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A DIALOGUE ABOUT THE DOCTRINE
OF CONSIDERATION

James D. Gordon III †

Great scholars¹ have long contemplated the doctrine of consideration in contract law.² Come with me, if you will,³ to a lawyer's office, where a conversation between the lawyer and a client is about to take place.⁴ The lawyer is Robert Lichten (L), and the client is

† Professor of Law, Brigham Young University Law School. B.A. 1977, Brigham Young University; J.D. 1980, Boalt Hall School of Law, University of California, Berkeley. I wanted to thank several famous law professors who commented on this article in order to persuade law review editors that the article is really good, or in any event that I have several famous law professor friends and am probably pretty famous myself. Unfortunately, the famous people I contacted told me they were too busy to read the article, not counting one person who read it and threatened to sue me if I mentioned his name anywhere in the article, or anytime during my entire life, for that matter. But here is the article anyway, with apologies to Pat Bagley, Jae R. Ballif, Dave Barry, George Carlin, Johnny Carson, the Congress of Wonders, Craig Griffin, Brian C. Johnson, Mel Lazarus, Tom Lehrer, Jay Leno, Hans A. Linde, Walter F. Pratt, Jr., Bud Scruggs, Mark Twain, and others.

¹ Id. However, it is humbling for me to realize that by the time Stephen Crane was my age, he had been dead for six years.

² And no wonder. Consideration is to contract law as Elvis is to rock-and-roll: the King. Revisionists, however, have questioned Elvis's greatness. They have wrestled with one disturbing issue: if Elvis is so great, how come he's buried in his own backyard—like a hamster. They address the question openly, knowing that it is legally impossible to slander a dead hamster.

³ Alfred Hitchcock and Rod Serling used this phrase when they were about to introduce you to a nightmare.

⁴ Law review articles in conversational style are in, and I certainly do not want to be left out. The best known is Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1 (1984), an abstruse dialogue about critical legal studies that sounds "like a pair of old acid-heads chewing over a passage in Sartre." David Luban, Legal Modernism, 84 Mich. L. Rev. 1656, 1671 (1986).

Actually, I don't know much about acid-heads. I attended BYU as an undergraduate. By the time I arrived at Berkeley in the late '70s, drugs were becoming passé, mostly because students could see ex-flower children from the 60s still wandering around Berkeley with vacant stares like those people in old pioneer photographs. While a few of my classmates still believed in "Better Living through Chemistry" (and a few had a slight dependency problem involving catnip), most of us were more "into" being laid-back, natural, and holistic, and getting in touch with our feelings. We learned that "the body is an entity." We didn't know what that meant, but it gave us a feeling of wholeness, which was one of the feelings we were busy trying to get in touch with. We ate stone ground bread. The primary advantage of stone ground bread is that it tastes better than oat bran. Of course, dirt tastes better than oat bran, too. But dirt wasn't organic enough.

The official student health manual encouraged people not to wear underarm deodorant. It said something like, "Put some on. How does your body feel? Does your body like that?" I am not making this up. Consequently, some of our classes were pow-
Carla Marchant (M), the president of Slater Valley Coal Company. The camera zooms in, and the volume increases until we can hear what they are saying.

L: How can I help you today? 

M: My company has a contract to sell as much coal to Barton Steel Company as it requires. The market price of coal has risen, so I asked Barton whether it would be willing to increase the contract price, and it agreed. I need you to draft the amendment. Here is the original contract.

L: (After reading it for a few minutes.) This contract is not enforceable.

M: What? Why not?

L: It provides that Barton can terminate at any time without notice. This is called an unrestricted termination clause, and it means that there is no consideration for your promises in the contract.

M: What's consideration?

L: There are many definitions of consideration, but basically it's a performance or return promise which is bargained for. There must be consideration for your promises to make them legally binding. Although Barton made lots of promises in the contract, it can terminate at any time. This is called the "illusory promise" situation. Since Barton's promises are unenforceable, they cannot serve as consideration for your promises. Therefore, you are entitled to walk away from the contract.

M: We don't want to walk away from it. We want to modify it, and Barton agreed.
L: But the contract is unenforceable. Basically, you didn’t get anything of value out of the deal.

M: Lawyers are so arrogant. Do you think that we spent hours negotiating the deal and thousands of dollars in legal fees drafting it just for fun? We got precisely what we wanted out of this deal, and the value we received justified our making a commitment to sell coal to Barton. It had commercial utility to us; otherwise we would not have done it.

L: What were you bargaining for?

M: We were bargaining for a business relationship, the chance to sell coal to Barton. Barton will probably buy an enormous amount of coal from us; it will probably not terminate. That’s worth a lot—to us, anyway.

L: But it’s invalid consideration. Barton’s promise is illusory.

M: You must learn to stop being so condescending. Do you think we’re fools? That we can’t read? We knew that we agreed to a termination clause. We were willing to live with that; we were still willing to commit ourselves to the bargain.

L: Not every bargained-for thing counts as consideration.
Even if it has value to the parties themselves, it must also have value in the eyes of the law.\textsuperscript{22}

M: But why?\textsuperscript{23} If it has sufficient commercial value to us, why should the court second-guess our judgment?

L: It's trying to protect you. It will relieve you of promises for which you didn't receive a certain kind of value in exchange.

M: Coal companies hardly need protection from themselves. Nor do most business people, for that matter.\textsuperscript{24} So the requirement of consideration is just a form of paternalism?\textsuperscript{25}

L: Well, not quite. The doctrine of consideration serves several policies.\textsuperscript{26} For example, consideration serves an evidentiary function; it provides some evidence that the promise was really made.\textsuperscript{27}

M: But this contract is in writing. There's no doubt that the promises were made.

L: Yes, and some civilized societies\textsuperscript{28} provide that written promises are binding. Suppose it were oral, though. Suppose you gave a clock to Barton in exchange for its promises. Then, if Barton denied the promise, you could say, "Then why does it have my clock?" It would be some evidence of the promise.\textsuperscript{29}

M: It might be evidence that a promise was made, but we could lie about the terms just as easily as we could lie about the promise's existence. Also, Barton could say it was a gift. Anyway, most large promises have to be in writing, under the Statute of Frauds.\textsuperscript{30} So

\begin{footnotes}
\item [23] At this point, Marchant is about as happy as a nine-lived cat run over by an eighteen-wheeler.
\item [24] \textit{But see} Ivan Boesky, Paul Bilzerian, and Michael Milken. Then again, why shouldn't we let investment bankers sink on their own? It's kind of nice to have at least one profession be less popular than lawyers, for a change.
\item [25] \textit{Cf.} the Soviet Union. Sonofagunavitch.
\item [26] Otherwise known as "black letter theory." Students cribbing from this Article for an upcoming contracts exam, take note.
\item [27] Melvin Eisenberg, \textit{Donative Promises}, 47 U. CHI. L. REV. 1, 4-5 (1979); see Lon Fuller, \textit{Consideration and Form}, 41 COLUM. L. REV. 799, 800 (1941).
\item [29] Barton could respond with a general denial, which is a legal way of saying to the court, "Well, who are you going to believe, me or your own eyes?" Barton could also file a demurrer, which derives from the Latin word \textit{demorari}, meaning "to delay." I am not making this up.
\item [30] Which may seem pretty obvious, but remember that Marchant isn't a lawyer. However, she has seen nearly every episode of \textit{L.A. Law}, and thus already knows how real lawyers talk and live.
\end{footnotes}

Moreover, the show has taught her other facts about the law, such as the fact that
the problem exists only for those contracts we are content to enforce if they are oral. And, it seems to me that the evidentiary purpose is doubtful for another reason.

L: Yes?

M: Most contracts are based on mutual promises. We can't point to Barton's "possession" of our promise as evidence of the contract. We can point to our performance or Barton's as evidence of the contract, but we can do that whether or not there is consideration. So the evidentiary policy is unpersuasive to me. Does consideration serve any other policies?

L: Yes. It helps exclude from the field cases in which the promisee incurred no significant costs. Since the promisee gives no consideration, it is not injured.

M: You must be kidding. The promisee is injured if it relies on the promise. Moreover, if the consideration consists of mutual promises, the promisee gives up nothing but its own promise—mere words. It is hurt only if it relies.

L: Well, actually, the law now recognizes a remedy for reliance. The remedy usually measures damages according to the promisee's costs rather than its expectation, but reliance theory can award expectation damages when justice requires it. However, consideration also serves another policy: it helps distinguish between promises and mere expressions of intent. This is sometimes called a "channeling function" or an "earmarking" function. "The populace is made aware that the use of a given device will attain a desired result."

M: But any formal requirement would serve that function. Isn't that so?

L: Well, yes. For example, under Roman law a promisor could make a promise enforceable by saying the word "spondeo." At trials only last one day, that law firms will turn down a huge client to take a pro bono case, and that a law firm with seven partners, four associates, and a staff of fifty can still make enough money to keep everyone rolling in sin. No wonder law school applications are up.

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31 See Eisenberg, supra note 27, at 3 (discussing "unrelied-upon donative promises").
32 See Restatement (Second) of Contracts § 90(1) (1979).
33 See id.; Eisenberg, supra note 27, at 29, 32.
34 Eisenberg, supra note 27, at 5.
35 Fuller, supra note 27, at 801.
36 J. CALAMARI & J. PERILLO, supra note 9, at 294.
37 Latin, for "Cross my heart and hope to die, stick a spatula [spatula] in my eye." Spondeo had to be said in response to the question, "Do you promise?" Assuming that this bilingual exchange occurred at Hadrian's wall, it presented a tricky conflict of laws issue. For discussion of spondeo under the doctrine of stipulatio, see Adolf Berger, Encyclopedic Dictionary of Roman Law, 43 Transactions of the Am. Philos. Soc'y 716 (1953).
common law, a promisor could make a written promise enforceable by placing a wax seal\textsuperscript{38} on it.\textsuperscript{39}

M: Then the issue is which formality would work best to identify promises people recognize as binding. On the other hand, maybe no formality is necessary. People don't generally expect one, except sometimes a writing. They make the distinction based on the words used and the factual circumstances. No one doubts that we intended our written promises to Barton to be real promises, not just expressions of our future intent. It seems to me that consideration is a clumsy tool for drawing the distinction between real promises and expressions of intent.\textsuperscript{40}

L: Consideration also serves a cautionary function; it helps insure deliberateness.\textsuperscript{41} Promises to make gifts are often based on emotion, surges of gratitude, or impulses of display.\textsuperscript{42} A donative promisor tends to look primarily to the promisee's interests rather than the promisor's own interests, making the promise "more likely to be uncalculated than deliberative."\textsuperscript{43}

M: I agree that the law should not enforce transactions intended as gifts. However, our contract with Barton was certainly not intended as a gift. It is a commercial agreement, and our motivation was commercial self-interest, not altruism. It seems odd that although the transaction was based entirely on self-interest, the law paternalistically says that we should have looked after our own interest even more—that we should have gotten more out of the deal.

L: You could argue that it comes close to saying that courts review the adequacy of consideration, which courts insist they don't do. However, courts would say that they are not reviewing the adequacy, only the existence, of consideration, and that only certain values qualify as consideration.

M: Why can't contract law distinguish between transactions intended as gifts and commercial contracts clearly not intended as gifts?

L: Actually, one of the greatest judges in the history of the common law, Lord Mansfield, held that no consideration should be

\textsuperscript{38} Or a wax sea lion. The common law was quite flexible.

\textsuperscript{39} This served evidentiary, cautionary, and channeling functions. Fuller, \textit{supra} note 27, at 801.

\textsuperscript{40} This may be a mixed metaphor, depending on whether the tool is a writing instrument. It's not as bad as some mixed metaphors, though, like the one by the ABA committee which reported that it had "smelled a rat and nipped it in the bud." But then again, the ABA always has been a bit of a loose cannon in a china shop.

\textsuperscript{41} Eisenberg, \textit{supra} note 27, at 5; see Fuller, \textit{supra} note 27, at 800.

\textsuperscript{42} Eisenberg, \textit{supra} note 27, at 5.

\textsuperscript{43} \textit{Id}. 
required in a commercial transaction, but the House of Lords overruled him.

M: Distinguishing gift promises from commercial promises would distinguish between promises based on altruism and those based on self-interest, in which parties are more likely self-protecting. Why do courts believe that they need to protect coal companies from making inconsiderate promises in business transactions?

L: The law applies to everyone. It's not so much the coal companies as it is individuals the law seeks to protect here. Another problem is that in some cases it is difficult to distinguish between the two types of promises.

M: Really? Commercial promises could be defined as promises related to exchanges. They would not have to be promises actually given in exchange for value; it would be sufficient that they were related to exchanges of value. That doesn’t seem like an unworkable test. Sure there would be hard cases, but there would be easy cases, too, and at least the law would be asking the right questions. It would distinguish promises based on self-interest from purely altruistic promises. Because altruistic promisors often do not adequately self-protect, the law would protect them and relieve them of their promises.

L: That’s interesting.

M: Also, the purpose of contract law is, as I understand it, to protect parties’ expectations. Since most people think that commer-

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44 Pillans v. Van Mierop, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765) rev’d, Rann v. Hughes, 7 T.R. 350, 101 Eng. Rep. 1014 n.a (Ex. 1778). In the same case, he also held that a written promise required no consideration, but this holding was also overruled in Rann v. Hughes. Lord Mansfield’s other accomplishments include incorporating the law merchant into the common law, creating the contract law doctrines of constructive conditions and substantial performance, and introducing the Roman law idea of quasi contracts into the common law. J. CALAMARI & J. PERILLO, supra note 9, at 248 n.2. I bet that he still wouldn’t have gotten tenure, though.

45 Rann v. Hughes. At that time most lords were so narrowminded they could see through a keyhole with both eyes. They received an education but didn’t let it go to their heads.

46 Self-interest is a powerful motivation, as is evidenced by the recent best-seller, How to Profit During the Coming Apocalypse.

47 Cf. Melvin Eisenberg, Principles of Consideration, 67 CORNELL L. REV. 640, 643 (1982) (“[B]ecause bargain promises are typically rooted in self-interest rather than altruism, they are likely to be finely calculated and deliberatively made.”).

48 However, this problem, like Wagner’s music, is not as bad as it sounds. Cf. bagpipe music, which is. Studies have shown that it is virtually impossible to distinguish the music of a world-class bagpipe band from the sound made by 300 cats and a blowtorch. Hear also Yoko Ono’s music. (The Bluebook apparently left this signal out. It also left out some other very useful signals, such as read and weep and try to distinguish this one. For contrary authority, it omitted disregard, ignore also, and for a really bizarre view, see.).

49 Notice how the dialogue has switched. Now Marchant is the teacher, and Lichten the student. This shows the power of the Socratic method in a law review article where it works. But see the law school classroom, where it usually doesn’t.
cial promises are binding and that gift promises are not, the rule would correspond to people's expectations. What good does it do for the law to insist on a rule in a geometry book from another universe, when the reality in our world is quite different? Don't courts care about what actual business practices are, about what people actually expect?

The story is told of Booker T. Washington, who founded the Tuskegee Institute. He could have arranged the sidewalks in a geometric pattern and forced students to walk on them. However, he knew that people take the most convenient routes regardless of where the sidewalks are. So, after the buildings were built, he waited until the students established footpaths, and then he built the sidewalks over the footpaths. It was brilliant.

L: In fact, an empirical study has shown that contract law is often deemed unnecessary by business people. Contracts are binding because business people adhere to the widely accepted norm that commitments are to be honored in almost all situations. The expectations of business people are shaped by that norm.

But perhaps parties' expectations aren't the only value at issue. Perhaps the state has an interest in enforcing only certain kinds of promises. For example, the state may believe that the tax-supported court system should not be used to redress every hurt, but only to redress "injuries that reach a certain intensity."

M: But, as we discussed before, consideration is a very impre-
cise way to measure injury. Moreover, it seems to me that the law already screens out claims involving trivial injuries by awarding only certain kinds of damages. For example, suppose A and B mutually promise to meet each other for dinner. The mutual promises are valid consideration, assuming that each party is bargaining for the other's presence. However, the law declines to compensate with damages the slight injury suffered, and so the case is not worth pursuing.

L: Perhaps the state has a different interest. Legal economists justify the doctrine of consideration by arguing that "from an economic point of view contracts involving an exchange of values tend to promote an increase in the public wealth."

M: If you want to use a free market analysis to justify consideration, I think you are doomed to failure. Because the doctrine of consideration does not recognize all the forms of value that private parties do, it restricts the free market. We voluntarily agreed with Barton to an unrestricted termination clause because we perceived that it was in our best commercial interest to do so. There is a market for such clauses. However, the doctrine of consideration says that this form of voluntary private ordering is not recognized by the law. The law restricts the market by saying that parties cannot make binding contracts with unrestricted termination clauses, even if they want to. The doctrine is a paternalistic one, designed to protect parties against themselves, rather than one which enhances the free market.

Moreover, promises may facilitate an exchange of values without being given directly in exchange for value. Some promises are related to exchanges, are ancillary to bargains, but are not themselves given in exchange for some identifiable price. These promises have economic and social utility because they assist exchanges and promote economic activity.

To change the subject slightly, is there any way that we could have made our contract with Barton binding?

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56 Cf. slander ruining a law professor's reputation, which can usually be pursued in small claims court.
57 These cases are often handled by informal but effective sanctions. For example, if you fail to pay your exorcist, he could have you repossessed.
58 C. BUFNOIR, PROPRIETE ET CONTRAT 487 (1900), cited in Eisenberg, supra note 27, at 4.
59 "Both policy and fairness ... support the enforcement of promises that are ancillary to a bargain and deliberatively made." Eisenberg, supra note 47, at 652.
60 See RESTATEMENT (SECOND) OF CONTRACTS § 87 comment b and § 88 comment a (1979) (option and guaranty contracts in a certain form are binding without consideration, because they are ancillary to bargains and have presumptive utility, and because option contracts are an appropriate preliminary step in the conclusion of a socially useful transaction).
L: Yes. You could have placed a restriction on the right of termination. For example, a requirement that Barton give ten days' notice before termination would suffice, because then Barton would be bound for at least ten days.61

M: That's absurd. We don't care about the ten days. If that's what we were bargaining for, we wouldn't have bothered to do the deal. What we wanted was the relationship, the chance to sell a lot of coal.

L: The contract might have been enforceable if you had simply deleted the words "without notice" from the termination clause. The Uniform Commercial Code, which applies to a sale of goods, such as coal, requires reasonable notification of cancellation unless the contract provides otherwise.62 And some courts hold that a requirement to give notice constitutes consideration.63

M: That's just a fiction of a lawyer's pen.64 We weren't bargaining for notice. But wait a minute. If a restriction on the termination clause suffices, what about the covenant of good faith imposed by the law in every contract?65 Barton in effect covenanted that it would not terminate for any reason that is in bad faith. That restricted its options, and therefore it gave consideration.66

L: Analytically yes. But courts would probably say that this restriction is insufficient.

M: I thought that courts decline to review the adequacy of consideration, and will review only whether there is any consideration. Are you saying that the obligation of good faith is worthless?67

L: Absolutely not. It was a major step forward in the law, and the restrictions it places on parties are meaningful. For example

62 U.C.C. § 2-309(3) & comment 8 (1978); see J. CALAMARI & J. PERILLO, supra note 9, at 230-31. Section 2-309(3) also provides that "an agreement dispensing with notification is invalid if its operation would be unconscionable." However, it is unlikely that the clause would be held unconscionable in this case, since it was freely agreed on by two businesses.
63 J. CALAMARI & J. PERILLO, supra note 9, at 229.
64 But then again, so is Marchant. So why should she complain?
66 At this point Lichten begins to wonder if Marchant has legal training. To avert suspicion, the author drinks a glass of water while Marchant is speaking.
67 Now Lichten is getting really suspicious. The author gargles with the water. The author realizes, for the first time in his life, that "gargo" is an onomatopoeia. Cf. buzz, zip, snap, crackle, pop, snore, swish, rustle, splash, slosh, shuffle, chop, sputter, plop, whiz, twang, bang, pound, tweet, gulp, gasp, cough, slush, squeegie, snip, sniff, chug, burp, snort, retch, shear, shred, motor, whipoorwill, pat, bubble, plunk, trap, tom-tom, drum, cymbal, tuba, trillik, strum, pluck, spit, rap, puff, pant, ricochet, wheeze, jingle, whoop, tap, whistle, howl, thud, brush, slam, cackle, drip, crisp, snicker, murmur, hiss, fizzle, shriek, whine, crunch, sniffle, fizzle, rip, ratlle, clang, flutter, roar, snarl, whack,
under the Uniform Commercial Code good faith is defined as "honesty in fact." For merchants the UCC defines it as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The Restatement defines it as "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."

M: So Barton could not terminate for the purpose of running us out of business or other bad faith reasons, could it?

L: No. However, I doubt that the requirement of good faith is a sufficient restriction to constitute consideration in these circumstances.

M: How much of a restriction on a party's options is required to constitute consideration?

L: Sometimes not very much. For example, A's promise that it will lease a ship to B if A buys the ship constitutes consideration. This is called a conditional promise, and it is sufficient consideration even though A has complete control over the condition. Although A can walk away from the deal by not buying the ship, he has limited his options: he cannot buy the ship and decline to lease it to B. That is enough of a limitation to constitute consideration.

M: Distinguishing the good faith case from the ship and notice cases doesn't make much sense to me.

L: I doubt that much of the law in this area makes sense to business people. For example, even without a termination clause, your contract with Barton was unenforceable at common law. The old common law considered Barton's promise to buy all the coal it "required" from you to be illusory because Barton might refrain from requiring anything. However, the UCC, which tried to make the law correspond more closely to business practices, recognized that requirements contracts serve a useful commercial purpose, and so it made them enforceable. It provides that a term which meas-

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69 Id. § 2-103(1)(b).
70 Restatement (SECOND) OF CONTRACTS § 205 comment a (1979).
71 Scott v. Moragues Lumber Co., 202 Ala. 312, 80 So. 394 (1918).
72 J. Calamari & J. Perillo, supra note 9, at 240.
73 Thereby marching the law headlong into the 20th Century.
ures the quantity by the output of the seller or the requirements of
the buyer means such actual output or requirements as may occur in
good faith.\textsuperscript{75}

M: Ah! So the good faith limitation can be sufficient.
L: In this context, yes.\textsuperscript{76} Courts have also reasoned that con-
sideration can be found in the buyer's surrender of the privilege of
purchasing elsewhere.\textsuperscript{77}

Let's change the subject again and look at the modification you
want to make in your contract. You will probably be shocked to
hear this, but under the common law the modification is unenforce-
able for lack of consideration. Because you give nothing to Barton
in exchange for its promise to pay you the extra money, the modifi-
cation is not binding. Under the "legal duty rule," your promise to
supply coal to Barton is not consideration for Barton's new promise,
because you already had a legal duty to do that.\textsuperscript{78}

M: I really am shocked. Business people modify agreements all
the time, and they expect the modifications to be binding.
L: The UCC recognizes that fact for goods contracts. It pro-
vides that "[a]n agreement modifying a contract needs ... no con-
sideration to be binding."\textsuperscript{79} It tries to avoid extortionate situations
by requiring that the modification be made in good faith.\textsuperscript{80} The
Second Restatement of Contracts also recognizes that some modifi-
cations are binding without consideration, but it is narrower than
the UCC.\textsuperscript{81} While your modification, if made in good faith, is bind-

\begin{itemize}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} For a discussion of other contexts in which courts have held that a requirement
of good faith or reasonableness avoids the illusory promise problem, see J. CALAMARI &
J. PERILLO, supra note 9, at 228. \textit{See also U.C.C. § 2-306(2) (1979) (an exclusive dealing
contract imposes an obligation on the seller to use best efforts to supply the goods and
on the buyer to use best efforts to promote their sale).}
\item \textsuperscript{77} J. CALAMARI & J. PERILLO, supra note 9, at 240.
\item \textsuperscript{78} \textit{See generally} B.J. Reiter, \textit{Courts, Consideration, and Common Sense}, 27 U. TORONTO L.J.
\item \textsuperscript{79} U.C.C. § 2-209(1) (1978).
\item \textsuperscript{80} \textit{Id.} comment 2.
\item \textsuperscript{81} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 89 (1979) provides:
\textbf{Modification of Executory Contract.}
\begin{itemize}
\item A promise modifying a duty under a contract not fully performed on
either side is binding
\begin{itemize}
\item (a) if the modification is fair and equitable in view of circumstances
not anticipated by the parties when the contract was made; or
\end{itemize}
\end{itemize}
ing because the UCC applies to your contract, it would not be binding under the Restatement if the rise in market price were anticipated.

M: But what if we simply tore up the old contract and signed a new one with the new price?

L: That would be enforceable under the common law. The rescinding agreement has consideration because each party relinquishes its executory rights under the old contract. And the new promises are consideration for each other.

M: Both transactions accomplish precisely the same result. The only difference is that in the second case the parties go through a special ceremony. The law might as well have the parties utter a mystical incantation.

L: The second case satisfies the doctrine of consideration, whereas the first case does not.

M: It's a victory of conceptualism over functionalism. And, if you ask me, it shows that the conceptual framework is defective. Contractual modifications are promises related to exchanges. The motives of the parties are primarily economic, not sentimental.

L: The first time the House of Lords addressed the question of modifications was in the 1884 case of Foakes v. Beer. Dr. Foakes owed Mrs. Beer a sum of money on a judgment. She promised to

(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.

82 See Reiter, supra note 78, at 492.

83 Id.

84 Contractual modifications are ancillary to exchanges and are "going-transaction adjustments." Fuller, supra note 27, at 818 (quoting Llewellyn). They are related to bargains, and keep the process flexible and serviceable. C. Fried, supra note 15, at 36 (interpreting John Dawson, Gifts and Promises (1980)).

Enforcing voluntary modifications supports the policy of freedom of contract and facilitates economic growth. Contracting parties often desire to alter their agreements in response to changes in circumstances or of mind. Because people are free to contract on whatever terms they choose, logically they should also be free to alter their contracts however they choose. Rules that preclude adjustment of contract terms in spite of parties' desires to change their agreements could discourage some from entering into contractual relationships. In view of the frequency of contract alteration, such laws also could impede rather than facilitate actual commercial practices.


85 Cf. Fuller, supra note 27, at 817 ("We may define exchange ... as a transaction in which the motives of the parties are primarily economic rather than sentimental.").

86 9 App. Cas. 605 (1884). This classic case will be remembered as long as first-year law students are required to study it. The case is included in casebooks because it is a useful one for professors who have a blackbelt in the Socratic method. The Socratic method is the reason that law school is the only place where you learn to hate your own name.
forgive the interest on the debt if he would pay part of the principal then and the rest in later installments. The House of Lords held that her promise to forgive the interest was unenforceable because she received no consideration for it.87

M: But people enter into these kinds of agreements all the time and consider them binding.

L: In fact, one lord noted precisely that.88 He wrote that business people recognize that prompt payment of part of a debt may be more beneficial to them than to insist on their rights and try to collect the whole sum by executing on the debt.89

M: Absolutely. Executing on debts is a hassle; it's expensive, time-consuming, and uncertain. Furthermore, it might push the debtor into bankruptcy, in which case the creditor could get less than under the compromise.

L: But the House of Lords held that the promise was not enforceable for want of consideration.90 Although the agreement might have had immense practical value to the creditor, it did not have value as a theoretical matter, since the creditor was already entitled to the full amount and thus theoretically received no fresh advantage.91

One lord wrote that it would have been wiser had lower courts resolved the matter differently in the past.92 However, because of stare decisis,93 he thought that it was not within the province of the House of Lords to overturn it.94 The law had been settled since 1602, and it would have upset expectations to change it.95

M: This is crazy. It was recognized in 1884 that business people still entered into these agreements. Even now, after nearly four hundred years of the legal duty rule, people still almost unanimously believe that contractual modifications are binding. Changing the rule would protect people's expectations, not upset them.

87 Show me a person who finds this case fascinating, and I'll show you the charisma coach for Calvin Coolidge.
88 It was a moment of definite interest, nearly approaching excitement.
89 Foakes v. Beer, 9 App. Cas. 605 (1884) (Lord Blackburn, concurring).
90 This was apparently the result of chromosome damage caused by generations of inbreeding among the aristocracy, which had a debilitating effect on rational thought. The lords would meet in Parliament daily for the sole purpose of participating in the rearrangement of ignorance.
91 This is the kind of argument that gives lunacy a bad name.
92 However, he recognized that wisdom is not all it's cracked up to be.
93 Latin, for "We stand by our past mistakes." Seventy percent of all legal reasoning is the logical fallacy of appeal to authority. The other forty percent is simply mathematical errors.
94 This argument is to logic as mud wrestling is to the performing arts.
L: The case has been widely criticized, but as Justice Holmes observed, in the law "a page of history is worth a volume of logic."

M: In fact, the whole doctrine of consideration involves a remarkable irony. Contract law is designed to protect people's expectations. But after centuries of the doctrine of consideration, people still basically believe that commercial promises are binding and that gifts are not. That's what their expectations are. They are absolutely stunned when their lawyers tell them that an unrestricted termination clause makes a contract completely unenforceable and that the law does not recognize many contractual modifications. It is a terrible indictment of the doctrine of consideration that the business community has never accepted it, or at least has largely ignored it. It's not that the doctrine is an anachronism, which would be bad enough; it's that it has never been accepted by the business community since the beginning.

You mentioned that the UCC recognizes commercial reality by enforcing contractual modifications. Does the law enforce other promises without consideration?

L: Yes. Examples include certain option contracts; certain guarantee contracts; promises to waive nonmaterial conditions; promises to pay a prior indebtedness which was unenforceable because of the statute of limitations, the promisor's minority, or bankruptcy; certain promises made in recognition of a benefit previously received by the promisor.
stipulations regarding pending judicial proceedings;\textsuperscript{109} and firm offers by merchants,\textsuperscript{110} written waivers of claims,\textsuperscript{111} and certain negotiable instruments under the UCC.\textsuperscript{112}

These promises are enforceable because they serve a socially useful purpose, are ancillary to bargains, or are justified by notions of unjust enrichment, morality, fairness, or commercial practice. Of course, the largest categories of promises binding without consideration are those made enforceable through the doctrines of reliance\textsuperscript{113} or restitution.\textsuperscript{114}

M: Those examples show that the doctrine of consideration is too narrow. Consideration is not the only social or commercial justification for enforcing promises.\textsuperscript{115}

I just have one final question. When parties give mutual promises, how is that consideration?

L: That is, quite frankly, an unsolved mystery. Under the doctrine of consideration, $A$'s promise is enforceable only if $A$ gets something of value in return. Suppose what $A$ gets in return is $B$'s promise. $B$'s promise has value only if it's enforceable, which takes us back to where we began. The analysis is completely circular.\textsuperscript{116}

The rule that mutual promises constitute consideration for each other has been described as "one of the secret paradoxes of the Common Law."\textsuperscript{117}

\textsuperscript{109} Id. § 94.
\textsuperscript{110} U.C.C. § 2-205 (1978).
\textsuperscript{111} Id. § 1-107.
\textsuperscript{112} Id. § 3-408.
\textsuperscript{113} RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).
\textsuperscript{114} Id. §§ 370-77.
\textsuperscript{115} Professor Charles L. Knapp has hypothesized that, if current trends in contract law continue, unchecked by counter trends, the Restatement of Contracts in the year 2000 might provide something like this:

\begin{enumerate}
\item Promises Enforceable
Every promise made apparently with serious intention to perform is enforceable by any person forseeably injured by its unjustified nonperformance.
\end{enumerate}


\textsuperscript{116} LON FULLER & MELVIN EISENBERG, BASIC CONTRACT LAW 81 (4th ed. 1981). On the other hand, perhaps it merely rests on the incontrovertible mathematical formula that $0 + 0 = 2$.

\textsuperscript{117} Frederick Pollock, Book Review, 30 L.Q. Rev. 128, 129 (1914) (reviewing J.G. Pease & A.M. Lutter, The Student's Summary of the Law of Contract (2d ed. 1913)). Regarding wholly executory contracts consisting of mutual promises, Lon L. Fuller wrote:

There is here no unjust enrichment. Reliance may or may not exist, but in any event will not be so tangible and direct as where it consists in the rendition of the price of the defendant's performance. On the side of form, we have lost the natural formality involved in the turning over of property or the rendition and acceptance of services. There remains sim-
M: Do you mean to tell me that consideration theory cannot even explain why the most common type of contract is enforceable? It hardly seems a theory worth saving.

L: Perhaps not, but do you have something better?

M: I'll try. First, I would preserve the doctrines of reliance and restitution. With respect to the doctrine of consideration, however, the law could do much better.

Since contract law is designed to protect parties' expectations, the law should first look at the basic expectations of business people and others who enter into contracts. People generally consider commercial contracts to be binding—particularly written ones, but not exclusively so. Because they consider commercial promises binding, they are likely to rely on them, sometimes in ways that are difficult to measure, and to be injured if the promise is breached. They are also likely to fix their expectations based on their belief that these agreements are binding. On the other hand, people recognize that gift promises are often not kept, and their expectations generally take this fact into account.

When I say commercial promises, I mean promises related to an exchange of values. They need not be given directly in exchange for a particular price; it is sufficient that they are related to an exchange. It is true that some promises are difficult to categorize as commercial promises or gifts. However, most promises are not difficult to categorize at all. Promises relating to the business operations of either party are generally commercial promises. Everyone expects them to be binding. Promises between individuals with other relationships, such as family relationships or friendship, can apply the fact that the transaction is an exchange and not a gift. This fact alone does offer some guaranty so far as the cautionary and channeling functions of form are concerned, though, except as the Statute of Frauds interposes to supply the deficiency, evidentiary safeguards are largely lacking.

Fuller, supra note 27, at 816-17.

[This theory's] basis is... utilitarian; the necessity in a commercial civilization that sensible expectations induced by a promisor be not too often defeated. Business calculations assume inevitably the dependability of undertakings about future conduct... Hence the test for the existence of a promise would depend on whether words or conduct should be expected to create a sense of practical dependability in another's mind.

... [T]he theory of dependable expectations, with its correlative test, is the theory which may be expected to control the development, in a civilization like ours, of contract law.

Malcolm Sharp, Pacta Sunt Servanda, 41 Colum. L. Rev. 783, 784-85 (1941).

See Eisenberg, supra note 27, at 8 & n.7, 5.

Professors Daniel A. Farber and John H. Matheson analyzed more than 200 recent promissory estoppel cases and concluded that the emerging new rule is that any promise made in furtherance of an economic activity is enforceable. Daniel A. Farber & John A. Matheson, Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake", 52 U. Chi. L. Rev. 903, 904-05 (1985).
sometimes be more difficult to classify. In these cases as well, however, the law should examine whether the promise is related to an intended exchange of values. While there are close cases, there are also paradigms, and in my judgment the distinction would be a workable one.

While expectations are sometimes shaped by legal rules, in this area the legal rules have failed to shape the market’s expectations after four hundred years, even though many of the actors in the market are very sophisticated. If the rules have shaped expectations, they have done so only to the extent of the general categories I mentioned—distinguishing between commercial promises and gifts. Therefore, it seems pointless to continue the charade.

L: What about the functions served by consideration?

M: The commercial-gift dichotomy serves the cautionary function better than does the doctrine of consideration. It distinguishes between transactions based on self-interest, in which the promisor can be presumed to self-protect, and transactions based on altruism, in which the promisor is thinking more about the donee’s interests than his own. In altruistic transactions the law can protect the promisor’s interests for him. The test asks directly whether a promise is intended as a commercial promise or a gift. The doctrine of consideration tries to make the same inquiry, but it asks the question in a narrow, wooden fashion. The result is that many clearly commercial promises are unenforceable. The law has attempted to rectify this underinclusivity by enforcing some promises without consideration, either through statute or by making common law exceptions to the doctrine of consideration.

The test also satisfies the channeling function better than does consideration because it better corresponds to people’s expectations about which promises are binding. People commonly understand that commercial promises are serious business and are normally binding commitments. The doctrine of consideration relieves people of promises that they expected to be binding and is therefore underinclusive, to the injury of promisees.

The test does not satisfy the evidentiary function, but that funct-

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

Id. at 929.

122 “Requiring an exchange increases the chance that the parties had in contemplation serious business with serious consequences.” C. Fried, supra note 15, at 38 (interpreting Fuller, supra note 27).
tion is only randomly served by the doctrine of consideration anyway. The Statute of Frauds is a more logical approach, and if more evidentiary security is deemed necessary, the Statute could be amended to cover all large promises.

L: What about economic theory?

M: The commercial-gift dichotomy corresponds better to economic theory than does consideration. Commercial promises facilitate economic exchange, and therefore should be enforceable. This argument might prove too much, since some gifts (especially from wealthier donors to poorer donees) could also stimulate economic activity. However, this effect is more speculative and remote for gifts than for exchanges, and the expectation, cautionary, and channeling arguments justify the law's general refusal to enforce gifts.

Moreover, the doctrine of consideration restricts the market because it substitutes its own judgment about what is valuable for the market's judgment. It refuses to recognize some values that people truly bargain for. It therefore fails to respect private autonomy and the voluntary private ordering of the market. If a market has been created for the terms of an exchange, so long as it is a real exchange and not a pretense, a court should not substitute its judgment about what is valuable and what is not. Of course, values which are simply inherent in gifts, such as the donor's personal satisfaction in giving the gift or seeing that the donee receives it, or an increase in the donor's stature, cannot count, since they would make all gifts enforceable. But other values which promisors genuinely consider sufficient should be recognized.

The law can protect persons who do not act voluntarily or knowingly by looking specifically at those issues and by providing additional protections for consumers, if necessary. However, the doctrine of consideration irrebuttably presumes that no one knowingly enters into a contract unless he or she receives in return what the court perceives to be valuable. As the market has shown for centuries, this assumption is simply incorrect.

The commercial-gift dichotomy would better protect real ex-

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123 "[Gifts have a wealth-redistribution effect, and taken as a class probably redistribute wealth to persons who have more utility for the money than the donors—a phenomenon that certainly affects the composition, and may affect the extent, of aggregate demand."

124 See Fuller, supra note 27, at 806-10. "[The rule that the law will not inquire into the adequacy of consideration] affirms the liberal principle that the free arrangements of rational persons should be respected." C. Fried, supra note 15, at 35.

125 "When the law says that there must be an exchange, it means just that and not a charade pretending to be an exchange." C. Fried, supra note 15, at 30.

126 "The goodness of the exchange is for the parties alone to judge—the law is concerned only that there be an exchange." Id. at 29 (emphasis in original).
pectations, better satisfy the cautionary and channeling functions, and better correspond to economic theory than does the doctrine of consideration. It would even explain why mutual promises are enforceable: they relate to and facilitate an exchange of values. For all these reasons, this test would much better serve the law of consensual private obligations than does the moribund doctrine of consideration.

L: Benjamin Cardozo observed that the time has come "when the old forms seem ready to decay, and the old rules of action have lost their binding force."127 Perhaps someday contract law will more closely reflect common sense and modern commercial practice,128 and business people will not have to seek legal advice reflecting irrational rules from centuries long past.129

128 [I]t is to be expected that business pressure will result in [the] modification and simplification [of the rules of consideration]. For they often appear to result in waste effort at all stages of legal activity—draftsmanship, counselling, litigation, and scholarship. Perhaps more important, here as elsewhere in the law, what might be the legitimate authority of a rational profession is impaired by the presence of rules and practices for which the layman may well have little respect.
Sharp, supra note 118, at 795.
129 But between now and then, there's a couple of quick bucks to be made by lawyers.