The Basis for Legal Enforcement of Promises
The Role of the Bargain

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Contract law is a foundational subject in law school because its basic principles carry over into other fields. Many students approach this subject with trepidation, expecting it to be the study of dry and wordy business documents understood only by the members of a secret society of attorneys. Perhaps there is some truth in that view; however, contract law can be described more simply and accurately as the law of promises.

From this standpoint, the emergence among humans of a law of contracts seems to have been inevitable. From the moment of the development of language, people began to make promises. We can safely assume that not long after the first promise was made, the first broken promise occurred. Often, when a promise is broken, the "promisee" does not like it. Depending on the nature of the promise and the extent to which the promisee may have relied on it, he or she might experience negative financial, emotional or social consequences.

In most if not all societies, a broken promise is regarded as a wrong, at least to some degree. But is this any concern of society in general, or is it strictly a personal matter between promisor and promisee? This essential question is what contract law is all about. Notice how the question is framed -- it asks if the broken promise is a concern of *society*. For example, the promisee individually might choose to end her friendship or stop doing business with the promisor, but this is not likely to be of interest to the community at large. Or, if a promisee takes revenge by violence, the criminal law might require punishment of the promisee for the violent act, but will not provide a remedy against the promisor for breaking the promise. If the broken promise has caused hurt feelings, the promisee is not likely to find a remedy in the civil court system.

When we ask about a society's interest in a broken promise, we really are asking whether or not the promisor should be held accountable before some external authority. Who would that authority be -- a tribal chief, a parent, a teacher, a council of government, a religious leader, a court? To answer, we must know more. If a society has some concern with the broken promise, exactly what *part* of that society is most directly interested? Is this a moral issue, requiring accountability to a moral authority? Is it a religious issue, calling for the attention of a religious authority? Is it an economic or business problem, calling for the decision of a law court that considers the economic harm caused by the broken promise?

Still we must know more. Who made the promise? To whom was it given and what were the circumstances? Did it involve business? Was it a family matter? Was the promise made in jest? Was it reasonable for the promisee to believe the promise was made seriously? Did the promisee do something differently or refrain from doing something based on the belief that the promise would be kept? Did the broken

promise cause any real harm, other than hurt feelings, anger or disappointment? Questions like these give us the idea that some promises might be of concern to general society while others are not. So we return to the original question: "Is a broken promise any concern of society in general?" Given that all promises do not seem to be of equal importance, there appear to be three possible answers: (1) Society should enforce all promises; (2) Society should enforce no promises; or (3) Society should enforce only some promises.

If we were to take the position that the breaking of a promise is an absolute moral or religious wrong, we might decide that anyone who breaks a promise should be punished as a wrongdoer, or at least required to make good on the promise. This would seem to call for enforcement by a moral or religious authority. In modern England and America there are no religious courts having legal authority to coerce or punish defendants under canon law (religious law) so, except as a matter of individual conscience, the religious issue is moot.

On the other hand, secular society has developed a definite economic interest in the enforcement of certain promises. The standard explanation for this interest is that in cases where one person makes a promise to induce a promise in return, each of the parties as well as the greater community can benefit from the resulting exchange. For example, suppose two people inhabit a desert island. One of them finds an abundant supply of water, but no food. The other finds a plentiful supply of food, but no water. By agreeing to an exchange of water for food, each party benefits. An economic system is created by the deal and society, in general, is improved.

In a slightly more complex illustration, suppose party "A" owns land, "B" manufactures steel, "C" owns construction equipment, "D" can provide labor, "E" supplies concrete, and so on. A large group of such parties, acting together, can produce an office building, a public park or a shopping center. None of the parties can do this alone, and the necessary group cooperation never will happen randomly. What is needed is a *deal* (or a series of deals) in which each necessary party *promises* to contribute to the project. Each of these promises will be made in exchange for someone else's promise to pay compensation. If all of the necessary promises can be assembled and organized, and if we can have a reasonable assurance that the promises will be kept, the project can be built.

If this happens, many people will benefit. In the short term, there will be jobs in construction, accounting, law, finance and other fields that are directly or tangentially connected to the project itself. Permanent employment will be created for others at the site of the completed project. If the project is not publicly owned it will generate property taxes and possibly profits for its owners. All of the temporary and permanent employees will receive income which, when spent, will support other businesses and create more jobs in the community. Everyone will pay taxes on what they earn and on most of what they spend. All of this will have a positive economic impact on the community. From this vantage, society has a clear interest in the promises made by the

participants in the original construction project.

In the above illustrations, society's interest in the enforcement of promises is economic. As we shall see, economic concerns tend to dominate the law of contracts. Those who break contractual promises are not punished as criminals or admonished for unethical conduct. A breaching party is rarely even compelled to perform the broken promise if it is reasonably possible to calculate the monetary value of the harm that has been caused. (Indeed, one major school of American legal thought overtly encourages parties to breach contracts if they can still realize profits after paying damages.)

With society's primary interest in the keeping of promises being economic, it is not surprising that economic concerns also have come to determine which promises the law will or will not enforce. Over the course of history, different "formalities" have been recognized in various cultures as ways to distinguish promises the law will enforce from those in which the law has no interest. Formalities are simply rituals, recitations, forms of writing, signatures or other processes designed to accompany the making of a promise intended by the promisor to be legally enforceable.

As Professor Fuller noted, formalities generally serve three distinct functions. (Lon L. Fuller was a Professor of Law at Harvard Law School. An excerpt from his 1941 article, *Consideration and Form*, is reprinted in your text.) First, a formal process serves as evidence the alleged promise in fact was made. The claims of the disappointed promisee are easier to prove if he or she can produce reliable evidence of the necessary formalities. This might be a witness who had heard the parties reciting legally binding oaths, like those used in ancient Rome. It might be a document bearing the wax seal of the promisor, as formerly used in England and in the United States, or perhaps a document bearing the promisor's signature, proving that the promise really was made.

A second purpose for formalities is cautionary, to warn the parties that their promises will be legally binding and are not just idle or hypothetical remarks. Finally, a formal process can serve as a "channel" or method by which both parties can be certain their desire to make legally binding promises is being carried out effectively. In other words, one who wants assurance that a promise will be legally binding can "channel" it through the established ritual or process and be sure the task has been accomplished properly.

Two separate and distinct kinds of formalities emerged in England and ultimately affected the development of American contract law. Under one approach, a promise was deemed enforceable if the promisor put it in writing, signed it, affixed his seal to the document in sealing wax and delivered it to the promisee ("signed, sealed and delivered"). During the twentieth century, this method gradually fell out of practice and virtually has vanished in modern America. (Sections 2-203 of the Uniform Commercial Code and section 1629 of the California Civil Code abolish "sealed instruments" as a basis for enforcing promises.)

A second kind of formality, based on the economic utility of promises made as part of a *bargaining* process, steadily grew in practice and eventually became dominant. Under this view, the law enforces promises made in exchange for other promises. To promise to give, to do or to pay something in exchange for something from the other party is referred to as "consideration." In other words, one party promises to give, do or pay something "in consideration" of the other party's return promise. Furthermore, each party intends his promise to be *conditioned* on the other party keeping that return promise. That is, each party intends to keep his promise only if the other party keeps hers, and each understands that his own failure to live up to the bargain will excuse the other party from performing.

It is important to observe here that it is not enough for each party coincidentally to have made a promise to the other. Under the "bargain theory" of consideration, each party must make his promise specifically to induce the other's return promise. For example, "A" promises to pay $500 to "B" for a certain bicycle. "A" does this because she wants the bicycle; she intends to influence "B" to promise it to her. "B" makes this promise because he wants the $500 and is willing to give up the bicycle to induce "A" to give him that amount. This mutual exchange of "consideration" reflects an underlying *bargain*. The bargaining relationship was described by Oliver Wendell Holmes as a "conventional reciprocal inducement." (Oliver Wendell Holmes, Jr. was a member of the United States Supreme Court from 1902 to 1932. His father, Oliver Wendell Holmes, Sr. was a prominent physician and a well-known American poet, known as one of the "fireside poets" of the 19th century.) Another way to describe the "bargain theory" is that to constitute a bargain the promises of the parties must represent a *deal*. In short, under the bargain theory of consideration, a contract is a legally enforceable set of promises that comes into existence when the parties have made a deal.

In contracts formed under the bargain theory, the bargaining process determines not only what promises are enforceable, but also what remedy is available to the aggrieved party in the event such a promise is broken ("breach of contract"). The promise-breaker ("breachor") must compensate the disappointed promisee in an amount that will put him in the same position as if the promise had been kept. This basic remedy is often said by courts to represent the "benefit of the bargain" the plaintiff has lost because of the defendant's breach of contract. This remedy also is known as "expectancy" damages or enforcement of the plaintiff's "expectancy interest."

By adopting the bargain theory (enforcing promises made as part of a bargain) and by eliminating the enforcement of sealed instruments, modern contract law left one significant category of promise unenforceable. Formerly, a gratuitous promise would have been enforceable by the promisee if made by the promisor under seal. A gratuitous promise is simply a promise to make a gift. It is not made in exchange for consideration. (*e.g.*, "I am going to give you five thousand dollars on your birthday.") Just as the presence of bargained-for consideration alerts us

to the enforceability of promises, the absence of consideration tells us the promise is gratuitous and therefore is unenforceable.

Unfortunately, every person to whom a gratuitous promise is made does not know what the law of contracts has to say about the matter. In fact, people who make gratuitous promises often expect them to be taken seriously. For example, a generous uncle might promise, in writing, to pay his niece's law school tuition. No bargain is made between the uncle and niece; he simply promises to give her the money. Influenced by this promise, the niece quits her job to devote more time to her studies, but the uncle dies before the niece is able to present the bill. The uncle's executor, bound by law to pay only the legally enforceable debts of the uncle, refuses to pay because the promise was gratuitous and therefore not legally enforceable.

In earlier times, the uncle could have put a seal on his written promise, making it binding despite being gratuitous. But that approach no longer is available. Moreover, the uncle's written promise was not made in the form of a legal will and it does not pretend to be one. The niece thus is left unable to compel payment of the promised funds, even though nobody questions the authenticity of the document containing the uncle's promise.

During the early twentieth century, numerous published appellate cases dealt with similar gratuitous promises. These earlier cases tended to involve promises between family members, but gradually promises made in business relationships also began to appear. In all of these cases the same problem arose: (1) The promise was made under circumstances where it was clear or should have been clear to the promisor that the promisee would be influenced to believe and rely on the promise in a way that would involve some significant detriment should the promise not be kept; (In the illustration above, the niece quits her job and loses the income she will need if her tuition is not paid by the uncle's estate) and (2) Once such a detriment in fact had occurred, it seemed highly unjust for a court to turn the promisee away with nothing.

In response to such circumstances, trial judges began to make excuses to permit enforcement, despite the gratuitous nature of a particular promise. Some judges would point out some incidental conduct of the promisee and hold that it was "consideration," even though no bargain ever had been made concerning that conduct. Other judges would attempt to decide the case under a theory of law other than contracts (*e.g.*, trusts or torts) using vague or tortured explanations of how liability was thus created. On appeal, higher courts often chose to affirm such creative attempts by trial courts to avoid injustice, offering opinions and explanations as vague as the ones they were affirming.

Gradually, enough case law had been published to embolden courts to hold that some promises can be enforced completely *without* bargained-for consideration. The law professors who drafted the first Restatement of Contracts for the American Law Institute ("ALI") identified this new theory as a

form of "estoppel." Estoppel is a traditional equitable theory preventing a person from unjustly enforcing legal rights after doing something to mislead another person into believing those rights would not be asserted. (The ALI researched and drafted the first Restatement of Contracts during the time from 1923 to 1947.) The first Restatement also recognized that everything about the estoppel approach, including the nature of the promisee's remedy for the broken promise, must be left to the equitable discretion of the enforcing court. The entire object of this theory was to avoid injustice.

It is important to note that the estoppel approach is not limited to cases where, as in the above illustration, the promisor dies before carrying out the promise. Injustice also can result where the promisor simply changes his mind and refuses to keep the promise, after the promisee has been harmed by relying on it. In appropriate circumstances, such a promise can be enforced like any other contract, despite the absence of any bargain. A key to enforcement is in showing the promisor knew or should have known the promise was likely to induce the promisee to make some kind of significant change, in the belief that the promise would be kept.

Because estoppel in this instance is based on a promise, it came to be known as "promissory estoppel." It is now recognized in all American jurisdictions. Other common names for it are "reliance theory" or "detrimental reliance" because reliance by the promisee on the gratuitous promise is one of its essential components. As we will discuss later, relatively few promises actually are enforceable under the doctrine of promissory estoppel, and the dominant basis for the enforcement of promises remains the law of consideration.