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## Consideration and the Commercial-Gift Dichotomy

James D. Gordon, III

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# Consideration and the Commercial-Gift Dichotomy

*James D. Gordon III\**

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I. INTRODUCTION<sup>1</sup>

The scene is a table at a sidewalk cafe, where a lawyer and a client are sitting down for lunch.<sup>2</sup> The lawyer is Robert Lichten (L), and the client is Carla Marchant (M),<sup>3</sup> the president of Slater Valley Coal Company. The sun is shining, a light breeze is blowing, and a record album of "Movie Street Noises"<sup>4</sup> is playing softly in the background. The camera zooms in.<sup>5</sup>

L: How are you enjoying your evening law school classes?<sup>6</sup>

M: Pretty well.<sup>7</sup>

L: The last time we met, you proposed a new theory for enforcing promises, a theory to replace the doctrine of consideration.<sup>8</sup> Remind me

1. This Article is a sequel to Gordon, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987 (1990). I am wary of sequels, based on my less than optimal experience with movie sequels. *Rambo II* and *III* were not as good as *Rambo*; *Jaws II* and *III* were even worse than *Jaws*. *Jaws* was more realistic than *Rambo*, though: at least in *Jaws* they did not try to make the shark talk. The last *Rambo* movie (*Rambo XV*) will be titled *On Rambo Pond*. Also, sequels typically do not do very well at the box office. *But see Henry V*.

2. In conformity with trade usage, the lawyer will bill the entire lunch hour to the client. An accurate billing statement for the hour would read:

Reviewing menu .1 hour; conference with waiter re today's specials .1 hour; visiting salad bar (including travel time both ways) .2 hour; eating salad .1 hour; peeling artichoke .1 hour; eating fettucini alfredo .2 hour; conference with client re whether to order any dessert today .1 hour; legal advice re contract law .1 hour. Total 1.0 hour.

The lawyer also will bill expenses for the lunch to the client. Why do lawyers bill their clients separately for items like photocopies, postage, and long distance telephone calls—have lawyers never heard of "overhead"?

3. As the previous article explained, "L" also stands for "lawyer," "M" also stands for "merchant," and "Marchant" is a play on the word "merchant." See Gordon, *supra* note 1, at 988 n.5. Readers who have forgotten these things already should have themselves checked for senility. Actually, senility is not so bad. For example, consider all the new friends you get to meet every day. Also, you get to hide your own Easter eggs.

4. "Not available in any stores." You can tell that you are getting old when you are watching a television record offer and you say, "Honey, get a pencil. This one looks pretty good!"

5. Camera lenses are always zooming in and out, especially now that any amateur with \$800 can buy a video camera and pretend to be Cecil B. DeMille, George Lucas, and Steven Spielberg all rolled into one. At our last family reunion, because the people with video cameras outnumbered the people without them, everyone just stood around and filmed each other filming each other. There were also some nice candid shots of me yelling at the children, the cat coughing up a fur ball (we watched that one backwards several times), and people sitting in front of the TV watching videos of themselves sitting in front of the TV watching videos of themselves. I can hardly remember how boring family gatherings used to be before we had video cameras to capture all the magic on film.

6. Marchant has to attend law school; otherwise she cannot say some of the things she needs to say in this Article. I have been spoiled by the law professor's privilege of controlling the hypothetical.

7. Ha! Law school is like one of those horror movies in which somebody wearing a hockey mask terrorizes people at a summer camp and slowly and carefully slashes them all into bloody little pieces. Except law school is worse because the professors do not wear hockey masks and you have to look directly at their faces.

8. Gordon, *supra* note 1, at 1003-06. Roscoe Pound wrote of the doctrine of consideration:

of what it is.

M: I accept the doctrines of reliance and restitution. As a substitute for the doctrine of consideration,<sup>9</sup> however, I propose a distinction between commercial promises and gift promises, and I believe that commercial promises should be enforceable. By "commercial promises," I mean promises related to an exchange of values.<sup>10</sup> They need not be given directly in exchange for a particular price;<sup>11</sup> it is sufficient that the promises are related to an exchange.<sup>12</sup>

L: Why do you think that your theory works better than the doctrine of consideration?

M: The doctrine of consideration serves several functions. For example, it serves a cautionary function because it helps ensure deliberateness. Often, promises to make gifts are based on emotion, surges of gratitude, or impulses of display.<sup>13</sup> A donative promisor tends to look primarily to the promisee's interests rather than the promisor's own in-

A legal requirement growing out of the exigencies of medieval legal procedure, which leads to so many unhappy results, is so difficult of definition that it has been the subject of endless debate, and in the best form in which it can be put is subject to so many exceptions, must be recognized as an anachronism that should be done away with.

Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1, 38 (1945) (footnotes omitted).

For other proposals to reform the doctrine of consideration, see K. SUTTON, *CONSIDERATION RECONSIDERED* 191-264 (1974). Reform always comes from below—the person with four aces never wants a new hand.

9. Consideration is often defined as a *quid pro quo*, a Latin phrase meaning "something for something." Being novices in trade, Romans always were leaving out the exact terms of their contracts, making enforcement problematic. ("Just precisely which 'something' were you referring to, Claudius?") The Romans were inexperienced in trade because their historical practice was simply to invade every country in the known world and take anything that they wanted. Cf. "*Veni, vidi, vici*," Latin for "I have made several economically efficient transactions here." The outlying provinces are said to have prospered during the Roman Empire. They were farther away. F. FELDKAMP, *ANCIENT GREEKS AND WORSE* 62 (1950).

10. "Among the odds and ends that are assembled under the heading of consideration the one central and essential idea is that of exchange, the product of a bargain." J. DAWSON, *GIFTS AND PROMISES* 198 (1980). "[T]he aim of the consideration requirement, speaking very generally, is to tie legal enforcement to the common act of trading one thing for another." M. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 14 (1990).

11.

A revised rule of promissory obligation should accept the fundamental fact that commitments are often made to promote economic activity and obtain economic benefits without any specific bargained-for exchange. Promisors expect various benefits to flow from their promise-making. A rule that gives force to this expectation simply reinforces the traditional free-will basis of promissory liability, albeit in an expanded context of relational and institutional interdependence.

Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 929 (1985).

12. "[A] sufficient reason for enforcing a promise is that it is part of an agreed exchange which would enable each party to secure from the other an act or result that he sought." J. DAWSON, *supra* note 10, at 221.

13. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979).

terests.<sup>14</sup> The commercial-gift dichotomy satisfies the cautionary function better than the doctrine of consideration because it distinguishes between transactions based on self-interest,<sup>15</sup> in which the promisor can be presumed to self-protect, and transactions based on altruism, in which the promisor is thinking more about the donee's interests than his own. The law can protect the promisor's interests in altruistic transactions.

Consideration also supposedly serves a channeling or "earmarking" function, helping to distinguish between enforceable promises and mere expressions of intent.<sup>16</sup> A channeling function is served when the "populace is made aware that the use of a given device will attain a desired result."<sup>17</sup> Because most people do not know about the doctrine of consideration, it is a very poor channeling device. The commercial-gift dichotomy serves the channeling function better because it corresponds more closely to people's expectations about which promises are binding. Contract law is designed to protect expectations, and people generally expect that commercial contracts are legally binding but that gift promises are not. People commonly understand that commercial promises are serious and are normally binding commitments.<sup>18</sup> The doctrine of consideration relieves people of promises that everyone expected to be binding and therefore is underinclusive.<sup>19</sup>

Consideration also serves an evidentiary function, but it does so only randomly. Although in some cases consideration provides evidence that a promise was made, a promisor still can assert that the consideration given was a gift, and either party can lie about the terms of the promise. Also, consideration serves no evidentiary function in an executory contract consisting of mutual promises.<sup>20</sup> In any event, most large promises have to be in writing anyway, under the Statute of Frauds.<sup>21</sup>

The commercial-gift dichotomy also corresponds to economic theory<sup>22</sup> better than consideration does.<sup>23</sup> Commercial promises facilitate

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14. *Id.*

15. Some people do not appear to care about self-interest and wealth. Joe Louis said, "I don't like money actually, but it quiets my nerves."

16. See Eisenberg, *supra* note 13, at 5.

17. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 294 (3d ed. 1987).

18. "Requiring an exchange increases the chance that the parties had in contemplation serious business with serious consequences." C. FRIED, *CONTRACT AS PROMISE* 38 (1981) (interpreting Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799 (1941)).

19. Gordon, *supra* note 1, at 1004.

20. *Id.* at 991.

21. *Id.* at 990.

22. According to economic theory, the market is supposed to meet consumer demand. However, the market also can create demand. Consider, for example, mountain bikes. Bike sales were lagging because, basically, everyone who wanted a bike already had one. Therefore, bike manufacturers suggested that people ride bikes in the mountains, where existing bicycles were inadequate.

economic exchange<sup>24</sup> and therefore should be enforceable.<sup>25</sup> Moreover, the doctrine of consideration restricts the market because it substitutes its own judgment about what is valuable<sup>26</sup> for the market's judgment.<sup>27</sup>

The mountains require heavy, sturdy bikes constructed out of leftover iron bridge girders. The bikes have 21 speeds, but 18 of the speeds are simply duplicates, so they are really only three-speed bikes. To make them more desirable, the manufacturers price the bikes at about the same level as Japanese luxury sedans and offer all kinds of expensive accessories like skintight clothing, fluorescent water bottles, and helmets that make the rider look like a complete dufus—just in case the skintight clothing did not do the trick. Buyers have no choice but to buy a helmet because, ultimately, it is cheaper than a neurosurgeon. Buyers soon discover that the fact that nobody ever has ridden bicycles on mountains in the entire history of the world was not exactly a complete coincidence. Cyclists did not simply forget that mountains existed, and now feel like total idiots, because they could have been riding in the mountains instead of on paved roads without boulders, rivers, sharp rocks, cliffs, poison oak, and sixty degree grades up and down. Consequently, most mountain bikes ultimately are resold in the secondary market (*i.e.*, garage sales presided over by smirking spouses).

23. “[C]ommercial dealings, the exchange in the market place, will need no formality, for the desiderata underlying its use are satisfied by the exchange of economic values.” K. SUTTON, *supra* note 8, at 260.

24. Having a common currency also would facilitate economic exchange. United States businesses currently refuse to recognize Canadian money, believing that Canadian quarters are good for nothing except to put on the eyes of dead hockey players.

25.

Exchange creates surplus, because each party presumably values what he gets more highly than what he gives. A modern free-enterprise system depends heavily on private planning and on credit transactions that involve exchanges over time. The extent to which private actors will be ready to engage in exchange, and are able to make reliable plans, rests partly on the probability that bargain promises will be kept. Legal enforcement of such promises increases that probability.

[J]ust as enforcing bargain promises is socially desirable because surplus is created through exchange, so too the law should enforce promises that facilitate or augment the likelihood of exchange.

Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 643, 653 (1982) (footnote omitted).

26. Some people who have nothing of value to trade simply invent something. One example is the Loch Ness monster, which is worth \$42 million in annual tourist revenues and about 2500 tourist-industry jobs. *The Universe*, May 29, 1990, at 2, col. 1. Nessie was first sighted in the sixth century, which means that by now she must be entitled to a government pension. Not to be outdone in the tourism industry, England has preserved fastidiously its principal natural resource: the monarchy. *Cf.* East Germany, which before reunification made automobiles that they could not exchange at the border for a pair of Nikes. East Germans, however, have made a brisk business exporting pieces of the Berlin Wall. At least, they say that those little chunks of concrete are pieces of the Berlin Wall. So far, enough pieces of the “Berlin Wall” have been sold to rebuild Hoover Dam.

27. The free market system sometimes makes odd judgments, however. For example, why does the dog food market make so many different kinds of dog food? They all taste the same to me.

The cat food market is also strange. For instance, “all natural” cat food contains horse meat. Is that the way it is in nature—the house cat is right above the horse on the food chain? Do we take our cats down to the racetrack and let them stalk thoroughbreds?

I do not mind buying cat food, but I hate setting up that little buffet. This is especially true because cats are basically worthless drones. If our cat were lobotomized in an accident, it would

Consideration theory refuses to recognize some values for which people truly bargain<sup>28</sup> and therefore fails to respect private autonomy<sup>29</sup> and the voluntary private ordering of the market.<sup>30</sup>

## II. PROBLEMS UNDER THE DOCTRINE OF CONSIDERATION

### A. Modifications

L: Last time we discussed some problems created by consideration theory. For example, under the doctrine of consideration's legal duty rule, many contractual modifications are not enforceable.<sup>31</sup> Does your theory solve this problem?

M: Yes. People often modify contracts, and they believe that their voluntary modifications are enforceable.<sup>32</sup> Contract law should protect those expectations, not defeat them. Analytically, because people are free to contract on whatever terms they choose, they also should be free to modify their contracts if they choose.<sup>33</sup> Contractual modifications are promises related to exchanges.<sup>34</sup> They keep the process flexible and serviceable<sup>35</sup> and therefore facilitate economic exchange.

L: But the legal duty rule helps prevent the extortionate "hold-up" game, in which one party to a contract refuses to perform unless the other makes an additional concession.<sup>36</sup>

M: The issue is whether a modification is voluntary or coerced, and the doctrine of consideration is a poor instrument for making that inquiry. The Uniform Commercial Code (UCC) is much better. It provides that an agreement modifying a contract for the sale of goods needs no consideration to be binding.<sup>37</sup> Instead, it requires that the

not change her lifestyle at all. Therefore, our cat gets whatever brand is on sale.

28. For example, countless people are willing pay lots of money for satellite dishes, even though all broadcasters eventually will begin scrambling their signals. When that happens, a satellite dish will be good for nothing except as a bird bath for condors.

29. See Fuller, *supra* note 18, at 806-10.

30. Private enterprise is said to be more efficient than public enterprise, *e.g.*, the United States Postal Service. At our post office there is a sign on the door that says "Please Open Slowly." Apparently the government believes that its employees should slow down even more.

31. Gordon, *supra* note 1, at 998.

32. *Id.*; see Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 681 (1982) (referring to the frequency of contract alteration).

33. Hillman, *supra* note 32, at 681. The legal duty rule meant that "within the limits of the obligation their agreement had created, the parties had destroyed their own power to contract." J. DAWSON, *supra* note 10, at 210.

34. Contractual modifications are ancillary to exchanges and are "going-transaction adjustments." Fuller, *supra* note 18, at 818 (quoting Karl Llewellyn); see RESTATEMENT (SECOND) OF CONTRACTS § 89 comment a (1981).

35. C. FRIED, *supra* note 18, at 36 (interpreting J. DAWSON, *supra* note 10).

36. See RESTATEMENT (SECOND) OF CONTRACTS § 73 comment a.

37. U.C.C. § 2-209 (1978). The United Nations Convention for the International Sale of Goods also does not require consideration for contractual modifications. UNITED NATIONS CONVEN-

modification be made in good faith.<sup>38</sup> The *Restatement (Second) of Contracts* imposes a duty of good faith in all contracts<sup>39</sup> and therefore the same approach would work for nongoods contracts.

The *Restatement* does enforce some contractual modifications without consideration. Section 89 provides:

A promise modifying a duty under a contract not fully performed on either side is binding

(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or

(b) to the extent provided by statute; or

(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.<sup>40</sup>

Comment a explains the rationale for section 89: "This section relates primarily<sup>41</sup> to adjustments in on-going transactions. Like offers and guaranties, such adjustments are ancillary to exchanges and have some of the same presumptive utility. . . . [R]elation to a bargain tends to satisfy the cautionary and channeling functions of legal formalities."<sup>42</sup> This rationale, however, would make all contractual modifications enforceable, not merely those listed in section 89. Saying that modifications are "ancillary to exchanges" and have a "relation to a bargain" is simply another way of stating the commercial-gift dichotomy: contractual modifications are related to exchanges.

Subsection (a)'s requirements that the modification be "fair and equitable" and made "in view of circumstances not anticipated by the parties" apparently are aimed at avoiding extortionate modifications. The *Restatement's* requirement of good faith, however, would perform that function better.

Section 89's requirement that the contract be "not fully performed on either side" is puzzling. Suppose that after Contractor has completed excavating a pit, he and Landowner agree on a higher price than the contract originally provided. Section 89 does not apply because the contract has been fully performed on one side. Arguably, the transaction is no longer "on-going"; on the other hand, because Landowner has not yet paid, the transaction has not yet been concluded. In any event, why should section 89 not apply? The adjustment is "ancillary" to an

---

TION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, art. 29 § 1, U.N. Doc. A/Conf. 97/18 (1980) [hereinafter UNITED NATIONS CONVENTION] (stating that a "contract may be modified . . . by the mere agreement of the parties").

38. U.C.C. § 2-209 comment 2.

39. RESTATEMENT (SECOND) OF CONTRACTS § 205.

40. *Id.* § 89.

41. *I.e.*, "exclusively." Section 89 only applies if the contract is "not fully performed on either side." *Id.*

42. *Id.* § 89 comment a.



exchange and has a "relation to a bargain." Moreover, because Contractor has already performed, his opportunity to extort a modification has disappeared. Consequently, the argument for enforcing this modification is even stronger than if he had not yet fully performed. Therefore, the requirement that the contract be "not fully performed on either side" seems backwards.

The doctrine of consideration also creates an indefensible anomaly in the area of contractual modifications. Under the common law, an unenforceable modification can be made enforceable by tearing up the old agreement and entering into a new one. The rescinding agreement has consideration because each party relinquishes its executory rights under the old contract,<sup>43</sup> and the new promises are consideration for each other. Thus, the parties can make an unenforceable modification enforceable simply by going through a special ceremony.<sup>44</sup> The law might just as well have them utter a mystical incantation.

### B. *Illusory Promises*

L: Another problem created by the doctrine of consideration concerns illusory promises. For example, a contract between A and B that A can cancel without notice is not binding on B, because A's promise is illusory and therefore is not consideration for B's promise.<sup>45</sup> Similarly, at one time outputs and requirements contracts were held unenforceable because a party might refrain from producing or requiring anything.<sup>46</sup> How does your theory handle those cases?

M: Businesses often are willing to enter into agreements that leave the other party's performance optional.<sup>47</sup> They do so because they perceive that the benefits of the relationship outweigh the costs and make the contract commercially justifiable.<sup>48</sup> The promises are related to ex-

43. Reiter, *Courts, Consideration, and Common Sense*, 27 U. TORONTO L.J. 439, 492 (1977).

44. Arguably, the ceremony has substance because upon rescission either party is free to walk away from the contract. The substance is illusory, however, because each party can argue that she rescinded in reliance on the other's promise to enter into an amended contract.

45. J. CALAMARI & J. PERILLO, *supra* note 17, at 229.

46. *See id.* at 240.

47. S. WILLISTON, *WILLISTON ON CONTRACTS* § 103B (rev. ed. 1936).

48.

The fallacy of the illusory-promise doctrine is that it treats transactions involving illusory promises as if they were failed bilateral contracts, intended to involve a promise for a promise. In fact, however, such transactions are often successful unilateral contracts, intended to involve a promise for an act—the act of giving the promisor a chance. The party who makes the real promise in these cases does not do so for altruistic reasons. Rather, he seeks to advance his own interests by inducing the promisee to give him a chance to show that his performance is attractive, so as to convince the promisee to transact. . . . Giving a chance is not cost-free, and presumably the promisor believes that without the promise the promisee's incentives to give the promisor a chance would be insufficient. . . . To increase the likelihood of

changes, are deliberative, and everyone expects them to be binding.<sup>49</sup> Under the commercial-gift dichotomy, they are.

### C. *Mutual Promises*

L: What about mutual promises as consideration?

M: Consideration theory cannot explain even why the most paradigmatic contract—one containing mutual promises—is enforceable. Under the doctrine of consideration, A's promise is enforceable only if A receives something valuable in return. Suppose what A gets in return is B's promise. B's promise has value only if it is enforceable, which takes us back to where we began. The analysis is completely circular.<sup>50</sup> The rule that mutual promises constitute valid consideration for each other has been described as "one of the secret paradoxes of the Common Law."<sup>51</sup> The commercial-gift dichotomy solves the problem: the promises are enforceable because they relate to and facilitate an exchange of values.<sup>52</sup>

L: Any defensible theory<sup>53</sup> can explain some cases.<sup>54</sup> The test, however, is whether it can explain more cases than any other theory. The more phenomena a theory explains, the more valuable it is.<sup>55</sup>

exchange, the promisor makes a promise that is intended to change the promisee's incentives sufficiently to induce him to give the promisor a chance. If the promisee gives the chance, the inducing promise should be enforceable under standard unilateral contract analysis.

Eisenberg, *supra* note 25, at 649-50 (footnote omitted).

49.

[N]o one surely would suggest that such transactions should fail because they are conceived on either side as promises of gift. The purpose clearly is to effect an exchange that both parties desire. If enforcement is denied, this will be because a court substitutes its judgment for that of the parties and considers the assurances from one side insufficient.

J. DAWSON, *supra* note 10, at 215.

50. L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 78 (5th ed. 1990).

51. Pollock, Book Review, 30 *LAW Q. REV.* 128, 129 (1914) (reviewing J. PEASE & A. LATTER, *THE STUDENT'S SUMMARY OF THE LAW OF CONTRACT* (1913)).

52.

[A promise exchanged for a promise is enforceable] by virtue of the fact of bargain, without more. Since the principle that bargains are binding is widely understood and is reinforced in many situations by custom and convention, the fact of bargain also tends to satisfy the cautionary and channeling functions of form. . . . Evidentiary safeguards, however, are largely left to the Statute of Frauds rather than to the requirement of consideration.

RESTATEMENT (SECOND) OF CONTRACTS § 75 comment a (1981).

53. By definition.

54. *E.g.*, Los Angeles Dodgers manager Tommy Lasorda appears more frequently on television in the spring, but that does not mean that he causes spring to occur. Incidentally, why do football and basketball coaches wear sweaters or suits, but baseball managers wear team uniforms? If the team gets behind, is Tommy Lasorda really going to pitch?

55. Law is sometimes prescriptive or normative. Other times it is descriptive. Legal realists adopt the descriptive view that law is what courts do. Critical Legal Studies (CLS), by comparison, asserts that law is simply what judges like. CLS rests on the following irrefutable syllogism:

Major premise: A lot of cases could be decided either way.

M: Fair enough. In addition to the doctrines of reliance and restitution, what are the exceptions to the doctrine of consideration?

L: They include certain option contracts;<sup>56</sup> firm offers by merchants under the UCC;<sup>57</sup> certain guaranty contracts;<sup>58</sup> promises to waive non-material conditions;<sup>59</sup> written waivers of claims under the UCC;<sup>60</sup> some negotiable instruments;<sup>61</sup> promises to perform a prior obligation that was unenforceable because of the statute of limitations,<sup>62</sup> bankruptcy,<sup>63</sup> or other invalidating causes;<sup>64</sup> certain promises made in recognition of a benefit previously received by the promisor;<sup>65</sup> stipulations regarding pending judicial proceedings;<sup>66</sup> voidable promises;<sup>67</sup> and offers for unilateral contracts.<sup>68</sup> The doctrine of consideration cannot explain why these promises are enforceable. Let's see if your theory can.

#### D. Option Contracts

L: Under the *Restatement*, option contracts in a certain form are enforceable without consideration. Section 87(1)(a) provides, "An offer is binding as an option contract if it . . . is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time."<sup>69</sup> Comment a explains that an option contract in this form is enforceable without consideration because it serves a useful purpose, is often a necessary step in making a bargain, and "partakes of the natural formali-

Minor premise: I don't like the way a lot of cases have been decided.

Conclusion: The law is a crock.

Practical Application: Come the revolution.

When you ask what happens after the revolution, it gets really fuzzy. Apparently, "hegemony" and "hierarchies" will be replaced by "communities of life" with "negative capability," "role jumbling," and "context smashing," which will permit us to "develop the species nature in concrete universality" and "discover the organic unity in each other's personalities." See generally R. UNGER, *KNOWLEDGE AND POLITICS* (1975). Don't worry too much about the specifics. After the revolution is over, Central Command, assisted by the Revolutionary Army, will explain persuasively the details to the survivors.

56. RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a).

57. U.C.C. § 2-205 (1978).

58. RESTATEMENT (SECOND) OF CONTRACTS § 88(a).

59. *Id.* § 84; *Clark v. West*, 193 N.Y. 349, 86 N.E. 1 (1908).

60. U.C.C. §§ 3-305, 3-408 (1978).

61. *Id.* § 1-107.

62. RESTATEMENT (SECOND) OF CONTRACTS § 82.

63. *Id.* § 83.

64. *Id.* § 84.

65. *Id.* § 86.

66. *Id.* § 94.

67. *Id.* § 85.

68. *Id.* § 45.

69. *Id.* § 87(1)(a).

ties inherent in business transactions."<sup>70</sup>

M: Two of the three rationales are true of all option contracts. Option contracts serve a useful social purpose and are preliminary steps in making a bargain. These are other ways of saying that option contracts are related to and facilitate bargains. The *Restatement*, however, states that these rationales are sufficient only if the option is in a certain form. This elevates form over substance.

L: The requirement of a signed writing satisfies evidentiary, cautionary, and channeling functions.

M: If more evidentiary security is deemed necessary, the Statute of Frauds could be amended to require more writings.<sup>71</sup> I am not sure, however, that more evidentiary security is necessary here. If the option is to make a contract within the Statute of Frauds, the statute generally will require a writing before that contract is enforceable. For example, suppose *A* gives *B* an option to buy a car<sup>72</sup> for six hundred dollars, and *B* later accepts the offer. Before *B* may enforce the contract to purchase the car, the UCC's Statute of Frauds<sup>73</sup> requires a writing. Therefore, most enforceable options unsupported by any writing are those relating to the class of oral contracts falling outside the Statute of Frauds. Section 87's requirement that the option be in writing, however, does add protection in one situation already within the Statute of Frauds. Suppose *A* gives *B* a signed offer that does not by its terms assure it will be held open. *B* accepts the offer a month later, alleging that *A* orally promised to keep the offer open for that period. A signed offer orally accepted is sufficient to satisfy the Statute of Frauds.<sup>74</sup> *A*'s giving *B* a signed written offer, however, is some evidence that *A* intended that the offer would stay open for some period of time. *A* probably would not have bothered to deliver a signed written offer if *A* intended that the offer would expire at the end of their conversation.

L: What about the cautionary and channeling functions?

M: Option contracts are related to economic exchanges—transactions based on self-interest, not altruism.<sup>75</sup> Moreover,

70. *Id.* § 87(1)(a) comment a.

71. Perhaps, however, less evidentiary security than the Statute of Frauds provides is necessary. For example, under the 1980 United Nations Convention on Contracts for the International Sale of Goods, a "contract of sale need not be concluded or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." UNITED NATIONS CONVENTION, *supra* note 37, art. 11.

72. Because the speed limit has been raised again, there are only two kinds of pedestrians: The quick and the dead.

73. U.C.C. § 2-201 (1978).

74. L. FULLER & M. EISENBERG, *supra* note 50, at B-20.

75. "[R]elation to a bargain tends to satisfy the cautionary and channeling functions of legal formalities." RESTATEMENT (SECOND) OF CONTRACTS § 89 comment a (1981).

people expect that option contracts are serious and binding commitments. Requiring that the option be in a certain form is too narrow because it relieves people of option contracts that everyone expects to be binding. In addition, the channeling function theoretically permits people to earmark promises they intend to be binding. Because hardly anybody knows about the formal requirements of section 87, however, that section serves the earmarking function very poorly.

L: I admit that most people probably do not know the formal requirements of section 87.<sup>76</sup>

M: The formal requirements are even worse than elevating form over substance. Section 87 provides that option contracts are enforceable without consideration only if they contain a false recital of consideration.<sup>77</sup> The law recognizes a lie, a sham.<sup>78</sup>

Option contracts present an example of value that the doctrine of consideration fails to recognize. Offerors typically do not grant options because they intend to make a gift of the option. The offeror usually grants it to induce the offeree to deliberate and to increase the probability that the offeree will accept the offer.<sup>79</sup>

Last, option contracts have another analytical problem. Suppose A offers to sell Blackacre to B and promises to keep the offer open until Friday at noon. On Thursday A revokes the offer. Because the offer has not yet been accepted, A may revoke it. A's promise to keep the offer open until Friday at noon lacks consideration and therefore is unenforceable. But can't B often allege detrimental reliance? B often can say, "Because of your promise, I thought that I had until Friday noon to accept. If I had known that you were going to revoke on Thursday, I

76. Ask first-year law students if they knew of this form before studying it in contracts class. For that matter, ask them if they knew of the form *after* studying it in contracts class.

77. See RESTATEMENT (SECOND) OF CONTRACTS § 87.

78.

Another piece of debris that has been picked up is the offer, for which consideration (or in some cases a seal) is needed if the offeror desires to make his offer irrevocable. This is a needless hindrance to the processes by which agreement is reached and, being artificial as well as needless, was soon made to look silly, so that a dollar, a hairpin, or a false recital would do.

J. DAWSON, *supra* note 10, at 4.

79.

A firm offer is made, not for altruistic motives, but to advance the offeror's interests by inducing the offeree to deliberate. In deciding whether to accept an offer, an offeree must often make an investment of time, trouble, and even money. The offeree is more likely to make such an investment if he is sure the offer will be held open while the investment is being made than he is if the offer may be revoked during that period. . . . Given the offeror's intent to induce such an investment, the likelihood that the investment will be made, the difficulty of proving the investment by direct means, and the probability that more exchanges will take place if firm offers are enforceable than if they are not, the law should respond by assuming that the offeror has received the investment he wanted to induce.

Eisenberg, *supra* note 25, at 653-54 (footnote omitted).

would have accepted before your revocation.”

L: The law could not recognize that kind of reliance because it would make many options enforceable without consideration.<sup>80</sup>

M: This reliance is just as foreseeable, reasonable, and real as are other forms of reliance. Therefore, the law should protect it.<sup>81</sup> Options should be enforceable without consideration. They are in New York,<sup>82</sup> Germany,<sup>83</sup> and France,<sup>84</sup> and under the 1980 United Nations Convention on Contracts for the International Sale of Goods.<sup>85</sup> That Conven-

80. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (stating that an “offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice” (emphasis added)). Comment e explains, “[C]ircumstances may be such that the offeree must undergo substantial expense, or undertake substantial commitments, or forego alternatives, in order to put himself in a position to accept. . . . But the reliance must be substantial as well as foreseeable.” *Id.* § 87(2) comment e.

Section 87(2)'s requirement that the reliance be substantial is odd, given that § 87 does not require full-scale enforcement of the offered contract, but allows for a restitution of benefits or partial or full reimbursement of loss, as justice requires. *Id.* Section 90 of the *Restatement of Contracts* required that the action or forbearance have a “definite and substantial character” because the relied-on promise was enforceable only through an award of expectation damages. RESTATEMENT OF CONTRACTS § 90 (1932). The *Restatement (Second) of Contracts* provides, however, that the remedy could be limited as justice requires, which sanctions the awarding of reliance damages. Partly because of that change, the requirement that the reliance be definite and substantial was deleted. Eisenberg, *supra* note 25, at 643, 658 (citing RESTATEMENT (SECOND) OF CONTRACTS § 90, Reporter's Note; 42 ALI PROCEEDINGS 296-97 (1966) (remarks of Professor Braucher)).

81. Cf. UNITED NATIONS CONVENTION, *supra* note 37, art. 16, § (2)(b) (stating that an “offer cannot be revoked . . . if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer”).

82. New York law provides that written options are enforceable without consideration:

Except as otherwise provided in section 2-205 of the uniform commercial code with respect to an offer by a merchant to buy or sell goods, when an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.

N.Y. GEN. OBLIG. LAW § 5-1109 (McKinney 1989).

83. BGB arts. 145, 148; J. DAWSON, *supra* note 10, at 213 (stating that under the German Code, an offer is effective for the period expressly defined or, if none is defined, for the time that the offeree can be expected to need for a decision, unless the offeror has expressly reserved the power to revoke). “The arguments for this solution . . . mostly emphasized the need of offerees for a firm basis for their decisions, the likelihood that offerees would rely by foregoing other opportunities, and the service that a binding effect would render in promoting the interests of the offerors themselves.” J. DAWSON, *supra* note 10, at 213 n.39.

84. “In France the Code has no provision on the subject, but in modern decisions French courts have concluded that the offeror's manifested intent to have the offer endure for a designated time must be given effect.” J. DAWSON, *supra* note 10, at 213.

85. The Convention also governs international airplane flights. It provides, for example, that if the person in the seat next to you dies, you have the legal right to eat his salad and dinner roll. The Convention also requires flight attendants to demonstrate how to buckle the seat belt, as if people did not already know. The way I see it, if you cannot figure out how to buckle the seat belt

tion provides that "an offer cannot be revoked . . . if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable."<sup>86</sup>

### E. Firm Offers Under the Uniform Commercial Code

M: Section 2-205 of the UCC makes signed firm offers by merchants enforceable without consideration.<sup>87</sup> The rule recognizes that firm offers by merchants are commercially useful and are considered binding in the marketplace.<sup>88</sup>

As with option contracts, however, the requirement that the firm offer be in writing is largely unnecessary. Because the UCC's Statute of Frauds requires a signed writing for contracts for the sale of goods of five hundred dollars or more,<sup>89</sup> the Statute of Frauds already protects against spurious claims for larger transactions. For example, suppose Merchant orally offers to sell a boat<sup>90</sup> to Buyer for ten thousand dollars. Buyer accepts the offer a month later, alleging that Merchant orally promised to keep the offer open for that period. Under the UCC's Statute of Frauds, Buyer cannot enforce the contract to buy the boat unless there is a "writing sufficient to indicate that a contract for sale has been made between the parties and signed" by Merchant.<sup>91</sup> Therefore, Buyer loses. The requirement that the firm offer must be in writing adds protection mostly for smaller transactions—those involving less than five hundred dollars—in which the need for written evidentiary security is less important.<sup>92</sup>

on your own, you might as well forget about the oxygen mask. Lastly, the Convention governs airline food. It permits, for example, those steaks with grill marks on them. Is this really supposed to make the passengers think that the cook has an open pit barbecue in the back of the plane? The Convention also requires that the food be generally awful. It is not a coincidence that one of the least used phrases in any language is "Stewardess, could I have the recipe for this?"

86. UNITED NATIONS CONVENTION, *supra* note 37, art. 16 § (2)(a).

87. Section 2-205 provides:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

U.C.C. § 2-205 (1978).

88. "The shortcomings of [the bargain theory of consideration] are striking. For example, it unsoundly renders unenforceable such important types of promises as firm offers . . ." Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1114 (1984).

89. U.C.C. § 2-201(1) (1978).

90. A boat has been defined as "a hole in the water that you throw money into." I do not like to go boating because I do not like to "heave ho," which always happens when I eat too much ho.

91. U.C.C. § 2-201(1).

92. The requirement of a writing, however, might add protection to some transactions for more than \$500. Suppose Merchant gives to Buyer a signed written offer that does not by its terms assure that it will be held open. Buyer accepts the offer a month later, alleging that Merchant

Another odd thing about the UCC provision is that the period of irrevocability cannot exceed three months. If a merchant voluntarily gives a firm offer lasting four months, why should the law protect the merchant from itself?<sup>93</sup>

Under the commercial-gift dichotomy, firm offers by merchants, as a subcategory of options, are enforceable without consideration.

#### F. Guaranty Contracts

L: Another example of a promise enforceable without consideration is a guaranty contract in a certain form. *Restatement* section 88(a) provides, "A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if . . . the promise is in writing and signed by the promisor and recites a purported consideration."<sup>94</sup> For example, suppose Debtor owes Bank one thousand dollars, and the loan is not in default. Friend then signs a promise guarantying Debtor's loan. Friend's promise is enforceable without consideration if it is in the form specified in section 88(a).

M: Section 88(a)'s requirement that the promise be in a signed writing is virtually meaningless because the Statute of Frauds already requires a signed writing for a promise to answer for the debt of another.<sup>95</sup> The only additional formality section 88(a) requires is the false recital of consideration, and my arguments on that point regarding option contracts are equally valid here.<sup>96</sup>

Guaranty contracts do involve an enhanced cautionary problem. Friend may make the promise based on sentimental affection for Debtor, particularly if Debtor is a relative.<sup>97</sup> The false recital of consideration, however, serves no cautionary function. Friend realizes when he signs a written promise to Bank that Bank expects it to be binding, and Friend has no doubts that it is enforceable. The false recital of consideration does not enhance Friend's awareness of these realities. More likely, Friend finds it a complete mystery.<sup>98</sup>

orally promised to keep the offer open for that period. The written offer might satisfy the UCC's Statute of Frauds. *See id.* § 2-201(1) & comment 1. It would satisfy the general Statute of Frauds. *See supra* note 74 and accompanying text.

93. Congress apparently does need protection from itself. For example, the Gramm-Rudman deficit-reduction law has been described as a law saying, "Step me before I kill again."

94. *RESTATEMENT (SECOND) OF CONTRACTS* § 88(a) (1981).

95. An Act for Prevention of Frauds and Perjuries (Statute of Frauds), § 4(2); *RESTATEMENT (SECOND) OF CONTRACTS* § 110(1)(b).

96. *See supra* notes 76-78 and accompanying text. Of course, "equally valid" is not the same as valid.

97. Or perhaps, particularly if Debtor is *not* a relative.

98. I used to watch Perry Mason mysteries, but the ending was always predictable. Mason would be cross-examining a witness brilliantly, and somebody in the courtroom would jump up and blurt out that she was actually the guilty party. I never could figure out why the murderers always



The cautionary problem can exist even when there is consideration. Assume that Friend makes the guaranty promise as an inducement for Bank to lend the money to Debtor. There is consideration because Friend gets what he bargained for: Bank extends the loan to Debtor. Friend's motives, however, are still completely altruistic. The law could require that Friend's promise is enforceable only if Friend is paid for guarantying the loan, but that rule would unduly restrict the market. The doctrine of consideration does not solve the cautionary problem of unpaid guaranty contracts.

Why does the *Restatement* say that the promises defined in section 88(a) are binding?

L: It explains, "Like option contracts, guaranties are ancillary to bargains, and have some of the same presumptive utility."<sup>99</sup>

M: But that rationale applies equally well to all guaranties, regardless of whether the guaranty contains a false recital of consideration. Therefore, all guaranties should be enforceable. The *Restatement's* rationale that guaranties are ancillary to bargains is another way of saying that they are "related to" bargains.<sup>100</sup>

### G. Waivers

L: Another category of promises enforceable without consideration, recognized in *Restatement* section 84, concerns promises to waive non-material conditions.<sup>101</sup> In *Clark v. West*,<sup>102</sup> for example, a publisher promised to pay an author two dollars per page for writing a law book. The publisher conditioned its payment of an extra four dollars per page on the author's abstention from intoxicating liquors during the author's

attended the trial. Why weren't they halfway to Rio de Janeiro? The long-running Perry Mason television series left a generation of Americans believing that most criminal defendants are innocent, that district attorneys are whining incompetents, and that lawyers and private investigators have shoulders the size of sides of beef. It also left them believing that lawyering is an exciting lifestyle because Mason never answered interrogatories, supervised document productions, sat through endless depositions, or even spent much time at his desk. Fortunately, these misconceptions were corrected by the cinema verité of *L.A. Law*.

99. RESTATEMENT (SECOND) OF CONTRACTS § 88 comment a.

100. Cf. Eisenberg, *supra* note 25, at 652 (stating that "[b]oth policy and fairness . . . support the enforcement of promises that are ancillary to a bargain and deliberately made").

101. Section 84(1) of the *Restatement* provides:

(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.

RESTATEMENT (SECOND) OF CONTRACTS § 84(1).

102. 193 N.Y. 349, 86 N.E. 1 (1908).

performance of the contract. The author alleged that the publisher, knowing that the author was not abstaining, later promised to pay the extra four dollars per page anyway. The court held that the waiver of the condition was enforceable without consideration.<sup>103</sup>

M: If the publisher promised to waive the condition before the author consumed liquor, and the author relied on the promise, the promise would be enforceable under the doctrine of detrimental reliance or promissory estoppel. If the publisher made the promise after the author consumed liquor, however, this simply would be a contractual modification, which under my theory would be enforceable if made in good faith.

L: Section 84 states that the promise is binding whether it is made before or after the time for the condition to occur.<sup>104</sup> This suggests that reliance is not the key. On the other hand, section 84 also provides that if the time for the occurrence of the condition has not expired, the promisor can reinstate the condition if the promisee still has a reasonable time to fulfill the condition under the contract or under an extension of time given by the promisor, and if reinstatement is not unjust because of a material change in position by the promisee.<sup>105</sup> This suggests that reliance is the key.

M: Section 84 appears to be simply an attempt to avoid the rigid common-law rules preventing contract modification. The exception permits the modification of contractual terms if they are conditions, but not if they are promises. The distinction between promises and conditions, however, is irrelevant to economic theory and to the policies served by consideration; the cautionary, channeling, evidentiary, and anti-extortion policies apply equally to modifications of conditions and to modifications of promises. Moreover, because section 84 does not want to undermine the doctrine of consideration too much, it distinguishes between material and nonmaterial conditions. Nonmaterial conditions can be waived without consideration, but material ones

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103. *Id.* at 359-62, 86 N.E. at 5-6.

104. RESTATEMENT (SECOND) OF CONTRACTS § 84(1).

105. Section 84(2) provides:

(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1).

*Id.* § 84(2).

cannot.<sup>106</sup> To further protect the doctrine of consideration, section 84 sometimes permits the promisor to break his promise before the promisee relies on it.<sup>107</sup> The impetus for section 84, however, is that the rule prohibiting contractual modifications is contrary to commercial practice and makes little sense. If contractual modifications were binding, this convoluted exception would be unnecessary.

L: As we discussed before, the UCC provides that modifications require no consideration to be binding.<sup>108</sup> The UCC, however, also provides that a waiver affecting an executory portion of a contract may be retracted unless the retraction would be unjust because of a material change of position in reliance on the waiver.<sup>109</sup> Presumably, the difference between a waiver and a modification is that a waiver<sup>110</sup> can be accomplished unilaterally, whereas a modification requires the other party's assent. Therefore, allowing waivers to be retracted before reliance but not allowing modifications to be retracted at all arguably makes some internal sense, because assent creates an expectation interest and makes reliance likely. Section 1-107, however, provides that "[a]ny claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party."<sup>111</sup> Thus, some waivers are binding without either assent or reliance. Arguably, those waivers create expectation interests and make reliance likely, but that argument reveals the weakness in the prior analysis: all waivers create expectation interests and make reliance likely. Why should everything turn on the question whether, when a waiver occurs, the other party says "OK" or simply takes the first party at his word?

M: None of this would be necessary under the commercial-gift dichotomy. Promises covered by Article 2 of the UCC are commercial promises related to the sale of goods. Waivers of claims arising out of those promises are related to commercial exchanges and therefore are enforceable.

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106. *Id.* § 84(1)(a).

107. *Id.* § 84(1)(b).

108. U.C.C. § 2-209(1) (1978).

109. Section 2-209(5) provides:

A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

*Id.* § 2-209(5).

110. A waiver is defined as a voluntary relinquishment of a known right. *Clark*, 193 N.Y. at 360, 86 N.E. at 5.

111. U.C.C. § 1-107 (1978).

*H. Negotiable Instruments*

L: Certain negotiable instruments under the UCC also are enforceable without consideration. For example, lack of consideration is not a defense against a holder in due course.<sup>112</sup> Suppose Maker gives Payee a promissory note in the form of a negotiable instrument as a gift. No exchange of values occurs when Maker signs the instrument, yet a holder in due course can enforce the note. I do not think that your theory can explain this one.

M: Because a person must take an instrument for value to be a holder in due course,<sup>113</sup> the instrument is related to an exchange of values. Putting the promise in the form of a negotiable instrument satisfies the cautionary, channeling, and evidentiary functions.

L: But Maker gives the note altruistically, as a gift. Therefore, the cautionary function is not satisfied.

M: The commercial form of the instrument cautions Maker to be careful. It puts her on notice that others in the marketplace expect this type of instrument to be binding. The commercial-gift dichotomy works quite well here. The lack of consideration is a defense against Payee. The instrument becomes enforceable without consideration when it is no longer simply a gift, but becomes a commercial promise—when it becomes related to an exchange of values by passing to a holder who takes it for value.

L: Under your argument, however, any gift promise that is assigned for value becomes enforceable by the assignee because it becomes related to an exchange of values.

M: Negotiable instruments are distinguishable from other promises. They are designed to be traded, to pass freely from hand to hand, similar to cash. The promisor knows or should know that a significant likelihood exists that the instrument will be negotiated because that is what it is designed specifically to do. For example, suppose that Drawer gives Payee a gift in the form of a check written on Drawer's bank. This is a negotiable instrument, and Drawer expects that Payee will negotiate the check. Although actual notice may be less clear to the maker of a note than to the drawer of a check, the maker of a note that is a negotiable instrument is on constructive notice.

L: The UCC eliminates the requirement of consideration for negotiable instruments in yet another circumstance. Section 3-408 provides that no consideration is necessary for an instrument given in payment for an antecedent obligation.<sup>114</sup> Comment 2 explains that this provision

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112. *Id.* § 3-305.

113. *Id.* § 3-302(1)(a).

114. *Id.* § 3-408.

means that the new obligation does not fail for lack of consideration when the creditor gives no concession or an instrument is given for more or less than the amount of the prior obligation.<sup>115</sup> For example, suppose Debtor owes Creditor one thousand dollars under an antecedent obligation. Debtor then gives Creditor a note promising to pay the debt. The note is enforceable, even if Creditor gave nothing for it, and even if the note contains a promise to pay an amount more or less than the antecedent obligation.

M: This section simply abrogates the legal duty rule for instruments. It is more evidence that the legal duty rule is ill-conceived and contrary to commercial practice.

### I. Past Consideration

L: One category that is difficult to explain contains certain promises supported by "past consideration." A promise to pay a prior contractual or quasi-contractual indebtedness that was unenforceable because of the statute of limitations,<sup>116</sup> or a promise to pay an indebtedness discharged or dischargeable in bankruptcy,<sup>117</sup> is enforceable without consideration. For example, suppose Debtor owes Creditor one thousand dollars on a contract. After the statute of limitations passes or the debt is discharged in bankruptcy, Debtor again promises Creditor to pay the indebtedness. The second promise is enforceable without consideration.

Additionally, the *Restatement* provides that "a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise, is binding."<sup>118</sup> For example, suppose a contract is voidable because of fraud or the promisor's infancy. A new promise made after discovery of the

115. *Id.* § 3-408 comment 2.

116. *Restatement* § 82(1) provides, "A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations." *RESTATEMENT (SECOND) OF CONTRACTS* § 82(1) (1981). Comment a explains:

Statutes enacted in most States provide that a promise included in the Section is not binding unless it is in writing and signed by or on behalf of the promisor, except where the promise is inferred from part payment or from the giving of a negotiable instrument or collateral security as stated in Subsection (2).

*Id.* § 82(1) comment a. The requirement of a writing serves an evidentiary function, and perhaps cautionary and channeling functions as well.

117. "An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding." *Id.* § 83. The Bankruptcy Reform Act of 1978, however, has limited the effect of this common-law rule. Pub. L. No. 95-598, 92 Stat. 2592 (codified as amended at 11 U.S.C. § 524 (1988)).

118. *RESTATEMENT (SECOND) OF CONTRACTS* § 85.

fraud or the attainment of majority is enforceable.<sup>119</sup>

M: What rationale is given for these exceptions?

L: There are two explanations. The first asserts that a moral obligation from the prior indebtedness serves as consideration for the later promise.<sup>120</sup>

M: But a moral obligation is not consideration. To constitute consideration, a performance or return promise must be bargained for.<sup>121</sup> The exchange must be made in return for the promise; past exchanges do not count.<sup>122</sup> What is the other rationale?

L: It is that Debtor simply is waiving a defense to an otherwise valid legal claim.<sup>123</sup>

M: What consideration does Debtor receive for his promise not to assert the defense?

L: None. One could argue, however, that Debtor is not simply promising not to assert the defense; he presently is giving up, or waiving, his right to assert it. Although it is a gift, an executed gift requires no consideration.

M: But Creditor is suing to enforce Debtor's later promise, and that promise is not supported by consideration. To say that by making a *promise* to pay, Debtor is actually *presently* giving something to Creditor is a fiction.<sup>124</sup> Moreover, that reasoning proves too much because it could make all promises enforceable. An equally valid argument is that any promise is a constructive waiver of some defenses, including the defense of lack of consideration. This argument also begs the question; the promise is classified as an executed gift because upon its making it creates rights in the promisee. Whether the promise creates rights in the promisee, however, is the question with which we began.

Both rationales are completely specious; I am astonished that they have gained any acceptance.<sup>125</sup> The past consideration exception states that because a person received something in the past, a new promise to pay for it should be enforceable. Consideration theory does not make the promise enforceable, however, because it requires that the parties

119. *Id.* § 85 illustrations 1 and 2.

120. L. FULLER & M. EISENBERG, *supra* note 50, at 177.

121. RESTATEMENT (SECOND) OF CONTRACTS § 71(1).

122. "[P]ast consideration' is inconsistent with the meaning of consideration stated in § 71, and there seems to be no consensus as to what constitutes a 'moral obligation.' The mere fact of promise has been thought to create a moral obligation, but it is clear that not all promises are enforced." *Id.* § 86 comment a.

123. L. FULLER & M. EISENBERG, *supra* note 50, at 177.

124. "The analysis assumes that consideration is required to create a legal obligation, but is not required to make effective the debtor's surrender of a defense to an existing obligation. What justification is there for this distinction?" *Id.*

125. These arguments are "quarks": they are so light they have no mass and so simple they have no internal structure. Yet they are some of the basic building blocks of legal atomic structure.

bargain for the exchange in advance. Under my theory, on the other hand, the promise is enforceable because it is related to an exchange of values; when the exchange occurs makes no difference.

L: The law recognizes one other category of past consideration. *Restatement* section 86 provides:

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

(a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

(b) to the extent that its value is disproportionate to the benefit.<sup>126</sup>

For example, suppose *A* saves *B*'s life and in so doing *A* is injured. *B*'s subsequent promise to compensate *A* for *A*'s injuries is binding under section 86.<sup>127</sup> The rationale is based on the policy against unjust enrichment.<sup>128</sup>

M: If the rationale is unjust enrichment, why not simply grant restitution?<sup>129</sup>

L: Restitution doctrine denies restitution in many cases to protect persons who have had benefits thrust upon them.<sup>130</sup>

M: Why doesn't the law of unjust enrichment simply inquire whether there truly is an "enrichment," whether it is really "unjust," and whether the benefactor deserves compensation to prevent injustice?

L: It usually does. For example, under restitution theory, the doctrine of the "officious intermeddler"<sup>131</sup> protects people from benefits thrust upon them. Restitution doctrine, however, has some gaps.

M: Couldn't section 86 be described as a form of restitution?

L: The promisee sues on the promise for expectation damages, not for the value of the benefit conferred.

M: True, but the promise is not binding to the extent that its value is disproportionate to the benefit.<sup>132</sup> Arguably, the promise, if it is not disproportionate, simply quantifies the value of the benefit to the

126. RESTATEMENT (SECOND) OF CONTRACTS § 86.

127. *Id.* § 86 illustration 7; see also *Webb v. McGowin*, 232 Ala. 374, 168 So. 199 (1936).

128. RESTATEMENT (SECOND) OF CONTRACTS § 86 comment b.

129. Restitution even permits recovery for benefits conferred by mistake. For example, I recently received a telephone call from a taxidermist. He said, "Sorry. We now realize that we had the wrong house. Your dog put up quite a fight—but I think you will like the peaceful look on his face."

130. RESTATEMENT (SECOND) OF CONTRACTS § 86 comment b.

131. The "officious intermeddler" is only one of the colorful characters encountered in the law. Others include the "fertile octogenarian" and the "naked trespasser." It is best not to let these three people spend much unsupervised time together.

132. RESTATEMENT (SECOND) OF CONTRACTS § 86(2).

promisor.<sup>133</sup>

My theory also could explain section 86 because the promise to compensate the benefactor is related to an exchange of values.<sup>134</sup> The benefactor conferred a benefit on the promisor, and in return the promisor promised to compensate the benefactor. The *Restatement*, however, provides that the promise is not enforceable if the benefactor conferred the original benefit as a gift.<sup>135</sup> If the benefactor intended the original benefit as a gift, the transaction would involve an exchange of gifts, not a commercial promise.

L: I am still troubled. The cautionary function is not well served because the promisor's action could be based on impulses of gratitude and emotion. The channeling function is uncertain because people do not have clear expectations about whether these types of promises are enforceable. The law cannot even shape expectations very well here because people's experiences with these types of promises are so infrequent.

M: As for economic theory, however, the promise does facilitate an exchange of values.<sup>136</sup> Although the exchange is not a bargain agreed to in advance, the promise is undertaken voluntarily after one side has performed. The issue is whether the restitutionary and economic arguments outweigh the cautionary one. Last time, I argued that although gifts also can stimulate economic activity, this effect is more speculative and remote for gifts than for exchanges. I also argued that the expectation, cautionary, and channeling arguments outweigh the economic argument and justify the law's general refusal to enforce gifts.<sup>137</sup> Here, however, an exchange occurs, and the expectation and channeling arguments are neutral. Therefore, the restitutionary and economic arguments could be perceived to outweigh the cautionary one.

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133. "Where the value of the benefit is uncertain, . . . a promise to pay a liquidated sum may serve to fix the amount due if in all the circumstances it is not disproportionate to the benefit." *Id.* § 86 comment i.

134. One commentator stated:

[P]romises prompted by enrichment already taken can fairly be associated with the idea of exchange that forms the essential support for the whole of bargain contract. So long as the promisee acted originally with an expectation of compensation, or even where it is not clearly established that a gift-making motivation controlled his conferring of benefit, the net effect of a promise of a return is to conclude a kind of exchange. There is no intelligible reason to require the trailing promise to stand apart from the chain of events which sponsored it.

Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1158-59 (1971) (footnote omitted).

135. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981).

136. Advertisers constantly are looking for new ways to facilitate economic exchange concerning their products. For example, they have discovered that having actors use products in movies makes people want to use those products. Of course, gun manufacturers have known this for years.

137. Gordon, *supra* note 1, at 1005.



### J. Stipulations

L: Another category of promises enforceable without consideration consists of stipulations regarding pending judicial proceedings.<sup>138</sup> No exchange takes place there, does it?

M: Why is a lawyer<sup>139</sup> or a party willing to stipulate to a certain fact or point of law, if she gets nothing in return?

L: She expects cooperation and reciprocity if she needs a similar concession from the other side. She acts in good faith and expects the other party to do the same.

M: Suppose the other lawyer said, "I want you to sign a stipulation making a concession, and I am telling you right now that I will make no concessions and give you no cooperation whatsoever in this litigation." Would the first lawyer sign the stipulation?

L: Why should she? She can expect nothing in return.

M: Then a sort of exchange may be going on here. A more fundamental exchange also is occurring. Both parties are exchanging their legal claims and defenses for a judgment by the court resolving the dispute. This is really a very formalized three-party exchange. The formality of the proceedings satisfies the cautionary, channeling, and evidentiary functions. Everyone understands that the proceedings are most serious, and a formal record is kept. The cautionary function is protected also because the parties generally are represented by legal counsel.

### K. Voidable Promises

L: Part of the doctrine of consideration is the mutuality rule, which requires that both parties must be bound or neither is.<sup>140</sup> Contracts involving a voidable duty lack mutuality, but are nevertheless enforceable. For example, consider a contract between A and B in which A has a defense such as infancy, incapacity, fraud,<sup>141</sup> duress, unconscionability,<sup>142</sup> unilateral mistake, the Statute of Frauds, consumer protection legislation, sovereign immunity, illegality, or mutual mistake when only

138. RESTATEMENT (SECOND) OF CONTRACTS § 94.

139. Contrary to popular belief, there is not an oversupply of lawyers. A recent study shows that in the United States there are still three ambulances for every lawyer.

140. J. CALAMARI & J. PERILLO, *supra* note 17, at 226.

141. *Cf.* THE NATIONAL ENQUIRER. Recently the *Enquirer* published a diet that is supposed to raise one's IQ. This was brave of the *Enquirer* because it risked losing all its readership. The *Enquirer*, however, does not know the meaning of the word "fear." It does not know the meaning of a lot of other words, either.

142. My dry cleaner charges four dollars to clean a shirt, which I consider unconscionable. So I do not pay it. When a shirt gets dirty I give it to Goodwill. They wash it, iron it, and put it on a hanger. The next day I buy it back for a dollar.

A knows of the illegality or mistake. A is not bound, but A's promise is, nevertheless, valid consideration for B's promise.<sup>143</sup> Consideration theory cannot explain it.<sup>144</sup> Williston<sup>145</sup> was forced to regard the voidable promise as an exception to the doctrine of consideration.<sup>146</sup>

M: This is an easy one. Under the commercial-gift dichotomy, B's promise is enforceable because it is related to an exchange of values.

#### L. Offers for Unilateral Contracts

L: The mutuality rule of the doctrine of consideration also fails to explain offers to make unilateral contracts.<sup>147</sup> Suppose A says to B, "I will give you one hundred dollars if you walk across the Brooklyn Bridge." A does not want B's promise to walk across the bridge; A wants the act of walking across the bridge. B is said to accept the offer when B performs the act requested—walking across the bridge—and a unilateral contract is created when the act is done. Suppose, however, that when B has walked halfway across the bridge, A drives by in a Mercedes-Benz<sup>148</sup> and shouts, "I withdraw my offer!"<sup>149</sup> Because B has not yet completed the act of crossing the bridge, the offer has not yet been accepted, and it therefore can be revoked. At least, that is what Professor Wormser concluded in a famous article.<sup>150</sup>

M: That is not fair to B. B did not expect A to treat her that way. Under this reasoning, A could revoke the offer even if B were only inches from completing the walk across the bridge.

L: Professor Wormser admitted that some believe that the result is hard on B.<sup>151</sup> He argued, however, that B did not promise to cross the bridge, and thus, B was not bound to the contract. Because B was not bound, why should A be bound? Binding A but not B would be unfair

143. "The fact that a rule of law renders a promise voidable or unenforceable does not prevent it from being consideration." RESTATEMENT (SECOND) OF CONTRACTS § 78.

144. J. DAWSON, *supra* note 10, at 213; see J. CALAMARI & J. PERILLO, *supra* note 17, at 227.

145. On the evolutionary chart, Williston is the third one from the left.

146. K. SUTTON, *supra* note 8, at 27.

147. Contract law solves this problem simply by noting it. "[T]he doctrine of mutuality of consideration applies only to a bilateral contract." J. CALAMARI & J. PERILLO, *supra* note 17, at 226 (footnote omitted).

148. I shaded the facts slightly to create some equities.

149. Ha ha ha ha ha! He has the soul of an IBM 360.

150. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136-38 (1916). How big does a person's ego have to be for him to title his article, "the true conception"? Ironically, Professor Wormser later ate his words. See *infra* notes 157-58 and accompanying text.

151. Wormser, *supra* note 150, at 138. In his next life, Professor Wormser was hoping to come back as a human being. When he died he donated his heart for transplantation. The hospital charged an outrageous sum for the heart. It justified the cost on the theory that the heart had never been used.

to A.<sup>152</sup>

M: It is not unfair to A. A decided the terms of the deal. If A wanted to bind B, A could have asked for a return promise, rather than an act.<sup>153</sup> A was the master of the offer and chose to propose a unilateral contract rather than a bilateral one.<sup>154</sup>

L: Professor McGovney suggested an analysis that solved the unfairness to B. He argued that A really was making two offers—the principal offer of one hundred dollars to cross the bridge, and an implied collateral offer to keep the principal offer open for a reasonable time if the offeree begins crossing the bridge at once.<sup>155</sup>

M: That makes more sense. B reasonably expects that A will let B have time to complete the act—that A will allow it to be done,<sup>156</sup> that A will not play a cruel trick on B by revoking at the last moment.

L: It is an implied-in-fact option contract. A impliedly promises to keep the principal offer open for a reasonable time to let B complete performance. Because Professor Wormser finally was persuaded of the superiority of this analysis he eventually recanted,<sup>157</sup> “clad in sackcloth.”<sup>158</sup>

M: What is the consideration for the implied collateral promise to keep the principal offer open?

L: Professor McGovney argued that B pays for the collateral promise when he begins crossing the bridge. B's stepping onto the bridge is both an acceptance of and consideration for the collateral offer.<sup>159</sup> The *Restatement* adopted this view.<sup>160</sup>

152. *Id.*

153. Several insurance companies recently have made an offer for a unilateral contract. Under the offer, you get a rebate on your auto insurance premium if you run over a trial lawyer.

154. See E. FARNSWORTH, *CONTRACTS* 144 (2d ed. 1990).

155. McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 659-60 (1914).

156. See Marchiondo v. Scheck, 78 N.M. 440, 442, 432 P.2d 405, 407 (1967) (observing that once partial performance is begun pursuant to an offer made, a contract results that has been termed a contract with conditions or an option contract); *Hutchinson v. Dobson-Bainbridge Realty Co.*, 31 Teun. App. 490, 498, 217 S.W.2d 6, 10 (1946) (noting that part performance of the consideration for an offer to make a unilateral contract may make such an offer irrevocable during the time stated and binding upon principal).

157. The most famous recanting in history was, of course, Galileo's. As Galileo recanted he reportedly muttered, “*Eppur si muove*,” Italian for “This is not going to look good in my tenure file.”

158. Wormser, Book Review, 3 J. LEGAL EDUC. 145, 146 (1950). Apparently Professor Wormser thought that asbes would be overdoing it. To show true penitence, Professor Wormser should have observed *Ezra* 9:3: “And when I heard this thing, I rent my garment and my mantle, and plucked off the hair of my head and of my beard, and sat down astonished.”

159. McGovney, *supra* note 155, at 659-60.

160. Section 45(1) of the *Restatement* provides: “Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.” *RESTATEMENT (SECOND) OF CONTRACTS* § 45(1) (1981). Comment d explains that “the beginning of

M: Let me see if I understand. A's principal promise to pay one hundred dollars is not enforceable because B gives no consideration for it. Therefore, Professor McGovney argued that an implied collateral promise makes the principal promise irrevocable. But wait a minute. The collateral promise suffers from the very same defect as the principal promise: it has no consideration. B's beginning of performance is not consideration because A is not bargaining for B's first steps onto the bridge. A is bargaining for the complete crossing of the bridge; that is what caused the whole problem. To say that A was "bargaining for" B's beginning of performance in return for the implied collateral promise is not true in fact; it is just a fiction to avoid a harsh result.

L: When Professor McGovney published his article in 1914, consideration could consist of some detriment to the promisee.<sup>161</sup> The *Restatement* limited the definition of consideration to something bargained for.<sup>162</sup> The *Restatement*, however, adopted Professor McGovney's theory without realizing that the change in the definition of consideration had destroyed the theory.

M: Consideration doctrine simply cannot explain why offers for unilateral contracts are irrevocable. Under the commercial-gift dichotomy, however, the implied-in-fact option contract is enforceable without consideration.

My theory also could explain offers for unilateral contracts in another way. A's offer includes an implied promise to act in good faith. It is bad faith for A to violate B's expectations by depriving B of the opportunity to complete performance already begun unless A warns B of that possibility in advance.<sup>163</sup> My theory would extend the duty of good faith to offers, whereas the *Restatement* and the UCC basically limit it to contracts.<sup>164</sup> Under current law, an implied promise of good faith in

performance . . . completes the manifestation of mutual assent and furnishes consideration for an option contract." *Id.* § 45(1) comment d.

161. In the nineteenth century, consideration was viewed as a benefit or detriment. Later, it was reduced to a single test, detriment to the promisee. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 931, 933 (1958). By the end of the nineteenth century, the old view had begun to give way to a requirement that the consideration be "bargained for." E. FARNSWORTH, *supra* note 154, at 43. The benefit-detriment view died slowly, however, persisting even beyond the first *Restatement of Contracts*. See Sharp, *Promissory Liability II*, 7 U. CHI. L. REV. 250, 252 (1939-1940) (stating that "[c]onsideration is, most simply, detriment to the promisee or benefit to the promisor").

162. RESTATEMENT (SECOND) OF CONTRACTS § 71.

163. "Good faith performance or enforcement of a contract emphasizes . . . consistency with the justified expectations of the other party." *Id.* § 205 comment a. Bad faith includes "evasion of the spirit of the bargain . . . and interference with or failure to cooperate in the other party's performance." *Id.* § 205 comment d.

164. See *id.* § 205 (providing that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"); U.C.C. § 1-203 (1978) (stating that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or

an offer is not enforceable before acceptance because no consideration is given for it. My theory, however, would enforce the implied promise to act in good faith because the promise is implied in an offer proposing an exchange.

### III. PROBLEMS FOR THE COMMERCIAL-GIFT DICHOTOMY

#### A. *Exchanges of Gifts*

L: I do not mean to confuse you,<sup>165</sup> but I think I see some problems with your theory. Suppose Parent promises to give a new car<sup>166</sup> to Child for Christmas.<sup>167</sup> It is a promise to make a gift, but it is related to an exchange of values—an exchange of gifts. Consideration theory explains it well: Parent is not bargaining for Child's gift and therefore Parent's promise is unenforceable. But isn't the promise enforceable under your theory?

M: No. A promise related to an exchange of gifts is not a commercial promise. Exchanges of gifts are not difficult to distinguish from commercial exchanges; the parties' motives are primarily sentimental, not economic.<sup>168</sup>

L: Let's try a harder case. Suppose Wealthy promises to give ten million dollars to University,<sup>169</sup> and University promises to name its library after Wealthy. This is an exchange of values. Is it an exchange of gifts or a commercial exchange?

M: It depends whether Wealthy's motives are primarily economic or sentimental. If Wealthy is bargaining for the renaming of the li-

enforcement").

165. Ha! Lichten is the kind of person who likes to go to hockey games and throw Ding Dongs onto the ice. I personally prefer bowling to hockey. I love any sport in which you can take three steps, sit down, and eat a hot dog. And for this you need special shoes? I like to take my entire family bowling. Where else can you buy a pair of shoes for fifty cents?

166. It need not be a nice car; a Yugo would do. On the other hand, we should give credit where credit is due. This year the Yugo was voted "Car of the Year"—by the American Association of Tow Truck Drivers.

"Yugo" is a clever name for a car. Chevrolet had a more difficult time introducing its Nova in Latin America. "No va" is Spanish for "It doesn't go."

167. In my opinion, Christmas has become too commercialized. For example, consider all the television specials shown at Christmastime; there is even one for atheists: it is called "Coincidence on 34th Street."

168. "We may define exchange . . . as a transaction in which the motives of the parties are primarily economic rather than sentimental." Fuller, *supra* note 18, at 817.

169. Years ago the president of a religious college reportedly asked a donor for \$5000. Because this was a lot of money in those days, the donor prayed about it. The answer to the prayer was to give the university \$10,000—twice as much. The donor replied, "But the request was only \$5000." The answer came again to give \$10,000. Later the donor asked a friend, "Has the president asked you for money yet?" "No," the friend replied. The donor softly advised, "Well, if he does, just give it to him. Do not pray about it."

brary,<sup>170</sup> it is a commercial exchange.<sup>171</sup> Wealthy is "buying" the name of the building.<sup>172</sup> If Wealthy promises to give the money without anything in return, however, and University voluntarily promises to rename the building, the promises simply constitute an exchange of gifts. The test is whether the motivation<sup>173</sup> for the transaction is self-interest or altruism.<sup>174</sup> Of course, self-interest that is simply inherent in gifts, such as the donor's personal satisfaction in giving the gift or seeing that the donee receives it, or an increase in the donor's stature, does not count because that would make all promises of gifts enforceable.<sup>175</sup>

### B. Practical Objections

L: If the commercial-gift dichotomy works well in theory, then it is more problematic in practice. For example, in 1925 the National Conference of Commissioners on Uniform State Laws proposed the Model Written Obligations Act.<sup>176</sup> The Act provides that a signed written promise shall not be unenforceable for lack of consideration if the writing contains "an additional express statement, in any form of language,

170. My hometown library burned down recently. The tragic fire destroyed both books—and one of them had not even been colored in yet.

171. "A bargain is an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other." Eisenberg, *supra* note 88, at 1115.

172. "The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good." *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 377, 159 N.E. 173, 176 (1927) (Cardozo, J.).

173. Motivations, however, are sometimes hard to identify. *See id.*; *see also* ego and super-ego. *Cf.* The Statute of Freuds.

174. For example, a person might promise to help clean up an oil spill because he expects to be paid for it, or simply because he is a conscientious citizen and the last time he held an empty oil can to his ear he could hear the ocean.

175. Gordon, *supra* note 1, at 1005. *Restatement* § 90(2) makes charitable subscriptions enforceable without consideration. Comment f explains:

American courts have traditionally favored charitable subscriptions . . . and have found consideration in many cases where the element of exchange was doubtful or nonexistent. Where recovery is rested on reliance in such cases, a probability of reliance is enough, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate.

RESTATEMENT (SECOND) OF CONTRACTS § 90 comment f (1981).

Generally, an entity such as a university that routinely engages in fund-raising will have some level of sophistication in the area, and therefore the probability of its reliance will depend partly on the applicable legal rule. Consequently, the *Restatement's* analysis is circular to some degree. One could assert that a public policy favoring charitable subscriptions outweighs the cautionary function, but that contention is open to argument.

176. *See Current Legislation: The Uniform Written Obligations Act*, 29 COLUM. L. REV. 206, 206 (1929) [hereinafter *Current Legislation*]. Originally called the *Uniform Written Obligations Act*, the name was changed when only two states adopted it. *See* J. CALAMARI & J. PERILLO, *supra* note 17, at 262. *Cf.* The Model Penal Code, the Model Business Corporations Act, and the Model Code of Evidence. Each of these acts is called a "Model" code because "Model" code sounds more dignified than "Widely Rejected" code.

that the signer intends to be legally bound."<sup>177</sup> Only Pennsylvania<sup>178</sup> and Utah adopted it, however, and Utah later repealed it.<sup>179</sup> Other states were reluctant to adopt the Act because such a clause could be inserted into the body of an unread printed form, and therefore the express statement of an intention to be bound did not ensure that the intention really existed.<sup>180</sup> At the same time, the form could leave the other party's performance optional.

M: This is simply a consumer protection issue. States could prohibit the use of these contracts with consumers.<sup>181</sup> Because consumers generally lack bargaining power<sup>182</sup> and often do not understand form contracts,<sup>183</sup> they are less able to self-protect. Therefore, it makes sense for the law to give them additional protection.<sup>184</sup>

L: What about a large business that uses these forms and imposes them on smaller firms that lack relative bargaining power?

M: That is a policy issue that can be decided according to a state's economic preferences. For example, a state reasonably could decide to prohibit such form contracts. A party's use of a form contract often evidences that it has such superior bargaining power that it can dictate virtually all the terms. Therefore, a state is justified in granting additional protection to the other party.

#### IV. CONCLUSION

M: There are many problems under the doctrine of consideration: contractual modifications; illusory promises; mutual promises; certain option contracts; firm offers by merchants; certain guaranty contracts; waivers; certain negotiable instruments; past consideration; stipulations regarding pending judicial proceedings; voidable promises; and offers for unilateral contracts. The doctrine of consideration cannot explain

177. MODEL WRITTEN OBLIGATIONS ACT § 1 (National Conference of Comm'rs on Uniform State Laws 1925), reprinted in *Current Legislation*, supra note 176, at 206.

178. PA. STAT. ANN. tit. 33, § 6 (Purdon 1967).

179. K. SUTTON, supra note 8, at 203.

180. *Id.* at 203-04.

181. Employees also should be protected. Regardless of their age, employees often lack bargaining power. For example, McDonalds recently began hiring senior citizens. Apparently, it is part of their cradle-to-grave minimum wage program. It is nice to know that when you are 80 years old you can still go out and make the same money that you made when you were 16 years old.

182. Of course, consumers could hire a lawyer. The difference between a lawyer and a terrorist is that you can negotiate with the terrorist.

183. Most form contracts are unfairly one-sided. Businesses find them in a book titled *Form Contracts of the Living Dead*.

184. Cf. The Federal Trade Commission (FTC), which also protects consumers. Several years ago an automobile manufacturer advertised that one of its cars was "700% quieter." When the FTC asked the manufacturer to substantiate this claim, the manufacturer replied that it meant that the car's inside was 700% quieter than the outside.

these problems,<sup>185</sup> but the commercial-gift dichotomy can.<sup>186</sup> The problems show that consideration theory is too narrow,<sup>187</sup> and that the law recognizes that consideration is not the only social or commercial justification for enforcing promises.

L: In some states<sup>188</sup> and many foreign countries<sup>189</sup> contracts are enforceable without consideration.<sup>190</sup> This view represents the future direction in international transactions as well:<sup>191</sup> the 1980 United Nations Convention on Contracts for the International Sale of Goods does not

185. Neither could the drafters of the *Restatement (Second) of Contracts*: "In the absence of bargain, the factors bearing on the enforcement of promises appear in widely varying combinations, and no general principle has emerged which distinguishes the binding promise from the non-binding." *RESTATEMENT (SECOND) OF CONTRACTS* Introductory Note to Chapter 4, Topic 2, Contracts Without Consideration.

186. My theory is bigger than your theory. It enforces the right promises, but not the wrong ones. Cf. A thermos jug, which magically keeps hot liquids hot and cold liquids cold. But how does the thermos jug *know*?

187. Cf. My upper body, which is also too narrow. I once went to a gym to lift weights, but the laughter made it difficult to concentrate. One weight lifter called me a wimp, and it made me angrier than I have ever been in my entire life. I was so angry that I almost said something. I have concluded that the reason weight lifters wear those big leather belts is that, basically, they are invertebrates.

188. See MASS. GEN. LAWS ANN. ch. 4, § 9a (West 1986) (providing that a recital that a writing is sealed makes it a sealed instrument enforceable without consideration); MISS. CODE ANN. § 75-19-3 (1972) (declaring that a writing is enforced without reference to seals); PA. STAT. ANN. tit. 33, § 6 (Purdon 1967) (stating that a signed written promise shall not be unenforceable for lack of consideration if the writing contains "an additional express statement, in any form of language, that the signer intends to be legally bound").

189. The civil law system of Europe does not require consideration. See J. DAWSON, *supra* note 10, at 226. For example, the French Civil Code provides that a contract that has "cause" is enforceable. See generally Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2 (1951). The French Civil Code was adopted first under Napoleon. Recently in France a terrorist threw a hand grenade into a kitchen. The result: Linoleum Blown apart. Meanwhile, Australian army experiments on the "boomerang grenade" have been discontinued without explanation.

190. In its 1937 report, the British Law Revision Committee was highly critical of consideration and recommended significant limitations. The Committee concluded:

[T]oday in very many cases the doctrine of consideration is a mere technicality, which is irreconcilable either with business expediency or common sense, and that it frequently affords a man a loophole for escape from a promise which he has deliberately given with intent to create a binding obligation and in reliance on which the promisee may have acted.

LAW REVISION COMMITTEE, SIXTH INTERIM REPORT 1937, CMND. No. 5549, at 17, *quoted in* K. SUTTON, *supra* note 8, at 223-24. Although many members of the Committee wanted to abolish the doctrine completely, the Committee believed that a recommendation to abolish such a deeply embedded doctrine would be viewed with suspicion and hostility. K. SUTTON, *supra* note 8, at 224. Therefore, the Committee merely recommended limiting the doctrine—to make written agreements and firm offers enforceable without consideration, abolish the legal duty rule, and make offers for unilateral contracts irrevocable upon the offeree's beginning of performance (unless provided otherwise). *Id.* at 224-29. These recommendations were viewed with suspicion and hostility and were not adopted.

191. I have always been interested in international things. When I was 18 years old, I told my father that I wanted to join the Navy. I explained, "I want to see strange lands and meet strange people." My father said, "You want to meet strange people? Go to St. Louis. Meet your mother's people."



require consideration.<sup>192</sup> The doctrine of consideration even appears to be dying in American common law, primarily because of the doctrine of detrimental reliance, or promissory estoppel. A study that analyzed more than two hundred recent promissory estoppel cases concluded that the emerging new rule is that any promise made in furtherance of an economic activity is enforceable.<sup>193</sup>

M: That sounds very much like the commercial-gift dichotomy. So we have seen the present and foreseen the future?

L: Perhaps. But in the law, the past clings on.<sup>194</sup> The common law relies heavily on tradition and precedent.<sup>195</sup> In a sense, it walks slowly while facing backwards.<sup>196</sup>

M: Sometimes, however, the law should turn around and face the future. In any event, it is not too much to ask that it merely face the present.<sup>197</sup> Consideration theory has outlived its time;<sup>198</sup> it does not explain contract law today. The commercial-gift dichotomy does. Courts, however, still give lip service<sup>199</sup> to the doctrine of consideration.

L: Well, that is the law for you. It says one thing but does another.<sup>200</sup> I trust that you have found our discussion about contract law

192. UNITED NATIONS CONVENTION, *supra* note 37, art. 11 (contract for sale is not subject to any requirement as to form), art. 16 § (2) (irrevocable offers are enforceable without consideration), art. 29 § (1) (contracts may be modified by mere agreement).

193. Farber & Matheson, *supra* note 11, at 904-05. Daniel A. Farber, one of the coauthors of this study, is the Henry J. Fletcher Professor of Law at the University of Minnesota Law School. I wrote a letter addressed to Henry J. Fletcher, Professor of Law, and asked whether he was getting a little too old to still be teaching. (Mr. Fletcher died circa 1929.) I received a response that stated:

My deceased status is less of a problem than you might imagine. On the basis of reading law reviews, I have concluded that some of the most distinguished members of the legal academy are technically brain dead, differing from myself only in that their estates have not yet been through probate. Yours post mortem, "Fletch."

Letter from Henry J. Fletcher, Professor of Law (Deceased) to James D. Gordon III (Apr. 11, 1990).

194. This is not to be confused with Klingons, antisocial creatures with troubled upbringings on *Star Trek*.

195. Voltaire observed that even the worst abuses can become venerable with age. K. SUTTON, *supra* note 8, at 264.

196. *Cf.* Moonwalking. By the way, why is it called moonwalking? Was it invented by Neil Armstrong? Why should we trust a person who, knowing that the entire world was waiting for his historic first words as he stepped onto the moon's surface, blew it? "No, no. I meant, that's one small step for a man, one giant leap for . . . oh, forget it."

197. *Cf.* The postpuberty trick-or-treaters who still insist on coming to my door on Halloween even though they are too old. I want to give them something nourishing for their adolescent bodies, so I spoon a ladle full of steaming hot soup into their bag.

198. *Cf.* The Rolling Stones. Mick Jagger is still doing his leaping leotarded chicken dance, but with less flash. Ron Woods looks like a broom from Disney's *The Sorcerer's Apprentice*, Keith Richards looks like a walking advertisement for Armour Star beef jerky, Bill Wyman is catatonic, and drummer Charlie Watts looks more and more like David Brinkley. It is amazing how virtuous living can keep people looking young.

199. *Cf.* George Bush, whose lips have been read (unsuccessfully) by millions of Americans.

200. *See id.*

today to be enlightening?

M: I guess so.<sup>201</sup> But given its serious flaws, I am surprised that the doctrine of consideration still survives. Consideration's many failures remind me of the reporter's interview with the boxer:

Reporter: How many fights have you fought?

Boxer: Ninety-eight.

Reporter: How many have you lost?

Boxer: Ninety-eight.

Reporter: How do you explain that?

Boxer: You can't win them all.

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201. Because you obviously are going to charge me for it anyway. Lawyers earn their bread by the sweat of their tongue.

