to the transaction. To the extent that people continue to construct self-image and reputation through action, the market is a limited resource for doing so.[82]

Certain needs may be capable of fulfillment through market exchange, but in a way that generates less value than a non-market solution would. In that sense, the market functions as a substitute when needs cannot be filled through a preferred method. For example, Herman might have a greater sense of well-being if he satisfies his desire for sex through a loving, committed relationship than if he pays for the services of a prostitute. He knows the prostitute is entirely self-interested—she sleeps with him for the money. In contrast, sex with a significant other is not only satisfying in itself, but it has other benefits: It reaffirms Herman's sense that he is attractive and loved, and he may experience pleasure from giving

80. *See id.* at 1907-08; *see also* RICHARD TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 245 (1971) (arguing that "the commercialization of blood . . . represses the expression of altruism, erodes the sense of community, . . . limits both personal and professional freedoms," and creates other costs).

81. *See, e.g.*, DUCK, *supra* note 75, at 21-22 (asserting that interaction with friends contributes to positive self-esteem, both because friends provide support and because they allow us to support them); *id.* at 24 (citing Steve Duck & Martin Lea, *Breakdown of Personal Relationships and the Threat to Personal Identity*, *in* THREATENED IDENTITIES 53 (Glynis M. Breakwell ed., 1983)) (asserting that interaction with friends helps to support and integrate each person's personality).

82. Of course, marketplace transactions can be used to convey status, taste, and class standing. But it is a limiting venue for constructing and exhibiting many other important character traits, especially those with a moral component.

pleasure to his partner. Rose, an elderly woman confined to her home with a broken ankle, might value care provided by her niece more than care for which she contracts with a social service agency. Again, care provided by her niece confers benefits other than the value of the care itself—Rose also feels loved. Although Alison would probably appreciate the support she receives from a bereavement counselor after the death of her husband, emotional support provided by a close friend or relative might be even more valuable because it is entirely voluntary.

In sum, the market has evolved because it meets a variety of material needs quite well. Yet, it is an extremely limited resource for the satisfactory fulfillment of a wide variety of other, less tangible needs. How do we ensure that these less tangible needs are met with the same ease with which we satisfy material needs through the market? We satisfy them through a system of long-term relationships founded on trust—trust that is forged by strict allegiance to the principles of reciprocity. The following paragraphs explain why trust is a fundamental component of this system and how trust is established, in part, through principles of reciprocity.

Why is trust necessary? That is, assuming that some needs cannot be met through market exchange, why not have a system of express social exchanges? Consider several situations that most of us will experience during our lives: our parents will die, loved ones will become ill, our careers may become shaky. In each of those situations, we may find ourselves with an increased need for social support yet less than our usual ability to be interesting company. But we will be unable to arrange the desired support through a system of express, discrete exchanges. For one, what we seek is emotional support motivated by love—an express exchange would be motivated by self-interest. Moreover, the person providing the support would reap little gain, so the transaction might not occur. Finally, consider the "costs," if you will, of identifying an appropriate "provider": First, the person in need, whose resources must largely be devoted to managing the crisis, must spend additional time and energy to determine who is most capable of fulfilling the particular need. Second, each party would have to determine the other's motive and make a determination regarding the other's trustworthiness.[83] Moreover, ambiguities inherent in each "transaction" would have to

83. *See* CHEAL, *supra* note 60, at 17 (citing David Cheal, *Transactions and Transformation Models, in* STUDIES IN SYMBOLIC INTERACTION 141, 145-46 (N.K. Denzin ed., 1984)).

be worked out. The ridiculous picture that this conjures up—of individuals desperately "bargaining" for emotional support during a time of crisis—is a testament to its undesirability.

So, we need a system that is responsive to fluctuating needs—a system that induces others to provide support even when we do not expressly request it, and even when there is no immediate benefit to the providers; a system that temporarily relieves us of the burden of payment and of devoting resources to the calculation or protection of our own self-interest; a system upon which we can depend. In short, we need a system based on trust.[84]

2. Building Trust Through Reciprocity

How is trust established? Reciprocity is a key element in maintaining and establishing trust-based relationships.[85] First, the impetus for all social interaction is the satisfaction of some form of need, whether it be for love, companionship, financial support, or a myriad of others. Successful interaction requires another person for whom satisfying that need is self-satisfying. For example, an individual might seek a marriage partner to fill a variety of needs: for love, support, financial stability, children. That individual will pursue a relationship with another when he or she perceives a particular other as capable of satisfying those needs. For that second person's part, he or she will enter into the relationship only if he or she perceives that there is some benefit in doing so. Thus, reciprocity plays a role in the formation of many relationships.[86]

In addition to facilitating the development of a relationship, reciprocity also enables trust to develop within the relationship. For example, consider a relationship between adult strangers. The parties will establish trust through a series of reciprocal actions that both confer specific benefits and telegraph future availability. Suppose Carol and Margaret meet at a P.T.A. meeting and find they have many things in common. Whether or not their acquaintanceship grows into a trust-based relationship may depend on a variety of factors. Suppose Carol must work late, and she asks Margaret to pick

84. *See* BERNARD BARBER, THE LOGIC AND LIMITS OF TRUST 8 (1983) (establishing that "[t]he fundamental importance of trust in social relationships and social systems is attested to by social thinkers and theorists of widely divergent theoretical persuasions"); *see also id.* at 21 (stating that "[t]rust is an integrative mechanism that creates and sustains solidarity in social relationships and systems").

85. *See id.* at 21 (stating that "[t]rust is never wholly realized in social relationships; maintaining it is a reciprocal and endless task for all"); DUCK, *supra* note 75, at 7 (establishing that reciprocity and trust are crucial to the development of friendships).

86. *See* CHEAL, *supra* note 60, at 11 (citing Cheal, *supra* note 83, at 141-42).

up her children from school. If Margaret does so, Carol's positive feelings for Margaret will increase. Carol will also be more likely to say yes when Margaret calls a few weeks later and asks Carol if she will babysit for a few hours.[87] If Margaret and Carol continue to reciprocate for favors in this way, the relationship between them will deepen. If the care provided extends to emotional support, the trust will deepen further.[88] For example, suppose Margaret's mother dies, and Carol responds to the news by immediately going to Margaret's house and cooking dinner for the family and providing emotional support. Carol has telegraphed her availability to Margaret, who will be even more likely to provide a similar level of support if and when Carol needs it.

Margaret and Carol will also cement the trust between them by giving gifts. The gifts may be redundant, that is, they may not fill a need that the donee could not herself satisfy.[89] Yet gifts within the context of this relationship will serve a variety of important functions. First, the act of gift-giving telegraphs continued availability to the other.[90] It is an expression of continued commitment to the relationship. Second, the act of giving a gift may confirm the giver's self-image as altruistic and kind. Third, it may add to the giver's reputation as a generous person. Thus, gifts within the relationship not only deepen trust but may serve as a means of self-expression.

Of course, lack of reciprocity will stall a budding relationship in its tracks[91] and may lead to the deterioration of an established relationship.[92] Suppose that when Margaret asks Carol to babysit for a few hours, Carol explains that she is too busy. If Carol continues to ask for favors but does not reciprocate, Margaret is likely to cool the relationship—she will feel "used." Similarly, if Carol routinely supplies emotional support to Margaret but finds that Margaret is

87. *See* DUCK, *supra* note 75, at 7 (noting that one of the "rules" of friendship is that each friend will repay debts and favors).

88. Duck states that in less intimate relationships, only services are exchanged; intimacy deepens as friends exchange confidences, opinions, and advice. Providing only services to another is a subtle way of telling the other that the relationship will not develop into a friendship. *See id.* at 20-21.

89. *See id.* at 12-13.

90. *See id.* at 18.

91. *See id.* at 7 (stating that a violation of the "rules" of friendship, one of which is the mandate to repay "debts and favours," can become grounds for dissolution of the relationship).

92. *See, e.g.*, GERALD R. LESLIE, THE FAMILY IN SOCIAL CONTEXT 554 (1973) (stating that what he calls the "companionship" aspect of marriage may erode as husbands devote more time to work than to marriage and wives become less interested in the sexual aspect of the marriage, perhaps in response to the husband's lack of attention).

generally unsympathetic to Carol, Carol will transfer her attention to a different relationship.

Reciprocity is also relevant to the development and sustenance of trust in relationships between biological family members. Consider a mother and her child, for example. The child first turns to his mother for support, not because he trusts her, but because he has no other choice. The mother satisfies the child's needs, not because she expects something back, but because she loves her son and feels a sense of responsibility toward him.[93] The love between mother and son may endure forever, but it does not necessarily follow that trust also will endure. For example, suppose that the mother is negligent—she leaves her son alone while she goes to bars, she is insensitive to his emotional needs, she leaves him with others for long periods. The son will learn that, although he may love his mother, he cannot trust her. Over time, he may lessen his efforts to satisfy her needs—for instance, he may engage in acts that displease her or expend energy in developing compensatory relationships. The mother's failure to return her son's love (by this I mean she fails to behave in a way that he perceives as loving) will decrease her son's trust. Conversely, the son may be the one who fails to reciprocate. Suppose an adult child becomes wealthy but neglects to visit his mother or share his wealth with her. Although the mother may continue to love her son, she will not trust that he will provide support of any kind—his failure to reciprocate for all she feels she has given him will be perceived as a breach of trust. When the benefits continuously flow in only one direction, trust will deteriorate.[94]

Of course, the concept of reciprocity is not generally symmetrical; parties do not conduct a series of tit-for-tat transactions. That is, Carol may not feel that Margaret "owes her one" because Carol babysat. A mother might not characterize her demand for

93. *Cf.* T. Berry Brazelton et al., *Early Mother-Infant Reciprocity*, *in* PARENT-INFANT INTERACTION 137, 147-48 (1975) (establishing that most mother-infant relationships involve a rhythm of reciprocity and that the infant becomes distressed when the mother breaks the rhythm by failing to respond). *See generally* 1 JOHN BOWLBY, ATTACHMENT (1969) (exploring the mother-child bond).

94. *Cf.* ROSENFELD, *supra* note 18, at 34, 37 (chronicling the breakdown of family bonds when the elderly are abandoned by their children); STACK, *supra* note 63, at 48 (noting that within the African-American community, the failure to provide adequate support to children leads to community censure and a loss of rights to those children; others take custody and, according to norms, have decisionmaking power over the children); Brazelton, *supra* note 93, at 145-46 (establishing that when normal reciprocal interaction between infant and mother is disturbed, the infant gradually stops looking to its mother for reassurance and engages in self-comforting behavior).

certain behavior from her child as her reward for fifteen hours of labor or years of sleepless nights (but then again, she might). The key to trust is that such an accounting is, at least on the surface, absent.[95] As in primitive cultures, the parties must deny the reciprocal nature of the relationship to achieve full benefits from it. The fact that reciprocation is delayed further helps to obscure its existence.

Explore another example: marriage. A marriage will be mutually satisfactory as long as there is a general sense that each party is equally committed to the relationship and expresses that commitment by acting in a supportive and giving fashion. But the parties generally must deny the reciprocal nature of the relationship.[96] Again, giving is not symmetrical, in more than one sense. First, one party might put up with a lack of emotional support because he appreciates a certain level of financial support, for instance. In other words, the objects of the exchange will vary depending upon the specific needs of the individual parties. Second, because the needs of the partners will vary over time, there may be periods in which one partner is intensely giving while the other mostly takes. The more giving partner gives for a complex mixture of reasons: some combination of love and self-interest, in gratitude for benefits received in the past and in reliance of obtaining reciprocal benefits in the future, and perhaps because he values his self-image as a "giving" person. If trust is sufficiently strong, the relationship can sustain an imbalance for some period of time, but eventually the party who perceives himself to be giving more than he is getting might become dissatisfied. It is the perceived commitment to the other that sustains the relationship. Commitment is symbolized by acts of giving, whether the gifts are tangible or intangible.

3. Whom Do We Trust?

All of the foregoing raises an obvious threshold question: Whom do we trust? Modern society is large and complex, and resources that can be invested in establishing and maintaining relationships are limited.[97] If we began our search for trust-based

95. *See, e.g.*, DUCK, *supra* note 75, at 20 (noting that the more intimate the relationship, the less likely friends are to expressly reciprocate); STACK, *supra* note 63, at 41-42 (noting that reciprocity is asymmetrical, or delayed).

96. Thus, Hegel viewed marriage as an agreement to end contracting. *See* HEGEL, *supra* note 14, at 203.

97. *See* DUCK, *supra* note 75, at 2 (stating that research shows that "relationships are extremely complex entities that need careful management and demand skills from their

relationships from scratch, the investment in identifying appropriate people would be unmanageable; we would do nothing but attempt to connect and construct relationships. How do we determine with whom we should form trust-based relationships?

Sociologist David Cheal asserts that the foundations of trust-based relationships in a complex society consist of three factors. First, standardized forms of relationships have evolved, and a common understanding exists as to the general duties attached to various roles.[98] Second, individuals develop a network of trust-based relationships that are long-term.[99] Third, individuals who form trust-based relationships must regularly telegraph their continuing availability to each other.[100] These factors enable us to commit more resources to the development of trust within relationships and fewer to the project of identifying possible significant others.

Established categories of relationships have evolved and thrive as a result of the need to minimize the costs of establishing the terms of relationships. The established rules and roles within the relationships create a common understanding regarding reciprocal expectations and obligations.[101] Refer back to Carol and Margaret, our two friends. The standardized role of "friend" creates a common understanding of reciprocal duties and entitlements, and the limits thereof.[102] For instance, both women might expect generally supportive behavior from the other but will understand that the needs of their immediate families will usually come first. Both women might expect a degree of loyalty from the other.[103] Similarly, the standardized roles of "husband" and "wife" create common, yet implicit, understandings. For example, both understand that they will

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participants at all times"); *id.* at 3 (asserting that " 'relationshipping' is actually a very complicated and prolonged process with many pitfalls and challenges").

98. *See* CHEAL, *supra* note 60, at 16-17.

99. *See id.*; *see also* BARBER, *supra* note 84, at 10-11 (discussing Luhman's theory that establishing trust-based relationships helps reduce the complexity of social life).

100. *See* CHEAL, *supra* note 60, at 16-17.

101. *See* BARBER, *supra* note 84, at 14-15 (explaining that people trust others to perform their "roles" competently); DUCK, *supra* note 75, at 20 (stating that "the relationship between two people is most often defined by what the people in it provide for one another, resources that they distribute and exchange" and noting that those who exchange only services are acquaintances whereas friends exchange confidences).

102. *See* DUCK, *supra* note 75, at 7 (citing sociological research demonstrating that people share a common understanding of what the role "friend" demands).

103. *See id.* (citing K.E. Davis & M. Todd, *Assessing Friendship: Prototypes, Paradigm Cases, and Relationship Description*, *in* UNDERSTANDING PERSONAL RELATIONSHIPS (S.W. Duck & D. Perlman eds., 1985) (demonstrating that most people expect a friend to be honest, show affection, share confidences, provide necessary help, act in a trustworthy manner, share time and activities, treat us with respect, and work through disputes)).

not have sexual relationships with others and that doing so would constitute a betrayal of trust.[104] They understand that they will pool their financial resources, instead of holding them separately, and that they will agree on some method of maximizing the welfare of the unit, whether they define value in financial terms or by other criteria such as self-actualization. Each probably expects the other to be his or her primary means of emotional support and to consider his or her needs before the needs of friends and distant relatives most of the time. Each expects the other to act in a manner that generally is giving and loving.

But the standardization of roles gives us only a very general sense of reciprocal expectations. As human beings, we can expect others to respond to the various demands that may arise through the course of a relationship with infinite variation. Thus, agreeing to accept standardized roles is only an initial step in establishing a trusting relationship. Resources must be committed to understanding an individual's personality in order to determine the extent to which that particular individual can be trusted to respond positively in any given situation.[105] Resources must also be applied to nurturing the relationship.[106] Accordingly, people stabilize interaction by limiting the number of persons with whom they engage in interdependent relationships. The development of a few relationships over time leads to greater predictability regarding the extent of the other's trustworthiness and likely response to various situations. As trust increases, parties to the relationship increase their investment, both in gratitude for past benefits conferred by the other, and in reliance on the implied promise of future support.

In sum, we have established that stable, long-term relationships based on trust are a necessary precondition to the fulfillment of a wide variety of fundamental needs. But attempting to form and sustain such relationships in a complex society is difficult given the wide variety of options and the anonymous nature of our culture. Accordingly, systems have evolved to simplify the process; we limit the number of people with whom we seek to engage in intimate relationships, and we have developed standardized roles that alert us to the best potential candidates.

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104. This social norm is reflected in various statutes, such as those that establish adultery as grounds for divorce, *see, e.g.*, N.Y. DOM. REL. LAW § 170 (McKinney 1988), and those that prevent a neglectful spouse from taking an elective share, *see, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 1981 & Supp. 1998).

105. *See* DUCK, *supra* note 75, at 2-3.

106. *See id.*

4. The Family: The Primary Standardized Long-Term Relationship

The most obvious and well-established examples of standardized relationships in western culture are those that exist within the family. It is a fair assumption that most people share a generalized understanding of the various duties and obligations that attach to each particular familial role, although there is a wide variety of behavior within specific relationships. To be sure, the specific understanding of particular roles has changed drastically in the last thirty years. But it is safe to say that it is generally assumed that parents will provide their children with love, financial support, and some degree of education (hence the term "deadbeat dad");[107] that children will strive to be respectful to their parents and act in a way that pleases them; that older children will care for aging parents; that husbands and wives will be each other's primary source of emotional support;[108] and that family members will act to benefit the whole—or at least refrain from causing harm to other members. Most importantly, it is generally assumed that immediate family members will be the primary source of emotional support, both generally and in times of crisis.[109]

The evolution of a standardized definition of "family" that emphasizes the primacy of the relationships makes sense from a variety of perspectives. A child will naturally look to her parents for the satisfaction of basic human needs. In post-industrial societies, where families live together but generally do not join with other families, we first look to those with whom we live for support. Because most parents respond positively, the roles become standardized. The fact that the role of parent is standardized telegraphs to parents the scope of their obligations. Once a psychological bond has been formed, it makes sense that the parties would turn to each other first. Turning to immediate family decreases the cost of searching for potential providers.[110] That the majority of family members do in fact become each other's main

107. Again, this norm is reflected in legislation, specifically in laws requiring parents to provide support for children. *See, e.g.*, N.Y. DOM. REL. LAW §§ 32-33 (McKinney 1988).

108. *See* BARBER, *supra* note 84, at 38-44 (discussing standardized roles of "husband" and "wife" and the changes in our understanding of those roles).

109. *See, e.g., id.* at 26 (stating that "[i]t is an everyday and valued conception in our society that the family is the primordial source and location of trust").

110. Sociobiologists might argue that it would be natural for an individual to satisfy basic needs through reciprocal, interdependent relationships with closest relatives because supporting closest relatives would also help perpetuate the individual's gene pool. *See* ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE (1994).

providers cements role standardization, which in turn creates expectations that family members will act accordingly.

Of course, family members generally do not conceive of family roles as the exclusive means by which to satisfy needs. We expect family members to develop friendships with others and children gradually to depend less on parental support and more on others, eventually forming their own families. When family trust thrives, however, the family functions as a sort of "safety net"—family members know that when others cannot provide support, family will step in to help.[111]

The standardization of family roles leads family members to harbor a general set of expectations regarding their obligations toward other members and others' obligations to them.[112] If, as in most cases, trust intensifies over time, reliance on that trust will increase. When family relationships are functional, they are the primary relationship to which most people look for satisfaction of needs. It follows that trust-based family relationships often create greater expectations and provoke more reliance than do relationships outside the family.

To illustrate, assume X is a first-year law student. Suppose X's elderly neighbor Y has broken a hip. X is a reasonably thoughtful and generous person. X may make gifts to help out her neighbor. For example, she might bake some casseroles or offer to pick things up at the market. But at some point, X must decide whether she can afford the cost of providing care. For example, she is unlikely to provide substantial nursing care to her neighbor because doing so would drastically interfere with her studies. She is likely to give as much as she can without incurring substantial costs to herself. Given the standardized definitions of neighborly behavior, Y is unlikely to expect X to make such a sacrifice. Rather, Y is likely to pay for services that she needs above and beyond what her neighbors and friends can provide, such as full- or part-time nursing care. Or, Y might pay X to provide more in the way of care, an arrangement that X will accept only if the reward outweighs the costs to her education. If it came to that, the parties would be likely to agree expressly on the amount of care and the cost, because both understand those services to be beyond the normal scope of the neighbor-neighbor

111. *See* BARBER, *supra* note 84, at 27 (stating that "[t]he shared tasks and values, the endless, minute, and changing obligations among family members, seem to be most efficiently handled by mutual trust").

112. *See* SUSSMAN ET AL., *supra* note 18, at 9.

relationship. In any case, X is unlikely to incur substantial costs in the vague hope that Y will substantially compensate X later by reciprocating in a substantial way or by bestowing a financial benefit such as a bequest.

Now suppose instead that X's mother, M, has the broken hip. First, the gross costs that X is willing to incur to provide care to her mother will likely be greater than those she was willing to bear to care for Y. For one, X has a sense of duty springing from the standardized nature of the mother-daughter relationship. This sense is likely strengthened by the specific history of a reciprocal, trusting, interdependent relationship. Satisfaction of that sense of duty inures a benefit to X and offsets the overall cost she will incur. Second, X's action is but one moment in an ongoing reciprocal relationship—X therefore understands that her mother has provided and will provide reciprocal benefits to her when she needs them, perhaps including a provision for X in her mother's will. The expectation that her mother will continue to provide for her in times of need might encourage X to incur more significant costs presently than she otherwise would.

The intensity of the trust in a functioning family inspires members to rely on expectations of future benefit inspired by that trust. Members are encouraged to support each other, sometimes even at substantial cost, both in gratitude for the past benefits of the relationship and out of a sense of expectation of future assistance. Reliance on trust confers a maximum benefit to the parties involved.

B. The Role of Implicit Understandings and Reliance

A family system that routinizes trust and encourages reliance on implied obligations provides a resource for satisfying fundamental needs that could not be duplicated in a system based on arms-length transactions. Moreover, *the key to maximizing the value of the family system is the implicit and unarticulated nature of the reciprocal relationships.* Specifically, the implicit nature of the system maximizes value by allowing the parties to view the provision of goods, services, and attention as motivated solely by altruism, even when self-interest might actually play a part. This, in turn, stabilizes the relationships and provides a safety net of support. An alternative system based on express agreements would destroy most, if not all, of the potential value of the relationship.

First, standardization of family roles and the trust that builds from those roles creates a benefit; as family members learn to trust each other and relationships are cemented, members experience gains. They each know that if the future should prove difficult, the

other family members will be there to provide support. Even if day-to-day contact becomes limited and relationships with non-relatives develop, most view family as providing a safety net—if all else fails, the family will be there.[113]

Second, we all value the belief that we mean something to others—especially to those in whom we have invested most heavily, who tend to be close family members. Thus, if we view the provision of care, services, or attention by a family member as motivated by love that we have inspired, we will value that attention more than we would if we perceived it to be motivated by self-interest. Refer back to mother, M. She might value regular care from her daughter, which she perceives as motivated by love, more than care from others of whose motives she is less certain. Thus, M might perceive visits by church members as motivated more by a sense of religious duty than by love that M has inspired. Certainly, M will value care provided by her daughter more than similar care by a paid provider. M's attribution of altruistic motives to her daughter could create other benefits as well; for example, the fact that her daughter wants to provide that care makes M feel as though she had been a good parent. But if M perceives that X is motivated by self-interest (for example, she expects a reward for her behavior), M will receive less value from the care X provides—in fact, she may value such care even less than she would value care by a paid provider. At least the professional's desire for compensation is expected and does not symbolize a failure of a trust-based relationship.

It seems reasonable to assume that almost every human is self-interested to some degree. We need to put food on the table, we have certain basic material desires, we would like to succeed at our jobs. All of these projects require some element of self-interest and may at times cause conflict with our altruistic impulses.[114] One does not have to believe that family members are generally selfish actors, masquerading as altruists in order to exploit the other members of the family, to understand that self-interested motives might at times conflict with altruistic impulses.[115]

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113. Of course, people other than family members might fill those needs. But if the family member refuses to provide support—if the person in need is "forced" to go outside the relationship—some of the previously built-up trust is destroyed. The safety net has holes. Just as parties create value by building up a relationship of trust that provides each of them with security, the parties destroy value when they fail to live up to expectations by refusing to perform reciprocal obligations.

114. Of course, even pure altruists have limited resources—they cannot care for everyone in need indiscriminately.

115. And our altruistic impulses may conflict with one another: We may have an

For example, refer back to M and X. It is likely that X would choose to give substantial care to her mother even if M were destitute and X were aware of that fact. But the fact that the daughter could not expect any compensation might affect her decision regarding how to apply her limited resources. For instance, her desire to earn a law degree, driven by a belief that she will be more capable of supporting herself and her family, including her mother, might be more intense than her desire to provide all the care her mother requires; thus, she might view the decision to abandon her studies or do poorly in school as not viable. As a result, she might be inclined to enlist the help of another relative, or supplement care with paid support.[116] Comparatively, if X believes that some reciprocal compensation will come her way at her mother's death, that fact will likely influence X's assessment of how to allocate her limited resources. Her response might amount to clear detrimental reliance on the implied promise of an inheritance—for instance, X might decide to drop out of law school to nurse her mother. Or, she might alter her behavior in subtler, though important, ways—the expectation of inheritance might affect her choice of which job to accept, how much volunteer work to do, what hours to work, or how much to save. When altruism runs out, the (conscious or subconscious) assumption that one will be compensated financially for current reliance may encourage transactions in the family system. Nevertheless, the transaction will be more valuable to M if she believes that her daughter provides care out of love, not because she expects an inheritance. Therefore, the concept of delayed reciprocity and the implicit nature of the "exchange" allows the parties to obtain maximum value—M can feel good about how much she is loved, and X can feel good about doing right by her mother.

The keys to maximizing the value of familial relationships are building trust and obscuring the role of self-interest. Trust will thrive when the parties conform to the reciprocity norm. The denial of self-interested motives (to the extent that they exist) is facilitated by the fact that reciprocity is delayed; that is, reciprocal actions are not taken immediately but are manifested over time.

In short, express agreement in the family context is virtually impossible. Because the system is based on trust, it would never

altruistic connection toward a variety of people but possess limited resources, which requires us to choose our preferences at various times.

116. Of course, to the extent that M is altruistic, she will discourage X from dropping out of law school or doing something else that she perceives as detrimental to X's best interests.

occur to most of us to conceptualize the give and take of family life as an "exchange" or "bargain." Because we trust others to respond in accordance with reciprocity norms, we would not even think it necessary to obtain assurances.[117] Of course, even if express agreement were otherwise possible, the constantly shifting status of relative duties and entitlement in a long-term, intimate relationship would make express agreement impracticable. Thus, family members are effectively forced to rely on trust that others will not abandon the reciprocal principles underlying the relationship.

The family system, when it works, is a wonderfully rich way to obtain necessary and fundamental emotional and psychological benefits. Because the key to the value of the relationships within the family is the implicit nature of the exchange and the trust that the others will honor notions of reciprocity, we would rarely, if ever, expect to see family members reduce implicit understandings to express agreement. What we would expect to see is reliance on trust.

III. RECIPROCITY AND WILLS LAW

Judges and juries have internalized societal norms concerning relationship formation and development. They bring these innate understandings to their determination of will contests. Courts examine a testator's relationships with the parties to a will contest to determine whether the contestant reasonably interpreted words and actions of the testator as implying a promise of inheritance. Courts know that the more interdependent the relationship, the less likely the parties are to reduce understandings to express agreement and the more likely they are to trust one another to behave in accordance with those implied understandings. Courts intuitively understand that the testator may have obtained benefits by implying a promise to reciprocate by leaving relatives a share in her estate. And courts, by manipulating doctrine, often recognize and give effect to the obligation that the "promisor" has voluntarily incurred.

Specifically, when the testator's will primarily benefits someone who is not one of the testator's closest relatives, courts are hesitant to give effect to the will if the testator's closest family members contest

117. Even if we did, it would be impossible to obtain the information necessary to assess the likelihood of performance without devaluing the relationship. It would be bad enough if the potential provider were to say "Sure I'll care for you, just remember me in your will." It would be even worse if she requests specific information about the relative's assets and other obligations and the exact amount the relative intends to devise. In that sense, the "transaction" is the mirror image of what occurs in the market place, where parties expect each other to try to obtain as much information as possible.

it.[118] The outcomes of cases and the language many courts use to justify their decisions suggest that the decision to give effect to a will depends less on whether the court believes that the will satisfies the formalities statute or embodies the testator's intent and more on whether the testator's decision to disinherit closest family members is justifiable in light of social norms.[119] Specifically, courts seem to consider whether the testator and her closest relatives enjoyed a trust-based relationship that by its nature would have created implied understandings from which the parties benefited and on which they relied. If such a relationship appeared to be in place, a court will likely find some reason to invalidate the will—thus causing the testator's estate to be distributed via the intestacy statutes to the testator's closest family members. Conversely, if no trust-based relationship appeared to be functioning, either because it never existed or because contestant family members appear to have breached it, courts will honor the testator's autonomy and give effect to the will.

A. Interdependency and the Implied Promise of Inheritance

What leads family members to believe that they will obtain an inheritance? It is one thing to say that family members come to depend on each other in reliance on trust. It is another to say that family members have a specific expectation of inheritance even when there has been no express promise to that effect.

First, family members generally are aware of the cultural tradition of passing wealth intergenerationally. The vast majority of Americans bequeath their estates to their spouse, children, or closest relatives,[120] and most give larger amounts to those who shoulder

118. *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 246-55, 260-68 (1996). In preparation for that article, I examined (within a randomly chosen five-year period between December 31, 1984, and January 1, 1990) all reported cases that considered the issue of undue influence in reviewing motions for summary judgment, directed verdict, or judgment notwithstanding the verdict (160 cases total). I also read and analyzed a voluminous number of formalities cases. *See id.* at 260-68, 275-78. Although that article establishes that courts bring a preference for blood relatives to will contest cases, it does not explain why courts do so, nor does it identify the specific social norm that courts support. This Article attempts to complete the project by identifying the role of the family reciprocity norm in wills cases.

119. *See id.* at 255-58.

120. Studies by sociologists suggest that only some six to seven percent of testators disinherit their closest relatives. *See, e.g.*, ROSENFELD, *supra* note 18, at 89 & n.14 (citing SUSSMAN ET AL., *supra* note 18, at 86-104). Rosenfeld also establishes that "the dominant belief among American families [is] that writing relatives or children out of someone's will is downright immoral." *Id.* at 89.

substantially greater burdens of care.[121]

Second, a devise flows naturally as the final act of reciprocity in an ongoing relationship—inheritance is viewed as a statement of reward, and so long as family members have taken care of each other, they expect the reciprocal nature of the relationship to continue to the end.[122] Moreover, family members, through actions and offhand remarks, may reinforce this expectation, and may even make statements of intention outright.

But why shouldn't a court adjudicating a will contest presume that the will's beneficiary has a reciprocity-based claim that is equally as persuasive as the claims of the testator's family members? Presumably, the testator designated the non-relative as beneficiary because she determined that the beneficiary was most entitled to the testator's estate. It is likely that the testator-beneficiary relationship was interdependent—based on trust and reciprocity. So why prefer the competing claims of family members?

There are several reasons why a court might approach a will contest with a (rebuttable) presumption that family members have stronger reliance-based claims than non-family will beneficiaries. First, most people are aware of the cultural norm of passing assets intergenerationally within families and disinheriting only for cause.[123] Thus, family members assume that if they are attentive and available, they will inherit. Conversely, non-relatives also are aware of that norm and would be less likely to expect (and thus to rely on) the prospect of an inheritance from a close friend absent clearly expressed declarations to that effect.

Moreover, standardized roles prescribe that basic support needs will be met whenever possible by family members.[124] Courts

121. Studies suggest that testators give greater proportions of their estate to children who have provided significantly more parental care than their siblings and that childless testators prefer those distant relatives with whom they have been close over those with whom they have had infrequent contact. *See* SUSSMAN ET AL., *supra* note 18, at 98-107; Bernheim et al., *supra* note 68 (presenting econometric and other evidence that bequests are often used as compensation for services rendered by beneficiaries).

122. *See* SUSSMAN ET AL., *supra* note 18, at 84-86. There is also a normative consensus that a testator is morally justified in disinheriting her closest relatives when the testator has been abandoned or neglected by them. *See id.* at 110-11; *see also* ROSENFELD, *supra* note 18, at 90-94 (examining the gender and class make-up of testators who disinherit close relatives). Interestingly, Rosenfeld establishes that disinheritance occurs most frequently at the lower end of the economic scale, *see* ROSENFELD, *supra* note 18, at 90-94, a fact that highlights the importance of disinheritance as a symbolic act of retribution.

123. *See supra* notes 120-22 and accompanying text.

124. *See supra* Part II.A.4.

understand that family members may make great sacrifices on behalf of each other without ever reducing the obligatory norm of reciprocity to an express understanding. On the other hand, acts of substantial support by non-relatives will be understood by the parties as extraordinary—thus, the beneficiary of those acts might feel some need to reciprocate immediately in some form or to make some express statement articulating the duty to reciprocate. The non-family member who performs extraordinary support functions will likely do so because the satisfaction he experiences is its own reward, or because he has an express understanding with the beneficiary, or some combination of both. Thus, it would not be surprising if a non-relative who provided primary care either was compensated during the testator's life or reduced the testator's desire to reciprocate to an express understanding, whereas we would not expect competing family members to have behaved in that way. When a non-relative claims to be entitled to the testator's estate, the sense that the non-relative relied on an implied agreement, or that the testator benefited from an implied agreement, is less believable initially than a similar claim advanced by a close family member.

The only scenario in which a non-relative's expectation of a large inheritance would be reasonable is when he has assumed the primary supportive functions traditionally performed by family—in short, when the testator-beneficiary relationship has become "familial" in nature. In that case, the support provided by family members, if any, is weak, as is the testator's relative trust in the familial relationship.[125] In this instance, the non-relative beneficiary might be more likely to harbor reasonable expectations of inheritance. First, cultural norms tell him that the testator would be justified in disinheriting her closest relatives.[126] Second, the relationship between potential testator and non-relative beneficiary is extremely interdependent. As such, the same rules that traditionally apply to family apply here: To honor the intimacy of the relationship, the parties will be reluctant to acknowledge expressly that reciprocity is a basis of the relationship and any attempt to discuss or expressly memorialize implied understandings would cheapen the relationship itself. In that situation, the expectation of reciprocity is more reasonable, as is the propensity to rely on implied agreements to abide by the reciprocity

125. *See* ROSENFELD, *supra* note 18, at 3, 112 (establishing that the incidents of extra-familial bequests, vindictive disinheritance, and escheat were lowest in senior communities when the residents maintained strong family ties and highest for recipients of geriatric nursing care).

126. *See supra* note 122 and accompanying text.

norm.

B. The Case Law

Because an extraordinarily high percentage of people devise their estates to close family members,[127] in all but a small fraction of estates cases there is no tension between honoring testator's intent and honoring the reciprocity norm. The difficulty arises in those few cases in which a court perceives that the testator has violated the reciprocity norm by failing to satisfy the reasonable expectations of family members. In those cases, I suggest, courts often disregard the testator's intent and find some way to ensure that testator's estate is distributed to family members perceived as deserving.[128]

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127. *See supra* note 120 and accompanying text.

128. There are some factual situations in which the characterization of a disinherited family member's claim as reliance-based is inaccurate because that family member would have taken the same care of the testator even if she had known that he would ultimately disinherit her. This would occur either when the disinherited family member is predominately altruistic, when that member was adequately compensated during life through return giving from the testator, or when the family member was "compensated" by a sense of having fulfilled a duty incurred by previous giving acts by the testator.

If most family members would engage in giving behavior even knowing that they would be disinherited, then what reason could there be for courts to view testators who prefer non-relatives as owing obligations to family? After all, the family member did not benefit the testator in reliance on receiving some future benefit, financial or otherwise, and she formed no expectation of a further reward in the form of an inheritance.

First, family members who feel that the testator owed them no obligation are not likely to end up in court fighting over a family member's estate. A pure altruist would feel no disappointment at being disinherited, for he would have achieved satisfaction from having acted altruistically in the past and would not have harbored expectations of being compensated. Similarly, those who feel that they were well compensated during the testator's life would have no motivation (except greed) for contesting a will. Of course, we could expect even a pure altruist to feel emotionally distraught at the rejection, given that disinheritance is often interpreted as a statement of indifference, hostility, or even hate. Nevertheless, once the statement has been made, winning a will contest could not lessen the altruist's feeling of rejection. So, the act of filing a will contest requires self-interested motives—a feeling of dessert or entitlement. It seems safe to say that most courts confronting will contests are dealing with contestants who feel entitled in large measure to a significant portion of the testator's estate.

Notwithstanding all that, for the sake of argument imagine a family member who contests the testator's will, not because she feels entitled to a portion of the estate but because she wishes to honor the testator by ensuring that only the testator's final, clearly expressed intentions are carried out (obviously, an extremely altruistic contestant). How might a court view the relationship between the testator and the family member? The point is that a court would have no real way of determining whether a contesting family member is owed an obligation or whether the testator discharged that obligation during life because wills doctrine precludes such an inquiry. Because doctrine insists on conceptualizing inheritance as a unilateral act, which leads to a focus on the testator's intent, the contestant cannot give voice (at least not directly) to issues of reciprocity because that issue has been deemed irrelevant. Thus, to the extent the court considers

Concern for the reciprocity norm is also revealed in cases in which the testator's will prefers one or more of his closest relatives over other equally close family members. Even here, we see that courts often disregard the testator's clear intent when the disinherited family member has a clear reciprocity-based claim.

The following sections develop the doctrinal argument. Specifically, I examine two discrete areas of wills law—the doctrine of undue influence and the formalities doctrine—to show how courts manipulate doctrine to honor the reciprocity norm.

1. Undue Influence Law

Academics view the undue influence doctrine as the judicial equivalent of silly putty.[129] For years, scholars have accused courts of manipulating the doctrine to achieve a variety of ends while ignoring the testator's intent. For instance, some view the doctrine as simply a thinly disguised rule of family preference—courts can use it to ensure that the testator's property passes to blood relatives.[130] Others see the doctrine as reflexively applied to punish those involved in

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those issues, it does so intuitively. If a reciprocal relationship between the testator and family members appeared to be functioning just prior to the testator's death, a court is likely to presume that the testator incurred enforceable obligations, absent evidence to the contrary.

129. A variety of scholars have struggled to make sense of the undue influence doctrine by suggesting that it is merely a vehicle that enables judges to impose a variety of subjective preferences. *See, e.g.*, Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 208-12 (1989) (criticizing courts for using undue influence doctrine to invalidate wills that benefit partners involved in "meretricious relationships"); Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do with It?*, 57 U. PITT. L. REV. 841, 843-58 (1996) (arguing that courts' use of undue influence doctrine to prefer testators' closest relatives can be explained by the principles of sociobiology); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997) (arguing that courts use the undue influence doctrine to deny testamentary freedom for those who fail to provide for family members); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981) (exploring the extent to which courts use the undue influence doctrine to invalidate wills preferring homosexual partners); Veena K. Murthy, Note, *Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?*, 4 CARDOZO WOMEN'S L.J. 105, 127-30 (1997) (arguing that courts use the undue influence doctrine in a way that reinforces gender stereotypes); *see also* Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1045-63 (1987) (exploring capacity doctrine and arguing that courts must refer to common values in determining capacity and cannot simply determine the testator's subjective intent).

130. *See* Madoff, *supra* note 129, at 577; *see also* Frolik, *supra* note 129, at 871-82 (using principles of sociobiology to explain courts' use of undue influence law to protect the testator's family).

relationships that the court views objectionable.[131] In my view, those explanations are insufficiently nuanced. We can clarify those explanations by examining the context of the family relationships in particular cases.[132]

A survey of more than 160 cases within a five-year period[133] reveals that when a testator's will appears to fly in the face of the reciprocity norm, courts commonly honor that norm by invalidating the will, often by finding that the testator-beneficiary relationship was "confidential" and created a presumption of undue influence. Such findings often seem to violate the testator's clear intentions.[134] Conversely, when the court wishes to uphold the will, the court will view an intimate interdependent relationship between a testator and a will beneficiary as justifying the bequest, rather than giving rise to a presumption of invalidity.[135]

Consider two recent cases in which courts upheld wills that disinherited the testator's blood-relatives. In each case, the court

131. *See* deFuria, *supra* note 129, at 205-06; Madoff, *supra* note 129, at 586-92; Sherman, *supra* note 129, at 227.

132. Even our understanding of cases that seem to reflect pure prejudice can be enriched if we consider the reciprocity norm. For example, *In re Will of Kauffman*, 247 N.Y.S.2d 664 (App. Div. 1964), is an infamous case that upheld the denial of probate to a will leaving the testator's estate to his life partner. The contestant, the testator's brother, enjoyed a solid relationship with the testator and provided for his needs for many years prior to the testator's relationship with his companion. *See id.* at 666. In upholding the undue influence finding, the court pointed to the testator-beneficiary relationship itself as evidence of the testator's mental instability. *See id.* at 682-86. The court's holding conformed to the reciprocity norm as the court saw it; the court's error was that it failed to understand that the testator and beneficiary enjoyed a family relationship. *Cf.* Smith v. Chatfield, 745 S.W.2d 199, 201 (Mo. Ct. App. 1987) (remanding the case to the jury for a determination of whether the will leaving the bulk of a female attorney testator's estate to the testator's boyfriend, instead of her niece, was procured by undue influence because the niece and her aunt appeared to have a good relationship).

133. *See* Leslie, *supra* note 118, at 243; *supra* note 118 (describing the survey).

134. *See, e.g.*, Birch v. Coleman, 691 S.W.2d 875, 879 (Ark. Ct. App. 1985) (reversing a lower court decision admitting a will to probate, where the will left the testator's entire estate to the care-giver in whose home he resided, and emphasizing that the testator had been close to the nephew-contestant and had treated him like a son); Gaines v. Frawley, 739 S.W.2d 950, 951 (Tex. App. 1987, no writ) (invalidating a will that gave the testator's estate to her live-in boyfriend and disinherited her two adult sons and emphasizing that the sons had been on good terms with the testator and had frequently visited her home).

135. *See, e.g.*, *In re* Estate of Kern, 716 P.2d 528, 530-31 (Kan. 1986) (upholding a will leaving the bulk of an estate to the testator's attorneys when the niece-contestant had not visited the testator in 30 years, even when the testator was very ill); *In re* Estate of Swain, 509 N.Y.S.2d 643, 645 (App. Div. 1986) (setting aside a jury verdict of undue influence when the testator's will left her estate to the daughter who had cared for her instead of her son); Pace v. Richmond, 343 S.E.2d 59, 60 (Va. 1986) (validating the testator's will, which left his estate to his neighbors and disinherited his nephews, when evidence showed that the testator had been extremely distraught about treatment from his nephews).

took pains to consider the quality of the family member-contestant's relationship to the decedent and found no supportive relationship. As a result, the courts viewed the testator as honoring the reciprocity norm, and, in each case, the court upheld the will.

In *In re Estate of Ambers*,[136] the testator left his entire estate to a couple who rented his farmland and named the wife as executor of his estate.[137] In so doing, he disinherited his ten siblings, who contested the will.[138] The case presented an unusual number of facts generally viewed as indicative of undue influence.[139] Moreover, an applicable statute could easily have been interpreted to place the burden of proof on the will beneficiaries.[140] Nevertheless, the court affirmed the trial court's rejection of an undue influence claim, noting that "George thought very highly of the Nelsons and reposed a great deal of trust in them," that "the Nelsons provided much helpful assistance to George over a period of many years," and that "George and the Nelsons had a close, affectionate relationship."[141] Of course, the same could be said of any relationship that becomes the subject of an undue influence claim.

Perhaps stronger evidence of the court's perspective is found in a footnote: The court noted that the contestants acknowledged at oral argument that they rarely, if ever, visited the testator—the testator's family members visited at a rate of one relative every three to six months, and no one relative appears to have visited with any frequency.[142] Thus, the relatives were not available to assist the testator as his health declined. By comparison, the beneficiaries visited regularly.[143] The court also quoted from the beneficiaries' brief that when the attorney "asked George to whom of his relatives he wanted to leave his property . . . George started to weep and said, 'they never come to visit me.' "[144] Moreover, the nurses at the home

136. 477 N.W.2d 218 (N.D. 1991).

137. *See id.* at 219-20.

138. *See id.* at 220.

139. The testator was elderly and executed the will shortly before his death while living in a nursing home; the beneficiaries were the testator's tenants and leased the testator's farmland for below market rates; the beneficiaries did not contact the testator's relatives when it became necessary to move him to a nursing home; after the testator moved to the nursing home, the beneficiaries obtained his power of attorney, made all bank deposits, received his mail, stored his personal property, had the keys to his house, and handled all of his financial affairs. *See id.* at 219-21.

140. *See id.* at 221-22 (interpreting N.D. CENT. CODE §§ 59-01-08, -01-16 (1985)).

141. *Id.* at 221.

142. *See id.* at 221 n.4.

143. *See id.*

144. *Id.* at 223.

where George lived for the last two years of his life were unaware that he had any family.[145] The decision to probate the will can be viewed as a determination that the heirs had no reciprocity-based claims.

Similarly, in *Estate of Sarabia*,[146] a court validated the testator's will leaving his entire estate to a male partner and business manager with whom he had lived for many years, even though the beneficiary had maintained complete control over the testator's financial affairs and actively assisted in procuring the will.[147] In rejecting the undue influence challenge of the testator's brother, the court determined that the testator had been competent and had not been coerced.[148] Although the court's opinion should have stopped there, the opinion continued at length, emphasizing the contestant brother's lack of a reasonable expectation of inheritance:

> "[T]his is not the case of an 'unnatural will' where dependents and those who had grown accustomed to lean upon the bounty of one are, at the death of that person, without apparent reason, deprived by his will of that bounty. Nor is it a will where relations, intimate in fact as well as in blood, who have had a reasonable basis for their 'expectations' have been disappointed at the expression of the testator."[149]

In both *Ambers* and *Sarabia*, the courts recognized the norm of reciprocity: reliance on inheritance is reasonable only when the testator and family members have been engaged in a trust-based reciprocal relationship.[150] Because relatives had not provided a safety net, their claims were weak. They had not conferred benefits on the testator, and their absence from his life demonstrated that they in fact had not relied on the hope of an inheritance.

Now, compare recent undue influence cases in which family members were involved in the testator's life and appeared to be available to provide support. In *In re Estate of Strozzi*,[151] the testator

145. *See id.*

146. 270 Cal. Rptr. 560 (Ct. App. 1990).

147. *See id.* at 561-62.

148. *See id.* at 563.

149. *Id.* at 565 (quoting *In re* Dolbeer's Estate, 86 P. 695, 698 (Cal. 1906)).

150. Other courts have also recognized the norm. *See In re* Estate of Kern, 716 P.2d 528, 530 (Kan. 1986) (noting that the testator "felt closer to [the beneficiaries] than to her relatives" and that the contestant did not have any contact with the testator for 30 years); *In re* Estate of Gearin, 517 N.Y.S.2d 339, 341 (App. Div. 1987) (stating that "it cannot be said [testator's] . . . choice of beneficiaries was strange or unreasonable").

151. 903 P.2d 852 (N.M. Ct. App. 1995).

devised his million-dollar ranch to two women to whom he was tangentially related by his sister's marriage. Prior to executing his will, the unmarried testator had fallen upon hard times,[152] and the beneficiaries had moved into a trailer next door to attend to his needs.[153] From then until the day the testator died, the beneficiaries met all of his basic needs—they cleaned, cooked, and generally cared for him on a daily basis for several years until his death.[154]

Nevertheless, the court did not view the testator's disposition of his ranch to the women as justifiable. In the court's view, the facts established a "confidential" relationship and a corresponding presumption of invalidity.[155] In justifying that result, the court stated:

> Perhaps the strongest corroborative evidence of a confidential relationship is [the beneficiaries'] own testimony regarding their continual presence at [the testator's] house and in all aspects of [the testator's] life in the days, months, and years after [the testator's brother's] death.... [The testator] confirmed the underpinnings of a confidential relationship when he stated at his deposition during conservatorship proceedings that [the beneficiaries] were the "best neighbors that I had" and that the [beneficiaries] "do honest work. I trust them."[156]

Thus, the same type of evidence that the *Ambers* court interpreted as *rebutting* a charge of undue influence was treated by the *Strozzi* court as suspicious enough to create a presumption of undue influence.

Why did the court not view the will as a final act of reciprocity in a trust-based relationship? In the court's view, the amount given was undue compensation for services rendered by the beneficiaries: "A [one] million [dollar] ranch estate is an extraordinary amount of consideration for the work Respondents performed over only the last few years of Strozzi's life."[157] It also appeared that the testator's closest relatives were involved in his life and were available to provide support. For example, his grandnephew had at one point instigated conservatorship proceedings.[158]

It is clear that the court did not focus on the facts regarding the will's execution, including whether the testator was competent or

152. The testator's brother had died, and shortly thereafter the testator injured himself in a fall. *See id.* at 853.
153. *See id.*
154. *See id.*
155. *See id.* at 855-56.
156. *Id.* at 856.
157. *Id.*
158. *See id.* at 853.

coerced, all of which should have been relevant given that the issue was whether the jury's decision was against the weight of the evidence. Not only was there no evidence of coercion, but there was ample reason to think that the testator wanted to prefer those who cared for him. Most notably, he had objected to the grandnephew's commencement of guardianship proceedings, which ended in a stipulation that the testator was mentally competent.[159] Although there was evidence that the testator had mental handicaps, there was no evidence that the testator lacked capacity or was otherwise susceptible to undue influence.[160] One could reasonably infer that he preferred the care he received from the beneficiaries to the attention he received from his blood relatives. The facts do not support the finding that the will did not reflect the testator's intent.

In *Strozzi*, the issue before the court was whether the jury's verdict was against the weight of the evidence—thus, even under the traditional, testator-focused view of wills law, the court had some legitimate basis for upholding the jury's verdict. In *In re Estate of Smith*,[161] however, the court went much farther, reversing under de novo review the trial court's determination that the contested will was valid. There is no doubt that the testator appeared to be a strong-willed, passionate, and extremely difficult woman given to extremes in behavior.[162] The contest involved the testator's adult son,

159. *See id.*

160. *See id.*

161. 862 P.2d 509 (Or. Ct. App. 1993).

162. *See id.* at 515. It certainly appears that the testator had a volatile and somewhat paranoid personality; at various times she accused her boyfriend of stealing from her, and she made the same allegations at other times regarding her son and his wife. *See id.* at 513. She had serious breaks at various times with both her son and her boyfriend and at various times accused her son or her boyfriend of "trying to kill her." *Id.* There is evidence that she had harbored animosity toward her son's wife for quite some time prior to coming to live with them. Both relationships appeared to involve a substantial amount of fighting. *See id.*

Three years before she died, the testator and her boyfriend split up because he was drinking. According to her son, she asked her son for help in getting her boyfriend out of the house. As a consequence, her son instigated guardianship proceedings and, after he was named guardian, began eviction proceedings. The testator then went to live with her son. During this time, she visited an attorney and stated that she did not want to leave any of her estate to her boyfriend and used language that indicated she was quite angry with him. She then executed a will leaving her entire estate to her son. By her son's admission, she experienced periods of memory loss during this time and sometimes appeared confused. *See id.* at 513-14.

Shortly thereafter, the testator and her boyfriend reconciled. After spending a weekend together, the testator determined that she wanted her boyfriend to be her guardian and decided to move back in with him. At this point, she turned on her son (just as she had previously turned on her boyfriend), deciding that he was only after her

the contestant, and the testator's boyfriend of eleven years, the will's sole beneficiary. The testator apparently fought frequently with her son and her boyfriend and harbored an intense dislike for her son's wife.[163] She had at least one serious falling out with her boyfriend and one with her son. Her affection fluctuated between them.[164] She wrote several wills that mirrored her changing preferences and vendettas. Her final will left her entire estate to her boyfriend and disinherited her son.[165] The trial court found that there was no undue influence involved in the procurement or execution of that will and admitted it to probate.[166]

The appellate court reversed in an opinion that stretched the concept of undue influence to new limits. The court held that the will was a product of undue influence *even though* it reflected testamentary intent. According to the court, the proper focus of the inquiry did not concern the testator's intent, but " 'the unfairness of the advantage which is reaped as the result of wrongful conduct.' "[167] The court elaborated: " ' "Undue influence does not negative consent by the donor. *Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.*" ' "[168] Instead of considering whether there was any reasonable evidence to support the lower court's determination, the court combed the record and highlighted any fact that would *support* a finding of undue influence. Although credibility usually cannot be evaluated on a cold record, the appellate court adopted the son's version of events and ridiculed and dismissed the beneficiary's testimony.[169] Even so, the court conceded that there was insufficient evidence to infer that the boyfriend coerced the testator or actively procured the will in his favor.[170] Nevertheless, the court determined that the will was the result of undue influence because the beneficiary

money. Shortly thereafter, she wrote a will leaving her estate to her boyfriend. *See id.* at 514. For the next two years, the boyfriend lived with the testator and served as her guardian. The testator had periods in which she refused to be left alone and so the boyfriend would spend "24 hours a day" with her. *Id.* at 515. Eventually, the son, who had not spoken to his mother since the guardianship proceedings, resumed contact, visiting her in the hospital while she recovered from a knee operation. *See id.* at 511-15.

163. *See id.* at 511-15.

164. *See id.*

165. *See id.* at 511.

166. *See id.*

167. *Id.* at 518 (quoting *In re* Estate of Reddaway, 329 P.2d 886, 890 (Or. 1958)).

168. *Id.* (quoting *Reddaway*, 329 P.2d at 890 (quoting 3 MODERN L. REV. 97, 100 (1939))) (emphasis in *Reddaway*).

169. *See id.* at 515-18.

170. *See id.* at 516.

used his confidential relationship with the testator to "dominate" her.[171] The court admitted that the testator was a strong-willed woman but justified its finding of the beneficiary's "dominance" by redefining the word: "[A] finding of dominance does not require evidence that an authoritative, controlling person bullied or directed the actions of a subservient one. Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence."[172]

Under Oregon law, the court could not shift the burden to the will's beneficiary unless it also recognized "suspicious circumstances."[173] It determined the requisite grounds for suspicion in the terms of the will itself.[174] According to the court, "an apparently unfair gift, such as one that disregards the natural objects of the testator's bounty, is an indication of undue influence.... [The testator's] will resulted in 'shunting the property away from those who had a reasonable expectation of being the recipients of the donor's bounty,' " and therefore, the court stated, "is at least a suspicious circumstance."[175] Thus, the court concluded, the testator and beneficiary had enjoyed a "confidential relationship" that created a presumption of undue influence that the beneficiary could not overcome.[176]

The *Smith* court forthrightly enforced compliance with the family reciprocity norm at the expense of effectuating the testator's intent. The testator's son had a reasonable expectation of inheritance on which he seemed to have relied; he had been a beneficiary in his mother's previous wills, had provided a great deal of emotional support in times of crises, and had weathered a fair amount of emotional abuse. On the other hand, the court emphasized that the boyfriend had no entitlement to the inheritance: The court belabored (as though it were relevant) the fact that when the boyfriend left his second wife to live with the testator, he brought no assets with him; that he never paid rent to the testator; that the evidence was "conflicting" regarding "what financial contributions, if any, he made to the relationship"; that he was sporadically employed;

171. *See id.* at 515.
172. *Id.*
173. *Id.*
174. *See id.* at 516-17 (emphasizing both the fact that the will departed from the testator's prior testamentary scheme, which gave one-third of her estate to her son and one-third to her boyfriend, as well as the fact that the court viewed the final disposition as "unnatural or unjust").
175. *Id.* at 517 (quoting *In re* Estate of Reddaway, 329 P.2d 886, 893 (Or. 1958)).
176. *See id.* at 518.

that he drank; and that he reneged on a promise to designate the testator as the sole beneficiary of his will because he added four specific bequests to others.[177] Thus, the court implied, the beneficiary received ample benefits from the testator during her life and therefore had no further entitlement to her estate.

If the court had been concerned with determining whether the will truly represented the testator's intent, it could have recognized ample evidence to support the lower court's verdict supporting the will. The testator and the beneficiary had lived together for eleven years, and he had nursed her for a six-year period while she recovered from two hip-replacement surgeries and two cataract operations.[178] She had previously benefited him in other wills, disinheriting him only once during a brief separation.[179] By all accounts, the testator was dependent on her boyfriend for the fulfillment of all of her needs. Towards the end of her life, she did not wish to be left alone at all.[180] The beneficiary continued to live with and care for the testator during the years after she had made her final will, even when her demands were extraordinary.[181] The testator's intent was a casualty of the *Smith* court's decision to support the reciprocity norm.[182]

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177. *Id.* at 511-12.

178. *See id.* at 509-11.

179. *See id.* at 512-15.

180. *See id.* at 515.

181. *See id.*

182. The treatment by courts of undue influence claims in intrafamily contexts gives added support to my thesis. Courts routinely determine that children who take care of parents—often exercising control over all aspects of their lives, including medical care, financial affairs, and making their major decisions—are deserving of favoritism and either refuse to label the relationship "confidential," or, more frequently, admit that it was confidential but nevertheless do not impose a presumption of undue influence. Conversely, courts will invalidate wills that disinherit children who have been available and supportive of their parents. For example, in *In re Estate of Tipp*, 933 P.2d 182 (Mont. 1997), the court upheld the lower court's rejection of an undue influence claim brought by one of the testator's daughters, when the will left the testator's house to another daughter, Sylvia, who had cared for her mother after she was diagnosed with cancer and broke a hip. The court admitted that Sylvia and her mother shared a confidential relationship, and that due to the testator's weakened mental condition, Sylvia had had the opportunity to exercise undue influence. *See id.* at 184-85. The contestant also proved that the testator depended entirely upon Sylvia to manage her finances and for transportation, and the testator's first will had treated her children equally. *See id.* at 185-86. The contestant alleged that the testator had changed her will in response to Sylvia's threat to institutionalize her if she did not and emphasized that Sylvia had twice driven her mother to her attorney's office for the purpose of changing the will. *See id.* at 183, 186. In rejecting the claim of undue influence, the court emphasized evidence that showed that the testator and Sylvia had become "increasingly close" and that the will could be understood as the testator's expression of gratitude for Sylvia's care. *Id.* at 186. Perhaps

2. Formalities

Although the principal objective of will formalities is to ensure that a document offered for probate embodies the testator's final intentions,[183] will formalities statutes do not expressly direct courts to consider the testator's intention.[184] Rather, courts must simply ensure that the proffered will complies with formalities.[185] Commentators have worried that courts have approached this task rather too formalistically—that documents intended by their drafters to be wills too often are denied probate for some trifling technicality.[186] Some courts have responded to those scholars'

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more importantly, the court highlighted the testimony of the testator's hospice worker that the testator had desired to stay in her home as she suffered from cancer and that the testator and Sylvia had made an agreement that the testator would "leav[e] her home to Sylvia in exchange for taking care of her until she died, whether it was tomorrow or, you know, five years from now." *Id.* The court also pointed to evidence that the testator's other children had refused to care for her in the way she had requested. *See id.* Accordingly, the court concluded that the will was not "unnatural." *Id.*

183. *See, e.g.*, Langbein, *Excusing Harmless Errors*, *supra* note 1, at 3 (restating the accepted wisdom that formalities are justified on functional grounds because they ensure implementation of the testator's final, deliberate intentions).

184. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 1998) (dictating the requirements for a validly executed will).

185. *See id.*

186. John Langbein laments that courts void potential wills for "[t]he most minute defect in formal compliance . . . no matter how abundant the evidence that the defect was inconsequential." Langbein, *Substantial Compliance*, *supra* note 1, at 489. Professor Bruce Mann states that "[c]ourts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator." Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994). Indeed, a review of writings on this subject shows that the dominant theme of estates law scholarship in the last few decades is the threat that formalism allegedly poses to testamentary freedom. *See* Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 635 (1992) ("Unfortunately, as has long been recognized, the doctrines created to serve the testator's wishes have the potential to undercut them. Will execution requirements . . . may deny effect to wishes due to minor defects in form."); Celia Wasserstein Fassberg, *Form and Formalism: A Case Study*, 31 AM. J. COMP. L. 627, 649-51 (1983); Gulliver & Tilson, *supra* note 1, at 17-18 (noting that "[d]octrinal barriers to the effectuation of intent are raised most frequently by the requirements of the statutes of wills" and arguing for a substantial performance approach to will construction); J. Rodney Johnson, *Dispensing with Wills Act Formalities for Substantively Valid Wills*, 18 VA. B. ASS'N J., Winter 1992, at 10, 13 (recommending that the Virginia legislature pass a dispensing power statute); Lindgren, *supra* note 1, at 546 (arguing that attestation requirements should be abolished because "[t]he law should set requirements at a level that tends to enforce the testator's intent, not frustrate it"); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1010 (1992) (arguing for an even greater reduction of formalities than are present in the revised UPC because "when formalism falls, intent rises"); Mann, *supra* note 1, at 39 (criticizing courts for "routinely invalidat[ing] wills because of minor defects in execution, even when no one questions that the will represents the wishes and intent of the testator"); J.K. Maxton, *Execution of*

concerns by announcing that they will validate wills that "substantially comply" with formalities when testators' intent is clear and convincing.[187] Toward the same end, scholars recently drafted Uniform Probate Code section 2-503 (known colloquially as the "dispensing power"), which would authorize courts to excuse non-compliance with formalities so long as evidence that the document was intended to operate as the testator's will is clear and convincing.[188] The dispensing power has been adopted in only a few states to date.[189] Scholars have predicted that the substantial compliance doctrine and statutory dispensing powers will substantially reduce judicial rejection of wills for trivial defects and will result in the validation of a greater number of wills.[190]

Probate courts, however, have not been as obsessed by

Wills: The Formalities Considered, 1 CANTERBURY L. REV. 393, 412-14 (1982); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 354-57 (1979) (criticizing strict construction and advocating their own statutory solution that would allow courts more discretion in validating wills); Rosemary Tobin, *The Wills Act Formalities: A Need for Reform*, 1991 N.Z. L.J. 191 (arguing for the adoption of the dispensing power in New Zealand to ensure effectuation of testamentary intent); Lydia A. Clougherty, Note, *An Analysis of the National Advisory Committee on Uniform State Laws' Recommendation to Modify the Wills Act Formalities*, 10 PROB. L.J. 283, 283-84 (1991) (suggesting new execution requirements to minimize the "risk of frustrating the testator's intent"); Kelly A. Hardin, Note, *An Analysis of the Virginia Wills Act Formalities and a Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1178-81 (1993) (arguing that the dispensing power is necessary to effectuate testamentary intent); Melissa Webb, Note, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904 (1983) (urging the legislature of Texas to adopt a substantial compliance statute governing will construction); *see also* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 33.1 cmt. g (1992) (noting that law reform organizations, some legislatures, and commentators support the use of a harmless error rule and recommending the use of the substantial compliance doctrine). *See generally* Langbein, *Excusing Harmless Errors*, *supra* note 1, at 51-54 (arguing for adoption of the dispensing power).

187. *See, e.g., In re* Will of Ranney, 589 A.2d 1339, 1343 (N.J. 1991); *see also* Langbein, *Substantial Compliance*, *supra* note 1, at 531 (urging courts to adopt the substantial compliance doctrine in will formalities disputes).

188. *See* UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 146 (Supp. 1998); *see also* Langbein, *Excusing Harmless Errors*, *supra* note 1, at 51-54 (arguing for the adoption of the dispensing power).

189. *See* COLO. REV. STAT. § 15-11-503 (1998); MONT. CODE ANN. § 72-2-523 (1997); S.D. CODIFIED LAWS § 29A-2-503 (Michie 1997).

190. For example, James Lindgren predicts that "[t]his new standard will change the outcome of the majority of cases involving will execution errors." Lindgren, *supra* note 186, at 1016. Professor Bruce Mann believes that the dispensing power will "restore[] a measure of candor to the process of determining the formal sufficiency of testamentary writings." Mann, *supra* note 186, at 1040. Langbein predicts that "[t]he cruelty of the old law" will disappear and testamentary freedom will presumably reign supreme. Langbein, *Excusing Harmless Errors*, *supra* note 1, at 1.

formalities as these scholars suggest.[191] As far back as the turn of the last century, some courts were willing to excuse less than strict compliance with will formalities.[192] Even within the same jurisdiction, judicial commitment to strict construction has ebbed and flowed noticeably.[193] Moreover, even in jurisdictions with no precedential support for substantial compliance, courts have achieved the same result by heroically stretching to recognize compliance.[194] The "problem," such as it is, is not simply that a number of judges are overly formalistic. Rather, the constant flux of formalities law is, in considerable measure, a product of the judicial struggle to support the reciprocity norm.

Admittedly, formalities cases are difficult to analyze for my purposes. Because the "official" objective is merely to ascertain whether the will was properly executed, most opinions leave out facts that are important to my analysis. Often, we know little more than the identity of the parties to the contest. Nevertheless, the little evidence we do have suggests that courts are mindful of reciprocity, and that the identity of the beneficiary, the quality of the relationship between testator and beneficiary, and the quality of the relationship between testator and contestant continue to influence courts' willingness to allow less than strict compliance with formalities. That is, courts require strict adherence to formalities, so long as doing so does not violate social norms that compete with free testation.[195] At the same time, courts are more willing to stretch formalities or allow substantial compliance when doing so better honors those norms.[196]

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191. *See* Leslie, *supra* note 118, at 258-68.

192. *See id.* at 262-64 & n.120.

193. *See id.* at 260-62 (discussing Texas law and the "witness presence" requirement); *id.* at 264-65 (discussing Michigan law, the "witness presence" requirement, and the substantial compliance doctrine); *id.* at 266 (discussing Illinois law and the signature requirement).

194. *See, e.g., id.* at 261-63 (discussing *Nichols v. Rowan*, 422 S.W.2d 21 (Tex. Civ. App. 1967, writ ref'd n.r.e.)).

195. *See id.* at 258-68.

196. *See id.* For example, even though Michigan's highest court applied the "substantial compliance" approach to wills formalities beginning in 1890, *see* Cook v. Winchester, 46 N.W. 106, 109 (Mich. 1890); *In re* Lane's Estate, 251 N.W. 590, 593 (Mich. 1933), two later cases, *see In re* Estate of Hill, 84 N.W.2d 457, 461 (Mich. 1957); *In re* Cytacki's Estate, 292 N.W. 489, 490-91 (Mich. 1940), disregarded that precedent, striking down wills for failing to strictly comply with the requirement that witnesses sign in the same room as the testator. In both *Cook* and *Lane*, the court upheld wills when the witnesses had signed well out of the testator's presence: In *Cook*, a witness signed the will in a separate room of the house, and the court conceded it had been "physically impossible" for the testator to see the witness. *Cook*, 46 N.W. at 107. In *Lane*, a witness signed in the corridor of a hospital, 30 feet from the testator's hospital room. *See Lane*, 251 N.W. at 591. Notwithstanding this precedent, courts in two later cases with

substantially similar facts demanded strict adherence to the presence requirement and invalidated wills, even though neither case raised an inference of fraud. *See Hill*, 84 N.W.2d at 461 (invalidating a will because one witness signed in a room next to testator); *Cytacki*, 292 N.W. at 490-91 (invalidating a will when the witness signed it in a house next door, nine feet away). In both later cases, the disinherited contestant was the testator's mother. *See Hill*, 84 N.W.2d at 459; *Cytacki*, 292 N.W. at 490. In striking down the wills to provide for the testators' mothers, the courts disregarded the testators' intentions. By invoking the necessity of strict compliance, they were able to justify doing so, because intent has no place in the analysis. For an extended discussion of this line of Michigan cases, see Leslie, *supra* note 118, at 264-65.

In *In re Demaris' Estate*, 110 P.2d 571 (Or. 1941), the Oregon Supreme Court determined that the witness presence test was met when witnesses had signed the will out of the testator's sight in a room located several rooms away from where the testator was located. Here, the court's concern for fairness as informed by the reciprocity norm was clear: The testator's will devised his entire estate to his sister Ida, whom the court characterized as having treated the testator "throughout her entire life . . . [with] tireless devotion." *Id.* at 578. Failure to validate the testator's will would have been disastrous for Ida. Under the intestacy statutes, the testator's entire estate would have been distributed to the testator's father's estate (the father had briefly outlived the testator). *See id.* at 573. Father and Ida were estranged, and his will disinherited her. *See id.* It is clear that the court's willingness to embrace wholeheartedly the doctrine of substantial compliance was motivated by its view of Ida as deserving:

> It is true that her brother and sisters are honest, industrious and splendid law-abiding citizens; but in sickness and distress, in good times and bad, she was the one who was always ready to sacrifice her own time and energy, whenever the testator, her brother, needed help. When he was sick, no matter where she might be, she was the one who was called upon to return, and care for him. Freely and gladly she answered the call and nursed him back to health. . . . [The testator] chose the honorable course, and it was only to be expected, that when he was stricken, and on his death-bed, and no doubt with a foreboding that he was approaching the end, his thoughts should turn towards his sister, who had been so unselfish and devoted to him.

Id. at 579. The fact that the court included that stirring account of the testator's relationship with his sister, despite its supposed irrelevance, indicates that the court found justification for its departure from strict construction because it viewed the sister as deserving. The key to the case is not that the court was determined to effect the testator's intent, but that it was determined to effect the testator's intent *because it was in accordance with social norms.*

Other "witness presence" cases reinforce the inference raised by the Michigan and Oregon cases. *See, e.g., In re* Tracy's Estate, 182 P.2d 336, 337 (Cal. Ct. App. 1947) (following *Demaris* in recognizing a valid revocation of a will in favor of a third party even though the witnesses signed in a different room, resulting in the distribution of the testator's estate to her husband); *In re* Estate of Weber, 387 P.2d 165, 166-68, 170 (Kan. 1963) (disregarding precedent stating that substantial compliance with formalities was sufficient and holding a will invalid when witnesses signed inside a bank and could *see* the testator, who remained in a car, through the window but could not hear him; the invalid will had mistakenly left the testator's entire estate to his niece, though the testator had meant to leave half to his niece and half to his incompetent wife—invalidation of the will passed the entire estate to his wife); *In re* Will of Pridgen, 249 N.C. 509, 510-12, 516, 107 S.E.2d 160, 161-62, 165 (1959) (recognizing a will leaving an entire estate to the testator's wife as properly executed, even though a witness admittedly signed the will in an adjoining room out of the testator's sight, when rejection of the will would have required the testator's wife to share the estate with the testator's two sisters and eight nephews and

Neither the growing acceptance of the substantial compliance doctrine nor enactments of the dispensing power has changed the way courts approach wills cases. Rather, those devices have made it easier for courts to enforce compliance with the reciprocity norm. When the testator's intent accords with the norm, a court will validate the will. But when a will appears to disappoint the reliance-based expectations of family members, a court will be likely to invalidate it on the ground that the defective document does not represent the testator's true intent.

Two recent cases, *Draper v. Pauley*[197] and *In re Estate of Brooks*[198] are illustrative. In *Draper*, the court invoked the substantial compliance doctrine to validate a will that fulfilled the testator's reciprocally-based obligations. In *Brooks*, the court could have validated a will with similar defects by applying the state's recently enacted dispensing power statute. Instead, the court invalidated the will, and the testator's estate was distributed in equal shares to her children, both of whom had active relationships with the testator.

In *Draper*, the elderly testator had lived with her niece, Patricia Pauley, and her family for a number of years.[199] The niece took care of her aunt's needs. During the last year of the testator's life, she was hospitalized.[200] When Pauley visited her at the hospital, the testator stated that she wanted to make out a will.[201] She called into her room a hospital employee who was also a notary.[202] First, the testator signed two pieces of blank paper and had the notary notarize her signature.[203] Then, the testator handed the blank, signed sheets to Pauley and dictated that upon her death Pauley should have the house.[204] When Pauley finished writing, she read it back to the testator, who stated that the document was exactly as she wanted it. Another visitor then signed her name next to the notary public's signature.[205] Thus, the document contained the signatures of the

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nieces); Taylor v. Estate of Taylor, 770 P.2d 163, 164-67 (Utah Ct. App. 1989) (determining that a document forgiving the testator's brother's debt to the testator did not substantially comply with formalities, when giving effect to the document would have deprived the testator's wife and children of estate assets).

197. 480 S.E.2d 495 (Va. 1997).
198. 927 P.2d 1024 (Mont. 1996).
199. *See Draper*, 480 S.E.2d at 495.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.* at 496.
204. *See id.*
205. *See id.*

testator and the notary, both of which were affixed prior to the drafting of the dispositive provisions of the will, and the signature of only one witness.

At the testator's death, Pauley offered the will for probate. The will was contested by the testator's two sons, who attacked the will as invalid for failure to comply with formalities.[206] The sons argued that the notary's signature could not satisfy the attestation requirement because it was affixed to the paper before it was a will. Because there was only one witness, they argued, the will could not be admitted to probate.

In affirming the trial court's admission of the will, the Virginia Supreme Court emphasized that the wills statute "is not intended to place restraints on the power to execute a will but to guard and protect that power. It should not be interpreted in a manner which imposes unnecessary difficulties that adversely affect the ability to exercise the power."[207] First, the court held that the testator's name was intended to be a signature, even though it was affixed prior to the will's drafting.[208] Then, invoking the doctrine of substantial compliance, the court held that Pauley's name, written by Pauley in the text describing Pauley as the beneficiary, could be counted as a witness signature.[209] Thus, the will was admitted to probate and the testator's sons went home empty-handed.

Draper is clearly a case in which a court was willing to struggle to uphold the will, whatever the doctrinal obstacles. First, the evidence gives rise to a strong inference that the testator intended that her niece have the house. Perhaps more importantly, her niece *deserved* it. The testator and her niece had a close, trust-based relationship upon which they had both relied. Pauley gave thirty years of support to the testator in reliance on that relationship. Moreover, Pauley also cared for the testator's retarded brother for the same length of time, and she continued to take care of him after the testator's death.[210] In contrast, the testator's sons had abandoned her[211] and could not, by any stretch of the imagination, have had a reciprocity-based

206. *See id.*
207. *Id.*
208. *See id.*
209. *See id.*
210. *See* Brief of Appellee at 1-3, Draper v. Pauley, 480 S.E.2d 495 (Va. 1997) (No. 960761).
211. As the first paragraph of the "Statement of Facts" section of the beneficiary's appellate brief emphasizes, the testator had lived with the beneficiary for 30 years and had seen her sons no more than five times during that entire period, nor had she spoken to them on the telephone. *See id.* at 1.

expectation of inheritance or taken actions in reasonable reliance on the prospect of inheritance. Given the equities of the case, the court would have strained to reach the same result if it had arisen fifty years earlier.

By contrast, in *In re Estate of Brooks*,[212] the Montana Supreme Court refused to invoke that state's dispensing power to save a will when probating the will would have disappointed a disinherited child's reasonable reciprocity-based expectations. In *Brooks*, the court upheld the trial court's denial of probate of Kay Brooks's will because it had only one witness signature. The facts regarding the will's execution are strikingly similar to those in *Draper*. The will's primary beneficiary drafted the will as the testator dictated it, and a mutual friend served as witness.[213] The wills in both *Draper* and *Brooks* had the signature of only one witness and of a notary who could not properly qualify as a required second witness. While the notary in *Draper* failed to qualify as a witness because she notarized the testator's signature before the will was drafted, the notary in *Brooks* could not serve as a witness because she notarized the testator's signature at the beneficiary's request and outside the testator's presence. The court so held despite the fact that the notary had known the testator for thirty years, knew her signature well, and thus felt comfortable notarizing testator's signature at the request of testator's son.[214] As a matter of formalities, the only significant distinction between the cases was that the beneficiary in *Brooks* later typed the will and thus deprived himself of the argument that his name in the body of the will served as a witness signature.[215]

Montana is one of the few states to have enacted a version of the dispensing power.[216] Thus, the Montana Supreme Court did not have to consider whether the will "substantially complied" with formalities. Rather, the court was authorized to overlook completely non-compliance with one or more formalities, so long as the will's proponent proved, by clear and convincing evidence, that the testator intended that the document be her will.[217]

The *Brooks* court refused to invoke the dispensing power. The court first determined that the dispensing power put the burden on

212. 927 P.2d 1024 (Mont. 1996).
213. *See id.* at 1025.
214. *See id.* at 1025-26.
215. *See id.*
216. *See* MONT. CODE ANN. § 72-2-523 (1997); *see also supra* note 189 (listing states that have enacted the dispensing power).
217. *See Brooks*, 927 P.2d at 1027 (interpreting MONT. CODE ANN. § 72-2-523).

the will's proponent to prove intent by clear and convincing evidence. The court then held that the beneficiary failed to meet that burden because he could not prove to the court's satisfaction that the testator had testamentary capacity.[218] Although the beneficiary had had the foresight to tape his drafting session with the testator, the tapes ultimately worked against him—the court found sufficient evidence of lack of capacity in the following exchange:

> [Son-beneficiary]: You own stock in Ford Motor Company and stock in Australia New Zealand Bank.
>
> Testator: I do? (laughs).[219]

When asked how she wanted to "handle" this stock, testator stated: "I am no good at that kind of thing. I have no idea."[220] Her will also directed that certain personal property be given to her daughter's family, even though she had already given it to them. From this, the court concluded that "Kay 'did not know what property she had and which would be disposed of by her will.' "[221] In addition, her doctor had noticed that over the past year she had become increasingly more forgetful.[222]

The key distinction between *Draper* and *Brooks* concerns the quality of the relationships between the testator and the child-contestant. In *Brooks*, the testator's daughter by all accounts seemed dutiful.[223] Although she lived in Washington state, the daughter brought her mother to live with her for a one-year period following her father's death and for intervals thereafter.[224] The court noted that after the testator was placed in a nursing home in Montana, the daughter-contestant drove once a month from Spokane to visit her mother.[225] Thus, the daughter had made substantial sacrifices to benefit her sick mother.

There is good reason to think, however, that the testator meant to leave her home only to her son rather than to confer joint ownership on both children. First, her son lived with her for most of

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218. *See id.* at 1029.
219. *Id.* at 1028.
220. *Id.*
221. *Id.* (quoting the lower court record).
222. *See id.* The court's capacity analysis in *Brooks* stands in marked contrast with that found in *In re Estate of Bodin*, 398 P.2d 616 (Mont. 1965), in which the Montana Supreme Court rejected a lack of capacity challenge to a will, despite evidence showing that the 79-year-old testator was sick, in pain, and under the influence of medication, which left her confused, forgetful, and uncommunicative. *See id.* at 619, 621.
223. *See Brooks*, 927 P.2d at 1025.
224. *See id.*
225. *See id.*

his adult life and continued to live in his mother's home after his mother went to the nursing home.[226] The mother might reasonably have wanted him to be able to continue to live in the home without dealing with a co-tenant. Most significantly, the court cryptically alluded to a disagreement between son and daughter about the "disposition of the family home," which had resulted in ill feelings between the siblings.[227] It was thus entirely possible that the testator thought a co-tenancy arrangement would not work. Moreover, the facts indicate that the son was quite attentive, although his business called him out of town with some frequency. In fact, the son visited his mother in the nursing home every single day when he was not out of town on business.[228] Additionally, it is clear that the testator did provide for her daughter to some degree, although the court's opinion neglects to give specifics.[229] As a result of the court's decision, the siblings received equal interests in the family home.

Draper and *Brooks*, taken together, suggest that the best predictor in formalities cases is the quality of the relationship between the testator and the contestant. Moreover, these cases are not aberrational.[230] A much broader survey of the case law would lead to the same conclusion.[231] When the contestant has acted in accordance with social norms, providing care and services to the testator, and can be viewed as having a claim akin to reliance, the court is more likely to invalidate the will.

IV. RECIPROCITY AND RELATIONSHIPS IN CONTRACT DOCTRINE

Courts considering wills cases support and reinforce the norms governing social relationships. They implicitly reject a view of testamentary transfers as unilateral. Rather, testamentary transfers are conceptualized as the last "gift" in an on-going, reciprocal,

226. *See id.*

227. *Id.*

228. *See id.*

229. *See id.* Strangely, the court mentioned that the testator previously had executed a will, but did not indicate what the provisions of that will were; it also neglected to distribute the estate in accordance with that will after denying probate to the second will, instead passing the property via intestacy. *See id.*

230. *See, e.g., In re* Will of Ranney, 589 A.2d 1339, 1340-45 (N.J. 1991) (applying the substantial compliance doctrine to validate a will when witnesses had signed only the self-proving affidavit; the will divided the estate between testator's children from his first marriage, his second wife, and various charities); *In re* Estate of Voeller, 534 N.W.2d 24, 26 (N.D. 1995) (rejecting the argument that a will with one witness "substantially complie[d]" with the wills statute, when the will left a large share of the estate to a neighbor to the detriment of the testator's five children).

231. *See, e.g., supra* note 196 (discussing cases).

interdependent relationship founded on trust.

It should not strike us as unusual that courts take this approach, for it mirrors the approach that courts take to relational contracts in business settings. A review of the current state of contracts law shows that, in this area, courts have rejected a bright-line distinction between gift and exchange, and that they support existing norms by enforcing gratuitous promises, often without proof of reliance.[232] In contracts law, as well as in wills law, courts understand that the more interdependent the relationship, the less likely are the parties to spell out and expressly agree upon the shifting obligations and benefits of their relationship. The norms of the relationship, interpreted against the backdrop of relevant societal norms, inform the parties' understanding of their agreement. Often, promises that, considered in isolation, might be termed "gratuitous" can be seen as exchange-based when considered in context. The "exchange" is not the prototypical discrete transaction; rather, the promise is made in furtherance of a reciprocal, long-term, trust-based relationship from which the promisor will later derive benefits.

A survey of recent contracts scholarship reveals strong evidence that courts are increasingly willing to enforce such "gratuitous" promises when those promises are grounded in reciprocity. Scholars argue that "gratuitous" promises invoke reciprocity in two ways. First, promisors often obtain benefits from the very act of promising. Second, promises often serve to initiate or fortify mutually beneficial long-term relationships.

Andrew Kull has argued that courts often enforce purely gratuitous express promises, notwithstanding rhetoric to the contrary, even when the promisee cannot prove consideration, detrimental reliance, or unjust enrichment.[233] Professor Kull argues that

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232. *See infra* text accompanying notes 250-90.

233. *See* Kull, *supra* note 5, at 40-46. Professors Yorio and Thel also demonstrate that courts enforce gratuitous promises even absent reliance, although they cite this phenomenon as evidence that the promissory basis of contracts law continues to thrive. *See* Yorio & Thel, *supra* note 9, at 114-15. An integral theme of the arguments both of Kull and of Yorio and Thel is that courts enforce only those gratuitous promises that are clearly made and seriously intended. *See* Kull, *supra* note 5, at 43-44; Yorio & Thel, *supra* note 9, at 113. I question their insistence that courts always require express, clear promises as a prerequisite to enforcement. In my view, courts do enforce less than clear promises if the surrounding circumstances, including the norms of the relationship in which the promise was made, would reasonably lead a promisee to infer a promise. That is, what is important to courts is not necessarily the force or clarity with which a representation is made, but whether, given the relationship between the parties, the promisee was reasonable both in interpreting the promisor's actions and representations as a promise and in relying on that promise, and whether the promisor generated a

enforcement is justifiable because even apparently "gratuitous" promises generate reciprocal benefit for the promisor, even if that benefit does not fit within traditional definitions of "consideration."[234] As Kull states, "[a] person makes a promise, gratuitous or compensated, because he derives a benefit (altruistic or otherwise) from the promisee's greater certainty of expectation."[235] Further, the ability to make an enforceable gratuitous promise enables the promisor to obtain the benefit of that promise at a lower cost than he would otherwise have to bear.[236] Kull argues that an understanding of gratuitous promises as conferring a reciprocal benefit on the promisor underlies decisions enforcing gratuitous promises, even though courts sculpt their rationales into accepted doctrinal shapes such as promissory estoppel or consideration.[237]

Professors Farber and Matheson document enforcement of gratuitous promises that have induced no provable detrimental

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benefit by making those representations. *Cf.* Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 905-06 (1987) (arguing that a promisor will be liable if certain factors, e.g., the parties' involvement in a trust-based relationship, prevented the parties from formalizing a contract and "a plausible benefit to the promisor can be identified").

234. *See* Kull, *supra* note 5, at 59-62. *But see* Joseph Raz, *Promises and Obligations*, *in* LAW, MORALITY, AND SOCIETY 210, 213-14 (P.M.S. Hacker & Joseph Raz eds., 1977) (arguing that it is wrong as a matter of analysis to say a necessary condition to a promise is that a promisor must receive, or expect to receive, a benefit).

235. Kull, *supra* note 5, at 57; *see also* Posner, *supra* note 40, at 412-13 (arguing that, in certain situations, the ability to make a legally enforceable promise generates utility for the promisor by "increasing the present value of an uncertain future stream of transfer payments").

236. *See* Kull, *supra* note 5, at 61. Kull states that "a person will normally give no assurances beyond those necessary to induce the desired level of reliance or expectation in his listeners. The context of gift normally requires a lower level of warranty than the context of bargain." *Id.* Kull also suggests that the ability to promise may have been the promisor's only tool for achieving his ends in a particular instance. *See id.* at 62. Richard Craswell also acknowledges that the promisor obtains a benefit from the act of promising and argues that one important benefit is that it induces an efficient level of reliance. *See* Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 483, 487-94 (1996).

237. *See* Kull, *supra* note 5, at 40-46. Kull excludes from his rule promises that are not intended to be legally enforceable and mentions "intra-familial" promises as an example of such promises. *See id.* at 40 n.3. He notes that courts traditionally have been less inclined to enforce *express, written* gratuitous promises within the family context and acknowledges that those cases present a problem for his thesis. *See id.* at 45 n.23. I contend that courts are reluctant to discuss familial obligations in contract terms because commodification of those relationships would devalue them. I do, however, argue that courts deciding wills cases routinely enforce *implied* promises in the family context, because the construct of wills law permits enforcement without the necessity of resorting to contract concepts. *See infra* Part V.

reliance.[238] They suggest that the key to modern promissory estoppel doctrine lies in an examination of the context in which the words and actions allegedly giving rise to liability occurred.[239] They claim that courts enforce seemingly gratuitous promises—promises made without consideration and that do not inspire detrimental reliance—if the promises are made in the context of a continuing relationship that requires a high level of mutual confidence and trust.[240] A rule of enforcement in those circumstances lowers transaction costs and encourages relationships that are economically beneficial to both the parties and to society as a whole.[241]

Like Kull, Farber and Matheson believe that courts understand that promisors sometimes benefit from the mere making of the promise.[242] Farber and Matheson assert that the key to determining whether a court will impose liability is whether the promisor incurred an "economic benefit" from the very act of making the promise.[243] For instance, they rely on *Pine River State Bank v. Mettille*,[244] in which

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238. *See* Farber & Matheson, *supra* note 3, at 910-14, 920-24.

239. *See id.* at 928-29. The authors demonstrate that "the cases in which courts have pushed the doctrine of promissory estoppel beyond its stated justification ... involve relationships in which one party must depend on the word of the other to engage in socially beneficial reliance." *Id.* at 928; *see also* Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 506-07 (1983) (arguing that one explanation for the expansion of promissory estoppel is that the doctrine is "an outgrowth of a more interdependent, community oriented moral climate"); Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 929 (1982) (book review) ("The relationship, with its normative implications, provides the code by which actions and omissions are interpreted and their normative significance established. An act has different normative implications depending on its social context.").

240. *See* Farber & Matheson, *supra* note 3, at 925.

241. *See id.* at 925-30. Taking this trend to its logical extreme, Jay Feinman has urged a new approach to promissory estoppel, one that would focus its analysis on the obligations and entitlements created by the particular relationship at issue. He argues that analyzing promissory estoppel cases with an understanding of the dynamics of interdependent relationships would eliminate the problematic aspects of the doctrine while maintaining its objective of supporting and regulating productive exchange behavior in society. *See* Feinman, *supra* note 20, at 312-15. Feinman stops short of analyzing whether "donative promises" made in the family context would be enforceable under his model. *See id.* at 313.

242. *See* Farber & Matheson, *supra* note 3, at 920-25.

243. *See id.* at 922. According to Farber and Matheson:

> It is not surprising to find courts imposing liability when the defendant has made a promise in the expectation of receiving an economic benefit from the plaintiff.... [B]reach of a promise seems especially unjust when the promisor was willing to reap economic benefits from the promise but not to pay the price.

Id.

244. 333 N.W.2d 622 (Minn. 1983). The court in *Pine River* awarded damages for breach of contract to an employee who was discharged in violation of the procedural

the court enforced a promise by an employer to an employee even though the only "consideration" given by the employee was his continued appearance at work after the employer made the promise.[245] Farber and Matheson argue that, in cases like *Pine River*, courts draw " 'inferences of reciprocity' "[246]—clearly, the employer intended to benefit in some way from the promise, whether through increased production or improved morale, or by the reactions of parties other than the promisee.[247] Even though the employer's promise was not part of a discrete exchange in which the employee provided reciprocal consideration, Farber and Matheson argue that the promise did create reciprocal benefits within the interdependent relationship that was the backdrop for the promise.[248] They argue that courts require only these reciprocal benefits—not traditional consideration or reliance by the promisee—for enforcement of promises.[249]

Recently decided cases confirm both the views of Kull and of Farber and Matheson. For example, in *Schonholz v. Long Island Jewish Medical Center*,[250] the Second Circuit reversed the trial court's grant of the defendant medical center's motion for summary judgment in an action by an officer of the hospital who claimed that she had relied to her detriment on the hospital's "promise" to pay certain severance benefits.[251] The hospital had requested the officer's resignation because she was constantly at odds with the hospital's chairman. The officer orally agreed to resign.[252] In a subsequent letter, the hospital's president confirmed the officer's impending resignation and noted that "[o]f course, the terms of your severance will be governed by the [Long Island Jewish] Medical Center personnel policies ... including the Severance Pay Program ....

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safeguards outlined in the employee handbook because the employee's "continued performance despite his freedom to leave" equaled both acceptance of the employer's "offer" and consideration. *Id.* at 626-27.

245. *See* Farber & Matheson, *supra* note 3, at 920 (citing *Pine River*, 333 N.W.2d at 629).

246. *Id.* at 921 (quoting Goetz & Scott, *supra* note 36, at 1308).

247. *See id.* at 924-29.

248. *See id.* at 925-26 ("In the context of ongoing relationships, exchange is a continuing rather than a discrete event. Where such relationships are highly interdependent, economic benefit is likely to be sought through informal understandings that reinforce the relationship, rather than through discrete bargains." (footnote omitted)).

249. *See id.* at 925-28.

250. 87 F.3d 72 (2d Cir. 1996).

251. *See id.* at 79-80.

252. *See id.* at 74.

Please arrange to meet with the Vice-Presidents of Finance and Human Resources to discuss ... the details."[253] The officer subsequently formalized her resignation in writing. Shortly thereafter, the Board voted to rescind the Severance Plan. The trial court dismissed the officer's promissory estoppel action as "without merit as a matter of law."[254]

Reversing, the Second Circuit held that a single fact was sufficient to defeat the hospital's summary judgment motion: The officer had written the formal resignation letter *after* the alleged promise to pay severance benefits was made.[255] Although the hospital was "free to terminate the Severance Plan at any time absent any promise to vest [the officer], that fact alone is not enough to defeat [the officer's] claim."[256] Even though the hospital had in fact not promised to vest the officer's benefits, the court held that the officer detrimentally relied on the "promise," even though that "promise" was made *after* the employee had orally agreed to resign and before the president had made any reference at all to the possible payment of severance benefits.[257]

From the court's recitation of facts, it is clear that the hospital gave the employee the option to resign as an alternative to being fired.[258] The trial court must have reasoned that she would have resigned, no matter what the severance terms, rather than be fired; it rejected plaintiff's promissory estoppel claim because the plaintiff "could not demonstrate any injury."[259] In reversing on that question, the Second Circuit did not emphasize the reliance of the officer. After all, because the officer had already agreed to resign, she could not very well argue that she resigned in reliance on the availability of the subsequently offered severance package. Instead, the Second Circuit emphasized the perceived *benefit* that the hospital received from the officer's formal letter of resignation.[260] The officer's resignation benefited the hospital because it saved the hospital the trouble of firing the employee, the court reasoned, and the officer gave up the "power to withhold that benefit" when she voluntarily

253. *Id.*
254. *Id.* at 75.
255. *See id.* at 79 (stating that "[the officer's] submission of her resignation just four days after the December 18 letter is, by itself, enough to create a triable issue as to reliance").
256. *Id.*
257. *See id.* at 74.
258. *See id.* at 74-75.
259. *Id.* at 77.
260. *See id.* at 79-80.

resigned.[261] The court concluded that it was that "possibility of loss" that the jury should be permitted to consider.[262] Thus, the court recognized an enforceable promise even absent provable reliance when a promise both reinforced an interdependent relationship (as did the promise implicit in the severance plan that was thereafter terminated) and conferred additional benefits on the promisor (as did the employer's "promise" to comply with the severance plan). Other recent cases are in accord with this reasoning.[263]

Thus, courts often impose obligations based on promises made in the context of interdependent relationships, even absent proof of actual, detrimental reliance. But even more startling is that some courts have awarded recovery in the name of promissory estoppel even absent proof of an express promise.[264] Courts analyzing a promise made in the context of an interdependent relationship do not, as one might expect, concentrate solely on whether the promisor made a definite promise. Rather, they also examine the context in which words and actions occurred to determine whether the alleged promisee reasonably *interpreted* words and actions as a promise. According to Farber and Matheson, "[t]he less formal the parties' actions, the greater must be the court's attention to their context."[265] The parties' words and actions must then be considered from an objective standard: What expectations would have been "likely to arise between similarly situated parties"?[266] Thus, a doctor's

261. *Id.* (surmising that "firing [the officer] might have affected employee morale at LIJ and could have led to a very abrupt and turbulent transition from [the officer] to a new Chief Operating Officer").

262. *Id.* at 80.

263. For example, in *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 532 N.W.2d 594 (Minn. Ct. App. 1995), the court ruled in favor of a teacher who sued his retirement fund association for rejecting his application to purchase retirement service credits for a two-year period when he worked for the Peace Corps. *See id.* at 595. The teacher first requested the credits some years after serving and was told that he could purchase those credits by a certain date. *See id.* A reasonable inference that could be drawn from the letter was that he could purchase the credits after the date, for an increased sum. The teacher declined to purchase the credits because he lacked the funds. *See id.* at 596. Some 15 years later he decided to purchase the credits, at which time his application was denied. *See id.* The court of appeals reversed an agency determination dismissing his claim, determining that the teacher's decision to defer purchase for 15 years was in reliance on the agency's promise to allow him to purchase after the deadline, even though the court itself admitted that his decision to forego purchase initially was based on the fact that he had insufficient funds. *See id.* at 597-98.

264. *See, e.g.*, Farber & Matheson, *supra* note 3, at 916-17; *infra* notes 269-86 and accompanying text.

265. Farber & Matheson, *supra* note 3, at 915.

266. *Id.* at 915 n.45. Remarking on the conclusory tone often adopted by courts, Farber and Matheson state:

reassurance to a patient after a tubal ligation that it was impossible for her to become pregnant was not a promise, but mere reassurance.[267] According to the authors, "[g]iven the common understanding that physicians generally do not give warranties, the court's conclusion was correct."[268]

Yet, in the context of a landlord-tenant relationship of long standing, a different court determined that a promise should be implied by conduct alone.[269] In *Wachovia Bank & Trust Co. v. Rubish*,[270] a landlord twice agreed to extend a lease on oral notice, despite a lease provision requiring the tenant to request renewals in writing.[271] The court held that the tenant, in giving oral notice a third time, had relied on an implicit promise that no written notice would thereafter be required.[272] Presumably, the court determined that, given the context of an ongoing, mutually beneficial relationship, the tenant could reasonably infer that he could trust the landlord to behave in accordance with prior conduct. Similarly, the court in *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*[273] construed a letter allowing a teacher to purchase retirement "credits" by December 31, 1975, or some "later date" as constituting a promise to allow him to purchase those credits some fifteen years later.[274]

These opinions support Ian Macneil's view that "promise" is but one component in contractual analysis, which may be given less weight than other factors when circumstances suggest that the parties' relationship gave rise to reasonable economic expectations.[275] The closer the relationship between promisor and promisee, the less

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> Judges called upon to determine whether a promise has been made must look beyond the words and acts which constitute the transaction to the nature of the relationship between the parties and the circumstances surrounding their actions.... The conclusory tone follows because we are being told what we ought already to understand as members of the community. It is inherent in the use of an objective standard—under both traditional contract and promissory estoppel theories of obligation—to determine whether a commitment was voluntarily made.

Id.

267. *See id.* at 915-17 & nn.47-50 (discussing *Garcia v. Von Micsky*, 602 F.2d 51, 52-53 (2d Cir. 1979)).

268. *Id.* at 916.

269. *See id.* at 917 & nn.56-57 (discussing *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982)).

270. 306 N.C. 417, 293 S.E.2d 749 (1982).

271. *See id.* at 429, 293 S.E.2d at 757.

272. *See id.*

273. 532 N.W.2d 594 (Minn. Ct. App. 1995).

274. *See id.* at 596-98; *supra* note 263 (discussing *Axelson* in greater detail).

275. *See* Macneil, *supra* note 8, at 734-35.

capable are the parties of reducing their understandings to express agreement[276]—thus, context is paramount.[277]

A particularly instructive example is *D & G Stout, Inc. v. Bacardi Imports, Inc.*[278] A local distributor inquired of Bacardi whether Bacardi would continue to use the distributor in the future.[279] Unbeknownst to Bacardi, the distributor sought the assurance because it was deciding whether to close its operations, sell the business, or continue with business as usual.[280] Bacardi responded to the inquiry by stating that *if* the distributor continued to meet Bacardi's sales expectations, and *if* there were no changes in market conditions, Bacardi would continue to use the distributor.[281] Ultimately, Bacardi decided to switch distributors based on information that the plaintiff distributor's prospects for viability were decreasing, information that the distributor later claimed was inaccurate.[282] Despite the clearly conditional nature of Bacardi's oral assurances, and Bacardi's ignorance of the distributor's reliance on those assurances, the court held that the assurances amounted to an enforceable promise.[283] In so holding, the court stressed the context in which the assurances were given:

> [T]he liquor distribution business traditionally had operated on an informal basis. Long term relationships were formed based on nothing more than a handshake. Bacardi and General had done business in this environment for years to the satisfaction of both, making it all the more reasonable for Bacardi to have expected General to rely on Bacardi's word, and for General to actually rely on it.... Nothing in the changes sweeping the liquor market ... suggested that the old rules were out the window, particularly with respect to a relationship of such long standing.[284]

276. *See* Goetz & Scott, *supra* note 3, at 1090-91 (noting that "reducing important terms of the arrangement to well-defined obligations" may be impracticable because of the parties' "inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance").

277. *See* Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983) (arguing that comprehending the contract involves understanding the context).

278. 805 F. Supp. 1434 (N.D. Ind. 1992).

279. *See id.* at 1439.

280. *See id.* at 1437-39.

281. *See id.* at 1439.

282. *See id.* at 1441-42.

283. *See id.* at 1444-45 (holding that "[t]he conditional or indefinite nature of the promise standing alone does not preclude an action under a promissory estoppel theory").

284. *Id.* at 1451.

In short, the distributor was justified in relying on Bacardi's assurances because it had developed a relationship of trust with Bacardi. Because of that background—a relationship within a business culture that emphasized trust—Bacardi should have assumed that its conditional promise would have been understood as a promise to deal fairly with the distributor.[285] The court's decision supports and validates reliance induced by trust, implicitly recognizing that trust is necessary to maximize the benefits of interdependent relationships that are beneficial to society as a whole. As Farber and Matheson note, when relationships are "highly interdependent, economic benefit is likely to be sought through informal understandings that reinforce the relationship, rather than through discrete bargains."[286]

Of course, other courts do not routinely enforce seemingly gratuitous promises.[287] But the existence of recent cases declining to enforce gratuitous promises does not necessarily undermine the strength of Farber and Matheson's observations. A finding of non-enforceability does not necessarily mean that a court reflexively applied classical doctrine; rather, it is probable that the court found that the *relationship* within which the promise was made was not sufficiently interdependent to give rise to reasonable inferences of reciprocity.[288] Promises made within the context of a relationship

285. In considering relevant business norms, the court understood that the relational contract was formed within "a minisociety with a vast array of norms beyond the norms centered on exchange and its immediate processes." Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 901 (1978).

286. Farber & Matheson, *supra* note 3, at 925-26.

287. *See, e.g.*, Dewein v. Estate of Dewein, 174 N.E.2d 875, 877 (Ill. App. Ct. 1961) (rejecting the plaintiff's claim because the plaintiff did not rely on the doctor's promise); Hayes v. Plantations Steel Co., 438 A.2d 1091, 1096 (R.I. 1982) (holding that the plaintiff's decision to retire was made prior to any promise by the employer, and so the plaintiff could not establish that he retired in reliance on those promises).

288. *See* Farber & Matheson, *supra* note 3, at 923-24. Melvin Eisenberg vigorously opposes the notion that courts enforce gratuitous promises made in a business setting. *See* Eisenberg, *supra* note 3, at 863. His basic arguments are: (1) reliance *is* a prerequisite to enforceability because the Restatements say that it is, *see id.* at 859; and (2) he can point to specific cases wherein courts declined to enforce promises on the grounds that they were gratuitous, *see id.* at 863. His arguments are problematic in two respects. First, his emphasis on the Restatements misses the mark—the project of "third-wave" scholars (as he terms them) is to determine what courts are actually *doing*, whatever they may be *saying*. Second, he fails to consider relational contract theory, and more specifically Farber and Matheson's article, which changes the nature of the debate. Thus, the question is not simply, "Are gratuitous promises enforceable?" but "When are gratuitous promises enforceable?" Phrased this way, it becomes clear that certain gratuitous promises are unenforceable *not* just because doctrine says they are not, but

that requires "a high level of mutual confidence and trust" are more likely to generate some benefit for the promisor or encourage reliance by the promisee.[289]

In sum, courts often view seemingly gratuitous promises as having reciprocal characteristics that justify enforcement. First, the promisor may benefit from the act of making the promise. Second, courts intuit that those involved in an ongoing or interdependent relationship might, through words and/or actions, create certain expectations in one another and might benefit from creating and encouraging those expectations.[290] In contracts law, at least, the rhetoric that insists on a sharp divide between gift and exchange paints a misleading picture of the case law.

Why, then, do contracts scholars continue to insist that non-commercial gratuitous promises and testamentary transfers are unilateral and unenforceable,[291] notwithstanding some troubling exceptions for which they cannot account?[292] Why assume that

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because the contexts in which those promises were made were not sufficiently trust-based to justify enforceability.

289. Farber & Matheson, *supra* note 3, at 925.

290. As Joseph Raz notes, "[t]he relationship, with its normative implications, provides the code by which actions and omissions are interpreted and their normative significance established. An act has different normative implications depending on its social context." Raz, *supra* note 239, at 929.

291. *See, e.g.*, Farber & Matheson, *supra* note 3, at 937-38 (noting that donative promises made within the family context are clearly not enforceable because "these promises are not generally made to coordinate activities or generate reliance beneficial to the promisor," but also acknowledging that family law "may well need to be reformed in order to protect values similar to those that we have identified in the field of contract law"); Goetz & Scott, *supra* note 36, at 1308 (stating that "intrafamilial donations . . . are peculiarly resistant to interactive adjustment and epitomize the non-reciprocity of donative promises"); *see also* Kull, *supra* note 5, at 40 & n.3 (arguing that seriously intended gratuitous promises are enforced, unless they are "understood by both parties to create no legally enforceable obligation," a category which includes "promises respecting social engagements and many intrafamilial promises").

292. One type of gratuitous promise that gives scholars trouble is the charitable subscription, which is, according to the RESTATEMENT (SECOND) OF CONTRACTS, enforceable, even if no consideration or reliance exists. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981). Goetz and Scott account for this by noting that charitable gratuitous promises are more likely to be the subject of negotiation and bargaining than other types of gratuitous promises, so the choice of enforceability rule would have less impact here than it would on gratuitous transfers made in situations in which social impediments to bargaining exist. They also emphasize the benefits (recognition and increased self-esteem) the promisor receives in making the pledge. *See* Goetz & Scott, *supra* note 36, at 1307-08. These grounds for distinction are unpersuasive. First, as we have seen, gratuitous promisors generally receive benefits from the very act of promising. Moreover, as I argue in more detail, the choice of enforcement rule would have little impact on gratuitous promises made within intimate relationships. *See infra* Parts V.A. & V.B.; *see also* Eisenberg, *supra* note 3, at 861 (distinguishing enforcement of charitable

courts' implicit understanding of the reciprocal nature of interdependent relationships disappears with a wave of the wand the moment the promisor dies? Why not assume instead that this understanding forms a background against which courts decide wills cases? The relationships involved in will contests are even more likely to be highly interdependent and based upon trust, and the promises made in the context of those relationships are much less likely to be reduced to an express agreement.[293]

V. IS ENFORCEMENT OF IMPLIED FAMILY UNDERSTANDINGS JUSTIFIABLE?

Once we accept that courts do enforce implicit understandings between interdependent parties, the obvious question is why do they do it? It has been suggested that courts enforce such understandings in the commercial context in order to promote efficiency. Specifically, courts mean to encourage reliance on relationships that maximize efficiency, for the ultimate good of the parties to the relationship and to society as a whole.[294] Because risk aversion in those settings would discourage productive relationships, the law should support and encourage actions based on trust.[295]

This argument is problematic. It assumes that parties are aware of, and consult, applicable law in their jurisdiction prior to taking any action in furtherance of a long-term business relationship. It also assumes that judges believe that those parties know the law and are actively seeking to influence behavior. But the justification is even more troubling when one attempts to apply it to the enforcement of promises made in intimate settings. Does enforcement of implicit family understandings advance instrumental objectives? Specifically, does enforcement encourage reliance and reciprocity within family relationships? Generally speaking, the answer is no. Even if courts consciously attempted to encourage reliance by family members, their efforts would have little effect because family members are even less likely than commercial actors to consult statutes and judicial decisions in shaping their relationships with parents, children, and spouses. Accordingly, many of the insights contained in recent scholarship on gratuitous promises are inapplicable to promises made

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pledges because relationships between donors and charities are not "affective," so that enforcement does not cheapen the relationship, and because "important social policy" reasons exist for enforcing pledges to charities).

293. *See supra* Parts II.A.4 & II.B.

294. *See* Farber & Matheson, *supra* note 3, at 945.

295. *See id.*

in the family realm because these insights rely on the assumption that the particular legal rule will influence whether and to what extent family members will make implicit arrangements and whether to honor the implied terms of those agreements.[296]

Indeed, to the extent that legal rules might affect behavior at the margins, a rule directing enforcement of testators' implied promises to family members might have undesirable effects; a rule that reveals and emphasizes the reciprocal nature of family obligations might devalue family relationships. By contrast, the current legal regime, which emphasizes testamentary intent and autonomy while enforcing implicit family understandings, allows courts to honor important social norms and to simultaneously minimize efficiency losses that would be created by explicitly treating family relationships as analogous to market transactions.

A. *An Enforceability Rule Would Not Encourage Trust or Increase Efficient Outcomes*

In their study of express and implicit promises in the commercial context, Farber and Matheson suggest that enforcement of certain promises encourages trust and efficient reliance, which benefits both the parties to the relationship and the economy as a whole.[297] Noting the importance of trust in long-term, interdependent business relationships and existing impediments to trust such as risk-averse personalities and asymmetrical information, they argue that gratuitous promises should be enforced even absent clear reliance: "The point in these cases is not that reliance has taken place in a particular instance, but rather that reliance should be encouraged among participants in a class of activities."[298]

Can judicial enforcement of testators' implied promises to family members be justified on the grounds that enforcement encourages trust and efficient reliance? First, even if a clear rule enforcing implicit promises among family members would encourage efficient reliance, existing wills doctrine does not embody such a rule: Wills decisions emphasize autonomy and intent, not reciprocity and obligation. Second, and more importantly, even a clear legal rule enforcing implied promises would not affect interactions between family members because family members assess the relationship, not

296. *But see* Macaulay, *supra* note 3, at 468-69 (arguing that business actors pay little attention to legal rules in interacting and incurring obligations).

297. *See* Farber & Matheson, *supra* note 3, at 905.

298. *Id.* at 929.

the legal rule, in determining the extent to which they should invest in that relationship.

Courts do not communicate the enforcement rule to the public. When courts take into account family claims, they claim to be honoring testamentary intent—thus, they re-emphasize the importance of autonomy, not interdependence. Even if some courts do consciously honor the reciprocity norm in deciding wills cases, that fact, obscured as it is by doctrine that nominally emphasizes intent, is not likely to be transmitted to the average layperson. To determine that courts often reward family members' reciprocally based claims, family members would have to read between the lines of judicial opinions, something most laypeople are not apt to do. And if family members cannot understand the subtleties of case law, there is little chance that particular decisions will affect social behavior.

Even an express rule enforcing testators' implied promises would do little to increase reliance and reciprocity. Suppose for a moment that courts clearly announced a rule enforcing implicit promises in favor of family members. Even such an express rule would have a negligible impact on behavior because most people do not consider applicable legal rules prior to interacting with family members. In concrete terms, Mary, in deciding to drop out of law school to attend to her ill mother, is not likely to calculate: "Well, she'll probably leave me her estate if I do, and if she doesn't, I can always sue." A husband who decides to work hard at a job he hates to put his wife through medical school probably would not calculate: "Well, if she leaves me as soon as she completes her residency I can always sue her for half the market value of her degree." An uncle who contributes to his adult nephew's medical school tuition probably does not expect to sue his nephew for restitution if the nephew neglects his uncle later in life. Indeed, the availability of legal redress does not appear likely, in these instances, to influence behavior even at the margins. Most decisions regarding whether and to what extent to trust other family members are based on an evaluation of the trustworthiness of the other, not the availability of legal relief if trust proves misplaced.

Standardized family roles also inform individual assessments of the other's trustworthiness,[299] in much the same way that standardized roles provide a helpful guide in making initial assessments of trust prior to initiating relationships in a commercial

299. *See supra* Part II.A.3.

context. If anything, we are taught that business transactions are motivated by self-interest and conducted at arm's length. Thus, business actors are more apt to consider applicable legal rules prior to acting and to take increased risks only if they perceive that the law will back them up.[300] But in the family context, standardized roles confirm our sense that we can trust our family, that family members will not act purely from self-interest. Thus, we need not bring the suspicion inherent in a business transaction to a family relationship. Standardized roles encourage trust in the relationship rather than the law. Thus, an express rule enforcing implied family understandings would do little to encourage trust or increase efficient outcomes.

B. *Enforcing Testators' Implied Promises Would Not Generate Inefficiencies*

For the same reason—family members do not understand legal doctrine, and even if they did, doctrine would not influence their actions—an express rule enforcing implied promises among family members would not necessarily *encourage* inefficient behavior. The following Part examines several other arguments for non-enforcement of "gratuitous" promises, all of which are premised on efficiency concerns; the Part concludes that, in the family context, none of them justify a regime of non-enforcement.

Professors Goetz and Scott argue that enforcement of gratuitous promises made in situations that preclude free information-gathering would have little effect on a particular promisor's decision to breach because "extra-legal" sanctions sufficiently police the promisor's behavior.[301] Moreover, they argue, enforcement could create substantial costs: Such a rule would require promisors to heavily condition promises they do make (to insulate themselves from future

300. The explanation of Farber and Matheson seems to assume that particular court decisions are transmitted to the public and understood by it, even though courts do not announce that they are departing from the settled doctrines of consideration or promissory estoppel, but purport to apply them. Although some business actors might be apprised of the law by legal counsel, others (employees for instance) may not be. To the extent that their argument assumes that private actors understand the nuances of case law, it is not entirely persuasive. In addition, to the extent that they argue that courts enforce unrelied-upon promises in order to encourage individuals in commercial relationships to trust one another, their argument is undermined by evidence that business people do not actually consult the law prior to making agreements or engaging in relationships. *See* Macaulay, *supra* note 3, at 467-68 (indicating that the law is largely irrelevant to those engaged in commercial relationships). Of course, even if Macaulay is correct, courts may nevertheless *believe* that their rulings affect behavior.

301. Goetz & Scott, *supra* note 36, at 1304-05; *see also* Posner, *supra* note 40, at 417 (recognizing the importance of social sanctions on family behavior).

liability if they later choose not to perform) and would ultimately discourage promise-making when the social context prohibits heavily conditional promises. While conceding that a non-enforcement rule might result in an inefficient level of reliance, they assert that these inefficiencies would be smaller than those created by an enforcement rule.[302] Eric Posner adds that an enforcement rule might encourage promisees to "over rely" because promisees would know they would be compensated for their reliance.[303]

Both arguments overestimate the effect that a legal rule would have on family behavior. In intimate family relationships, parties are likely to disregard the legal rule and focus almost entirely on their estimation of the trustworthiness of the other family member, their desire to maximize the value of the long-term relationship, and their altruistic impulses to benefit the other party to the relationship. Although Goetz and Scott (correctly) acknowledge that family members are more likely to be influenced by social sanctions than legal ones,[304] they fail to carry this insight to its logical conclusion. If parties are far more influenced by social norms and sanctions in determining whether to honor an agreement, legal rules would have little effect on the promisor's decision whether to make a promise in the first place. Thus, a potential promisor involved in a long-term relationship would not make a promise that might affect the promisee's behavior if the promisor thinks there is even a small chance she will change her mind. To keep the promisee's trust, which is vital to the health of the relationship, the promisor will feel compelled to make only those promises she is reasonably certain she can keep, regardless of whether her promises are legally enforceable. If she makes the promises at all, she will heavily condition them, not out of fears of legal enforcement, but to avoid disappointing the promisee in the future. The promisor knows that breaking a promise

302. *See* Goetz & Scott, *supra* note 36, at 1304-05; *see also* Posner, *supra* note 3, at 593-94 (making essentially the same point). Goetz and Scott contrast this result to the effects of a non-enforcement rule: If a promisee knows that the promise is not legally enforceable, the promisee will protect herself against the possibility of non-performance by tempering her reliance. *See* Goetz & Scott, *supra* note 36, at 1278-80. According to Goetz and Scott, a non-enforcement rule is more desirable because the promisee's "adjustments will be more precise and less costly in reduced reliance than the solely quantitative precautionary adjustments available to promisors reluctant to impair the social relationship." *Id.* at 1305.

303. *See* Posner, *supra* note 3, at 594. Richard Craswell also notes this argument, but rejects it, concluding that enforcement would still create cases in which overreliance is less costly than underreliance and that sometimes the rule would inspire efficient reliance, which is the optimal outcome. *See* Craswell, *supra* note 236, at 494.

304. *See* Goetz & Scott, *supra* note 36, at 1272.

would upset the promisee and decrease or destroy the trust between the parties, which would substantially devalue the relationship—a concern of far greater importance to the promisor than the specter of legal liability.

Similarly, the degree to which a promisee will rely on an implied promise depends entirely upon the promisee's estimation of the promisor's trustworthiness. If trustworthiness is doubtful, the fact that a court might in fact enforce the obligation will be unlikely to encourage reliance—the last thing that most people intend to do is sue close family members over disappointments. Thus, family members would act the same way regardless of the legal rule; they would not make fewer or more heavily conditioned promises if the rule were changed because the law would add little to the sanction the relationship already provides. Enforcement of these implied promises, then, would not realistically induce excess caution in promisors or excess reliance in promisees.

Melvin Eisenberg has advanced a second argument against enforcement of gratuitous transfers. He begins by refuting the traditional argument for non-enforcement[305] that gratuitous promises in non-commercial settings generate little value, and that enforcement costs easily outweigh the value that would be created by enforcement.[306] He focuses on the role of the donative promise within the larger context of a particular relationship[307] and argues

305. *See* Eisenberg, *supra* note 3, at 846-49 (arguing that gratuitous promises made in non-commercial settings are in fact often *more valuable* than those made in commercial contexts).

306. *See, e.g.*, Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 2-7 (1979) (emphasizing the lack of injury to a disappointed promisee and high enforcement costs); *see also* Posner, *supra* note 40, at 417 (justifying the non-enforcement rule of "trivial social promises, especially within the family" because such promises involve "small stakes," extra-legal sanctions adequately police behavior, and enforcement costs would greatly outweigh the benefits of enforcement). It is telling that traditionally, analysts of the gratuitous promise issue consistently illustrate the problem with examples involving an uncle who promises his nephew he will do some specific act but later reneges. As this Article argues, the uncle-nephew scenario is not representative of the majority of family agreements, which are much more complex and are generally less clearly expressed. In conceptualizing the donative transfer so cleanly, scholars of the old school were blinded to the more common, and much more difficult, types of promises that regularly occur within families and thus greatly underestimated the value generated by family promises. *See, e.g., Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. 95-103 (1926) (providing the discussions of Williston and others on appropriate damage calculation when a donative promise inspires reliance); Eisenberg, *supra*, at 5-6; *see also* Posner, *supra* note 40, at 412-14, 416 (taking the abstraction even farther by simply hypothesizing individuals "A" and "B," who appear to have no intimate connection or family relationship with one another).

307. *See* Eisenberg, *supra* note 3, at 840-46.

that such donative promises are even more valuable than promises that result from clear bargains.[308] From this he concludes that courts should not enforce donative promises within personal relationships because enforcement would devalue the act of giving and, by extension, the relationship itself.[309] Taking a cue from Margaret Radin,[310] Eisenberg argues that enforcement of gratuitous transfers would introduce the language of commodification into the realm of personal relationships, thereby creating confusion.[311] For example, a promisee would not know whether a promisor performed his promise out of love or because he feared a lawsuit; the promisee would therefore ascribe less value to the gift.[312]

Although Eisenberg's observation about the value of donative promises within personal relationships is sound, his analysis of whether courts should enforce them misses the mark because he, too, overstates the impact of law on interpersonal relationships. Most people in intimate relationships characterized by a high degree of trust will assume that people whom they love keep their promises out of love, not out of fear of enforcement. For instance, does Maggie, a fifteen-year-old child, value the financial support she obtains from her parents less because the law would require her parents to provide for her if they refused to do so? Does Arthur, a sixty-year-old widower, value his wife's testamentary gift of the bulk of her estate any less because the law would give him an elective share if she failed to provide for him? In both cases, the donee *assumes* that the donor

308. *See id.* at 849.

309. *See id.* at 847-49. Eric Posner also makes this claim in the Introduction to *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*. *See* Posner, *supra* note 3, at 567.

310. *See* Radin, *supra* note 79.

311. *See* Eisenberg, *supra* note 3, at 847-49. Eisenberg admits, however, that gratuitous promises that inspire reasonable reliance should be enforceable to the extent of the reliance. *See id.* at 834, 865. It is hard to reconcile his assumption with his main point. If the value of the performance to the promisee would be cheapened by the knowledge that the law provides a remedy, the same would hold when the promisee relied; thus, how can he determine the promisee's motive?

312. Eisenberg also notes that sometimes promisors might have a morally justifiable reason for promise-breaking—e.g., others have made more urgent demands on his limited resources. *See id.* at 849-50. In these cases, Eisenberg argues, promisees should not be entitled to enforcement because the promisee is morally obligated to release the promisor from his obligation. *See id.* Of course, people release each other from moral obligations all the time. When the promisee feels release is justified, he will not sue for enforcement. The difficulty arises when the promisee feels the breach is not justifiable. Why should we assume that reneging was justifiable rather than litigate the issue? Eisenberg also assumes that a promisor who has inspired the promisee to rely on the promise is morally obligated to perform. *See id.* at 823, 834. Why, then, is a promisor who received a benefit from the act of promising not similarly obligated?

is motivated by altruism. Similarly, promisees would assume altruistic or loving motives for performance of gratuitous promises even if the law enforced those promises. The promisee's assessment of the promisor's character, not the law, determines what motivations the promisee will ascribe to the promisor.[313]

Eric Posner gives a different twist on the argument against enforcement of gratuitous promises made within the context of interpersonal relationships.[314] Although Posner acknowledges that gratuitous transfers and promises within trust-based relationships may be valuable, he contends that long-term relationships are a mix of promises, some of which are intended to be enforceable, and others that are not.[315] When parties fail to specify in advance which promises are intended to be enforceable, the costs of enforcement are large because courts will not immediately know which promises to enforce.[316] To cut those costs and to encourage parties to specify in advance which promises they intend to be enforceable, courts do not generally enforce vague, gratuitous promises made within an interdependent relationship.[317]

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313. One could take the non-commodification argument farther and argue that the very act of adjudication and enforcement of gratuitous promises would cheapen intimate relationships because it would require speaking about them in contract terms. If permitted to operate, this process would, as Radin puts it, "endorse[] the picture of persons as profit-maximizers." Radin, *supra* note 79, at 1907. Thus, the party seeking enforcement of a gratuitous promise would have to reveal self-interested motives and speak the language of contract: "I earned it," "I relied on it," etc. Although it certainly would be distasteful to speak of close relationships in those terms, it is not accurate to say that the process would devalue the particular relationship in which the promise was made. Rather, *it was the promisor's act of breaking the promise that devalued the relationship.* At that point, the promisor seriously diminished or destroyed the promisee's trust in the promisor. The promisor has revealed that his motives were not necessarily as altruistic as the promisee might have supposed. The promisee no longer believes he can trust the word of the promisor. Thus, although the act of litigating enforcement might further decrease value, the decrease would seem to be insubstantial compared to the decrease brought about by the promisor's breach of promise. At least the provision of the remedy would provide the promisee with something of value, whereas a rule of non-enforceability would leave him with nothing.

314. *See* Posner, *supra* note 3.

315. *See id.* at 578-81.

316. *See id.*

317. Posner acknowledges that courts increasingly have been willing to enforce commercial promises that are vague as to whether the parties contemplated legal enforcement—e.g., firm offers and requirement contracts—because "commercial exigency" demanded it. *Id.* at 606. He appears to assume (although he does not say so expressly) that enforcement of these vague but efficient contracts will encourage parties to make more of them. He states that whether this loosening of the consideration requirement should be extended to non-commercial promises depends entirely on the value that is generated by such promises. *See id.* But again, this analysis fails when applied to the family context, where individuals are unlikely to be influenced by the legal

Although Posner does not delineate between commercial and intimate relationships, his model of relationships appears to contemplate primarily commercial relationships or personal relationships that contain an unusually high number of express, quid pro quo exchanges. He seems to claim that his analysis is applicable to all situations involving gratuitous transfers, but his examples all involve promises made within the legal academy—a context in which parties are much more likely to consider the availability of legal remedies prior to acting.[318]

Posner's explanation is unpersuasive when applied to family interactions. First, as we have seen, courts in wills cases certainly do not transmit the enforceability of grantors' promises to the general public. But even supposing such a rule were express, it is hard to believe that courts would seek to induce family members to discuss in advance which of their promises are intended to be enforced. Family relationships do not fit Posner's model of a series of intended enforceable and non-enforceable agreements; rather, parties in this context do not contemplate the need to resort to legal process. Most importantly, because legal rules have little effect on family behavior, a rule enforcing promises would have little effect on the volume of promises made within families. Besides, even if family members were primarily influenced by legal rules, requiring express understandings among family members would cheapen the value of the benefits obtained in the relationship and the relationship itself.[319] Thus, requiring family members to reduce understandings to express, enforceable agreements would frustrate, rather than promote, efficient outcomes.

C. *An Enforceability Rule Might Generate Costs at the Margins*

Of course, there are interdependent familial relationships where trust is weak and self-interested motives predominate. In such relationships, the parties might be more likely to consider the applicable law prior to undertaking particular acts within an interdependent relationship. At the margins, would an express rule enforcing implied family understandings increase levels of trust and beneficial reliance, or would it generate inefficiencies?

It is fair to suppose that a promisee involved in such a relationship might be more inclined to act in reliance on an implied

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rule both in promising and in deciding whether to perform a promise.

318. *See id.* at 581.

319. *See supra* Part II.B.

promise of inheritance if she knew that a court would back her up if her trust proved misplaced and the family member disinherited her. On the other hand, that knowledge might encourage an equal number of promisees in shaky relationships to *decrease* reliance-type behavior. If courts presumed that family members who have been active in the testator's life have reliance-type claims against the testator's assets, some family members might keep their investment in other family members to the minimum necessary to convince a court of the legitimacy of their claim. Those members might reciprocate *only* to the extent necessary to prevent legal disinheritance, even if the potential testator desires more attention or support, because the potential beneficiary knows that she is likely to prevail in a will contest so long as she can show she had a functioning relationship with the testator.

Consider an example. Suppose that mother and her adult son, who live in the same town, have had a difficult relationship with a history of mutual disappointments and perceived betrayals of trust. Mother and son do love one another, and each harbors hope that the relationship will improve, but neither is likely to trust the other to provide support in times of need or to keep his or her word. Past history has taught the two to protect their self-interest when dealing with one another. Visits between the two are difficult—there are good moments, but just as often there are misunderstandings and arguments. For purposes of analysis only, assume it is possible to attribute a monetary value to the benefits and costs that the mother and son experience as a result of the visits. Suppose the mother attaches a value of $500 per month to the son's weekly visits. To the son, the visits impose a net cost (after subtracting whatever benefit the son receives from the visits) of $400 per month. Because the visits are so costly to the son, he has no incentive to visit, even though the net value of the visits exceeds the costs. In this extreme situation, the son might be more inclined to visit if he knows that his mother will "cover his costs" at some point—for example, by leaving her estate to him. Thus, the prospect of inheritance might generate efficiency gains.

But suppose the son knows that courts would find and enforce an implied understanding even if he visited only once a month, instead of once a week. The self-interested son might then visit only once a month, incurring a cost of only $100 per month. The mother, however, might view such infrequent visits as worthless, or worse, evidence of the son's lack of concern. From an economic perspective, the son's visits would be inefficient. They would cost the son more

than they would benefit the mother. Yet a rule that gives the son a share in his mother's estate as long as he has been moderately attentive would generate these visits, while a freedom of testation rule might encourage the son either to make no visits (and incur no costs) or to make more frequent visits in the hope that his mother would treat him generously. On these facts, a rule that enforced implied agreements would be inefficient.[320]

We have no basis for knowing which of these scenarios is more common at the margins, and, of course, these scenarios do not exhaust the universe. Because the parties cannot reveal their actual preferences too precisely without destroying value, courts inevitably find it difficult to determine the content of an implied understanding; family members who might seek to use judicial decisions as a guide to their own behavior will find the task more daunting. Whether enforcement of implied understandings will generate efficient reliance is anybody's guess. Moreover, as I have already demonstrated, any impact the rule would have on behavior would be marginal at best, since most family members pay no attention to legal rules in shaping their intrafamilial behavior. Thus, when we analyze various efficiency arguments on their own terms, we find that the analysis simply is not helpful for determining the effect that an enforcement rule would have in the family context.

Explicitly enforcing implied promises would, however, generate other marginal costs. First, a rule requiring testators to reward trusting family members might decrease the pleasure testators obtain from leaving property to those who have been good to them. That is, a potential testator who believes she is free to disinherit her family might experience greater pleasure in writing a will that benefits them than would the testator who feels that the law requires her to do so. The latter testator cannot make an unequivocal and persuasive statement that her motivations are altruistic. Second, Eisenberg's point has some force at the margins—the testator's family members might lose some of the pleasure that comes with believing that a testamentary gift is motivated by love or duty.[321] Thus, at best, a rule

320. Of course, whatever the legal rule, the son may "over-invest" because he may not know exactly how much the mother is willing to compensate him for the visits (or, to put it in layman's terms, he may not know the worth of her estate). For instance, he may incur visiting costs of say, $600 per month. And if his mother is completely self-interested, she will not inform her son of his error. *See* James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71, 74-77 (1983).

321. Eisenberg makes this point more generally, arguing against enforceability of donative transfers. *See* Eisenberg, *supra* note 3, at 847-49.

expressly recognizing family claims might, at the margins, impede some efficient outcomes.

In sum, an express rule recognizing implied family understandings would not encourage trust nor would it promote efficient behavior in the main. Although such a rule would probably not generate significant costs, the commodification of familial relationships might decrease value at the margins. Hence, the efficiency justification for the prevalent judicial approach to will contests is tenuous at best.

D. The Law's Supportive Function

If enforcing implied family understandings has little instrumental effect, what other explanation is there for the judicial inclination to enforce those understandings? When courts enforce implied familial understandings at the expense of testator's intent, they mirror and support well-entrenched social norms.[322] The idea that one function of the law is to support existing social norms is well entrenched in legal literature. Contract literature is illustrative. Joseph Raz goes so far as to say that "the predominate purpose of contract law is to support existing moral practices."[323] Similarly, P.S. Atiyah argues that judicial decisions reflect changing social beliefs.[324] Thus, for

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322. As Cardozo stated:

> The constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong. A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the *mores* of the time.... Life casts the molds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 64 (1921).

323. Raz, *supra* note 239, at 934. According to Raz, "there is no doubt that the practice of promising is not a creation of the law. Rather, it is ... rooted in moral precepts and social conventions." *Id.* at 916. Thus, it follows that contracts law, "with its 'implied conditions,' formalizes, articulates and gives effect to moral practices." *Id.* at 932. Raz does not suggest, however, that moral practices are always in accord with moral principles, and assumes that the validity of the law is determined by the extent to which it conforms with moral principles, not moral practices. But he does seem to assume that there is a high degree of overlap between moral principles and moral practices. *See id.* at 932-34; *see also* JOSEPH RAZ, *The Institutional Nature of Law*, *in* THE AUTHORITY OF LAW 103, 119-20 (1979) (discussing law's role as a "norm-applying" institution).

324. *See, e.g.*, P.S. ATIYAH, PROMISES, MORALS, AND LAW 4 (1981) [hereinafter ATIYAH, PROMISES] (arguing that changing notions regarding the moral foundations of contract affected the development of the law); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 778-79 (1979) [hereinafter ATIYAH, RISE AND FALL] (arguing that classical contract theory does not reflect either present day values or the way the law is developing).

Atiyah, the case law is a window on the social norms of the time.[325]

Examples abound of the legal system's accommodation of social norms—even when statutes or common-law rules appear to stand in the way. In particular, consider the norm that concerns us here: Parties to trust-based relationships who induce reliance and receive benefits are morally responsible for those consequences. The law has often supported and preserved that norm. Consider the history of the trust. Prior to the early fifteenth century, trusts were not enforceable in any English court.[326] Nevertheless, trust arrangements (called "uses") were commonplace because they served a variety of useful functions.[327] In the early fifteenth century, the Court of Chancery began to enforce beneficiaries' claims against trustees, thus recognizing and sanctioning pre-existing social practices.[328] In 1535, Parliament explicitly barred the use,[329] but people continued to use trust arrangements despite the unavailability of legal redress. Because these trust settlors relied on assessments of the trustee's trustworthiness, they did not contemplate resort to the legal process to enforce the arrangement.[330] When suits were brought to enforce trust terms, courts enforced them by creatively interpreting the Statute of Uses to avoid the prohibition on most types of trust arrangements.[331] Thus, despite a clear statutory prohibition, courts

325. *See* ATIYAH, RISE AND FALL, *supra* note 324, at 779. Atiyah argues that courts apply social norms and that changes in law represent changes in moral norms. Specifically, Atiyah's description of evolving contracts law hinges on the historical movement toward, and then away from, the view of morality as rooted in personal autonomy. Atiyah argues that as society has moved away from the view of autonomy as the key to morality, so has the law. Legal principles based on respect for autonomy are curtailed when competing values become entrenched in the culture as a whole. *See, e.g.*, *id.* at 726-27. Charles Fried also envisions a moral basis for contracts law, although he views as irrelevant the question whether the correct moral basis accurately reflects current norms. *See* CHARLES FRIED, CONTRACT AS PROMISE 2-3 (1981). For Fried, not only does the law reflect moral principles, but courts *have a duty* to consider and implement proper moral principles in deciding cases. *See id.* at 69-73 (applying certain moral principles to the question of contract gaps, regardless of whether the correct moral principles are currently in fashion).

326. *See* Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1145 (1996).

327. *See id.* at 1143-45.

328. *See id.* at 1145.

329. *See id.* at 1145-47.

330. According to Avini, Frances Bacon recognized that a use " 'is no more but a general trust, when a man will trust the conscience of another better than his own estate and possession; which is an accident or event of human society which hath been and will be in all laws.' " *Id.* at 1142 (quoting FRANCIS BACON, READING ON THE STATUTE OF USES, *reprinted in* CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA 415 (David S. Berkowitz & Samuel E. Thorne eds., 1979)).

331. *See id.* at 1145-47.

repeatedly recognized an ingrained social practice, *not* in order to affect behavior—clearly, people created and would continue to create trust arrangements regardless of whether the arrangements were legally enforceable—but so as not to disadvantage those who had relied in good faith on social norms.

Constructive trust doctrine is another example. Although the statute of frauds directs that trusts of real property must be in writing, families often have oral understandings that land shall be held in trust-like arrangements.[332] Although family members could easily memorialize their understandings in writing by creating private express trusts, they do not perceive that such a need exists—they trust one another.[333] Moreover, those who do perceive such a need might be reluctant to initiate such an action for fear of offending other family members. When trust proves misplaced, courts could simply apply the statute of frauds, but doing so would punish family members who rely on trust. Instead the law enforces these family agreements by imposing constructive trusts—it performs its supportive function.[334] Notably, courts enforce even *implicit* family

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332. For example, a father might transfer title to real property to his daughters with the understanding that he will continue to treat the property as his own until his death and that his daughters will reconvey the property to him if he should ever find it necessary.

333. As Cardozo emphasized when imposing a constructive trust on property transferred by a brother to his sister:

> [The grantor] found, as he thought, in the bond of kinship a protection as potent as any that could be assured to him by covenants of title. It was—"the case of a confidence induced, not by the bare promise of another, but by the promise and the confidential relation conjoined." "The absence of a formal writing grew out of that very confidence and trust, and was occasioned by it."
>
> ... It is not the promise only, nor the breach only, but unjust enrichment under cover of the relation of confidence, which puts the court in motion.

Sinclair v. Purdy, 139 N.E. 255, 258 (N.Y. 1923) (quoting Wood v. Rabe, 96 N.Y. 414, 426 (1884); Goldsmith v. Goldsmith, 39 N.E. 1067, 1068 (N.Y. 1895)).

334. *Cf.* Raz, *supra* note 239, at 933-38 (discussing the law's supportive function in the context of contracts). For example, in *Sinclair v. Purdy*, 139 N.E. 255 (N.Y. 1923), Elijah Purdy, a clerk of the court, transferred his one-seventh share of his father's estate to his sister, Elvira, who held title to her own one-seventh share. Elijah made the transfer because his ownership of property had subjected him to constant requests that he go to bail for those who had been arrested. Later, when Elijah became ill, his niece took him into her home and cared for him throughout his final illness. In return, Elijah promised to devise to her his interest in his father's estate. However, Elijah's will gave nothing to his niece. The jury found that Elijah and his niece had made an enforceable contract, but the court rejected the niece's claim that Elijah had conveyed the property to Elvira with the understanding that Elijah continued to have an ownership interest. Instead, the court directed the jury to find that Elijah had no interest in his father's property, legal or equitable, to devise. *See id.* at 256-57. The New York Court of Appeals reversed the appellate division's affirmance of the trial court's direction, determining that the jury should have been allowed to decide "whether there had been such an abuse of a confidential relationship [between Elijah and his sister] as to lead without a writing to the

trust agreements, with the understanding that the family context would make an express promise "superfluous."[335] The relevant issue is "what impression was knowingly permitted to exist in the mind of the [transferor]" by the transferees.[336] Indeed, one court held, in certain circumstances " 'a promise may be implied or inferred from the very transaction itself' " if the context is an intimate relationship.[337] Thus, when social norms dictate that family understandings should be implicit, courts provide redress to those who abided by those norms only to be disappointed by family members who failed to reciprocate.[338]

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implication of a trust." *Id.* at 258; *see also* Moses v. Moses, 53 A.2d 805, 808 (N.J. 1947) (holding that a husband who transferred land to his wife to establish credit for her but without intent to transfer his property interest was barred from enforcing an express trust by the statute of frauds, but that the "constructive trust formula" was applicable as a "remedial device for restoration of the status quo"); Nehls v. Meyer, 95 N.W.2d 780, 782 (Wis. 1959) (reversing a municipal court's order of eviction of the brother by his sister to whom he had conveyed the subject property because even though "the statute of frauds will prevent enforcement of an oral express trust, . . . in a proper case a constructive trust will be employed to accomplish justice").

335. Thus, "silence in the presence of conditional assertions may constitute tacit consent and promise to comply with conditions." Farano v. Stephanelli, 183 N.Y.S.2d 707, 712 (App. Div. 1959). In *Farano*, the court reversed a trial court's refusal to impose a constructive trust on the grounds that the father-transferor could not prove that his transferee daughters expressly agreed to return the transferred property to their father upon his request. *See id.* at 714. Noting that the family had enjoyed close and intimate relationships prior to the dispute, the court stated that "[i]n confidential relationships especially, mutual understanding does not always depend upon words expressly uttered." *Id.* at 712.

336. *Id.*

337. Brand v. Brand, 811 F.2d 74, 78 (2d Cir. 1987) (quoting Sharp v. Kosmalski, 351 N.E.2d 721, 723 (N.Y. 1976)). In *Brand*, the court determined that a father's transfer of the bulk of his assets to joint and co-tenancies with one of two sons was made in reliance on the son's promise to divide the assets evenly with his brother after the father's death. *See id.* at 80. In imposing a constructive trust, the court noted that "an express promise is not required. 'Even without an express promise, . . . courts of equity have imposed a constructive trust upon property transferred in reliance on a confidential relationship . . . .' " *Id.* at 78 (quoting *Sharp*, 351 N.E.2d at 723).

338. Of course, even a legal system that seeks only to support social norms will have some marginally instrumental effects. For one, it might cause people to be less concerned with the law—prior to acting, they need only consult their intuitive sense of moral norms. *See* Raz, *supra* note 239, at 934 (noting that when the law's function is entirely supportive, then individuals need refer only to social norms, not the law, in planning or calculating behavior). Thus, those involved in trust-based relationships may continue to rely on social practices in determining behavior within those relationships and need not worry that the law will not back them up. Moreover, such a legal system might to some degree impede the development of other practices that might undermine current norms. *See id.* In that sense, it further strengthens people's ability to rely on moral norms rather than the law prior to acting.

E. The Construct of Wills Law Resolves the Tension

So we have a conundrum: On one hand, courts are inclined to enforce implicit promises to avoid punishing those who relied in good faith on social norms. Yet, a system that expressly recognized claims of breach of implied promise might be costly at the margins—the specter of enforcement might cheapen gratuitous promises and transfers within familial relationships where trust is shaky. The current structure of wills law, however, provides escape from the conundrum.[339]

In a will contest, the focus is on the testator's intent: In formalities cases, "is the proffered document a final, seriously intended, testamentary expression?" In capacity, undue influence, and fraud cases, "is the will disinheriting family really reflective of the testator's intent?"[340] Thus, the family member who contests the will is spared having to admit that the testator breached her implied promise to provide for the contestant. Rather, the contestant can argue that the testator considered disinheritance but did not make a final decision to disinherit (lack of formalities), or that the testator would have devised to the family member if she had been in her right mind (capacity, undue influence) or had not been coerced (undue influence and fraud). Because we do not conceive of the testator as having broken a promise, existing doctrine preserves the value of the relationship and the value of receiving the inheritance—the contestant receives the estate, not because the court has forced a disloyal testator to perform, but because the court enables the testator to do what she would have done if she could speak from the grave with all her faculties restored. The sanctity of the relationship is preserved.

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339. This structure invokes Dan-Cohen's elaboration of Bentham's theory of conduct rules and decision rules. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). According to Dan-Cohen's theory, the law reconciles competing values by organically evolving into a structure of "conduct rules" and "decision rules." *Id.* at 625. The general public is aware of only the conduct rule. *See id.* at 627. Thus, the "conduct rule" affects and shapes behavior, *see id.*, but the court may apply an overriding "decision rule" when application of the conduct rule would work an injustice in a particular case. *See id.* at 632-35 (discussing the criminal defense of duress as an example of a decision rule). The "decision rule" is not fully understood by the public at large and thus does not influence behavior in undesirable ways. *See id.* at 632.

340. Applying Dan-Cohen's model, the "conduct rule" (the rule of which the public is aware) is a rule of testamentary freedom (with some limited statutory exceptions). This rule preserves the conception of family understandings as voluntary and motivated by altruism, which preserves the sanctity of the trust-based relationship and maximizes the value of the relationship.

Further, the structure of wills law prevents the general public from understanding that courts recognize implicit agreements.[341] Because judicial holdings emphasize intent, the enforcement of the family reciprocity norm is obscured—thus, the dangers of conceptualizing interactions in family relationships as mirrors of market transactions are neutralized. At the margins, when self-interested individuals in families that lack trust might consider the law prior to acting, the law will not further strip the value from interactions. Instead, it emphasizes the voluntary nature of the transactions and obscures self-interested motives.[342]

CONCLUSION

In law, the borders between gift and exchange, will and contract, are fluid rather than clear. Just as courts in contracts cases often consider the norms of the relationship and the broader culture in which the relationship sits, so do courts deciding wills cases. In contracts cases, courts understand that parties engaged in interdependent, long-term relationships are unable or unwilling to spell out in advance the legal ramifications of every act that may occur as the relationship evolves. The higher the level of trust, the more likely each party is to accept oral assurances and to rely on implicit representations made by the other. And trust-based relationships often are the best and most efficient way of maximizing benefits to both parties and to society as a whole. When one party to a trust-based relationship benefits from the other party's response to an implied understanding, courts will enforce the understanding.

The family is a web of interdependent relationships based on

341. Again using Dan-Cohen's model, we can term the phenomenon of courts enforcing testators' implied promises as the "decision rule." The "decision rule" recognizes that testators make implied promises to devise and that family members have a reliance-type claim of enforcement. By overriding the testator's intent when the testator breached reliance-based obligations, the decision rule ensures that those who rely on trust-based family relationships are not prejudiced by doing so.

342. Dan-Cohen posits that transmission is obscured through a variety of means—for example, the decision rule may be too vague to be easily understood, the legal sophistication of actors may be low, or emotional involvement in the act may be such that the actor may not deliberate and obtain legal advice prior to acting. *See* Dan-Cohen, *supra* note 339, at 634, 639-43. Here, transmission of the decision rule is obscured by family members' unwillingness to consult the law prior to interacting with other family members and the vagueness of the decision rule. Of course, separation is not complete. For instance, family members do consult attorneys prior to writing wills. Here again, however, the rhetoric of wills law obscures the decision rule. To the extent that attorneys do understand it, and they do, they have little incentive to inform a client that her will might not hold up. Thus, there is some separation between the conduct rule and the decision rule.

trust. Family systems are the most fundamental means of providing the support that individuals need to function, yet the nature of familial relationships absolutely precludes reducing implicit arrangements to express agreements. One would expect many principles of relational contract to be especially applicable in the family context. Yet, as many scholars have observed, there are few cases in which family members invoke relational contract principles to seek recovery from relatives who have defaulted on implied agreements.

Scholars who have searched in vain for application of relational contract principles in the family context have been searching in the wrong place. Because family relationships (other than marriages) rarely rupture beyond repair before the death of one of the parties, it is wills law—not contracts law—that best illustrates judicial application of relational contract principles. And wills law—despite its Marlboro Man ideology—does not generally permit a testator to escape from the reciprocally-based expectations he has created in family members.