GIFTS, THE LAW AND FUNCTIONAL RATIONALISM

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MYLES MCGREGOR-LOWNDES

ASSOCIATE PROFESSOR
SCHOOL OF ACCOUNTING LEGAL
QUEENSLAND UNIVERSITY OF TECHNOLOGY
BRISBANE

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ABSTRACT

This paper examines the legal facilitation (or rather lack of facilitation) of gifts. The emerging western political ideology of welfare is based on the premise that nonprofit organisations are to play a far greater role in the delivery of welfare services. This role will be enabled in part by increased gifts. The ideology has not addressed the fundamental hostility of the law to the facilitation of gifts. The nature of the legal obstruction of such gifts is compared to equivalent commercial transactions, the reasons given for this obstruction are analysed and the appropriateness of such nonfacilitation is challenged. A state that does not alter the legal hostility to gifts may find that organisations do not attain their expected role in the changing welfare state.

This paper examines the legal facilitation of a direct gratuitous *inter vivos*[1] property transfer (gift) from a donor (one who transfers property) to the donee (one who ultimately receives property). For example, the paper addresses the question, what is the legal conception of A giving a gift of food to B? For this analysis, it matters little who the parties to the transaction are, be they individuals, charitable[2] or for profit entities. It does not include transactions that are not directly given to the donee, but are to be passed through an intermediary to a donee. The legal analysis of intermediaries is more complex with different issues.[3]

Examples of intermediaries are the executors of a deceased person's estate,[4] trust or community organisation receiving property to hand on to donees, usually according to

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[1] *Inter vivos* refers to a gift made during the donor's lifetime (Latin: between the living). It is used to distinguish a gift made after death which has a special and complex set of laws.

[2] The word "charitable" is used in this paper, unless the context otherwise dictates, in its popular meaning, that is a nonprofit, non-government, voluntary, donative organisation, it is not used in its restricted legal meaning flowing from common law or statutes.

[3] These issues revolve around how the entity carries out its functions as an intermediary between the donor and donee. It includes such specific matters as the way in which it holds title to the property and how the fidelity of the intermediary to the donor is ensured.

[4] If a donor wishes to transfer property after death, this must be through an intermediary, as the former donor's property is not within the donor's control or possession at that time. After death a donor ceases to exist and their wishes must be carried out by another, usually as a trustee, executor or administrator. These are treated as intermediaries in this paper.

conditions.[5] Charitable intermediaries can also be donors and donees in different transactions where they are not performing an intermediary function. For example where a person gifts property to a charitable organisation without any conditions as to its use, the charitable organisation is a donee. When a charity gifts a piece of property to another without condition that it be passed on to others, it is acting as a donor in a direct gift.

The emerging western ideology be it known as reconstitution of civil society, modernisation, de-modernisation, shadow state, corporatisation or even economic rationalism expects charitable organisations to play a far greater role in the delivery of services.[6] Part of the funding for this shift is to come from increased voluntary action. This has taken for granted that the law facilitates voluntary action, particularly gratuitous property transfers such as gifts. If the law places a barrier to the gratuitous transfer of property the presumed policy outcomes may not fully eventuate.

Analysis of gratuitous transfers in their own right is not a novel proposition for either traditional legal or economic scholars. It has gained attention from traditional contract law scholars as a "puzzle".[7] Fuller[8] and Posner[9] typify those mostly American scholars who

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[5] These conditions might be that the property is to go to a particular class of persons for a particular purpose. It would also include the condition that the property is only to be used for the purposes of the intermediary and not for the profit of the controllers or members of the intermediary.

[6] This interpretation of social welfare is adopted by a number of scholars such as J.R. Wolch, *The Shadow State: Government and Voluntary Sector in Transition*, The Foundation Center, New York, 1990; A. Ware, *Between Profit and State: Intermediate Organisations in Britain and the United States*, Polity Press, 1989; L.M. Salamon, 'Of Market Failure, Voluntary Failure, and Third Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State', *Journal of Voluntary Action Research*, Vol.16, No.1-2, 1987, pp.29-49; H.K. Anheier & W. Seibel (ed.), *The Third Sector: Comparative Studies of Nonprofit Organizations*, Walter de Gruyter, Berlin, 1990; D. Billis & M. Harris, 'Taking the Strain of Change: U.K. Local Voluntary Agencies Enter the Post-Thatcher Period', *Nonprofit and Voluntary Sector Quarterly*, Vol.21, No.3, 1992, pp.211-225; M. Considine, 'The Costs of Increased Control: Corporate Management and Australian Community Organisations', *Australian Social Work*, Vol.41, No.3, 1988, pp.17-25; R. Kramer, 'Voluntary Organisations in the Welfare State: On the Threshold of the 90's', *The Centre for Voluntary Organisations*, London School of Economics, Working Paper No.8, London, 1990; C. Pierson, *Beyond the Welfare State? A new Political Economy of Welfare*, Polity Press, Cambridge, 1991; H.K. Anheier & W. Seibel, *The Third Sector: Comparative Studies of Nonprofit Organisations*, Walter de Gruyter, Berlin, 1990; R. Kramer, *Voluntary Agencies in the Welfare State*, University of California Press, 1981.

[7] K.C.T. Sutton, *Consideration Reconsidered-Studies on the Doctrine of Consideration of the Law of Contract*, University of Queensland Press, Brisbane, 1974; Sir William Holdsworth, *A History of English Law*, Sweet & Maxwell, London, Vol.8, 1973, pp.3-28; B. Coote, 'The Essence of Contract', *Journal of Contract Law*, Vol.1, No.2. pp.91-112 and Vol.1, No.3 pp.183-204 are examples of such work.

[8] L.L. Fuller, 'Consideration and Form', *Columbia Law Review 799*, Vol.41, 1941, pp.799-824.

[9] R.A. Posner, 'Gratuitous Promises in Law and Economics', *Journal of Legal Studies*, Vol.6, 1977, pp.411-426.

have examined the *inter vivos* gratuitous transfer from a functional economic perspective. What is uncommon is the analysis of direct gratuitous transfers to and by charitable organisations. It is when economists and lawyers have turned to examine charitable intermediaries that the role of the gratuitous transfer has been neglected.

Anglo-Australian economic scholarship of charitable intermediaries can be illustrated by Culyer, Wiseman and Posnett, English scholars who attempted an economic rationale of charitable activity using the concept that

> *The legal treatment of charities is seen as a logical extension of the laws of contracts and inheritance.*[10]

They noted that,

> *Thus philanthropic transactions, in common with all other transactions involving the transfer of property rights, require the protection of a system of law to enable contracts between individuals to take effect and be enforced,*[11]

but do not go on to examine the gratuitous exchange or acknowledge that the law does not "protect or enable" such contracts. They concentrated their work on the facilitation of the intermediary performing its intermediary function. American economic scholarship of charitable intermediaries has also not seriously addressed this issue.[12]

The charitable organisation has been the sole focus of traditional English legal texts on

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[10] A.J. Culyer, J. Wiseman & J.W. Posnett, 'Charity and Public Policy in the UK - The Law and the Economics', *Social and Economic Administration*, Vol.10, No.1, Spring 1976, pp.32-50.

[11] Culyer et al, ibid, p.33.

[12] For example Hansmann in his two leading articles on nonprofit corporations (H.B. Hansmann, 'The Role of Nonprofit Enterprise', *The Yale Law Journal*, Vol.89, No.5, 1980, pp.835-901 and 'Reforming Nonprofit Corporation Law', *University of Pennsylvania Law Review*, Vol.129, No.3, 1981, pp.497-1050) does not examine the law/economics of donations nor does B.A. Weisbrod (B.A. Weisbrod, *The Voluntary Nonprofit Sector: An economic Analysis*, Lexington Books, Lexington, 1977; *The Nonprofit Economy*, Harvard University Press, Cambridge, Massachusetts, 1988). The analysis of gratuitous transfers by American scholars outside the context of gratuitous intermediaries has been substantial, (see footnotes 109-123).

charity such as *Tudor on Charities* or *The Modern Law of Charities*[13] and other texts.[14] They do not deal adequately, if at all, with the legal nature or implications of direct property transfers between donors and donees and the implications for charitable organisations. Their focus is exclusively on the legal implications of the trust in its intermediary function and consequently excludes valuable insights that a critical analysis of gratuitous *inter vivos* property transfers can reveal. For example, Chesterman writes,

> *In the smallest, simplest communities, philanthropic welfare provision can frequently take this simple form of direct almsgiving. No bureaucracies or other organisational structures need to be interposed to facilitate the flow of material benefits from giver to recipient; in addition, an express or implicit requirement that the latter should show homage or deference in return can be easily communicated.*[15]

Although Chesterman is correct in stating that intermediaries are not necessary for a transfer of property, facilitation of such transfers may still be required. It is argued that this facilitation is not in the form of a bureaucracy, but a more basic requirement of legal recognition and promotion of the gratuitous exchange. He does not acknowledge the hostility of the law to gifts. It will be argued that the state of traditional legal scholarship is a reflection of the classificatory division in the English common law between equity and assumpsit.[16]

The first part of the paper identifies the actual lack of legal facilitation of the gratuitous transfer compared to a commercial transaction. The method to facilitate gratuitous promises to transfer property is to formalise the transactions by using a deed under seal (which was the medieval commercial practice) or symbolic consideration. It will be argued

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[13] G. Spencer, Maurice & David B. Parker, *Tudor on Charities*, 7th ed., Sweet & Maxwell, London, 1984; and G.W. Keeton & L.A. Sheridan, *The Modern Law of Charities*, 2nd ed., Northern Ireland Legal Quarterly Inc., Belfast, 1971.

[14] See, for example, E. Cairns, *Charities: Law and Practice*, Sweet & Maxwell, London, 1988; F.M. Bradshaw, *The Law of Charitable trusts in Australia*, Butterworths, Sydney, 1983; M.R. Chesterman, *Charities, Trusts and Social Welfare*, Weidenfeld and Nicolson, London, 1979.

[15] Chesterman ibid, p.2.

[16] The law of trusts being found in Equity and the law of individual gratuitous transfers being a matter entirely for assumpsit (that is, contract law). One writer notes, "Though a branch of public law, charitable trusts are commonly treated in general textbooks on trusts, alongside private trusts, presumably because (they, sic) developed in equity." L.A. Sheridan, "Nature of Charity", *The Malayan Law Journal*, December, 1957, pp.lxxvi-xcix at p.lxxvi.

that forced recourse to these devices is pure formalism and creates anomalous situations. In comparison with the contemporary state of the law in America, which facilitates the enforcement of gratuitous promises, the systemic dysfunctional judicial attitude towards gifts in Anglo-Australian law is even more sharply focused.

It is argued that the Anglo-australian law's treatment of such gratuitous property transfers suffers from formalism and its development was stunted in the nineteenth century against the background of laissez-faire economic and libertarian political philosophies, which are inappropriate to the modern welfare state. The support of the current state of the common law by functional economic scholars is also examined and challenged. The assumptions underlying the rational construction are challenged and a new functional paradigm proposed. This provides a basis for reform of the stagnated morass of legal conceptions that overbear the gratuitous *inter vivos* property transfer.

The law's response to completed gifts

The direct property transfer in its simplest form may be expressed in terms of A, a natural person delivering a loaf of bread to B, another natural person. This is a purely philanthropic transfer, a gift, which occurs where the transfer of property is voluntary and for no tangible gain to the donor[17]. At common law an effective gift of property requires that:

(a) the donor had an intention to part with the property;
(b) the subject matter was certain;
(c) the donor must be able to dispose of the property;
(d) the donor must employ the means recognised by the common law as necessary to transfer the property;

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[17] A gratuitous transfer, gift or philanthropic action must be distinguished from a commercial property transfer. A gratuitous transfer is unilateral, the donor receives no market price or tangible *quid pro quo* in return for the transfer of the property. Some of the literature seeks to construct in a gratuitous transfer some return, price or value flowing from the donee back to the donor to turn it into an exchange relationship (see T.R. Ireland, *The Calculus of Philanthropy*, in the Economics of Charity, Institute of Economic Affairs, London, 1969, pp.65-78 and W.M. Landes and R.A. Posner, Salvors, Finders, "Good Samaritans, and other Rescuers: An economic study of law and altruism", *The Journal of Legal Studies*, Vol.7, 1978, pp.83-128). The difference between a gift and a bargain adopted in this paper is derived from the work of Atkinson (R. Atkinson, "Altruism in Nonprofit Organisations", *Boston College Law Review*, Vol.31, No.3, pp.501-639) and Hall & Colombo (M.A. Hall & J.D. Colombo, "The Donative Theory of the Charitable Tax Exemption", *Ohio State Law Journal*, Vol.52, 1991, pp.1379-1476). The distinguishing feature is whether the value of the return is independent of the transaction itself, if so it is a unilateral gratuitous transfer of property, a gift.

(e) the donee must be capable of acquiring the property; and

(f) the donee must accept the property[18].

In terms of the example, if the bread is given from one to another as a gift, satisfying the above requirements, the law recognises that the bread belongs to B. At first scrutiny the requirements of the common law seem rational, prudent, consistent with the legal framework and societal expectations. However the law is distinctly reluctant to facilitate the transfer in ways that have been developed for commercial exchanges of property.

The common law will not lend its support to rectify a defective transfer of the property, or default in some other warranty or condition made by a donor[19]. Put in terms of the example, if the bread was not A's to transfer, then the law would enforce the return of the bread to the rightful owner, but B would have no remedy against A either for the replacement of the bread or recompense due to the defective transfer. B would have no legal remedy if the bread was warranted by A to be fit for human consumption and was not in fact so.

Donees cannot be compelled to accept a gift, but that approximates all of their rights[20]. A, the donor is similarly in a weak legal position.[21] The common law would also not enforce conditions or directions of the donor as to the purpose for which the property was to be applied by the donee, or its free disposition once it was in the hands of the donee[22]. For example an imposed condition by A that the bread is to be used to feed B rather than be sold to provide B with addictive substances would not be enforced by the common law courts.

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[18] See *Bowman v. Secular Society Ltd* [1917] A.C. 406 at 436 and *Re Wasserberg: Union of London and Smiths Bank Ltd v. Wasserberg* [1915] 1 Ch 195.

[19] The type of contract referred to in this section is the parol or simple contract which forms the vast bulk of contracts made. The contract formed by a deed under seal will be dealt with in text accompanying footnote 35.

[20] See *Dewar v. Dewar* [1975] 2 ALL ER 728.

[21] This legal position ought not to be confused with the moral power or actual power of a donor over a donee.

[22] A concise authority for this proposition is to be found in Lord Parker's judgment in the case of *Bowman v. Secular Society Limited* [1917] A.C. 406 at 436-7.

All these remedies may have been available if the transaction was not a gift but a bargain, that is, that the law could point to consideration supporting the transaction. The concept of a bargain or "consideration" is essential to English contract law recognising a parol contract, that is, a legally enforceable agreement[23]. Consideration is an abstract legal concept used to signify the presence of a mutual exchange and common law chose to only enforce mutual exchanges. Gifts were perceived as unilateral exchanges and hence were not enforced. The perception of the law that a gift involves no mutuality is a crucial issue will be examined later in this paper.

The Law's response to incomplete gifts

The situations presented so far have been gifts that have been legally completed, that is, the donor has done all that is necessary to legally transfer the property to the donee. The law will not disturb a completed transaction provided that there are no other vitiating circumstances.[24] Where the transfer is not complete or where there is an executory promise to transfer a gift, then the general principle is that the transfer will not be enforced by the common law or equity. This is in direct contrast to commercial transactions supported by consideration, which will be enforced by the common law and equity. The legal function of enforcing promises is an important facilitation of commerce and one could hardly imagine our present society functioning without this facility. Yet, this facility is in the most part denied to gratuitous transferors.

The attitude of the common law is illustrated in the case of *In re Hudson. Creed v. Henderson*.[25] The judge made an opening comment that,

> *I believe this is the first time in the annals of the Court of Chancery, or of the Court which has succeeded it, in which an attempt has been made, and made against a*

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[23] The English common law requires consideration to enforce a promise, that is in the oft quoted words of Lush J in *Currie v. Misa* (1875) LR 10 Ex 153 at 162 "either some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" for a parol or simple agreement to be enforceable. Formal contracts such as those of record (for example, judgements and recognisances entered into the records of the courts) or contacts under seal (that is, contracts that are deeds under seal) do not require consideration to be present.

[24] These are fraud, duress or undue influence which are discussed text accompanying footnote 63 and following.

[25] (1885) 54 LJ. CH. N.S. 811.

dead man's estate, to make it liable for a promise given by him during his lifetime to make a charitable contribution to any object.[26]

Mr Hudson had promised verbally to give 20,000 pounds to a church and then signed a form whereby he promised to pay the sum in four equal instalments for the purpose of liquidating "chapel debts." The promisor paid 12,000 pounds before his death and the church sought to recover the outstanding sum from the promisor's estate.

The church's case was based on the notion that the money was a legal debt owed by the estate to them, due to the testator having a legally enforceable contract with the church. The judge found that Mr. Hudson's actions were voluntary, there was no consideration and so no contract. The church had argued that consideration was present in the form of reliance by the church on the donation, and further reliance in that others would only make a donation in consequence of Hudson's promise. The church had also incurred expenses and liabilities that it would not have incurred but for the promise of the testator. This was not accepted by the judge saying,

I am bound to say that this is an attempt to turn a charity into something very different from a charity. I think it ought to fail, and I think it does fail. I do not know to what extent a contrary decision might open a new form of posthumous charity. Posthumous charity is already bad enough, and it is quite sufficiently protected by law without establishing a new principle which would extend the doctrine in its favour far more than it has been extended or ought to be extended.[27]

This line of reasoning was followed in later English cases[28], but the arguments raised by the church would have satisfied an American court[29].

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[26] Pearson J., ibid, (1885) 54 LJ CH N.S. 811 at 814.

[27] ibid, at p.815.

[28] In re Churchill. *Taylor v. University of Manchester* [1917] 1 Ch. 206; In re Cory. *Kinnaird v. Cory* (1912) 29 T.L.R. 18; *In re Soames. The Church Schools Company (Limited) v. Soames* (1897) 13 T.L.R. 439.

[29] Refer text accompanying footnote 66 and following.

The Australian courts have closely followed English precedent.[30] A recent Australian case that deals with these issues is the New South Wales Court of Appeal case of *Beaton v. McDivitt*.[31] Kirby P, adopted the conventional English notion of consideration noting that he was bound by the High Court of Australia's statement of consideration in the case of *Australian Woollen Mills Pty Ltd v. The Commonwealth*.[32] He rationalised the adoption of the English concept of bargain on the grounds that,

> *People make foolish and ill considered promises to confer gifts and benefits on others ... In the cold light of the dawns that follow, disputes require courts to decide whether these promises will be enforced.*[33]

It is a revealing remark and illustrates the entrenchment of the English precedent in Australia. Kirby P has the deserved reputation of one of Australia's most reformist judges having spent many years as head of the federal law reform commissions and delivering many adventurous judicial decisions and indicates the entrenched attitude of the courts.[34]

Where consideration is lacking in commercial promises, resort could be had by the parties to rendering their promises into the form of a "deed under seal." In the early history of

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[30] See such cases as *Phillips v. Bennett* (1866) S.A.L.R. 75 where in 1866, the Full Court of the South Australian Supreme Court regarded the action by a school trustee to recover a sum of four pound ten shillings from a defaulting donor to the construction of a class room, as *nudum pactum*. J. Gwynne commented at p.76 that, "... such a promise to the Trustee or persons collecting money, however binding in point of morals, has no force whatever in law, being without consideration." The matter was again considered in *The National Trustees Executors and Agency Company Limited v. O'Hea and others* (1904) 29 V.L.R. 814.. The case involved the will of Monsignor O'Hea who was a Dean of the Roman Catholic Church and certain claims made against the estate as the result of incomplete gifts. The Supreme Court was referred to a number of American cases which supported the contention that consideration could be present in a gift situation. The Victorian Court said,"Conceding that English Courts would give relief upon the same equity, it should certainly be given cautiously, and only in cases which left no doubt of a distinct promise, and of action clearly induced by the promise. The facts before me fall short in this respect..." (Beckett J. at p.822).

[31] (1987) 13 NSWLR 162. This case involved the status of a promise from a land owner to a person to allowing occupation of part of the land. A transfer of title to the occupier was to occur on the happening of an event that was eventually frustrated. One of the issues was that there was no conventional consideration involved in the bargain.

[32] (1954) 92 CLR 424.

[33] op cit, Kirby P. at p.169.

[34] To illustrate this point see, W.L. Morrison, 'The Activism of Mr Justice Kirby: reforming the laws with unreformed theory', *Quadrant*, Vol.29, No.2, 1985, pp.53-57; R. McGeock, 'Tribute to Mr Justice Kirby, former solicitor now president of NSW court of Appeal', *Law Society Journal*, Vol.22, No.1, 1984, pp.774-775; P.J. Downey, 'Australian Judges', *New Zealand Law Journal*, 1984, pp.353-354; K.D. Kirby, 'The Seven Deadly Sins', *Brief*, Vol.13, No.7, 1985, pp.28-29.

English law this form had to be used in order to give validity to executory contracts[35]. A deed under seal originally required that the promise be placed on parchment or paper, sealed by the promisor, delivered as a deed that has been witnessed and attested.[36] Best, C.J. said in *Morley v. Boothby* that,

> *The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it.*[37]

Thus the general principle of English law is stated as,

> *... if an individual wishes to bind himself by gratuitous promise, the rule that all simple contracts require to be supported by the presence of consideration forbids him to implement his intention otherwise than by deed. If he complies with this formality, he will doubtless be made to pay damages should he break his promise.*[38]

Rendering the gift into the form of a deed is not however a complete solution to legal enforcement. The equitable remedy of "specific performance" is not available to enforce a gift in any legal form, deed or otherwise. This is illustrated in the firm words of The Lord Chancellor in the case of *Wycherley v. Wycherley*,[39]

> *It is certain that, in general, courts will not compel the performance of voluntary agreements. An agreement, in its nature, imports a reciprocity, and a quid pro quo, and where that reciprocity does not exist, the power of enforcing it does not exist. ... I know of no instance where a court of equity has compelled a man to execute what was a mere act of volition.*

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[35] A.W.B. Simpson, *A History of the Common Law of Contract*, Claredon Press, Oxford, 1987, pp.88-90.

[36] *Goddard v. Denton* (1584) 2 Co. Rep. 4b; 76 E.R. 396.

[37] *Morley v. Boothby* (1825) 3 Bing. 107 at 111-112; 130 E.R. 455 at 456.

[38] G.C. Cheshire & C.H.S. Fifoot, *The Law of Contract*, Butterworths, Sydney, 1966, at p.103.

[39] 1763 2 Eden 175 at 177-178; 28 E.R. 864 at 864-865, emphasis added.

This position was retained still a century later when Lord Justice Knight Bruce in *Kekewich v. Manning*[40] said,

> *In equity, where at least the covenantor is living, or where specific performance of such a [voluntary] covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed.*

The law of equity will intervene under certain limited circumstances to provide some relief to a donee who has not had perfect title vested in them by a donor. This has not always been so. Before the nineteenth century it was not at all beyond doubt that a declaration of trust could be effective though gratuitous transfers[41]. The pre-nineteenth century view was that "no court of conscience will enforce *donum gratuitum*, though an intent appear so clearly, where it is not executed or sufficiently passed by law".[42]

There has been a continuing argument in equity as to whether an attempted gratuitous transfer that was not complete at law could be rectified by equity looking to the intention of the donor. The equity courts have to choose between two competing maxims, "Equity follows the [common] Law" and "Equity looks to the intent rather than the form."[43] The equity courts applied the strict view that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding on him.[44] This has been eased in the English case of *Re Rose*[45] where by the use of a constructive trust, unknown at the time of the previous cases, if a donor has done all that the donor alone can do then the equitable title vests in the donee and the donor holds the legal title for the donee until such time as all the steps have been completed and the legal title vests in the donee. It is not clear whether this relaxation of the principle has been adopted in Australia as there has not been a case

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[40] (1851) 1 De G.M. & G. 176 at 188; 42 E.R. 519 at 524.

[41] See *Ex parte Pye* (1811) 18 Ves. Jun. 140; 34 E.R. 271.

[42] Bacon, *Reading on the Statute of Uses* (Works, Spedding (ed.)), J. Stephens, London, Vol.7, 403.

[43] H.A.J. Ford & W.A. Lee, *Principles of the Law of Trusts*, The Law Book Company Limited, Sydney, 1990, at p.110.

[44] Turner L.J. in *Milroy v. Lord* (1862) 4 De G.F. & J. 264 at 274; 45 E.R. 1185 at 1189.

[45] *In Re Rose. Rose v. Inland Revenue Commissioners* [1952] Ch. 499.

on the point.[46] Here equity has used a fictitious intermediary entity to over come the problem. This only serves to highlight the comments made at the beginning of this chapter about the fixation of equity and equity scholars, with intermediaries. It is a cumbersome solution to the problem and is not without doubt as to its applicability in Australia.

The other possibility of the development of Anglo-australian law to assist gratuitous promises is the doctrine of promissory estoppel. Promissory estoppel was used extensively to permit American courts to break away from English precedent to enforce gratuitous promises.[47] Estoppel allows the court to intervene in the unjust departure by a party from an assumption of fact which that party has caused another party to adopt or accept for the purpose of the legal relationship.[48] English, and Australian courts more so, have been reluctant to extend this doctrine as far as it has developed in the United States. The doctrine cannot be used as a weapon, only a shield, which is a defence to an action which limits its use in enforcing a gratuitous promise. To go further would, in the High Court of Australia's opinion, directly threaten the doctrine of consideration, as a gratuitous promisee could make a promise binding by acting on it.[49]

The law as it currently stands in England and Australia does not facilitate gifts. It stops short of prohibiting such transfers by not interfering with a completed transfer without any vitiating elements.[50] The concept of common law consideration and the reluctance of equity to depart from this has resulted in donors and donees being placed in an impossible position to enforce their agreement by recourse to the courts. The law has not developed significantly through either of the possible avenues of fictitious intermediaries in the form of trusts or promissory estoppel. In a time of rapid change and public policy of welfare

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[46] Obiter dicta in several Australian cases do not bode well for following the English precedent, see Windeyer J. in *Norman v. F.C.T.* (1963) 109 C.L.R. 555 at 602-3 and *Olsson v. Dyson* (1970) 120 C.L.R. 365.. Kitto J. at 375, with whose judgment Menzies J. agreed in the case of *Olsson v. Dyson* said: "But there is no equity to perfect an imperfect gift: because the absence of consideration a purported assignment, if incomplete as a legal assignment, effects nothing in equity". This view has been altered by statute in various jurisdictions to give effect to the clear intentions of donors, such as Section 200 of the *Queensland Property Law Act.*

[47] Refer to text accompanying footnote 77 and following.

[48] See further Dixon J. in *Grundt v. Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641. An example would be if A leases a house to B at $10 a month, but because of some factor A and B agree (without fresh consideration) for a period of time that the rent is reduced to $5 a month, then at the end of the period A cannot sue for the balance monies.

[49] *Waltons Stores (Interstate) Ltd v. Maher* (1988) 76 ALR 513.

[50] These are fraud, duress and undue influence that will be discussed later, refer footnote 62 and following.

being premised on voluntary action,[51] what will be the effects if the law takes several centuries to accommodate altered social circumstances?

As will be seen later in this paper it is not the position in the other major western legal systems, such as the civil law countries in Europe or the United States of America. Before looking for the reasons behind the dominance of consideration and whether this is appropriate for a modern welfare state, another aspect of consideration requires to be introduced.

In the terminology of the law, the common law courts would assist to enforce a transaction where there is "sufficient but inadequate" (symbolic) consideration. A property may be transferred for a grossly inadequate value such as a peppercorn or a hairpin and the court will lend its aid to enforcing the promise.[52] The traditional rationale for this policy position is that the philosophy of freedom of contract requires that courts not interfere in matters of commercial judgement which is best left to the parties. The courts have also resiled from the prospect of examining the price of each contract to establish whether it is adequate, perhaps a daunting task. Thus if A promised to transfer a loaf of bread to B in exchange for a speck of dust, the court would enforce the promise. The court would not probe the adequacy of the exchange. This is a device used to make apparent gifts legally enforceable. It is common in Australia for leases of property to nonprofit entities to be for a nominal sum such as one dollar or the settlement of a trust for ten dollars.

While consideration need not be adequate, it must be "sufficient," that is it must be recognised as of some value in the perception of the law. There are several categories of motivations that are not regarded as sufficient consideration[53], but the one which often relates to gifts concerns moral obligations. A moral obligation, such as natural love and affection is regarded of no value to the law.[54] Holdsworth remarks that "Quite why the

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[51] Refer to footnote 50.

[52] See *Thomas v. Thomas* (1842) 2 QB 851; 114 E.R. 330 where one pound annual rental for a house was sufficient consideration and *Chappell & Co Ltd v. Nestle Co Ltd* [1960] AC 87 where used chocolate wrappers could be consideration.

[53] The other categories are the performance of an existing contractual duty owed to the promisor and the performance of a public duty.

[54] See *Eastwood v. Kenyon* (1840) 11 AD & EI 438; 113 E.R. 482, which is the most cited references in modern texts, but the proposition was stated much earlier in *Harford v. Gardiner* (1587) 2 Leo. 31 which overruled *Hunt v. Bate* (1856) Dy. 272; 73 E.R. 605.

courts adopted this general principle is nowhere stated."[55] Equity again follows the common law on this point in that it will not deny a party remedies because the value is less than may be expected or inappropriate.[56]

This boundary of the commercial bargain produces the result that a donee who gives up in reality some thing of minor worth is in a better position than one who relies solely on generous motives. The other issue that provides some odd results is the law's distinction between conditional gift promises and a contract. As previously noted, if A promises to gift B a loaf of bread, there is no contract, it is but a gift. If A promises to give B a loaf of bread after B fetches it from the cupboard, there is still no consideration and hence no contract. The fetching of the bread is not the price of the promise, but a condition precedent to the operation of A's gift. If A promises to give B a loaf of bread in return for B bringing a loaf of bread from the cupboard, there is a bargain, as the act is stipulated for the price of the promise.[57] There is an exchange in both instances, but the law will not recognise the enforceability of both exchanges because of the adherence to the principles of consideration. The common law assumes that the exchange is the hallmark of a transfer that ought to be enforced for the good of society. As has been mentioned this view of the world does not consider the altered nature and importance of gratuitous transfer in contemporary society nor certain types of exchanges nor reliance or intention of the parties to a gratuitous transfer.

Law and contractual intention

Direct gifts, even if supported by symbolic consideration, can still be unenforceable because of the intention of the parties. The common law presumption is that social or domestic arrangements are not intended to create contractual relations and will not be enforced by the courts[58]. Agreements between husband and wife, family members or nonrelations in a domestic context will be presumed by the court not to have intended to create a legally binding agreement unless there is a positive and unambiguous indication to the contrary.

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[55] Holdsworth, ibid Vol.3, p.434.

[56] *Haywood v. Cope* (1858) 25 Beav. 140; 53 E.R. 509; *Mountford v. Scott* [1975] Ch. 258.

[57] See the cases of *Dickinson v. Abel* [1969] 1 ALL ER 484 and *Wyatt v. Kreglinger & Fernay* [1933] 1 KB 793.

[58] See *Balfour v. Balfour* [1919] 2 KB 571 or a more recent example in *In Re Gonin (dec'd)* [1977] 3 WLR 379.

If A (husband of B) gives to B a loaf of bread for symbolic consideration, there is no issue with consideration, but the courts would presume that this social or domestic transfer of property is not intended to be enforced by the law. If the parties could show some contrary intention such as attending a solicitor to draw up a formal agreement, the courts may enforce the agreement. This is a direct contrast to commercial arrangements which will be presumed to be legally binding unless their are positive indications to the contrary.[59]

The judgments in the case of *Balfour v. Balfour*[60] which involve an agreement between husband and wife indicate that public policy concerning the administration of justice was a prime concern of the judges, Atkin L.J. saying that,

> *the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations.*

he went on to say that,

> *Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts*[61].

It is acknowledged that most domestic agreements are not those which society wishes to place before its judicial system. This doctrine reinforces the common law's view of consideration as relating only to commercial arrangements. We will reserve the public policy justifications for further comment.

Judicial Intervention for public protection

Despite the common law's reluctance to enforce gratuitous transfers as contracts between donors and donees, it does intervene in such transfers to protect donors from the

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[59] Refer *Australian Woollen Mills Pty Ltd v. Commonwealth* (1954) 92 CLR 424.

[60] [1919] 2 KB 571.

[61] at p.579, Duke L.J., also expresses the same sentiments at p.577.

consequences of their actions. The strand connecting these instances is that the circumstances of the transfer offends the basic tenets of justice and fairness. Undue influence[62], unconscionable conduct[63] and duress[64] are all grounds for relief of donors from transfers so tainted.

The law provides protection for donors against transfers that are regarded as unfair. There has been no corresponding development of protection for donees. The protection alluded to here is not protection of transfers, as donees by definition have none. The law could seek to uphold fairness considerations relating to the transferred property. Some situations may be the state of the property, be it defective or property that may cause harm, property that is onerous in terms of attaching obligations[65], or fails to perform the intended purpose at all or satisfactorily.

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[62] Undue influence finds its roots in the equitable doctrine that influence by a person over another should not be abused and that confidence 'reposed' should not be 'betrayed'(See *Smith v. Kay* (1859) 7 HLC 750 at 779; 11 ER 299 at 311). Certain relationships will raise a presumption of undue influence in a transaction and the onus of rebutting the presumption is on the dominant party. Judicially recognised relationships in which the presumption will be presumed are: parent and child (See *Bank of New South Wales v. Rogers* (1941) 65 CLR 42); guardian and ward (See *London and Westminster Loan and Discount Co (Ltd) v. Bilton* (1911) 27 TLR 184); trustee and beneficiary (See *Wheeler v. Sargeant* (1893) 69 LT 181); solicitor and client (See *Westmelton (Vic) Pty Ltd v. Archer and Shulman* (1982) VR 305); physician and patient (See *Williams v. Johnson* [1937] 4 All ER 34); and religious adviser and advisee (See *Allcard v. Skinner* (1887) 36 Ch D 145).

Undue influence may also be claimed outside these relationships, but the weaker party must establish at the time of the gift that the dominant party had actual influence over the weaker's mind. Undue influence will also extend to the situation where a third party uses undue influence to effect a property transfer between the weaker party and another (See *Powell v. Powell* [1900] 1 Ch 243). The court will set aside the property transfer.

[63] "Unconscionable conduct" has for centuries been a ground for equitable remedies based on the wider notion of equitable fraud, rather than common law fraud. Where a stronger party has dealt with a party with a special disability such as illiteracy, age, infirmity or ignorance unfairly, the onus is on the stronger party to show that the dealing was fair and just (See Mason J, in *Commercial Bank of Australia v. Amadio* (1983) 57 ALJR 358 at 363). A donor who has gifted property to a donee in a stronger position than the donor may have the transfer rescinded if the donee cannot prove that the transfer was fair. There appear to be no cases where the donor is in the superior position to the donee, and one can only imagine that it would arise in the situation where the transfer of property was accompanied by onerous obligations on the donee to the benefit of the donor.

[64] Duress, a common law concept, also permitted relief to weaker parties where consent to an agreement was obtained by an illegitimate threat, coercion or force. Where property has been transferred as a result of threats of or actual violence to persons or property then the courts will assist to reverse the transfer. The law would intervene, whether or not there was a binding contract, to permit recovery of property (See *T.A. Sundell & Sons Pty Ltd v. Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323).

[65] For example a mortgage, rental conditions or tied service contracts to the donor. This ought not to be confused with donor conditions attempting to be attached to the gift which the law will not enforce. Mortgages and leases will run with real property independently on donor conditions by force of the law.

Donors are twice protected; once through consideration and again by the vitiating circumstances that the law will remedy. One may ask, is the gratuitous transfer so prone to fraud, perjury, misunderstanding and regretted hasty decisions due to unconscionable emotional pressure that this double protection is warranted? This is an issue that will be taken up for comment later in this paper.

Comparison with the treatment of inter vivos gifts in Continental and American Law

There is no such requirement of consideration in the Continental law codes of France and Germany, consideration is not formally recognised as part of their legal system of enforcing contacts or agreements. In Roman law those who promised to make gifts could be compelled to complete them although the donor later resiles from the promise and no consideration was necessary[66]. Dawson comments that:

> *In our own laws the starting point is that most promises of gift are wasted words, and it is only their performance that counts, so that the gift is conceived as a one-sided act - a transfer in which the transferor holds all the controls. In western Europe a different way of thinking has come to be a habit. In what we might be called the Romanesque tradition, a gift is conceived as a two-sided transaction, a contract which, like any other contract, requires mutual consent...*[67]

Like English law, the promise could not be open-ended and condition *potestative* (a condition wholly subject to the promisor's control) was void.[68] The French and German codes typify the general thrust of continental law in this matter requiring that the agreement be notarised, a document executed by the donor, accepted by the donee and actual transfer of the property.[69] These are much more onerous requirements than those of the English tradition. Dawson posits that this is due to the Roman and Continental

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[66] J.P. Dawson, *Gifts and Promises Continental and American Law Compared*, Yale University Press, New Haven and London, 1980, p.23. The contract form was classified as *nude pact* and could be enforced in the secular courts. Such agreements in the last two hundred years to the end of the reign of Justinian were required to be registered, mainly to facilitate tax collections, but also to provide authentication and facilitate enforcement.

[67] Dawson, p.2.

[68] French Civil Code, art. 1174; and A.T. Von Mehren, 'Civil Law Analogues to Consideration', *Harvard Law Review*, Vol.72, pp.1024-1026 (1959).

[69] Dawson, specifically p.213 and generally chapters 2 & 3.

preoccupation with succession and 'forced heirship', but notes that it has the advantages of ensuring "deliberation, informed consent and a full public record through the active participation by a trained public official."[70]

American judges have been far more adventurous than their English or Australian counterparts in developing techniques to enforce transfers of property to donees. They have overcome many hurdles that the English conception of consideration placed in the path of enforcing gratuitous transfers. American law has a long tradition of favouring, on a public policy stance, such transfers which would have traditionally failed because of a lack of consideration.[71] Justice Harris in *Salsbury v. Northwestern Bell Telephone Company*[72] after noting the difficulty of enforcing gratuitous transfers said:

> *Yet, the courts have generally striven to find grounds for enforcement, indicating the depth of feeling in this country that private philanthropy serves a highly important function in our society.*

Professor Shattuck commented as early as 1937 that,

> *No more interesting instance of judicial legislation is to be found in the books. Our courts have taken it upon themselves to make certain that no subscriber to charity escapes paying his subscription.*[73]

This desire has driven judges to find consideration on various tenuous grounds. Transfers have been enforced on the basis that the donee promises to use the property for charitable purposes.[74] Cohen points out that the nonprofit organisation is bound by the objects of its constitution and the nondistribution constraint to do so in any case, so there is no real

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[70] Dawson, p.226 and see also p.229.

[71] A.L. Corbin, 'Corbin on Contracts, A Comprehensive Treatise on the Working Rules of Contract Law', Section 118 (West ed. 1965); Kenneth P. Cohen, 'Charitable Subscriptions - Is consideration necessary?', *Baylor Law Review*, Vol.26, 1974, pp.256-261.

[72] 221 N.W.2d 609 (Iowa 1974).

[73] W.L. Shattuck, 'Gratuitous promises - a new writ?', *Michigan Law Review*, Vol.35, 1937, pp.908-945 at 931.

[74] *In re Lord's Will* 175 Misc. 921, 25 N.Y.S.2d 747, 151 A.L.R. 589.

promise made.[75] In other cases the argument has been that other donors have contributed in reliance on the promise by the particular donor and the mutual promise affords good consideration.[76] A moral obligation has been found to be consideration for the enforcement of a gratuitous transfer[77] and the equitable doctrine of promissory estoppel is also used. If the donee has in reliance on the promise altered their position such as expending money, incurring a liability, performing services, then consideration will exist.[78] It has been criticised in the following terms:

> *Courts should act with restraint in respect to the public policy arguments endeavouring to sustain a mere charitable subscription. To ascribe consideration where there is none, or to adopt any other theory which affords charities a different legal rationale than other entities, is to approve fiction.*
>
> *The wisdom of such a policy, its possible detriment as well as its benefit to public bodies, may be the subject of legislative inquiry and decision.*[79]

A bold step is contained in the Second restatement of Contracts in which enforcement of charitable subscriptions can be achieved without consideration or detrimental reliance.[80] A promise which the donor should reasonably expect to induce action or forbearance on the part of the donee will be enforced if injustice can be avoided only by enforcement of the promise. Unlike other types of promises the court does not have to inquire whether the promise actually induced action or forbearance on the part of the donee. This allows the

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[75] ibid 256-7.

[76] Such authorities are summarised in the case of *G.B. Jordan et al., v. Mount Sinai Hospital of Greater Miami Inc., a Florida corporation not for profit* 276 So.2d 102 (Dist. Ct. App. 1973).

[77] *Caul v. Gibson*, 3 Pa. 416 (1846).

[78] Some case examples are *Doyle v. Glassock*, 24 Tex. 200, 58 S.W. 152 (1859) and *McKeon v. City of Council Bluffs*, 206 Iowa 556, 221 N.W. 351, 62 A.L.R. 1006.

[79] *Jordan v. Mount Sinai Hospital of Greater Miami Inc.*, op. cit. at 108.

[80] The Second Restatement of Contracts Chapter 4 P90(2) takes the position that

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise....
>
> (2) A charitable subscription .... is binding under Subsection (1) without proof that the promise induced action or forbearance.

allegation of reliance by the donee to be enforced by the court without investigation and avoids the problem of mixed motives.

Novack discusses many organisations that are seeking to enforce promises of property to nonprofit organisations in the American courts.[81] American judicial decisions have facilitated the enforcement of gratuitous property transfers. This could be directly attributed to the greater flexibility of the American judiciary to accommodate perceived public policy and the historical importance accorded to philanthropic activity. It is a stark contrast to the English and Australian legal relationship between donors and donees.

Analysis of the Anglo-Australian position

So far this paper has described the contemporary legal state of Anglo-australian law which it is argued does not facilitate the gratuitous transfer of property in the same manner as commercial transfers. The method to facilitate transfers is to formalise the transactions by the use of a deed under seal or symbolic consideration. These devices still do not give the legal facilitation that is accorded commercial transfers. It will be argued that forced recourse to these devices is pure formalism and creates anomalous situations. In comparison with the contemporary state of the law in America, the systemic dysfunctional judicial attitude towards gifts in Anglo-Australian law is even more sharply focused.

The following analysis addresses the question, what explanations can be offered for the difference? This question is important to consider as it exposes the forces that shaped the law as it now stands and assists to understand why contemporary socially desired and encouraged transfers are faltering. The first discipline that is used to explain the state of the law is that of history, it offers insights into the policy issues that have influenced judicial attitudes towards gratuitous transfers. The second discipline is that of economics which is found to offer rationalisations and a context for the way that the common law has developed. A closer analysis of the attitudes present in the law's assumptions in the treatment of gratuitous transfers leads to a restatement of the function of the law of gratuitous transfers in terms of social facilitation.

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[81] Janet Novack, *Forbes*, 29 October, 1990, p.68. One case she mentions was before the courts seeking $12 million on behalf of nine charities from one estate as the result of unfulfilled pledges. The American broadsheet *The Chronicle of Philanthropy* while profiling presidential candidate Ross Perot's philanthropy mentioned several threats of legal action concerning Perot gifts. (*The Chronicle of Philanthropy*, June 16, 1992 pp.7-11.)

Historical Analysis

A fundamental of English contract law has been its emphasis on freedom of contract; that is, "freedom to contract and to negotiate contractual terms; it assumes a paradigm situations of one-to-one negotiation of all of the terms of an agreement by the parties with equal bargaining strength concerned to maximise their individual positions."[82] One unfamiliar with the actual position of gratuitous promises would perhaps assume that these agreements too were left to parties to negotiate, unhindered duly by the law. This general observation does not fit the law's treatment of gratuitous promises. Why might this be so? There are several possible reasons, the first is that gratuitous promises fell outside the origins of contact law (unlike the civil law) and the conceptual boundaries were never expanded (as they have been in America) to include such transactions.

Consideration has its historical roots in the common law actions of debt, covenant and assumpsit and by borrowing the Roman law's idea that a *nude pact* was not enforceable.[83] In the thirteenth century only those agreements that could be brought within the form of the common law's personal actions such as debt or covenant would be entertained before the common law courts. The essence of these actions rested not on promises but that a duty had arisen from status, relations or a tangible transaction of property. The notion that a promise itself was enforceable independent of a duty was to come much later in English legal history. These forms of action did never include gratuitous conduct as did the Roman law. With debt, the duty arose from a person having property that was to be transferred because of *quid pro quo*. A promise was finally recognised by the writ of assumpsit as enforceable, but the promise had to be accompanied by consideration. A promise to gift was never considered as enforceable. The writs which predated assumpsit did not enforce a gift or a promise, let alone a promise to gift.

The term consideration emerged by the end of the sixteenth century in the context of "the facts or circumstances which must be proved in order to make a promise enforceable by

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[82] J.W. Carter & D.J. Harland, *Contract Law in Australia*, 2nd ed., Butterworths, Sydney, 1991, p.7.

[83] Nude pact or nudum pactum in Roman law means unenforceability of an agreement for reasons such as a lack of lawful "cause", as consideration was not necessary element of a civil contract. In English law it has been used to denote an agreement that failed for lack of consideration. Refer to *Stroud's Judicial Dictionary of Words and Phrases*, 5th ed. London, Sweet & Maxwell, 1986.

this action (assumpsit)."[84] The role of a promise was largely evidentiary rather than substantive as it was to become. The eighteenth and early nineteenth centuries saw a departure from consideration being driven by the common law procedural forms, and instead being viewed as an indication of evidentiary valuation that the parties intended their agreement to be enforced by the law. Sir William Holdsworth identifies Lord Mansfield as the prime mover that put consideration in this new context and made theoretical space for moral and conscientious obligations to be enforced by the law in their own right rather than some twisting of theory to find conventional consideration to support an agreement[85]. Lord Mansfield's decisions[86] were followed as accepted doctrine until the second quarter of the nineteenth century. If Mansfield's line of reasoning had been followed, English law may well have developed a position similar to the American law.[87] It had been set free of the formalism of consideration and perceived consideration as evidence of reliance, but not the exclusive indicia of contractual intention.

This was not to be, as in the nineteenth century the procedural origins of consideration were recalled and reimposed on contract law. The cases of *Eastwood v. Kenyon*[88] and *Thomas v. Thomas*[89] were to reaffirm that consideration was not to be understood as merely evidence of a bargain, but "as a compendious word which summed up the conditions which the plaintiff must satisfy before he could succeed in indebitatus or in special assumpsit."[90] Denman CJ., offered reasons other than the proper application of precedent for the decision in *Eastwood v. Kenyon*. He noted that the Lord Mansfield's reasoning would in the ultimate lead to annihilation of "the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."[91] This would result in "mischievous consequences to society" in that suits would be multiplied

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[84] Sir William Holdsworth, *A History of English Law*, Sweet & Maxwell, London, 1973, Vol.8, p.7.

[85] ibid, pp.25-34.

[86] See *Trueman v. Fenton 2 Cowp.* 544; 98 E.R. 1232, *Hawkes v. Saunders* 1 Cow. 289; 98 E.R. 1091; *Slade v. Morley* (1603) 4 Co. Rep. 926; 76 E.R.1074, and *Martyn v. Hind* (1776) 2 Cow. 447; 98 E.R. 1174.

[87] Holdsworth, Vol.3, p.42.

[88] (1840) 11 Ad. and E. 438; 113 E.R. 482.

[89] (1842) 2 Q.B. 851; 114 E.R. 330.

[90] Holdsworth, Vol.8, p.38.

[91] *Eastwood v. Kenyon* at p.450.

and temptations to executors would be increased.[92] In the case of *Thomas v. Thomas* a few years later, symbolic consideration was accepted by Denman CJ on the grounds that it "shews a sufficient legal consideration quite independent of the moral feeling."[93] Patterson J. subscribed to the same sentiment saying that one ought not to "confound consideration with motive."[94]

The promise given for consideration was all that was needed, it was itself the source of the contractual duty and it no longer depended on some pre-existing duty. Atiyah comments that once a promise itself independently was considered as consideration, "it now became difficult to see why a gratuitous promise was not binding."[95] He does not go on to explain this puzzle. In 1854 the Mercantile Law Commission contemplated the abolition of the doctrine.[96] However as we have seen the English law never made the transition to permitting the enforcement of gratuitous promises.

The rise of formalism and the decline in the influence of equity was a general trend in most areas of the law at this time, not just isolated to consideration. Atiyah posits that formalism was encouraged then by the case load pressure on the judiciary.[97] This encouraged rule-utilitarianism where the judges sought "to search for fixed principles which would govern large numbers of cases without too close inquiry into the facts, and with the danger, therefore, which the individual decision might be (or anyhow, might seem) hard and perhaps unjust."[98] It was simple, if there was consideration there was a contract. There was no need for the court to weigh up facts to decide on reliance, serious intention or motive. This is supported by Markesinis' comment that:

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[92] *Eastwood v. Kenyon* at p.450.

[93] *Thomas v. Thomas* at p.859.

[94] *Thomas v. Thomas* at p.860.

[95] Atiyah, p.452.

[96] Second Report, (1854-5) H.C.Parliamentary Papers, xviii. 664, 678.

[97] As noted above this was one of the reasons given by C.J. Denman for the decision in *Eastwood v. Kenyon* (Refer to footnote 92 above) and also mentioned by L.J. Atkin, in *Balfour v. Balfour* ([1912] 2 KB 571 at 579 and refer footnote 61) In 1846 there were only 15 common law judges in the whole of England. (Atiyah, p.390).

[98] Atiyah p.392.

> *Consideration . . . was devised by commercially-minded lawyers at a time when they were anxious to escape from their formalistic medieval laws and expand their law of contracts. Assumpsit provided the means for expansion while consideration ensured that it remained under control.*[99]

The formalism of the Anglo-australian judiciary in this area remains entrenched to this today.[100] In neither jurisdiction has the constructive trust nor promissory estoppel been developed to mitigate the effect of a strict doctrine of consideration and the Australian courts are perhaps even more tentative on these doctrines than the English.[101] In summary, history reveals that the personal actions on which the formative writs of contract were based did not include gratuitous transfers, unlike the Roman law. The assumptions flowing from freedom of contract are commercially orientated, not based on morally enforceable obligations. The free market intellectual theory had little to say about gratuitous transactions in the nineteenth century and judges need not address the issue as according to ancient precedent it was of no concern to the law what a person may do voluntarily. The continental law based on Roman law developed "causa" which did not draw a distinction between bargains and gratuitous transfers. The American judges altered the received English common law by extending the theory of consideration. They finally recognised the social utility and public policy of enforcing gratuitous promises by moving to the position that consideration was merely an evidentiary element of reliance. Despite prolific English academic commentary to alter the law such as Holdsworth,

> *There is, it seems to me, good sense in Lord Mansfield's view that consideration should be treated, not as the sole test of the validity of a simple contract, but simply as a piece of evidence which proves its conclusion.*[102]

The judicial use of consideration to free contracts from medieval law, but still control the law's scope was crucial to the development of contract law. It has long outlived its restricting function and reform has never been achieved.

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[99] B.S. Markesinis, 'Cause and Consideration: a Study in Parallel', *Cambridge Law Journal*, 1978, Vol.37, pp.53-75 at 55.

[100] Evidenced by the case of *Beaton v McDivitt* op. cit., refer text accompanying footnote 31.

[101] *Re Rose* [1952] Ch. 499 (see footnote 45) does appear to have been accepted in Australia.

[102] Holdsworth op cit p.47.

Functional rationalism

Not all find the historical critique of the apparent non-facilitation of gratuitous promises convincing. Fuller[103] and Posner[104] have argued that the common law's treatment of gifts serves a proper function in regulating society's affairs in a deliberate rational economic paradigm.

Fuller raises several arguments about why the common law does not enforce gratuitous promises. First, the gratuitous transfer is not an exchange "which conduces to the production of wealth and the division of labour," nor is there either reliance on the promise by the donee nor unjust enrichment.[105] Fuller and Posner contend it is not the place of the law to intervene in such relationships. Posner gives the example of a man promising to take a woman to dinner and reneging.[106] He argues that in such a situation the most effective remedies to the injured party are those outside the legal system. He says,

> *... the real reason for the law's generally not enforcing gratuitous promises is not a belief, which would be economically unsound, that there is a difference in kind between the gratuitous and the bargained-for promise, but an empirical hunch that gratuitous promises tend both to involve small stakes and to be made in family settings where there are economically superior alternatives to legal enforcement.*[107]

Posner states the question as

> *whether it is economical for society to recognise a promise as legally enforceable thus requires a comparison of the utility of the promise to the promisor with the social cost of enforcing the promise.*[108]

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[103] L.L. Fuller, 'Consideration and Form', *Columbia Law Review 799*, Vol.41, 1941, pp.799-824.

[104] R.A. Posner, 'Gratuitous Promises in Law and Economics', *Journal of Legal Studies*, Vol.6, 1977, pp.411-426.

[105] Fuller, ibid, p.814.

[106] Posner, op cit, p.50.

[107] Posner, op cit, p.50-51.

[108] ibid p.49.

He comes to the conclusion that the case for the enforcement of gratuitous promises will generally be stronger the larger the promised transfer and if it is to be made over a period of time in instalments. Non-enforceability of gratuitous promises could tend to bias transfers excessively towards immediacy which would not allow the economic benefits of instalment gifts.[109]

Secondly, formalities are present in the common law to serve evidentiary and cautionary functions as well as to "canalise" transactions.[110] The evidentiary formalities permit cost effective determinations of the terms of the agreement and its existence, cautionary formalities serve to both warn the parties of the consequences of their contemplated actions and to give an indication to the judiciary that the parties deliberatively intended their pact. Channelling is the directing of parties into forms that the court can easily recognise and administer.

The gratuitous promise differs from a bargain with consideration and these differences dictate a higher test of formality. The bargain is a form of tangible mutual exchange about which the law is comfortable in making the assumption that the parties wished to enforce the bargain. Further, it is socially undesirable not to enforce the bargain. They agree that this mutual and tangible bargain is not present in a gratuitous transfer. The promise is perceived not to be in response to a tangible benefit nor is the relationship mutual. Thus the law insists that formality be the actual delivery of the property to the donee, or execution of a formal deed under seal or symbolic consideration which is evidentiary and cautionary and canalised into a legal form which the parties know will be recognised by the courts.

This argument has a logic which is compelling, symmetrical and self-contained. To ensure efficient administration of justice and avoid disputes over unintended gifts, the law provides a means whereby parties can place their gratuitous transfer on a formal basis. For these theorists the common law has reached an economically and socially rational solution in deciding what promises should be enforced by the law.

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[109] R.A. Posner, 'Gratuitous promises in Economics and Law 1977', *Journal of Legal Studies*, Vol.6, pp.411-426. Further economic analysis has been made on the basis of Posner's article, see S. Shavell, 'An economic Analysis of Altruism and Deferred Gifts', *The Journal of Legal Studies*, Vol.20, 1991, pp.401-421.

[110] Fuller, op cit p.815.

Assessment of the Functional Rationalisation

The economic functionalist approach which has dominated the debate about consideration and gratuitous promises for the last fifty years has recently been criticised in two American articles. Baron[111] and Kull[112] both take to task the rational economic paradigm on the validity and appropriateness of the assumptions it makes. They assert that the functionalists justify existing rules by developing a rationale, rather than examining whether the rule is justified on realistic assumptions. It echoes Pound's observation of functionalism as "The rational is real and the real is rational. Hence it is futile to criticise legal institutions or attempt to improve them by legislation."[113]

Baron and Kull hint at a redefinition of the old functionalists' assumptions which would reform the law into performing a greater facilitative role which is attune to contemporary societal and public policy requirements. This section first examines the criticisms of functionalists' assumptions and then develops the shape of the law based on modified assumptions about society, human behaviour and the need for facilitation of gratuitous property transfers.

One of the basic assumptions that the functionalists made was that gratuitous transfers were of little economic importance. Fuller quoted from the French writer Bufnoir who described the gift as a 'sterile transmission' which has been echoed by many other writers without giving a rigorous explanation of the sterility.[114] The size of philanthropic transfer and the nonprofit sector, which has only recently been the subject of extensive academic investigation, shows that the economic contribution is significant. It can no longer be claimed, if it was ever true that "personal altruism is rare and from strangers even rarer"

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[111] J.B. Baron, 'Gifts, Bargains, and Form', *Indiana Law Journal*, Vol.64, No.2, pp.155-203.

[112] A. Kull, 'Reconsidering Gratuitous Promises', *Journal of Legal Studies*, Vol.21, 1992, pp.39-65.

[113] R. Pound, *Interpretations of Legal History*, Wm. W. Grant & Sons Inc., Florida, 1986 (reprint), p.66.

[114] Fuller, op cit p.814-815, citing Claude Bufnoir, Propriete et Contrat 487 (2d ed. 1924). R.A. Posner, *Economic Analysis of the Law*, Little Brown & Co., Boston, 1972, at p.216 claims that there is no basis for the conclusion that, "... a transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's activities."; see also, M.A. Eisenberg, 'Donative Promises', *University of Chicago Law Review*, Vol.47, 1979, pp.1-33 at 4; C.J. Goetz & R.E. Scott, 'Enforcing Promises: An examination of the Basis of Contract', *Yale Law Journal*, Vol.89, 1980, pp.1261-1322 at 1266; C. Fried, *Contract as Promise*, at 36, Harvard University Press, Cambridge, 1981.

and promises prompted by affection are "seldom made."[115] Billig in reviewing Paragraph 90 of the American Restatement of Contracts noted,

> *The doctrine of consideration in contract law grew up in an age not faced with the legal problems arising out of charitable subscriptions totalling millions annually.*[116]

The economic and social impact of modern philanthropy has been alluded to earlier in this paper and will not be repeated here.[117] The argument that gifts have a wealth-redistribution effect, in that it goes to people who have more utility for the money than the donors and thus affects aggregate demand, has never been addressed by the functionalists.[118] An example is the bald statement of Posner without support that, there is no basis for the conclusion that "transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's utilities."[119] On this issue Baron[120] employs the arguments of Langbein[121] - that wealth consists of more than commodities and that property can play an important role in society not because it directly generates material wealth or the division of labor, but because it gives other personal and social attributes.

There is also a second related assumption which requires scrutiny. It is that in addition to the gratuitous transfer being economically trivial, there are relatively trivial social policy issues at stake. The economic and social policy of Thatcher and Reagan regimes, alluded to earlier in this paper, places a deal of emphasis on the charitable intermediary's reliance on philanthropic contributions which alters this assumption, if it were ever true. As Soljar puts it, "Among candidates for legal enforcement, neglected wives and children can surely have

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[115] *Baron* op. cit., p.184 citing Stoljar, 'A Rationale of Gifts and Favours', *Modern Law Review*, Vol.19, 1956, pp.237-254 at 249 and Havinghurst, 'Consideration Ethics and Administration', *Columbia Law Review*, Vol.42, 1942, pp.1-31 at 17; and Hays, 'Formal Contracts and Consideration: A Legislative Program', *Columbia Law Review*, Vol.42, 1941, pp.849-862, at 852.

[116] T.C. Billig, op. cit., at p.476.

[117] Refer to footnote 6.

[118] Hochman & Rodgers, 'Pareto Optimal Redistribution', *American Economic Review*, Vol.59, pp.542-581 at 542-3.

[119] R.A. Posner, *Economic Analysis of the Law*, Little Brown and Co., Boston, 1972, at p.216.

[120] Baron, p.199-200.

[121] Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission', *Michigan Law Review*, Vol.86, 1988, pp.722-751.

no lesser social priority than commercial purposes."[122] It is to be noted that the law would enforce the most trivial of commercial bargains that had very little economic impact. This proposition's basis is the parties' wisdom, not the courts, to decide on the desirability of making promises. Once the promise is made and intended to be legally binding, it is worth enforcing by the courts. The functionalists consistently use examples of trivial family or social arrangements, such as Posner's previously mentioned dinner invitation. The common law can effectively screen out such arrangements by the assumptions of contractual intention. The common law now catches the serious intended economically significant gratuitous transfers, that the functionalists do not refer, as well as socially trivial pacts. If the law takes the effort to enforce trivial bargains it should take the time to enforce serious, significant and relied on gratuitous promises.

The argument of Fuller was that there was no reliance on gratuitous promises and no unjust enrichment which would cause the law to concern itself with such promises. There are certainly examples where the donee can be said not to rely on a gratuitous promise and at best expect or hope that the promise is kept, but this is not always the case. Professor Shattuck commenting on American law forcefully argues that,

> *Experience has proved that promisees all too frequently rely to their injury on gratuitous promises. It is useless to argue that they should not rely where there is no consideration for the promise. The uncontrovertible fact is that they do rely. .... Many courts voicing, we believe, a sound and current ethical opinion, have chosen to put the risk of such reliance on the promisor. He is bound to make no promises which are calculated to induce injurious reliance, on pain of responsibility for the consequences.*[123]

As the previously noted American cases illustrate, donees may rely on a promise to start constructing buildings, programs of assistance and other donors may rely on a significant gift to also contribute and unjust enrichment can be imagined in the donor's undeserved boost in community reputation, personal satisfaction, and the other benefits of altruism.[124]

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[122] 'Enforcing Benevolent Promises', *Sydney Law Review*, Vol.12, 1989, pp.17-39 at 20.

[123] W.L. Shattuck, 'Gratuitous promises - a new writ?', 1937, *Michigan Law Review*, Vol.35, pp.908-945 at pp.942-943.

[124] See text accompanying footnote 66 and following.

At any rate commercial promises do not need to show reliance or unjust enrichment to be enforced.

The legal difference between a gratuitous and commercial promises is also explained by the necessity of the law to reduce the costs of enforcement. The characteristics of normal human behaviour in relation to gratuitous promises make them relatively expensive to enforce compared to a commercial bargain. Unless the evidentiary, cautionary and channelling safeguards were present, then the relative cost of enforcing such gratuitous promises would outweigh the social benefits. Kull and Baron examine in detail the assumptions on which this argument rest and conclude that the assumptions are not as self evident as they initially appear. Once these assumptions are replaced there is little difference between commercial promises and gratuitous promises.

The first assumption is that an alleged gratuitous promise is more difficult to ascertain than a commercial promise.[125] As Kull points out,

> *A plaintiff who attempts to recover on the basis of a promise that is a figment of his imagination, in the absence of either objective proof or corroborating circumstances, is unlikely to succeed; and the difficulty is the same whether he has imagined a bargain promise or a gift.*[126]

The law is capable of dealing with difficult situations involving the determination of a person's intent or state of mind (murder), emotional state (undue influence, duress, automatons), or intent of voluntary dispositions (relation back doctrine of voluntary settlements in insolvency or disposal of property in the face of a family law division of property). It seems that the law could adequately deal with deciding which gratuitous promises it should enforce on the basis of reliance and positive intent.

A related corollary to this assumption is that solemn writing in the form of a deed under seal is necessary as evidence for a gratuitous promise. Are donors, donees and witnesses of gratuitous promises more prone to perjury, fraud or misunderstanding than commercial transactions? Does the absence of consideration or a sealed deed in a transaction

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[125] Mechem, op. cit., p.349.

[126] Kull, op. cit., p.53.

consistently point to perjury, fraud or rash promises? These assumptions do not seem plausible when stated so bluntly and the historical explanation of a slow reforming formalist court seems a more cogent reason for the policy of the common law.

The second assumption is that gratuitous promises are more likely to be made in highly emotional states which causes imprudence or carelessness and donors ought to be protected from this undue influence or their own failings.[127] The statement of Kirby P. in *Beaton v. McDivitt* is illustrative of the centuries old judicial disposition, "People make foolish and ill considered promises to confer gifts and other benefits to others."[128] But how does this differ from a bidding duel at an auction, the emotion of a takeover duel for a corporation, or even the more commonplace emotive advertising campaign? The law does not offer such encompassing protection in commercial matters. The protections which are offered by statute such as the Statute of Frauds[129] and Trade Practices Act[130] make no distinction between commercial and gratuitous promises. Unless this assumption is borne out, such conduct should be left to the established standards of duress and undue influence.[131]

Baron examines sociological evidence as to the motives of donors and donees in areas such as blood and kidney donations and the anthropological nature of gifts.[132] She makes the case that donors are not overly impulsive despite family pressures for an organ donation and gifts can be viewed sociologically as mutual transactions, just as bargains are viewed. As Baron admits there is still much work to be done by sociologists in this area, but it does throw a good deal of doubt on the way that functionalists have constructed their reality.

Another argument of the judiciary for centuries, is that liberalisation would mean an overwhelming number of claims being brought before the courts.[133] In America where

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[127] Baron, op. cit., p.169, Kull, op. cit., p.53.

[128] (1987) 13 NSWLR 162 at 169.

[129] For example, *Property Law Act (Qld)* 1974-1990, Sections 10-12.

[130] *Trade Practices Act 1974 (Cth)*. See also the case of *Peter Geoffrey Webber Clarke v. New Concept Import Services Pty Ltd* (1982) A.T.P.R. 40-264 which was to the effect that a good of no commercial value or a gift is included in the consumer protection provisions of the Act.

[131] Refer to text accompanying footnote 62 and following.

[132] Baron, op. cit., pp.175-178 & 194-198.

[133] Refer to footnotes 61 and 97.

such matters can be brought before the courts there has not been the feared explosion and clogging of the judicial system with hearing such matters. The fact that the law will enforce such gratuitous transfers does not mean that recourse will be had to the courts to enforce every or even a substantial number of transfers. The costs of litigation act as an effective threshold to ensure that only substantial cases reach the courts in the vast majority of instances.[134]

The market model also assumes the sovereignty of the consumer, where the consumer's choices ultimately dominate the direction of the market. Where the consumer is sovereign, the ideal market will only maximise that which is worth maximising and this sovereignty is the embodiment of individual freedom. The previous discussion of Anglo-australian law has shown graphically that the consumer of a gratuitous transfer (donee) has scarcely any remedy, power or influence in the gratuitous transaction. The market model of gratuitous transfers must either cast the donor as the "consumer" of some altruistic emotion or other usually intangible benefit, thus conflating the role of supplier and consumer into the one individual.[135] The donee (as defined in this work) has no sovereignty in the transaction. Ought not in the ideal market the ultimate consumer of the tangible property, the donee, be given some power in the market as a quid pro quo consumer is?

The functionalist writers over the last half century have sought to explain the English law's rules of consideration as part of a rational schema of efficiency on assumptions that appear not to be as self-evident as proposed by such writers. Pound's observation of functionalism as "The rational is real and the real is rational. Hence it is futile to criticise legal institutions or attempt to improve them by legislation" serves to underline the fatal flaw of functional analysis.[136]

The historical analysis of the development of the law's policy on gratuitous transfers provides a plausible explanation for the current legal position. The functionalists are

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[134] This would be even more so the case in the Anglo-australian jurisdictions where the winning parties costs have to be borne by the loser as well as their own costs.

[135] See the survey of such theories noted in M.A. Hall & J.D. Colombo, 'The Donative Theory of the Charitable Tax Exemption', *Ohio State Law Journal*, Vol.52, 1991, pp.1379-1476, at p.1401.

[136] R. Pound, *Interpretations of Legal History*, Wm. W. Grant & Sons Inc., Florida, 1986 (reprint), p.66.

notable for their lack of historical analysis.[137] As Veljanovski writes,

> *The obvious point appears to have escaped its proponents (functionalists) that much of the common law during the nineteenth century was strongly influenced by laissez faire economics. It should therefore not come as a surprise when simple market economics can 'explain' this body of law.*[138]

The functionalist assumptions are being challenged and scrutinised. Many of them fall short of the mark as a basis for the rationalisation of the present state of the law and require to be challenged if new social needs are to be accommodated. Baker concludes that,

> *The economic analysis, although a failure as a guide to either welfare or freedom, may codify the basis and dominant ideology, the common sense, of the historical period in which common law developed. As increased awareness and better understanding of 'that' common sense leads us to the conclusion that sometimes it is nonsense, we need to develop a new understanding as to how law can be used to structure the social arena in a way that promotes human welfare and human sovereignty."*[139]

It is to this task that we turn in the facilitation of human welfare and sovereignty through gratuitous transfers.

The new functionalism - facilitation

This paper has argued so far that the formalism which engulfed the English judiciary in the nineteenth century prevented the development of consideration outside the strictures placed on it by its origins in ancient personal forms of writs. The ancient writs did not recognise voluntary promises or even assist in the completion of incomplete voluntary transfers. Neither the Anglo-australian development of promissory estoppel nor constructive trusts has

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[137] J. North, "Structure and Performance: The Task of Economic History", *Journal of Economic Literature*, Vol.16, 1978, pp.963-978.

[138] C.G. Veljanovski, "The Economic Approach to Law: A Critical Introduction", *British Journal of Law and Society*, Vol.7, No.2, 1980, pp.158-193 at p.184.

[139] C.W. Baker, 'The Ideology of the Economic Analysis of Law', *Philosophy and Public Affairs*, Vol.5, No.1, 1975, pp. 3-48 at pp.47-48.

provided a solution to the issue of the doctrine of consideration being diametrically opposed to enforcing gratuitous promises.

If one role of the law is to provide facilitation of socially useful transactions, then on the arguments that have been made that philanthropic transfers are socially useful, they ought to be facilitated by the law. The question that needs to be pondered is, is the nineteenth century notions of commercial life which judges applied to gift transactions appropriate to the realities of emerging social welfare regime? It is proposed that a functionalist position driven not by legitimising the present legal position, but seeking the function that the law ought to fulfil is appropriate for the modern welfare state. If the law is to serve functions that facilitate useful social transactions, then what is the role of the law?

Coote in an extensive treatise examining the essence of contract, constructs a new perception of the doctrine of consideration.[140] He theorises that promises can be classified by levels of intended or assumed obligation. The appropriate criterion for the legal enforcement of promises is the assumptions of the parties concerning legal enforcement. He posits,

> *What each party is seen to have bargained for is the assumption, by the other, of reciprocal legal obligation to him or her. Those assumptions are the consideration each provides for the other."*[141]

This echoes Shattuck who perceptively wrote in 1937,

> *In a climate of opinion which attaches obligation to the mere act of making a promise, the promisor who promises a gift and the man (943) who makes a business promise are indistinguishable; it is the act of promising which is significant. But in Anglo-American law "consideration" has for centuries been an additional element of significance.*[142]

Although Coote does not specifically deal with the issue of gratuitous promises, his

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[140] B. Coote, 'The Essence of Contract', *Journal of Contract Law*, Vol.1, No.2, pp.91-112 and Vol.1, No.3, pp.183-204.

[141] ibid at p.193.

[142] W.L. Shattuck, 'Gratuitous Promises - A New Writ?', *Michigan Law Review*, Vol.35, 1937, pp.908-945 at p.942.

principle of contractual enforcement is equally applicable, "The enquiry should be what obligations were undertaken by the promisor as that undertaking should have been understood by a reasonable person in the position of the promisee."[143] Such a proposition may be an appropriate basis for the enforcement of gratuitous promises.

Conclusion

The changing welfare state is increasingly reliant on charitable intermediaries to replace the state as a direct welfare provider, funded by the state, clients and public philanthropy. Cost savings available to intermediaries through such devices as voluntary labour and philanthropic transfers of property are part of the state's strategy. The focus of this paper is to determine the level of legal facilitation of *inter vivos* gratuitous transfers.

In summary, the Anglo-australian law tolerates *inter vivos* gratuitous transactions, but does not recognise that donees have any rights, apart from refusing the transfer of property. This is taken to the extent of refusing to assist a donee to perfect their title even when the intention of the donor was unequivocal and the defect is minor and technical. The courts refuse to recognise motives that could not be reduced to some commercial value. This could be overcome by a sham mutual bargain involving symbolic consideration or "channelling" the activity into the form of a deed under seal. But with social or domestic relationships, even if there was a mutual bargain, (sham or otherwise) the courts presume that the agreement is not legally enforceable. The late concession of equity was to invent a constructive trust to facilitate the gratuitous transfer. Promissory estoppel used to broaden the facilitation of commercial transactions has been closed to assisting gratuitous transfers in direct contrast to American developments.

The law, economic functionalist and legal scholars are caught in a conceptual web of the nineteenth century. Economic functionalists are locked into an elaborate historical tautology based on discredited assumptions about gratuitous transfers. As was indicated in the introduction to this paper there is a division of legal scholarship which reflects a legal division between equity and common law (contract). The Anglo-australian charitable intermediary scholars have confined themselves to equity issues and have largely failed to analyse the relevance of the common law's hostility to gratuitous transfers affecting the dynamics of the charitable intermediary. It is contended that there are theoretical and

[143] ibid., p.199, cites omitted.

practical benefits from viewing direct gratuitous transfers as a part of charity law. The analytical benefits are an appreciation of the legal restrictions placed on intermediaries and an identification of judicial policy towards gratuitous conduct that has not facilitated philanthropic transactions. This will assist in developing an explanation of the failure of charitable intermediaries to be a facilitative legal form for the delivery of gratuitous property transfers. Direct gratuitous transfers are just one example of defective legal infrastructure of charitable intermediaries.[144]

The nineteenth century battle between equity courts and the common law courts about contract and consideration was won by the common law. The rise of the formalism of the common law and the decline in the influence of equity was a general trend in most areas of the law at this time, not just isolated to consideration. This formalism later rationalised by functional economics is no longer appropriate for the policy direction of the modern welfare state. The functionalist explanation of the state of the common law is not persuasive as the assumptions that it rests on are not now, if they ever have been, appropriate to the role philanthropy is expected to play in a welfare state.

The Anglo-Australian legal environment is distinctly hostile to the facilitation of gratuitous transfers and one can but speculate on the effect that this has had on philanthropic transfers.[145] The function of the law in relation to *inter vivos* gratuitous property transfers should be to facilitate seriously made promises. The alteration of the law would have minimal adverse affects, (as has been the case in America) and requires only law reform which does not have to be supported for its implementation by any expensive temporary or permanent bureaucracy.

Present ideology and public policy which was premised on the efficient operation of philanthropic transfers to sustain a contraction of government is clearly misplaced in relation to *inter vivos* gratuitous transfers. The rigidity of Anglo-australian law in this area is such that it has not taken into account (nor likely to in the foreseeable future), the altered policy direction or current social environment. The unprogressive and slow nature of common law precedent and the lack of attention by policy analysts to such law reform, places shackles on the nonprofit sector to generate gratuitous transfers of property.

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[144] Other defective legal infrastructure issues concern, perpetual duration; perpetuities of conditional transfers; management structures; liability; artificial personality and state supervision.

[145] There appears to be no research which has quantified the cost of the barriers that the law places against the enforcement of gratuitous transfers. It would pose an interesting economic study to quantify such costs.

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