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MORAL OBLIGATION AS CONSIDERATION IN CONTRACTS

W. Jack Grosse

I. INTRODUCTION

ONE TAYLOR HAD ASSAULTED his wife; in the resulting melee, the wife knocked Taylor to the floor of their house and would have surely succeeded in decapitating him with an axe but for the timely interference of the plaintiff, Lena Harrington, who caught the axe in her hand as it was descending, thereby saving Taylor's life. Subsequently, Taylor promised to pay Harrington her damages, but after paying a small sum, refused to pay further. The court, in answer to Harrington's suit, stated:

The question presented is whether there was a consideration recognized by our law as sufficient to support the promise. The court is of the opinion that, however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.1

In Webb v. McGowin,2 Webb, while clearing the upper floor of a mill, was in the act of dropping a pine block from the upper floor to the ground below when he saw McGowin beneath him and directly under the block. The block weighed 75 pounds, and had Webb turned it loose, the resultant blow would have seriously injured or killed McGowin. Instead, Webb rode the block to the ground successfully diverting it in such a way as to miss McGowin, but causing Webb substantial injuries crippling him for life. Out of gratitude, McGowin promised Webb $15.00 every two weeks during the remainder of

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2. 27 Ala. App. 82, 168 So. 196 (1935).
Webb's life. Webb was paid until McGowin died, but shortly thereafter payments stopped. Webb brought an action against the executors of McGowin's estate for breach of contract. The court rendered a decision for Webb stating:

It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor . . . . The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by the promisor of benefits of a material or pecuniary nature . . . . Here the promisor received a material benefit constituting a valid consideration for his promise.3

In Manwill v. Oyler,4 payments were made by plaintiff on defendant's behalf aggregating some $5,000 and, in addition, plaintiff transferred to defendant a grazing permit worth $1,800 and 18 head of cattle worth $3,000. After any action at law on these transactions would have been barred by the statute of limitations, defendants made an oral promise to plaintiff to repay these sums. Defendant did not pay as he had promised, and plaintiff brought an action on the oral agreement. Plaintiff's theory to support his cause of action was that the defendant was under a moral obligation to repay. In response to this claim, the court denied recovery stating:

The difficulty we see with the doctrine is that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration. This is so because in nearly all circumstances where a promise is made there is some moral aspect of the situation which provides the motivation for making the promise even if it is to make an outright gift. And second, if we are dealing with moral concepts, the making of a promise itself creates a moral obligation to perform it . . . . In urging that the moral consideration here present makes a binding contract, plaintiff places great reliance on what is termed the material benefit rule as reflecting the trend of modern authority. The substance of that rule is that where the promisors have received something from the promisee of value in the form of money or other material benefits under such circumstances as to create a moral obligation to pay for what they have received, and later promises to do so there is consideration for such promise. But even the authorities standing for that rule affirm that there must be something beyond a bare promise, as of an offered gift or gratuity. The circum-

3. Id. at 85-86, 168 So. at 198.
stances must be such that it is reasonably to be supposed that
the promisee expected to be compensated in some way therefor. 5

In Brunhoeber v. Brunhoeber, 6 the husband promised to pay his
wife various sums of money which he owed her. A subsequent
divorce decree provided for a property settlement which, in effect,
extinguished the prior agreement between them, but the husband
promised in writing to pay a portion of this debt despite the decree.
When he reneged on his promise, the wife brought a suit on the
promise. The court found for the wife, stating:

This court is firmly committed to the rule that the moral obli-
gation of a debtor to pay a prior obligation is a sufficient con-
sideration to support a new promise to pay when the original
obligation has been extinguished or rendered unenforceable by
operation of law. 7

These are some of the faces of the battered and indistinct head
of moral obligation as it bears on the question of consideration in
contracts. Even a casual perusal of exemplary cases arising in this
area reveals the inescapable conclusion that courts are arriving at
decisions in a piecemeal manner. In many instances courts are guilty
of "bootstrapping" by fitting and even twisting doctrine developed
through precedent to justify a decision which would not normally be
justified by the facts as established. A brief survey of the current
law on moral obligation is appropriate at this point in order to pro-
vide a foundation for subsequent treatment.

II. THE DOCTRINE OF MORAL OBLIGATION AS
CURRENTLY CONCEIVED

Apparently, the first hint that a promise based on a moral obli-
gation would be legally binding stemmed from an early English case
in which Lord Mansfield stated: "[W]here a man is under a moral
obligation which no Court of Law or Equity can enforce, and
promises, the honesty and rectitude of the thing is a considera-
tion." 8

In most of the examples cited by Lord Mansfield as illustrative of

5. Id. at 435–36, 361 P.2d at 178.
7. Id. at 399, 304 P.2d at 523.
v. Hill, 98 Eng. Rep. 1088 (1775), Lord Mansfield stated:
[I]t is the case of a promise made upon a good and valuable consideration,
which in all cases is a sufficient ground to support an action. It is so in cases
of obligations, which would otherwise only bind a man’s conscience, and which,
without such promise, he could not be compelled to pay.
Id. at 1090–91.
the application of this principle, the party bound by the promise had received a benefit prior to the promise.9 Shortly thereafter, in the case of Wennall v. Adney,10 the author of the opinion posited that an express promise can be binding only where the previously received consideration would have been binding at law at the time that it was rendered, but was not enforceable at the time the promise was made because of some positive rule of law.11 The opinions in these early cases pose the problem confronted by most courts today, and provide a point of demarcation between promises based on a previously legally binding obligation and those which were based on obligations that were enforceable in law or equity. The cases arising in this area, while never large in number, nevertheless continue to present problems which, to facilitate analysis, warrant classification based on the facts inherent in each.

If one were to attempt to arrange promises based on moral obligation on a continuum, they could be logically arranged in the following order:

(1) Moral obligations arising from strictly ethical considerations without the receipt of material benefit;

(2) Moral obligations arising from the receipt of a material benefit which did not give rise to a legal obligation;

(3) Moral obligations arising from an antecedent legal obligation previously performed;

(4) Moral obligations arising from a legal obligation still enforceable;

(5) Moral obligations arising from a prior legal obligation barred by some positive rule of law.12

9. The illustrative situations described by Lord Mansfield concerned: a just debt barred by the statute of limitations; a promise by a man after becoming of age to pay a meritorious debt contracted during his minority; a promise by a bankrupt in affluent circumstances to pay the whole of his debts; and a promise by a man to perform a secret trust, or a trust void for want of a writing as required by the statute of frauds.

10. 127 Eng. Rep. 137 (1802). A lengthy footnote to this opinion states in part:
   And it may further be observed, that however general the expressions used by Lord Mansfield may at first sight appear, the instances adduced by him as illustrative of the rule of law, do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise.

11. Id. at 138 n.(a). Thus, it would appear that the foundation for the "material benefit rule," which would develop in expanded circumstances at a later date, was established in this note.

12. These categories were suggested by the annotation contained in 17 A.L.R. 1299 (1922). They are realigned to reflect a division between those promises based on a prior legal obligation and those which are not.
A. Moral Obligations Arising from Strictly Ethical
Considerations Without the Receipt of
Material Benefit

While some earlier cases in the United States supported Lord Mansfield’s rule that promises based solely on ethical motives were enforceable, the modern trend has been to deny enforcement of any promise unsupported by consideration. This is true even in the early jurisdictions, such as Maryland and Pennsylvania, that seemed to allow enforcement of such promises. There are several categories of situations in which promises are made upon the cause of a moral obligation arising from a past relationship which did not at any time raise a legal obligation. As an example, where the promisor bases his promise on a past service or support of a relative or third person, and there is nothing to show that, at the time the service or support was performed, payment was contemplated, the subsequent promise is unenforceable because it lacks the sufficient consideration to make it binding.

Where the promise is prompted by the recognition of a moral obligation predicated upon a past illicit cohabitation, a Washington court declared that such a promise was unenforceable unless some element other than moral consideration was present. Dictum in the case hinted at the possibility of enforcement if the promisor had received material benefits in connection with the illicit cohabitation.

One situation in which a promise supported by a moral instead of a legal obligation will be enforced is where a father voluntarily undertakes to support an acknowledged child. Although under common law the father of an illegitimate child was under no legal obligation to support the child, an undertaking by the father to pay for such support is binding; the natural obligation arising out of the relationship of father and child is sufficient to uphold the promise. The enforcement of promises made by the father of an illegitimate

15. E.g., Harper v. Davis, 115 Md. 349, 80 A. 1012 (1911).
18. Id. at 368, 135 P.2d at 827.
child on the basis of a natural obligation can be compared to civil law concepts which permit natural obligation to be sufficient consideration to support a new contract. Moral obligation resting upon past support of paupers is not a sufficient consideration for a subsequent promise to pay for such support, at least in those cases where the support was rendered to someone other than the subsequent promisor. The position that courts take in such situations is that the support was intended as a gratuity and, even though a material benefit was rendered, it is not sufficient as consideration because the benefit ran to someone other than the promisor.

A promise based upon the recognition of a moral obligation in connection with the debt of an estate or a deceased person is enforceable. It should be noted, however, that in many of these cases consideration other than moral obligation may be found, and the promise supportable on that principle alone.

B. Moral Obligations Arising from the Receipt of a Material Benefit Which Did Not Give Rise to a Legal Obligation

In significant numbers, more recent cases have held that, if the promisor has received a material benefit prior to the time of the promise, the previously received benefit is sufficient consideration to make the contract enforceable, even though the material benefit did not create a legal obligation at the time that it was rendered. Some of these cases require that the circumstances must be such that it is reasonably to be supposed that the promisee expected compensation for the benefits conferred at the time he conferred them. The majority of courts require that not only must the promisee have suffered a detriment in conferring a material benefit upon the subsequent promisor, but also that a benefit did in fact accrue to him. Presumably, there need not have been an antecedent request or the creation of legal liability at the time the material benefit was conferred; however, if the promisee intended a gratuity at the time he rendered his service, the subsequent promise is unenforceable due

22. Freeman v. Dodge, 98 Me. 536, 57 A. 884 (1904).
to the lack of a sufficient consideration. One qualification that the courts adhering to the material benefit rule impose when giving the rule effect is that the material benefit must have been conferred upon the promisor and not upon some third person. There are still jurisdictions, however, which refuse to subscribe to the theory that the receipt of material benefit, without new consideration, is sufficient to support a subsequent promise.

C. Moral Obligations Arising from an Antecedent Legal Obligation Previously Performed

The majority of cases falling within this area concern the situation where performance under a previous contract already legally discharged serves as the basis for a new promise to pay additional compensation. This is predicated upon the subsequent promisor’s recognition of a moral obligation to pay additional amounts to compensate for inadequate payment on the original contract. The rule in this area is that a promise to pay an amount in addition to the agreed employment contract price for the services rendered under the contract is unenforceable unless new consideration is found. Undoubtedly, the rationale for this position is that, in the absence of a precise measuring device, the courts will not question the adequacy of consideration. Since the parties must be presumed to have arrived at what they considered to be a fair bargain at the time of the original contract, it is not sound policy for the courts to declare that the agreement was not fair. Therefore, a new promise cannot be enforced based on the privately recognized inadequacy, since the original contract was not legally challengeable on the matter of adequacy of consideration at the time that it was made.

D. Moral Obligations Arising from a Legal Obligation Still Enforceable

The cases falling in this area are seemingly decided on the basis of the pre-existing duty rule as a part of the general application of consideration as an essential element in contract formation. The

30. E.g., Kansas, Wisconsin and Oregon.
most frequent statement used to dispose of a case where a new promise is given in exchange for a promise already legally binding on the promisee is that the new promise is unenforceable because the promisee has given in return a promise which, being nothing more than what he has already promised, cannot therefore be a detriment to him. Here, as in the situations where moral obligations arise out of an antecedent legal liability already performed, the courts adhere to the concept that the parties will not be permitted to privately weigh the consideration and adjust it through a new promise on the part of the promisor. In actual practice, however, this is too broad a rule to be uniformly followed, and some courts have enforced the new promise on moral, economic or fictional grounds. Particularly in construction contracts, a minority of courts have established an exception where the promise is made on account of unforeseen and substantial difficulties in the performance of the contract.  

These courts have reasoned that, since a party to the contract can repudiate it and terminate his duty by substituting a duty to pay damages, any new promise that he makes to perform will be detrimental to him and will support a promise to pay him additional compensation to perform his original promise. Thus, it is apparent that a minority of courts, at least in some situations, are dissatisfied with the pre-existing duty rule. In many cases, it would appear that the court is upholding the enforceability of the promise on the basis of moral obligation alone, perhaps citing a material benefit as providing the necessary reason for an exception. It becomes clear, however, upon closer inspection that the court is convinced that the promisee could have recovered for his services under the theory of quasi-contract. In McGuire v. Lawton, where the promisee had expended funds for medical services for the subsequent promisor’s wife, the court held that the subsequent promise was supported by a moral obligation.


34. See 1A A. Corbin, Contracts §§ 171-192 (rev. ed. 1963) for the general rule and exceptions thereto. See also 1 S. Williston, Contracts §§ 130 et seq. (3d ed. 1957). The courts are in some disagreement in this area. Many of the cases arising in this category involve the giving of some insignificant additional consideration by the promisor, and it is this small difference which is sufficient to make the new promise binding. It is indisputable that in many of these cases the parties provide for additional consideration even though it really is not of any vital importance other than to make an otherwise insufficient consideration sufficient. Since the courts will not delve into the adequacy of consideration, the parties are successful in avoiding potential unenforceability. See 1A A. Corbin, supra, §§ 192 et seq.; 1 S. Williston, supra, §§ 121, 122.

35. 9 Pa. D. & C. 730 (1926).
E. Moral Obligations Arising from a Prior Legal Obligation Barred by Some Positive Rule of Law

Where a new promise is based on a prior legal obligation barred by some positive rule of law or by statute, the majority of courts will enforce these promises. It is immediately apparent that, in enforcing these new promises, courts must justify an exception to the past consideration rule. Since the promisee exchanges nothing for the new promise, the consideration for the new promise can only be found in the past. In addition, by enforcing the new promise, the courts are, in effect, giving a broader meaning to the contract than bargain. One area in which express promises are legally enforceable without new consideration is found in situations where the antecedent debt or duty to perform is barred by the running of the statute of limitations. It is frequently stated that "the moral obligation involved in the original debt affords a sufficient consideration to support a new promise to pay the debt."96 In some cases, a new promise will be implied by an acknowledgment of the debt, but in the majority of American jurisdictions, the acknowledgment must be in writing.97

Another area in which promises are legally enforceable without new consideration is where a debt discharged in bankruptcy or insolvency proceedings is revived by the debtor's subsequent promise. A distinction is usually drawn between a discharge in bankruptcy proceedings and a voluntary discharge of the debtor by the creditor. In the latter cases, the requisite moral obligation is found to be lacking, presumably on the theory that moral obligation cannot be found where the parties themselves did not recognize any further obligation on the original debt at the time of the discharge.98 This rule is followed by a majority of courts in cases involving accord and satisfaction,99 and in those cases where there has been a composition agreement between the debtor and his creditors.100

Where a contract is unenforceable because of a statute of frauds, there is a conflict as to whether a subsequent promise is enforceable without new consideration. There are two approaches taken by the

courts in these cases. The first turns on the point of whether the statute of frauds in question makes contracts in violation of the statute void or merely unenforceable. If the statute merely makes the contract unenforceable, then the approach taken is to determine whether the subsequent promisor received material benefits under the prior legally unenforceable contract. This approach amounts to a combination of the enforcement of the new promise without consideration on the basis of a prior legal obligation, and the application of the material benefit rule to cases wherein a prior legal obligation did not exist.  

Considerable confusion exists in factual situations where the antecedent agreement was void or voidable. The most frequent approach has been that, if the statute makes contracts within its ambit void, the new promise is not enforceable because no prior legal obligation ever existed. On pure logic, this rationale seems sound. On the other hand, antecedent agreements which were merely voidable because of infancy, fraud, insanity or duress would appear capable of supporting a subsequent promise without the requirement of new consideration. Many courts fail to observe the distinction between void and voidable agreements, determining the enforceability of the new promise on the basis of the receipt of pecuniary or material benefit. The Restatement (Second) of Contracts, section 89, recognizes the enforceability of a subsequent promise without new consideration where the voidable contract has not been voided prior to the giving of the new promise. Some courts will enforce a new promise without consideration where the service or act done by the promisee in the past was expressly or impliedly requested by the promisor.  

It is necessary to state at this point that many cases falling into one or more of the above categories have been determined on grounds other than moral obligation. Many courts unwilling to predicate enforceability of a subsequent promise on prior acts or obligations will enforce such new promises based upon events subsequent to the new promise. Both past consideration and induced reliance can constitute substitutes for consideration. The fundamental and primary purpose underlying this practice is to prevent an unjust result.

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42. Born v. La Fayette Auto Co., 196 Ind. 399, 145 N.E. 833 (1924); Brunhoeber v. Brunhoeber, 180 Kan. 396, 304 P.2d 521 (1946); Puckett v. Alexander, 102 N.C. 96, 8 S.E. 767 (1889).
44. Friedman v. Suttle, 10 Ariz. 57, 85 P. 726 (1906).
Although the doctrine known as promissory estoppel is generally applied in cases falling outside the scope of moral obligation, it may occupy an important place in supplying legal support for moral obligation that would not otherwise sustain a new promise. The application of this principle is particularly evident in the area of moral obligations arising strictly from ethical considerations without material benefit, and moral obligations arising from antecedent legal obligations still enforceable. Analysis of many of these cases leads to the conclusion that the existence of a moral obligation lends added support to cases in which the elements necessary to sustain promissory estoppel are weak. As in all cases involving the doctrine, the basic purpose is to prevent injustice to one whose actions are based on promissory reliance.

III. STATUTORY PROVISIONS RELATING TO MORAL OBLIGATION

Some states have statutes which either directly or indirectly bear on the subject of moral obligation as consideration in contracts. Many of these statutes relate to moral obligation only indirectly, in the sense that the purpose behind the statute is not to foster the enforcement of promises founded on moral obligation, but rather to place the question of consideration in the case of executory promises beyond the scope of judicial inquiry. Usually these statutes are considered as substitutes for the old common law seal. As an example, a New Mexico statute states: "Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done." California has a statute which makes a written instrument presumptive evidence of consideration. Pennsylvania apparently is the only state to adopt the Model Written Obligations Act. This Act provides, in pertinent part:

A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

45. See ReSTATEMENT OF CONTRACTS § 90 (1932).
47. N.M. STAT. ANN. § 20-2-8 (1953).
49. It was formerly called the Uniform Written Obligations Act. This Act was proposed by the National Conference of Commissioners on Uniform State Laws. See notes 94 & 127 infra.
50. PA. STAT. tit. 33, § 6 (1967).
New York has passed the New York General Obligations Law which contains several sections applicable to the requirement of consideration in contracts. One section, applicable to past consideration, makes a promise in writing and signed by the promisor or his agent binding without new consideration if the consideration is expressed in the writing, and if it can be proved to have been performed and would be a valid consideration but for the time when it was performed.\textsuperscript{51} Other sections allow for modification or discharge of contracts without consideration, provided that the modification or discharge is in writing and signed by the one to be charged.\textsuperscript{52} In addition, the Uniform Commercial Code, adopted by all of the states, makes a written offer irrevocable without consideration if it is in writing and signed by the offeror.\textsuperscript{53}

Perhaps the most significant connection between these statutes and moral obligation is that the statutes recognize a moral obligation on the part of the promisor, modifier, or discharger to live up to his promise. It is interesting to note that reliance is not an element in any of these statutory applications, at least to the extent that no reliance is necessary before the right inures under the writing. It is enough that the promisee has the right to rely; it is not necessary that he actually do so.

There are very few statutes dealing directly with the question of moral obligation as consideration in contracts. California has a statutory provision to the effect that:

\[ a \text{]n existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.\textsuperscript{54} \]

Although this statute appears to be broad enough to include within its scope cases in which the prior services rendered by the promisee did not give rise to a prior legal obligation on the basis of the material benefit rule, to date no court has interpreted the statute to include such situations. The statute, as judicially interpreted, has been limited in application, insofar as moral obligation as consideration is concerned, to those cases where a prior legal and enforceable obligation once existed.\textsuperscript{55}

The relevant Georgia statute provides:

\begin{itemize}
  \item \textsuperscript{51} New York Gen. Obligations Law § 5-1105 (McKinney 1964).
  \item \textsuperscript{52} Id. § 5-1103. See also §§ 5-1107, 5-1115.
  \item \textsuperscript{53} Uniform Commercial Code § 2-205.
  \item \textsuperscript{54} Cal. Civ. Code § 1614 (West 1954).
  \item \textsuperscript{55} Leonard v. Gallagher, 235 Cal. App. 2d 362, 45 Cal. Rptr. 211 (1965).
\end{itemize}
Considerations are distinguished into good and valuable. A good consideration is such as is founded on natural duty and affection, or on a strong moral obligation. A valuable consideration is founded on money . . . except marriage, which is a valuable consideration.\(^56\)

Again, the Georgia courts have limited the application of this statute to those situations in which a moral obligation was supported by some antecedent legal obligation unenforceable at the time, or by some present equitable duty.\(^57\)

Louisiana divides obligations into imperfect, natural, and perfect or civil. Imperfect obligations are those which operate only in the moral sense and are unenforceable.\(^58\) Article 1758 of the Louisiana Civil Code defines natural obligations, but fails to include any mention of strictly moral obligations without prior legal obligations or concurrent equitable duties. Article 1759 of the Code states that a natural obligation is a sufficient consideration for a new contract. By a reasonable interpretation of these statutes, it would appear that Louisiana would not enforce moral obligations unless predicated on prior legal or current equitable obligations. At the present time, it would appear that there are no statutes which directly provide for the enforcement of promises based on antecedent services unless those services gave rise to either legal or equitable obligations at the time they were performed, or at a time concurrent with the promise.

An analysis of the categories of moral obligation, the case holdings within them, and the relevant statutes suggests that the majority of courts are not willing to enforce promises based on moral obligation unaccompanied by some pecuniary or material gain received in the past. Moreover, it has only been in recent years that some courts have been willing to extend enforcement of promises not supported by simultaneous consideration nor by prior legal obligation to material benefits received in the past. Many jurisdictions still will not predicate enforceability on the material benefit rule. Undoubtedly, there is considerable confusion and inconsistency in the application of general principle to cases arising in the moral obligation area.

It is submitted that the confusion and inconsistency arise because of misconceptions in the following areas: (1) the matter of contract definition; (2) the matter of consideration; (3) the underlying concept of contract purpose; (4) the concept of moral obligation.

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tion or obligation in general; and, (5) the definition and ascertainment of a gift. Some of the problems in these areas will be explored and some possible solutions suggested.

IV. Definition of Contracts

There are many definitions of contract, but the one which is most often quoted is the one propounded in the Restatement of the Law of Contracts (the "Restatement"). Section 1 of the Restatement defines contract as "[a] promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." This definition offers very little by way of precise identification of a contract since it merely states that a contract is a promise or set of promises which the law will enforce. The elements of a contract are not found in this definition; it thus becomes obvious that additional help is needed in order to make the definition workable. This additional help has been provided by section 19 of the Restatement wherein the requirements for formation of an informal contract are enumerated. Subsequent sections set forth the requirement of mutual assent, but the concept of bargain, which appears to underlie the Restatement concept

59. Contract definitions can be classified into three groups: one views a contract as an agreement; the second as a promise; and the third as both an agreement and a promise. See Snyder, Contract — Fact or Legal Hypothesis?, 21 Miss. L. Rev. 304, 306 (1950).

60. Restatement of Contracts § 1 (1932). Restatement (Second) of Contracts (Tent. Draft No. 1, 1964) retains this definition of contract. The Uniform Commercial Code § 1-201 defines contract as "the total legal obligation which results from the parties' agreement as affected by ... [chapters in other part of the Code] and any other applicable rules of law."

61. This is merely a definition of a contract in a circular manner, since it is the same as saying that a contract is a legally enforceable promise, whereas a promise is legally enforceable only if it is a contract. 17 Am. Jur. 2d Contracts § 1 (1964).

62. In its Restatement, the American Law Institute has set forth the following guidelines:

   The requirements of the law for the formation of an informal contract are: (a) A promisor and a promise, each of whom has legal capacity to act as such in the proposed contract; (b) A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise, except as otherwise stated in §§ 85-94; (c) A sufficient consideration except as otherwise stated in §§ 85-94 and 535; (d) The transaction, though satisfying the foregoing requirements, must be one that is not void by statute or by special rules of common law.

63. Restatement of Contracts § 20 (1932) states:

   A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but except as qualified by §§ 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

64. Restatement of Contracts § 21 (1932) states:

   The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct.
of contract, does not appear in any section or comment until the sections on consideration are reached.\textsuperscript{64} The Restatement (Second) of Contracts (the "Restatement Second") corrects this conceptual defect by reworking section 19.\textsuperscript{65} While not changing the definition of a contract, the Restatement Second more clearly sets forth the requirement of bargain as fundamental to contract formation. Section 19 of the Restatement Second provides: "(1) Except as stated in subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." The comments list the two essential elements of a bargain as agreement and exchange.\textsuperscript{66} Agreement is considered to be a "meeting of the minds."\textsuperscript{67} Furthermore, the manifestation of mutual assent must be made by each party with reference to the other.\textsuperscript{68} The second essential element of a bargain, exchange, is embodied in the concept of consideration.\textsuperscript{69}

The requirement of consideration in common law contracts has been the subject of extensive discussion. It has been criticized, praised and misconstrued by many legal writers.\textsuperscript{70} In examining the basis for the consideration requirement, it would appear that this concept "seems to be in large part an historical accident, an outgrowth of the procedural requirements that ultimately developed for the maintenance of the action of assumpsit . . . .\textsuperscript{71}"

\begin{itemize}
\item \textsuperscript{64} The definition of consideration has been described by the following language: Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise. Restatement of Contracts § 75 (1932) (emphasis added).
\item \textsuperscript{65} Restatement (Second) of Contracts § 19 (Tent. Draft No. 1, 1964).
\item \textsuperscript{66} The comment states that "[t]he typical contract is a bargain and is binding without regard to form. The governing principle in the typical case is that bargains are enforceable unless some other principle conflicts . . . ." Id. § 19, comment b at 85.
\item \textsuperscript{67} Id. § 19, comment c at 85.
\item \textsuperscript{68} Id. § 23, comment a at 109.
\item \textsuperscript{69} In its explanatory comments the American Law Institute states: The word "consideration" has often been used with meanings different from that given here. It is often used merely to express the legal conclusion that a promise is enforceable. Historically, its primary meaning may have been that conditions were met under which an action of assumpsit would lie. It was also used as the equivalent of the quid pro quo required in an action of debt . . . . On the other hand, consideration has sometimes been used to refer to almost any reason asserted for enforcing a promise, even though the reason was insufficient . . . .
\item \textsuperscript{70} Consideration has also been used to refer to the element of exchange without regard to legal consequences. Consistent with that usage has been the use of the phrase "sufficient consideration" to express the legal conclusion that one requirement for an enforceable bargain is met.
\item \textsuperscript{65} Restatement (Second) of Contracts § 75, comment a at 4 (Tent. Draft No. 2, 1965).
\item \textsuperscript{71} See Patterson, An Apology For Consideration, 58 Colum. L. Rev. 929 (1958); Wright, Ought the Doctrine of Consideration to be Abolished from the Common Law?, 49 Harv. L. Rev. 1225 (1936).
\end{itemize}
An early view, undoubtedly encouraged by Lord Mansfield, was that the presence of consideration was one mode among others for supplying evidence of the intention of the parties to form a contract. Furthermore, it was felt that if the terms of the contract were reduced to writing either by reason of custom or by requirement of statute, such evidence was sufficient without consideration.\textsuperscript{72} However, this view was repudiated later in the development of the English Common Law.\textsuperscript{73} Consequently, consideration served as the sole means of indicating that the parties intended that the agreement should be binding. Courts began to regard a quid pro quo transaction as essential to establish the binding force of the agreement. Thus, with rare exceptions, the bargain theory of contracts, through the concept of consideration, was established in the English Common Law.

Other theories have been advanced attempting to define contract in terms other than bargain. Under the influence of scholasticism there arose, during the Middle Ages, the belief in the power of the human will to create law. From this theory it followed that all agreements should be enforceable, without reference to any form, simply by virtue of the fact that the parties intended such a result. This concept of the “juristic act,” characterizing the omnipotence of the human will, was, and still is to a considerable extent, the fundamental theory underlying the enforcement of contract promises in Europe. Perhaps, Kessler expressed the policy of the “will theory” best when he stated:

Contract, to be really useful to the business enterpriser within the setting of a free enterprise economy, must be a tool of almost unlimited pliability. To accomplish this end, the legal system has to reduce the ceremony necessary to vouch for the deliberate nature of a contractual transaction to the indispensable minimum; it has to give freedom of contract as to form . . . .

Within the framework of a free enterprise system the essential prerequisite of contractual liability is volition, that is, consent freely given and not coercion or status.\textsuperscript{74}

Another theory that attempted to define contract in terms other than bargain was the “injurious reliance theory.” Within the framework of that theory, contractual liability should arise only where: (1) someone makes a promise explicitly in words or implicitly by

\textsuperscript{72} Pillans v. Van Mierop, 97 Eng. Rep. 1035 (1765).
\textsuperscript{74} Kessler, \textit{Contract as a Principal of Order}, \textit{Readings in Jurisprudence and Legal Philosophy} 140 (M. Cohen & F. Cohen eds. 1951).
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some act; (2) someone else relies on it; and (3) the latter person suffers some loss thereby. The fundamental basis of this theory is not only that promises ought to be kept, but also that anyone injured by reliance on the promise should be compensated for his loss by the one who caused it. In the view of Adam Smith, "[t]he foundation of contract is the reasonable expectation, which the person who promises raises in the person to whom he binds himself; of which the satisfaction may be extorted by force."76

Still another theory that has at one time or another found favor is the "equivalent theory," at the core of which lies the concept of *quid pro quo*. Advocates of this theory insist that it is only fair that one who has received something of value from another, give something of value in return. Therefore, when a promise is given to compensate another for what was received, the promisor should legally be forced to live up to his promise. The fact that the "cause" of the promise relates to the past is not controlling even if the original property or service was intended as a gift. The difficulty with the justification of such a theory involves the problem of defining equivalency. It is entirely possible that the "equivalent theory" is the forerunner of the common law doctrine of consideration or, at the very least, has exerted a great influence on its inception and maintenance. Regardless of the possible choices of contract theories, the common law basis for contract enforcement is rooted in the theory of consideration.

While an accidental beginning may have been responsible for the creation of the concept of consideration, its requirement has taken on a different cast and remains a crucial part of common law contract formation. It appears that the consideration requirement is peculiar to the English Common Law. The civil law "never employed the fictional basis for contracts that lugged consideration into the English Law."77 While this statement might be somewhat misleading, it is true to the extent that consideration has developed to signify "bargain." The requirement in civil law contracts which most closely approximates consideration is "cause." Current civil law developed from French law, which from its early roots adhered to the philosophy of the free will of men. Converted into contract application, free will evolved to mean that the individual could bind himself, subject to certain restrictions based on public policy, merely by expressing a will to do so. The only inquiry into the enforceability

76. A. Smith, Lectures on Justice, Police, Revenue and Arms 1 (Cannan ed. 1896), quoted in Kessler, supra note 74, at 140.
77. Ferson, Consideration and Contracts, 28 Rocky Mt. L. Rev. 31, 32 (1955).
of the promise went to the motive of the promisor, which in essence is the "cause" which prompted him to make the promise.\textsuperscript{78} Probably the basic difference between "cause" and consideration, insofar as either bears on the validity of a contract, is that, while at common law an agreement must be accompanied by consideration, in the civil law agreement alone equals contract.\textsuperscript{79}

Consideration must serve some valid function or purpose; otherwise, intelligence would dictate its removal as a requirement in contract formation. Professor Fuller divides the functions of consideration into formal and substantive.\textsuperscript{80} The formal functions are evidentiary, that is, to provide evidence of the meaning of the contract; cautionary, to provide a deterrent to inconsiderate action; and channeling, to furnish a simple and external test of enforceability.\textsuperscript{81} The substantive function most commonly attributed to consideration is that it provides a test for the objective determination of the intention of the parties to be contractually bound. Regardless of the fundamental theory supporting the concept of consideration, it would appear that current theories concerning consideration focus upon the concept of a price or agreed exchange for a promise. The Restatement Second, in changing the wording of section 75 slightly, but the meaning dramatically, posited that: "(1) To constitute consideration, a performance or a return promise must be bargained for."\textsuperscript{82} The consequence of this provision is to make unmistakable the requirement that an exchange must be simultaneous. This, of course, makes all promises based on past consideration unenforceable.

Both the Restatement and the proposed Restatement Second provide for exceptions to the "bargain theory" of consideration. Section 19 (2) of the Restatement Second provides that: "[w]hether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under rules stated in sections 86–94."\textsuperscript{83} An examination of the sections referred to reveals that sections 86, 87, and 89 are similar to the exceptions in the original

\textsuperscript{78} Smith, \textit{A Refresher Course in Cause}, 12 \textit{La. L. Rev.} 2 (1951). In general terms, civil law contracts are divided into two categories — onerous contracts and donations. Onerous contracts are those which involve equivalents and are enforceable without question, subject to certain public policy exceptions. Donations are gratuitous contracts enforceable at law depending on the "cause" underlying the promise. All donations, except those which are based on mere liberality, are enforceable, provided they meet the form requirements imposed by special statutes.

\textsuperscript{79} \textit{Id.} at 4.

\textsuperscript{80} Fuller, \textit{Consideration and Form}, 41 \textit{Colum. L. Rev.} 799 (1940).

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Restatement (Second) of Contracts} § 75 (Tent. Draft No. 2, 1965). This intention is objective and is to be distinguished from motive. Motive itself cannot serve as consideration. 1 S. \textit{Williston, supra} note 34, § 110.

\textsuperscript{83} \textit{Restatement (Second) of Contracts} § 19(2) (Tent. Draft No. 1, 1964).
Restatement. Section 88 allows for the enforcement of a promise to waive a condition precedent. Sections 91, 92 and 93 relate to qualifications of the new promise, such as to whom it should be made, the time for its performance, and knowledge of the facts of the antecedent transaction which prompted its formation. Section 94 provides for the enforcement of a promise made with reference to a judicial proceeding, upon the meeting of certain formal requirements. The effect of these sections is to allow for the enforcement of promises made upon the "cause" of a prior legal obligation barred by some positive rule of law or a statute. To this extent, the Restatement Second continues policy already in effect.

Certainly the Restatement Second section most relevant to the question of moral obligation is section 89. Section 89A, a change from the original Restatement, 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.

There is no doubt as to the basis upon which the section is predicated. Comment (a) to section 89A states:

These terms are not used here: [referring to past consideration and moral obligation mentioned in the preceding sentence] "past consideration" is inconsistent with the meaning of consideration stated in section 75 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. Nor are moral obligations based solely on gratitude or sentiment sufficient of themselves to support a subsequent promise.

84. The Restatement (Second) provides:
§ 86. (1) 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.
§ 87. 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.
§ 89. 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.

86. Restatement (Second) of Contracts § 89A (Tent. Draft No. 2, 1965).
An analysis of this section brings to light several important qualifications contained either in the wording itself or in the implications which may be drawn therefrom. Initially, it is obvious that the provisions of the section are not considered as forming a substitute for consideration. The application of this section is restricted to those situations in which it is necessary as a matter of public policy to prevent injustice. In literal terms, this must mean that, where this section is applicable, the new promise is supported not on the basis of contract, but rather on the basis of public policy. The emphasis, therefore, is shifted from private autonomy to a quasi-contractual basis. The result of this approach is to forego recognition of a moral obligation on the part of the promisor, focusing rather on concepts of restitution to prevent unjust enrichment. The purpose served by the new promise is to quantify the unjust enrichment. But even this function is limited by subsection (2) (b), which provides that the new promise is not binding to the extent that its value is disproportionate to the benefit.\footnote{Restatement (Second) of Contracts § 89A(2) (b) (Tent. Draft No. 2, 1965).} Under subsection (2) (b), the courts intend to "weigh" the value of the promise in terms of the benefit previously conferred. In a case where the court does in fact find that the new promise was disproportionate to the value of the benefit previously received, the new promise should be completely unenforceable under this section. If this weighing is done, once again a standard alien to the intention of the parties is used to determine the adequacy of the benefit previously conferred. In view of the traditional policy of the courts not to weigh consideration, it is apparent, if consistency of policy is to be maintained, that this section does not in any sense purport to provide a substitute for consideration.

An examination of the illustrations contained in the various comment subsections leads to the conclusion that the application of this section in terms of moral obligation is restricted to those situations in which a material benefit has been received by the promisor in an antecedent relationship with the promisee. Each illustration depicts a relationship in which, most probably, the promisee could have recovered under the theory of quasi-contract, both at the time the promise was made, and subsequently, provided that the statute of limitations has not run. One is tempted to ask why, if this is true, a new promise is necessary. This view can be bolstered by reference to the illustrations under comment subsection (a), wherein the illustrated fact situations involve the benefit of a person other than the promisor. Each illustration ends with the statement that this promise
is not enforceable. In other words, a quasi-contractual fact situation does not exist, and therefore a promise based on such a third-party benefit is not binding under section 89A.

It is submitted that the purpose behind section 89A is clearly identified in comment subsection (b): “Enforcement of the subsequent promise sometimes makes it unnecessary to decide a difficult question as to the limits on quasi-contractual relief.” Of course, in one sense, the section does not amount to a substitute, either on the basis of quasi-contract or restitution, for enforcement of quasi-contractual obligations. The new promise is enforced according to its express terms, rather than on the basis of the amount of the unjust enrichment. This conclusion is made in full recognition of subsection (2) (b), wherein a promise disproportionate in value to the benefit will not be enforceable. It is suggested that only in patently obvious situations would subsection (2) (b) ever be used as an exception to the enforcement of the new promise.

It might be argued that when “justice” is the basis for contract policy, certainly the element of morality is the underlying rationale. Furthermore, if morality is the basis for the enforcement of a promise without new consideration, then moral obligation is, in effect, the real consideration allowing the contract to be legally binding. This is true only to the extent that the moral obligation is a public one rather than one stemming from private recognition. It would be possible, therefore, to conclude that under section 89A moral obligation still does not serve as a basis for the enforcement of a new promise without fresh consideration.

Sections 89B, 89C and 89D represent some changes in the area of firm offers, guaranties and modification that have previously been followed as exceptions to the consideration requirement. Section


89. The pertinent provisions are as follows:

§ 89B.

(1) An offer is binding as an option contract if it (a) is in writing and signed by the offeror, recites a purported consideration for the making of an offer, and proposes an exchange on fair terms within a reasonable time; or (b) is made irrevocable by statute.

(2) 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.

§ 89C.

A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if (a) the promise is in writing and signed by the promisor and recites a purported consideration; or (b) the promise is made binding by statute; or (c) the promisor should reasonably expect the promise to induce action or forbearance of a substantial character on the part...
90 of the Restatement Second is the former promissory estoppel section of the original Restatement, reworked but with substantially the same effect. Suffice it to say that the exceptions to the requirement of consideration in contract formation, primarily to the extent of the material benefit application, are increasing in number and application. The Restatement Second amply provides for their perpetuation.

Professor Fuller has stated:

Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in legal relations.

The most important qualifying phrase, "within certain limits," is one which requires more precise definition. That society or government has the inherent power to limit the change or establishment of legal relations and to compel individuals to subordinate their own selfish interests to the interests of society is too fundamental to evoke serious argument. While one may quarrel with the content of "illegality" in the area of contracts, no one can seriously argue that the right to contract should be unlimited. Certain types of promises should be enforced and certain types should not. The most important question concerns how society decides which ones to enforce and which ones not to enforce. There are two concepts worthy of brief discussion at this point; illegality and unenforceability. When the legal system, at the prodding of government, refuses to enforce gambling agreements, agreements to commit crimes or torts, or agreements which would have the effect of undermining social conscience or welfare, there can be no effective argument. Presumably, those responsible for declaring such agreements void are acting with the representative approval of individuals in the society. In these cases,

\[\text{of the promisee or a third person, and the promise does induce such action or reliance.}\]

\[\text{§ 89D.}\]

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 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.


\[90.\] The rewording is as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) of Contracts § 90 (Tent. Draft No. 2, 1965).

91. Fuller, supra note 80, at 806.
illegality relates to the substance of the agreement for the purpose of serving some valid social or economic end. On the other hand, many promises are unenforceable because of the lack of the defined consideration. This limits the substance of the promise for no valid purpose since the subject matter of the promise does not contravene any public policy.

What function does the requirement of consideration really serve? What difference does it make whether the promise is induced by the anticipation of a bargained for exchange or by another motive? There is no objection to the requirement of consideration in contract formation in the sense that it represents the price paid for a promise, but why should the definition of "price" be limited to terms of "bargain?" Why should it matter whether the inducement for a present promise is a current, future or past benefit so long as the intention is a present one? The answers to these questions should provoke some serious thought and inquiry into the rationale behind the requirement of bargain as necessary to make consideration sufficient.

V. Reasons For Enforcing Promises Founded Upon Moral Obligation

The Restatement definition of contract emphasizes promise. The real purpose of this definition is to allow for the enforcement of such promises, and it seems that the imposition of the requirement of consideration arbitrarily and unnaturally limits the function of private autonomy. Without a strong public policy, based on some rational and natural advantage of making promises that do not meet current tests of consideration unenforceable, the legal system will be depriving an individual of a basic right to satisfy the recognition of an individual obligation. The exceptions allowed in the category of prior legal obligation are inconsistent with the bargain doctrine contained in the Restatement Second. Why should prior legal obligations be enforced based on a new promise — not supportable on the bargain theory — but not other recognized obligations? The Restatement Second supplies the answer that "there seems to be no consensus as to what constitutes a 'moral obligation'."92 Furthermore:

[i]n other cases restitution is denied by virtue of rules designed to guard against false claims, stale claims, claims already litigated, and the like. In many such cases a subsequent promise

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to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails.\textsuperscript{93}

It is illogical to justify the enforcement of such promises on the basis that the new promise removes the reason for denial of relief. The new promise is still unsupported by consideration in the sense that consideration consists of a "bargain."

No society enforces every promise; the search thus continues to discover rational principles which would distinguish those enforceable from those unenforceable. If one subscribes to the theory that contract formation is a private right that should be given full effect in the absence of strong public policy to the contrary, it would appear logical that there ought to be such strong policy before the enforcement of any promise is prohibited. Nevertheless, many of the reasons given for refusal to enforce contracts founded upon moral consideration are less than persuasive.

The most compelling reason given relates to the gratuitous promise. It is argued that the promise to make a gift does not involve the exchange of goods fundamental to our concept of economy. The only counter argument is that promises which are voluntarily made by an individual, and which apparently serve some individual purpose, should be enforceable unless the enforcement of the promise in some manner operates to the disadvantage of society. The enforcement of such promises, however, is inconsistent with the theory of consideration as applied under those circumstances where the term is defined as the price paid for the promise. The line should be drawn somewhere. Unless some tangible motivating reason can be found to support the promise, the only reason to enforce such a gratuitous promise would be the obligation that the promise itself raises. The rules of law with respect to gifts do not lend any enlightenment on this topic. Under those rules, a promise to make a gift is not enforceable because it lacks consideration,\textsuperscript{94} and, furthermore, such a promise cannot be considered a gift because a gift is an executed transaction.\textsuperscript{95}

The most often cited reason for not enforcing a promise is that it lacks a legally sufficient consideration.\textsuperscript{96} The test to determine

\textsuperscript{93} Id. comment b at 126-27.
\textsuperscript{94} However, section 1 of the Model Written Obligations Act provides that: A written release or promise hereafter made and signed by the person releasing or promising, shall not be invalid for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.
\textsuperscript{95} See R. Brown, The Law of Personal Property § 48 (2d ed. 1955).
\textsuperscript{96} See Cohen, supra note 75, at 578. The author cites "injurious reliance" as the most favored theory behind contract enforcement, stating that "[c]ontract
whether or not the consideration is legally sufficient is whether the act, forbearance, or return promise results in a benefit to the promisor or a detriment to the promisee. The two requisites that must be met to conclude that consideration is legally sufficient are: (1) that something which the law regards as value was given for the promise, and (2) that which was given must have been dealt with by the parties as the agreed exchange for the promise. This test is, of course, based on the bargain theory of consideration and assumes that the promisee must have given some concurrent exchange as the price requested for the promise. The majority of the cases concern the question of what the law regards as value. The answer is provided in general terms by testing the detriment to the promisee of that which he gave to the promisor in exchange for his promise. In so doing, such promises or acts by the promisee to do something that he is already legally bound to do, or the forbearing from doing something that he does not have a legal right to do, are lacking in the necessary detrimental quality, and therefore fail to meet the test of legal sufficiency. It is apparent that, while the courts do not purport to measure the adequacy of consideration, they will examine or qualify the sufficiency of the consideration; once consideration of any form is found, its quality in relation to the promise for which it was given will be unquestioned. The result of this current practice is that the courts quite obviously weigh, in terms of the civil law, the motivation of the promisor from the point of view of what the legal system thinks he receives for his promise, rather than what is in the mind of the promisor himself. This conflicting approach of determining whether there is consideration, but not how much consideration is present, belies judicial rationale and reduces the private autonomy concept of contract which should support the functioning of a free enterprise system.

In an about face, the common law jurisdictions have deviated from the bargain requirement in cases which obviously call for an application of fair treatment. Undoubtedly predicating action on the injurious reliance theory, most common law courts adopt the doctrine of promissory estoppel. The essence of this doctrine is that "promises are, within limits, legally enforceable where the promisee has relied on the promise to his injury, even though the reliance was not bargained for."97

This doctrine is restricted to situations where only through the enforcement of the promise will injustice be prevented. Further restrictions require that the detriment suffered by the promisee must be economically substantial, the reliance must have been foreseeable by the promisor at the time that he made his promise, and the promisee's reliance must have been justifiable. To justify this doctrine, the courts describe it as a substitute for consideration, which is merely another way of stating that the fundamental concept in contract enforcement is the requirement of bargain but the legal system will supply the "cause" of the promise where it is missing. It cannot be sensibly argued that the application of this doctrine has not resulted in justice being rendered in situations where it would not otherwise have been; however, the use of a fiction to accomplish this end gives rise to the thought that the requirement of consideration will be unreasonably maintained even in circumstances which require artifice to overcome inadequacy.

What is the future of consideration as a requirement in the formation of contracts? At its present pace, its consistency will be eroded by the increasing number of enforceable promises which predicate their motivating forces on foundations other than bargain. Already such a trend is in evidence. If the proposed draft of the Restatement Second is adopted by the American Law Institute and followed by the courts, firm offers, guaranties, and modifications of executory contracts will be exempt from the requirement of consideration. Whenever the exceptions to a general rule become too numerous, it is time for a reevaluation of the basic rule. Perhaps a solution to this problem is to either define consideration to include what now are treated as exceptions, or to eliminate consideration as a contract requirement. A workable definition, if the latter route is chosen, would provide for a return to the basic assumption that what we are concerned with in contract situations is a promise or a set of promises. If the former is chosen, it is suggested that the following definition be used: Consideration is a promise or other act which manifests a recognition by the promisor of a moral obligation and which the law will enforce as a legal obligation unless contrary to

98. See Restatement (Second) of Contracts § 90 (Tent. Draft No. 2, 1965).
99. In this respect, Professor Fuller has made the following observations:

The future of consideration is tied up to a considerable extent with the future of the principle of private autonomy. If the development of our society continues along the lines it is now following, we may expect, I believe, that private contract as an instrument of exchange will decrease in importance. On the other hand, with an increasing interdependence among the members of society we may expect to see reliance (unbargained-for, or half bargained-for) become increasingly important as a basis of liability.

Fuller, supra note 80, at 823.
some positive rule of public policy. In the section following, some ramifications of such a definition are explored.

VI. THE PURPOSE UNDERLYING CONTRACT ENFORCEMENT

If a legal system is to differentiate between enforceable and unenforceable agreements, it would seem to be absolutely necessary to establish standards for deciding which agreements serve worthwhile ends. If one were to trace backward through time the roots of the legal concept called contract, one would no doubt find that the enforcement of contracts initially came about because of commercial reasons.\(^{100}\) We continue to recognize this fundamental purpose behind the enforcement of contracts. It is common knowledge that "social agreements" (promises to meet for lunch and the like) are not legally enforceable as contracts.\(^{101}\) When one enters the field of legal theory, it is possible to construct a theory behind the enforcement of agreements which would include as a foundation reasons for their enforcement on grounds other than merely commercial advantage. As an example, the position might be taken that the purpose of enforcing agreements is to regulate order and to guide purely social institutions.\(^{102}\) Undoubtedly, our legal system performs this function, but it does not do so primarily with the tool of contract enforcement. The theory that contract enforcement must serve a commercial end does not eliminate from consideration the question of morality in the formation and enforcement of promises. It does, however, restrict the application of moral obligation to the field of economic endeavor. With this in mind, it might be said that the definition of moral obligation in the field of contracts merely means that a person is morally bound to keep any promise that serves a commercial end consistent with the economic theory prevalent at the time. In other words, moral obligation within the context of contract enforcement merely means that promises recognizing a moral obligation will be enforced where the moral obligation possesses commercial utility. Upon this basis, recognition of a moral obligation which serves only selfish interests not in any way connected with our economic system should not be enforced on the premise of contract. Thus, promises to make gifts, which could be called sterile transfers of property, are not enforceable because of the lack of commercial advantage.

\(^{100}\) See P. Devlin, The Enforcement of Morals 44 (1965); Cohen, supra note 75; Llewellyn, What Price Contract — An Essay in Perspective, 40 Yale L.J. 704 (1931).

\(^{101}\) 1 S. Williston, supra note 34, § 2.

\(^{102}\) Llewellyn, supra note 100, at 717.
Jeremy Bentham, the great English utilitarian, advocated a theory of legislation which would work toward the end of the greatest good for the greatest number. While this theory envisions laws and regulations which go beyond the scope of mere contract theory, nevertheless, the concept of utility can be applied with advantage to the field of contract enforcement. Promises based on the recognition of moral obligation, whether the obligation arises from a concurrent act or promise, or prior act or promise, should be enforced whenever the performance of the act advances commercial utility. The determination of commercial utility should not be too difficult.

The fundamental economic function of a commercial community is the exploitation of the process whereby goods and services are exchanged so that the economic wealth or income of the economy is increased. While the net result is a total increase in wealth, the individual additions are considered marginal. It is indeed difficult, if not impossible, to quantify marginal gains (expressed in terms of utility) from a community viewpoint, but approximations can be made by referring to the voluntary nature of the two party undertaking. *Ceteris paribus*, it can be assumed that when two parties to a contract voluntarily undertake to exchange economic values, each presumes to benefit by the exchange. This concept is embodied in the present simultaneous bargain theory through the use of the doctrine that the law will not weigh consideration in a contract. If A agrees to exchange real property with a market value of $25,000 for a lot with a market value of $1,000, the law will not weigh the exchange values of the economic assets for the parties unless some other element, such as unconscionability or coercion, enters the agreement to the extent that countervailing public policy dictates nonenforcement. However, in the latter situation, the underlying reason for nonenforcement relates not to utility or value, but rather to the absence of free will on the part of one of the parties to the agreement. The extreme example of the doctrine that the legal system will not weigh consideration can be found in those cases wherein peppercorn is exchanged for a promise, the purpose of which is obviously, in the majority of cases, a successful attempt to circumvent the requirement of consideration. It can be argued that the prevention of disutility is as much a concern of any economic system as the promotion of utility.

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103. Jeremy Bentham developed a complex theory involving pleasure and pain. Utility was defined as being the net pleasure after any pain connected with the action under consideration had been discounted. See *The Great Philosophers; Selected Readings in Jurisprudence* 261-66 (C. Morris ed. 1959).
Perhaps the starting point for any consideration of the net effect of any legal or economic practice on total community economic assets is the definition of economic assets. In any economic community, assets consist of raw materials, in both natural and refined states, and the total available labor supply. Maximization of economic activity stems from the most economically efficient use of all assets. Since community values change over time, the use of community assets change, resulting in a situation whereby differing methods for economic use of assets are constantly in a state of flux. It is, therefore, necessary that exchange of goods and services be accorded a degree of flexibility commensurate with changes in community economic needs. Any exchange of goods and services which increases individual utility is a desirable end in itself, especially in a free enterprise economy. It is only necessary to ascertain, to the extent possible, whether community economic advantage results from the enforcement of the individual agreements. Generally, it can be said that any agreement which if enforced would not reduce the net community assets adds to the utility realized through the exchange of such assets. In this sense, community commercial utility is defined in the negative. Realistically, it would appear that the following categories illustrate situations in which economic advantage would accrue to the community from enforcement of contracts based on moral consideration:

(1) Any exchange of goods or services whether resulting from simultaneously exchanged promises (with resulting performances), or promises and/or performance exchanged over time. This category would include cases where a promise was made to pay for previously received material benefits, whether or not counter performance was expected or anticipated at the time the benefit was conferred. Specific examples would include promises to compensate for what were initially gifts of goods or services (not quasi-contractually recoverable), promises based on prior legally binding obligations barred by some positive rule of law, promises by an infant after reaching majority to pay for services received under a contract entered into while he was under infancy protection, promises to compensate employees through future bonuses for services performed in the past where a legal duty to so compensate was not present, and promises to compensate for extra work performed outside the scope of the original contract and not bargained for;

(2) Effectuation of already legally binding contracts which, but for the new promise, would be frustrated. This category would
include cases where unforeseen circumstances arise after contract formation whereby the original promisor would abandon his performance in the absence of additional compensation, cases where a promise to waive a condition precedent results in contract performance rather than forfeiture, and cases where a new promise is based on a liquidated debt reduction without the corresponding peppercorns of preperformance day payments or differing place payments;

(3) Promises to encourage contract formation which are unsupported by presently required consideration. This category would include cases involving unpaid-for options and releases from liability (contract or tort) where damages are liquidated.

If the concept of commercial utility is to be used as a foundation for enforcing contracts based on moral consideration, then, proceeding on the assumption that this concept envisions the perpetuation of commercial ends, the question of the measurement of such utility in terms of promise enforcement looms as a crucial determination. In retrospect, it would appear that present day contract enforcement is not predicated solely upon an economic base. The theories used to determine promise enforcement, such as the will theory, the equivalent theory or the injurious-reliance theory, are one-sided. This is to say that, in the utilization of any one of these theories, the approach is from the perspective that promise enforcement is either from the point of view of the promisor (the will theory) or the promisee (the injurious-reliance theory). Only in one theory (the equivalent theory) are both the promisor and the promisee included in any determination. However, in the latter theory the concept of simultaneous bargain causes such overriding preoccupation that any determination of utility is limited to enforcement of promises of current exchange without inquiry into the adequacy of the consideration. The doctrine of past consideration, being insufficient to support a contract in most instances, excludes from the area of enforcement those promises based upon the recognition of an additional duty, and prevents the determination of an equivalent exchange from the point of view of the parties to the promise. It might be said that any enforcement of promises based on past consideration restricted to carefully specified situations is predicated on non-contract theories in the sense that the bargain theory of exchange is the only real basis for promise enforcement under both present and proposed Restatement interpretations.

It is submitted that a more uniform theory of promise enforcement would measure the commercial utility of enforcement from two viewpoints; the economic value of enforcement to the promisor, and
its value to the promisee. Under ordinary circumstances, where there was in fact economic value to both parties individually (excluding the necessity of simultaneous bargain), the result of enforcement of such contracts would be a quid pro quo transaction. From the viewpoint of the promisor, it can be stated that whether or not it is commercially advantageous to enforce the promise would depend on whether or not the commercial utility to the promising party is also an economic advantage to the community. If, therefore, the “will” of the promisor, manifested by the voluntary nature of his promissory undertaking, results both in economic advantage to him and in the perpetuation of economic exchange in the community, then the promise possesses commercial utility. Likewise, if the promise raises an economic advantage or expectation in the promisee, completes an advantage, or rectifies a potential economic disadvantage, and this also results in commercial advantage to the community, then the promise possesses commercial utility from the promisee’s viewpoint. Where these two commercial advantages coincide, there appears to be every reason to enforce the promise unless some contrary public policy outweighs the advantage.

In the most fundamental situation, where simultaneous promises are exchanged for each other, the contractual enforcement of these promises is predicated on the theory that a quid pro quo situation exists or will exist where the promised performances are executed. The legal system assumes that economic advantage prompts each party to the agreement to make a promise, and that the promises should be enforced where economic advantage accrues to the community. This latter element is usually expressed in the negative as not being contrary to public policy. But, the basis for determination of economic advantage is not based on each promise singly, but rather on both promises taken together as the exchange for each other. This approach is necessitated by adherence to the simultaneous bargain theory. Where a promise is not supported by a simultaneous promise emanating from the promisee, the doctrine of past consideration or any one of several other doctrines prohibits the enforcement of the promise even though there might be economic advantage to the promisor as well as to the promisee. A prime example is the case where a contractor in a construction contract performs additional work not called for by the contract and is promised consideration beyond the contract price to compensate him for this work. Unless a quasi-contractual claim is allowed, the contractor might very well go uncompensated for his work. When the promisor makes a promise to pay for past work, it can be assumed that, at least at
the time the promise is made, he believes that the promise should be founded either upon a present economic advantage to him, or upon a moral obligation to compensate for an economic advantage which accrued to him in the past. It is true that the advantage gained has already been realized, but the promise was nevertheless the direct result of a recognized advantage, and was voluntarily made. From the viewpoint of the promisee-contractor, the promise is of economic value to him as compensation for an economic disadvantage already incurred. From the viewpoint of the community, the enforcement of the promise merely completes an exchange of economic values between the two parties, and is presumably economically beneficial. Had the promise been exchanged currently with the performance of the additional work, either for a return promise to perform the work or as the basis for the formation of a unilateral contract, the promise would have been enforced without hesitation; justice should not be defeated simply for a lack of contemporaneity.

Many jurisdictions would consider the enforcement of a promise based on past consideration as grounded on the principle of a moral obligation arising from the receipt of a material benefit. However, these jurisdictions almost uniformly restrict enforcement to those situations where the past consideration did not give rise to a legal obligation. To this extent, these jurisdictions are in fact using a type of commercial utility theory to justify promise enforcement. Yet, in those situations where the previous performance is based on a prior legal obligation, courts almost invariably hold that a subsequent promise to pay additional consideration for the prior performance is unenforceable because of the doctrine of past consideration. Examples of these cases would include employment contracts where the employer, in recognition of past services, promises the retiring employee some additional consideration, such as retirement income or a bonus, and construction contracts where the contractor substituted more costly work or materials for those called for in the contract. It would appear that in either of these cases the promise should be enforceable based on the theory that the promisor, in making the new promise, is recognizing an economic advantage already realized, and that the promisee is receiving an economic advantage in compensation for an economic detriment already suffered. The economic system realizes an advantage in the sense that the enforcement of both the previous and the subsequent promises completes or perpetuates economic activity.

In the area where a subsequent promise is based on a legal obligation still enforceable, the vast majority of courts refuse to enforce
the subsequent promise. The apparent justification for this position is that the enforcement of the new promise exchanged for or made upon a promise by the promisee to perform what he is already legally bound to perform might promote a "hold-up game." Thus, where unforeseen circumstances or more difficult performance invites a new promise to supplement the originally agreed upon consideration, most courts are unwilling to support the new promise. Here again, it would seem that each party to the new promise realizes an economic advantage; the promisor receives a completed job, and the promisee receives compensation for additional work. It is quite obvious that our legal system does allow the new promise to be enforced in those cases where the parties anticipate the legal difficulty and have the promisee return an inconsequential promise to the promisor. If the legal system turns its head at the situation where an inconsequential promise is exchanged, why should it bother to inquire where the new promise is not supported by a peppercorn? The Uniform Commercial Code\textsuperscript{104} permits a modification of a sales contract without consideration. It is logical to assume that such modification would be equally advantageous in other areas as well. Unless the courts are willing to weigh the consideration in the entire contract, it would appear that a presumption ought to prevail that the promisor does not think that he is being held up; if he did, he would resort to his legal remedy of a suit for damages and the substitution of another contractor predicated on the doctrine of anticipatory breach. In most cases where the court refuses to enforce the new promise, it seems that an attempt is being made to adjust or assign the risk assumed by the parties to the contract for such economic changes.

The only test that the courts should be using is whether or not the parties, through the use of the original contract and the new promise, are in fact accomplishing a purpose which serves an economic function. As previously mentioned, practically all states have enacted statutes which provide for the enforcement of promises supported only by prior legal obligations barred by some positive rule of law. Apparently in these cases, public policy dictates that the new promise should be enforceable although the consideration for it is not current. There is, undoubtedly, an underlying assumption that the reinstatement of binding legal obligation serves some community interest, but it is debatable whether that interest is deemed economic. Nevertheless, in these cases economic advantage does accrue to the community in the form of economic adjustment. The net effect is to release economic advantage from time and space limitations.

\textsuperscript{104} Uniform Commercial Code § 2-209.
In the situations just discussed, it should be noted that injurious reliance is not a supporting force underlying the enforcement of the new promise, nor should it be. The question is not whether it is economically expedient to prevent injury occurring through reliance, although most certainly this is a worthwhile end, but rather whether or not the promisee has an economic interest in prospective reliance. Most courts today will not enforce a promise to keep an offer open unless the promise is supported by consideration. To circumvent this requirement, the promisee can create a legally binding option contract by exchanging little more than a nominal consideration for the promise. It can be seriously argued that there is economic advantage to be gained by both parties, as well as by the economic community, in enforcing a promise to keep an offer open without supporting consideration. Most certainly, the economic system is interested in the exchange of economic goods and services at a privately agreed upon price. Individually recognized utilities realized from the exchange promote community economic advantage. Once again, the Uniform Commercial Code\(^\text{105}\) has provided for the enforcement of such unpaid-for options when made by merchants. Why option contracts between merchants occupy a position of greater importance to the community than other types of contracts is not easy to understand. Another area in which the promisee should be accorded the legal privilege of relying on a promise unsupported by consideration arises in situations in which the performance of the promisor is conditioned upon the happening of an event with the promisor agreeing to waive the necessity of the condition. Present practice would render the promise revocable unless the promisee has in fact changed his position in reliance on the promise to waive. Again, it would seem that the economic interests of the two parties to the contract are advanced by the promise to waive, and it cannot be doubted that the community economic interest is promoted, or would be, by the performance of the contract, if the contract in its inception was of economic value.

Under a commercial utility theory, the types and categories of promises that would not be enforceable would be, in the majority of cases, where economic advantage is one-sided. The commercial advantage to the community in enforcing such a promise would be absent. So, where an uncle promises to pay for a nephew’s trip to Europe, or where a good samaritan promises to buy a tramp a new pair of shoes if he will walk two blocks to the shoe store, the com-

\(^{105}\) Id. § 2-205.
mmercial or economic advantage to the promisor is missing, and there
is no economic exchange of values at all.

At first glance it might appear that two of the cases illustrated
in the opening section of this article might fall into the category of
promises not enforceable because economic advantage does not accrue
to the community.106 But it is arguable that the preservation and
maintenance of a portion of the labor supply, and a prevention of the
draining of the resources through public payments are substantial
economic reasons to support the promise. While it is not possible
to differentiate economic from ethical promissory causes in every
case, where there is doubt, a presumption should exist that economic
advantage does accrue, subject of course to non-economic public policy
reasons. In many of the cases involving a possibility of ethical cause
as a basis for the promise, the doctrine of promissory estoppel may
still be used to prevent injustice. The use of this doctrine is, however,
on a basis other than contract.

VII. Moral Obligation

Obligation in its popular sense is merely a synonym for duty.107
Sometimes moral obligation is referred to as an "ought", and in this
sense it means a moral imperative.108 A system of morals or ethics
would hold that a promise to which no defense of lack of capacity,
fraud, illegality and the like can be made, imposes a moral duty upon
the promisor to perform it although there is no valuable considera-
tion, and although it was intended to be absolutely gratuitous.109 It
has been stated many times that an honest man keeps his promise;
by this it is meant that the promise itself carries an obligation to
perform it.110 This may or may not be accepted as a sufficient reason
to convert a moral obligation into a legal one, but it is not necessary
that the mere promise itself creates its own obligation. If a gift
promise is to be enforced, then the only basis upon which to predicate
obligation would be on the basis of the liability contained in the
promise itself.111 But, moving slightly away from this gift side of
the continuum toward the bargain side, it becomes necessary to look
beyond the promise itself. The additional factor necessary to give

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110. Id.
rise to a right to enforcement is obligation. Moral obligation ordinarily refers to something more than the ethical obligation to keep a promise just for the sake of the promise. It has been stated that: "Moral obligation is likely . . . to be urged most strenuously when some interest is involved which is not yet recognized as a legal right, but which it is felt should be so recognized. Services rendered or property used in saving the life of another, present what are perhaps the strongest examples of this type of moral obligation."\textsuperscript{112}

It is conceivable that moral obligation can be separated into two categories: those which are based on promises arising from ethical motives or purposes and those based on promises arising from commercial interest or motivation. At least on the basis of contract, the type of moral obligation that the economic community is interested in enforcing stems from individual selfish economic cause and motive. Where the basis of the moral obligation is a selfish economic cause based either on past, present, or future consideration, it is to the advantage of the economic community to have it enforced.

Perhaps the phrase "moral obligation" is not very descriptive of the real intention behind the recognition of a duty through a promise. More likely, the civil law concept of "cause" is closer to the point. The primary concern behind promise enforcement in the traditional area of moral obligation appears to be the elimination of those promises based solely on causes not founded on prior legal obligation from the category of enforceable promises. In this sense, the very root of the problem lies in identifying the instituting force behind the new promise. This can be simplified by resorting to an analysis of the primary motivating cause supporting the new promise. In any case where the cause appears to be predicated on exchange of goods and services, either past or present, the moral obligation resulting from such a cause possesses a commercial flavor and should be enforceable, freed not only from limitations of time and space, but also from limitations of form.

It is suggested that if the phrase "moral obligation" continues in contract terminology, it is likely that the confusion between cause and motive will continue to exist. The difference between cause and motive involves the distinction between the immediate stimulus invoking the promise and the underlying reason which supports the stimulus. As previously stated, the civil law recognizes this distinction, and predicates enforceability on cause alone.

Many attempts have been made to draw distinctions which will separate, for purposes of identification, the types of morality con-

\textsuperscript{112} Page, supra note 71, at 493.
tained in any definition of moral obligation. Professor Fuller in his book *The Morality of Law* distinguishes between the morality of aspiration and the morality of duty. He describes morality of aspiration as values based upon “the Good Life, of excellence, of the fullest realization of human powers ...”, and morality of duty as “the basic rules without which an ordered society directed toward certain specific goals must fail to its mark ...”. There have been many criticisms of this attempted distinction. Typical of such criticism is the following statement:

It seems clear that not only is the proffered distinction a difficult one to make (at least as difficult as that between the *is* and the *ought*) but it also lacks sufficient preciseness of definition. . . . There are enough difficulties inherent in a structural-functional analysis of society, or its subsystems, without intentionally adding the confusion of fusion of fact and value to the inquiry. Analytically, once the ends or needs of a society are determined, determination of the means that will achieve those ends is strictly factual, although rejection or selection among alternative means involves a moral inquiry.

Notwithstanding the vagueness of Professor Fuller's distinction and the numerous criticisms of such an attempt, it is submitted that the line of demarcation can be identified by reserving to the category of morality of duty those promissory causes which do further some economic end, and assigning to the category of morality of aspiration those promissory causes which are primarily oriented toward solely ethical ends. In this sense, therefore, any promise which, if enforced, will advance society's economic goals possesses a morality of duty quite separate from any ethical considerations which are normally the determinant of a morality of aspiration. It is quite irrelevant what the underlying “motive” (a subjective determination impossible to ascertain) behind the promise might in fact be, so long as the apparent cause is economically grounded. Perhaps the confusion can be reduced by referring to what has been labeled as “economic cause.” Men ought to engage in economic activity; therefore, any promise based on such a cause creates its own duty of performance. In any case, economic motivation should supply the criterion for enforcement.

114. *Id.*
115. *Id.*
VIII. THE SPECIAL CASE OF GIFT

A gift has been defined as: "[a] voluntary transfer of personal property without consideration;"117 "[a] parting by owner with property without pecuniary consideration;"118 and "[a] voluntary transfer of his property by one to another, without any consideration or compensation therefor."119 The fundamental and controlling element in any gift is intention.120 Furthermore, "[t]he transaction of gift is, obviously, one resting on the volition of the two parties, the donor and the donee."121 In order to make out a gift, it must be shown not only that "[it] was sent as a gift, but that it was received as a gift."122 Although a complete discussion of gift is not germane to the concept of moral obligation as consideration in contracts, there are several touching points that need to be discussed and perhaps clarified.

In the first place, a gift is an executed transaction in the sense that delivery is essential to its effectuation. A mere promise to make a gift is unenforceable not only for the lack of a valid consideration, but also because of the absence of delivery of the subject matter of the gift. "If the gift is to take effect only at some time in the future, it is in substance a mere promise to give, and unenforceable for lack of a valid consideration."123 It would appear, therefore, that many promises based strictly on moral obligation would be considered as mere promises to make gifts and unenforceable as lacking consideration. If moral obligation (as previously defined) were sufficient consideration to make a promise binding, then the area of unenforceable gift promises would be considerably reduced.

The reevaluation of so-called gift promises should not be an interference into the area of gifts; in essence, the primary consideration in every gift case, apart from the concept of intention, is delivery of the subject matter. The decision that a promise to make a gift is unenforceable primarily concerns contract law and not the law of gifts. If a promise to make a gift is unenforceable as a gift, then so be it; however, this should not preclude an attempt to determine whether or not the promise might be enforceable on the basis of contract. Whether or not a promise is a mere promise to make a gift, and therefore unenforceable as a gift, or whether it is

120. R. Brown, supra note 95, § 48, at 130.
121. Id. at 129.
122. Hill v. Wilson, L.R. 8 Ch. App. 888, 896 (1873).
123. R. Brown, supra note 95, § 37, at 83.
based on moral obligation, and is therefore enforceable, is a matter of the intent of the promisor. If the promisor intends to become obligated because of a moral obligation, then the consideration requirement necessary to make a common law contract binding is present. It is enough that a gift was not intended by the promisor. It then becomes a matter of testing a promise based on the recognition of a moral obligation on the basis of commercial utility.

It should not matter that the moral obligation motivating the promise arises out of a past act or event. All that is necessary is that the promisor does not actually intend to confer a gift. This is true even though the motivating cause out of which the moral obligation is recognized was, according to the intention of the promisee, a gift. This is true because, as previously stated, a gift is a gift because of the intentions of both the donor and donee and not just one of the parties. It is not enough that the donor intends a gift. It is also necessary for the donee to accept it. If this is true in a gift case where delivery is present, then it should be equally true in the situation in which there has merely been a promise to make a gift, even though the promise would be unenforceable on gift instead of contract principles.

A problem arises at this point as to whether it is possible for the recipient of what was intended to be a gift to defer his decision to accept the intention of the donor, so that at a later time he may choose to treat it as the basis of an obligation. He should be able to do so. The intention of the donee is just as important in effectuating a gift as is the intention of the donor. If the donee chooses to wait to decide, it cannot matter to the donor. Nor can it matter to the donee, since if he chooses not to become legally bound to return value for value, he does not make a promise. To hold that such a change of mind would erode the foundations of both gift and contract formation is a fallacy. If the original donor insists that his original intention was to confer a gift, and he will not be frustrated in his intention, then his recourse is to refuse acceptance of the donee's promise. After all, it is the promise of the promisor that the legal system is concerned about, and the intention of the promisee should not matter insofar as it controls the question of enforceability.

Whenever a promise is made in which the promisor does not exact a return promise or act, it is necessary to inquire whether the motivating force behind the promise is an intention to make a gift, or whether it is based on some past act which has raised a moral obligation of such consequence that it serves as a basis for the giving of the present promise. It may be argued that it is extremely diffi-
cult to determine the motivating force behind a promise. Indeed, it is admitted that the confluence of gift promise and promise based on moral obligation is the most difficult area in which to ascertain moral obligation. However, this argument is equally applicable to other areas of contract formation. The difficulty can be reduced by formulating standards capable of covering the majority of fact situations. As an example, love and affection may be considered as a basis for a moral obligation in cases where the relationship is such that a natural obligation arises in such situations. Blood relationships, perhaps even in-law relationships, could be considered as raising a moral obligation in cases where promises are given to provide necessities. These standards could be used to provide rebuttable presumptions — a practice not alien to other areas of contract law.

It is apparent that a finding of moral obligation as motivation for a promise would not reduce the number of gift exchanges, but would merely reduce the number of unenforceable gift promises. This should not work a hardship on legal theory. In numerous instances the courts have been confronted with the problem of being unable to enforce a promise on gift principles because of the absence of delivery. Although these courts would want to enforce the promise as a contract, they are inhibited from so doing since formal consideration is absent. Rather than twist the facts (and frequently the intentions of the parties) to find a legal base for enforcement, it would seem more sensible to permit moral obligation to provide the necessary consideration to support the promise.

IX. Conclusion

One writer has stated:

Courts have frequently enforced promises on the simple ground that the promisor was only promising to do what he ought to have done anyway. These cases have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic one must inevitably make at times with sentiment. I believe that these decisions are capable of rational defense. When we say the defendant was

124. Under present interpretation of the law, "[l]ove and affection is a good consideration and as such will support a deed. It is not a sufficient consideration for a promise." 17 AM. JUR. 2D Contracts § 98, at 443 (1964). 125. See Kirksey v Kirksey, 8 Ala. 131 (1845), where a promise based on an in-law relationship was held not to be sufficient consideration.

126. Examples of such presumptions include: a presumption of sufficient consideration where recital is present; a presumption of legality and a presumption that each party to a written contract knows of its contents.

morally obligated to do the thing he promised, we in effect assert the existence of a substantive ground for enforcing the promise. In a broad sense, a similar line of reasoning justifies the special status accorded by the law to contracts of exchange. Men ought to exchange goods and services; therefore, when they enter contracts to that end we enforce those contracts. On the side of form, concern for formal guaranties justifiably diminishes where the promise is backed by a moral obligation to do the thing promised.\textsuperscript{128}

The most important sentence in the passage is “Men ought to exchange goods and services; therefore, when they enter contracts to that end we enforce those contracts.”\textsuperscript{129} However, the real meaning of this statement must be found in the implication drawn from the context in which the statement was uttered — moral obligation. We do, under the present theory of contract formation, enforce contracts for the exchange of goods and services. In large measure, we enforce those agreements only when they involve a simultaneous bargain. This is precisely why the consideration theory fails in its attempt to promote the exchange of goods and services. If we are to assume that the essence of contract formation and enforcement has a commercial foundation, then refusing to enforce promises based on the receipt of goods and services in the past is failure to give full effect to the underlying theory behind enforcing promises which advance commercial interests.

The insistence on a formal requirement of simultaneous bargain in consideration commands us to admit that agreement, insofar as enforceability is concerned, is more technical than practical. Furthermore, the present application of contract law, establishing numerous exceptions to the requirement of consideration in contract formation, recognizes its own failure to provide a common basis for enforcement of promises. But, even recognition of the exceptions seems to be based on formal requirements rather than on some underlying substantive philosophy. Promises to perform based on a prior legal obligation barred by some positive rule of law are enforced because the legal system thinks that, at least in these cases, moral obligation is capable of being identified in a concrete form — a material benefit received at some prior time. The major objection to enforcing many promises on the basis of moral obligation is that such obligation is difficult to ascertain. What is so difficult about the ascertainment of a promise based on the receipt of goods or services in a previous

\textsuperscript{128} Fuller, supra note 80, at 821.

\textsuperscript{129} Probably a better word here would be “agreements” on the theory that many agreements to exchange goods and services are unenforceable today because of the restrictive use of the requirement of consideration.
time period? The question to be asked in these cases is whether the promise would have been supported by consideration if, at the time the goods or services were delivered or performed, the promisor had recognized his obligation. If the answer is yes, then the refusal to enforce such a promise must be grounded in some technical requirement unrelated to any substantive philosophy of enforcement. The requirement of consideration, under its present definition, is a marvelous bit of arbitrary decision-making.

It may be argued that the requirement of consideration and its associated rules do perform a very valuable service in that they provide sufficient proof that the promisor intended and actually promised to be bound. It is more likely that the promisor will voluntarily keep his promise where he gets something in exchange than he would if he were making a gratuitous promise or one based on a benefit received at some time in the long distant past. Our legal system has faced these problems before, and has solved them by requiring solemnity in making the promise either through the use of a seal or the requirement of a writing. There could be no serious objections to the requirement that certain types of promises should be in writing before they are enforceable. Protection in this area is already afforded by the statute of frauds which is found in varying degrees of application in practically all states today. If our legal system felt that promises based on past consideration needed more formality than is ordinarily required of promises involving a commercial interest, then such a promise should be required to be in writing. But to refuse to enforce a promise because of the likelihood of having difficulty in ascertaining whether the promisor was serious, or because it is more likely that he will keep a promise based on current consideration, is illogical.

It is important to classify moral obligations, differentiating between those involving an economic advantage to the community, and those devoid of commercial utility. In this respect, one can speak of a moral obligation to do or refrain from doing something and mean that, based on religion or philosophy, a certain act or restraint is obligatory. Yet in the field of contracts, moral obligation must be restricted to the recognition of a commercial connection.

Confusion has crept into recent decisions because of the courts' failure to realize that enforcement of promises in contract can be justified only on the basis of the advancement of commercial interests. If we are to enforce promises on some basis other than commercial utility, then we enter an area where perhaps promises ought to be kept simply because this is the honest and straightforward thing
to do. While this may be desirable, the basis for such a conclusion would have nothing to do with exchange. It is imperative that moral obligation in the area of contract formation be restricted to commercial relationships.

At this point, one might question the value to the economic system of the establishment of such a commercial utility concept as a basis for promise enforcement. The use of commercial utility as a frame of reference would at least accomplish the following worthwhile ends:

(1) Transfer the exchange of economic values back to private parties, putting meaning into the concept that consideration will not be weighed;

(2) Eliminate time and space elements from the concept of consideration, stretching the life of the contract from the time of the original promise or performance until the completion of the performance undertaken by virtue of the last promise;

(3) Reduce the number of lawsuits arising because one or both of the parties evidences dissatisfaction with the bargain;

(4) Equalize enforcement of contracts between those which use a mere peppercorn to circumvent the requirement of consideration and those which do not, even though economic values are in fact exchanged in an identical manner;

(5) Make contract enforcement a commercial conduit; and

(6) Return contract formation to private parties.

Our legal system will increasingly enforce promises based on a moral obligation. The question remaining, however, is in what manner will the system distinguish between which ones to enforce. Will the present consideration concept be used and a special category entitled “exceptions” be established in such a manner as to predicate enforceability on mere arbitrary inclusion and exclusion, or can the concept of exchange be extended backward to include all bargains which advance the exchange of goods and services?

The use of a more realistic frame of reference, based on the assumption that moral obligation is defined in commercial terms, should facilitate the task of differentiating between enforceable and unenforceable promises, keeping in mind that the definition of moral obligation depends on the fundamental concept of commercial utility.