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RETRAINING THE GATEKEEPER: FURTHER REFLECTIONS ON THE DOCTRINE OF CONSIDERATION

Mark B. Wessman*

I. INTRODUCTION

The classical “doctrine” of consideration subdivides at a number of points. Initially, it splits into two branches. The first branch is the proposition that the presence of consideration for a promise is presumptively¹ a *sufficient* reason to enforce the promise. That proposition is now the subject of a broad consensus, and I do not wish to challenge it in this Article. The second branch, however, is the proposition that consideration is a *necessary* condition for the enforcement of a promise, *i.e.*, that *only* bargain promises should be enforced. The second proposition assigns to the doctrine of consideration the role of gatekeeper, admitting some promises to the regime of contract and screening others out. In an earlier article² I adopted the traditional view that the second proposition itself subdivides into a group of corollaries, all of which function as gatekeepers in various contexts.³ I argued that, contrary to the beliefs and predictions of the majority of contract scholars, these gatekeeper corollaries are still frequently used by judges as the basis for refusing to enforce promises.⁴ I then isolated four of the gatekeeper corollaries for

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1. The qualifier “presumptively” must be added because there is also broad consensus that certain bargain promises should not be enforced, for example, those induced by fraud, mistake, duress, and similar forms of error or misbehavior.

2. Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993).

3. *Id.* at 49.

4. *Id.* at 47-48. My conclusions were based on an analysis of over 300 cases decided since the mid-1970s in which courts either declined to enforce promises on grounds of lack of consideration or left that possibility open on remand. An updated version of the same database of cases forms the basis for this Article.

examination—specifically, the rule that an illusory promise is not consideration, the requirement of mutuality of obligation, and the rules that past consideration and moral consideration are not sufficient.⁵ The conclusion of my analysis of the current operation of those rules was that the four corollaries are largely redundant and that, when not redundant, they result in a denial of enforcement to classes of promises that should be enforced.⁶

In this Article I examine the remaining gatekeeper corollaries to the doctrine of consideration. Specifically, I shall analyze the current operation of the requirement of consideration for an option,⁷ the pre-existing duty rule, which itself fragments into a number of sub-rules,⁸ certain special consideration requirements pertaining to covenants not to compete and to employment that is not terminable at will,⁹ and the presumptive invalidity of “gratuitous” promises under the general requirement of bargained exchange.¹⁰ I conclude that, to varying degrees, the corollaries are all partially redundant, in the sense that many of the case dispositions they produce could be produced by an appeal to other doctrines or defenses or by a direct appeal to the policies allegedly served by the corollaries.¹¹ In addition, I conclude that each corollary denies enforcement to certain classes of promises that it would be better to enforce.¹²

I then proceed to a more general examination of the reasons often given for and against enforcing promises of various kinds in order to assess their bearing on the question of whether the gatekeeping function of the doctrine of consideration should be retained.¹³ Initially, I observe that the class of promises lumped together and classified as “gratuitous” by the doctrine of consideration actually includes a broad range of promises of different kinds, many of which have little in common with the stereotype of the purely

5. *Id.* at 49-51.

6. *Id.* at 51-52, 116-17.

7. *See infra* part II.

8. *See infra* part III.

9. *See infra* part IV.

10. *See infra* part V.

11. *See infra* notes 55, 115, 119-65, 191-95, 230, 233, 251-56, 270, 281-95, 390-93 and accompanying text.

12. *See infra* notes 61-76, 197-213, 234-50, 257-69, 271-72, 320-39, 343-57, 363-86, 395-96, 412-427 and accompanying text.

13. *See infra* part VI.

altruistic gift promise that seems to dominate discussions of gratuitous promises.¹⁴

Using a more expansive conception of the range of gratuitous promises, I proceed to an examination of the reasons commonly given for having any regime of promissory enforcement, with a view to determining whether those reasons support a new presumption in favor of the enforcement of gratuitous promises or the retention of the gatekeeping function of the doctrine of consideration.¹⁵ First, I consider the view that bargain promises are enforced because doing so enhances utility through the facilitation of exchange.¹⁶ I conclude that many gratuitous promises likewise are designed to facilitate exchange, and that even those that are not may enhance utility.¹⁷ Second, I consider the view that promises should be enforced to protect legitimate expectations, reliance, or both.¹⁸ I conclude that both the expectation and reliance rationales for promissory enforcement support a presumption in favor of enforcing gratuitous promises, and I reject the view that reliance upon, or expectations based upon, gratuitous promises are somehow inherently less rational or legitimate than in the case of bargain promises.¹⁹ Third, I briefly examine the view that enforcement of promises is justified by some normative conception of human autonomy and conclude that such a justification is entirely neutral with respect to the gratuitous or bargain character of the promises at issue.²⁰

After concluding that the general reasons in favor of enforcing at least some promises provide no basis for a general denial of enforcement to the whole class of gratuitous promises, I examine more particular reasons that have been, or might be, given for denying enforcement to gratuitous promises, even assuming that bargain promises are generally enforceable.²¹ I first examine and reject the contention that gratuitous promises are too trivial to merit state enforcement, whether the criteria for assessing importance are financial or nonfinancial.²² Second, I reject the claim that gratuitous

14. See *infra* part VI.A.

15. See *infra* part VI.B.

16. See *infra* part VI.B.1.

17. See *infra* part VI.B.1.

18. See *infra* part VI.B.2.

19. See *infra* part VI.B.2.

20. See *infra* part VI.B.3.

21. See *infra* part VI.C.

22. See *infra* part VI.C.1.

promises should be denied enforcement because the bulk of them are impulsive or imprudent, partly because the claim lacks empirical foundation and partly because the use of consideration doctrine to police for impulsiveness or imprudence is theoretically inconsistent with the treatment accorded bargain promises.²³ Third, I reject the contention that gratuitous promises should not be enforced because they are too easily fabricated.²⁴ I argue that such a contention is overbroad, that it is empirically suspect, and that better methods of addressing the potential problem of fabrication can be devised.²⁵ Fourth, I consider the contention that enforcing gratuitous promises would create an inordinate risk of attaching contractual consequences where none were intended.²⁶ I conclude that such a contention both posits a dubious correlation between the gratuitous character of a promise and the lack of serious contractual intent, and exaggerates the importance the common-law system of contracts attaches to the possibility of inadvertent contractual consequences.²⁷ Fifth, I examine an argument that gratuitous promises are understood to be subject to a broader range of moral excuses than other types of promises, and that a regime in which such promises were presumptively enforceable would therefore be burdened with an excessively complicated system of novel defenses.²⁸ I dispute both the empirical premise of the argument and the degree of difficulty in accommodating the concern reflected in the argument, even if its premises are true.²⁹

Finally, I examine the merits of a claim occasionally made in defense of the doctrine of consideration. That claim is that abandonment of the doctrine would produce significant distortions elsewhere in the system of common-law contracts and that, therefore, the doctrine of consideration should be retained even if, examined in isolation, it has obvious faults.³⁰ My analysis suggests that claim is false, and I conclude that retention of the gatekeeping function of the doctrine of consideration is unjustified.³¹ My analysis also suggests

23. See *infra* part VI.C.2.

24. See *infra* part VI.C.3.

25. See *infra* part VI.C.3.

26. See *infra* part VI.C.4.

27. See *infra* part VI.C.4.

28. See *infra* part VI.C.5.

29. See *infra* part VI.C.5.

30. See *infra* part VI.C.6.

31. See *infra* part VI.C.6.

the relatively minor adjustments in other doctrines that should accompany the abandonment of consideration's gatekeeping role, as well as the residual and somewhat reduced functions that the concept of consideration might continue to serve.³²

II. THE REVOCABILITY OF OFFERS IN THE ABSENCE OF CONSIDERATION

The contract formation mechanism envisioned by classical contract theory was the familiar and simple model of a definite offer followed by a mirror-image acceptance. Because the model presupposed, or, at the very least, allowed, sequential communications of assent, its articulation required an answer to the question: Under what circumstances may an offer be withdrawn prior to acceptance?

The answer of classical theory was as simple as the offer/acceptance model itself. The universe of offers was divided into two classes. The more numerous class consisted of unadorned offers, which were revocable in the unfettered discretion of the offeror unless and until accepted.³³ Escape from the fully revocable class into the smaller class of irrevocable offers required either that the offer be contained in a writing under seal³⁴ or that the offeree pay some consideration for an undertaking to hold the offer open for a period of time.³⁵ A promise to hold the offer open, by itself, would not confer irrevocability on the offer; a seal or some form of payment was essential to preclude revocation.³⁶

To one not steeped in the common-law tradition, or, indeed, even to one who can remember what it was like not to think in terms of common-law categories, this division of the universe of offers must seem curious. After all, not every offer is so obviously advantageous or disadvantageous to the offeree that a rational response can be given immediately. Indeed, if one were to design a system of contract

32. See *infra* part VI.C.6.

33. For a statement of the classical rules on the revocability of offers, see GRANT GILMORE, *THE DEATH OF CONTRACT* 28-30 (1974).

34. For a concise description of the deterioration of the seal as a formal touchstone of promissory enforcement, see Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 659-60 (1982) [hereinafter Eisenberg, *Principles*]. While this Article will devote some attention to the question whether there should be *some* purely formal device for creating promissory liability, the erosion of the seal is so advanced that there is no hope of saving it. Accordingly, the seal will not be considered further.

35. GILMORE, *supra* note 33, at 28-30.

36. *Id.*

law from scratch, one might *presume* that a period of deliberation upon an offer was necessary or desirable and create a rule making offers irrevocable for a reasonable period of time unless the offeror clearly indicated an immediate response was required.³⁷ Some civil law systems do exactly that.³⁸ At the very least, however, one might regard the presence of a specific undertaking to hold an offer open as an indication that a period of deliberation or investigation was in the interests of both offeree and offeror. One would then be inclined to create a rule making an offer irrevocable for any period of time specified by the offeror,³⁹ whether the offeror had sold, or simply given, the undertaking to hold the offer open.

Classical theory's presumption of the revocability of offers thus calls for some explanation. The primary explanation relies upon the doctrine of consideration.⁴⁰ Its premise is that offers are promises, albeit promises conditional upon the offeree's response, and perhaps other things or events.⁴¹ Like other promises, offers must be supported by consideration or they are unenforceable. In this regard, there is nothing special about a specific promise to hold an offer open.⁴² If the offeree has paid for such a promise, it is enforceable⁴³ and is classified as an "option" or "option contract."⁴⁴ Otherwise, it is just another naked promise added to the cluster of promises constituting the offer, and it accomplishes nothing.⁴⁵

It is possible to question the foregoing argument at a number of points. One could argue that offers are not always,⁴⁶ or even

37. See JOHN P. DAWSON, GIFTS AND PROMISES 213 (1980).

38. See *id.* (discussing the German approach).

39. See *id.* (discussing the French approach).

40. GILMORE, *supra* note 33, at 21-22, 29-30. For an argument that the principle of free revocability is not properly regarded as a corollary of the doctrine of consideration, see E. ALLAN FARNSWORTH, CONTRACTS § 3.16 (2d ed. 1990) [hereinafter FARNSWORTH, CONTRACTS].

41. RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1981) (describing cases in which offers are promises as the "normal" cases).

42. See GILMORE, *supra* note 33, at 29-30.

43. *Id.*

44. The latter term is used by the current Restatement. RESTATEMENT (SECOND) OF CONTRACTS §§ 25, 87.

45. See GILMORE, *supra* note 33, at 30.

46. Williston and Goble once engaged in a brief debate over whether the offer of a so-called "reverse unilateral contract" took the form of a promise. See George W. Goble, *Is an Offer a Promise?*, 22 ILL. L. REV. 567 (1928); Samuel Williston, *Is an Offer a Promise?*, 22 ILL. L. REV. 788 (1928). Because such cases are relatively atypical, the Williston/Goble debate has little relevance to this Article.

often,⁴⁷ promises, and that offers not classifiable as promises need not satisfy the consideration requirement at all. Such a maneuver accomplishes little, however. If the majority of offers are promises, then the consideration requirement imposed by classical theory applies to them. Even if most offers fall into some category of communication other than "promise," it is open to the proponent of the doctrine of consideration to argue that such communications are sufficiently similar to promises that the doctrine should apply to them as well.

A more promising line of attack upon the classical rule on the revocability of offers begins with the observation that the evolution of the law, apparently driven by the needs of the commercial world, has riddled the classical rule with exceptions. Consistent with Llewellyn's belief that business actors recognize the short-term irrevocable offer in practice,⁴⁸ the firm offer provision of Article 2 of the Uniform Commercial Code gives merchants a formal device that permits the creation of gratuitous⁴⁹ but irrevocable offers for the sale of goods.⁵⁰ State statutes occasionally recognize the firm offer device outside the context of the sale of goods.⁵¹

The drafters of the *Restatement (Second) of Contracts* likewise recommend that assurances of the irrevocability of an offer be enforceable even in the absence of consideration if the offer is fair and reasonably limited in duration, and if the offeror is prepared to put the offer in proper form.⁵² Given the trend toward enforcement

47. Dawson seemed to regard offers as a category of communications—which he called "proposals"—conceptually distinct from promises, although he conceded that offers could include or be accompanied by promises. See DAWSON, *supra* note 37, at 213.

48. See K.N. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 872 (1941) [hereinafter Llewellyn, *Reform*].

49. By characterizing firm offers as "gratuitous," I mean only that they do not satisfy the technical requirements of the classical doctrine of consideration. I do not mean to imply that such offers are intended as gifts, a connotation sometimes associated with the word gratuitous. I shall refer to promises to make a gift as either "donative" or "gift" promises.

50. See U.C.C. § 2-205 (1994), which permits a merchant to make an irrevocable offer to buy or sell goods by putting the offer in a proper form. The formal requisites of the firm offer are a writing, a signature, and an express assurance that the offer will be held open. *Id.* The maximum period of irrevocability under § 2-205 is three months. *Id.*

51. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1109 (McKinney 1989).

52. See RESTATEMENT (SECOND) OF CONTRACTS § 87(1). The formal requisites for an irrevocable offer under that section are a signed writing and a mere recitation of consideration. *Id.* The Restatement also recommends that an offer be deemed irrevocable if the offeree has reasonably and foreseeably relied upon it. See *id.* § 87(2).

of assurances of irrevocability on the basis of form and the tendency of the commercial community to adjust to legal rules over time, one would expect that whatever remains of the classical rule on the full revocability of offers⁵³ would create few problems. One would expect that commercial actors who wanted to make or receive gratuitous but irrevocable offers would have a formal device enabling them to do so, and one would expect to find few cases in which a party believed he had a firm offer or option but did not.

It is therefore somewhat surprising to find a significant number of cases in which offerees of purported options, rights of first refusal, or other offers attempt to exercise or accept and enforce the offers in question, only to run afoul of the classical rule of full revocability in the absence of consideration.⁵⁴ In a few of these cases, one observes

53. Obviously, verbal assurances of irrevocability do not fall within any of the exceptions to the classical rule of the revocability of offers enumerated in the text. Moreover, both § 2-205 of the U.C.C. and § 87(1) of the *Restatement (Second) of Contracts* contain temporal limits on the permissible period of irrevocability. In addition, it is always possible for an offeror's purported assurance of irrevocability to fall short of the clarity required by those provisions. Thus, notwithstanding the breadth of the exceptions, there is still room for the classical rule to operate.

54. See, e.g., *First Dev. Corp. v. Martin Marietta Corp.*, 959 F.2d 617 (6th Cir. 1992); *First Nat'l Bankshares v. Geisel*, 853 F. Supp. 1344 (D. Kan. 1994); *International Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 564 F. Supp. 1247 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1373 (7th Cir. 1985); *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978); *In re III Enters., Inc. V.*, 163 B.R. 453 (Bankr. E.D. Pa.), *aff'd*, 169 B.R. 551 (E.D. Pa. 1994); *In re Wilhoit*, 69 B.R. 365 (Bankr. M.D. Fla. 1987); *Campbell v. CG Realty Invs., Inc. (In re CG Realty Invs., Inc.)*, 79 B.R. 249 (Bankr. E.D. Pa. 1987); *Stuart v. Ennis*, 482 So. 2d 1168 (Ala. 1985); *Crowley v. Bass*, 445 So. 2d 902 (Ala. 1984); *Allen R. Krauss Co. v. Fox*, 644 P.2d 279 (Ariz. Ct. App. 1982); *Benson v. Chalfonte Dev. Corp.*, 348 So. 2d 557 (Fla. Dist. Ct. App. 1976); *Lewis v. Fletcher*, 617 P.2d 834 (Idaho 1980); *Hermes v. William F. Meyer Co.*, 382 N.E.2d 841 (Ill. App. Ct. 1978); *Berryman v. Knoch*, 559 P.2d 790 (Kan. 1977); *Goodyear Tire & Rubber Co. v. Ruiz*, 367 So. 2d 79 (La. Ct. App. 1979); *Pearl v. Merchants-Warren Nat'l Bank*, 400 N.E.2d 1314 (Mass. App. Ct. 1980); *Barbat v. M.E. Arden Co.*, 254 N.W.2d 779 (Mich. Ct. App. 1977); *National Advertising Co. v. Herold*, 735 S.W.2d 74 (Mo. Ct. App. 1987); *Serpa v. Darling*, 810 P.2d 778 (Nev. 1991); *Capalongo v. Desch*, 438 N.Y.S.2d 638 (App. Div. 1981), *aff'd*, 457 N.Y.S.2d 243 (Ct. App. 1982); *Normile v. Miller*, 306 S.E.2d 147 (N.C. Ct. App. 1983), *aff'd as modified*, 326 S.E.2d 11 (N.C. 1985); *Campbell v. Matlock*, 749 S.W.2d 748 (Tenn. Ct. App. 1987); *Culbertson v. Brodsky*, 788 S.W.2d 156 (Tex. Ct. App. 1990); *Hott v. Pearcy/Christon, Inc.*, 663 S.W.2d 851 (Tex. Ct. App. 1983); *Bastian v. Cedar Hills Inv. & Land Co.*, 632 P.2d 818 (Utah 1981); *Ragosta v. Wilder*, 592 A.2d 367 (Vt. 1991); *Clarke v. Equinox Holdings, Ltd.*, 783 P.2d 82 (Wash. Ct. App. 1989); *Saunders v. Callaway*, 708 P.2d 652 (Wash. Ct. App. 1985); see also *Good Hope Refineries, Inc. v. Benavides*, 602 F.2d 998 (1st Cir. 1979) (involving failure to make timely tender of consideration for extension of duration of option); *Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.*, 121 Cal. App. 3d 447, 176 Cal. Rptr. 546 (1981) (involving lack of consideration for agreement to make override payments upon exercise of valid option); *Beall v. Beall*, 434 A.2d 1015 (Md.

a pattern that has become familiar from the examination of other corollaries to the doctrine of consideration. Specifically, in a few cases, the refusal to permit the offeree to enforce the purported option or similar offer is supported by an independent legal theory quite unrelated to the doctrine of consideration.⁵⁵ If the alternate theory is used, the doctrine of consideration is redundant; if the alternate theory is not expressly mentioned, the doctrine of consideration may be pretextual and is clearly replaceable.

In most of the cases in question, however, no such alternate theory is apparent, and the corollary to the doctrine of consideration

1981) (finding a lack of consideration for extension of duration of option); *McGee v. Clark*, 343 So. 2d 486 (Miss. 1977) (finding a lack of consideration for supplemental agreement providing for termination of option); *Foster v. Ohio State Univ.*, 534 N.E.2d 1220 (Ohio Ct. App. 1987) (reaffirming in dictum full revocability of offers); *Barnett v. Buchan Baking Co.*, 724 P.2d 1077 (Wash. Ct. App. 1986) (finding a lack of consideration for modification of option), *aff'd*, 738 P.2d 1056 (Wash. 1987).

55. See, e.g., *First Dev. Corp. v. Martin Marietta Corp.*, 959 F.2d 617 (6th Cir. 1992) (involving a failure to accept unconditionally and failure of governing documents to reflect intent to create irrevocable option); *International Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 564 F. Supp. 1247 (N.D. Ill. 1983) (assuming implicitly the traditional rule of revocability; expressly relying on parol evidence rule, revocation of previous offer by subsequent offer and acceptance), *aff'd*, 753 F.2d 1373 (7th Cir. 1985); *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978) (involving a failure to establish prerequisites of specific performance); *In re III Enters., Inc. V*, 163 B.R. 453 (Bankr. E.D. Pa.) (holding that option failed for lack of consideration, indefiniteness, failure of assent, and failure of the governing document to reflect anything more than preliminary negotiations), *aff'd*, 169 B.R. 551 (E.D. Pa. 1994); *Campbell v. CG Realty Invs., Inc. (In re CG Realty Invs., Inc.)*, 79 B.R. 249 (Bankr. E.D. Pa. 1987) (holding that option fails for lack of consideration and because unlimited escape clause indicates lack of intent to be bound); *Stuart v. Ennis*, 482 So. 2d 1168 (Ala. 1985) (holding that option fails for lack of consideration, unfairness of price, and non-assignability to party seeking to exercise option); *Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.*, 121 Cal. App. 3d 447, 176 Cal. Rptr. 546 (1981) (holding agreement to make override payment for each acre purchased pursuant to valid option rescinded for lack of consideration and intentional misrepresentation); *Barbat v. M. E. Arden Co.*, 254 N.W.2d 779 (Mich. Ct. App. 1977) (holding irrevocability clause in offer to purchase real estate unsupported by consideration because consideration alleged illegal); *McGee v. Clark*, 343 So. 2d 486 (Miss. 1977) (holding supplemental agreement terminating option void for misrepresentation, mistake, and want of consideration); *National Advertising Co. v. Herold*, 735 S.W.2d 74 (Mo. Ct. App. 1987) (finding no consideration and no commitment to hold offer open); *Serpa v. Darling*, 810 P.2d 778 (Nev. 1991) (finding lack of consideration, failure to agree on essential terms, failure of consideration, and indefiniteness); *Normile v. Miller*, 306 S.E.2d 147 (N.C. Ct. App. 1983) (court of appeals finds lack of consideration for option), *aff'd as modified*, 326 S.E.2d 11 (N.C. 1985) (Supreme Court finds absence of commitment to hold offer open); *Bastian v. Cedar Hills Inv. & Land Co.*, 632 P.2d 818 (Utah 1981) (confusing lack of consideration and failure of consideration; defenses of indefiniteness and failure of condition precedent also potentially available); *Clarke v. Equinox Holdings, Ltd.*, 783 P.2d 82 (Wash. Ct. App. 1989) (holding option fails because consideration not paid and because final option never signed).

providing for the full revocability of offers seems to be the genuine—and the only possible—ground of decision. Such cases most often involve offers to purchase or sell real property, and the ways in which the parties run afoul of the classical rule on the revocability of offers fall into recurring patterns. Sometimes there is neither provision for—nor payment of—consideration for the offer at issue.⁵⁶ In other cases consideration for the offer is recited or required, but it is never actually paid.⁵⁷ In a small number of cases, a deposit or earnest money is extracted from the offeree, but the offer provides for its return if the purported option is not exercised or if the proposed deal is not consummated for reasons other than the offeree's default.⁵⁸ In a slight variation of the last type of case, one purported option required the offeree to tender a \$5000 check to a title company but prohibited its negotiation and required its return in the event the offeree decided against exercising the option.⁵⁹ Finally, in the most curious of the cases in question, purported options granted as part of a larger bargain transaction are occasionally invalidated for failure to

56. See, e.g., *In re III Enters., Inc. V*, 163 B.R. 453 (Bankr. E.D. Pa.) (stock option), *aff'd*, 169 B.R. 551 (E.D. Pa. 1994); *Crowley v. Bass*, 445 So. 2d 902 (Ala. 1984); *Pearl v. Merchants-Warren Nat'l Bank*, 400 N.E.2d 1314 (Mass. App. Ct. 1980); *Capalongo v. Desch*, 438 N.Y.S.2d 638 (App. Div. 1981), *aff'd*, 457 N.Y.S.2d 243 (Ct. App. 1982); *Ragosta v. Wilder*, 592 A.2d 367 (Vt. 1991).

57. *In re Wilhoit*, 69 B.R. 365 (Bankr. M.D. Fla. 1987); *Lewis v. Fletcher*, 617 P.2d 834 (Idaho 1980); *Hermes v. William F. Meyer Co.*, 382 N.E.2d 841 (Ill. App. Ct. 1978); *Berryman v. Kmoch*, 559 P.2d 790 (Kan. 1977); *Goodyear Tire & Rubber Co. v. Ruiz*, 367 So. 2d 79 (La. Ct. App. 1979); *Campbell v. Matlock*, 749 S.W.2d 748 (Tenn. Ct. App. 1987); *Hott v. Percy/Christon, Inc.*, 663 S.W.2d 851 (Tex. Ct. App. 1983); *Clarke v. Equinox Holdings, Ltd.*, 783 P.2d 82 (Wash. Ct. App. 1989); see also *First Nat'l Bankshares v. Geisel*, 853 F. Supp. 1344 (D. Kan. 1994) (involving a stock option; consideration recited but not paid); *Normile v. Miller*, 306 S.E.2d 147 (N.C. Ct. App. 1983) (earnest money contemplated but not paid), *aff'd as modified*, 326 S.E.2d 11 (N.C. 1985). Such cases must be regarded as at least implicit rejections of the suggestion in § 87(1) of the *Restatement (Second) of Contracts* that option contracts should be enforceable based on a mere recitation of consideration. However, of the foregoing cases, only *Lewis v. Fletcher* contains an *explicit* rejection of the *Restatement* rule.

58. *First Dev. Corp. v. Martin Marietta Corp.*, 959 F.2d 617 (6th Cir. 1992); *Allen R. Krauss Co. v. Fox*, 644 P.2d 279 (Ariz. Ct. App. 1982) (involving earnest money subject to forfeiture only if purchaser defaults); *Benson v. Chalfonte Dev. Corp.*, 348 So. 2d 557 (Fla. Dist. Ct. App. 1976) (involving deposit returnable with interest at prevailing passbook rate; case remanded for submission to jury on issue of consideration); *Saunders v. Callaway*, 708 P.2d 652 (Wash. Ct. App. 1985) (holding that where larger contract of which option was a part failed and optionee's payment was returned, option was not supported by consideration).

59. *Culbertson v. Brodsky*, 788 S.W.2d 156 (Tex. Ct. App. 1990).

allocate a separate amount or item of consideration for the irrevocability of the option.⁶⁰

The persistence of such cases of "failed irrevocability" might be partially explained by simple ignorance of the traditional requirement of consideration for irrevocability or by the explicit or implicit rejection by the courts of the exception to it recommended in section 87(1) of the *Restatement (Second) of Contracts*. An alternate explanation is also possible, however. It may be that the very variety of ways in which commercial parties try to provide a "free look," *i.e.*, a period of guaranteed, but gratuitous, irrevocability for an offer, indicates that the free look meets a legitimate commercial need.

It has been suggested, for example, that an offeror's commitment to a period of irrevocability might be a tool of sales psychology.⁶¹ The offeror's willingness to hold the offer open—and thus hold the subject matter of the offer off the market—might serve as a signal to the offeree of the offeror's confidence that the offeree will find the proposed exchange beneficial.⁶² Alternatively, a short period of irrevocability may suggest to the offeree the need for urgent action.⁶³

Commentators have also suggested that the free option might be explained and justified in terms of its effect on the offeree's incentive to consider the offer seriously.⁶⁴ Deliberation on an offer and investigation of its desirability are not cost-free activities. Sometimes investigation and deliberation require out-of-pocket expenditures,⁶⁵ and they presumably always involve some opportunity cost.⁶⁶ Assuming that offerees are generally rational economic actors, they

60. *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978); *In re Wilhoit*, 69 B.R. 365 (Bankr. M.D. Fla. 1987); *Campbell v. CG Realty Invs., Inc.* (*In re CG Realty Invs., Inc.*), 79 B.R. 249 (Bankr. E.D. Pa. 1987); *Stuart v. Ennis*, 482 So. 2d 1168 (Ala. 1985). Such decisions are simple misapplications of traditional consideration principles, as the consideration for the larger transaction should support the option as well. *See Metropolitan Park Dist. v. Griffith*, 723 P.2d 1093, 1099 (Wash. 1986) ("When an option agreement is a subsidiary part of a larger transaction . . . the consideration for the option itself is rarely a definitely determinable portion of what the option holder gives to the other party. The parties need not make a separate valuation of the option in order for it to be enforceable.").

61. *See* Harold C. Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 24 (1942) (discussing the firm offer). Havighurst remained a defender of the traditional rule of full revocability.

62. *See* Eisenberg, *Principles*, *supra* note 34, at 653.

63. *See* Havighurst, *supra* note 61, at 24.

64. *See* Eisenberg, *Principles*, *supra* note 34, at 653-54.

65. *See id.* at 653.

66. *See* DAWSON, *supra* note 37, at 213 n.39.

can only be induced to incur such costs and risks by the prospect of some anticipated benefit. Normally, that anticipated benefit will be the perceived likelihood that investigation and deliberation will reveal the offer to be a proposal for a beneficial exchange.

If an offer may be withdrawn before investigation and deliberation is complete, there is a risk that investigation and deliberation costs will be wasted even though the offer does propose a beneficial exchange. This risk will effectively reduce the anticipated benefit of such activities relative to their anticipated costs. A period of irrevocability for the offer would eliminate that risk and so increase the anticipated benefits of investigation and deliberation relative to their anticipated costs. An offeror who wished to induce an offeree to invest time, effort, or expense in investigation and deliberation on the offer thus might choose to make the offer irrevocable,⁶⁷ particularly if the cost of irrevocability to the offeror were small. Indeed, if the offeree's initial or preinvestigation assessment of its value is sufficiently high, it might make sense to offer a token, or even a substantial, payment in return for a period of irrevocability coextensive with the time necessary for investigation. In such situations the conventional paid option makes economic sense.

There is no reason, however, to suppose that all offers fit that pattern. If the gap between the anticipated benefit and the anticipated cost of investigation and deliberation were nonexistent or sufficiently narrow,⁶⁸ a free period of irrevocability might be necessary to induce such activities. An offeror who wished to induce an offeree to investigate and deliberate in such a situation would thus search for a device which gave the offeree a free look. It thus seems likely that the gratuitous irrevocable offer meets a commercial need, providing some reason to enforce the promise of irrevocability even in the absence of consideration.

Indeed, if the attempt to induce deliberation and investigation through a promise of irrevocability is sufficiently explicit and direct,

67. Eisenberg, *Principles*, *supra* note 34, at 653; see James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283, 294 (1991) [hereinafter Gordon, *Consideration*].

68. The gap between anticipated benefits and anticipated costs of investigation and deliberation may be narrow if the offeree had very limited initial information as to the potential benefit of the offer, if the costs of investigation were particularly high, or if the opportunity created by the offer was a particularly speculative one. In a reasonably competitive market, in which a wide range of potential exchanges are available, all of these possibilities are realistic.

it may be that the so-called free look really qualifies as a bargain, albeit one that classical theory did not recognize.⁶⁹ Successful attempts to induce action through promises result in perfectly ordinary unilateral contracts, and some assurances of irrevocability may very well fall into that category. Since it is universally conceded that genuine bargains should be enforced,⁷⁰ a promise of irrevocability given as an express or implicit inducement for serious investigation and deliberation on an offer should qualify for enforcement quite easily.⁷¹

Of course, express or implied-in-fact bargains in which assurances of irrevocability are consciously used to induce investigative or deliberative activities may not explain all, or even the bulk, of such assurances. Some assurances that an offer will be held open are undoubtedly given, not as part of a discrete bargain for investigative or deliberative activity, but out of a more vague and indirect hope that some such benefit will be produced.⁷² Even such assurances, however, are not intended as simple gifts or favors.⁷³ They are business promises intended to facilitate the process of exchange, and they should be enforced for largely the same reasons bargains are enforced. One of the reasons ordinary classical bargains are enforced is that bargain promises facilitate exchange and the consequent creation of surplus.⁷⁴ Even if an assurance of the irrevocability of an offer does not technically qualify as part of a discrete bargain, it is directed toward the same end: increasing the likelihood of exchange.⁷⁵ The reasons supporting the enforcement of the ordinary

69. See Gordon, *Consideration*, *supra* note 67, at 294.

70. The statement in the text must, as usual, be qualified to exclude bargains procured by fraud, duress, undue influence, and the like. For statements of the traditional reasons in favor of enforcement of ordinary bargain transactions, see DAWSON, *supra* note 37, at 221; Eisenberg, *Principles*, *supra* note 34, at 643.

71. It does not follow, of course, that the investment of time, effort or expense in deliberation could be easily proven. Professor Eisenberg suggests that the desirability of enforcing the firm offer follows from the offeror's intent to induce such investment, the likelihood that it will be made, the difficulty of proving it directly, and the increased probability of exchange. See Eisenberg, *Principles*, *supra* note 34, at 653-54.

72. The benefit hoped for could, of course, be an increased likelihood the offeree will consider the offer seriously, or it could simply amount to a favorable impression on the offeree created by an apparent expression of offeror confidence. See *id.* at 653.

73. See *id.*; Gordon, *Consideration*, *supra* note 67, at 294.

74. See Eisenberg, *Principles*, *supra* note 34, at 643, 653-54.

75. *Id.*; Gordon, *Consideration*, *supra* note 67, at 293-94.

bargain thus dictate enforcement of the assurance of irrevocability as well.⁷⁶

A proponent of the classical rule requiring consideration for an option might make three objections at this point, corresponding roughly to the three functions—evidentiary, channeling, and cautionary—said to be served by the doctrine of consideration.⁷⁷ First, it might be argued that assurances of irrevocability are too easily fabricated to be enforced in the absence of consideration. A disappointed offeree who waits too long to accept and allows the offeror to revoke will be tempted to invent a promise to hold the offer open. Payment for a promise of irrevocability provides some independent evidence that the promise was made.

The first objection has little merit. Initially, it must be observed that the traditional rule requiring consideration for an option does not serve the evidentiary function very well in any event. Because the payment for an option may be a mere token payment, it can be fabricated as easily as a promise of irrevocability.⁷⁸ A disappointed offeree who lies by saying the offeror promised to hold the offer open can easily add that the offeror was given a dollar to do so. If fabrication of assurances of irrevocability is really a recurring problem, a requirement that such assurances be in writing would provide a much better solution. Indeed, because the most frequent use of the option device appears to be in the context of offers to buy and sell real estate, which are normally subject to the statute of frauds in any event, such a writing requirement would effect little change from current rules.⁷⁹

The second possible objection invokes the channeling function allegedly served by the doctrine of consideration. A formal device or legal requirement serves a channeling function if it provides a recognizable way for parties who intend their actions to have, or avoid, specified legal consequences to attain their end and if it

76. See K.C.T. SUTTON, CONSIDERATION RECONSIDERED 215 (1974); Eisenberg, *Principles*, *supra* note 34, at 653-54; James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 995 (1990) [hereinafter Gordon, *Dialogue*].

77. The classic statement of the three functions of formality, and their attribution to the doctrine of consideration, is found in Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

78. Similar doubts about the alleged evidentiary function of consideration generally are expressed in Gordon, *Dialogue*, *supra* note 76, at 990.

79. Professor Gordon makes the same general point about the other recurring type of irrevocable offer, the firm offer for the sale of goods. See Gordon, *Consideration*, *supra* note 67, at 296.

provides a vehicle for courts to recognize such intent.⁸⁰ The need for a channeling device for irrevocable offers arises because it is often difficult to distinguish in practice between an offer which the offeror is committed to hold open and an offer for which the offeror has merely specified a lapse date. Consider the following statements:

- (1) This option is irrevocable until, and may be exercised by optionee at any time before December 1, 1993.
- (2) This offer will remain open until December 1, 1993.
- (3) Offeree may accept this offer by written notice to offeror at any time before December 1, 1993.
- (4) This offer will expire on December 1, 1993.
- (5) Unless revoked earlier by offeror, this offer expires on December 1, 1993.

Statement (1) clearly purports to create a period of irrevocability. Statement (5) clearly does not; it merely specifies the time at which the offeree's power of acceptance lapses if neither party does anything further. Statements (2)-(4) illustrate the varying degrees of ambiguity that an offeror might inadvertently introduce into the offer while attempting to accomplish what either (1) or (5) accomplishes clearly. Particularly if the offeror is not a lawyer, the introduction of such ambiguity is quite likely. A proponent of the doctrine of consideration might argue that the requirement of payment for an option is important because it provides a way of determining whether the offeror means (1) or (5) when using an expression similar to (2)-(4).

It must be conceded, of course, that an expression like statement (1), accompanied by a nonrefundable option payment, is an unambiguous indication of an intent to create a legally enforceable period of irrevocability. It thus fulfills a channeling function for parties who intentionally use it or courts who recognize it. All that implies, however, is that the classical option should continue to be an effective way of creating a legally enforceable period of irrevocability. It does not settle the question of whether the classical option should be the *exclusive* method for creating such a period of irrevocability.⁸¹

Moreover, the payment of consideration in the course of negotiations over an offer containing ambiguous language such as statements (2)-(4) does not necessarily perform a similar channeling

80. See Fuller, *supra* note 77, at 801; Gordon, *Dialogue*, *supra* note 76, at 991.

81. I am ignoring, for the moment, the exceptions to the consideration requirement found in U.C.C. § 2-205 (1994) and recommended in § 87(1) of the *Restatement (Second) of Contracts*.

function and does not reliably distinguish a commitment to irrevocability from a specification of a lapse date. The mere payment of money during negotiations may itself be an ambiguous act; both refundable deposits and "earnest money"—forfeitable only in the event a prospective purchaser breaches—have failed to qualify as option payments making an offer irrevocable under current rules.⁸² The ambiguity created by sloppy language in statements (2)-(4) thus may not be removed by the simple expedient of an accompanying payment. Indeed, statements (1) and (5) are potentially effective channeling devices primarily because of their language, not because (1) is typically accompanied by a small payment.

In sum, the problem of distinguishing between commitments to irrevocability and specifications of a lapse date is quite real,⁸³ and its solution may very well require a channeling device. But the problem is one of interpretation or of assent, and the doctrine of consideration does not solve it. The need for a channeling device to distinguish commitments to irrevocability from specifications of a lapse date therefore provides no support for retention of the consideration requirement.

Finally, a proponent of the doctrine of consideration might argue that retaining the requirement of consideration for an option fulfills a cautionary function.⁸⁴ Real estate options, in particular, are often granted by individuals unsophisticated in business to more savvy optionees.⁸⁵ Everyone can conjure up the image of the greedy real estate developer inveigling the aged and infirm landowner into signing an option to sell the Old Homestead for a pittance. Indeed, in such situations there is both a risk that the proposed exchange will be unfair at the outset and a risk that, even if fair initially, the deal will become unfair over time if the duration of the option is so long that it encompasses drastic movements in the market. Requiring payment for an option, it might be argued, impresses the optionor with the seriousness of the transaction and encourages self-protection.

82. See cases cited *supra* notes 58-59.

83. For cases in which the parties or the courts seem confused over the distinction between an assurance of irrevocability and the specification of a lapse date, see *First Dev. Corp. v. Martin Marietta Corp.*, 959 F.2d 617 (6th Cir. 1992); *Normile v. Miller*, 306 S.E.2d 147 (N.C. Ct. App. 1983), *aff'd as modified*, 326 S.E.2d 11 (N.C. 1985); *Ragosta v. Wilder*, 592 A.2d 367 (Vt. 1991).

84. For a general description of the cautionary function, see Fuller, *supra* note 77, at 800.

85. See Llewellyn, *Reform*, *supra* note 48, at 872.

The response to the foregoing argument is that it greatly exaggerates the cautionary function served by option payments. It may be that the substantial option payments one occasionally encounters in the cases do perform such a function. Options, however, can be bought for a dollar,⁸⁶ and it is an open question whether the payment of a dollar for a real estate option solemnizes the occasion or trivializes it. A token payment probably has no greater cautionary effect than a simple requirement of form (for example, a signed writing or the use of specified language). If, as argued above, the free look has some business utility, it would be better to use formal requirements to serve any necessary cautionary function⁸⁷ and enforce commitments to hold an offer open even if the commitment were not supported by consideration.⁸⁸

III. THE PRE-EXISTING DUTY RULE, MODIFICATIONS, SETTLEMENTS, COMPROMISES, AND RELEASES

A. Introduction

Of all the purported corollaries to the doctrine of consideration, the pre-existing duty rule has probably received the harshest treatment at the hands of the critics.⁸⁹ It appears to have no current

86. See DAWSON, *supra* note 37, at 212.

87. Requirements of form cannot, of course, assure that the gratuitous option will propose a fair exchange. However, option payments cannot guarantee fairness either. See Llewellyn, *Reform*, *supra* note 48, at 872 ("Now I suppose that if an option to buy for a song is itself bought for a hundred, there is not too often much that a court can do about it."). The possibility of unfairness in the proposed exchange at the time of the grant of the option must be policed, if at all, through doctrines of good faith and unconscionability. The possibility that an option will become unfair with the passage of time and fluctuations in the market can be reduced either by setting a specific time limit on the duration of options, as U.C.C. § 2-205 does for firm offers, or by imposing a requirement that an option propose an exchange within a reasonable time, as § 87(1) of the *Restatement (Second) of Contracts* (1981) does. See, e.g., *First Nat'l Bankshares v. Geisel*, 853 F. Supp. 1344 (D. Kan. 1994) (finding that the requirements of the *Restatement* rule were not met where sufficient time passed that the proposed exchange had become unfair).

88. Whether an offer should be presumed irrevocable for a reasonable time even in the absence of a specific commitment to hold it open is a separate policy question and is beyond the scope of this Article. The fact that a rational response to many offers requires some time and effort counts in favor of such a rule. On the other hand, Professor Farnsworth has observed that abandonment of the general presumption of revocability would allow the offeree to speculate with respect to the subject matter of the contract while the offeror could not. FARNSWORTH, *CONTRACTS*, *supra* note 40, § 3.2. In any case this Article is concerned only with offers including an express assurance of irrevocability.

89. DAWSON, *supra* note 37, at 207-11; See *id.* §§ 4.21-4.25; 2 JOSEPH M. PERILLO &

academic advocates, and the last serious defense of it in its pure form⁹⁰ was published in 1954.⁹¹ The pre-existing duty rule is, nevertheless, one of the most durable of the corollaries to the doctrine of consideration, and it is invoked in judicial opinions with a frequency unmatched by any other corollary. The longevity of the rule in the face of nearly unanimous criticism is somewhat puzzling.

One of the possible explanations for the persistence of the pre-existing duty rule is the very variety of contexts in which it is possible to invoke it.⁹² The rule appears deceptively simple, the sort of doctrine that may be stated in a sentence or two: Promising to perform, or performing, an act that one is already under a legal duty to perform, is not consideration for a return promise.⁹³ Similarly, doing or promising to do part of what one is legally obligated to do is not consideration for a discharge, release, or compromise of the remainder.⁹⁴

HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS §§ 7.1-7.21 (rev. ed. 1995) [hereinafter CORBIN]; SUTTON, *supra* note 76, at 200, 211-13, 237-38, 261; Eisenberg, *Principles*, *supra* note 34, at 644-49; Gordon, *Consideration*, *supra* note 67, at 288-90; Gordon, *Dialogue*, *supra* note 76, at 998-1001; C.J. Hamson, *The Reform of Consideration*, 54 LAW Q. REV. 233, 237-40 (1938); Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 684-88 (1982) [hereinafter Hillman, *Restatement*]; Robert A. Hillman, *Contract Modification in Iowa—Recker v. Gustafson and the Resurrection of the Preexisting Duty Doctrine*, 65 IOWA L. REV. 343 (1980) [hereinafter Hillman, *Resurrection*]; Charles L. Knapp, *The Promise of the Future—and Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932, 942-44 (1984) (reviewing E. ALLAN FARNSWORTH, CONTRACTS (1982)); Henry Mather, *Contract Modification Under Duress*, 33 S.C. L. REV. 615, 616-17 (1982); Richard Nathan, *Grappling with the Pre-Existing Duty Rule: A Proposal for a Statutory Amendment*, 23 AM. BUS. L.J. 509 (1986); Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936-39 (1958); B.J. Reiter, *Courts, Consideration, and Common Sense*, 27 U. TORONTO L.J. 439 (1977); Thornton E. Robison, *Enforcing Extorted Contract Modifications*, 68 IOWA L. REV. 699, 700-04 (1983); Lord Wright, *Ought the Doctrine of Consideration to Be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1229-31 (1936).

90. Partial defenses based upon the pre-existing duty rule—defenses of the “rule” as qualified by a significant battery of exceptions—are less rare and include fairly recent attempts. See, e.g., Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 546 (1981), discussed *infra* note 225.

91. See K.O. Shatwell, *The Doctrine of Consideration in the Modern Law*, 1 SYDNEY L. REV. 289, 306-08 (1954); see also Havighurst, *supra* note 61, at 25-30 (defending the traditional pre-existing duty rule).

92. For a useful division of the pre-existing duty rule into its component sub-rules, see Shatwell, *supra* note 91, at 306-07.

93. See CORBIN, *supra* note 89, §§ 7.5-7.6.

94. *Id.*

Such simple formulae, however, obscure the complexity of the rule, the variety of tasks it performs, and the way in which it overlaps with related applications of the more general doctrine of consideration. To be sure, in its paradigm cases, the pre-existing duty rule is a *postformation* policing device. It applies to *modifications* of ongoing contracts, and its traditional role is to distinguish enforceable from unenforceable modifications. It performs that role by requiring that any adjustment in contractual duties be an adjustment to the duties of both parties, *i.e.*, that the modification on each side be supported by "fresh" consideration on the other. However, particularly when the pre-existing duty is a "public" duty or a duty to a third person, the pre-existing duty rule can also be invoked at the *formation* stage of the contracting process.

At the opposite end of the spectrum, particularly in its incarnation in *Foakes v. Beer*,⁹⁵ the pre-existing duty rule operates as a policing device at the stage of cessation of contractual relations. In that role it applies to the compromise or release of contractual obligations. At that point the pre-existing duty rule blends with related applications of the more general requirement of bargained exchange, and the scope of the resulting cluster of rules extends to the settlement of disputes not even founded on a contract. It is perhaps understandable that judges would be reluctant to give up a tool capable of working with such a broad range of materials. It is also apparent that rational evaluation of the pre-existing duty rule will require separate analysis of each of the typical contexts in which it operates.

B. *Pre-Existing Contractual Duty Owed to a Third Party*

One of the more controversial subrules encompassed by the pre-existing duty rule is the doctrine that an existing duty to one person may not provide consideration for an agreement with a new party.⁹⁶ Thus, if *A* owes *B* a particular duty under an existing contract, *A*'s promise to *C* to perform the duty to *B* will not provide consideration for a promise from *C* to *A*. This aspect of the pre-existing duty rule has never commanded unanimous support, even in the courts.⁹⁷

95. 9 App. Cas. 605 (H.L. 1884).

96. See CORBIN, *supra* note 89, § 7.5.

97. For a recent case declining to apply the rule, see *USLife Title Co. v. Gutkin*, 732 P.2d 579 (Ariz. Ct. App. 1986). In that case an escrow agent in a land sale transaction prepared a deed containing an erroneous description of the land vendors intended to

There is however a small group of recent cases in which it has been applied.⁹⁸

Critics of the extension of the pre-existing duty rule to duties owed to third parties realized long ago that such cases usually involve genuine bargains.⁹⁹ If *C* promises to pay *B* if *B* will perform or promise to perform a pre-existing contractual duty to *A*, it is often because *B*'s performance will benefit *C* as well as *A*. If *B*'s promise to *C* is enforceable, *B* has given up some portion of the freedom *B* would otherwise have to seek a modification or release of *B*'s obligation from *A*.¹⁰⁰ The exchange and mutual inducement aspects of the notion of bargain are clearly present.¹⁰¹

*Arden Equipment Co. v. Rhodes*¹⁰² provides a more concrete example. Mr. and Mrs. Rhodes bought a backhoe from Arden Equipment, apparently financing the purchase with a secured loan from the Bank of Asheville.¹⁰³ The Rhodes defaulted, and the bank

convey to purchasers. *Id.* at 581. The ultimate result was that a remote purchaser was unable to secure financing and construct apartments on a portion of the property. *Id.* at 582. Faced with a lawsuit by the remote purchaser, the escrow agent agreed to pay the original vendor \$17,000 for a quitclaim deed to correct the original error. *Id.* at 583. After payment and receipt of the deed, the escrow agent sought to recover the \$17,000 as unjust enrichment, in part on the theory that the original vendor's pre-existing duty to convey the land to the original purchaser made the quitclaim deed insufficient consideration for the escrow agent's promise to pay for it. *Id.* at 585. The court rejected the escrow agent's theory. *Id.* at 586. The court relied on § 73 cmt. d of the *Restatement (Second) of Contracts* (1981), which identifies a modern trend to regard the performance of a pre-existing duty as sufficient consideration for a promise provided the duty is not owed to the promisor. *USLife Title Co.*, 732 P.2d at 586.

98. *Bennett v. Genoa AG Ctr., Inc. (In re Bennett)*, 154 B.R. 157 (Bankr. N.D.N.Y. 1993); *American Fletcher Mortgage Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978); *Mann Elec. Co. v. Webco S. Corp.*, 390 S.E.2d 905 (Ga. Ct. App. 1990); *City Nat'l Bank v. Russell*, 615 N.E.2d 1308 (Ill. App. Ct. 1993); *Arnold v. Krewson*, 834 S.W.2d 229 (Mo. Ct. App. 1992); *Tender Loving Care Agency v. Hladun*, 488 N.Y.S.2d 790 (App. Div. 1985); *Arden Equip. Co. v. Rhodes*, 285 S.E.2d 874 (N.C. Ct. App. 1982).

99. See Hamson, *supra* note 89, at 237-38.

100. *Id.* at 237.

101. The "requirement" of consideration may be summarized roughly as a requirement that an enforceable promise be part of an exchange of values and that each side of the exchange induce the other. See FARNSWORTH, *CONTRACTS*, *supra* note 40, §§ 2.2-2.10; GILMORE, *supra* note 33, at 18-34; OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 292-95 (1881).

102. 285 S.E.2d 874 (N.C. Ct. App. 1982).

103. Mr. and Mrs. Rhodes apparently signed a note and a security agreement making the backhoe collateral for the loan. *Id.* at 874-75. The court's opinion does not make it clear whether the Bank of Asheville was the original note payee and secured party or whether the bank acquired its interest by assignment from Arden Equipment. By the time of default, however, the bank was acting as secured party. *Id.*

gave notice that the backhoe would be sold at a private sale,¹⁰⁴ which is permitted by Article 9 of the Uniform Commercial Code.¹⁰⁵ The backhoe was sold at a price which left a deficiency on the note in excess of \$6000.¹⁰⁶ The bank and Arden Equipment apparently had some form of recourse arrangement as Arden Equipment then purchased the note from the bank and sought to recover the deficiency in an action against Mr. and Mrs. Rhodes.¹⁰⁷ By way of defense, the Rhodes alleged that Arden Equipment had promised them that it would not seek a deficiency judgment if they surrendered the collateral—the backhoe—to the bank voluntarily.¹⁰⁸ Although Mr. and Mrs. Rhodes had performed their side of the bargain, the court refused to hold Arden Equipment to its promise.¹⁰⁹ The bank was legally entitled to possession of the backhoe, and the Rhodes' promise to surrender it voluntarily thus could not supply consideration for its agreement with Arden Equipment.¹¹⁰

Quite clearly, however, the agreement between Arden Equipment and the Rhodes is indistinguishable from conventional bargains. Arden Equipment was presumably responsible to the bank for any deficiency resulting from the sale of the collateral. To the extent it could reduce the bank's costs of sale, that deficiency would be smaller. The cost savings entailed by a nonjudicial, voluntary repossession thus inured directly to the benefit of Arden Equipment.¹¹¹ On the other side of the transaction, it is clear that the Rhodes gave up something of substance. As a practical matter, a debtor can normally force a secured party to resort to judicial process to establish its entitlement to the collateral¹¹² and giving up such

104. *Id.* at 874.

105. *See* U.C.C. § 9-504 (1994).

106. *Arden Equip. Co.*, 285 S.E.2d at 874-75.

107. *Id.*

108. *Id.* at 874.

109. *Id.* at 876.

110. *Id.*

111. Indeed, if a borrower has too few assets to make obtaining a deficiency judgment worth the effort and expense, trading the right to a deficiency judgment for a voluntary surrender of the collateral might very well be a prudent move for a creditor. Obviously, if Arden Equipment once felt such a trade was prudent, it had reconsidered its decision by the time suit was filed.

112. The reason a debtor has some control over a secured creditor's resort to repossession is the requirement in U.C.C. § 9-503 that the remedy of self-help repossession be exercised without a "breach of the peace." U.C.C. § 9-503. Violation of that requirement can expose a secured creditor to tort liability, including liability for punitive damages. As a practical matter, § 9-503 makes it perilous for a secured creditor to

procedural protection constitutes a forfeiture of rights of more than negligible importance. Even under the archaic formula defining consideration as "benefit to the promisor or detriment to the promisee,"¹¹³ therefore, the Rhodes/Arden Equipment compromise appears to qualify as a bargain.

Extending the pre-existing duty rule to encompass contractual duties owed to third persons thus introduces internal inconsistency into the doctrine of consideration. Real bargains are disqualified from enforcement by a purported corollary to a more general doctrine that is designed to guarantee the enforcement of bargains.¹¹⁴ To be sure, in some of the cases so extending the pre-existing duty rule the resulting case dispositions are satisfactory, or, at least, not obviously unsatisfactory. In such cases, however, there is generally some ground unrelated to the doctrine of consideration for refusing to enforce the promise in question.¹¹⁵ If it is desirable to withhold enforcement

proceed with self-help repossession if the debtor even protests orally. The secured creditor's only truly safe response to a debtor's objection is to obtain judicial authorization to seize the collateral. For a collection of illustrative cases, see 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 27-6 (Prac. 3d ed. 1988).

113. The formula persists in consideration cases in spite of the fact that neither benefit nor detriment is universally required as a condition of the enforcement of promises. P.S. ATIYAH, *Consideration: A Restatement*, in *ESSAYS ON CONTRACT* 179, 191-99 (1986).

114. In addition to *Arden Equip. Co.*, see *Bennett v. Genoa AG Ctr., Inc. (In re Bennett)*, 154 B.R. 157, 159-60 (Bankr. N.D.N.Y. 1993) (holding junior creditor's promise to release lien on property to enable debtor to sell property and satisfy pre-existing duty to pay proceeds to senior creditor unenforceable, even though sale would have improved junior creditor's position as to debtor's remaining property); *Mann Elec. Co. v. Webco S. Corp.*, 390 S.E.2d 905, 908 (Ga. Ct. App. 1990) (involving an owner of a construction project, who had no direct contractual relationship with subcontractor, but who promised to pay delinquent general contractor and subcontractor with joint checks; court remands for determination whether general's breach of subcontract is so material as to excuse subcontractor's performance, implying that only under that circumstance is consideration present).

115. The alternate ground of decision is embraced by the court in some cases. In others, the use of the pre-existing duty rule truncates the record, and the alternate ground is merely suggested by the facts of the case. See *American Fletcher Mortgage Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978) (holding standby lender's alleged agreement to make loan to developer if primary lender funded loan to developer unenforceable because primary lender was already under a duty to developer, and because of failure of assent and of conditions precedent); *City Nat'l Bank v. Russell*, 615 N.E.2d 1308 (Ill. App. Ct. 1993) (reversing summary judgment on guaranty; court finds material issues of fact as to consideration for and fraud in the inducement of an increase in the amount guaranteed); *Arnold v. Krewson*, 834 S.W.2d 229 (Mo. Ct. App. 1992) (holding former wife's promise to reduce former husband's child support obligations in return for former husband's payment of debt upon which former husband and former wife were jointly liable unenforceable, because husband was already obligated to pay debt; facts

from such promises, it is not because they are not constituents of bargains, but because there are some grounds for refusing to enforce genuine bargains. The extension of the pre-existing duty rule to contractual duties owed to third parties is thus either redundant or harmful, and it creates doctrinal and theoretical inconsistencies as well.

C. "Public" Duties

The pre-existing duty rule is also applied in instances in which the duty in question is a duty imposed by some branch of law other than contract.¹¹⁶ The duty may be one imposed on all citizens, such as the duty to refrain from conduct that amounts to a tort or a crime. Alternatively, the duty may be an official duty imposed upon a certain group of public employees, elected officials, or other limited class. In either case the traditional rule is that a promise to perform, or actual performance, of the public duty is not consideration for a return promise.¹¹⁷ The traditional rule is alive and well and reflected in recent cases.¹¹⁸

In contrast to cases decided under other corollaries to the doctrine of consideration, the cases decided under the "public duty" arm of the pre-existing duty rule do not appear to include a significant number of undesirable decisions. Nevertheless, those cases do not provide significant support for retention of the pre-existing duty rule

suggest husband may have taken advantage of former wife's economic necessity and pressure by obligee); *Tender Loving Care Agency v. Hladun*, 488 N.Y.S.2d 790 (App. Div. 1985) (holding daughter's oral promise to pay for health care services for which father had contracted unenforceable on grounds of pre-existing duty rule and statute of frauds).

116. See *infra* cases cited in note 118.

117. See RESTATEMENT OF CONTRACTS § 76 (1932).

118. *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981); *Holcomb v. United States*, 622 F.2d 937 (7th Cir. 1980); *In re Lloyd, Carr & Co.*, 617 F.2d 882 (1st Cir. 1980); *Spiering v. City of Madison*, 863 F. Supp. 1065 (D.S.D. 1994); *Robles v. Humana Hosp. Cartersville*, 785 F. Supp. 989 (N.D. Ga. 1992); *Salaymeh v. St. Vincent Memorial Hosp. Corp.*, 706 F. Supp. 643 (C.D. Ill. 1989); *Floyd v. United States*, 26 Cl. Ct. 889 (1992), *aff'd*, 996 F.2d 1237 (Fed. Cir.), *cert. denied*, 114 S. Ct. 328 (1993); *Travelers Ins. Co. v. Breese*, 675 P.2d 1327 (Ariz. Ct. App. 1983); *Schaefer v. Williams*, 15 Cal. App. 4th 1243, 19 Cal. Rptr. 2d 212 (1993); *Slattery v. Wells Fargo Armored Serv. Corp.*, 366 So. 2d 157 (Fla. Dist. Ct. App. 1979); *White v. Village of Homewood*, 628 N.E.2d 616 (Ill. App. Ct. 1993), *cert. denied*, 633 N.E.2d 16 (Ill. 1994); *Harris v. Johnson*, 578 N.E.2d 1326 (Ill. App. Ct. 1991); *Hurley v. Hurley*, 615 P.2d 256 (N.M. 1980), *overruled on other grounds by Ellsworth v. Ellsworth*, 637 P.2d 564 (N.M. 1981); *Góncalves v. Regent Int'l Hotels, Ltd.*, 447 N.E.2d 693 (N.Y. 1983); *Cronk v. State*, 420 N.Y.S.2d 113 (Ct. Cl. 1979); *Agristor Credit Corp. v. Unruh*, 571 P.2d 1220 (Okla. 1977); *City of Spartanburg v. Spartan Villa*, 253 S.E.2d 501 (S.C. 1978); *Bayer v. Burke*, 338 N.W.2d 293 (S.D. 1983).

because the rule reaches its greatest level of redundancy in the public duty cases.¹¹⁹ The public duty arm of the pre-existing duty rule is conceptually connected to more satisfactory doctrines that may be used in lieu of the doctrine of consideration in cases involving a promise exchanged for performance—or a promise of performance—of a public duty.

More specifically, the public duty cases tend to fall into three categories.¹²⁰ In the first category the promise to perform the pre-existing public duty operates as an instrument of coercion. Indeed, the connection between coercion and the promise to perform a pre-existing public duty is most obvious when the public duty is the duty to refrain from committing a crime or a tort. The crudest extortionist may threaten to beat a victim if the latter does not promise to pay a sum of money. The extortionist who promises to refrain from battery for the same return is only slightly more refined. The first category of pre-existing public duty cases includes a few equally severe cases of coercion.

*Salmeron v. United States*¹²¹ is probably the most appalling example. Robert Salmeron began divorce proceedings in California against his wife, Susan.¹²² Service of process on Susan was accomplished with little difficulty, as Susan was in the local county jail at the time.¹²³ Robert had physical custody of the couple's two minor children, and he sought permanent custody in the divorce proceeding.¹²⁴ At the appropriate time, Robert's attorney informed Susan of a final hearing date on Robert's petition for dissolution of the marriage.¹²⁵ Susan then arranged an extremely unpleasant surprise.

Robert and the children had been living with Robert's mother in her home.¹²⁶ Five days before the final hearing, U.S. marshals took the children from the mother's home while Robert was away.¹²⁷

119. Hamson seems to have recognized this overlap between violation of public policy and bargains for performance of a public duty. Oddly enough, however, he seemed to regard the overlap as a reason for retention of the public duty arm of the pre-existing duty rule. See Hamson, *supra* note 89, at 240.

120. The categories overlap to some extent, and certain cases could be placed in more than one category.

121. 724 F.2d 1357 (9th Cir. 1983).

122. *Id.* at 1359.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

The marshals neither gave prior notice of the action they were about to take nor obtained any form of judicial authorization.¹²⁸ The children were turned over to Susan, whose release from jail had been arranged by the local U.S. attorney.¹²⁹ Susan's boyfriend, who was apparently a member of the Hell's Angels Motorcycle Club, was released at the same time.¹³⁰ Although Robert was awarded custody of the two children in the divorce proceeding, Susan, her boyfriend, and the two children were accepted into the federal Witness Protection Program, presumably in return for testimony against the Hell's Angels.¹³¹ All four were then relocated to an undisclosed location.¹³²

It took Robert twenty-one months and litigation in both California and the District of Columbia to get the children back,¹³³ largely due to the recalcitrance of federal officials.¹³⁴ Finally, while the litigation was still pending, a government attorney offered to return the children if Robert would release the government from any liability for their "relocation."¹³⁵ Robert signed the release, the children were returned, and Robert promptly filed a tort action against the government.¹³⁶ Summary judgment in favor of the government, based on the release, was reversed on appeal.¹³⁷ The Court of Appeals determined that there were two "triable issues of fact."¹³⁸ First, notwithstanding Robert's representation by counsel, there was a significant possibility that the release had not been executed voluntarily.¹³⁹ Second, it appeared that, in offering to

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1360.

134. *Id.* at 1362. Indeed, although the government was informed of the state custody order, it was more than six months before any federal official disclosed to Robert that his children were in the Witness Protection Program. *Id.* at 1360. The government broke an agreement to produce the children for a custody hearing in California. *Id.* Robert's habeas corpus proceeding in the Northern District of California was then transferred to the District of Columbia when the government, in an ex parte communication, informed the California judge that the children were not in the jurisdiction. *Id.* The government's offer to return the children came only after the government had moved to dismiss the District of Columbia case on the grounds that jurisdiction was proper only in Virginia. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1364-65.

138. *Id.* at 1363.

139. *Id.* at 1362.

return the children in compliance with a state custody order, the government merely promised to give Robert something he was already entitled to.¹⁴⁰ If so, the government's satisfaction of its correlative duty could not provide consideration for the release.¹⁴¹

The close connection between the two grounds of decision is quite obvious. The "promise" to perform the pre-existing duty carried a thinly veiled threat.¹⁴² Other cases in this category are less colorful, but the use of a promise to perform a pre-existing public duty as an instrument of coercion is equally clear.¹⁴³ In such cases the various doctrines used to police coercion, including duress, undue influence, and unconscionability, could provide substitutes for the pre-existing duty rule.

In the second category of cases, the public duty arm of the pre-existing duty rule exhibits an equally close connection to another cluster of contractual defenses, specifically the defenses of illegality and inconsistency with public policy. The major concern in this category of cases is that enforcement of a transaction in which one party merely promises to perform a pre-existing public duty would encourage some form of behavior inimical to the interest of society. The clearest cases are those in which a public official receives a promise of special compensation or some other benefit in return for performing the duties of the office.¹⁴⁴ Enforcement of such promis-

140. *Id.* at 1362-63.

141. *Id.*

142. Robert's attorney testified that when he received the offer of the return of his children in exchange for a release, Robert specifically asked whether the government would turn over the children in the absence of a release. The response was, "'Well, do you want the children back?'" *Id.* at 1361.

143. *See, e.g.,* *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (invalidating waiver of right to use trade name in return for approval of site plan for restaurant; one judge relies on pre-existing duty rule while the other relies on defense of duress); *Spiering v. City of Madison*, 863 F. Supp. 1065 (D.S.D. 1994) (involving settlement of grievance in return for refraining from discharge of employee in violation of First Amendment rights); *Agristor Credit Corp. v. Unruh*, 571 P.2d 1220 (Okla. 1977) (holding that agreement by feed suppliers not to disrupt commercially reasonable sale conducted by secured creditor with priority over feed suppliers was not consideration for alleged agreement by secured creditor to pay a portion of proceeds to suppliers; feed suppliers' disruption of sale would have had "disastrous effect" on sale); *City of Spartanburg v. Spartan Villa*, 253 S.E.2d 501 (S.C. 1978) (finding no consideration for alleged agreement by developer, after project was completed, to pay unusually high sewer tap fee in return for city's performance of pre-existing duty to provide sewer service; appellate court did not reach lower court finding of economic duress).

144. *See, e.g.,* *Slattery v. Wells Fargo Armored Serv. Corp.*, 366 So. 2d 157 (Fla. Dist. Ct. App. 1979) (precluding independent polygraph operator employed by state offices from

es might encourage public employees to shirk their duties unless such special benefits became routine or to perform their duties selectively in favor of their benefactors.¹⁴⁵ In other cases the objectionable feature of the transaction is that one party uses the performance of a public duty to extract a waiver of an important right.¹⁴⁶ Finally, there is a series of cases in which the courts express concern that the enforcement of promises given in return for the performance of a public duty would encourage behavior which would actually frustrate the statutory scheme giving rise to the public duty.¹⁴⁷ In the cases

recovering on promise of reward for information learned during the course of state employment; recovery barred by pre-existing duty rule and public policy); *Harris v. Johnson*, 578 N.E.2d 1326 (Ill. App. Ct. 1991) (holding promise by incoming mayor to reappoint current police chief if police chief would continue to fulfill duties of the office in the interim unenforceable on grounds of lack of consideration and inconsistency with public policy). *Harris* is of particular interest because it illustrates the primacy of the public policy rationale in this type of case. The incoming mayor's promise to reappoint the police chief if the chief remained on the job may or may not have satisfied traditional consideration requirements. If the chief were required by the terms of the contract to remain in the job for a specific term, the pre-existing duty rule would apply, and the mayor's promise would be unenforceable. If, on the other hand, the chief were free to leave at any time, it is at least arguable that the agreement to forego exercising the right to leave would provide consideration for the mayor's promise even under classical consideration theory. In either case, however, the public policy concerns implicated when the chief, a public employee, extracted an additional benefit for doing the chief's duty are sufficient to deny enforcement to the mayor's promise. It thus matters very little whether the transaction is a classical bargain.

145. See CORBIN, *supra* note 89, § 7.11; Eisenberg, *Principles*, *supra* note 34, at 647-49; Patterson, *supra* note 89, at 939.

146. See, e.g., *White v. Village of Homewood*, 628 N.E.2d 616 (Ill. App. Ct. 1993) (holding that where municipal code required administration of pre-employment agility test, test administration was not consideration for applicant's release of potential liability for negligent administration), *cert. denied*, 633 N.E.2d 16 (Ill. 1994); *Goncalves v. Regent Int'l Hotels, Ltd.*, 447 N.E.2d 693 (N.Y. 1983) (holding that where statute required hotel to provide a safe as condition of limiting liability, privilege of using safe was not consideration for liability limitation and release contained in safe deposit box receipt); *Cronk v. State*, 420 N.Y.S.2d 113 (Ct. Cl. 1979) (holding that interim payment mandated by statute in appropriation cases in which parties do not reach settlement does not provide consideration for provision preventing claimant from introducing specific evidence in court; agreement lacks consideration, is unconscionable, and is contrary to public policy).

147. See, e.g., *In re Lloyd, Carr & Co.*, 617 F.2d 882 (1st Cir. 1980) (holding that agreement by bankrupt to retrieve assets secreted in Bermuda in return for permission to use half the assets for bail in criminal proceeding unenforceable by bankrupt; bankrupt had pre-existing duty to turn over all funds to receiver, and recognizing agreement would encourage bankrupts to refuse to comply, in contravention of public policy); *Goncalves v. Regent Int'l Hotels, Ltd.*, 447 N.E.2d 693 (N.Y. 1983) (noting that recognition of liability limitation in hotel safe deposit box receipt would encourage hotel operators to provide less security than statute requires for limitation of liability); *Bayer v. Burke*, 338 N.W.2d 293 (S.D. 1983) (holding that note given in return for forbearance from suit upon gambling

in this category, the defense of illegality or inconsistency with public policy is sufficient by itself to dictate the desirable result.¹⁴⁸ The pre-existing duty rule is a needless complication.

The third category of cases decided under the public duty arm of the pre-existing duty rule is similarly intimately connected with public policy, but the structure of the cases is somewhat different. In this class of cases, one of the parties attempts to transform a public duty into a contractual duty, usually for the purpose of collecting damages for its breach.¹⁴⁹ Though the courts often use the doctrine of consideration as a vehicle for deciding such cases, the truly objectionable feature of such cases is the impropriety of classifying the underlying duty as contractual.

*Pennsylvania Department of Transportation v. First Pennsylvania Bank*¹⁵⁰ provides a straightforward example. The plaintiff bank financed an individual's purchase of a new car from an automobile dealer, Murphy Ford.¹⁵¹ The bank reserved a security interest in the vehicle, and, when Murphy Ford submitted a title application to the Department of Transportation (DOT), it requested notation of the

debts held unenforceable). In addition to the foregoing cases, *Holcomb v. United States*, 622 F.2d 937 (7th Cir. 1980) is probably explainable on similar grounds. That case involved a suit by the officers of a bankrupt corporation against the Internal Revenue Service (IRS) for a refund of payments of corporate taxes made by them individually on behalf of the corporation. *Id.* at 939. The officers alleged that, in return for their agreement to make payments of corporate "trust fund" taxes, for which they were personally liable, during the pendency of the corporate bankruptcy, the IRS agreed to apply any proceeds from the corporate bankruptcy to corporate taxes for which the officers were personally liable rather than corporate taxes for which they were not personally liable. *Id.* at 938, 940. The effect of the agreement, of course, would be to reduce the officers' individual exposure. The court held that the officers were under a pre-existing duty to pay the corporate taxes, and that any agreement by the government based on the satisfaction of that duty was without consideration. *Id.* at 941. While the court did not mention it, it may be that enforcement of such agreements would encourage taxpayers to "stonewall" the government until they could extract such a liability reduction at the expense of the public purse. Absent some such public policy implications, the alleged agreement at issue in *Holcomb* would appear to be a reasonable form of compromise agreement.

148. Indeed, the illegality/public policy defense is actually superior because it will yield the desirable result even if the party whose behavior is undesirable manages to circumvent the pre-existing duty rule by adding a "peppercorn"—some trivial consideration—to his promise to perform a pre-existing duty.

149. *Pennsylvania Dep't of Transp. v. First Pa. Bank*, 466 A.2d 753 (Pa. Commw. Ct. 1983).

150. *Id.*

151. *Id.* at 754.

name of the secured party on the certificate of title.¹⁵² By statute DOT had a duty to record such a lien upon request.¹⁵³ DOT, however, failed to endorse the title properly and, instead, mailed it to the vehicle's purchaser.¹⁵⁴ The purchaser then sold the car, defaulted on the loan, and left the jurisdiction.¹⁵⁵ The bank obtained an award against DOT from the Pennsylvania Board of Claims in the amount of the outstanding loan balance.¹⁵⁶ The bank's theory was that it was the third party beneficiary of a contract between DOT and Murphy Ford under which DOT was obligated to record the lien.¹⁵⁷ The award was reversed on appeal on the grounds that the requirement of a bargained exchange could not be satisfied if one of the parties—DOT—had a pre-existing duty to render the promised performance.¹⁵⁸

It requires very little reflection to appreciate the contrived nature of the court's reasoning and the presence of a strong, but unarticulated, policy basis for the decision. The pre-existing duty rule is normally used to invalidate a promise given in *return* for a promise to fulfill a pre-existing duty.¹⁵⁹ It is not designed to deny enforcement of the pre-existing duty itself. In *First Pennsylvania Bank*, however, the effect of the court's decision was to preclude an award of damages for violation of the pre-existing duty to record a lien on a title certificate.¹⁶⁰ The court seems to have the doctrine of consideration precisely backwards. If the duty to record the lien were truly contractual, the consideration necessary to support it could presumably be found in Murphy Ford's payment of the usual title application fee.¹⁶¹ The pre-existing duty rule could only be used to attack whatever duties the alleged "contract" placed on Murphy Ford. While further fancy judicial footwork might bring the case within the ambit of traditional consideration principles,¹⁶² it is apparent that

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. CORBIN, *supra* note 89, § 7.1.

160. *Pennsylvania Dep't of Transp. v. First Pa. Bank*, 466 A.2d 753 (Pa. Commw. Ct. 1983).

161. *Id.* at 754.

162. It is possible, of course, that the ever-manipulable doctrine of consideration could be stretched to deny enforcement of DOT's duty as well. Thus, it might be argued,

there is no need to resort to such heroic measures. The simple truth is that any reference to an "agreement" between Murphy Ford and DOT is pure fiction. A statute requires Murphy Ford to pay a fee to obtain a certificate of title. The statute likewise requires DOT to record a lien on the certificate upon an appropriate request accompanied by payment of the fee. There is nothing remotely like assent on either side, and the obligations are in no sense consensual.¹⁶³

If a public official fails to perform such a nonconsensual duty, several interesting policy questions arise. The courts or the legislature must decide whether sovereign immunity has been, or should be, waived in order to permit a private right of action against the official. The appropriate theory of recovery and standard of care must likewise be selected. The bank's contract claim was nothing but an attempt to circumvent such questions instead of answering them and to recover from the nearest deep pocket when the bank's borrower was beyond its reach. The court apparently sensed, but did not articulate, the conceptual impropriety of the bank's use of contract law for such purposes.¹⁶⁴

While the pre-existing duty rule could be bent and twisted to foil the bank, a direct appeal to policy would have articulated the defect in the bank's approach more clearly. Several of the cases decided under the public duty arm of the pre-existing duty rule seem to reflect a similar, though sometimes unarticulated, recognition of the impropriety of using contract law to enforce public duties or to provide a covert resolution of the policy issues such duties raise.¹⁶⁵

because DOT had a pre-existing duty to record the lien, Murphy's "promises" were not supported by consideration and could not be enforced by DOT. Under the principle of mutuality of obligation, however, if DOT could not enforce the contract, neither could Murphy Ford. Thus, neither party has any remedy in contract against the other, and the bank, as a third party beneficiary, has no greater rights. There are two responses to the foregoing argument. First, the court actually adopted nothing remotely like the argument, and, given the rather straightforward policy basis for its decision, it would have been foolish to engage in such convoluted reasoning. Second, the crucial premise for the argument is the principle of mutuality obligation, which I have criticized extensively elsewhere. See Wessman, *supra* note 2.

163. See *Pennsylvania Dep't of Transp. v. First Pa. Bank*, 466 A.2d 753 (Pa. Commw. Ct. 1983).

164. See *id.*

165. See *Floyd v. United States*, 26 Cl. Ct. 889 (1992), *aff'd*, 996 F.2d 1237 (Fed. Cir.), *cert. denied*, 114 S. Ct. 328 (1993) (holding that the language of a security agreement with Farmers Home Administration (FmHA) obligating FmHA to "make or insure future loans . . . provided funds are available and the Debtor meets all then current requirements imposed by regulations" could not be the basis of a breach of contract action because the

The three categories of cases described above literally exhaust the cases decided under the public duty arm of the pre-existing duty rule. While the public duty rule appears to do little substantive harm, it is at best an indirect way of producing results desirable for other reasons. Direct appeals to public policy and to the defenses used to police coercion would produce the desirable results without the doctrinal distraction.

D. Modifications of Ongoing Contracts

The bulk of the criticism of the pre-existing duty rule has been directed at its role in policing adjustments to contractual relations in which performance is continuing or expected to continue.¹⁶⁶ As a policing device for modifications, the rule has been subjected to a battery of critical arguments which, by now, form a familiar litany.

Initially, critics have observed that the pre-existing duty rule was not truly a logical entailment of the more general doctrine of consideration, even if one assumes that consideration should generally

language merely restated administrative duties of FmHA and therefore (1) did not satisfy the requirement of consideration, and (2) may not be transformed from discretionary administrative responsibility into a contractual undertaking); *Robles v. Humana Hosp.*, 785 F. Supp. 989 (N.D. Ga. 1992) (holding that physician has no contract action against hospital for failure to comply with its own bylaws concerning revocation of staff privileges; bylaws concerning professional review are mandated by statute and cannot be consideration for a contract, and interpreting them as a contract would be inconsistent with public policy); *Salaymeh v. St. Vincent Memorial Hosp. Corp.*, 706 F. Supp. 643 (C.D. Ill. 1989) (holding that physician who resigned in return for promise of confidentiality of adverse report may not maintain contract action; statute required that report be kept confidential, and promise of confidentiality could not be consideration for contract); *Schaefer v. Williams*, 15 Cal. App. 4th 1243, 19 Cal. Rptr. 2d 212 (1993) (holding an election campaign pledge to abide by the Code of Fair Campaign Practices, including refraining from defamation, not enforceable through private action in contract); *Hurley v. Hurley*, 615 P.2d 256 (N.M. 1980), *overruled on other grounds by* *Ellsworth v. Ellsworth*, 637 P.2d 564 (N.M. 1981) (involving a husband's promises to refrain from infidelity, be a faithful and providing husband, and submit to counseling in return for wife's dismissal of divorce action; wife may not recover for breach because (1) husband only promised to do what he was already bound to do, depriving the contract of mutuality, and (2) contract is also against public policy); *Cronk v. State*, 420 N.Y.S.2d 113 (Ct. Cl. 1979) (holding that evidentiary exclusion in "Agreement for Advance Payment" not enforceable; agreement is required by statute and not a true contract, and it would run afoul of the pre-existing duty rule if it were assumed to be contractual); *see also* *Travelers Ins. Co. v. Breese*, 675 P.2d 1327 (Ariz. Ct. App. 1983) (holding that where worker's compensation carrier's election of remedies agreement merely reproduced statutory obligations of carrier, those obligations could not be consideration, and agreement imposed no duty on insured to file suit against third party responsible for accident).

166. *See* authorities cited *supra* note 89.

function as a gatekeeper.¹⁶⁷ Even if it is assumed that only promises that are components of bargained exchanges should be enforced, an adjustment to only one side of a bargained exchange does not transform the entire exchange transaction into a gift transaction.¹⁶⁸ It merely alters the value or extent of the performances exchanged and perhaps the balance of advantage to the exchange.¹⁶⁹ Nothing in the very notion of consideration, however, logically compels that modifications be treated like initial contract formation¹⁷⁰ or that parties who have agreed on the terms of a proposed exchange may not revisit and revalue it if they choose.¹⁷¹ Therefore, even advocates of the traditional gatekeeping function of the doctrine of consideration need not accept the pre-existing duty rule as a simple logical consequence.

Further, it has been argued, even if one accepts Fuller's view that the general "requirement" of consideration serves cautionary, channeling, and evidentiary functions analogous to the functions served by formalities generally,¹⁷² the pre-existing duty rule is

167. See FARNSWORTH, *CONTRACTS*, *supra* note 40, § 4.21 ("The logic of the pre-existing duty rule is far from inexorable. To one schooled in the contemporary bargain theory of consideration, it might seem just as logical to conclude that performance, even by one who is already under a duty to perform, is consideration for a promise if the performance is bargained for.").

168. Cf. Reiter, *supra* note 89, at 456-57 (arguing that unilateral modifications involve actual bargaining and allocation of goods and resources).

169. Obviously, there is a logically possible limiting case in which a one-sided adjustment to an exchange transaction converts it from an exchange to a gratuitous transaction. If one party has not yet commenced performance and the effect of the adjustment is to eliminate all duties of performance incumbent upon that party while preserving the duties of the other party, the other party's performance or promise becomes technically gratuitous. Such cases are probably empirically trivial. In the reported modification cases discussed *infra* notes 191-272 and accompanying text, both parties typically render or promise some performance at some point. The modifications at issue merely change the balance of advantage to the exchanges in question.

170. See SUTTON, *supra* note 76, at 261 n.251 (citing Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 742 (1931)); Reiter, *supra* note 89, at 507.

171. See DAWSON, *supra* note 37, at 210 ("Any performance that was already due under an existing obligation was erased—deleted—as a permissible subject of new agreement, unless it was modified in some minor way Thus, within the limits of the obligation their agreement had created, the parties had destroyed their own power to contract. The logic that produced this contradiction could have been refuted, but it seemed easier to find a way around it.").

172. Fuller, *supra* note 77, at 800-06; see also Nathan, *supra* note 89, at 514 (discussing Fuller's "cautionary" function and "channeling" function in relation to the pre-existing duty rule.); Reiter, *supra* note 89, at 454-55 (discussing Fuller's three functions performed by legal formalities in contracts).

neither necessary nor important in performing those functions. To the extent evidentiary problems are presented in the context of contract modification, such problems are better solved by requiring a writing or some similar formality.¹⁷³ Moreover, the modification context does not present any particularly pressing need for cautionary and channeling devices.¹⁷⁴ Modifications are normally adjustments in ongoing business exchanges, and the exchange context itself provides some incentive for caution and appropriate channeling of conduct.¹⁷⁵

If the pre-existing duty rule is thus neither required for the sake of logical consistency nor supported by the alleged policy basis for the general requirement of consideration, its genesis and durability call for some explanation. The usual explanation is that the pre-existing duty rule was a device developed by the common-law courts as an indirect way of policing a particular type of bargaining evil, variously characterized as "coerced,"¹⁷⁶ "extorted,"¹⁷⁷ or "opportunistic."¹⁷⁸ The precise definition of the evil to be avoided varies to some extent among commentators.¹⁷⁹ The fundamental goal, however, seems to be to distinguish modifications motivated by some legitimate business justification, on the one hand, from modifications at an opposite pole designed merely to reallocate the potential gain of a previously-agreed exchange and procured by exploiting the superior bargaining position of one party or the weakness or vulnerability of the other.¹⁸⁰

173. See Reiter, *supra* note 89, at 457 n.73.

174. Cf. Hillman, *Restatement*, *supra* note 89, at 688 n.52 (arguing that most modification cases involve modifications made with sufficient deliberation).

175. See Reiter, *supra* note 89, at 457.

176. See Gordon, *Consideration*, *supra* note 67, at 288; Hillman, *Restatement*, *supra* note 89, at 681; Nathan, *supra* note 89, at 512.

177. See Gordon, *Consideration*, *supra* note 67, at 289; Nathan, *supra* note 89, at 512; Robison, *supra* note 89, at 701-02; see also CORBIN, *supra* note 89, § 7.6 (identifying the purpose of the pre-existing duty rule as the prevention of a "hold-up game").

178. See Muris, *supra* note 90, at 522-26, 532-52.

179. Compare Hillman, *Restatement*, *supra* note 89, at 682-84 (characterizing the problem as distinguishing between voluntary and coercive or extortionate modifications and specifying the factors to be considered in making the distinction) with Muris, *supra* note 90, at 523-26 (defining opportunism) and Robison, *supra* note 89, at 701-02 (explaining extortion in terms of temporary monopoly).

180. See authorities cited *supra* notes 173-79. A few commentators would go even further and allow enforcement of some modifications that are, in some sense, coerced. See Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987); Robison, *supra* note 89. Even the view that all coercive modifications should be denied enforcement, however, is a lesser restriction on modification than the

Assuming that the goal of modification law is, or ought to be, to distinguish coerced or opportunistic modifications from justified modifications and enforce only the latter, it has been argued that the pre-existing duty rule is a supremely clumsy tool for accomplishing that goal. On the one hand the rule is clearly underinclusive because it is so easily avoided by the sophisticated extortionist. Since, under traditional rules, a mere peppercorn suffices as consideration, any party who knows of the rule and has the power and desire to coerce a modification can easily extract a major concession from the opposite party while making a minor adjustment in his own contemplated performance.¹⁸¹ The pre-existing duty rule is thus a hurdle only to the crude or ignorant extortionist.

On the other hand as a device for policing coercion, the pre-existing duty rule is also overinclusive.¹⁸² It deters or blocks enforcement of one-sided modifications that are not coerced and for which there are good reasons. Indeed, there are numerous instances in which one who promises to pay an increased price for a previously promised performance is making what Corbin called a "bargain in fact," in the sense that the receipt of the previously promised performance is a genuine benefit worth the increased price to the promisor.¹⁸³ More broadly, some have argued that the picture of modification painted by the pre-existing duty rule is a distortion of the actual character of the exchange process, particularly in the context of long-term contracts or business relationships. Such long-term relationships are often characterized by a series of adjustments in performance on both sides, only some of which can be paired and characterized as a mutual quid pro quo.¹⁸⁴ Moreover, the adjust-

pre-existing duty rule, which is the primary concern of this section. Accordingly, the question whether all, or only some, coercive modifications should be denied enforcement is irrelevant to this Article; the pre-existing duty rule is too restrictive under either view.

181. See SUTTON, *supra* note 76, at 212 n.76; Hillman, *Restatement, supra* note 89, at 684-85; Mather, *supra* note 89, at 616-17; Nathan, *supra* note 89, at 520-21; Reiter, *supra* note 89, at 458-59.

182. See Hillman, *Restatement, supra* note 89, at 685; Nathan, *supra* note 89, at 513.

183. See CORBIN, *supra* note 89, § 7.2; see also ATIYAH, *supra* note 113, at 190 (arguing that there may be benefit and detriment in fact where there is no additional consideration for a modification to a contract); SUTTON, *supra* note 76, at 237-38; Hamson, *supra* note 89, at 237-39 (arguing that there may be actual benefit or detriment to the parties to modify a contract in the absence of additional consideration even where one party owes a pre-existing duty to the other); Nathan, *supra* note 89, at 518 (arguing that courts should consider "actual" benefit and detriment as opposed to "legal" benefit and detriment).

184. See Gordon, *Dialogue, supra* note 76, at 995, 1004 n.121; Hillman, *Restatement, supra* note 89, at 700-01; Reiter, *supra* note 89, at 465-66; Wright, *supra* note 89, at 1230-

ments or promises of adjustment which may not be so characterized generate the same expectations and are no less worthy of enforcement than the ones that fit the more discrete modification model presupposed by the pre-existing duty rule.

Because of the imprecision of the pre-existing duty rule in its pristine form, courts have been forced to find devices to ameliorate its harsh effects in particular cases.¹⁸⁵ An imaginative court wishing to enforce an apparently one-sided modification may be able to "find" a peppercorn's worth of consideration on the apparently unchanged side of the transaction.¹⁸⁶ If the contract of which modification is sought is at least partially executory on both sides, an apparently one-sided adjustment might be enforced on the—normally fictitious and mildly silly—theory that the parties agreed to a mutual rescission of the old contract and to a new contract on the modified terms.¹⁸⁷ Alternatively, if a court can find circumstances unanticipated at the time of the initial formation of the contract that make a one-sided modification fair, there is likewise authority for enforcement of the modification.¹⁸⁸

While all of these exceptions to the pre-existing duty rule undoubtedly enable creative judges to enforce desirable one-sided modifications, they also destroy the apparent simplicity of the pre-existing duty rule, arguably its main attraction. As a result, some commentators advocate the outright abandonment of the pre-existing duty rule and favor the use of doctrines such as good faith and economic duress as the devices for policing coercion in the modification process.¹⁸⁹ The notion of duress, in particular, offers the additional advantage that it not only offers a vehicle for refusing to

31.

185. See Hillman, *Restatement*, *supra* note 89, at 685; Knapp, *supra* note 89, at 943; Reiter, *supra* note 89, at 474.

186. See Patterson, *supra* note 89, at 936; Reiter, *supra* note 89, at 475-76.

187. See CORBIN, *supra* note 89, § 7.15; Gordon, *Consideration*, *supra* note 67, at 290; Gordon, *Dialogue*, *supra* note 76, at 999; Hillman, *Restatement*, *supra* note 89, at 685; Knapp, *supra* note 89, at 943; Nathan, *supra* note 89, at 525-26; Reiter, *supra* note 89, at 492-98; Robison, *supra* note 89, at 700-01.

188. See Hillman, *Restatement*, *supra* note 89, at 685; Knapp, *supra* note 89, at 943; Nathan, *supra* note 89, at 522-25; Reiter, *supra* note 89, at 476-79.

189. See DAWSON, *supra* note 37, at 210-11; Gordon, *Consideration*, *supra* note 67, at 289; Gordon, *Dialogue*, *supra* note 76, at 998-99; Hillman, *Restatement*, *supra* note 89, at 703; Knapp, *supra* note 89, at 943; Nathan, *supra* note 89, at 528-42; Patterson, *supra* note 89, at 937. With respect to sales of goods, § 2-209(1) of the U.C.C. has abolished the pre-existing duty rule, and the decades of experience under the Code have produced no clamor for its reintroduction.

enforce coerced promises but also supports a claim for unjust enrichment in those situations in which the offending party manages to coerce actual performance in addition to a promise.¹⁹⁰

In assessing whether the current operation of the pre-existing duty rule lives up to the foul reputation spread by its critics, it is helpful to note that its application is concentrated in particular kinds of cases. Because the problems created by the rule vary somewhat with these recurring factual contexts, the discussion of the rule's role in policing modifications will likewise be organized according to the most frequently recurring factual patterns.

1. Construction and similar cases

Building contracts and similar contracts for the development or improvement of realty constitute a significant subset of the cases in which the pre-existing duty rule has been applied in recent years. In a significant portion of these cases, the pre-existing duty rule is as redundant as other corollaries to the doctrine of consideration have proven to be in other contexts. It is comparatively easy to find cases of purported modifications in which the pre-existing duty rule produces results that are, or could be, justified by appeal to other doctrinal mechanisms, including findings of failure of assent or of misunderstanding;¹⁹¹ applications of the defenses of duress, fraud, or lack of good faith;¹⁹² findings that particular communications do not

190. See Knapp, *supra* note 89, at 943 n.21.

191. See *American Fletcher Mortgage v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978) (using pre-existing duty rule as a ground of decision alternate to failure of assent); *Newkirk Constr. Corp. v. Gulf County*, 366 So. 2d 813 (Fla. Dist. Ct. App. 1979) (holding that alleged amendment to contract fails for lack of mutual assent and lack of new consideration); *All In One Maintenance Serv. v. Beech Mountain Constr. Co.*, 318 S.E.2d 856 (N.C. Ct. App. 1984) (applying pre-existing duty rule to support reversal of summary judgment on contractor's claim that subcontractor released contractor from all liability; parties also disagree whether release was intended to cover liability for termination of contract or merely pre-termination claims); *Remington v. Wren*, 564 P.2d 1025 (Or. 1977) (finding attempt by contractor to establish account stated for amount greater than contract price unsuccessful due to lack of consideration; facts suggest owners never agreed to price increase); *Ferrer v. Taft Structurals, Inc.*, 587 P.2d 177 (Wash. Ct. App. 1978) (holding that subcontractor's unilateral upward adjustments to subcontract price lacked consideration and that contractor never agreed to any modifications).

192. See *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198 (7th Cir. 1985) (involving a contractor who agreed to pay extra charges only after subcontractor refused to remove stockpiled material creating safety hazard); *Montgomery Indus. Int'l v. Thomas Constr. Co.*, 620 F.2d 91 (5th Cir. 1980) (holding alleged novation of subcontract vitiated by duress and lack of consideration); *Dugan v. First Nat'l Bank*, 606 P.2d 1009 (Kan. 1980) (reversing summary judgment; material issues of fact remained as

amount to contractual undertakings;¹⁹³ opportune interpretations of the scope of particular contractual provisions;¹⁹⁴ or findings of excuse by one party's breach or by failure of a condition precedent.¹⁹⁵ In such cases a corollary to the doctrine of consideration is unnecessary, even if it does little harm.

Even disregarding those cases in which the pre-existing duty rule is essentially unnecessary but harmless, however, there remains a more troublesome class of construction cases decided under the pre-existing duty rule.¹⁹⁶ In this class, the pre-existing duty rule appears to exhibit some of the flaws alleged by its critics or, at the very least, to channel the development of the record so that it is difficult to tell whether or not the rule is operating unfairly. Occasionally, one encounters a case in which the pre-existing duty rule derails a modification that clearly qualifies as one of Corbin's "bargains in fact."¹⁹⁷ *Okemah Construction, Inc. v. Barkley-Farmer, Inc.*¹⁹⁸ is

to contentions that second subordination agreement signed by elderly, widowed lessor lacked consideration and was procured by misrepresentation); *All In One Maintenance Serv. v. Beech Mountain Constr. Co.*, 318 S.E.2d 856 (N.C. Ct. App. 1984) (reversing summary judgment on contractor's defense based on subcontractor's release; contractor procured ambiguous release while apparently concealing decision to terminate subcontract from subcontractor).

193. See *Newkirk Constr. Corp. v. Gulf County*, 366 So. 2d 813 (Fla. Dist. Ct. App. 1979) (holding that letter temporarily directing joint payments did not amount to irrevocable assignment of progress payments); *Argeros and Co. v. Pennsylvania Dep't of Transp.*, 447 A.2d 1065 (Pa. Commw. Ct. 1982) (applying pre-existing duty rule to claim for extra work; court also suggests instruction to complete work did not amount to modification); *Barnhill v. Moore*, 630 S.W.2d 817 (Tex. Ct. App. 1982) (involving a subcontractor on land clearing contract who had been ordered to stop work and who then sought to recover for contractor's breach of alleged promise to notify subcontractor when to resume; court applies pre-existing duty rule and also classifies alleged promise as "idle conversation").

194. See *Hoagland v. Celebrity Homes, Inc.*, 572 P.2d 493 (Colo. Ct. App. 1977) (holding that builder-vendor's unilateral attempt to eliminate liability on implied warranties of workmanlike construction and habitability fails for lack of consideration and because language of express warranty would not be construed to exclude implied warranties).

195. See *Brannan v. United States*, 7 Cl. Ct. 399 (1985) (finding that state Farmers Home Administration (FmHA) director's promises to waive requirements of federal regulations regarding FmHA loan commitment lacked consideration and remained subject to unfulfilled conditions); *Carroccia v. Todd*, 615 P.2d 225 (Mont. 1980) (finding that supplemental agreement between owners and contractor for correction of structural problems violated pre-existing duty rule; facts suggest agreement was also breached by contractor).

196. See cases cited *infra* notes 197-224.

197. See authorities cited *supra* note 183.

198. 583 S.W.2d 458 (Tex. Civ. App. 1979).

a good example. The case involved a contract under which Okemah Construction, Inc. (Okemah) agreed to remove sixty-seven miles of underground pipe, cut it into forty foot lengths, and load it onto trailers, all for a total price of fifty-nine cents per lineal foot of pipe removed.¹⁹⁹ Okemah agreed to provide two of the necessary trailers, and, in addition to agreeing to pay the stated price, Barkley-Farmer, Inc. agreed to furnish any additional trailers necessary to enable removal and loading of approximately 50,000 lineal feet of pipe per week.²⁰⁰

Almost immediately, Okemah experienced delays in performing, which Okemah attributed to Barkley-Farmer's failure to supply the promised extra trailers.²⁰¹ According to Okemah, the delays made it impossible for Okemah to make money on the contract and required a reduction of the size of its work crew.²⁰² Though Okemah apparently did not threaten to breach, it did indicate that, if Barkley-Farmer so desired, it would discontinue work on the project.²⁰³ Barkley-Farmer then promised an increase in the contract price to ninety cents per lineal foot of pipe removed.²⁰⁴ Okemah, in turn, resumed work with an enlarged crew and more trailers from Barkley-Farmer.²⁰⁵ For a time, Barkley-Farmer paid Okemah's invoices at the revised rate.²⁰⁶ Eventually, however, Barkley-Farmer refused to pay Okemah's last nine invoices, apparently in an effort to reduce the overall contract price to the original fifty-nine cent rate.²⁰⁷ When Okemah sued for the balance of the contract price at the revised rate, Barkley-Farmer successfully resisted the claim on the basis of the pre-existing duty rule.²⁰⁸

As a policy matter, however, there is every reason to enforce the sort of price increase found in *Okemah*. There is no indication that Okemah employed any form of coercion or behaved opportunistically in obtaining the modification. Indeed, the only behavior properly characterized as opportunism is Barkley-Farmer's obtaining the

199. *Id.* at 459.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 460.

functional equivalent of specific performance by agreeing to the modification, appearing to honor it, and then contesting it when Okemah had performed.²⁰⁹ Moreover, in a situation in which one party to a contract can perform only at a loss, a simple unilateral price increase may very well be as reasonable a business response to the situation as some form of mutual adjustment.²¹⁰ Indeed, with a little creativity, the modification at issue in *Okemah* might even have been fit within traditional consideration doctrine, either on the theory that it represented a compromise of Okemah's potential claim for breach arising from Barkley-Farmer's failure to supply enough trailers or on the theory that the price increase conferred a genuine benefit on Barkley-Farmer by enabling Okemah to continue in business.²¹¹ When a party on the opposite side of a transaction is financially troubled or can perform only at a loss, an upward price adjustment that enables a mutually beneficial exchange to go forward may be a perfectly reasonable response, and its claim to enforcement stands on no different footing than exchange promises generally. Similar reasons justify enforcement of other possible one-sided responses to the financial ills of a contracting partner, including both price reductions in favor of a party whose duty is to pay money²¹² and

209. Professor Narasimhan has characterized this form of opportunism as "self help specific performance." Narasimhan, *supra* note 180, at 62.

210. Indeed, under the peppercorn theory of consideration, Okemah and Barkley-Farmer could easily have produced an enforceable mutual adjustment yielding the economic equivalent of a simple price increase. For example, if Okemah agreed to supply three trailers—rather than two—and Barkley-Farmer agreed to a price increase of 90 cents plus any incremental cost per foot required to amortize the cost of the additional trailer, the resulting modification would avoid the pre-existing duty rule and yield the economic equivalent of a simple price increase. There is no reason to require such machinations, however. Absent coercion or opportunism, there is as much reason to enforce the simple price increase as the more complicated mutual modification formula.

211. Obviously, the latter theory supposes that continued performance at the original contract price would, at some point, have threatened the solvency of Okemah. It should hardly be any great revelation that some contractors are so thinly capitalized that such an assumption is realistic. See also *Intercon Mfg., Inc. v. Centrifugal Casting Mach. Co.*, 875 P.2d 1149 (Okla. Ct. App. 1993) (involving a general contractor who promised to pay supplier interest after general contractor's delays deprived supplier of all profits on contract; promise lacked consideration).

212. See *Construction Assocs. v. Peru Community Sch. Bldg. Corp.*, 393 N.E.2d 792 (Ind. Ct. App. 1979). *Peru* involved a dispute between a contractor, the owner, and its architect on a project plagued by delays and the need for extra work. *Id.* at 793. Much of the opinion is devoted to a recitation of findings attributing blame for the delays to the owner and its agents, which should have, but did not, cause the architect to extend the deadline for substantial completion. *Id.* at 794-96. At the end of the opinion, however, the court considered a change order, executed by both parties, that effectively reduced the

promises of profitable work in the future to a party who must perform at a current loss.²¹³

Another recurring type of construction case provides further reason to doubt the wisdom of retention of the pre-existing duty rule, although this type of case tends to be somewhat more ambiguous in its implications. There are several recent cases of the type in question. In each such case a contractor sought to recover from the

price of the contractor's provision of additional fill material from the original contract price of \$5.00 per cubic yard to \$3.50 per cubic yard. *Id.* at 797. The previous recalcitrance of the owner and architect in granting extensions of time for delays caused by their own fault might suggest that the price modification was extorted. Yet both the trial and appellate courts rejected the contractor's assertion of a defense of duress. If, however, the price modification was untainted by unfairness in the bargaining process, it probably represented a reasonable concession to a school district on a troubled project, and its enforcement is supported by the arguments made in the text. Indeed, it is also supported by the *Restatement's* authorization of the gratuitous waiver of a portion of a return performance under an executory contract. See RESTATEMENT (SECOND) OF CONTRACTS § 275 cmt. a, illus. 2 (1981). The appellate court's remand for a finding on the issue of consideration was thus unnecessary.

213. See *Thermoglaze, Inc. v. Morningside Gardens Co.*, 583 A.2d 1331 (Conn. App. Ct. 1991); *W.E. Koehler Constr. Co. v. Medical Ctr.*, 670 S.W.2d 558 (Mo. Ct. App. 1984). In *Koehler* a contractor was induced to hold a bid price firm by an oral promise that he would be permitted to make changes from the contract specifications with respect to materials and methods of construction. *Id.* at 559. When the final contract documents were executed, however, they contained no reference to the oral promise, and an integration clause and the parol evidence rule effectively precluded the contractor from recovering on it. *Id.* at 559, 561-63. When the owner insisted on strict performance of the contract, the contractor agreed to proceed only in response to an oral promise of additional work at a reasonable price on the lower unfinished level of the same building. *Id.* at 560. The court ultimately held the second oral promise unenforceable under the pre-existing duty rule. *Id.* at 561. *Thermoglaze* was somewhat simpler. After a window installer had installed 195 windows with white trim, as required by the contract, the owner expressed a preference for bronze trim. *Thermoglaze*, 583 A.2d at 1332. The contractor allegedly agreed to re-install bronze windows at no charge provided the owner made up the loss by awarding the contractor additional contracts on other properties that the owner controlled. *Id.* The trial and appellate courts held the re-installation promise unenforceable for lack of consideration, although it is not clear whether the courts believed the promise of future work was insufficient as consideration or was simply never made. *Id.* at 1333.

Assuming the promises of future work were made in both cases, the arguments made in the text would support enforcement of both modifications. Indeed, the modification at issue in *Thermoglaze* was a mutual adjustment of duties, and so should have satisfied the pre-existing duty rule. The real problem in such cases is whether the promise of future work is sufficiently definite to be enforced. If the promise of future work is vague as to the property at issue or the number and size of the projects at issue, as was apparently the case in *Thermoglaze*, the requirement of definiteness precludes enforcement. If, however, a specific property is specified, and particularly if the project in question is awarded to and completed by a rival contractor, both of which occurred in *Koehler*, it is difficult to see why a court could not fashion a remedy.

project owner for "extra" work—unanticipated work that the contractor regarded as outside the scope of the original contract—for which the owner allegedly agreed to pay a sum in addition to the original contract price.²¹⁴ In each case, however, the owner was subsequently able to contest the alleged modification successfully on the grounds that the work in question was not really extra work.²¹⁵ Rather, it was within the scope of the original contract specifications or requirements, often because a duty to inspect for and discover the risk leading to the need for the extra work had been imposed on the contractor by the contract documents.²¹⁶ A promise by the owner to pay for such work was therefore a promise of additional compensation for performance of a pre-existing duty and unenforceable as a consequence.²¹⁷

Of course, few would classify such results as unfair if the contractor was aware of the duty to inspect or at fault for not being aware of it, and if the contractor either (a) became aware of the risk creating a need for additional work but disregarded it; (b) inspected negligently; or (c) deliberately avoided inspection. In such cases the contractor seeking a modification would appear to be attempting to recover for risks expressly or negligently assumed at the time of contracting, and such attempts to recapture gains foregone at the time of contracting may be classified as opportunism,²¹⁸ or even bad faith.²¹⁹ It is not clear, however, that contractor opportunism, or bad faith, accounts for all, or even most, of the disputes in this category.

214. *Crookham & Vessels, Inc. v. Larry Moyer Trucking, Inc.*, 699 S.W.2d 414 (Ark. Ct. App. 1985); *Hiers-Wright Assocs. v. Manufacturers Hanover Mortgage Corp.*, 356 S.E.2d 903 (Ga. Ct. App. 1987); *W.H. Lyman Constr. Co. v. Village of Gurnee*, 475 N.E.2d 273 (Ill. App. Ct. 1985) [hereinafter *Lyman (1985)*]; *Argeros and Co. v. Pennsylvania Dep't of Transp.*, 447 A.2d 1065 (Pa. Commw. Ct. 1982).

215. *Crookham*, 699 S.W.2d at 416; *Hiers-Wright*, 356 S.E.2d at 905-06; *Lyman (1985)*, 475 N.E.2d at 278; *Argeros*, 447 A.2d at 1067-68.

216. *Crookham*, 699 S.W.2d at 415-16; *Hiers-Wright*, 356 S.E.2d at 906; *Lyman (1985)*, 475 N.E.2d at 278; *Argeros*, 447 A.2d at 1067-68.

217. *Crookham*, 699 S.W.2d at 416-17; *Hiers-Wright*, 356 S.E.2d at 906; *Lyman (1985)*, 475 N.E.2d at 279; *Argeros*, 447 A.2d at 1068.

218. See *Muris*, *supra* note 90, at 522-24.

219. For a concise summary of the view that "good faith" is to be explained in terms of recapture of opportunities previously foregone, see A. Brooke Overby, *Bondage, Domination, and the Art of the Deal: An Assessment of Judicial Strategies in Lender Liability Good Faith Litigation*, 61 *FORDHAM L. REV.* 963, 980-83 (1993) (summarizing the approach of Burton and Andersen).

The fact situations presented by cases involving claims for unanticipated work also provide opportunities for coercion, opportunism, or bad faith on the part of the project owner. Clauses imposing a duty to inspect on the contractor or imposing the risk of unanticipated site conditions upon the contractor may be inserted as early as the initial bid specifications,²²⁰ when the bargaining power of the project owner is at its height and the owner's control over the documents is virtually absolute. They may be at variance with industry practice,²²¹ and their existence or importance may be minimized or hidden. Indeed, an owner's promise to pay for unanticipated work in order to keep the contractor on the job may have precisely such a minimizing effect. Alternatively, the risk creating the need for additional work may be particularly difficult to discover.²²² Under such circumstances, it is by no means clear that refusal to enforce the owner's promise to pay is either fair or effective in avoiding the evils that modification doctrine is supposed to prevent.

Thus, in situations in which an owner promises to pay a contractor for extra work and then contests the modification on the grounds that the contract documents allocated such work to the contractor, it is not possible, without more, to determine which of the two is behaving improperly—the contractor in seeking the modification or the owner in granting and then contesting it.²²³ The problem with

220. See, e.g., *Crookham*, 699 S.W.2d at 415-16; *W.H. Lyman Constr. Co. v. Village of Gurnee*, 403 N.E.2d 1325, 1328-29 (Ill. App. Ct. 1980); *Argeros*, 447 A.2d at 1067.

221. The contractor unsuccessfully asserted such a variation from industry practice in *Lyman* (1985), 475 N.E.2d at 277, 279.

222. The contractor alleged that the need for additional work could not be ascertained until the project was underway in *Hiers-Wright*, 356 S.E.2d at 906.

223. *Lineberger v. Williams*, 393 S.E.2d 23 (Ga. Ct. App. 1990) is an interesting variant of the usual "extra compensation" construction case. In *Lineberger* an owner serving as his own general contractor hired another contractor to assist him in return for specified payments at certain stages of construction. *Id.* at 24. The contract contained no provision concerning duration, and the contractor expressed a desire to move out of state part way through the project. *Id.* The owner then promised additional compensation to induce the contractor to remain on the job until completion. *Id.* When the owner subsequently refused to pay, the contractor sued and won a jury verdict. *Id.* The appellate court reversed and remanded for a new trial on the issue of whether the original contract required the contractor to remain on the job until completion of the project. *Id.* at 25-26. If so, the promise of additional compensation would be invalidated by the pre-existing duty rule. If not, the modification could stand. Surely, however, the key issue is whether the contractor extorted the modification by a threat to quit at a time when he had the owner "over a barrel" or whether the owner voluntarily agreed to a revaluation of the contractor's services and then opportunistically contested it once performance was complete. While the parties' original understanding of the duration of their agreement

the courts' continued invocation of the pre-existing duty rule in such situations, however, is that it is utterly mechanical and so prevents the courts from taking the inquiry far enough to make such a determination. In each of the actual cases in this category during the relevant time period, it appears that the contractor had not actually anticipated the site conditions that increased the cost of his own performance, and in only one did the court actually find that the owner had not, in fact, promised to reimburse the extra expense.²²⁴ The pre-existing duty rule—together with the relevant risk-shifting language of the contract and/or the parol evidence rule—then derailed any further analysis of opportunism, coercion, deception, or bad faith, and it is therefore virtually impossible to determine if the dispositions of the cases were justified. As a result it is virtually impossible to ascertain, in the construction context, whether the purported exception to the pre-existing duty rule for work required by unanticipated circumstances is functioning as a reliable corrective to the harshness of the pre-existing duty rule or whether it is actually being evaded through judicious use of boilerplate risk allocation and integration clauses, the parol evidence rule, and opportunistic behavior. In turn this undermines the contention of the rule's only recent defender that, for all its conceptual and practical faults in its pure form, the pre-existing duty rule operates well when it operates in tandem with its recognized exceptions.²²⁵

would clearly be relevant to that issue, the appellate court's exclusive focus on the pre-existing duty rule prevented any discussion of other evidence relevant to determining which of the parties acted improperly.

224. In *Argeros* the court held that the owner's instruction to complete the project did not amount to a promise to pay for additional work. *Argeros*, 447 A.2d at 1068.

225. See *Muris*, *supra* note 90, at 551-52. If I understand Professor *Muris* correctly, he is not claiming to have provided an *empirical* demonstration that the pre-existing duty rule, coupled with the "unanticipated circumstances" exception, produces uniformly desirable results. Indeed, he concedes, at one point, that there is no empirical proof of the percentage of litigated modifications that are extorted. See *id.* at 542. Rather, he seems to be arguing that the point of modification law is to deter opportunistic behavior, and that using the pre-existing duty rule and its exceptions as vehicles for doing so is more efficient than permitting courts to examine the question of opportunism directly. *Id.* at 531, 543-46. Whether a modification is opportunistic depends, in his view, on the reasons why the party on the "short end" of the modification agreed to it, and, in particular, whether the modification, in spite of its apparent disadvantage, in fact conferred a benefit upon him. *Id.* at 534, 543. Since, in any litigated case, the party on the short end will claim extortion, direct examination of opportunism will force the trier of fact to decide which party's word is more credible, a "subjective and treacherous task." *Id.* at 543. On the other hand, the pre-existing duty rule effectively allocates the burden of persuasion on the issue of opportunism to the party advocating the modification. *Id.* at 546. To meet this burden,

2. Other contracts for services

It should be no surprise that cases involving other service contracts of various kinds²²⁶ also form a significant subset of the cases in which the pre-existing duty rule has been applied. It is easy to conjure up images of a greedy and ruthless employer using superior

the proponent of the modification must demonstrate the applicability of the unanticipated circumstances exception. *Id.* at 543-44, 546. However, the factors relevant to the exception are more likely to be "objectively verifiable" matters such as unexpected physical obstacles, the financial condition of the party seeking the modification, or the existence of a less costly alternative to modification. *Id.* at 544-45. Demonstration of such objectively verifiable matters is, according to Professor Muris, less costly than the credibility determinations required by a direct examination of the issue of opportunism. *Id.* at 546.

There are two replies to Professor Muris' argument. First, it exaggerates the extent to which the exceptions to the pre-existing duty rule eliminate the need for the trier of fact to assess subjective states or make credibility determinations. The "unanticipated circumstances" exception requires that the facts supporting the need for modification be either unforeseen by the parties or foreseen as a remote, general possibility but not with specificity or as likely. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) cmt. b. More generally, it makes relevant the reasons why a modification was sought or conceded. The "rescission theory" exception makes the intent of the parties at the time of modification highly relevant. Claims about what the parties to a contract anticipated or intended or claims about the reasons why they sought or agreed to a modification, however, are, at bottom, every bit as subjective and every bit as subject to conflicting testimony as the claims about mutual benefit Professor Muris seeks to avoid submitting to a trier of fact. *Cf.* Hillman, *Restatement, supra* note 89, at 689-92 (arguing that the factors relevant to a direct assessment of the presence or absence of duress must be considered in applying the qualified version of the pre-existing duty rule).

Second, Professor Muris' argument understates the extent to which the objectively verifiable evidence of which he approves would be relevant to a direct assessment of opportunism or coercion by a trier of fact. All of the "objective" evidence he specifies—the presence of documents corroborating the ability of the party seeking modification to perform without it, a protest by one party to the modification, the deteriorating financial condition of one party, the presence of demonstrable obstacles to performance, the existence of cheaper alternatives to modification—has some bearing on a direct assessment of the question whether a particular modification is extorted or opportunistic. In short, whether the evils modification law is supposed to deter are assessed directly, through doctrines of duress, good faith, and the like, or indirectly, through the pre-existing duty rule coupled with its exceptions, the domain of potentially relevant evidence will include some "subjective" and some "objective" matters. There is no way of predicting or demonstrating in the abstract which method of assessment will include more subjective judgments or require more credibility determinations. Moreover, the examination of actual cases applying the pre-existing duty rule suggests that the results produced by the rule and its exceptions are usually unpredictable and frequently wrong in substance. This, in turn, suggests that direct assessment of opportunism or extortion would be superior.

226. For purposes of analysis, I include in this category not only simple at-will employment, but also more sophisticated agency, brokerage, distributorship, and similar arrangements.

bargaining power to force a unilateral reduction in compensation or benefits upon a hapless employee. While the melodramatic imaginary case is comparatively rare,²²⁷ there are nevertheless a few examples of attempts by one party to a services contract to extract a unilateral reduction of compensation or benefits from the other.²²⁸ Such attempts have generally failed, in part because of applications of the pre-existing duty rule.²²⁹ However, in the reported examples of such cases within the relevant time period, the pre-existing duty rule has not operated alone. In each case a further ground of decision supports the result dictated by the pre-existing duty rule. In the recent cases the additional ground has generally been one of the assent doctrines.²³⁰ This is somewhat curious, in part because unilateral reductions of compensation almost cry out for an examination of the possibility of coercion, and policing for coercion more naturally falls within the province of the defense of duress rather than the requirements of mutual assent. Moreover, in some of the cases, the party protesting the unilateral reduction continued in the business relationship even after the reduction was imposed or announced,²³¹

227. *Ebling v. Gove's Cove, Inc.*, 663 P.2d 132 (Wash. Ct. App. 1983) approaches the imaginary case.

228. *Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016 (8th Cir. 1991) (involving unilateral suspension of advertising allowance by provider of photofinishing services to chain of drug stores); *Employer-Teamsters Joint Council No. 84 v. Weatherall Concrete, Inc.*, 468 F. Supp. 1167 (S.D. W. Va. 1979) (involving erroneous billing and payment of lower health and pension fund payments than required by collective bargaining agreement); *In re Estate of Johnson*, 566 So. 2d 1345 (Fla. Dist. Ct. App. 1990) (involving alleged "nullification" of contingency fee agreement); *Guild Management Co. v. Oxenhandler*, 541 S.W.2d 687 (Mo. Ct. App. 1976) (involving alleged waiver of brokerage fee); *Ebling v. Gove's Cove, Inc.*, 663 P.2d 132 (Wash. Ct. App. 1983) (involving alleged agreement to reduce salesman's commission).

229. See *infra* note 230.

230. See, e.g., *Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016 (8th Cir. 1991) (holding that an alleged waiver of advertising allowance was unsupported by consideration and that the party resisting modification never expressly agreed to it); *Employer-Teamsters Joint Council No. 84 v. Weatherall Concrete, Inc.*, 468 F. Supp. 1167 (S.D. W. Va. 1979) (holding that alleged accord and satisfaction of health and pension fund contributions failed for lack of consideration and failure to show new agreement); *In re Estate of Johnson*, 566 So. 2d 1345 (Fla. Dist. Ct. App. 1990) (alleged modification of contingency fee arrangement failed for lack of consideration and failure to reach agreement); *Guild Management Co. v. Oxenhandler*, 541 S.W.2d 687 (Mo. Ct. App. 1976) (holding that alleged waiver of brokerage fee failed for lack of mutual assent; trial court had rested its decision on lack of consideration); *Ebling v. Gove's Cove, Inc.*, 663 P.2d 132 (Wash. Ct. App. 1983) (holding that there was no mutual agreement to, or consideration for, commission reduction).

231. See *Guardian*, 936 F.2d at 1018, 1020; *Guild*, 541 S.W.2d at 688-92.

which might have enabled a court desiring to enforce the modification at issue to conclude that assent had been manifested by conduct. The fact that courts do not draw that conclusion where there is any evidence of protest indicates that the distinction between coerced assent and failure of assent is occasionally somewhat blurred²³² and that assent doctrines are sufficiently malleable to assist the vitiating defenses of bad faith or duress in the task of policing for coercion.

If the scope of examination is expanded to include other forms of service contract modification, a pattern very similar to that found in the construction cases emerges. In the majority of cases in which the pre-existing duty rule is applied, there are alternate grounds for invalidation of the purported modifications at issue, whether those grounds are actually used by the courts or simply suggested by the facts.²³³ In such cases the dispositions dictated by the pre-existing

232. See, e.g., *Guild*, 541 S.W.2d at 691-92 (finding an absence of agreement as to modification but characterizing proposal of modification as a "Hobson's choice," thus suggesting agreement was made under duress).

233. See *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739 (6th Cir. 1993) (holding that alleged modification of agency contract failed for lack of mutual assent and lack of consideration); *Hensley v. E.R. Carpenter Co.*, 633 F.2d 1106 (5th Cir. 1980) (holding that alleged promise of bonus failed under pre-existing duty rule; facts suggest that communication in question did not amount to promise of bonus); *Greenamyre Eng'g & Technology, Inc. v. Mediscan Research, Ltd. (In re Mediscan Research, Ltd.)*, 109 B.R. 392 (Bankr. 9th Cir. 1989) (invalidating amendment to agreement and note increasing compensation for research and development project for lack of consideration, impossibility, and common law fraud), *aff'd*, 940 F.2d 558 (9th Cir. 1991); *Toth v. Square D Co.*, 712 F. Supp. 1231 (D.S.C. 1989) (involving an attempt by employer to effect change in terms of employment by unilateral handbook change; summary judgment denied on issues of new consideration and assent to change); *Forstmann v. Culp*, 648 F. Supp. 1379 (M.D.N.C. 1986) (holding that alleged agreement to hire as manager and grant equity share in company to be acquired failed for indefiniteness and violation of pre-existing duty rule); *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal. App. 3d 299, 231 Cal. Rptr. 820 (1986) (holding that alleged implied promise to employ until age 65 failed to reflect intention to effect novation, violated parole evidence rule, and lacked new consideration; employer's alleged assurances also ambiguous); *Tierney v. Capricorn Investors, L.P.*, 592 N.Y.S.2d 700 (App. Div. 1993) (holding that alleged oral promise to increase investment banker's compensation lacked consideration and contradicted written employment agreement's integration clause and clause requiring writing for modification); *Software Clearing House, Inc. v. Intrak, Inc.*, 583 N.E.2d 1056 (Ohio Ct. App. 1990) (holding that promise to make additional payments under marketing agreement lacked new consideration; facts suggest that promise should have been interpreted narrowly so that promise had been performed); *Price v. Mercury Supply Co.*, 682 S.W.2d 924 (Tenn. Ct. App. 1984) (holding that alleged promises to employ vice president for the rest of his life were mere statements of encouragement and approval, not promises; only consideration asserted was past services). There are also a couple of cases in which the consideration doctrine may have been used in lieu of a more direct appeal to public policy. See *Johnson v. Delchamps, Inc.*, 846 F.2d 1003 (5th Cir.

duty rule and the alternate grounds do not appear to be particularly troublesome. There is, however, a smaller class of service contract cases in which the pre-existing duty rule does seem to do some harm. There is the occasional case in which a court refuses to enforce a promise to pay an employee a bonus on the grounds that the promise was given subsequent to the services that motivated it—services that the employee was already under a duty to perform.²³⁴ In such cases the pre-existing duty rule overlaps with another corollary to the doctrine of consideration—the rule that past consideration is no consideration. I have argued elsewhere that such bonus promises should be enforced.²³⁵ There is also an occasional case in which the pre-existing duty rule invalidates a promise that seems to fit the model of a one-sided adjustment justifiable on “relational” grounds.²³⁶ Finally, and somewhat ironically, one occasionally finds

1988) (holding that employee's pre-polygraph release of claim for negligent administration of polygraph examination lacked consideration and did not qualify as civil law gratuitous remission); *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 207 Cal. Rptr. 574 (1984) (reversing grant of injunction against performer enforcing exclusive services provision of contract; lack of consideration used as subsidiary finding in application of statute imposing minimum compensation requirement for injunction).

234. See *Spickelmier Indus. v. Passander*, 359 N.E.2d 563 (Ind. Ct. App. 1977).

235. See *Wessman*, *supra* note 2, at 103-05, 105 n.403.

236. See *Gary Safe Co. v. A.C. Andrews Co.*, 568 S.W.2d 166 (Tex. Civ. App. 1978). Gary Safe Company manufactured safes used by businesses of various kinds. *Id.* at 167. For several years Gary Safe sold safes to Andrews and Andrews resold them at retail, although there was no formal agreement making Andrews an official distributor or dealer for Gary Safe. *Id.* Andrews sold some of the safes to its own customer, Southland Corporation, which operated a chain of convenience stores. *Id.* After approximately a decade of this three-tiered business relationship, Gary Safe began selling safes directly to Southland, bypassing Andrews. *Id.* When Andrews protested the direct sales to a business that Andrews regarded as its own customer, Gary Safe agreed to pay Andrews a commission, even on sales made directly from Gary Safe to Southland. *Id.* While it is not clear whether this agreement should have been considered the formation of a new contract, as the court seemed to regard it, or as the modification of an ongoing business arrangement, the court ultimately held the promise to pay a commission unenforceable for lack of consideration. *Id.* at 168. The appellate court was also troubled by the trial court's conclusion that Andrews had tacitly agreed not to interfere with Gary Safe's direct sales—an arrangement the appellate court thought might violate state antitrust laws. *Id.* Presumably, the court suspected that Gary Safe and Andrews were engaged in market allocation. If so, that suspicion might have been a reason not to enforce the commission arrangement, had the court examined the issue directly. If the arrangement was not a form of market allocation, however, then, considered solely as a matter of contract law, it would seem reasonable to enforce the commission arrangement. The promise to pay a commission was an attempt to save an ongoing business relationship between Andrews and Gary Safe, presumably in order to facilitate further exchanges between them. Obviously, Gary Safe stood to gain if Andrews continued to buy safes and sell them to customers other than Southland, and that outcome, presumably, is what the commission arrangement

a service contract case in which the pre-existing duty rule is twisted into an instrument for the covert examination of the substantive fairness of a modification.²³⁷

*Gross v. Diehl Specialties International, Inc.*²³⁸ was such a case. Mr. Gross was a managerial and technical employee of the defendant corporation under a fifteen-year employment contract.²³⁹ His compensation package included a salary, profit sharing, and a royalty for the use of his inventions, ownership of which reverted to Gross when the agreement terminated.²⁴⁰ The company prospered for about five years, and the owner, whose health was failing, was able to sell the company for \$3 million.²⁴¹ The new owner demanded, as a condition of paying so high a price, that Gross and the company enter into a new contract.²⁴² Gross complied, and the new contract contained only changes unfavorable to Gross, including a reduction of his royalties, additions to his duties, and the loss of residual rights in his own inventions.²⁴³ The company's performance declined over the next two years, and Gross was terminated.²⁴⁴ In Gross's subsequent suit, it was necessary to determine whether the operative contract was the original employment agreement or the subsequent

was designed to encourage. Though technically lacking in consideration, this type of promise is so similar to a conventional bargain that it has a very similar claim to enforcement. The only real problem with the promise should have been the failure to specify a duration for the commission arrangement, but this omission should only create a problem of interpretation, not of enforceability.

237. In addition to *Gross v. Diehl Specialties Int'l*, 776 S.W.2d 879 (Mo. Ct. App. 1989), discussed *infra* notes 238-50 and accompanying text, *Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016 (8th Cir. 1991) appears to be a case of this type. As indicated *supra* notes 228-31 and accompanying text, the modification at issue in *Medicare* was a unilaterally imposed reduction in the compensation due to one party. *Medicare*, 936 F.2d at 1016. The party imposing the modification, however, was sufficiently clever that it agreed to pay a portion of the originally agreed compensation earlier than contemplated by the original agreement. *Id.* Technically, of course, this is one of the classic ways in which the peppercorn theory of consideration may be used to circumvent the pre-existing duty rule. See CORBIN, *supra* note 89, § 7.20. The *Guardian* court, however, found that the modification lacked consideration, presumably because the modification was patently unfair. *Guardian*, 936 F.2d at 1020. However, because the court also found that the disadvantaged party had never expressly agreed to the modification, the discussion of consideration is technically redundant. *Id.*

238. 776 S.W.2d 879 (Mo. Ct. App. 1989).

239. *Id.* at 881.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 881-82.

agreement executed at the time of the sale of the company.²⁴⁵ The appellate court ultimately decided that the original agreement was operative because the subsequent modifying agreement lacked fresh consideration.²⁴⁶

If the disposition of the case appears appealing, it is probably because the reader assumes, although the court did not find, that the new owners extorted the modification from Gross in some manner amounting to economic duress or, at least, exercised the bargaining power available to a prospective purchaser in order to cut an unconscionable deal. There is, however, the somewhat more disquieting possibility that the modification derailed in the case was a genuine bargain. Indeed, as a mere technical matter, the case is an incorrect application of the doctrine of consideration. If Gross entered into a modification of his employment agreement in order to induce the new owner to enter into the purchase of the business, the purchase is technically consideration for the modification whether Gross, or the former owner, received any separate economic benefit from the modification or not.²⁴⁷ However, quite beyond the mere technical requirements of consideration, it appears that the new owner increased the price of the business to reflect the reduction in Gross's rights.²⁴⁸ The fact that the increased price was an economic benefit to the former owner rather than Gross does not make it any less a true economic concession. If the modification was not extorted—if, for example, it was motivated by Gross's desire to provide a nest egg for a retiring friend in poor health or fear that the declining friend would "run the business into the ground"—it was as much a bargain as the purchase of the business itself. In short, absent duress or unconscionability, the modification should have been enforced, and the court's failure to do so suggests that its real concern was the perceived unfairness of the modification to Gross.

A defender of the pre-existing duty rule might respond with a simple assertion that any rule can be misapplied, and that judicial misuse of a rule says more about the judge than the rule. Indeed, this assertion may often be true. However, *Gross* illustrates Llewellyn's

245. *Id.* at 883.

246. *Id.* at 883-84.

247. Under the conventional bargain theory of consideration, the payment of the purchase price could be consideration for any number of counterpromises or concessions by Gross and the original owner. See RESTATEMENT (SECOND) OF CONTRACTS §§ 71(3), 80.

248. See *Gross*, 776 S.W.2d at 881, 884.

observations concerning the covert use of the doctrine of consideration in order to police for substantive transactional fairness.²⁴⁹ After *Gross* it is difficult to predict how the pre-existing duty rule will operate. If that is the case, moreover, the traditional channeling function purportedly served by the doctrine of consideration is in jeopardy. Suppose, for example, that the owners of a large but financially troubled company wish to sell it to a "turnaround artist," but the latter insists on salary reductions for incumbent managerial employees as a condition of sale. If the alternative is bankruptcy for the company, the managers may very well be prepared to agree, and they clearly will receive a real benefit if the company continues in operation. How is this genuine bargain to be implemented? After *Gross* the parties' goals can no longer be accomplished by reciting, or even paying, a peppercorn's worth of consideration to the managers, for *Gross* implicitly rejects the peppercorn theory. It is doubtful that reciting that the reduction is a condition of the sale will help, for *Gross* seems to require that the managers actually be enriched by the sale if the modification is to survive.²⁵⁰ With sufficient creativity, the parties might be able to devise satisfactory documentation, but, after *Gross*, it is difficult to imagine anyone giving a legal opinion that the documents are enforceable according to their terms. It would seem that the use of the pre-existing duty rule as a device for policing the substantive fairness of a modification threatens the channeling function that the notion of consideration supposedly serves. In turn,

249. See Llewellyn, *Reform*, *supra* note 48, at 865-66 (arguing that the use of consideration to police for fairness upsets transactions randomly and unpredictably); see also Wessman, *supra* note 2, at 92-93 (asserting that the use of consideration "to police for fairness . . . contains a . . . built-in form of incoherence").

250. This statement illustrates what is perhaps the most confusing aspect of *Gross*. The court first assumed that the buyer of the company "insisted" on the new contract with Gross before the sale of the company, suggesting that it was part of the initial bargain. *Gross*, 776 S.W.2d at 881. The court assumed throughout that the purchase price was inflated to reflect the reduction of benefits to Gross. *Id.* Yet, at the end of the court's opinion, it suggested there was no evidence that the modification of the Gross contract was a potential deal breaker as far as the purchasers were concerned, in the sense that they would have refused to proceed without it. *Id.* at 884. The doctrine of consideration, of course, has never required that the consideration furnished by one party be the sole, or even the strongest, motivation for the performance or promise of the other. See DAWSON, *supra* note 37, at 204-05. The court then minimized the significance of the inflation of the purchase price to reflect Gross's concession with the observation that the former owner's windfall could not be a benefit to Gross. *Gross*, 776 S.W.2d at 884. As noted earlier, however, a benefit to a third party is traditionally perfectly adequate consideration. See *supra* part III.B. The implication of the court's view is that a successful modification requires quantifiable enrichment on both sides of the modification.

this possibility provides some reason to leave the policing function to doctrines like duress and unconscionability.

3. Lending and credit relationships

Commercial loans and other types of credit extension often contemplate or result in long-term contractual relationships, and familiar fluctuations in business cycles create pressures toward adjustments in such relationships. Some of these adjustments are one-sided, and, as a result, cases involving a variety of long-term credit relationships also form a significant subset of the pre-existing duty rule cases. As in the context of service contracts, the context of the lender-borrower relationship suggests a stereotypical case in which a ruthless lender agrees to one set of loan terms at the inception of the borrower's project and then, when the borrower is financially dependent and in the midst of the financed business project, the lender extracts a much more favorable set of terms. The stereotypical case occasionally occurs, and the pre-existing duty rule invalidates the coerced modification.²⁵¹ It is difficult to see, however, why the defense of economic duress could not be used to dispose of such cases equally well. More broadly, in the context of lending and other credit relationships, the cases exhibit the same pattern that was observed in other subclasses of the pre-existing duty rule cases. In the majority of cases, applications of the pre-existing duty rule occur in factual circumstances that would justify applications of alternative doctrines leading to the same results.²⁵² Most such cases are of little interest

251. See, e.g., *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 677 P.2d 1317 (Ariz. Ct. App. 1983). In *K-Line* a lender made a commitment to a builder of duplexes to supply permanent financing on specified terms. *Id.* at 1319. After the builder had commenced construction on four units, incurred \$660,000 in debt, and pre-sold 11 of 12 units, the lender reneged on the original commitment and agreed to provide financing only on terms substantially less favorable to potential borrowers. *Id.* The court rejected the lender's contention that the second agreement was an accord and satisfaction of the original commitment, relying on the pre-existing duty rule. *Id.* at 1321.

252. See *Federal Deposit Ins. Corp. v. Waldron*, 630 F.2d 239 (4th Cir. 1980) (holding that an alleged release of guarantors by renewal note failed for lack of consideration and failure to meet writing requirement imposed by statute); *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978) (holding that alleged agreement to forbear foreclosure failed for lack of fresh consideration, mutual assent, absence of authority, indefiniteness, vagueness, and violation of the parol evidence rule and the statute of frauds); *Massey-Ferguson Credit Corp. v. Peterson*, 626 P.2d 767 (Idaho 1980) (finding insufficient evidence to support trial court's conclusion that lender agreed to delay repossession and permit debtor's continued use of collateral; any such promise also would have lacked consideration); *Thornton v. Ankeny State Bank*, 453 N.W.2d 240 (Iowa Ct. App. 1990) (holding that cosigner's

except as further illustrations of the redundancy of consideration doctrine.

One group of cases in which the pre-existing duty rule is similarly redundant is of somewhat greater interest. There are several lending cases in which the borrower asserts, and the lender denies, that some partial adjustment in the ongoing contractual relationship was actually a permanent or total readjustment, usually characterized as a novation or accord and satisfaction of the original contract.²⁵³ If the adjust-

execution of substitute note for debt from which he had been discharged lacked valid consideration; facts suggest fraud or mistake defenses); *Windorf v. Ferris*, 397 N.W.2d 268 (Mich. Ct. App. 1986) (holding that alleged modification to land contract violated statute of frauds and failed for lack of consideration and mutual assent); *McGee v. Clark*, 343 So. 2d 486 (Miss. 1977) (holding that alleged modification terminating real estate option was void on grounds of lack of fresh consideration, mistake, and misrepresentation); *Schwonke v. Banister*, 443 N.Y.S.2d 513 (App. Div. 1981) (holding mortgagee's alleged oral promise to permit mortgagor to delay payment of taxes unenforceable on grounds of pre-existing duty rule and statute of frauds); *Federal Deposit Ins. Corp. v. Hyer*, 413 N.Y.S.2d 939 (App. Div. 1979) (holding that alleged agreement to repayment schedule on overdue note failed for lack of consideration and failure to satisfy writing requirement; facts suggest scope of any agreement only covered payments already accepted); *Mozingo v. North Carolina Nat'l Bank*, 229 S.E.2d 57 (N.C. Ct. App. 1976) (reversing summary judgment in favor of lender on substitute notes, finding material issues of fact as to issues of consideration and oral qualifications on notes); *First Fed. Sav. & Loan Ass'n v. Reggie*, 546 A.2d 62 (Pa. Super. Ct. 1988) (reversing summary judgment of foreclosure in favor of mortgagee; lender's actions in obtaining mortgage securing debt that had already been discharged left material issues of fact regarding defenses of lack of consideration, fraud, and misrepresentation); *Marcotte v. Harrison*, 443 A.2d 1225 (R.I. 1982) (holding alleged promise to cancel note unsupported by consideration; facts suggest possibility of undue influence, and trial court finds no credible evidence promise was made); *Garrett v. Bankwest, Inc.*, 459 N.W.2d 833 (S.D. 1990) (holding that personal property secured lender's alleged promise to buy out real estate mortgagee's interest, redeem ranch, and lease ranch to debtor failed for lack of consideration, indefiniteness, and failure to reach complete agreement); *see also* *South Am. Shoe Corp. v. Kurtz (In re Silberman, Inc.)*, 30 B.R. 219 (Bankr. E.D. Pa. 1983) (holding that alleged modification to workout agreement by which receivers promised not to close stores was not supported by consideration; in addition, receivers did not materially breach promise); *United States Home Acceptance Corp. v. Kelly Park Hills, Inc.*, 542 So. 2d 463 (Fla. Dist. Ct. App. 1989) (holding that, due to lack of consideration, installment payment arrangement did not constitute novation discharging guarantors; in addition, guarantors had agreed in advance to permit lender to change time of payment); *Sens v. Decatur Fed. Sav. & Loan Ass'n*, 285 S.E.2d 226 (Ga. Ct. App. 1981) (holding that agreement between lender and borrower delaying payment did not amount to novation discharging guarantor as there was no consideration for moratorium on collection; lender, however, had in fact permitted delayed payment); *cf.* *Mundy v. Arcuri*, 267 S.E.2d 454 (W. Va. 1980) (finding no evidence of consideration for modification but affirming finding of waiver to produce disposition functionally identical to modification theory).

253. *See* *Miami Nat'l Bank v. Forecast Constr. Corp.*, 366 So. 2d 1202 (Fla. Dist. Ct. App. 1979) (involving alleged novation and discharge of guarantors by virtue of prepaid

ment consists of the borrower's taking or permitting some action that he was under a contractual duty to take or permit, then the pre-existing duty rule invalidates the alleged novation, accord and satisfaction, or permanent modification.²⁵⁴ If the proponents of the doctrine of consideration were correct in what is asserted to be one of its virtues, this is the type of case in which one would expect the pre-existing duty rule to operate as the sole ground of decision. Claims of novation or accord and satisfaction raise an issue as to whether the parties to a contract intended by certain actions to extinguish or satisfy their original obligations. Such issues of intent are arguably more fact-intensive and less appropriate for disposition as a matter of law than the issue of consideration. If so, one would expect courts applying the pre-existing duty rule in order to invalidate an alleged novation or accord and satisfaction simply to sidestep the issues regarding the parties' intentions. Such issue avoidance, however, is not characteristic of the cases now under examination. More often, the courts applying the pre-existing duty rule also address the issue of the parties' intention to extinguish their original obligations, sometimes through an express holding that the evidence of such an intention is insufficient or, failing that, through some express discussion of the issue.²⁵⁵ The fact that the courts usually address

principal reduction and agreement to pay installments); *Walsey v. Alterman Foods, Inc.*, 231 S.E.2d 3 (Ga. Ct. App. 1976) (involving alleged accord and satisfaction by substitution of note for open account indebtedness); *Sperry v. ITT Commercial Fin. Corp.*, 799 S.W.2d 871 (Mo. Ct. App. 1990) (involving alleged agreement to limit scope of repossession); *Pink v. Busch*, 691 P.2d 456 (Nev. 1984) (involving an alleged release of original guarantors by addition of new guarantors incident to sale of business); *PNC Bank, Nat'l Ass'n v. Balsamo*, 634 A.2d 645 (Pa. Super. Ct. 1993) (involving alleged accord and satisfaction of judicial lien on piece of real estate by deed in lieu of foreclosure on another piece of real estate); *Greenwood Assocs. v. Crestar Bank*, 448 S.E.2d 399 (Va. 1994) (involving an alleged agreement by debtor to forbear other options in return for lender's assurance it would not "double profit" from foreclosure sale).

254. See *Miami Nat'l Bank*, 366 So. 2d at 1204; *Walsey*, 231 S.E.2d at 5; *Sperry*, 799 S.W.2d at 877.

255. See, e.g., *Miami Nat'l Bank v. Forecast Constr. Corp.*, 366 So. 2d 1202 (Fla. Dist. Ct. App. 1979) (holding there was insufficient evidence for jury to find intention to extinguish original indebtedness); *Walsey v. Alterman Foods, Inc.*, 231 S.E.2d 3 (Ga. Ct. App. 1976) (finding no clearly expressed agreement to extinguish open account indebtedness); *Pink v. Busch*, 691 P.2d 456 (Nev. 1984) (discussing conversations pertaining to alleged release of guarantors); *PNC Bank, Nat'l Ass'n v. Balsamo*, 634 A.2d 645 (Pa. Super. Ct. 1993) (holding evidence established clear intention of the parties that deed in lieu of foreclosure would affect judicial lien on only one parcel of real estate); *Cf. Sperry v. ITT Commercial Finance Corp.*, 799 S.W.2d 871 (Mo. Ct. App. 1990) (discussing conversations concerning alleged modification of security agreement provisions regarding permissible scope of repossession). But see *American Nat'l Bank v. Warner*, 468 N.E.2d

the issue of the parties' intentions directly thus undermines the contention of the proponents of the doctrine of consideration that its relatively greater amenability to summary disposition is a source of savings in the time and expense of judicial administration.²⁵⁶

Quite apart from cases in which the pre-existing duty rule is redundant, however, there is a subclass of lending cases in which its application is troublesome. First, there are cases of apparent misapplication of the pre-existing duty rule to real bargains, troublesome not only because bargains generally should be enforced but because such misapplications illustrate the complexity of the doctrine of consideration and its consequent reduction of the predictability of judicial decisions.²⁵⁷ Second, there is at least one case in the relevant time period in which a court appears to have made dubious use of the pre-existing duty rule as a tool with which to nullify a jury verdict based on evidence that was not credible.²⁵⁸ While it is no

184 (Ill. App. Ct. 1984) (holding that an alleged release of the comaker of note by acceptance of renewal notes and guaranty was unsupported by consideration and that the bank's intention was irrelevant); *Greenwood Assocs. v. Crestar Bank*, 448 S.E.2d 399 (Va. 1994) (sustaining demurrer on theory of lack of consideration, avoiding decision on issues of indefiniteness and statute of frauds). The *Warner* court's discussion of the consideration issue, however, is sufficiently convoluted and confusing that it hardly represents any advance over a direct assessment of the evidence concerning the parties' intent to effect a release.

256. For a more abstract argument addressed to the same contention, see *Wessman*, *supra* note 2, at 81.

257. See *In re Bennett*, 154 B.R. 157 (N.D.N.Y. 1993) (holding second priority lender's agreement to release subordinate lien on land in order to permit sale of land and retirement of debt to first priority lender, with consequent improvement in position of second priority lender's position as to remaining assets, lacked consideration); *Life Sav. & Loan Ass'n of America v. Palos Bank & Trust Co.*, 508 N.E.2d 262 (Ill. App. Ct. 1987) (holding that substitution of new lead bank's obligations to secondary lender for original lead bank's obligations was gratuitous); see also *Greenwood Assocs. v. Crestar Bank*, 448 S.E.2d 399 (Va. 1994) (involving alleged agreement by lender not to "double profit" from foreclosure sale if borrower refrained from seeking other bidders, seeking injunction, or filing bankruptcy; agreement lacked consideration due to insufficiently explicit agreement to forbear).

258. The case in question is *Brand S Corp. v. King*, 639 P.2d 429 (Idaho 1981), and its facts are quite peculiar. Brand S planned to build a sawmill and contracted with the King family for a supply of logs. *Id.* at 430. The contract was a buyer financing arrangement under which Brand S advanced \$140,000 to the Kings. *Id.* The Kings were to repay the advance in the form of logs credited at a specified rate or, at the option of Brand S, out of the proceeds of the sales of logs to others. *Id.* When the lumber market collapsed, Brand S decided not to build the sawmill. *Id.* In addition, the Kings alleged, and Brand S denied, that an agent of Brand S told them to "save themselves from bankruptcy" and forget about the \$140,000 loan. *Id.* When Brand S sued for repayment, the Kings obtained a jury verdict that nothing was due. *Id.* The verdict clearly indicated that the

secret that juries make mistakes, judicial use of consideration doctrine as a method of evading the usual restrictions on the review of a jury's credibility determinations should cause some intellectual discomfort as long as society remains committed to the use of juries in commercial cases.

Finally, in the lending context, as in others, one occasionally encounters a case in which the pre-existing duty rule appears to have been used quite cynically. *Walker v. Associates Commercial Corp.*²⁵⁹ is an interesting example. Walker, a Tennessee trucker, financed the purchase of a new truck by means of a conditional sale contract held by Associates.²⁶⁰ When the truck broke down in Kansas, Walker missed one of his monthly installment payments.²⁶¹ To make matters worse, the repair charges exceeded Walker's warranty coverage by \$1500, and the repair facility presumably acquired a lien on the truck for the unpaid charges.²⁶² Walker alleged, and the jury apparently believed, that he agreed to borrow money from friends and relatives in order to pay the repair charges and obtain release of the truck in return for Associates' agreement to extend the time for payment of the past due installment.²⁶³ Walker did as he promised, but Associates repossessed and sold the truck just as Walker was about to put the truck in service for a new company.²⁶⁴ Walker's action for breach of the extension agreement was successful at the trial level, but an appellate court ultimately held the extension agreement unenforceable because Walker had a pre-existing duty

jury believed the Kings' version of the relevant conversation. See *id.* The appellate court held that the alleged modification of the original repayment obligation lacked consideration and that Brand S was entitled to judgment on its loan agreement. *Id.* at 431-32.

It is, of course, just barely possible that the promise to forgive the loan was made. Certainly, if it was made, a relational contract theorist, and perhaps even Corbin, would regard it as worthy of enforcement. In a time of economic crisis in a particular industry, a promise made to facilitate survival of a future trading partner in the hope of future beneficial exchanges is sufficiently similar to a conventional bargain to trigger similar reasons for enforcement. It may even qualify as one of Corbin's "bargains in fact." See CORBIN, *supra* note 89, § 7.2. However, I am certainly skeptical enough to doubt that the words "forget about the \$140,000 you owe me" spring lightly from the lips of the average businessperson, and it is tempting to explain the case by assuming that the appellate court simply used whatever tool it could find to nullify what it regarded as a silly verdict by a gullible jury.

259. 673 S.W.2d 517 (Tenn. Ct. App. 1983).

260. *Id.* at 519.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

under the conditional sale contract to keep the truck free of all rival liens.²⁶⁵ The modification granting an extension thus failed for lack of consideration.²⁶⁶

The case is extremely difficult to justify, as it seems clear that, if one disregards the technical requirements of the doctrine of consideration, the extension agreement was not only a "bargain in fact," but a reasonable one. Quite apart from the physical journey to Kansas, Walker took the extraordinary step of borrowing from family and friends to pay his repair bill. It is doubtful that he would have done so in the absence of an extension and equally doubtful that Associates could have forced him to such lengths under the conditional sale agreement's provision concerning rival encumbrances. Associates, on the other hand, rid itself of a rival creditor with a lien that, in all probability, would have been superior to its own²⁶⁷ and, in addition, effectively enlisted Walker's unwitting aid in its own collection activity. The lender's inducement of full—or perhaps extraordinary—performance by agreeing to, and then contesting, a modification seems to be a clear instance of creditor opportunism in the form of "self-help specific performance."²⁶⁸ If one assumes that most lending is done by professional repetitive participants in the market, most of whom have access to legal expertise, one would expect similar examples of the opportunistic use of the pre-existing duty rule to occur in the future.²⁶⁹

265. *Id.* at 518, 520-21.

266. *Id.* at 521.

267. *See* U.C.C. § 9-310 (1994).

268. *See* Narasimhan, *supra* note 180, at 62.

269. Of course, such opportunistic use of the pre-existing duty rule is not confined to lenders. *See, e.g.,* *McCrackin v. Clay*, 261 S.E.2d 471 (Ga. Ct. App. 1979). In *McCrackin* the vendors under a land sale contract hesitated to close the transaction out of fear that monthly social security supplemental income checks that they received would terminate if the sale were consummated. *Id.* at 472. The purchaser and her attorney persuaded the vendors to close by signing a written collateral agreement in which they promised to continue such payments to the vendors for life in the event the government terminated them. *Id.* Ultimately, the purchaser and her attorney successfully contested the modification on the grounds that the vendors had a pre-existing duty to close the transaction and so supplied no consideration for the collateral agreement. *Id.* Over dissent the court also refused to entertain the facially plausible claim that the attorney committed promissory fraud by preparing and executing a contract he knew to be unenforceable. *Id.* at 473 (Birdsong, J., dissenting). While it is not clear whether the vendors' concerns over their benefit checks would have provided sufficient ammunition for a defense of mistake to the original land sale contract or prompted a discretionary refusal of specific performance, certainly those concerns provided a very practical and facially appealing reason to seek renegotiation of the agreement. The purchaser was able

4. The residue

The foregoing three categories of cases together account for the vast majority of instances in which the pre-existing duty rule is used to invalidate the modification of an ongoing contract. The remaining cases form an odd assortment that collectively conform to the pattern established with respect to the primary categories of pre-existing duty rule cases. In the vast majority of these residual cases, the pre-existing duty rule is used in tandem with, or under factual circumstances that suggest, some alternate, independent ground for the disposition of the case.²⁷⁰ The cases in which the pre-existing duty

to avoid the renegotiation, as well as any mistake defense and the burden of establishing entitlement to specific performance, by what appears to be a very cynical use of the pre-existing duty rule.

270. See *Fischer v. Atlantic Richfield Co.*, 774 F. Supp. 616 (W.D. Okla. 1989) (finding summary judgment inappropriate as to effectiveness of releases; material issues remain as to inconsistency with public policy, mistake, and consideration for and scope of alleged waiver of releases); *Thrash v. Deason*, 435 So. 2d 69 (Ala. 1983) (finding summary judgment inappropriate on issue of consideration for alleged release of one obligor on note and agreement to look to second obligor for payment; concurring opinion expresses doubt that relevant communications amounted to release); *In re Estate of Mariotte*, 619 P.2d 1068 (Ariz. Ct. App. 1980) (finding agreement to retroactive increase in compensation for care of infirm friend lacked new consideration; facts suggest undue influence); *Sterling v. Sterling*, 621 S.W.2d 1 (Ark. Ct. App. 1981) (holding that alleged novation reducing contractual alimony failed for lack of consideration and insufficient evidence of intention to accept reduced payments except on temporary basis); *Sorrells v. Bailey Cattle Co.*, 595 S.W.2d 950 (Ark. Ct. App. 1980) (holding that second writing modifying land sale contract lacked new consideration and failed for lack of definiteness, violation of the statute of frauds, and material breach by one party); *Pino v. Union Bankers Ins. Co.*, 627 So. 2d 535 (Fla. Dist. Ct. App. 1993) (holding that alleged accord and satisfaction of insurance company's obligations failed for lack of offer, acceptance, and consideration); *Recker v. Gustafson*, 279 N.W.2d 744 (Iowa 1979) (holding that modification to land sale contract failed for lack of consideration; facts suggest modification extorted by threat of baseless litigation); *Ponze v. Guirl*, 794 S.W.2d 699 (Mo. Ct. App. 1990) (holding that alleged novation converting investment to loan failed for lack of consideration as well as indefiniteness and failure of certain communications to amount to a promise); *Sims v. Craig*, 627 P.2d 875 (N.M. 1981) (holding that alleged novation of real estate option lacked consideration; facts suggest economic duress, and court expressly adopts negligent misrepresentation theory); *Jole v. Bredbenner*, 768 P.2d 433 (Or. Ct. App. 1989) (holding that alleged agreement to forbear collection of back rent in return for repayment schedule on arrearages violated pre-existing duty rule; letter agreement setting out schedule contained no express promise to forbear); *Guenther v. Fariss*, 833 P.2d 417 (Wash. Ct. App. 1992) (holding that release of claim against insolvent estate was insufficient consideration for modification of limited partnership agreement changing profit allocation; facts suggest court could have interpreted agreement so that condition terminating reallocation was satisfied); *Barnett v. Buchan Baking Co.*, 724 P.2d 1077 (Wash. Ct. App. 1986) (holding that alleged modification of option failed for lack of new consideration;

rule is harmless but unnecessary are accompanied by a much smaller group of cases in which the application of the rule is more disturbing, either because it is used to invalidate desirable modifications²⁷¹ or because it appears to be used as an indirect and imprecise way of addressing some legal issue other than consideration.²⁷²

critical party also failed to assent to modification), *aff'd*, 738 P.2d 1056 (Wash. 1987); *see also* Vergne Roig v. Corporacion Desarrollo Comercial (*In re* GEM de Puerto Rico, Inc.), 79 B.R. 142 (Bankr. D.P.R. 1987) (holding that termination of lease to bankrupt corporation and re-leasing to another company lacked consideration; transaction also occurred without court approval in violation of 11 U.S.C. § 363, and facts suggest it was a fraudulent conveyance), *appeal dismissed*, 860 F.2d 1072 (1st Cir. 1988); Hassett v. Far W. Fed. Sav. and Loan Ass'n (*In re* O.P.M. Leasing Servs.), 40 B.R. 380 (Bankr. S.D.N.Y.) (using lack of consideration for modifications to computer lease agreement as a subsidiary finding for avoidance of transfers in violation of various provisions of Bankruptcy Code), *aff'd*, 44 B.R. 1023 (S.D.N.Y. 1984).

271. *See* Beall v. Beall, 434 A.2d 1015 (Md. 1981). In *Beall* the court invalidated a written extension of a conventional real estate option on the grounds that the extension itself was unsupported by new consideration. *Id.* at 1021. If, as I have argued *supra* notes 33-88 and accompanying text, there is little reason to impose a requirement of consideration for an initial grant of an option, it is difficult to see why an extension of an option should be subjected to such a requirement. Moreover, the fact that the extension was written and literally appended to the original option should have satisfied whatever cautionary, evidentiary, and channeling functions a requirement of consideration is supposed to serve.

272. *See* Penn Compression Moulding, Inc. v. Mar-Bal, Inc., 326 S.E.2d 280 (N.C. Ct. App.), *aff'd*, 334 S.E.2d 391 (N.C. 1985). This case involved two "friendly competitors" in the insulator business. *Id.* at 281. Penn Compression competed with Mar-Bal in some product lines, but Penn also purchased from Mar-Bal some products Penn did not produce itself. *Id.* On one occasion Penn asked Mar-Bal to fill an order for one of Penn's established customers, and Mar-Bal complied. *Id.* After Penn had discontinued its own purchases from Mar-Bal, the same customer cancelled an order it had placed with Penn and reallocated the business to Mar-Bal. *Id.* Subsequent protests and negotiations between Penn and Mar-Bal produced an agreement under which Penn committed to pay its overdue balance with Mar-Bal and Mar-Bal agreed to pay Penn a sales commission on certain product sales to the customer that Penn had introduced to Mar-Bal. *Id.* at 281-82. Because Penn already had a duty to pay its outstanding balance, the commission arrangement violated the pre-existing duty rule and was ultimately held unenforceable. *Id.* at 283.

If the disposition of the case has some intuitive appeal, however, it is either because the arrangement between two competitors may have been a form of market allocation inconsistent with the policy embodied in antitrust law or because Penn may have used the threat of nonpayment and/or frivolous litigation to extort the commission agreement. If so, however, it would have been preferable for the court to address those questions directly, for, absent extortion or anticompetitive consequences, the commission arrangement seems reasonable enough. As a matter of contract theory, its enforcement could be justified either on the theory that the promise to pay a commission was simply a recognition of the value of past services in introducing Mar-Bal to a new customer or on the theory that the promise was made to salvage a business relationship between Penn and Mar-Bal that could have produced further beneficial exchanges.

In sum, the pre-existing duty rule has little to commend it as a device for policing modifications of ongoing contractual arrangements. In the vast majority of the instances of its use for that purpose, it is simply redundant. In other cases, however, the rule causes the kinds of harm that its critics attribute to it. In no single transactional context are the harmful cases particularly numerous, but they recur consistently in virtually every transactional context and collectively provide some impetus to abandon the pre-existing duty rule.

E. Compromises, Settlements, and Releases

The use of the various branches of the doctrine of consideration becomes even more complex when the focus of examination is shifted from modifications of ongoing contractual arrangements to the numerous and varied cases in which parties have made some effort to reach a final adjustment—in the form of a settlement or release—of their respective obligations. The increased factual complexity is, in part, a result of the fact that a corollary to the doctrine of consideration may be applied regardless of the temporal point in the history of the parties' relationship at which a settlement is reached or a release or discharge is granted. While the words "settlement," "compromise," "release," and similar expressions seem most at home when a dispute has arisen, a default has occurred, or litigation is already underway, there are nevertheless instances of pre-emptive attempts to settle potential disputes or absolve potential liability. Such attempts may occur, for example, at or near the initial stage of contract formation²⁷³ or when liability-generating conduct has occurred but no actual dispute is yet in progress.²⁷⁴

273. See *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564 (N.D. Ga. 1987) (involving an alleged surrender of claim in return for inclusion in future transaction); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985 (N.D. Ga. 1982) (involving a release and indemnification clause in work order receipt intended to be signed before crane services rendered but actually signed after services supplied); *Weindel v. DeSoto Rural Fire Protection Ass'n*, 765 S.W.2d 712 (Mo. Ct. App. 1989) (involving a release of all liability executed contemporaneously with purchase of tag entitling purchaser to firefighting services).

274. See *Chaput v. Unisys Corp.*, 964 F.2d 1299 (2d Cir. 1992) (involving a general release signed shortly after layoff announced); *McIlroy Bank & Trust Co. v. Comstock*, 678 S.W.2d 782 (Ark. Ct. App. 1984) (involving a bank that conditioned payment of certificate of deposit to one of two joint payees on execution of indemnity agreement covering possible disputes with the other); *Williams v. Winn Dixie*, 447 So. 2d 8 (La. Ct. App. 1984) (involving a shoplifting suspect who signed a release of civil liability during two to three hour period of detention and interrogation by store manager and security guard).

Further factual complexity is added by the fact that the doctrine of consideration may be applied to a purported settlement or release whether the underlying obligations or liability arise out of a contract or out of some other source. Indeed, the consideration cases during the relevant time period include numerous examples of compromises or releases of contractual obligations²⁷⁵ as well as similar adjustments to forms of legal obligation not based on contract, or, at least, not *exclusively* based on contract.²⁷⁶

275. See *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564 (N.D. Ga. 1987) (involving an alleged oral contract between a product manufacturer and the product's exclusive licensing agent regarding the advertising of an unlicensed product); *Matey v. Pruitt*, 510 So. 2d 351 (Fla. Dist. Ct. App. 1987) (concerning an alleged compromise of claims for contributive share of payment of judgment on a promissory note); *Owings v. Georgia R.R. Bank & Trust*, 372 S.E.2d 825 (Ga. Ct. App. 1988) (involving compromise of claims for attorneys fees under judgment on personal guaranty); *Hall v. Bank S.*, 368 S.E.2d 810 (Ga. Ct. App. 1988) (concerning an alleged accord and satisfaction of liability under promissory note and security agreement); *Management Recruiters, Inc. v. J & B Smith Co.*, 362 S.E.2d 462 (Ga. Ct. App. 1987) (involving an oral guarantee given in return for forbearance from suit to recover fees for services rendered to corporation); *Sellers v. Citizens & S. Nat'l Bank*, 338 S.E.2d 480 (Ga. Ct. App. 1985) (concerning note given as part of settlement of real estate loan); *Zagoria v. Dubose Enters.*, 296 S.E.2d 353 (Ga. Ct. App. 1982) (involving an alleged assumption of liability for partner's dishonored checks), *rev'd on other grounds*, 302 S.E.2d 674 (Ga. 1983); *Sylvester v. Animal Emergency Clinic*, 825 P.2d 1053 (Haw. 1992) (concerning a purported settlement of claims arising out of employment contract); *Palmetto Leasing Co. v. Chiles*, 602 N.E.2d 77 (Ill. App. Ct. 1992) (involving a settlement of claims arising out of equipment lease); *Upper Ave. Nat'l Bank v. First Arlington Nat'l Bank*, 400 N.E.2d 1105 (Ill. App. Ct. 1980) (involving a release of claim for air conditioning and heating services in return for part payment); *Burns v. Fernandez*, 401 So. 2d 1033 (La. Ct. App. 1981) (concerning a release of insolvent insurance company and insured in return for partial payment under policy); *Passer v. United States Fidelity & Guar. Co.*, 577 S.W.2d 639 (Mo. 1979) (involving an alleged covenant not to sue on contingency fee agreement); *Dickey v. Thirty-Three Venturers*, 550 S.W.2d 926 (Mo. Ct. App. 1977) (concerning a settlement of claims arising out of purchase of five banks); *Fletcher, Barnhardt & White, Inc. v. Matthews, Inc.*, 397 S.E.2d 81 (N.C. Ct. App. 1990) (involving an alleged promise to pay deficiency in commission draw account upon termination of employment); *Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins.*, 377 S.E.2d 797 (N.C. Ct. App. 1989) (concerning a promise by insurer to make check for covered loss jointly payable to insured and secured creditor); *Mancino v. Friedman*, 429 N.E.2d 1181 (Ohio Ct. App. 1980) (involving a note given in return for release of mechanics liens arising out of painting services); *Di Sante v. Russ Fin. Co.*, 380 A.2d 439 (Pa. Super. Ct. 1977) (concerning an alleged promise to refrain from execution on judgment for 45 days in return for partial payment of judgment on assumpsit and trespass claim); *Republic Nat'l Life Ins. v. United States Fire Ins. Co.*, 602 S.W.2d 527 (Tex. 1980) (involving a release of claim under fidelity bond upon partial payment); *Boardman v. Dorsett*, 685 P.2d 615 (Wash. Ct. App. 1984) (concerning a land purchaser's withholding of \$1000 of purchase price until vendor remedied certain alleged defects).

276. See, e.g., *Bank One v. Taylor*, 970 F.2d 16 (5th Cir. 1992) (concerning a release of

tort claims for lender liability in return for bank's disbursement of funds in frozen account and agreement to forgo meritless claim for attorneys fees), *cert. denied*, 113 S. Ct. 2331 (1993); Chaput v. Unisys Corp., 964 F.2d 1299 (2d Cir. 1992) (involving a release allegedly covering claims for age discrimination as well as ordinary claims arising out of employment termination); Bass v. Phoenix Seadrill/78, Ltd., 562 F. Supp. 790 (E.D. Tex. 1983) (concerning a settlement of claim for personal injuries); George R. Hall, Inc. v. Superior Trucking Co., 532 F. Supp. 985 (N.D. Ga. 1982) (involving a release allegedly covering negligence liability as well as contract claims); Milwee v. Peachtree Cypress Inv. Co., 510 F. Supp. 279 (E.D. Tenn. 1977) (concerning a release of claims arising out of settlement of estate and merger of two corporations); Smith v. Smith (*In re Smith*), 81 B.R. 888 (Bankr. W.D. Mich. 1988) (involving a property settlement agreement in divorce proceeding); Griffin v. Hardin, 456 So. 2d 1113 (Ala. Civ. App. 1984) (concerning an alleged compromise of obligation to pay judgment; nature of claim leading to judgment unspecified); Pride v. Harris, 882 P.2d 381 (Alaska 1994) (involving alleged accord and satisfaction of personal injury claim); E.P. Dobson, Inc. v. Richard, 705 S.W.2d 893 (Ark. Ct. App. 1986) (concerning an alleged compromise of negligence claim); McIlroy Bank & Trust Co. v. Comstock, 678 S.W.2d 782 (Ark. Ct. App. 1984) (involving an indemnification agreement in return for bank's performance of statutory duty to pay one of two joint payees of certificate of deposit); Orange County Found. for Preservation of Pub. Property v. Irvine Co., 139 Cal. App. 3d 195, 188 Cal. Rptr. 552 (1983) (involving settlement of land title dispute); Alhino v. Starr, 112 Cal. App. 3d 158, 169 Cal. Rptr. 136 (1980) (concerning alleged waiver of damages for fraud by entry into new agreement after discovery of fraud); 4934, Inc. v. District of Columbia Dep't of Employment Servs., 605 A.2d 50 (D.C. 1992) (involving an alleged compromise of personal injury claim); Interdonato v. Interdonato, 521 A.2d 1124 (D.C. 1987) (concerning release of claims for misuse of assets of testamentary trust); Leseke v. Nutaro, 567 So. 2d 949 (Fla. Dist. Ct. App. 1990) (involving an alleged compromise of personal injury claim); McAdams v. Scullin, 368 N.E.2d 1036 (Ill. App. Ct. 1977) (child support); Dyer v. National By-Products, 380 N.W.2d 732 (Iowa 1986) (concerning an alleged promise of lifetime employment in return for release of claim for personal injuries); Kansas *ex rel.* Ludwick v. Bryant, 697 P.2d 858 (Kan. 1985) (involving a personal guarantee of corporate tax liability); Williams v. Winn Dixie, 447 So. 2d 8 (La. Ct. App. 1984) (concerning a release of liability for unlawful detention); Consiglio v. Missouri Dep't of Social Servs., 863 S.W.2d 665 (Mo. Ct. App. 1993) (child support); Arnold v. Krewson, 834 S.W.2d 229 (Mo. Ct. App. 1992) (child support); Elmore v. Wal-Mart Stores, Inc., 812 S.W.2d 178 (Mo. Ct. App. 1991) (involving an alleged compromise of personal injury claim); Weindel v. DeSoto Rural Fire Protection Ass'n, 765 S.W.2d 712 (Mo. Ct. App. 1989) (concerning a release of both tort and contract liability); Rose v. Howard, 670 S.W.2d 142 (Mo. Ct. App. 1984) (involving an agreement concerning division of estate); Otten v. Otten, 632 S.W.2d 45 (Mo. Ct. App. 1982) (child support); Kennedy v. Kennedy, 575 S.W.2d 833 (Mo. Ct. App. 1978) (child support); Fafoutis v. Lyons, 540 N.Y.S.2d 20 (App. Div. 1989) (concerning an alleged compromise of obligations determined by informal accounting upon dissolution of partnership); Holt v. Holt, 282 S.E.2d 784 (N.C. 1981) (involving a family settlement agreement regarding division of estate); Holley v. Coggin Pontiac, Inc., 259 S.E.2d 1 (N.C. Ct. App. 1979) (involving an alleged accord and satisfaction of claims for fraud and deceptive trade practices arising out of automobile sale), *review denied*, 261 S.E.2d 919 (N.C. 1979); Schloss v. McGinness, 474 N.E.2d 666 (Ohio Ct. App. 1984) (involving an agreement to share estate); Thibault v. Cleland, 363 S.E.2d 114 (S.C. Ct. App. 1987) (concerning an acknowledgment of liability by insurer for negligence claim against insured); Victoria Bank & Trust v. Brady, 779 S.W.2d 893 (Tex. Ct. App. 1989) (involving a release of claims against lender covering both tort and contract claims), *rev'd on other grounds*, 811 S.W.2d 931 (Tex. 1991); Hamilton

Finally, the settlement and release cases present an additional layer of complexity because they implicate more than one branch of the doctrine of consideration. Some of the cases are simple applications of the general requirement of bargained exchange to settlement agreements or releases.²⁷⁷ Others involve applications of the pre-existing duty rule to one-sided final adjustments to obligations of various kinds.²⁷⁸ Still others implicate a functionally separate corollary to the doctrine of consideration—the rule that, although the adequacy of consideration is normally irrelevant to the enforceability of a promise, the surrender of a frivolous or absolutely worthless

v. Harper, 404 S.E.2d 540 (W. Va. 1991) (concerning a personal injury claim).

277. See *Ziggity Sys., Inc. v. Val Watering Sys.*, 769 F. Supp. 752, 835-36 (E.D. Pa. 1990); *Milwee v. Peachtree Cypress Inv. Co.*, 510 F. Supp. 279, 283 (E.D. Tenn. 1977); *Smith v. Smith (In re Smith)*, 81 B.R. 888, 894 (Bankr. W.D. Mich. 1988); *E.P. Dobson, Inc. v. Richard*, 705 S.W.2d 893 (Ark. Ct. App. 1986); *Leseke v. Nutaro*, 567 So. 2d 949, 950 (Fla. Dist. Ct. App. 1990); *Management Recruiters, Inc. v. J & B Smith Co.*, 362 S.E.2d 462, 463-64 (Ga. Ct. App. 1987); *Sellers v. Citizens & S. Nat'l Bank*, 338 S.E.2d 480, 482-83 (Ga. Ct. App. 1985); *Zagoria v. Dubose Enters.*, 296 S.E.2d 353, 358 (Ga. Ct. App. 1982), *rev'd on other grounds*, 302 S.E.2d 674 (Ga. 1983); *Palmetto Leasing Co. v. Chiles*, 602 N.E.2d 77, 79 (Ill. App. Ct. 1992); *McAdams v. Scullin*, 368 N.E.2d 1036, 1039 (Ill. App. Ct. 1977); *Williams v. Winn Dixie*, 447 So. 2d 8, 10-11 (La. Ct. App. 1984); *Passer v. United States Fidelity & Guar. Co.*, 577 S.W.2d 639, 648 (Mo. 1979); *Consiglio v. Missouri Dep't of Social Servs.*, 863 S.W.2d 665, 667 (Mo. Ct. App. 1993); *Elmore v. Wal-Mart Stores*, 812 S.W.2d 178, 182 (Mo. Ct. App. 1991); *Rose v. Howard*, 670 S.W.2d 142, 145-46 (Mo. Ct. App. 1984); *Fletcher, Barnhardt & White, Inc. v. Matthews, Inc.*, 397 S.E.2d 81, 83 (N.C. Ct. App. 1990); *Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins. Co.*, 377 S.E.2d 797, 798-99 (N.C. Ct. App. 1989); *Holley v. Coggin Pontiac, Inc.* 259 S.E.2d 1, 5 (N.C. Ct. App.), *review denied*, 261 S.E.2d 919 (N.C. 1979); *Thibault v. Cleland*, 363 S.E.2d 114, 115 (S.C. Ct. App. 1987); *Hamilton v. Harper*, 404 S.E.2d 540, 543-44 (W. Va. 1991).

278. See, e.g., *Chaput v. Unisys Corp.*, 964 F.2d 1299, 1301-02 (2d Cir. 1992); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985, 992 (N.D. Ga. 1982); *Griffin v. Hardin*, 456 So. 2d 1113, 1116 (Ala. Civ. App. 1984); *Pride v. Harris*, 882 P.2d 381, 384 (Alaska 1994); *McIlroy Bank & Trust v. Comstock*, 678 S.W.2d 782, 784 (Ark. Ct. App. 1984); *Alhino v. Starr*, 112 Cal. App. 3d 158, 168, 169 Cal. Rptr. 136, 142 (1980); *Interdonato v. Interdonato*, 521 A.2d 1124, 1134 (D.C. 1987); *Owings v. Georgia R.R. Bank & Trust*, 372 S.E.2d 825, 826 (Ga. Ct. App. 1988); *Hall v. Bank S.*, 368 S.E.2d 810, 811 (Ga. Ct. App. 1988); *Sylvester v. Animal Emergency Clinic*, 825 P.2d 1053 (Haw. 1992); *Upper Ave. Nat'l Bank v. First Arlington Nat'l Bank*, 400 N.E.2d 1105, 1107-08 (Ill. App. Ct. 1980); *Burns v. Fernandez*, 401 So. 2d 1033, 1039 (La. Ct. App. 1981); *Weindel v. DeSoto Rural Fire Protection Ass'n*, 765 S.W.2d 712, 715 (Mo. Ct. App. 1989); *Arnold v. Krewson*, 834 S.W.2d 229, 232-33 (Mo. Ct. App. 1992); *Otten v. Otten*, 632 S.W.2d 45, 48 (Mo. Ct. App. 1982); *Kennedy v. Kennedy*, 575 S.W.2d 833, 835 (Mo. Ct. App. 1978); *Fafoutis v. Lyons*, 540 N.Y.S.2d 20, 21 (App. Div. 1989); *Mancino v. Friedman*, 429 N.E.2d 1181, 1185-86 (Ohio Ct. App. 1980); *Di Sante v. Russ Fin. Co.*, 380 A.2d 439, 441 (Pa. Super. Ct. 1977); *Victoria Bank & Trust v. Brady*, 779 S.W.2d 893, 903 (Tex. Ct. App. 1989), *rev'd on other grounds*, 811 S.W.2d 931 (Tex. 1991); *Republic Nat'l Life Ins. Co. v. United States Fire Ins. Co.*, 602 S.W.2d 527 (Tex. 1980).

claim is not consideration for a return promise.²⁷⁹ The various guises in which the doctrine of consideration appears in the settlement context, together with the increased variety in the stage at which it is applied and the type of obligations compromised or released, make the settlement and release cases somewhat less manageable than other subclasses of consideration cases and less amenable to easy generalizations. Nevertheless, it is possible to make several useful observations.

First, there is the fairly obvious fact that, by the time parties negotiate a settlement or release, either a dispute is in progress or at least one party thinks a dispute is likely. The plausible assumption that parties to a dispute are less likely to contemplate future dealings than parties to the simple modification of an ongoing contract, leads one to expect that the reputational concerns that provide some deterrent to coercive, deceptive, or opportunistic behavior in the simple modification context²⁸⁰ would be less significant in the settlement context. One would therefore expect to find a number of settlement or release cases in which the defense of lack of consideration serves as a backup theory for one of the defenses based on misconduct. Indeed, an examination of the settlement cases does reveal some of the more colorful instances of duress, fraud, and similar misconduct. In *Holt v. Holt*,²⁸¹ for example, a son who had been excluded from sharing his mother's estate by a codicil to her will extracted an agreement from his more fortunate brothers to share the estate anyway.²⁸² The agreement was induced by violent and

279. See *Bank One v. Taylor*, 970 F.2d 16, 25-27 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2331 (1993); *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564, 1580-81 (N.D. Ga. 1987); *Foundation for Preservation of Pub. Property v. Irvine Co.*, 139 Cal. App. 3d 195, 188 Cal. Rptr. 552, 555-56 (1983); *4934, Inc. v. District of Columbia Dep't of Employment Servs.*, 605 A.2d 50 (D.C. 1992); *Matey v. Pruitt*, 510 So. 2d 351, 353 (Fla. Dist. Ct. App. 1987); *Dyer v. National By-Products, Inc.*, 380 N.W.2d 732, 735-36 (Iowa 1986); *State ex rel. Ludwick v. Bryant*, 697 P.2d 858, 861-63 (Kan. 1985); *Dickey v. Thirty-Three Venturers*, 550 S.W.2d 926, 930 (Mo. Ct. App. 1977); *Holt v. Holt*, 282 S.E.2d 784, 790-91 (N.C. 1981); *Schloss v. McGinness*, 474 N.E.2d 666, 668 (Ohio Ct. App. 1984).

At a conceptual level, of course, the rule that the surrender of a frivolous claim is not consideration can be assimilated quite easily to the pre-existing duty rule if one simply posits that everyone has a pre-existing legal duty not to file frivolous litigation or make unsupportable claims. In practice, however, courts tend not to assimilate the two rules, and I have, therefore, characterized them as "functionally" separate.

280. See E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 604-06 [hereinafter *Past of Promise*] (suggesting that nonlegal sanctions are more significant where the parties contemplate further transactions); Muris, *supra* note 90, at 526-28.

281. 282 S.E.2d 784 (N.C. 1981).

282. *Id.* at 785-86.

profane tirades by the excluded son and his daughter at the reading of the will, coupled with threats of litigation that would "inundate" the other, somewhat more grief-stricken, brothers with attorney's fees.²⁸³ If this scene is not colorful enough, one may resort to *Williams v. Winn Dixie*,²⁸⁴ in which a grocery store manager and security guard detained and interrogated a woman for two to three hours after she allegedly attempted to steal cheese worth \$2.48.²⁸⁵ Before she left the woman signed a release, apparently under the impression that signing was the only way to regain her freedom.²⁸⁶ Even more common, if less dramatic, are instances in which a settlement or release is obtained by the use of threats, or actual conduct, to block the consummation of a transaction economically significant to the party who agrees to the release or settlement.²⁸⁷ Consideration doctrine is frequently used to block the enforcement of such compromises or releases.²⁸⁸ However, although the evidence

283. *Id.*

284. 447 So. 2d 8 (La. Ct. App. 1984).

285. *Id.* at 9.

286. *Id.* at 9-10.

287. *See, e.g., Bank One v. Taylor*, 970 F.2d 16 (5th Cir. 1992) (involving bank that wrongfully froze depositor's funds causing depositor to miss business opportunities, and also refused to turn over funds until depositor signed release), *cert. denied*, 113 S. Ct. 2331 (1993); *Interdonato v. Interdonato*, 521 A.2d 1124 (D.C. 1987) (involving an uncle who, while acting as trustee of testamentary trust, refused to turn over trust assets for nephew's business venture until nephew dismissed lawsuit and signed release); *Dickey v. Thirty-Three Venturers*, 550 S.W.2d 926 (Mo. Ct. App. 1977) (involving settlement agreement induced by sham litigation that blocked consummation of bank sales); *Mancino v. Friedman*, 429 N.E.2d 1181 (Ohio Ct. App. 1980) (involving an attorney for painters who refused to release his clients' mechanic's liens and enable refinancing of property unless part-owner of property gave note for attorney's fees); *Boardman v. Dorsett*, 685 P.2d 615 (Wash. Ct. App. 1984) (involving a vendee who withheld \$1000 at closing to induce vendor to do work not required by earnest money agreement), *review denied*, 103 Wash. 2d 1006 (1984).

288. *See, e.g., Bank One v. Taylor*, 970 F.2d 16 (5th Cir. 1992) (holding that release lacked consideration because surrender of baseless claim for attorney's fees insufficient), *cert. denied*, 113 S. Ct. 2331 (1993); *Interdonato v. Interdonato*, 521 A.2d 1124 (D.C. 1987) (invalidating release under the pre-existing duty rule); *Williams v. Winn Dixie*, 447 So. 2d 8 (La. Ct. App. 1984) (finding insufficient evidence of consideration); *Dickey v. Thirty-Three Venturers*, 550 S.W.2d 926 (Mo. Ct. App. 1977) (stating that relinquishment of meritless claim as to which there was no good faith dispute was not consideration for compromise); *Holt v. Holt*, 282 S.E.2d 784 (N.C. 1981) (holding that relinquishment of right to contest a will as to which there was no bona fide dispute was not consideration for agreement to share estate); *Mancino v. Friedman*, 429 N.E.2d 1181 (Ohio Ct. App. 1980) (finding that fulfillment of pre-existing duty was insufficient consideration for note); *Boardman v. Dorsett*, 685 P.2d 615 (Wash. Ct. App. 1984) (finding that pre-existing duty rule applied).

of misconduct is not always as egregious as in the cases just discussed,²⁸⁹ it is clear that the defense of duress could, and often does,²⁹⁰ block enforcement as well. Nearly as common are cases in which the doctrine of consideration is used to invalidate compromises or releases, but in which misrepresentations and dishonest conduct of various kinds and degrees play a role in the inducement of the compromises or releases at issue.²⁹¹

289. See, e.g., *Matey v. Pruitt*, 510 So. 2d 351 (Fla. Dist. Ct. App. 1987) (holding that forbearance from threatened lawsuit was not consideration for indemnification; party threatening lawsuit had neither valid claim nor belief that it would succeed), *review denied*, 520 So. 2d 585 (Fla. 1988); *Arnold v. Krewson*, 834 S.W.2d 229 (Mo. Ct. App. 1992) (involving ex-husband who obtained ex-wife's release of pre-existing child support obligation in return for ex-husband's payment of debt for siding; release signed only after siding company filed suit against ex-wife for payment); *Schloss v. McGinness*, 474 N.E.2d 666 (Ohio Ct. App. 1984) (holding that niece who threatened to contest aunt's will did not provide consideration for her sister's agreement to share aunt's estate by promising not to carry out threat because niece had no standing to contest will). The reports of these three cases are sketchy in varying degrees, and none of them contain an express finding of duress. However, the facts of each case at least suggest a certain degree of coercion, and it may be that, in the absence of the consideration doctrine, the courts in each case might have focused on the issue of duress more explicitly.

290. See, e.g., *Bank One v. Taylor*, 970 F.2d 16 (5th Cir. 1992) (noting that the jury had found that release was procured by economic duress), *cert. denied*, 113 S. Ct. 2331 (1993); *Interdonato v. Interdonato*, 521 A.2d 1124 (D.C. 1987) (finding sufficient evidence on issue of duress to survive summary judgment motion); *Williams v. Winn Dixie*, 447 So. 2d 8 (La. Ct. App. 1984) (indicating that plaintiff pled lack of consideration and duress in effort to invalidate release); *Dickey v. Thirty-Three Venturers*, 550 S.W.2d 926 (Mo. Ct. App. 1977) (noting that the defense of economic duress was asserted in trial court); *Mancino v. Friedman*, 429 N.E.2d 1181 (Ohio Ct. App. 1980) (finding sufficient evidence of duress to support vacation of judgment on note).

291. See, e.g., *Chaput v. Unisys Corp.*, 964 F.2d 1299 (2d Cir. 1992) (noting a misrepresentation that release "didn't mean anything"); *Milwee v. Peachtree Cypress Inv. Co.*, 510 F. Supp. 279 (E.D. Tenn. 1977) (involving release executed by an agent, apparently obtained after carrying out scheme to obtain reinstatement of corporate charter through misrepresentations to deprive rightful heir of real estate held in corporate name); *Kansas ex rel. Ludwick v. Bryant*, 697 P.2d 858 (Kan. 1985) (finding that an individual, who was never personally liable for corporate debt, was induced to sign guaranty of tax liability of defunct corporation by misrepresentation that bankruptcy could not discharge her); *Rose v. Howard*, 670 S.W.2d 142 (Mo. Ct. App. 1984) (finding that agreement to assign Native American headrights lacked consideration where trial court also found elements of fraud, mistake, and undue influence); *Holley v. Coggin Pontiac, Inc.*, 259 S.E.2d 1 (N.C. Ct. App. 1979) (noting that fraud in the inducement of sale that was undiscovered at time of alleged accord, tainted accord as well), *review denied*, 261 S.E.2d 919 (N.C. 1979); *Victoria Bank & Trust v. Brady*, 779 S.W.2d 893 (Tex. Ct. App. 1989) (involving a release signed as part of settlement of foreclosure action, culminating series of transactions in which bank induced customer to sign documents assuming partner's pre-existing debt, contrary to bank's own representations), *rev'd on other grounds*, 811 S.W.2d 931 (Tex. 1991); *Hamilton v. Harper*, 404 S.E.2d 540 (W. Va. 1991) (involving litigant who accepted insurer's \$100,000 offer before insurer could learn that case to which offer

While the reports of the cases are not always sufficiently detailed to permit the reader to ascertain whether all elements of fraud or negligent misrepresentation are satisfied,²⁹² the cases at least suggest that a portion of the work performed in settlement cases by the doctrine of consideration could be taken over by defenses based on misrepresentation. To the extent courts are using consideration doctrine to police settlements for coercion, deception, or opportunism, it appears that they could use other defenses for the same purposes.

Second, an equally significant portion of the cases applying corollaries to the doctrine of consideration in the settlement context consists of cases in which the various doctrines grouped under the heading of mutual assent could, or do, lead the courts in question to the same conclusions as those dictated by the doctrine of consideration.²⁹³ Similarly, courts invalidating a release for lack of consider-

pertained had been dismissed).

292. Of the cases cited *supra* note 291, only *Holley* contains an express finding of fraud by the appellate court. *Holley*, 259 S.E.2d at 5. In addition, the trial court in *Rose* made an express finding of fraud, *Rose*, 670 S.W.2d at 145, and claims for or defenses of fraud were asserted at the trial court level in all of them except *Chaput*.

293. See, e.g., *Ziggity Sys., Inc. v. Val Watering Sys.*, 769 F. Supp. 752 (E.D. Pa. 1990) (holding that there was no consideration for promise to contact before filing suit; facts suggest alleged promise was mere courtesy); *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564 (N.D. Ga. 1987) (stating that alleged compromise of frivolous claim was not consideration for promise of inclusion in future transaction and that promise was also mere agreement to agree and too indefinite to enforce); *Griffin v. Hardin*, 456 So. 2d 1113 (Ala. Civ. App. 1984) (finding that alleged settlement agreement failed for lack of offer, acceptance, and consideration); *E.P. Dobson, Inc. v. Richard*, 705 S.W.2d 893 (Ark. Ct. App. 1986) (holding that there was no consideration for alleged promise to pay for damage caused by defendant's son; facts suggest defendant's statement was mere erroneous factual statement concerning scope of insurance coverage); *Alhino v. Starr*, 112 Cal. App. 3d 158, 169 Cal. Rptr. 136 (1980) (stating that reformed note was not intended as new agreement waiving fraud claim but merely intended to conform transaction documentation to original agreement, and that reformed note also lacked new consideration); *Leseke v. Nutaro*, 567 So. 2d 949 (Fla. Dist. Ct. App. 1990) (holding that settlement agreement lacked consideration where court could also have found agreement fatally indefinite); *Douglas v. Dixie Fin. Corp.*, 228 S.E.2d 144 (Ga. Ct. App. 1976) (finding that renewal of promissory note was not accord and satisfaction due to insufficient evidence of agreement and illegal consideration), *overruled on other grounds*, 296 S.E.2d 593 (1982)); *Palmetto Leasing v. Chiles*, 602 N.E.2d 77 (Ill. App. Ct. 1992) (concluding that check given in connection with settlement lacked consideration and unwritten aspects of settlement were indefinite and subject to condition precedent); *Belt v. Shepard*, 808 P.2d 907 (Kan. Ct. App. 1991) (stating that insufficient evidence existed that deceased partner had assented to discharge of liability of retiring partner where alleged discharge also lacked consideration); *Passer v. United States Fidelity & Guar.*, 577 S.W.2d 639 (Mo. 1979) (concluding there was no consideration for covenant not to sue; facts suggest statement relied upon was not a promise); *Consiglio v. Missouri Dep't of Social Servs.*, 863 S.W.2d 665 (Mo. Ct. App. 1993) (finding no evidence mother either

ation occasionally are able to reach the same practical result by restrictive interpretations of the language of the release itself²⁹⁴ or expansive interpretations of conditions attached to it.²⁹⁵ The cases in which consideration doctrine is thus made redundant by some misconduct-based defense, some branch of assent doctrine, or simple contract interpretation, collectively constitute the vast majority of the consideration cases involving settlements.

The remaining settlement cases involving applications of the corollaries to the doctrine of consideration form an odd assortment that defy easy description and characterization. Initially, there is a group of cases, each of which leaves the reader with the impression that a consideration tail is wagging a public-policy dog. Given that the settlement cases include so many in which the obligations that are the subject of compromise derive from some source other than, or in addition to, a contract between the parties and are thus, in some

agreed to reduced child support or received any consideration for reduction); *Fletcher, Barnhardt & White, Inc. v. Matthews*, 397 S.E.2d 81 (N.C. Ct. App. 1990) (finding that, notwithstanding post-termination statements of intent to repay, evidence indicated parties did not intend to impose personal liability on commission salesperson for deficiency in draw account, and that post-termination statements also lacked consideration), *review denied*, 402 S.E.2d 411 (N.C. 1991); *Holley v. Coggin Pontiac*, 259 S.E.2d 1 (N.C. Ct. App. 1979) (finding insufficient language indicating check was offered by defendant in full satisfaction of all claims and that alleged accord also lacked mutuality); *Cardamone v. University of Pittsburgh*, 384 A.2d 1228 (Pa. Super. Ct. 1978) (holding that university's agreement to pay medical expenses of injured student athlete lacked consideration where language of agreement specifically disclaimed intent to make legally enforceable commitment); *Di Sante v. Russ Fin. Co.*, 380 A.2d 439 (Pa. Super. Ct. 1978) (stating that payment of \$1000 judgment that debtor already owed did not constitute consideration for alleged promise to delay execution for 45 days where letter containing alleged promise could have been construed as something less than unequivocal commitment to delay of 45 days); *see also Dyer v. National By-Products, Inc.*, 380 N.W.2d 732 (Iowa 1986) (finding material issue of fact as to sufficiency of consideration in case in which existence of the promise was disputed); *Hugh O'Connor, Inc. v. J. Robert Autenreith, Inc.*, 343 So. 2d 1090 (La. Ct. App. 1977) (stating that alleged release by owner lacked consideration where alleged release was made by architect who lacked authority to agree on behalf of owner), *writ refused*, 345 So. 2d 59 (La. 1977); *Elmore v. Wal-Mart Stores*, 812 S.W.2d 178 (Mo. Ct. App. 1991) (stating that there was no consideration for defendant's alleged promises to pay plaintiff's medical bills in case in which the existence of promises was disputed).

294. *Victoria Bank & Trust v. Brady*, 779 S.W.2d 1090, 1095 (Tex. Ct. App. 1989) (concluding release lacked consideration), *aff'd in part and rev'd in part*, 811 S.W.2d 931, 939 (Tex. 1991) (concluding that claims against lender fell outside the scope of the released claims); *see also Pride v. Harris*, 882 P.2d 381, 384 (Alaska 1994) (stating that there was no consideration for alleged accord and satisfaction where facts also suggested alternative theory of limited scope of release).

295. *Burns v. Fernandez*, 401 So. 2d 1033, 1038-39 (La. Ct. App. 1981) (finding that release violated pre-existing duty rule and was voided by failure of condition subsequent).

sense, public duties, it should not be surprising to find a group of cases in which courts seem to be manipulating consideration doctrine to achieve a desired policy objective. The group includes most obviously those cases in which a finding of lack of consideration is used as a subsidiary finding on the way to a case disposition based explicitly on some legislatively articulated public policy²⁹⁶ as well as the rare cases in which courts are authorized to examine not just the sufficiency, or mere presence, of consideration but its adequacy as well.²⁹⁷

Though it is perhaps less obvious, in two other groups of settlement cases consideration doctrine is used as a convenient rationale for conclusions courts would like to reach for policy reasons. First, there is a group of cases in which courts have refused to recognize gratuitous releases of liability for overdue child support.²⁹⁸ Though the level of child support payments may often be the subject of agreement between divorcing parties, child support obligations are hardly a simple matter of contract. They are characteristically incorporated into a court order, presumably after a judicial analysis of the interests of all concerned, including the children who are the beneficiaries of, though probably not parties to, any child support agreement. Indeed, courts commonly deny the divorcing parties the right to make informal, private contracts changing the amount of child support prospectively.²⁹⁹ While past due child support payments

296. See, e.g., *Orange County Found. for Preservation of Pub. Property v. Irvine Co.*, 139 Cal. App. 3d 195, 188 Cal. Rptr. 552 (1983) (holding that compromise of private company's invalid claim to islands was insufficient to support settlement agreement and that payment under settlement agreement therefore constituted gift of public money barred by state constitution); *4934, Inc. v. District of Columbia Dep't of Employment Servs.*, 605 A.2d 50 (D.C. Ct. App. 1992) (stating that alleged settlement of personal injury claim against foreign government was not true compromise because surrender of unfounded claim is not consideration; accordingly, claimant's worker's compensation claim against insurer was not barred by a statutory provision relieving insurer of liability if claimant compromised claim without written approval of insurer); see also *Keene Corp. v. International Fidelity Ins. Co.*, 736 F.2d 388 (7th Cir. 1984) (relying on state judicial decisions, court determined that compensated surety was not discharged from liability on bond by an agreement granting additional time for performance on underlying contract unless the extension was supported by new consideration).

297. *Bass v. Phoenix Seadrill/78, Ltd.*, 562 F. Supp. 790 (E.D. Tex. 1983) (finding "Mary Carter" settlement agreement in admiralty/personal injury case to be based on inadequate consideration, champertous, and an improper impediment to settlement with remaining defendants).

298. See cases cited *infra* notes 299-300.

299. See, e.g., *Otten v. Otten*, 632 S.W.2d 45 (Mo. Ct. App. 1982); *Kennedy v. Kennedy*, 575 S.W.2d 833 (Mo. Ct. App. 1978).

may nevertheless be compromised, like any other debt, attempts to enforce gratuitous releases of past due child support often fail.³⁰⁰ It is tempting to conclude that judicial motivation in such cases includes, not only belief in the soundness of consideration doctrine, but concern for the welfare of the children involved, as well as background awareness of the social problems generated by widespread nonpayment of child support.

Second, on several occasions courts have used consideration doctrine to deny enforcement of advance releases of, or attempts to shift, liability for one party's errors or negligence.³⁰¹ Releases and disclaimers of liability, particularly of tort liability, always raise difficult policy questions, and it is once again tempting to conclude that the courts in such cases are reacting less to the concern that the releases in question are gratuitous than to their own doubts that parties should be permitted to agree to them at all.

At this point, however, an advocate of the doctrine of consideration might respond with a loud "So what?" If, in fact, courts are achieving satisfactory results from a policy point of view in such cases, what does it matter that the official rationale is a reference to the doctrine of consideration? Courts are not legislatures and are therefore understandably reluctant to make overt policy decisions. If consideration provides a reliable, if somewhat archaic, tool for accomplishing the same thing, what is the harm?

I have elsewhere echoed the general, abstract objections of others to judicial decisions in which the real reasons are not the stated reasons.³⁰² While I would not entirely rule out the possibility that

300. *McAdams v. Scullin*, 368 N.E.2d 1036 (Ill. App. Ct. 1977); *Consiglio v. Missouri Dep't of Social Servs.*, 863 S.W.2d 665 (Mo. Ct. App. 1993); *Otten v. Otten*, 632 S.W.2d 45 (Mo. Ct. App. 1982); *Kennedy v. Kennedy*, 575 S.W.2d 833 (Mo. Ct. App. 1978); see also *Bogigian v. Bogigian*, 551 N.E.2d 1149 (Ind. Ct. App.) (holding that wife's release of judgment against husband lacked consideration), *reh'g denied*, 559 N.E.2d 1199 (Ind. 1990).

301. See *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985 (N.D. Ga. 1982) (holding that release covering liability for negligent provision of crane services failed for lack of consideration because it was signed after service was provided); *McIlroy Bank & Trust v. Comstock*, 678 S.W.2d 782 (Ark. Ct. App. 1984) (holding that indemnity agreement bank required before making payment on certificate of deposit to one of two joint payees lacked consideration); *Weindel v. DeSoto Rural Fire Protection Ass'n*, 765 S.W.2d 712 (Mo. Ct. App. 1989) (finding that release covering negligence liability required by volunteer firefighting organization at the time of "fire tag" purchase lacked consideration).

302. See *Wessman*, *supra* note 2, at 81-82, 92-93 (summarizing Reiter's view that "dressing decisions in disguise" reduces predictability in the law, causes an appearance of arbitrariness and unfairness, stunts the growth of the law with respect to the secret grounds

relative ease of judicial administration might, on rare occasions, dictate the use of rules in which one ground of decision serves as a proxy for another, I generally believe that it is important, not just that judges reach the right results, but that they articulate the right reasons. More concretely, some of the cases in the categories enumerated above provide illustrations of the clumsiness of consideration doctrine as a tool in the covert service of policy concerns. Sometimes, for example, the vagaries of consideration doctrine are not finely tuned to the policy concerns they are dragged in to serve, and courts are forced to distort consideration doctrine to achieve the desired results. *Weindel v. DeSoto Rural Fire Protection Ass'n*³⁰³ provides an illustration. The defendant in the case was a volunteer firefighting association in rural Missouri, and the plaintiff was a homeowner whose home had been destroyed by fire.³⁰⁴ In order to be eligible for the protection of the association, the homeowner was required to buy a "fire tag" for \$12.50.³⁰⁵ At the time of purchase, the homeowner signed a receipt for the tag that included very broad language releasing the association from any liability to subscribing homeowners, whether in contract or in tort.³⁰⁶ When the homeowner sued to recover for the destruction of his property, alleging that the association negligently failed to extinguish the fire, the association asserted the release by way of defense.³⁰⁷ Ultimately, the appellate court refused to enforce the release because it was not supported by "new consideration."³⁰⁸

As a matter of consideration doctrine, of course, the case is a blatant error.³⁰⁹ The purchase of the fire tag and the execution of the receipt were contemporaneous and so clearly part of a single transaction. Since a single promise may, under traditional standards, provide consideration for a number of return promises or performances, the association's commitment to provide services was technically consideration for both the small payment and the advance release of

of decision and sets misleading precedent, as well as Llewellyn's similar observations concerning the use of consideration doctrine to police fairness).

303. 765 S.W.2d 712 (Mo. Ct. App. 1989).

304. *Id.* at 713-14.

305. *Id.* at 713.

306. *Id.* at 715.

307. *Id.* at 713, 715.

308. *Id.* at 715.

309. Indeed, that is one reason one suspects it is policy-driven in the first place.

liability.³¹⁰ By traditional standards, the fairness of the exchange is immaterial.

Moreover, it is not even clear that the result reached by the distortion of consideration doctrine is a desirable one. It may seem unconscionable, at first blush, to permit those who provide such vital services as firefighting to disclaim liability as broadly as the association in *Weindel*. On the other hand, it may be that rural volunteer firefighting associations would not be economically viable without a fairly broad limitation of liability. The policy question raised by such broad limitations of liability must be faced, and traditional consideration doctrine does nothing to resolve it.³¹¹ Indeed, twisting consideration doctrine to resolve such issues simply makes the doctrine so malleable that it is capable of justifying nearly anything, and, once that point is reached, its operation becomes utterly unpredictable.

In addition to cases in which the use of consideration doctrine to resolve policy questions produces distortion in the doctrine itself, there are cases in which its use for that purpose is both futile and distracting because applying the doctrine of consideration creates, at most, a temporary obstacle to enforceability and leaves the underlying policy question unresolved. In *George R. Hall, Inc. v. Superior Trucking Co.*,³¹² for example, the court used consideration doctrine to invalidate a release and indemnity agreement in favor of a crane company executed by a motor carrier.³¹³ The work order containing

310. See RESTATEMENT (SECOND) OF CONTRACTS § 80 (1981).

311. For a similar example among the child support cases, see *Kennedy v. Kennedy*, 575 S.W.2d 833 (Mo. Ct. App. 1978). In *Kennedy* an ex-husband fell behind on his required support payments of \$42 per week. *Id.* at 834. He was acquitted of criminal charges of failing to support his children, largely because of his poor financial condition. *Id.* His ex-wife then agreed to release him from the liability for past due child support if he would pay \$30 every two weeks until he "got back on [his] feet." *Id.* A month later, he suffered an injury and apparently never got "back on his feet," although he did have railroad retirement benefits and an accident settlement available for garnishment by his ex-wife. *Id.* The court refused to enforce the parties' settlement agreement, since the ex-husband had only promised to do part of what he was already obligated to do. *Id.* at 835. In so doing the court ignored the obvious contract question of whether the ex-husband's severe financial embarrassment, and his subsequent disability, might qualify him for the "unforeseen circumstances" exception to the pre-existing duty rule. Indeed, this apparent indifference to the more technical aspects of the consideration doctrine is one reason for the suspicion that the real reasons actuating the court were policy reasons. However, contract law does not answer the policy question of what circumstances excuse the payment of child support, and it would have been preferable for the court to face the question directly.

312. 532 F. Supp. 985 (N.D. Ga. 1982).

313. *Id.* at 992. The crane operator had been hired by the carrier to transfer a large

the release had not been signed until after the crane company had completed its work.³¹⁴ Moreover, the crane company representative who presented the work order to the carrier did not understand the release and indemnity language, and the carrier's representative did not even see it.³¹⁵ Apart from the usual policy questions concerning the propriety of advance disclaimers or releases of negligence liability, the release at issue thus presented the question whether the party disadvantaged by a disclaimer or release should be bound even in the absence of subjective agreement.³¹⁶ The court, however, focused on the apparently short³¹⁷ period of time between the verbal hiring of the crane company and the execution of the work order, and invalidated the release contained in the work order as an unenforceable attempt to modify a pre-existing verbal contract without new consideration.³¹⁸ The court did, of course, dispose of the case, but the consideration problem is so minor that it can be avoided by the simple expedient of obtaining execution of the work order before any services are provided. The decision gives no guidance on the policy questions which are more difficult, more interesting, and likely to recur.³¹⁹

printing press from one of its trucks to another. *Id.* at 989. When the press fell and was damaged, the owner of the press obtained a negligence judgment against both the carrier and the crane operator. *Id.* The carrier sought contribution from the crane operator towards the tort judgment against both of them, and the crane operator defended on the grounds that a work order signed by both parties contained language releasing the crane operator from negligence liability and requiring the carrier to indemnify it against any loss. *Id.* at 989-90.

314. *Id.* at 990.

315. *Id.* at 990, 993. Apparently, the crane company representative handed the two-page work order over for signature while still in a "receipt book" and with the relevant language on the side face down. *Id.* at 990 n.1.

316. *See also* Bogigian v. Bogigian, 551 N.E.2d 1149 (Ind. Ct. App.) (holding that former wife's release of judgment against former husband lacked consideration; former wife also contended she did not understand document), *reh'g denied*, 559 N.E.2d 1199 (Ind. 1990).

317. The court's opinion does not specify exactly how much time elapsed between the provision of crane services and the execution of the work order. The crane services were necessary, however, because the truck carrying the printing press had been involved in a collision, and the task of the crane company was to move the press to a relief truck. *George R. Hall, Inc.*, 532 F. Supp. at 989. The emergency nature of the occasion, and the fact that the crane was apparently dispatched after a phone call, suggests that the whole sequence of events was relatively short. *See id.* at 989, 992.

318. *Id.* at 992.

319. *See also* *McIlroy Bank & Trust v. Comstock*, 678 S.W.2d 782 (Ark. Ct. App. 1984). In *McIlroy* two sisters, Comstock and Browne, were joint payees on certificates of deposit originally purchased by their late mother. *Id.* at 783. Browne asked the bank not to cash

The use of consideration doctrine as a tool for advancing some independent public policy thus creates conceptual difficulties in the doctrine itself, reduces the predictability of its application, and makes judicial decisions less reliable guides for future action than they might otherwise have been. However, the "bottom line" in such cases is usually a conclusion that a father must pay his child support or that an attempt to evade liability for negligence has failed, and, in the current political climate, such conclusions are not generally unpalatable. However, a number of settlement or release cases show the doctrine of consideration generating undesirable case dispositions. A few are simple misapplications of the doctrine of consideration and are of little theoretical interest except as reminders that the complexity of the doctrine remains troublesome in practice.³²⁰ In a small

the certificates without notifying her, but she never gave written instructions not to cash them without more than one signature. *Id.* Comstock then presented the certificates for payment. *Id.* The bank required her to execute an indemnity agreement protecting the bank, and then paid her. *Id.* Browne subsequently demanded payment of "her share" of the proceeds, and the bank complied. *Id.* The bank then sought to recover an amount corresponding to Browne's "share" from Comstock under the indemnity agreement. *Id.* The court refused to enforce the indemnity agreement because it lacked consideration. *Id.* at 784. At the time Comstock presented the certificates for payment, the bank had a pre-existing duty to pay either of the joint payees upon proper demand in the absence of written instructions from one of them to require more than one signature. *Id.* Payment could thus not serve as consideration for Comstock's agreement to indemnify the bank. *Id.* at 783-84. Again, however, the consideration problem could be avoided fairly easily, presumably through the use of appropriately drafted agreements on signature cards executed at the time of the purchase of the certificate. The more interesting question is whether a bank should be permitted to shift its statutory risk of erroneous payment to one of two warring joint payees through such indemnity agreements, and consideration doctrine does not speak to that issue.

320. See *Management Recruiters, Inc. v. J & B Smith Co.*, 362 S.E.2d 462 (Ga. Ct. App. 1987) (holding alleged promise by individual to pay corporate debt in exchange for creditor's forbearance from suing corporation lacked consideration); *Zagoria v. Dubose Enters.*, 296 S.E.2d 353 (Ga. Ct. App. 1982) (finding agreement between attorney and shareholder of a professional corporation to assume liability for dishonored checks written by another shareholder of same corporation lacked consideration; neither agreement by client to continue using firm nor agreement by another client to allow second attorney further time for repayment constituted consideration), *rev'd on other grounds*, 302 S.E.2d 674 (1983); *Bogigian v. Bogigian*, 551 N.E.2d 1149 (Ind. Ct. App. 1990) (holding former wife's release of judgment against former husband lacked consideration; dissent noted that former wife received release of her liability on mortgage); see also *Fafoutis v. Lyons*, 540 N.Y.S.2d 20 (App. Div. 1989) (finding promise to pay existing debt if creditor delayed suit until contingency occurred was not enforceable; though existing debt time-barred by the time contingency occurred, second promise to pay it would not itself be consideration for valid contract); *Town & Country Linoleum & Carpet Co. v. Welch*, 392 N.Y.S.2d 517 (App. Div. 1977) (reversing lower court dismissal on issue of novation and finding that discharge of the original obligation would be sufficient consideration).

group of more disturbing cases, courts have refused to enforce promises made in a business context by a commercially sophisticated person or entity because of an inability to find a return promise or performance.³²¹ Recent examples include a promise by an insurer to make payment jointly to its insured debtor and the debtor's secured creditor³²² as well as an acknowledgment by an insurer of liability for its insured's negligent repair efforts and a promise to have the damage corrected.³²³ Judicial refusal to enforce a technically separate promise by an insurer made in the course of carrying out what are clearly contractual obligations is objectionable because such promises are as likely to generate expectations, as well as unprovable forms of reliance, on the part of the promisee as more conventional bargains.³²⁴ Other apparently gratuitous promises extended in the business context may even be given in the hope of generating opportunities for future beneficial exchanges, even though the future exchanges are not yet specified or even identifiable.³²⁵ If one aban-

321. *Sellers v. Citizens & S. Nat'l Bank*, 338 S.E.2d 480 (Ga. Ct. App. 1985); *Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins. Co.*, 377 S.E.2d 797 (N.C. Ct. App. 1989); *Thibault v. Cleland*, 363 S.E.2d 114 (S.C. Ct. App. 1987).

322. *Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins.*, 377 S.E.2d 797 (N.C. Ct. App. 1989).

323. *Thibault v. Cleland*, 363 S.E.2d 114 (S.C. Ct. App. 1987).

324. See *infra* notes 442-60 and accompanying text.

325. See *Sellers v. Citizens & S. Nat'l Bank*, 338 S.E.2d 480 (Ga. Ct. App. 1985). In *Sellers* an attorney representing a group of real estate developers received a 10% interest in the land involved in the project in lieu of a monetary fee for his services. *Id.* at 481. The attorney's interest was subject to a security deed, and the attorney assumed a pro rata share of the debt secured by the deed. *Id.* Later, the attorney deeded the interest back to the original investors who assumed his share of the debt in question. *Id.* When the development project proved not to be viable, the investors settled with the creditor holding the security deed, and the attorney gave a note representing 10% of the settlement amount. *Id.* The court found the note to be lacking in consideration and unenforceable. *Id.* at 481-82.

The initially puzzling aspect of *Sellers*, of course, is why the attorney gave a note in partial payment of the settlement when the interest in the project had terminated and the attorney had received nothing of real value for the previous services. The holder of the note contended that it had been executed by the attorney to appease one of the original investors, presumably in the hope of obtaining additional legal business from the investor. *Id.* at 481. Indeed, the hopes of future business had been realized by the time of trial. *Id.* It thus appears that the whole sequence of events fits a more "relational" model of exchange. The note, as part of that sequence, was given by a commercially sophisticated party and was presumably sufficiently formal to satisfy any evidentiary or cautionary concerns. Enforcing the note would thus seem to be consistent with both the presumption in favor of the enforcement of exchange promises and the functions sometimes attributed to the doctrine of consideration. The court, however, rejected this rationale for enforcement, on the grounds that the mere motive for a contract—here the prospect of

dons the erroneous belief that all exchange consists of the discrete, reciprocal pairings of specific promises or performances posited by the classical theory of contract,³²⁶ any reason for distinguishing between conventional bargains and the promises given in the hope of less specific future beneficial relations disappears.

Slightly more common than the foregoing types of undesirable cases are the recent applications of the branch of the pre-existing duty rule commonly identified as the rule of *Foakes v. Beer*³²⁷—the rule that actual payment of a sum less than that owed cannot be consideration for discharge of the remainder.³²⁸ A creditor's actual agreement to accept less than the full amount of the claim in satisfaction of the whole would seem to be a genuine bargain,³²⁹ and there seems little reason to refuse to enforce such a bargain in the absence of some vitiating defense such as fraud or duress. Indeed, it is clear in some of the cases that the creditor receives more from the debtor's partial, but voluntary, cooperation than the creditor could, as a practical matter, compel the debtor to give up. *Owings v. Georgia Railroad Bank & Trust*³³⁰ provides a good illustration. A Georgia bank obtained a judgment against certain individuals on their personal guaranties of a loan to a business.³³¹ The judgment was in the amount of \$231,811.15 plus attorney's fees in the amount of fifteen percent of the indebtedness.³³² According to the individual judgment debtors, the bank agreed to discount the attorney's fees to

future business—is not consideration unless it is the subject of explicit bargaining. *Id.*

326. See Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 920-29 (1985); see also ATIYAH, *supra* note 113, at 241-42 (suggesting that promises in business context with hope of indirect gain should be enforceable); Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 309-17 (1992) (suggesting that elements of gift are embedded in exchange and that exchange practice includes fluid, ongoing adjustments characterized by trust and hopes of reciprocity).

327. 9 App. Cas. 605 (H.L. 1884). For discussions of the rule, see GILMORE, *supra* note 33, at 30-33, 118-20; CORBIN, *supra* note 89, § 7.4.

328. See, e.g., *Owings v. Georgia R.R. Bank & Trust*, 372 S.E.2d 825, 826 (Ga. Ct. App. 1988); *Hall v. Bank S.*, 368 S.E.2d 810 (Ga. Ct. App. 1988); *Sylvester v. Animal Emergency Clinic*, 825 P.2d 1053 (Haw. 1992); *Upper Ave. Nat'l Bank v. First Arlington Nat'l Bank*, 400 N.E.2d 1105 (Ill. App. Ct. 1980); *Republic Nat'l Life Ins. v. United States Fire Ins. Co.*, 589 S.W.2d 737 (Tex. Civ. App. 1979), *rev'd*, 602 S.W.2d 527 (Tex. 1980).

329. See CORBIN, *supra* note 89, § 7.2 (arguing that cases governed by the pre-existing duty rule may be instances of the exchange of genuine benefits or detriment).

330. 372 S.E.2d 825 (Ga. Ct. App. 1988).

331. *Id.* at 825-26.

332. *Id.*

actual expenses incurred if the judgment debtors made certain efforts to pay promptly.³³³ In response the judgment debtors obtained a loan from another bank and sold some property in Florida.³³⁴ At the meeting scheduled for payment of the proceeds to the Georgia bank, however, the bank collected the full fifteen percent attorney's fees in addition to the full amount of the debt.³³⁵ The individual judgment debtors then sued for recovery of the difference between the bank's actual expenditures for attorney's fees and the fifteen percent collected, and were awarded in excess of \$20,000 by a jury.³³⁶ Neither the trial nor the appellate court let the award stand.³³⁷ The appellate court concluded that the individual judgment debtors' agreement to pay the judgment promptly was merely the promise to perform a pre-existing duty and could not be consideration for the bank's promise to reduce the amount of the debt.³³⁸

It is obvious, however, that the compromise agreement was a substantial benefit to the bank. It is highly doubtful that the bank could have compelled the debtors to obtain a loan from another bank in order to pay the judgment. While the bank might ultimately have been able to reach the judgment debtors' Florida property, it could only have done so upon incurring the expense of domesticating its Georgia judgment in Florida and taking whatever steps were necessary for execution in Florida. Even then, a forced judicial sale would likely have brought a distress sale price, perhaps substantially less than the market transaction that the judgment debtors apparently arranged. In short, the bank and the judgment debtors made a genuine bargain producing an apparent economic benefit to the bank. The use of the pre-existing duty rule to allow the bank to reap the benefit of the bargain without rendering its own performance is an illustration of the formalistic character of the rule and a dramatic example of the merit of the arguments of the rule's critics.³³⁹

At the end of a tour through the current operation of the multifaceted pre-existing duty rule—as well as its overlap with other corollaries to the doctrine of consideration in the compromise and

333. *Id.* at 826. While the bank disputed the existence of the agreement, a jury implicitly resolved that issue in favor of the individual judgment debtors. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. See *supra* notes 167-89 and accompanying text.

release context—one is driven to the conclusion that even the most durable of the corollaries to the doctrine of consideration has little remaining justification. It is usually redundant, and, when it is not, it consistently produces results that are troubling in various degrees.

IV: PROMISE-SPECIFIC CONSIDERATION REQUIREMENTS

As traditionally conceived consideration is a bit like Tabasco sauce; a little of it goes a long way. Specifically, the traditional rule is that a single item of consideration on one side of a transaction can supply consideration for any number of return promises or performances.³⁴⁰ Presumably, this rule follows from the general proposition that it is not the task of the courts to inquire into the adequacy of consideration. It is therefore somewhat counterintuitive to find that, in certain contexts, the courts seem to focus on certain types of promises and insist that each promise falling within one of those types be paired with its own supporting item of consideration.³⁴¹ This unusually strict reciprocity requirement occurs principally in two types of cases: those involving claims that an employee has contracted out of employment at will and those involving covenants by an employee not to compete with the employer upon termination of employment. Obviously, both types of cases are highly charged with policy issues. The policy issues are somewhat different in each type of case, however, and I shall address them separately.

A. *Contracting Out of Employment at Will*

Though the rules governing employment “at will” may have lost some of their common-law harshness, employment for an indefinite term is still generally presumed to be employment at will, both in the sense that the duration of employment may be concluded at any time and in the sense that there are no restrictions—or, at any rate, very few restrictions—on the power of either party to terminate the employment relationship.³⁴² Given the precariousness of such an

340. See RESTATEMENT (SECOND) OF CONTRACTS § 80(1) cmt. a. (1981).

341. Obviously, in the case of modifications to ongoing contracts, the strict promise-by-promise consideration requirement is not as counterintuitive, in light of the pre-existing duty rule. If the modification consists of the addition of a single duty or promise on one side, then the pre-existing duty rule requires that that duty or promise be paired with one or more reciprocal items of fresh consideration. In the cases to be considered in this section, however, the courts go beyond what the pre-existing duty rule requires.

342. See Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189 (1983); Jordan Leibman & Richard Nathan,

arrangement for the employee, it is hardly surprising to find cases in which employees claim to have been promised something more permanent, either in the form of a commitment to employment for life or in the form of a restriction on the employer's power to discharge. If such a promise is made after employment at will has commenced, the doctrine of consideration is occasionally used to deny enforcement of the promise of lifetime employment or restrictions on the power to discharge.³⁴³ Such cases are not particularly surprising, as they are simply applications of the amazingly durable pre-existing duty rule. As such, these cases are subject to all the criticism leveled at the pre-existing duty rule by its critics.³⁴⁴ Indeed, a midcareer change in employment status from employment terminable at will to employment for life or employment subject to discharge only for cause could be justified in much the same way as a promise to pay a bonus, either as a simple revisiting and revaluing of the original exchange³⁴⁵ or as a promise made in recognition of the past receipt of a benefit.³⁴⁶

The more interesting cases are the true exceptions to the rule that a single consideration can support any number of return promises. In a number of cases, employees have contended that, at the very inception of the employment relationship, the employer has made some promise—typically a promise of lifetime employment or a commitment to discharge only for cause—that takes the relationship out of the category of employment at will.³⁴⁷ In spite of the usual

The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement, 60 S. CAL. L. REV. 1465, 1494-95 (1987); Peter Linzer, *The Decline of Assent: At-Will Employment As a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 335-37 (1986).

343. See *Schoeneck v. Chicago Nat'l League Ball Club, Inc.*, 867 F. Supp. 696, 702 (N.D. Ill. 1994); *Wilson v. Vulcan Rivet & Bolt Corp.*, 439 So. 2d 65, 66 (Ala. 1983); *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal. App. 3d 299, 318, 231 Cal. Rptr. 820, 829-30 (1986); *Dyer v. National By-Products, Inc.*, 380 N.W.2d 732, 736 (Iowa 1986); *Eaton v. Aid for Victims of Crime, Inc.*, 536 S.W.2d 176, 177 (Mo. Ct. App. 1976); *Jones v. East Ctr. for Community Mental Health, Inc.*, 482 N.E.2d 969, 973 (Ohio Ct. App. 1984); *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 933 (Tenn. Ct. App. 1984).

344. See *supra* notes 167-89 and accompanying text.

345. See *supra* notes 168-70 and accompanying text.

346. See RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

347. *Fregara v. Jet Aviation Business Jets*, 764 F. Supp. 940, 945-46 (D.N.J. 1991); *Hesston Corp. v. Roche*, 599 So. 2d 148, 151 (Fla. Dist. Ct. App. 1992); *Koch v. Illinois Power Co.*, 529 N.E.2d 281, 284 (Ill. App. Ct. 1988), *appeal denied*, 535 N.E.2d 915 (Ill. 1989); *Mayer v. King Cola Mid-America, Inc.*, 660 S.W.2d 746, 748 (Mo. Ct. App. 1983); *Alter v. Resorts Int'l, Inc.*, 560 A.2d 1290, 1291 (N.J. Super. Ct. Ch. Div. 1989); *Gonzales v. United Southwest Nat'l Bank*, 602 P.2d 619, 620 (N.M. 1979); *Burkhimer v. Gealy*, 250

rule that a single promise by the employee could support any number of return promises by the employer, a number of courts have imposed a requirement that the employer's promise of more permanent employment be supported by some consideration other than the employee's promise of services. If such a discrete item of consideration is absent, the promise of lifetime employment or of discharge only for cause is unenforceable.³⁴⁸ The exceptional nature of this "additional consideration" requirement is either a signal that special policy concerns are implicated in cases involving qualification of employment at will or that consideration is performing some special function in this context. Accordingly, it is necessary to examine the justifications that might be given for the additional consideration requirement.

One justification sometimes offered is that additional consideration beyond the promise of services is necessary for an employer's promise qualifying employment at will because "mutuality of obligation" requires it.³⁴⁹ Absent additional consideration supplied by the employee, the employer is committed to lifetime employment, or employment terminable only for cause, while the employee is still free to end the relationship at will. Under the principle that "both parties must be bound or neither is bound," it allegedly follows that the employer's promise qualifying employment at will is unenforceable.

S.E.2d 678, 680 (N.C. Ct. App. 1979); *Goodpaster v. Pfizer, Inc.*, 665 P.2d 414, 416 (Wash. Ct. App. 1983).

348. See, e.g., *Fregara v. Jet Aviation Business Jets*, 764 F. Supp. 940 (D.N.J. 1991); *Forstmann v. Culp*, 648 F. Supp. 1379 (M.D.N.C. 1986); *Hesston Corp. v. Roche*, 599 So. 2d 148 (Fla. Dist. Ct. App. 1992); *Koch v. Illinois Power Co.*, 529 N.E.2d 281 (Ill. App. Ct. 1988); *Panther v. Mr. Good-Rents, Inc.*, 817 S.W.2d 1 (Mo. Ct. App. 1991); *Alter v. Resorts Int'l, Inc.*, 560 A.2d 1290 (N.J. Super. Ct. Ch. Div. 1989); *Gonzales v. United Southwest Nat'l Bank*, 602 P.2d 619 (N.M. 1979); *Burkhimer v. Gealy*, 250 S.E.2d 678 (N.C. Ct. App. 1979); *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979); *Goodpaster v. Pfizer, Inc.*, 665 P.2d 414 (Wash. Ct. App. 1983).

349. *Schoeneck v. Chicago Nat'l League Ball Club, Inc.*, 867 F. Supp. 696 (N.D. Ill. 1994); *Hesston Corp. v. Roche*, 599 So. 2d 148 (Fla. Dist. Ct. App. 1992); *Koch v. Illinois Power Co.*, 529 N.E.2d 281 (Ill. App. Ct. 1988); cf. *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216 (Fla. Dist. Ct. App. 1981) (noting that in a bilateral contract, the promise of one party constitutes the sole consideration for the promise of the other party), *review denied*, 415 So. 2d 1361 (Fla. 1982); *Mayer v. King Cola Mid-America, Inc.*, 660 S.W.2d 746 (Mo. Ct. App. 1983) (holding that absent mutuality, there can be no contract to enforce in law or equity); *Jones v. East Ctr. for Community Mental Health, Inc.*, 482 N.E.2d 969 (Ohio Ct. App. 1984) (stating that where employment contract of definite duration exists between the parties, there is also mutuality of obligation).

The foregoing basis for the additional consideration requirement is thoroughly unsatisfactory. Initially, the argument proves more than its proponent desires. Carried to its logical conclusion, it requires not only that the employee provide some form of additional consideration for an employer promise qualifying employment at will, but that the additional consideration take the form of an employee commitment to stay on the job for a specified term or to leave only for certain types of reasons. Only in that event are both parties "bound" in the requisite sense. Moreover, quite apart from the fact that the "requirement" of mutuality of obligation has been riddled with exceptions over the years,³⁵⁰ I have argued elsewhere that the requirement has little to commend it and should be abandoned.³⁵¹ Finally, if it is alleged that a requirement that qualifications of the right to terminate employment be reciprocal rests on some notion of fairness, the appropriate response is simply to deny that symmetry is always fair. In particular for a society in which the great bulk of citizens are dependent upon their employers for economic security but in which employers have access to an ample supply of labor, asymmetry in the power to terminate employment is hardly unfair. The employee's "right" to terminate is not a major burden to the employer if the employee has limited mobility or some other economic incentive not to exercise it.³⁵² The employer's power to fire at will, on the other hand, is normally potentially devastating to the employee. Requiring formal symmetry in termination rights thus ignores the differential impact of such rights. That is formalism, not fairness.³⁵³

The other potential basis for the requirement of special or additional consideration for employer promises qualifying employment at will is quite different. In many of the cases involving such promises, the nature of the representation or commitment made by the employer is problematic.³⁵⁴ An employer who tells a prospec-

350. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 78-79 cmt. f.

351. See Wessman, *supra* note 2, at 102.

352. See Krauskopf, *supra* note 342, at 196; Linzer, *supra* note 342, at 336-37.

353. Of course, judgments of fairness are often complex and difficult, and one might object that fairness does require that an employer receive *some* return for effectively restricting access to the ample supply of labor by qualifying the right to terminate a particular employee at will. Even if that premise is true, however, it does not follow that this employer's return must be separable from all other aspects of the employment relationship or that it take any particular form, let alone the form of a parallel restriction on the employee's right to discontinue services.

354. Schoeneck v. Chicago Nat'l League Ball Club, Inc., 867 F. Supp. 696 (N.D. Ill.

tive employee, "As long as you perform well, you will have nothing to worry about," may be doing one of two things. The employer may be making a somewhat clumsy promise of lifetime employment or employment terminable only for cause, or may be engaging in "mere puffery"—simple commendation of the employer's own track record. The job of sorting out which the employer is doing is normally assigned to the objective theory of assent. However, one might argue that if a requirement of special or additional consideration is imposed, the doctrine of consideration will function as an evidentiary and channeling device,³⁵⁵ simultaneously providing corroboration that the promise qualifying employment at will was made³⁵⁶ and enabling the parties to signal, and the courts to recognize, the difference between mere commendations and promises in this context.

One must concede, of course, that special consideration for an employer's apparent commitment to lifetime employment or restrictions on the right to discharge *could* serve such evidentiary and channeling functions. If an employer and a prospective employee drafted and executed an agreement containing representations by the employer concerning length of employment and restrictions on the right to discharge, and allocated some separate item of consideration supplied by the employee for those representations—perhaps reciting the separate consideration in the same paragraph that contained the employer's representations—a court no doubt would and should classify the representations as promises rather than puffery. All that classification proves, however, is that supplying additional consideration for an employer promise qualifying employment at will should be available as an evidentiary and channeling device. The mere possibility that consideration might facilitate such classification does not prove that it should be a mandatory and exclusive device for

1994); *Fregara v. Jet Aviation Business Jets*, 764 F. Supp. 940 (D.N.J. 1991); *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal. App. 3d 299, 231 Cal. Rptr. 820 (1986); *Hesston Corp. v. Roche*, 599 So. 2d 148 (Fla. Dist. Ct. App. 1992); *Koch v. Illinois Power Co.*, 529 N.E.2d 281 (Ill. App. Ct. 1988); *Mayer v. King Cola Mid-America, Inc.*, 660 S.W.2d 746 (Mo. Ct. App. 1983); *Gonzales v. United Southwest Nat'l Bank*, 602 P.2d 619 (N.M. 1979); *Burkhimer v. Gealy*, 250 S.E.2d 678 (N.C. Ct. App. 1979); *Price v. Mercury Supply Co.*, 682 S.W.2d 924 (Tenn. Ct. App. 1984); *Goodpaster v. Pfizer, Inc.*, 665 P.2d 414 (Wash. Ct. App. 1983).

355. Once again, I am relying on Fuller's influential analogy between consideration and the functions of legal formalities. See Fuller, *supra* note 77, at 799-806.

356. Such corroboration might be deemed desirable either on the theory that promises qualifying employment at will are somewhat unusual or on the theory that they represent the surrender by the employer of a valuable right.

distinguishing true commitments to lifetime employment or restrictions on discharge from mere commendations or vague reassurances. Assigning the requirement of additional consideration the role of a gatekeeper with respect to such commitments is only defensible on the assumption that the practice of supplying additional consideration is not only *effective* as an evidentiary and signaling device but also *accessible* to those charged with the duty of using the device. However, there is good reason to doubt that the device of supplying additional consideration for a commitment to lifetime employment or restrictions on discharge is accessible to most employees. Such commitments, of course, favor the employee, and it is therefore in the employee's, not the employer's, interest to have such commitments clearly signaled.³⁵⁷ One may fairly assume, however, that, of the two parties to the employment contract, the employee is the least likely to be represented by counsel and the least likely to know that a separate item of consideration needs to be allocated to the employer's promise qualifying employment at will. If the employee is unlikely to know or learn of the additional consideration channeling and evidentiary device, it makes little sense to make its use mandatory and to penalize the employee's failure to use it with the inability to effectuate an intention to obtain the desired enforceable commitment from the employer. In short, requiring additional consideration to make an employer's commitment to lifetime employment or restrictions on the power to discharge enforceable cannot be justified by appeal to the evidentiary and channeling functions of consideration in corroborating the making of promises and distinguishing promises from mere commendations. Indeed, substantial authority now supports the abandonment of an absolute requirement of additional consideration,³⁵⁸ and courts occasionally recognize that the presence

357. I am not suggesting that all employers will behave opportunistically by making such commitments and then deliberately failing to put them in enforceable form, although it is probably fair to assume that some will. Doing so would, after all, permit an opportunistic employer to produce a desired favorable impression on the prospective employee without incurring an enforceable commitment. But not all employers are opportunists, and I am making the more modest suggestion that employers will often have little incentive to invest the time, trouble and expense to learn of and use formal devices for signaling contractual provisions that are for the sole benefit of the employee.

358. *Corson v. Universal Door Sys., Inc.*, 596 So. 2d 565, 568 (Ala. 1991); *Johnson v. George J. Ball, Inc.*, 617 N.E.2d 1355, 1359-60 (Ill. App. Ct. 1993); *Wior v. Anchor Indus., Inc.*, 641 N.E.2d 1275, 1279 (Ind. Ct. App. 1994); *Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 780-81 (N.M. 1993), *cert. denied*, 114 S. Ct. 1068 (1994); *Sowards v. Norbar, Inc.*, 605 N.E.2d 468, 471-72 (Ohio Ct. App. 1992); *Moshtaghi v. The Citadel*, 443 S.E.2d 915, 918

of additional consideration may, in some instances, serve a more limited evidentiary function.³⁵⁹

B. Covenants Not to Compete

At first glance the treatment of covenants not to compete seems precisely the opposite of that accorded to promises qualifying employment at will. There are very few cases imposing a requirement of special or additional consideration for a covenant not to compete given by the employee at the inception of the employment relationship.³⁶⁰ In most cases if an employee agrees, at the time the employment relationship commences, that upon termination he or she will not compete with the employer or disclose confidential information obtained from the employer, the initial promise of employment supports the covenant not to compete as well as any other commitments made by the employee.³⁶¹ If, however, the covenant not to compete is obtained by the employer after the employment relationship has commenced,³⁶² numerous cases hold that the covenant must be supported by independent consideration.³⁶³ It is tempting to

(S.C. Ct. App. 1994).

359. *Alter*, 560 A.2d at 1293; *Hartbarger* 857 P.2d at 781 n.3.

360. See *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 171 (Tex. 1987) (analyzing consideration supplied for covenant not to compete that was executed at time of grant of franchise); cf. *McCandless v. Carpenter*, 848 P.2d 444, 449 (Idaho Ct. App. 1993) (discussing consideration for covenant not to compete executed incident to sale of used equipment).

361. Most of the cases cited *infra* note 363 articulate this traditional rule.

362. I shall refer to covenants not to compete executed after the employment relationship has commenced as "post-employment covenants" or "afterthought" covenants. In using those terms I am not referring to the rare covenants executed after an employment relationship has ended. Nor am I referring to the fact that the covenant may restrict the employee's activities after his employment ceases. Almost all covenants not to compete restrict post-termination activities, regardless of when they are executed.

363. See, e.g., *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *Rivendell Forest Prod., Ltd. v. Georgia-Pacific Corp.*, 824 F. Supp. 961 (D. Colo. 1993), *rev'd on other grounds*, 28 F.3d 1042 (10th Cir. 1994); *National Risk Management, Inc. v. Bramwell*, 819 F. Supp. 417 (E.D. Pa. 1993); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982); *Creative Entertainment, Inc. v. Lorenz*, 638 N.E.2d 217 (Ill. App. Ct. 1994); *Mid-Town Petroleum, Inc. v. Gowen*, 611 N.E.2d 1221 (Ill. App. Ct. 1993); *Advanced Copy Prod., Inc. v. Cool*, 363 N.E.2d 1070 (Ind. Ct. App. 1977); *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376 (Iowa 1983); *Insurance Agents, Inc. v. Abel*, 338 N.W.2d 531 (Iowa Ct. App. 1983); *Evco Distrib., Inc. v. Brandau*, 626 P.2d 1192 (Kan. 1981); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Josten's Inc. v. National Computer Sys., Inc.*, 318 N.W.2d 691 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct.

regard such cases as simple applications of the pre-existing duty rule in its role as a policing device for contract modifications. As such, they are subject to all the general criticism of the pre-existing duty rule outlined in the preceding section.³⁶⁴ Indeed, considered as simple applications of the pre-existing duty rule, such cases may be particularly good examples of the rule's defects, as there are perfectly good reasons for an employer to obtain a covenant not to compete part way through the employment relationship and reasons to enforce such "afterthought" agreements whether the employer supplies fresh consideration or not.³⁶⁵ During the course of an ongoing employment relationship, an employee may acquire specialized expertise, valuable information, or "relational" assets, all at the employer's expense or with the employer's assistance.³⁶⁶ At the inception of the employment relationship the employer may not be able to identify which employees will acquire such assets, and it may be impractical or uneconomical to extract post-termination covenants not to compete from all prospective employees.³⁶⁷ It may thus be practically necessary for the employer to obtain the covenant not to compete in the middle of the employee's career, and the informational and relational interests that justify such a covenant would seem to do so whether market forces dictate that the employer give the employee some small raise for the covenant or not. Considered as mere applications of the pre-existing duty rule, the cases denying enforcement to afterthought covenants on grounds of lack of fresh consideration are arguably

App. 1993); *Kari Family Clinic of Chiropractic v. Bohnen*, 349 N.W.2d 868 (Minn. Ct. App. 1984); *Nooter Corp. v. Todd*, 687 S.W.2d 695 (Mo. Ct. App. 1985); *Hogan v. Bergen Brunswick Corp.*, 376 A.2d 1277 (N.J. Super. Ct. Ch. Div. 1977), *vacated*, 378 A.2d 1164 (N.J. Super. Ct. App. Div. 1977); *Milner Airco, Inc. v. Morris*, 433 S.E.2d 811 (N.C. Ct. App. 1993); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990); *Stevenson v. Parsons*, 389 S.E.2d 291 (N.C. Ct. App. 1989), *review denied*, 389 S.E.2d 819 (N.C. 1990); *Brooks Distrib. v. Pugh*, 373 S.E.2d 300 (N.C. Ct. App. 1988), *rev'd on other grounds*, 378 S.E.2d 31 (N.C. 1989); *Collier Cobb & Assocs. v. Leak*, 300 S.E.2d 583 (N.C. Ct. App. 1983); *Cohen & Co. v. Messina*, 492 N.E.2d 867 (Ohio Ct. App. 1985); *Bilec v. Auburn & Assocs., Inc. Pension Trust*, 588 A.2d 538 (Pa. Super. Ct. 1990); *Records Ctr., Inc. v. Comprehensive Management, Inc.*, 525 A.2d 433 (Pa. Super. Ct. 1987); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667 (Tex. 1990); *Environmental Prod. Co. v. Duncan*, 285 S.E.2d 889 (W. Va. 1981); *Pemco Corp. v. Rose*, 257 S.E.2d 885 (W. Va. 1979); *NBZ, Inc. v. Pilarski*, 520 N.W.2d 93 (Wis. Ct. App. 1994).

364. See *supra* notes 167-90 and accompanying text.

365. See, e.g., *Leibman & Nathan, supra* note 342, at 1508.

366. *Id.* at 1484-91.

367. *Id.* at 1490-93.

egregious examples of its defects, but there is nothing conceptually distinctive about them.

However, considering such cases as simple applications of the pre-existing duty rule, in my view, oversimplifies the role the doctrine of consideration plays in such cases and underestimates their distinctiveness. Among the cases denying enforcement to post-employment covenants not to compete, a few contain rather unusual features. First, there are a few cases in which the covenants not to compete in question were obtained so close to the commencement of the employment relationship that the courts could easily have classified them as contemporaneous with the inception of employment and concluded that they were supported by the employer's initial promise to employ.³⁶⁸ Promises that could be considered contemporaneous with employment thus become "subsequent" to employment and subject to a "fresh" consideration requirement. The courts' apparent insistence on strict contemporaneousness as a condition for enforcement of such covenants as ancillary to an initial employment contract suggests that consideration is playing a somewhat distinctive role. Second, there are a few cases denying enforcement of postemployment covenants not to compete in which the "inducement" component of the requirement of consideration is applied in an unusually rigid fashion.³⁶⁹ In these cases the employee's salary or

368. See, e.g., *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.) (involving a noncompetition agreement signed slightly over three weeks after hiring), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982) (involving a noncompetition agreement that was signed within one week of commencing employment); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980) (involving employer who was under the mistaken assumption that an agreement signed by a minor would be void, and thus did not require employee to sign noncompetition agreement until four months after the commencement of employment); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993) (involving a noncompetition agreement signed within three weeks of commencing employment); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990) (finding that since the restrictive covenant was not discussed during pre hiring interviews, it was not part of the employment contract); *Stevenson v. Parsons*, 389 S.E.2d 291 (N.C. Ct. App. 1989) (finding that the employment relationship was established prior to the noncompetition agreement), *review denied*, 389 S.E.2d 819 (N.C. 1990); *Pemco Corp. v. Rose*, 257 S.E.2d 885 (W. Va. 1979) (holding that written restrictive covenant was invalid since it was entered into one month after original oral agreement and had no consideration).

369. *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990); *Environmental Prod. Co. v. Duncan*, 285 S.E.2d 889 (W. Va. 1981).

other benefits may have increased subsequent to the execution of the covenant not to compete, but the court withholds enforcement anyway on the grounds that the covenant and the subsequent benefit are not linked by the strict relationship of mutual inducement required by the doctrine of consideration in its most stringent formulation.³⁷⁰ Again, the fact that the requirement of mutual inducement is applied with great strictness in a business context is some indication that the doctrine of consideration is playing something other than its usual role.³⁷¹ It suggests that the courts are approaching the imposition of a promise-specific consideration requirement—a requirement that a separate item of consideration be allocable to the covenant not to compete—although it is clear that the courts are not prepared to do so as clearly and specifically as they were in the case of promises qualifying employment at will.

If courts are thus creeping toward a special, promise-specific consideration requirement, it is probably because they are sensing policy concerns with respect to covenants not to compete that act as counterweights to the admittedly good reasons employers often have for seeking such covenants. A covenant not to compete given, and observed, by an employee always removes at least one participant from the market for services and thus has at least a marginal impact on competition.³⁷² At the individual level, a covenant not to compete can severely restrict a former employee's ability to make a living if not appropriately limited in temporal and geographic scope, and in the nature of the activities restricted.³⁷³ In the abstract, however, if there are reasons to enforce a particular type of promise and also reasons to be suspicious of that type of promise, the determination whether to enforce a promise of that type in a particular case should normally be some sort of balancing approach—a determination of overall reasonableness based on the

370. See cases cited *supra* note 369.

371. Cf. DAWSON, *supra* note 37, at 204-05 & n.17 (arguing that the doctrine of consideration does not require that securing the opposite party's performance be the promisor's primary motive as long as it is somewhere in his range of motives).

372. See, e.g., *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982) (requiring additional consideration for noncompetition agreement); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987) (emphasizing policy in favor of free competition), *superseded by statute as stated in DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991); Leibman & Nathan, *supra* note 342, at 1481.

373. See, e.g., *Gagliardi Bros.*, 538 F. Supp. at 529-30; *Iowa Glass Depot*, 338 N.W.2d at 383-84; *Hill*, 725 S.W.2d at 171-72; *Pemco Corp.*, 257 S.E.2d at 891-92; Leibman & Nathan, *supra* note 342, at 1481-82.

relative strength of the reasons favoring or counting against enforcement in the particular case. Thus, in the case of covenants not to compete, one would expect to find a standard of enforceability defined in terms of overall reasonableness, taking into account the employer's need for such a covenant to protect some informational or relational interest, the degree to which the employee's post-termination activity is restricted by the covenant, and the effect, if any, on competition. Indeed, in the case of covenants not to compete executed contemporaneously with the initial employment contract, as well as postemployment covenants for which consideration is given, the cases generally make enforcement of the covenant depend on such a determination of reasonableness.³⁷⁴ However, the background of a general reasonableness standard for such covenants raises a question about the role of the doctrine of consideration as a test of the enforceability of postemployment covenants not to compete. In a determination of overall reasonableness based on multiple factors,³⁷⁵ in the abstract there is no reason to suppose that any single factor should be so decisive in all or any significant percentage of cases that it should become the sole arbiter of enforceability, effectively supplanting the general determination of reasonableness. Thus, while it would not be surprising to find that courts, when faced with the question of the reasonableness of a postemployment covenant not to compete, would consider the presence or absence of a separate payment for the covenant to be relevant, it is somewhat surprising that the presence or absence of consideration is elevated to a litmus

374. See, e.g., *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1268 (8th Cir. 1978); *Uarco, Inc. v. Eastland*, 584 F. Supp. 1259, 1261 (D. Kan. 1984); *Cherry, Bekaert & Holland v. LaSalle*, 413 So. 2d 436, 437-48 (Fla. Dist. Ct. App. 1982); *Iowa Glass Depot*, 338 N.W.2d at 381; *Davies & Davies Agency*, 298 N.W.2d at 131-32; *Brooks Distrib.*, 373 S.E.2d at 303; *Records Ctr.*, 525 A.2d at 434-35; *Central Adjustment Bureau*, 678 S.W.2d at 35-37.

375. It deserves emphasis that the reasonableness inquiry reflected in the relevant cases is truly multifaceted and is not, in practice, confined to examination of the economic effect of a particular covenant on the markets in which relevant employers and employees participate. While there are frequent references in the cases to the public interest in favor of open competition, it is doubtful—except perhaps in the case of rock stars or sports figures—that a restriction on any one employee has much effect on the market. Nor are the cases filled with theoretical discussions of the economic effects of the general adoption of particular kinds of covenants. Rather, the practical focus of the courts in most cases seems to be upon the individual needs, interests, and equities of particular employers and employees, making the reasonableness inquiry much more like a determination of fairness in the individual case than an analysis of market conditions. See cases cited *supra* note 374 and *infra* note 378.

test capable of supplanting the general reasonableness analysis when separate consideration is absent. The distinctive role of the doctrine of consideration as a test for enforcement of postemployment covenants not to compete thus calls for some explanation.

Two possible explanations immediately spring to mind. First, if it is assumed that, in the current labor market, employees are generally dependent for economic security on their employers and that employers generally have dramatically more bargaining power than employees, the employment relationship may normally be assumed to be inherently coercive, particularly after it has commenced. A postemployment covenant not to compete, therefore, is quite likely to be the product of unfair bargaining pressure on the part of the employer unless such pressure is checked in some manner. It may be that a fairly strict consideration requirement, approaching the level of a promise-specific requirement, is a method of policing for such pressure.

Second, the presence or absence of consideration for a postemployment covenant not to compete may be a good proxy for reasonableness or unreasonableness, making summary disposition more likely and conserving judicial resources that would otherwise be used in making the broader reasonableness assessment.

It is, of course, relatively easy to question the premises of both explanations. With respect to the first explanation, for example, it may be doubted that an employee who has progressed to the point of acquiring informational or relational assets from the employer is so utterly lacking in bargaining power that the employment relationship may be presumed to be coercive. Moreover, the clumsiness of the doctrine of consideration as a policing device for improper bargaining pressure has been argued at some length, both in this Article³⁷⁶ and by a string of previous critics.³⁷⁷

With respect to the second explanation, employees challenging postemployment covenants not to compete are likely to challenge them both on grounds of lack of consideration and lack of reasonableness, in part because pleading rules permit it and in part because both consideration doctrine and the standards of reasonableness are sufficiently tricky that reliance on one theory when two are available would probably strike most lawyers as too risky. Therefore, it may be

376. See *supra* notes 180-190 and accompanying text.

377. See *supra* note 89.

doubted that a special consideration requirement results in any significant conservation of judicial resources. Even under current standards, which include a consideration requirement, there are a number of cases in which appellate courts find consideration absent and then make an assessment of the reasonableness of the covenant at issue anyway,³⁷⁸ and there are others in which appellate courts address only the issue of consideration but the trial courts involved were forced to address both the consideration issue and the reasonableness issue at the most labor-intensive stage.³⁷⁹

Quite apart from the accuracy of their express premises or implications, however, both of the foregoing explanations for the consideration requirement rely on an assumption that may not be apparent at first glance. Both rely on an implicit assumption that the peppercorn theory of consideration has been eliminated from the usual cluster of rules constituting the doctrine of consideration. If the requirement of consideration used as a test for postemployment covenants not to compete can be satisfied by providing some commitment or performance of negligible value, such as the addition of a thirty-day notice requirement before termination³⁸⁰ or the

378. See *Bilec v. Auburn & Assoc., Inc. Pension Trust*, 588 A.2d 538 (Pa. Super. Ct. 1991); *Records Ctr., Inc. v. Comprehensive Management, Inc.*, 525 A.2d 433 (Pa. Super. Ct. 1987); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987); *Pemco Corp. v. Rose*, 257 S.E.2d 885 (W. Va. 1979); *NBZ, Inc. v. Pilarski*, 520 N.W.2d 93 (Wis. Ct. App. 1994); see also *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264 (8th Cir. 1978) (reversing trial court findings of lack of consideration and unreasonable scope); *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.) (addressing reasonableness of covenant despite finding inadequate consideration), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982) (addressing reasonableness of covenant despite finding inadequate consideration); *Freeman v. Duluth Clinic*, 334 N.W.2d 626 (Minn. 1983) (addressing lack of consideration where arbitration panel addressed both issues); *Davies & Davies Agency v. Davies*, 298 N.W.2d 127 (Minn. 1980) (finding lack of consideration as to one employee and addressing reasonableness of covenant with respect to another).

379. *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993); *Hogan v. Bergen Brunswick Corp.*, 376 A.2d 1277 (N.J. Super. Ct. Ch. Div.), *vacated*, 378 A.2d 1164 (N.J. Super. Ct. App. Div. 1977); *Milner Aircor, Inc. v. Morris*, 433 S.E.2d 811 (N.C. Ct. App. 1993); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667 (Tex. 1990); *Environmental Prods. Co. v. Duncan*, 285 S.E.2d 889 (W. Va. 1981).

380. See *Advanced Copy Prods. v. Cool*, 363 N.E.2d 1070 (Ind. Ct. App. 1977) (finding 30-day notice provision sufficient consideration). But see *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.) (finding one-week notice provision insufficient), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *Evco Distrib. v. Brandau*, 626 P.2d 1192 (Kan. Ct. App. 1981) (finding provision requiring employer to notify employee whether post-termination activity would

continuation of at will employment for even a single day,³⁸¹ it is difficult to see how consideration provides much protection against coercion or serves as any reliable proxy for the reasonableness of the covenant's terms. Employers, who are presumably the most likely parties to the employment relationship to be represented by counsel, could master the peppercorn requirement with relative ease. Coercive bargaining power is not mitigated by the need to supply a trifle for a major concession, and, absent some requirement of rough equivalence in value, a trifling consideration could support the most draconian of restrictions. Both explanations thus depend on an implicit assumption that, contrary to the usual rules relating to consideration, courts assessing postemployment covenants not to compete will examine the adequacy of consideration.

Indeed, one of the interesting aspects of the cases involving postemployment covenants not to compete is that the formulation of the consideration requirement seems to presuppose that a peppercorn will not suffice. Courts tend to speak in terms of a requirement of "adequate"³⁸² or "reasonable"³⁸³ consideration, and some cases

be considered a breach insufficient consideration); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990) (finding 30-day notice provision insufficient); *Collier Cobb & Assocs. v. Leak*, 300 S.E.2d 583 (N.C. Ct. App. 1983) (finding 30-day notice provision insufficient).

381. If one conceptualizes at will employment as a continuing series of offers of unilateral contracts accepted by successive performances, one could regard a post-employment covenant not to compete as supported by consideration in the form of the employer's forbearance from exercising his unqualified right to discharge, even if the forbearance lasted only a short while.

382. See, e.g., *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *National Risk Management, Inc. v. Bramwell*, 819 F. Supp. 417 (E.D. Pa. 1993); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982); *Cherry, Bekaert & Holland v. LaSalle*, 413 So. 2d 436 (Fla. Dist. Ct. App. 1982); *Creative Entertainment, Inc. v. Lorenz*, 638 N.E.2d 217 (Ill. App. Ct. 1994); *Mid-Town Petroleum v. Gowen*, 611 N.E.2d 1221 (Ill. App. Ct. 1993); *Freeman v. Duluth Clinic*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993); *Kari Family Clinic of Chiropractic v. Bohnen*, 349 N.W.2d 868 (Minn. Ct. App. 1984); *Nooter Corp. v. Todd*, 687 S.W.2d 695 (Mo. Ct. App. 1985); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990); *Cohen & Co. v. Messina*, 492 N.E.2d 867 (Ohio Ct. App. 1985); *Bilec v. Auburn & Assocs. Inc. Pension Trust*, 588 A.2d 538 (Pa. Super. Ct. 1991); *Environmental Prods. Co. v. Duncan*, 285 S.E.2d 889 (W. Va. 1981); *Pemco Corp. v. Rose*, 257 S.E.2d 885 (W. Va. 1979); see also *McCandless v. Carpenter*, 848 P.2d 444 (Idaho Ct. App. 1993) (imposing special consideration requirement for specific performance of covenant executed incident to sale of used equipment); *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376 (Iowa 1983) (finding sufficient consideration in continued employment to satisfy consideration requirement but examining adequacy of consideration in determining whether covenant met reasonableness

require that the employee have received "real advantages."³⁸⁴ In part, such formulations are no doubt due to the fact that the employers seeking to enforce covenants not to compete generally seek injunctive relief,³⁸⁵ and in equity the rule that the adequacy of consideration will not be examined has never held complete sway. However, it also seems plausible to suppose that such formulations reflect the fact, whether it is recognized or not, that consideration doctrine cannot accomplish what judges want it to do in this context unless it amounts to a requirement that the employee be fairly paid—not just paid a trifle—for the execution of a postemployment covenant not to compete.

Somewhat ironically, however, if the consideration test that is applied to a postemployment covenant not to compete must be a substantive test of rough equivalence in value, the justification for retaining consideration as a separate test of enforceability, independent of the requirement that the covenant be reasonable, is completely undercut. Surely, the determination whether an employee has

requirement); *Stevenson v. Parsons*, 384 S.E.2d 291 (N.C. Ct. App. 1989) (discussing "valuable consideration"), *review denied*, 389 S.E.2d 819 (N.C. 1990); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667 (Tex. 1990) (requiring "independent valuable consideration").

383. *See, e.g., Milner Airco, Inc. v. Morris*, 433 S.E.2d 811 (N.C. Ct. App. 1993); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *see also Evco Distrib. v. Brandau*, 626 P.2d 1192 (Kan. Ct. App. 1981) (finding no "actual benefit" or "real detriment").

384. *See, e.g., Freeman v. Duluth Clinic*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Josten's Inc. v. National Computer Sys.*, 318 N.W.2d 691 (Minn. 1982); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993).

385. *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill.), *aff'd*, 24 F.3d 941 (7th Cir. 1994); *National Risk Management, Inc. v. Bramwell*, 819 F. Supp. 417 (E.D. Pa. 1993); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982); *McCandless v. Carpenter*, 848 P.2d 444 (Idaho Ct. App. 1993); *Creative Entertainment, Inc. v. Lorenz*, 638 N.E.2d 217 (Ill. App. Ct. 1994); *Mid-Town Petroleum v. Gowen*, 611 N.E.2d 1221 (Ill. App. Ct. 1993); *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376 (Iowa 1983); *Evco Distrib. v. Brandau*, 626 P.2d 1192 (Kan. Ct. App. 1981); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993); *Nooter Corp. v. Todd*, 687 S.W.2d 695 (Mo. Ct. App. 1985); *Milner Airco, Inc. v. Morris*, 433 S.E.2d 811 (N.C. Ct. App. 1993); *Young v. Mastrom, Inc.*, 392 S.E.2d 446 (N.C. Ct. App. 1990); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667 (Tex. 1990); *Environmental Prods. Co. v. Duncan*, 285 S.E.2d 889 (W. Va. 1981); *Pemco Corp. v. Rose*, 257 S.E.2d 885 (W. Va. 1979); *NBZ, Inc. v. Pilarski*, 520 N.W.2d 93 (Wis. Ct. App. 1994).

received "fair consideration" for a covenant not to compete depends not only on what the employer serves up at the time of the execution of the covenant, but on the benefits the employer has conferred on the employee by way of informational and relational assets as well as on the extent of the restrictions the employer wants to impose. Whether the employer supplies some new benefit contemporaneous with the execution of the postemployment covenant may be one fact relevant in determining whether the covenant was coerced or whether the employee has been "fairly paid," but there is no reason to isolate it for separate treatment and regard it as an independent gatekeeper. A requirement of fair consideration is, in fact, a truncated form of the requirement that a covenant not to compete be reasonable overall, an assessment requiring an examination of the same factors and the same range of evidence as a general determination of reasonableness.³⁸⁶ If so, neither conceptual clarity nor judicial efficiency is improved by isolating the issue of consideration for separate treatment and assigning it the status of a gatekeeper.

V. THE GENERAL REQUIREMENT OF BARGAINED EXCHANGE

A. *The Residual Cases*

Though the analysis of the numerous cases decided under the various specialized corollaries to the doctrine of consideration is complete, a significant class of cases decided under the general requirement of bargained exchange remains. It is still easy to find cases in which a promise is not enforced because nothing is exchanged or promised for it, or because, although there may be performances or promises on both sides of a transaction, the promise ultimately denied enforcement did not induce, or was not induced by, the performance or promise on the opposite side of the transaction. Initially, there are two interesting aspects of this group of cases. First, although a reference to "gratuitous" promises may conjure up images of doting relatives making imprudent promises to younger family members or wheedling relatives extracting deathbed promises from aged—and wealthy—benefactors, and although intrafamily promises do form part of the relevant class of cases,³⁸⁷ the overwhelming

386. Obviously, however, the truncation of the general reasonableness inquiry under the rubric of "adequate consideration" threatens to distort that inquiry by masking the breadth of the range of factors relevant to the determination of overall reasonableness.

387. See *Grubbs v. Mattson*, 599 S.W.2d 148 (Ark. Ct. App. 1980); *Simonian v.*

majority of promises invalidated for failure to satisfy the requirement of bargained exchange are promises made in a business context.³⁸⁸

Patterson, 27 Cal. App. 4th 773, 32 Cal. Rptr. 2d 722 (1994); *Kremser v. Tonokaboni*, 356 So. 2d 1331 (Fla. Dist. Ct. App. 1978); *Grandon v. Amcore Trust Co.*, 588 N.E.2d 311 (Ill. App. Ct.), *cert. denied*, 602 N.E.2d 451 (Ill. 1992); *Thomas v. Bryant*, 597 So. 2d 1065 (La. Ct. App. 1992); *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978), *overruled on other grounds*, 545 A.2d 1027 (Me. 1991); *In re Estate of Wahby*, 758 S.W.2d 440 (Mo. 1988). In addition, there are a few cases that deny enforcement of promises one would not normally classify as business promises or intrafamily promises. See, e.g., *Altimus v. Manhood Found.*, 425 F. Supp. 1118 (S.D.N.Y. 1976) (involving a claim for preparation of inadequate parole plan for prisoner), *aff'd*, 559 F.2d 1202 (2d Cir. 1977); *Vallaire v. Lee*, 430 So. 2d 1080 (La. Ct. App. 1983) (discussing note and second mortgage executed by mistress without consideration as subterfuge designed to defeat her mother's claims under state forced heirship law); *Whitten v. Greeley-Shaw*, 520 A.2d 1307 (Me. 1987) (various promises to mistress); *Maryland Nat'l Bank v. United Jewish Appeal Fed'n*, 407 A.2d 1130 (Md. 1979) (charitable subscription); *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989) (charitable subscription); *Cash v. Benward*, 873 S.W.2d 913 (Mo. Ct. App. 1994) (involving alleged promise to provide assistance in obtaining insurance coverage); *Bartmess v. Bourassa*, 639 P.2d 1147 (Mont. 1982) (discussing a note obtained fraudulently by son from mother); *Kully v. Goldman*, 305 N.W.2d 800 (Neb. 1981) (dealing with promise to obtain and transfer season tickets to college football games); *Schreiber v. Olan Mills*, 627 A.2d 806 (Pa. Super. Ct. 1993) (involving an alleged agreement by telemarketer to pay for "listening services" of those solicited).

388. See *Patel v. American Bd. of Psychiatry & Neurology*, 975 F.2d 1312 (7th Cir. 1992); *Henig Furs, Inc. v. J.C. Penney Co.*, 811 F. Supp. 1546 (M.D. Ala. 1993); *Banque Arabe et Internationale d'Investissement v. Bulk Oil (USA), Inc.*, 726 F. Supp. 1411 (S.D.N.Y. 1989); *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564 (N.D. Ga. 1987); *Wadsworth v. Nalco Chem. Co.*, 523 F. Supp. 997 (N.D. Ala. 1981), *aff'd*, 679 F.2d 251 (11th Cir. 1982); *Erika, Inc. v. Blue Cross & Blue Shield*, 496 F. Supp. 786 (N.D. Ala. 1980); *ACMAT Corp. v. International Union of Operating Eng'rs*, 442 F. Supp. 772 (D. Conn. 1977); *Soar v. National Football League Players Ass'n*, 438 F. Supp. 337 (D.R.I. 1975), *aff'd*, 550 F.2d 1287 (1st Cir. 1977); *FDIC v. Butler (In re Conner Corp.)*, 127 B.R. 775 (Bankr. E.D.N.C. 1991); *Munoz v. New Metro. Fed. Sav. & Loan Ass'n (In re Munoz)*, 81 B.R. 695 (Bankr. S.D. Fla. 1987); *McHale v. Kohut (In re Ocean Beach Club, Inc.)*, 79 B.R. 505 (Bankr. S.D. Fla. 1987); *Griffith v. Lawrence Sys., Inc. (In re Hipp, Inc.)*, 71 B.R. 643 (Bankr. N.D. Tex. 1987); *Kennebago Corp. v. Blackburn (In re Kennebago Corp.)*, 50 B.R. 153 (Bankr. D. Me. 1985); *Memorial Assocs. v. Sunset Memorial Gardens, Inc. (In re Sunset Memorial Gardens, Inc.)*, 49 B.R. 817 (Bankr. D.N.D. 1985); *Sepco, Inc. v. Valley State Bank (In re Sepco, Inc.)*, 36 B.R. 279 (Bankr. D.S.D.), *aff'd sub nom.*, *United States v. Arlon Indus., Inc. (In re Sepco, Inc.)*, 750 F.2d 51 (8th Cir. 1984); *Kittle v. Sand Mountain Bank*, 437 So. 2d 100 (Ala. 1983); *Certified Collectors, Inc. v. Lesnick*, 570 P.2d 769 (Ariz. 1977); *City of Arvada v. Concrete Contractors, Inc.*, 628 P.2d 170 (Colo. Ct. App.), *rev'd on other grounds*, 621 P.2d 320 (Colo. 1981); *Grant v. Oten*, 626 P.2d 764 (Colo. Ct. App. 1981); *Lambert v. Weeks*, 554 So. 2d 634 (Fla. Dist. Ct. App. 1989); *Kaufman v. Harder*, 354 So. 2d 109 (Fla. Dist. Ct. App. 1978), *cert. denied*, 359 So. 2d 1215 (Fla. 1978); *Davidson v. Willis*, 362 S.E.2d 115 (Ga. Ct. App. 1987); *Wilson v. Barton & Ludwig, Inc.*, 296 S.E.2d 74 (Ga. Ct. App. 1982); *Gulden v. Newberry Wrecker Serv.*, 267 S.E.2d 763 (Ga. Ct. App. 1980); *Trust Co. v. Rhodes*, 242 S.E.2d 738 (Ga. Ct. App. 1978); *Verson v. Steimberg*, 548 N.E.2d 363 (Ill. App. Ct. 1989); *Agnew v. Brown*, 422 N.E.2d 111 (Ill. App. Ct. 1981); *Codo v. Union Nat'l*

In this respect the cases decided under the general requirement of bargained exchange are no different from those decided under the various corollaries to the doctrine of consideration.³⁸⁹ Second, cases decided under the general requirement of bargained exchange also fall into the patterns observed in the examination of cases decided under the corollaries. In most of the cases in which a promise is denied enforcement for lack of consideration, some other legal defense or doctrine also provides, or could provide, a sufficient reason to deny enforcement. Most commonly, the alternate ground of decision is one of the group of doctrines that form the law of mutual assent.³⁹⁰ In a smaller, but still significant, group of cases, the

Bank and Trust, 370 N.E.2d 140 (Ill. App. Ct. 1977); Burdsall v. City of Elwood, 454 N.E.2d 434 (Ind. Ct. App. 1983); Hormuth Drywall & Painting Serv. v. Erectioneers, Inc., 381 N.E.2d 490 (Ind. Ct. App. 1978); Urbanational Developers v. Shamrock Eng'g, 372 N.E.2d 742 (Ind. App. Ct. 1978); Graves v. Porterfield, 555 So. 2d 595 (La. Ct. App. 1989); Eustis v. Moons, 367 So. 2d 1343 (La. Ct. App.), *cert. denied*, 370 So. 2d 577 (La. 1979); Bethany Trust Co. v. Harker, 780 S.W.2d 151 (Mo. Ct. App. 1989); Lillo v. Thee, 676 S.W.2d 77 (Mo. Ct. App. 1984); Schwedes v. Romain, 587 P.2d 388 (Mont. 1978); Schremp v. Gallup, 315 N.W.2d 248 (Neb. 1982); Chasan v. Village Dist., 523 A.2d 16 (N.H. 1986); Arcan Transp., Inc. v. Marine Midland Bank-Western, 388 N.Y.S.2d 737 (App. Div. 1976); University of N.C. v. Shoemate, 437 S.E.2d 892 (N.C. Ct. App.), *cert. denied*, 447 S.E.2d 413 (N.C. 1994); Labarre v. Duke Univ., 393 S.E.2d 321 (N.C. Ct. App. 1990), *review denied*, 399 S.E.2d 122 (N.C. 1990); Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning, 358 S.E.2d 539 (N.C. Ct. App. 1987), *aff'd*, 366 S.E.2d 441 (N.C. 1988); Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 351 S.E.2d 786 (N.C. Ct. App. 1987); Reidy v. Macauley, 290 S.E.2d 746 (N.C. Ct. App.), *cert. denied*, 294 S.E.2d 221 (N.C. 1982); Commodore Home Sys., Inc. v. Citicorp Acceptance Co., 780 P.2d 674 (Okla. 1989).

389. I should add that, in this respect, my examination of recent cases is entirely consistent with Professor Havighurst's 1942 examination of 183 cases from the *Northeastern* and *Northwestern Reporters*. See Havighurst, *supra* note 61, at 20 n.45.

390. See, e.g., Patel v. American Bd. of Psychiatry and Neurology, 975 F.2d 1312 (7th Cir. 1992) (holding that no consideration existed for written assurance that foreign internship satisfied certification requirements; facts suggest communication was not a promise); Henig Furs, Inc. v. J.C. Penney Co., 811 F. Supp. 1546 (M.D. Ala. 1993) (holding that alleged promise by large retailer to permit fur dealer to solicit individual stores was not an offer and was not supported by consideration); Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co., 679 F. Supp. 1564 (N.D. Ga. 1987) (holding that manufacturer's promise to include advertising and licensing agent in future deal was mere agreement to agree, indefinite, and unsupported by consideration); Erika, Inc. v. Blue Cross & Blue Shield, 496 F. Supp. 786 (N.D. Ala. 1980) (holding that agreement by insurer to make direct payment to provider lacked both consideration and offer and acceptance); Altimus v. Manhood Found., 425 F. Supp. 1118 (S.D.N.Y. 1976) (finding no evidence that defendants made a promise to prepare adequate parole plan for prisoner or that prisoner supplied any consideration), *aff'd*, 559 F.2d 1202 (2d Cir. 1977); Soar v. National Football League Players Ass'n, 438 F. Supp. 337 (D.R.I. 1975) (finding alleged promise of retroactive pension coverage too indefinite and not supported by consideration), *aff'd*, 550 F.2d 1287 (1st Cir. 1977); FDIC v. Butler (*In re Conner Corp.*), 127 B.R. 775 (Bankr.

alternate ground is one of the defenses based on misconduct.³⁹¹

E.D.N.C. 1991) (holding that alleged agreement to maintain specified level of capital for savings and loan lacked both consideration and mutual manifestation of assent); *Munoz v. New Metro. Fed. Sav. & Loan Ass'n* (*In re Munoz*), 81 B.R. 695 (Bankr. S.D. Fla. 1987) (finding no consideration and absence of intention to assign note); *Memorial Assocs. v. Sunset Memorial Gardens, Inc.* (*In re Sunset Memorial Gardens*), 49 B.R. 817 (Bankr. D.N.D. 1985) (holding that alleged agreement between cemetery and joint venture of funeral homes lacked both consideration and mutual assent); *Certified Collectors, Inc. v. Lesnick*, 570 P.2d 769 (Ariz. 1977) (en banc) (holding that a purported assignment which merely recited consideration but lacked basic elements of an assignment failed for indefiniteness); *Simonian v. Patterson*, 27 Cal. App. 4th 773, 32 Cal. Rptr. 2d 722 (1994) (holding alleged promise by father to daughter's fiance to assist in efforts to collect debt from daughter lacked consideration; facts suggest that alleged promise was indefinite and too casual to amount to contractual undertaking); *Burdsall v. City of Elwood*, 454 N.E.2d 434 (Ind. Ct. App. 1983) (holding that alleged promise by mayor to appoint plaintiff fire chief failed for lack of consideration; facts suggest assurances were not an unequivocal promise); *Hormuth Drywall & Painting Serv., Inc. v. Erectioneers, Inc.*, 381 N.E.2d 490 (Ind. Ct. App. 1978) (holding that no consideration existed for alleged promises by owner and general contractor to assist one subcontractor in collecting payments due from another; facts suggest communications were too vague and indefinite to be enforceable); *Eustis v. Moons*, 367 So. 2d 1343 (La. Ct. App.) (holding that no consideration existed for alleged guaranty by general agent of employee's obligation under commission-sharing arrangement, and that alleged beneficiary of guaranty was not party to subsequent memorandum), *cert. denied*, 370 So. 2d 577 (La. 1979); *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978) (holding that alleged agreement to purchase stock failed for lack of consideration and mutual assent); *Cash v. Benward*, 873 S.W.2d 913 (Mo. Ct. App. 1994) (holding that alleged promise to assist in obtaining insurance coverage lacked consideration and was too casual to be reasonably understood as contractual undertaking); *Chasan v. Village Dist.*, 523 A.2d 16 (N.H. 1986) (holding that board of directors report was not properly classified as offer under objective theory of assent and lacked both definiteness and consideration); *Arcan Transp., Inc. v. Marine Midland Bank-Western*, 388 N.Y.S.2d 737 (App. Div. 1976) (holding that alleged working capital agreement was too indefinite and lacked consideration); *Reidy v. Macauley*, 290 S.E.2d 746 (N.C. Ct. App.) (holding that no consideration existed for buyers' alleged obligation to pay broker's commission; facts suggest that promise was made only by sellers, not buyers), *cert. denied*, 294 S.E.2d 211 (N.C. 1982); *Schreiber v. Olan Mills*, 627 A.2d 806 (Pa. Super. Ct. 1993) (holding that alleged agreement by telemarketer to pay for "listening services" of those solicited lacked consideration and unconditional manifestation of assent); *see also* *Commodore Home Sys., Inc. v. Citicorp Acceptance Co.*, 780 P.2d 674 (Okla. 1989) (holding that alleged promise by secured creditor to pay supplier of debtor directly lacked consideration; existence of promise disputed).

391. *See, e.g., Banque Arabe et Internationale D'Investissement v. Bulk Oil (USA) Inc.*, 726 F. Supp. 1411 (S.D.N.Y. 1989) (holding that no consideration existed for oil buyer's promise to post letter of credit and advise through bank financing seller; facts suggest promise was induced by seller as part of a scheme to mislead the bank); *McHale v. Kohut* (*In re Ocean Beach Club, Inc.*), 79 B.R. 505 (Bankr. S.D. Fla. 1987) (holding that no consideration existed for note and mortgage; facts suggest transaction was either collusive, sham, or usurious); *Griffith v. Lawrence Sys., Inc.* (*In re Hipp, Inc.*), 71 B.R. 643 (Bankr. N.D. Tex. 1987) (finding no consideration for note executed and transferred as part of series of sham transactions designed to manufacture bankruptcy claim); *Sepco, Inc. v. Valley State Bank* (*In re Sepco, Inc.*), 36 B.R. 279 (Bankr. D.S.D.) (finding that

There are also a few cases in which the alternate ground is failure of some condition attached to the alleged promise,³⁹² as well as a small

subordination agreement in favor of bank was obtained from holder of mechanic's lien through fraud and lacked consideration), *aff'd sub nom*, *United States v. Arlon Indus., Inc. (In re Sepco, Inc.)*, 750 F.2d 51 (8th Cir. 1984); *Grubbs v. Mattson*, 599 S.W.2d 148 (Ark. Ct. App. 1980) (holding that no consideration existed for alleged agreement between sisters to share mother's estate, where lower court found agreement induced by fraud and duress of one sister); *City of Arvada v. Concrete Contractors, Inc.*, 628 P.2d 170 (Colo. Ct. App. 1981) (finding no consideration for developer's promise to pipe ditch, and declining to address duress defense raised in trial court); *Grant v. Oten*, 626 P.2d 764 (Colo. Ct. App. 1981) (holding that no consideration existed for note and second deed of trust executed by functionally illiterate and blind maker at the direction of her employer and the payee of note, upon whom maker was dependent for explanation); *Kremser v. Tonokaboni*, 356 So. 2d 1331 (Fla. Dist. Ct. App. 1978) (holding that note and mortgage executed by aunt in favor of niece's husband lacked consideration; facts suggest fraud and undue influence); *Davidson v. Willis*, 362 S.E.2d 115 (Ga. Ct. App. 1987) (finding no consideration for note executed as part of transaction allegedly induced by fraud and duress); *Verson v. Steimberg*, 548 N.E.2d 363 (Ill. App. Ct. 1989) (finding no consideration for execution of trust deed by estranged wife to secure notes given by husband as part of purchase of business; facts suggest character of document was misrepresented); *Agriew v. Brown*, 422 N.E.2d 111 (Ill. App. Ct. 1981) (finding no consideration for alleged assignment of rights under land sale contract; facts suggest fraud on part of assignee or misunderstanding between parties); *Codo v. Union Nat'l Bank & Trust*, 370 N.E.2d 140 (Ill. App. Ct. 1977) (finding no consideration for note and mortgage executed as part of sham transaction designed to create priority over other possible creditors); *Vallaire v. Lee*, 430 So. 2d 1080 (La. Ct. App. 1983) (holding that note and second mortgage executed by mistress without consideration was subterfuge designed to defeat claims of her mother under state forced heirship law); *Whitten v. Greeley-Shaw*, 520 A.2d 1307 (Me. 1987) (holding mistress's promise not to phone married lover without permission was insufficient consideration for substantial return promises; facts suggest promises were induced by threat to visit vacation home and expose affair to wife); *In re Estate of Wahby*, 758 S.W.2d 440 (Mo. 1988) (holding that agreement to share estate was induced by duress, including death threats; absence of consideration reduced burden of proof of duress); *Lillo v. Thee*, 676 S.W.2d 77 (Mo. Ct. App. 1984) (finding no consideration for note and deed of trust; facts suggest payee induced maker to execute note as refinancing of a prior note that had already been paid); *Bartmess v. Bourassa*, 639 P.2d 1147 (Mont. 1982) (finding no consideration for note and mortgage executed by widow under erroneous belief that the note and mortgage were necessary to obtain bail bond for son; facts suggest fraud); *Manufacturers Hanover Trust Co. v. L.N. Properties Inc.*, 570 N.Y.S.2d 576 (Sup. Ct. 1991) (affirming denial of summary judgment for defendants on issues of fraud and lack of consideration for note); *Fuchs v. MiCAD Sys., Inc.*, 526 N.Y.S.2d 445 (App. Div. 1988) (reversing summary judgment on notes, finding material issues of fact on issues of fraud and consideration); *University of N.C. v. Shoemate*, 437 S.E.2d 892 (N.C. Ct. App.) (holding that employment agreement between purported physician and hospital lacked consideration as physician had not attended medical school; facts suggest fraud in the inducement), *cert. denied*, 447 S.E.2d 413 (N.C. 1994).

392. See *Thomas v. Bryant*, 597 So. 2d 1065 (La. Ct. App. 1992) (reversing summary judgment against maker of promissory note where maker defended on grounds of lack of consideration and failure to comply with conditions); *Graves v. Porterfield*, 555 So. 2d 595 (La. Ct. App. 1989) (holding a promissory note invalid because payee, who was not a

group in which one suspects that consideration doctrine has been manipulated in service of judicial notions of public policy.³⁹³ In all of these cases the doctrine of consideration is once again redundant. When that class of cases is disregarded, there remains a smaller class of cases in which the doctrine of consideration really does pull the laboring oar but in which the results it produces are a source of some intellectual discomfort.³⁹⁴ In some cases the intellectual discomfort is simply a recognition that consideration doctrine itself has been

holder in due course, failed to provide consideration; maker had contended note intended only as security for return of car); *Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n*, 351 S.E.2d 786 (N.C. Ct. App. 1987) (holding that a promise to purchase a construction loan lacked consideration and was unenforceable due to unfulfilled conditions).

393. The most obvious—and perfectly acceptable—examples are cases in which a finding of lack of consideration is simply an element or stage in the analysis leading to a case disposition expressly based on a policy defined by statute. *See, e.g., Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886 (Bankr. D. Minn. 1992) (finding charitable contributions avoidable under the Bankruptcy Code as fraudulent conveyances), *aff'd*, 152 B.R. 939 (Bankr. D. Minn. 1993). More troublesome are cases in which it is clear that a court could have found consideration for a promise but applied the requirement of consideration with more than the customary rigidity, presumably for the purpose of reaching a result in accord with its own conception of policy. *See ACMAT Corp. v. International Union of Operating Eng'rs*, 442 F. Supp. 772 (D. Conn. 1977) (holding that ironworkers' local union was not bound by its agreement with a subcontractor and another local union allocating work between the two unions because subcontractor was not party to separate subcontract with ironworkers and thus furnished no consideration); *Wilson v. Barton & Ludwig, Inc.*, 296 S.E.2d 74 (Ga. Ct. App. 1982) (holding that an idea must be novel for its disclosure to constitute a property right sufficient to serve as consideration for implied contract to compensate); *Urbanational Developers v. Shamrock Eng'g*, 372 N.E.2d 742 (Ind. Ct. App. 1978) (reversing summary judgment as to validity of "no lien" agreement between an owner and general contractor executed simultaneously with general construction contract); *Higgins v. Monroe Evening News*, 272 N.W.2d 537 (Mich. 1978) (holding that the reward of a dime, candy, or soft drink did not constitute consideration for services, and that provider of services was therefore not eligible for workers' compensation benefits), *rev'd on other grounds*, 295 N.W.2d 769 (Mich. 1976); *Labarre v. Duke Univ.*, 393 S.E.2d 321 (N.C. Ct. App.) (holding that a physician's oral promise to perform an epidural anesthetic procedure personally required consideration beyond submission to treatment), *review denied*, 399 S.E.2d 122 (N.C. 1990). I have argued elsewhere that it would be better for courts to face the policy questions presented by such cases directly. *See supra* notes 302-19 and accompanying text; *see also* Wessman, *supra* note 2, at 93-97 (arguing that public policy questions should be faced directly and expressly).

394. In addition to the cases in which consideration doctrine is redundant and cases in which it does harm, there is a small class of cases in which the judicial description of the facts is so sketchy that it is impossible to determine whether or not the case disposition is desirable. *See Lambert v. Weeks*, 554 So. 2d 634 (Fla. Dist. Ct. App. 1989); *Kaufman v. Harder*, 354 So. 2d 109 (Fla. Dist. Ct. App.), *cert. denied*, 359 So. 2d 1215 (Fla. 1978).

misapplied³⁹⁵ or that idiosyncratic subrules have introduced a degree

395. In some instances the misapplication is apparent judicial conflation of the defenses of lack of consideration and failure of consideration. See, e.g., *Williamson v. Guice*, 613 So. 2d 797 (La. Ct. App.), *cert. denied*, 617 So. 2d 937 (La. 1993); *City Bank & Trust Co. v. White*, 434 So. 2d 1299 (La. Ct. App. 1983); *Johnson v. Bond*, 540 S.W.2d 516 (Tex. Civ. App. 1976). The real gatekeeping function of the doctrine of consideration is performed by the legal theory of lack of consideration, which normally consists of a claim that a promise is not part of an exchange or was not induced by a return promise or performance. Lack of consideration is said to make a promise unenforceable at the outset. The conceptually distinct defense of failure of consideration presupposes that, at the outset, a promise was part of a bargained-for exchange and so was supported by consideration. If one party to the bargain fails to perform, however, the other party's performance is excused. It is the defense of lack of consideration that is the subject of criticism in this Article, in part because it unduly restricts the class of enforceable promises. Not all enforceable promises need be bargains. However, I have indicated, *supra* note 1, that I have no quarrel with the general proposition that the *presence* of consideration should make a bargain promise presumptively enforceable. Likewise, when a promise is made as part of a bargain, I have no quarrel with the defense of failure of consideration. If both parties do, in fact, contemplate an exchange, the failure of the exchange on one side should excuse performance on the other. The conceptual basis for the defense is, in effect, that each party's duty to perform is conditional upon the other's correlative duty. See *RESTATEMENT (SECOND) OF CONTRACTS* § 237 cmt. a (1981). Indeed, the drafters of the *Restatement* recommend use of the phrase "failure of performance" rather than "failure of consideration" precisely to avoid confusion with lack or absence of consideration. *Id.*

In other instances of apparent misapplication of consideration doctrine, courts appear reluctant to recognize what appear to be fairly strong showings of the presence of consideration. See *Urbanational Developers v. Shamrock Eng'g*, 372 N.E.2d 742 (Ind. Ct. App. 1978) (remanding for determination of consideration for "no lien" agreement executed simultaneously with construction contract); *Schrempp v. Gallup*, 315 N.W.2d 248 (Neb. 1982) (remanding to determine whether forbearance from renewal of a lease was consideration for a note executed by sublessee in favor of sublessor as underlying lease was expiring). Finally, there are occasional cases in which the doctrine of consideration is distorted in an apparent attempt to reach a fair result that the court seems unable to reach any other way. In *Gulden v. Newberry Wrecker Serv.*, 267 S.E.2d 763 (Ga. Ct. App. 1980), for example, a sublessor and sublessee entered into a five-year sublease of real property in spite of the fact that the sublessor's own leasehold interest expired in two years. *Id.* at 764. When the true owner dispossessed the sublessee slightly less than two years before the termination of the sublease, the sublessee sued the sublessor for breach. *Id.* While the facts of the case at least suggest a possible defense of mutual mistake, the court was precluded from disposing of the case on that theory by its belief that both parties were chargeable with notice of the limitations on the sublessor's interest. *Id.* at 765. Assuming that to be correct, one would suppose the appropriate conclusion would be that the sublessor breached and that the sublessee either waived the breach or failed to mitigate. Instead, the court reached the same result—that is, no liability—by the dubious step of splitting the sublease into the part coinciding with the sublessor's interest and the part beyond his interest and holding the latter part to be without consideration. *Id.* Quite apart from the fact that subparts of contracts need not normally be assigned separate consideration, the court clearly analyzed the consideration issue from the wrong perspective. It is fairly obvious that the party seeking to enforce the sublease had supplied consideration in the form of a promise to pay rent for five years.

of incoherence into the doctrine.³⁹⁶ The latter category includes a few recent cases in which courts carve out exceptions to the general rule that consideration for a promise or performance may be supplied by a third party or provided to a third party.³⁹⁷ For example, although a pledge of one's own assets may normally be supported by consideration in the form of a loan or extension of credit to someone else, courts occasionally use the doctrine of consideration to invalidate a wife's mortgage of real estate to secure her husband's debts³⁹⁸ or a corporation's pledge of assets to secure the debt incurred by purchasers of its stock in a leveraged buyout.³⁹⁹ The first exception may be motivated by a concern that one spouse will overreach or deceive the other, and the second may be motivated by a concern that a corporation's creditors may be prejudiced by an encumbrance of all assets to secure the debt of the privileged shareholders.⁴⁰⁰ Those are commendable concerns, and they may, in some instances, justify exceptions to the normal consideration rules, assuming the consider-

396. See, e.g., *Grandon v. Amcore Trust Co.*, 588 N.E.2d 311 (Ill. App. Ct.), *cert. denied*, 602 N.E.2d 451 (Ill. 1992). In *Grandon* the critical issue was the enforceability of a restrictive legend on the shares of stock of a close corporation that gave the corporation the right to repurchase the shares upon the death of the shareholder. *Id.* at 312. The court expounded the familiar reasons in favor of permitting such restrictions upon the transfer of shares of a close corporation and noted that such restrictions are even valid against an employee who receives a gratuitous transfer of shares or options to purchase shares. *Id.* at 314-15. A gift of stock to an employee, it seems, may be beneficial to both transferor and transferee, even if the benefits are not part of a bargain, and that is enough to validate the restriction. After recognizing the validity of conditions attached to a gift of stock to an employee, the court refused to recognize the validity of the same conditions attached to a gift of stock to the wife of a major shareholder because intrafamily transfers are presumed gratuitous on the part of both transferor and transferee. *Id.* at 315. Obviously, however, the reasons that lead a close corporation to restrict transfers of its shares apply whether the party against whom enforcement is sought is the heir of a deceased or retired employee or the heir of a former shareholder's deceased spouse.

397. See RESTATEMENT (SECOND) OF CONTRACTS § 71(4).

398. See, e.g., *Kittle v. Sand Mountain Bank*, 437 So. 2d 100 (Ala. 1983); *Verson v. Steimberg*, 548 N.E.2d 363 (Ill. App. Ct. 1989).

399. *Kennebago Corp. v. Blackburn (In re Kennebago Corp.)*, 50 B.R. 153 (Bankr. D. Me. 1985).

400. Indeed, in addition to finding a lack of consideration for the note and mortgage at issue, the *Kennebago* court found the note and mortgage subject to equitable subordination under § 510 of the Bankruptcy Code. *Id.* at 157.

ation rules are already in place.⁴⁰¹ Even if they do, however, they render an already complicated doctrine even more labyrinthine.

Further reason to be dissatisfied with the doctrine of consideration is provided by a pair of cases in which the courts seem to use lack of consideration to deny enforcement of promises regarded as trivial or so casual that legal consequences could not have been intended.⁴⁰² The dissatisfaction arises because the presence or absence of consideration is an unreliable proxy for seriousness or legal intent. For example, in *Wadsworth v. Nalco Chemical Co.*⁴⁰³ the promise at issue truly was gratuitous. A prospective employer promised an applicant for employment that his current employer would not be told of the application.⁴⁰⁴ When the current employer nonetheless learned of the applicant's wandering eye, the current employer terminated him.⁴⁰⁵ The applicant's suit against the prospective employer on the promise of confidentiality was dismissed on summary judgment because there had been no consideration for the promise.⁴⁰⁶

In contrast, in *Kully v. Goldman*⁴⁰⁷ the court technically misapplied the doctrine of consideration. At issue was an alleged promise by one football fan, Goldman, to another, Kully, to obtain four season tickets to University of Nebraska varsity football games every year and resell them to Kully for the same price he paid for them.⁴⁰⁸ The arrangement was apparently necessary because excessive demand made it impossible for anyone except students to obtain new season tickets and impossible for nonstudents to get permission from the

401. Of course, once the doctrine of consideration reaches a certain level of complication, it seems unlikely that retention of the doctrine of consideration, with all its corollaries and exceptions, is a better way of addressing those concerns than direct application of the defenses of fraud, duress, and undue influence in the case of mortgages by spouses and fraudulent conveyance law in the case of leveraged buyouts.

402. See, e.g., *Wadsworth v. Nalco Chem. Co.*, 523 F. Supp. 997 (N.D. Ala. 1981), *aff'd*, 679 F.2d 251 (11th Cir. 1982); *Kully v. Goldman*, 305 N.W.2d 800 (Neb. 1981); see also *Simonian v. Patterson*, 27 Cal. App. 4th 773, 32 Cal. Rptr. 2d 722 (1994) (holding that an attempt to use the legal system to sue an ex-fiance's father to recover an engagement ring under a tort theory was frivolous); *Cash v. Benward*, 873 S.W.2d 913 (Mo. Ct. App. 1994) (holding that a gratuitous promise was not intended as consideration for contract to perform).

403. 523 F. Supp. 997 (N.D. Ala. 1981), *aff'd*, 679 F.2d 251 (11th Cir. 1982).

404. *Id.* at 998.

405. *Id.*

406. *Id.* at 1000-01.

407. 305 N.W.2d 800 (Neb. 1981).

408. *Id.* at 801.

university for an official transfer of season tickets.⁴⁰⁹ The parties performed under the agreement for seventeen seasons, and, when Goldman sought to terminate, Kully brought an action for equitable relief.⁴¹⁰ The suit was unsuccessful, in part because the Supreme Court of Nebraska ultimately held the promise lacked consideration.⁴¹¹ The court's instinct, of course, was reliable. Goldman was indeed making a gift, and the gift is most appropriately characterized as a gift of his access to scarce and coveted tickets. However, as a technical matter, the doctrine of consideration was satisfied. A resale contract without a profit is still a contract, and the consideration consists of a promise to convey on one side and a promise to pay on the other.

The point, however, is not simply that the Nebraska court made a technical error. Rather, the point is that the two cases together illustrate the difficulty of using the doctrine of consideration as a vehicle for screening out promises that are casual, trivial, or made without serious intention to be bound. The promise of confidentiality in *Wadsworth* may have been gratuitous, but it was arguably a serious one. It was made in the business context for the purpose of exploring the desirability of a future exchange in the form of a possible employment relationship. It is arguable that promises thus ancillary to potential exchanges should be enforced.⁴¹² In contrast, the promise of football tickets in *Kully*, though clearly part of a reciprocal arrangement, was arguably a mere social promise—a mere favor for a friend. Only a truly rabid Cornhusker fan could be enthusiastic about judicial intervention in support of such a promise. In these two instances, therefore, the seriousness of the promise at issue is in no way correlated to the presence or absence of consideration.

A further source of dissatisfaction with the doctrine of consideration is the fact that some jurisdictions still lag behind in recognizing exceptions to the doctrine that otherwise command widespread support. In recent cases, for example, courts have refused to enforce charitable subscriptions in the absence of consideration or demonstrable reliance.⁴¹³ The court in one recent case⁴¹⁴ effectively refused

409. *Id.* at 802.

410. *Id.* at 801.

411. *Id.* at 802-03.

412. See Eisenberg, *Principles*, *supra* note 34, at 652-56; Gordon, *Consideration*, *supra* note 67, at 289-90, 292-98; Reiter, *supra* note 89, at 456-58; *infra* notes 437-38, 452, 488-89 and accompanying text.

413. See, e.g., *Maryland Nat'l Bank v. United Jewish Appeal Fed'n, Inc.*, 407 A.2d 1130

to recognize that a voidable or unenforceable promise may be consideration for a return promise,⁴¹⁵ and another court recently refused to permit the "offensive" use of promissory estoppel.⁴¹⁶ The objectionable feature of such cases is not only that they make the law less uniform but that they apply the doctrine of consideration with its classical rigor in circumstances in which it is generally agreed to be desirable to carve out exceptions.

Finally, as was observed earlier with respect to the cases decided under more specific corollaries to the doctrine of consideration, one occasionally encounters a case in which the general requirement of bargained exchange is used to deny enforcement to a promise that has enough in common with a conventional bargain to have a similar claim to enforcement. For example, in *Trust Co. of Columbus v. Rhodes*⁴¹⁷ a bank made loans to a motorcycle dealer over a period of years.⁴¹⁸ One note was secured by a blanket security interest on the dealer's inventory of motorcycles and parts.⁴¹⁹ When the motorcycle business, including the bank's collateral, was destroyed by fire, the bank learned, no doubt to its chagrin, that it was listed as a loss payee only on the dealer's insurance policy covering motorcycles, not on the policy covering parts.⁴²⁰ The bank nevertheless notified the dealer's insurers of the full extent of its security interest and obtained from the insurer's agents two separate and undisputed promises to make any insurance proceeds checks jointly payable to the bank and the dealer.⁴²¹ The insurer performed as promised on the first check it issued but issued a second check payable only to the dealer.⁴²² The dealer cashed the check and failed to pay the bank.⁴²³ The bank sued to recover the balance of its debt from both the dealer and the insurer, relying on the promise of joint payment

(Md. 1979); *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989). But see RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (recommending enforcement of charitable subscriptions in the absence of consideration or reliance).

414. *Schwedes v. Romain*, 587 P.2d 388 (Mont. 1978).

415. See RESTATEMENT (SECOND) OF CONTRACTS § 78 cmt. c., illus. 2.

416. *Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning*, 358 S.E.2d 539 (N.C. Ct. App. 1987), *aff'd*, 366 S.E.2d 441 (1988).

417. 242 S.E.2d 738 (Ga. Ct. App. 1978).

418. *Id.* at 739.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

for recovery against the latter.⁴²⁴ The appellate court affirmed summary judgment in favor of the insurer, noting quite correctly that the bank had neither promised to provide any benefit to the insurer nor agreed to forbear collection activities or any other action.⁴²⁵

However, if the blinders of consideration doctrine are removed, there is much to commend enforcement of the insurer's promise of joint payment. The bank's claim to the insurance proceeds generated by bank collateral was clearly superior to the debtor's,⁴²⁶ and the promise of joint payment was thus an appropriate response to the bank's notification of the extent of its security interest. There was no question that the promise was made, and any evidentiary need for consideration was therefore lacking. Though the promise was not itself part of a discrete bargain, it was, in effect, bounded by the context of two perfectly ordinary bargains—the insurance contract and the lending arrangement. It was a promise made by one sophisticated business participant to another. Moreover, it would appear to be the type of promise likely to induce reliance by the promisee, albeit reliance of a type—failure to take alternative steps to protect the bank's interest—difficult to prove.⁴²⁷ If, as will be suggested below, such factors figure in traditional explanations of the reasons conventional bargains are enforced, they also favor enforcement of gratuitous promises like the promise at issue in *Rhodes*.

424. *Id.*

425. *Id.* at 740.

426. See U.C.C. § 9-306 (1994).

427. For a similar example of a promise likely to induce reliance that is difficult to prove, see *Bethany Trust Co. v. Harker*, 780 S.W.2d 151 (Mo. Ct. App. 1989). The case was a suit brought on a note payable to a bank executed by Leroy Harker and allegedly guaranteed by Colleen Harker. *Id.* at 151-52. Colleen's written guaranty agreement was executed in 1974, and Leroy's note was not executed until 1984. *Id.* Perhaps because of the length of time between the execution of the guaranty and the note, the appellate court ultimately held that the bank was required to prove it had relied on the guaranty in extending credit to Leroy, effectively requiring the bank to prove the guaranty was part of the 1984 bargain. *Id.* at 153. Unfortunately, the bank did not sue on the note until 1987, at which point the relevant loan officer—who had presumably engaged in numerous transactions in the meantime—could not recall his subjective thought processes three years earlier. *Id.* at 152. Given that a written guaranty is the type of promise likely to generate reliance, for reasons to be developed *infra* part V.B, it would have been preferable to presume the guaranty was enforceable and handle any concerns over the length of time between the guaranty and the note through an analysis of whether the guaranty lapsed after a reasonable length of time.

B. Preliminary Conclusions

At the end of a long journey through the thicket of consideration cases, it is possible to draw the following conclusions. First, and most obviously, the doctrine of consideration and its corollaries are alive and well, at least if the test of viability is frequency of use as an express ground of decision. Second, and somewhat in tension with the first conclusion, most uses of the doctrine of consideration and its corollaries are redundant, in the sense that there are usually independent reasons not to enforce the promises they are used to invalidate. Probably the simplest explanation for this phenomenon is that consideration doctrine has been qualified and limited so many times that the most common harsh results produced by the simple, classical statement of the doctrine have gradually been reduced. Indeed, it is presumably this gradual erosion of the doctrine of consideration that led scholars like Gilmore to conclude that it had been, or soon would be, qualified right out of existence.⁴²⁸ However, contrary to Gilmore, it is necessary to draw a third conclusion. Specifically, consideration doctrine has not entirely lost its bite. Except with respect to corollaries for which its redundancy is virtually complete, the various branches of consideration doctrine each produce a group of cases that are objectionable. The number of objectionable cases is small relative to the number of cases in which consideration doctrine is redundant, but the objectionable cases persist and seem to defy the attempt to civilize the doctrine of consideration through a process of limitation, qualification, and creation of exceptions. At some point, legal theorists must face the question whether the whole qualifying and limiting enterprise has collapsed under its own weight. The persistence of troublesome cases in the face of progressive articulation and complication of the doctrine of consideration would suggest that the process of qualification can never be completed, and that something would be gained by abandonment of the gatekeeping function of the doctrine of consideration altogether.⁴²⁹

Before embracing that conclusion, however, it is necessary to move the analysis to a somewhat more general level. The sheer tenacity with which judges cling to the doctrine of consideration and its corollaries counsels a certain degree of caution in abandoning

428. See GILMORE, *supra* note 33.

429. Cf. Knapp, *supra* note 89, at 938, 943-44 (suggesting that when a supposed "rule" is understandable only in light of its exceptions it should cease to be regarded as a rule).

them. The preceding analysis has demonstrated that, as currently applied, the doctrine of consideration and its corollaries do little good and some harm. It is theoretically possible, however, that there are reasons to retain them that are of a more general character and are not readily ascertainable from an examination of cases. It is worth asking whether there are reasons to deny enforcement to gratuitous promises, either because they lack some element or feature that forms part of the rationale for enforcing promises or because they have some feature that makes it positively undesirable to enforce them. It is to those questions, as well as the most common answers to them, that the next section is devoted.

VI. THE THEORY OF CONSIDERATION: THE GATEKEEPER'S LAST STAND

A. *Introduction: The Promising Continuum*

It is likely that most first-year contracts teachers, at some point, describe the doctrine of consideration as a vehicle, admittedly imperfect, for distinguishing between gifts and bargains. Our students must often be tempted to regard gifts and bargains as mutually exclusive categories divided by a clear conceptual line. One of the benefits of reading large numbers of cases is that it dispels any such notion.⁴³⁰ To be sure, there are clear cases of gifts and of bargains, and the clear cases form opposite poles. But between the two poles are a broad spectrum of transactions and promises,⁴³¹ and, for purposes of the analysis to follow, it is helpful to illustrate that range. Accordingly, in the discussion of the reasons for enforcing or not enforcing promises, it will be beneficial to refer occasionally to the following illustrative, although nonexclusive and nonexhaustive, list of types of promises:

430. Indeed, the strict dichotomy between gifts and exchanges has occasionally been questioned in the critical literature. See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 157, 190-201 (1989); Rose, *supra* note 326, at 309-17.

431. This point was appreciated quite clearly in Samuel Stoljar, *Enforcing Benevolent Promises*, 12 SYDNEY L. REV. 17, 18-20 (1989) (distinguishing three different types of gift promises with corresponding differences in the strength of the obligation incurred).

1. The completely altruistic promise to make a gift to a stranger, of which Williston's "tramp hypothetical"⁴³² provides a convenient example.
2. The promise to do a favor for a friend, for example, a promise to pick up a friend at the airport.
3. Intrafamilial promises, including the following examples:
 - A. Father promises to buy a car for son upon son's graduation from high school;
 - B. Mother promises to pay for daughter's medical school education;
 - C. Grandfather promises grandson that he will inherit the family farm upon grandfather's death;
 - D. Sister, to whom much has been devised in parent's will, agrees with brother, to whom little has been devised, that, notwithstanding the will, they will share parent's estate equally.
4. A formal pledge of a sum of money to a specific charity.
5. Nonexchange promises reflecting cooperative business behavior, including:
 - A. A promise by an insurer to make a check jointly payable to the insured and the insured's secured lender, with whom the insurer has no contract;
 - B. A promise by a first mortgagee to inform a second mortgagee if the common mortgagor defaults and the first mortgagee institutes foreclosure proceedings.
6. Promises in the business context that are technically gratuitous but nonetheless related to exchange, including:
 - A. The one-sided modification of a contract;
 - B. The postloan guaranty of a borrower's obligations by a third party;
 - C. The uncompensated firm offer or option;
 - D. The promise made with a hope of inducing future unspecified exchanges, for instance, an automobile

432. Williston's tramp hypothetical involved a donor moved by sympathy to make a conditional gift promise of a coat to a tramp. It was designed to illustrate the distinction between a bargain and a conditional gift. See 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 7:18 (Richard A. Lord ed., 4th ed. 1992). For an argument that such impulsive generosity is relatively rare, see Havighurst, *supra* note 61, at 15.

dealer's promise to make free repairs for a customer whose warranty has recently expired;

E. Promises in recognition of a past benefit;

F. Proposed business deals that give one party an unlimited termination right, for instance, Professor Eisenberg's "confident law student" hypothetical.⁴³³

7. The conventional business bargain, for instance, a forward contract for the purchase and sale of 10,000 bushels of wheat at a fixed price.

While further examples could be added to the list almost indefinitely, it is not necessary to provide a comprehensive taxonomy of promises. The foregoing examples sufficiently illustrate the variety of gratuitous promises, and the task that remains is to assess them in light of the reasons commonly assigned for enforcing promises, as well as the defects commonly attributed to gratuitous promises, in order to determine if retention of the gatekeeping function of consideration doctrine is desirable. Ultimately, I conclude that most of the reasons commonly given for retention of the doctrine have already been found inadequate or appear to be inadequate upon further analysis.

B. Reasons for Enforcing Promises

1. Exchange

It is generally assumed that society should foster exchange because exchange creates "wealth"⁴³⁴ or "surplus."⁴³⁵ It is sometimes argued that a regime of enforcement of exchange promises is justified because it increases the likelihood of beneficial exchange, presumably by reducing the incentive to breach⁴³⁶ and providing some assurance to the party who must perform first that he will receive the agreed return or its rough equivalent. As Dawson observed, this is why the presence of more than merely technical

433. Eisenberg's hypothetical involves a law student with substandard grades who offers to work for a prestigious law firm for one-third the normal starting salary, subject to an unlimited termination right in favor of the law firm. It is designed to illustrate how a genuine bargain may include an illusory promise on one side. See Eisenberg, *Principles*, *supra* note 34, at 650-51.

434. See Baron, *supra* note 430, at 156; Fuller, *supra* note 77, at 815.

435. See Eisenberg, *Principles*, *supra* note 34, at 643.

436. See *id.* at 652. For an accessible summary of the economic analysis of the incentive effects of contract remedies on the breach decision, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 25-36 (1983).

consideration is generally regarded as a sufficient reason for enforcing a promise.⁴³⁷ Making consideration a necessary condition for enforcement of a promise, however, seems to reflect an assumption that *only* bargain promises play a role in increasing utility through exchange.

A number of commentators, however, have observed that the latter assumption is false. The gratuitous exchange-related business promises of category (6) of the illustrative list probably increase the likelihood of beneficial exchange, even if they do so less directly than the bargain promises illustrated by the forward grain contract of category (7).⁴³⁸ Even the nonexchange cooperative business promises of category (5) probably make exchange more likely, if only by reducing the apparent risk of further or continued business relations for one party. Moreover, economic theory is in no way committed to the notion that only bilateral exchange increases utility.⁴³⁹ Interdependent utility is a perfectly familiar phenomenon and is quite likely to be present in the context of true donative promises among family or friends like those in categories (2) and (3).⁴⁴⁰ Even the purely altruistic promisor of category (1) may derive more satisfaction from using money to buy a coat for a stranger than he would from keeping it, particularly if the promisor has plenty of money. While there may be other reasons not to enforce such promises, it cannot be assumed that they play no role in enhancing utility.⁴⁴¹

437. See DAWSON, *supra* note 37, at 220-21.

438. See SUTTON, *supra* note 76, at 215; Eisenberg, *Principles*, *supra* note 34, at 652-56; Gordon, *Consideration*, *supra* note 67, at 290-91, 293, 298; Gordon, *Dialogue*, *supra* note 76, at 995. Indeed, illusory promises of the type exemplified in 6.E. may be components of genuine bargains. See Eisenberg, *Principles*, *supra* note 34, at 649-51; Gordon, *Consideration*, *supra* note 67, at 290-91; Gordon, *Dialogue*, *supra* note 76, at 988-89.

439. See Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 4 (1981) [hereinafter Eisenberg, *Promises*] (conceding that gifts have a wealth redistribution effect and probably redistribute wealth to persons who have more utility for money than the donors, but arguing that the effect of legal enforcement of donative promises is trivial).

440. See Mary L. Fellows, *Donative Promises Redux*, in PROPERTY LAW AND LEGAL EDUCATION 27, 29-30 (Peter Hay & Michael H. Hoeflich eds., 1988); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1272 (1980). But see Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 412 (1977) (arguing that interdependent utilities explain gifts, but not gift promises, and giving an alternative explanation of the enhancement of utility by certain gift promises).

441. For a strong argument that a regime of enforceable gratuitous promises would enhance utility, see Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39 (1992).

2. Protecting expectations and reliance

Alternatively, it is often argued that promises are enforced because it is desirable to protect the expectations⁴⁴² promises generate in promisees or the actions they induce promisees to take in reliance.⁴⁴³ The argument has a number of strands and variations, some normative and some descriptive. The widespread acceptance of the doctrine of promissory estoppel is strong evidence of the descriptive claim that the protection of reasonable reliance is, in fact, one of the functions of the common-law system of contracts.⁴⁴⁴ Economic theorists have argued that a regime of enforceable promises is desirable because it encourages beneficial adaptive behavior designed to enhance the utility to the promisee of the performance promised.⁴⁴⁵ Others have emphasized the need for protection of reliance in an economy characterized by specialization,⁴⁴⁶ the impossibility of confining exchange to simultaneous exchange,⁴⁴⁷ and the need for predictability and planning.⁴⁴⁸ Fuller and Perdue suggest that even the enforcement of the fully executory bilateral bargain is justified by the likelihood of reliance, particularly reliance in forms that are difficult to prove.⁴⁴⁹ In whatever variation they

442. See SUTTON, *supra* note 76, at 238-39, 248; Baron, *supra* note 430, at 182-83; Roscoe Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1, 1-2 (1945). But see Eisenberg, *Promises*, *supra* note 439, at 3 (arguing that mere disappointment of expectations is, in the case of donative promises, a trivial injury); Patterson, *supra* note 89, at 942-43 (arguing that expectations alone are not a sufficient basis for enforcement of promises).

443. See Baron, *supra* note 430, at 182-83; Fuller, *supra* note 77, at 810-12; Lon L. Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936).

444. See Fuller, *supra* note 77, at 811. Of course, this is not to say that the promissory estoppel as applied by judges is confined to cases of demonstrable individual reliance. See Farber & Matheson, *supra* note 326, at 909-10, 920-29 (arguing that, although individual reliance is of reduced significance as a determinant of liability and remedy in promissory estoppel cases, reliance remains the policy basis behind promissory liability); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

445. See Fellows, *supra* note 440, at 28; Goetz & Scott, *supra* note 440, at 1266-71.

446. See Eisenberg, *Principles*, *supra* note 34, at 643; Farnsworth, *Past of Promise*, *supra* note 280, at 585-86; Hillman, *Restatement*, *supra* note 89, at 681 n.9; Patterson, *supra* note 89, at 945.

447. See Eisenberg, *Principles*, *supra* note 34, at 643; Farnsworth, *Past of Promise*, *supra* note 280, at 585-86.

448. See Eisenberg, *Principles*, *supra* note 34, at 652; Malcolm P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 784-85 (1941).

449. See Fuller & Perdue, *supra* note 443, at 61-62; see also Farnsworth, *Past of Promise*, *supra* note 280, at 597 (citing Fuller & Perdue's contention that the justification

are found, however, the reliance and expectation rationales for promissory enforcement are impossible to confine to the class of promises blessed by the doctrine of consideration. The doctrine of promissory estoppel itself dramatically expanded the class to include promises that generated unbargained-for reliance, at least where the reliance takes a quantifiable form, such as out-of-pocket expenditure. If the reliance to be encouraged extends to any utility-enhancing adaptive behavior, whether reflected in out-of-pocket expenditure or not, it is arguable⁴⁵⁰ that virtually all promises should be presumptively enforceable unless they are either induced by some form of misconduct, suspect for policy reasons, or qualified by the promisor in ways that indicate an intention not to be bound. Certainly, the bulk of the gratuitous promises on the illustrative list outlined above would make possible, and would seem likely to generate, such adaptive behavior.⁴⁵¹ Perhaps this is most obvious in the case of the business promises ancillary to exchanges falling into category (6),⁴⁵² but even the nonexchange cooperative business promises of category (5) would seem likely to generate negative reliance by the promisee in the form of omitting to take alternative action to protect her interest. Charitable organizations make grand plans on the basis of the income stream represented by charitable subscriptions in much the same way that profit-making organizations make plans relying on the proceeds of exchanges,⁴⁵³ although, in the case of charitable organizations, it may be difficult or impossible to isolate the action taken in reliance upon one specific pledge.⁴⁵⁴ The intra-family promises exemplified in category (3) seem likely to induce each promisee to

for protecting the expectation interest is that it is the most effective way of protecting the reliance interest).

450. Economic theorists are not in agreement on the question whether, in the case of gratuitous promises, the costs of some form of enforcement outweigh the utility-enhancing effects of "beneficial reliance," which is presumably possible with any promise. Compare Goetz & Scott, *supra* note 440, at 1303-04 (arguing that enforcement of nonreciprocal promises is unnecessary and would result in a suboptimal level of promising) with Fellows, *supra* note 440, at 29-32 (disputing several premises of the Goetz and Scott analysis) and Kull, *supra* note 441, at 57-58 (arguing that gratuitous promisors will make promises conditional or give mere statements of intent rather than refraining from promising under a regime of legal enforcement).

451. Cf. Hamson, *supra* note 89, at 250 (suggesting that any honest, serious promisor can foresee reliance on his promise).

452. See Eisenberg, *Principles*, *supra* note 34, at 652-56.

453. See, e.g., the description of fundraising and budgeting activities in *Maryland Nat'l Bank v. United Jewish Appeal Fed'n*, 407 A.2d 1130 (Md. 1979).

454. See *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989).

alter life plans and are most naturally explainable as attempts to do exactly that.⁴⁵⁵ A friend whom I have promised to meet at the airport may fail to make other arrangements or neglect to bring cab fare, and even Williston's tramp might alter his action in light of the promise of a warm coat, although, if the promisor is a perfect stranger whose motives and character are unknown, the adaptive behavior may not be very extensive.⁴⁵⁶

Of course, not all of the foregoing promises will actually induce reliance in every case. However, if Fuller is correct in asserting that the mere likelihood of unprovable reliance—rather than demonstrable reliance in each case—is the rationale for protecting even fully executory expectations,⁴⁵⁷ it is difficult to see why the likelihood of reliance should not be enough to make gratuitous promises presumptively enforceable.⁴⁵⁸ The common forms of gratuitous promises illustrated above cannot be demonstrated to be less likely to induce beneficial adaptive behavior than conventional bargains.

Nor can it be objected that reliance on the types of gratuitous promises illustrated above is inherently less rational than reliance on bargain promises. The reliance and expectation rationales for promissory enforcement are occasionally said to be circular on the grounds that expectations or reliance cannot be reasonable unless it is presumed in advance that the promises that generate expectations or induce reliance are legally enforceable.⁴⁵⁹ To accept the premise that only legal enforceability would induce a rational being to rely on a promise is to block out the behavior of real human beings with legal blinders and to assume that all reasoning must be legal reasoning. Under any commonsense notion of rationality, if my parents promised

455. See Stoljar, *supra* note 431, at 32-33. Havighurst argues that, in such cases, the courts strain to find consideration, and concedes that reliance strengthens the case for enforcement. See Havighurst, *supra* note 61, at 15-16; see also Knapp, *supra* note 89, at 951 (arguing that reasonable expectations may be generated by relations between promisee and promisor that give the promisee reason to believe in the promisor's altruistic concern for his welfare).

456. See Stoljar, *supra* note 431, at 18.

457. See Fuller & Perdue, *supra* note 443, at 61-62.

458. Cf. SUTTON, *supra* note 76, at 201 (articulating Whiteside's view that deliberate, intentional promises should be enforced if they are of a type ordinarily relied upon in economic or business dealings).

459. Cf. Fellows, *supra* note 440, at 37-38 (articulating, and then rebutting, the argument); Gordon, *Consideration*, *supra* note 67, at 291 (recounting the "paradox" of the enforceability of the executory bilateral exchange of promises); Gordon, *Dialogue*, *supra* note 76, at 1002 (same).

to pay for my medical school education, I probably know enough about their character or their concern for my welfare to make a rational prediction about the likelihood that the promise will be kept and adapt my behavior accordingly.⁴⁶⁰ The fact that the promise is donative makes little difference. It may, indeed, be more rational to rely on the parental donative promise than on the promise of a used car dealer that the 1949 Packard about to be sold to me will last another 50,000 miles, notwithstanding the fact that the car dealer's promise is part of a proposed bargain.

The reliance and expectation rationales for promissory enforcement thus seem to push in the direction of including the kind of gratuitous promises illustrated above within the class of enforceable promises. Moreover, if the difficulty of proof of negative reliance and the burden of proving reliance in every case has already led to validation of broad classes of promises even in the absence of individualized proof of reliance,⁴⁶¹ perhaps those rationales even militate in favor of a presumptive rule of enforceability of promises generally, in the absence of specific reason to deny enforcement.

3. Autonomy

There is an alternative strand of contemporary contracts scholarship that finds the basis for promissory enforcement in the propriety of effectuating the intentions of rational, autonomous agents when such agents wish to create legally binding obligations.⁴⁶² Whether denominated "will" theories⁴⁶³ or "consent"⁴⁶⁴ theories, such accounts of contract attempt to find the reason for enforcing promises in some conception of human autonomy and respect for the individual. The details of such theories, however, are of little concern in the present context. The core of such theories is the principle that promises should be enforced because they are the freely-chosen obligations of autonomous agents. The principle, quite obviously, is

460. See Fellows, *supra* note 440, at 37-38, 50 n.64; Stoljar, *supra* note 431, at 32-33.

461. See Fuller, *supra* note 77, at 811-12; Fuller & Perdue, *supra* note 443, at 61-62.

462. See CHARLES FRIED, *CONTRACT AS PROMISE* 1-6 (1981); Fuller, *supra* note 77, at 806-10; see also Farnsworth, *Past of Promise*, *supra* note 280, at 599-600 (describing the will theory of contract).

463. See A.S. Burrows, *The Will Theory of Contract Revived—Fried's "Contract as Promise,"* 38 *CURRENT LEGAL PROBS.* 141, 142 (1985) (characterizing Fried's theory as a "will theory"); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 *YALE L.J.* 404 (1981) (reviewing CHARLES FRIED, *CONTRACT AS PROMISE* (1981)).

464. Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269 (1986).

entirely neutral with respect to the character of the promise, and specifically with respect to the question whether the promise is gratuitous or part of a bargained exchange.⁴⁶⁵ Even Williston, who some have characterized as a principal architect of the classical doctrine of consideration, had sufficient respect for autonomy to believe that there should be some purely formal device for the creation of a legally binding promise.⁴⁶⁶ The seal once served that function,⁴⁶⁷ and Williston's dramatically unsuccessful Uniform Written Obligations Act was presumably intended to serve it as well.⁴⁶⁸ To those sufficiently familiar with the doctrine of consideration, providing a peppercorn in return for an otherwise gratuitous promise can make a gift pass for a bargain,⁴⁶⁹ and at various points, the drafters of the *Restatement (Second) of Contracts* recommend recognition of promises based on a mere recitation of consideration.⁴⁷⁰ While all of these formal devices are subject to practical difficulties, they all reflect at least partial recognition of the autonomy rationale for promissory enforcement, and they are all capable of operating just as well in favor of gift promises as exchange promises. Therefore it is apparent that, whatever content is given to the somewhat problematic notion of autonomy, that notion provides no basis for retention of the gatekeeping function of the doctrine of consideration.

465. Kull, *supra* note 441, at 50-51.

466. See Eisenberg, *Principles*, *supra* note 34, at 659 (quoting Williston).

467. See Baron, *supra* note 430, at 187; Eisenberg, *Principles*, *supra* note 34, at 660; Eisenberg, *Promises*, *supra* note 439, at 8-9; Fuller, *supra* note 77, at 800; Paul R. Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 850 (1941); K.N. Llewellyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777, 781 (1941) [hereinafter Llewellyn, *Complexity*].

468. See Baron, *supra* note 430, at 187 n.187; Hays, *supra* note 467, at 850.

469. See A.G. Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract: A Competitive Analysis*, 17 INT'L & COMP. L.Q. 137, 155 (1968); Malcolm S. Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L. REV. 825, 832 (1941); Stoljar, *supra* note 431, at 20-21, 24.

470. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 87(1)(a), 88(a) (1981) (recommending the recognition of a mere recitation of consideration in option contracts and guaranties).

C. *Possible Reasons to Refuse to Enforce Gratuitous Promises*

1. Gratuitous promises are trivial

It has been argued that, in contrast to the bargain promises with which the world of commerce is concerned, gratuitous promises are simply too unimportant to justify putting the enforcement mechanism of the state at the disposal of recipients of such promises.⁴⁷¹ Such a claim immediately prompts a request for a description of the criteria by which "important" promises are distinguished from the "unimportant." If the criterion is the economic value of the promise in question, there are two fairly obvious responses. First, many of the promises that are technically gratuitous may actually involve rather significant sums. One-sided modifications to business contracts, for example, may very well take the form of significant price increases. Indeed, even promises that are not only technically gratuitous but clear examples of gifts are not necessarily trivial in a financial sense. It is true that a promise to meet a friend at the airport is of no greater value than the price of a cab ride. A parent's promise to finance a medical school education, however, is in a decidedly different class, and charitable subscriptions are often conspicuously large. The claim that gratuitous or donative promises are financially trivial is thus empirically suspect.

Second, even if gratuitous promises were financially trivial, that fact would not establish the need for retention of the gatekeeping function of the doctrine of consideration. Indeed, it has been argued that the implication would be precisely the reverse. The state mechanisms for contract enforcement will not be invoked for financially trivial promises in any event; litigation is simply too expensive to use for recovery of small amounts.⁴⁷² The doctrine of consideration is not necessary to screen out suits for small change.⁴⁷³

471. See Baron, *supra* note 430, at 156, 180, 189 (describing traditional views); Fuller, *supra* note 77, at 799 (attributing the view to Ballantine and Willis).

472. See Gordon, *Dialogue*, *supra* note 76, at 994-95; cf. Stoljar, *supra* note 431, at 19 (arguing that practical remedial difficulties screen social promises out of the legal system).

473. Indeed, it has been observed that the doctrine of consideration is actually indifferent to the financial stakes involved in a promise. See Kull, *supra* note 441, at 48-49. If trivial gratuitous promises are common, so are trivial bargained exchanges. The latter may not be litigated, but it is not to the credit of the doctrine of consideration that they are kept out of court.

If the criterion of importance is not financial, how should it be specified precisely? Perhaps the concern is to screen out promises that are merely social promises among friends or family members, either because such promises are not worth state resources or, alternatively, because the relationships in question should not be subject to state intrusion.⁴⁷⁴ Quite apart from the fact that mere social promises will be screened out of state enforcement mechanisms by their lack of economic value, however, it has been argued that the doctrine of consideration would not screen them out reliably in any event. Many social or family arrangements are reciprocal and fit rather easily into bargain form.⁴⁷⁵ I have argued elsewhere that the job of screening out such promises properly belongs to the objective theory of assent, not to the doctrine of consideration.⁴⁷⁶

Alternatively, donative promises between family members might initially seem appropriate for classification as unimportant or otherwise inappropriate for state intervention. A moment's reflection, however, makes any such initial plausibility disappear. Intrafamilial donative *transfers* generally are the subject of a variety of formal legal mechanisms, including the laws of inheritance, wills and trusts as well as laws pertaining to dissolution. Donative transfers among family members are thus apparently of sufficient importance to society to devote significant resources to creation and enforcement mechanisms, and any interest in family privacy is apparently not of sufficient magnitude to prevent the state from facilitating and regulating such transfers.⁴⁷⁷ Moreover, the intimacy of the family context does not preclude the enforcement of actual bargains among family members or intrafamilial promises upon which one party has relied.⁴⁷⁸ Against that background, it seems anomalous that intrafamilial donative promises should receive radically different treatment.

The argument that gratuitous promises should be denied enforcement because they lack importance must ultimately be rejected. While some gratuitous promises are unimportant in some definable sense, many are not. Moreover, the doctrine of consider-

474. See Reiter, *supra* note 89, at 440.

475. See Chloros, *supra* note 469, at 147 ("[I]n purely domestic arrangements there is often consideration but no intention to be bound.").

476. See Wessman, *supra* note 2, at 61-65.

477. See Baron, *supra* note 430, at 200; Fellows, *supra* note 440, at 28; see also Kull, *supra* note 441, at 48 (arguing that private enabling law generally makes no distinction in principle between significant and trivial undertakings).

478. See Eisenberg, *Promises*, *supra* note 439, at 6 n.15.

ation is neither necessary nor sufficient to screen out the unimportant classes.

2. Gratuitous promises are impulsive or foolish

The doctrine of consideration is occasionally said to be necessary or desirable as a safeguard against rash or foolish gratuitous promises.⁴⁷⁹ Fuller's influential article popularized the view that the doctrine of consideration performs a cautionary function analogous to that performed by legal formalities generally.⁴⁸⁰ The fact that a promise is part of a bargain purportedly impresses the promisor with the seriousness of the commitment and encourages deliberation and prudence. Apparently, the fear is that, without the safeguard consideration provides, people would make extravagant promises motivated by surges of emotion or the importunings of wheedling relatives.⁴⁸¹

The argument really has two strands, and they need to be unraveled. First, the argument reflects an apprehension that there are promisors who need to be prevented from making gift promises so generous that they risk the promisor's own financial health. Second, the argument reflects a concern that people often make gift promises for the wrong reasons or motives. As an empirical matter, of course, it is possible to question how often these implicit premises are true. One suspects that more people have been bankrupted by entering into speculative bargains—by exchange promises—than by excessive philanthropy. Moreover, of the promises on the illustrative list, only the promise in Williston's tramp hypothetical seems impulsive. Even the intrafamilial promises on the list seem to be designed for the facilitation of future planning⁴⁸² and so seem likely to be deliberate. It may be, therefore, that the need for a cautionary device is not as great as the argument suggests. Nevertheless, everyone can probably think of examples of imprudent gifts—for example, the cult devotee who donates all his worldly goods to the cult leader—and, particularly in the family context, it is fairly easy to find occasional examples of

479. See Baron, *supra* note 430, at 160-84 (describing traditional justifications for formality in the case of donative promises); Eisenberg, *Promises*, *supra* note 439, at 5; Fuller, *supra* note 77, at 799 & n.2 (attributing the view to Ames, Ballantine, and Whittier); Gordon, *Consideration*, *supra* note 67, at 285-86; Gordon, *Dialogue*, *supra* note 76, at 992-93.

480. Fuller, *supra* note 77, at 800, 805, 815.

481. See Eisenberg, *Promises*, *supra* note 439, at 5; Patterson, *supra* note 89, at 955.

482. See Stoljar, *supra* note 431, at 32-33.

promises made because the promisor was cajoled or pressured by relatives. Accordingly, a further response to the argument is necessary.

The best answer that has been given is that the problems that allegedly create the need for a cautionary device are in no sense confined to gratuitous promises or donative promises. Except in the sort of exceptional circumstances that justify an application of the defense of unconscionability, the law simply does not police for imprudence where exchange promises are concerned.⁴⁸³ By making the adequacy of consideration officially irrelevant, the doctrine of consideration itself expressly disclaims any such policing function.⁴⁸⁴ Given that foolish deals are probably more common than foolish gifts, it seems curious to police for prudence in the latter case, but not the former, and doubly curious to assign the job to the doctrine of consideration. The same is true with respect to impulsive promises. A bargain promise is not disqualified from enforcement simply because it was made quickly or impulsively. Bargain promises made for the "wrong reason" are often disqualified from enforcement, but the task of disqualification is assigned, not to the doctrine of consideration, but to traditional defenses such as duress, fraud, and undue influence. If gratuitous promises were presumptively enforceable, there is no reason why circumstances establishing one of those defenses should not overcome the presumption just as they do in the case of bargain promises. The argument that the doctrine of consideration is desirable as a safeguard against rash, imprudent, or wheedled promises thus ultimately collapses.

3. Gratuitous promises are too easily fabricated

Again taking a cue from Fuller's influential analogy of consideration to a legal formality, some argue that consideration performs an evidentiary function.⁴⁸⁵ Eliminating the doctrine of consideration and opening the door to enforcement of gratuitous promises would also open the door to the enforcement of too many fabricated promis-

483. See Fellows, *supra* note 440, at 33; Havighurst, *supra* note 61, at 8-9; Kull, *supra* note 441, at 54.

484. Of course, the disclaimer is undoubtedly false in some instances. The doctrine of consideration is sometimes used covertly as a way to police fairness, although its use for that purpose is quite unfortunate. See *supra* notes 237-38 and accompanying text. In addition, see Llewellyn, *Reform*, *supra* note 48, at 865-66; Wessman, *supra* note 2, at 86-93.

485. See Fuller, *supra* note 77, at 800, 815.

es.⁴⁸⁶ It is easy to make a fraudulent claim that my father promised to leave me the family farm, particularly if my father is already dead. If I must furnish consideration in order to make a promise enforceable, however, I must engage in some overt conduct, and that is harder to fabricate.⁴⁸⁷

There are several responses to the foregoing argument. First, even if the claim that gratuitous promises are easier to fabricate than bargain promises is correct, the doctrine of consideration nevertheless denies enforcement to gratuitous promises even in cases in which there is absolutely no doubt or dispute that the promise was made. As a vehicle for the prevention of fraudulent claims, therefore, the doctrine of consideration is overbroad.

Second, the doctrine of consideration is overbroad in a second sense. It should be recalled that the class of promises the doctrine screens out is in no sense limited to the stereotypical gift promise from parent to child just used as an example. It has often been observed that the class of technically gratuitous promises includes many that are ancillary to ongoing exchanges,⁴⁸⁸ even if they are not "paired" with specific reciprocal items of consideration. If connection to an exchange fulfills an evidentiary function, therefore, at least that class of gratuitous promises already has the desired connection to an exchange.⁴⁸⁹

Third, the premise that exchange promises are inherently harder to fabricate than bargain promises is open to dispute.⁴⁹⁰ As some critics have observed, this is in part because the completely executory bargain is enforceable.⁴⁹¹ If it is easy to lie by claiming that my father agreed to leave me the family farm, it is nearly as easy to lie by claiming he agreed to sell it to me for an advantageous price. If I am believed, the sale contract is enforceable even if I have not yet

486. See Eisenberg, *Promises*, *supra* note 439, at 4-5.

487. See Patterson, *supra* note 89, at 949 ("Consideration requires something to be done outside the writing and that is less easy to fake.").

488. See Eisenberg, *Principles*, *supra* note 34, at 652-56; Gordon, *Consideration*, *supra* note 67, at 289-90, 292-98; Reiter, *supra* note 89, at 456-58.

489. See Fuller, *supra* note 77, at 818-19.

490. See Kull, *supra* note 441, at 53.

491. Cf. Gordon, *Consideration*, *supra* note 67, at 286 (arguing that consideration serves no evidentiary function in an executory bilateral contract); Gordon, *Dialogue*, *supra* note 76, at 991 (arguing that promisee may not point to promisor's "possession" of counterpromise as evidence); Havighurst, *supra* note 61, at 7 (arguing that a perjurer swearing to a false promise would only enhance his credibility by swearing to a false return promise as well).

paid. Moreover, if words may be ambiguous or difficult to verify, conduct is often even more ambiguous. If a friend has actually paid me \$5000, it may make his claim that I promised to sell him my car more credible. If, however, my response to the claim is that the payment was merely the repayment of an earlier loan, the evidentiary value of the conduct is exhausted.⁴⁹² In sum, bargains are sometimes as easy to fabricate as gifts, and consideration is not necessarily of evidentiary value.

Finally, it would seem desirable to address the question of the need for a formality more directly than is possible with the doctrine of consideration.⁴⁹³ If there is a need for a formality with respect to a class of promises, it is presumably because the subject matter of such promises is important enough to create an incentive for fraud and because fraudulent assertion of such promises is relatively easy to accomplish and relatively difficult to detect. Given the imprecision of the doctrine of consideration as an evidentiary tool, it would seem more sensible to ask directly which promises are particularly important or particularly subject to fraudulent assertion and impose some genuine formality⁴⁹⁴ like a writing requirement on whatever class is identified.⁴⁹⁵

4. Enforcing gratuitous promises might bind promisors inadvertently

The next argument sometimes made in favor of the doctrine of consideration draws its premise from the third of "Fuller's famous

492. A similar point is made by Gordon, *Consideration*, *supra* note 67, at 286 and Gordon, *Dialogue*, *supra* note 76, at 990.

493. See Gordon, *Consideration*, *supra* note 67, at 293 (suggesting amending the statute of frauds if more evidentiary security is deemed necessary).

494. Cf. Chloros, *supra* note 469, at 155 (arguing that the need for greater formality in English contract law must be assessed independently of the doctrine of consideration).

495. That appears to be the conceptual approach implicit within the statute of frauds and dead man's statutes. Cf. Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1018, 1027-28 (1959) (noting that the statute of frauds, unlike the doctrine of consideration, identifies "unenforceable transaction types in functional or economic terms"). Both of the latter are somewhat out of favor at the moment, undoubtedly because a writing requirement can itself be used as an instrument of fraud. Arguably, however, the current distaste for such formalities is less an indictment of the general conceptual approach than the lack of success in finding a suitable formal device. If a writing requirement is too narrow a restriction, it may be that a more general requirement of independent corroboration, *i.e.*, evidence of the promise other than the word of the promisee, would fulfill the necessary evidentiary function without itself becoming a ready instrument of fraud.

functions of form,"—the channeling function.⁴⁹⁶ Legal formalities are useful because they provide an accessible way for those who desire certain legal consequences to channel their behavior so that that intention will be easily recognizable and the intended consequences achieved.⁴⁹⁷ Conversely, a good formality also provides a way for those desiring to avoid legal consequences to accomplish that intention, if only by avoiding use of the formality.⁴⁹⁸ Consideration, it is argued, accords roughly with the layperson's sense of which promises must be kept.⁴⁹⁹ If promises without consideration were presumptively enforceable, too many gratuitous promisors would find themselves saddled with legal consequences they never intended.⁵⁰⁰

To the extent that the argument relies upon an empirical premise that gratuitous promises are perceived by laypersons to be "less binding" than bargain promises, part of the answer to the argument must be postponed until the next subsection. For the moment, however, it should be recalled that the correlation between bargain form and the intention to effect legal consequences is far from perfect. As noted earlier many social promises that all would concede to be too trivial to merit enforcement are nevertheless reciprocal promises that technically satisfy the doctrine of consideration.⁵⁰¹ Conversely, many of the technically gratuitous promises that are ancillary to exchanges, and so in no sense gifts, are undoubtedly made with the same level of deliberation and legal intention as the bargain promises constituting the underlying exchange.⁵⁰² Indeed, the sorts of intrafamilial promises exemplified in category (3) of the illustrative list are normally accompanied by a serious intention to perform.⁵⁰³

496. Fuller, *supra* note 77, at 801-03.

497. *Id.* at 801; Patterson, *supra* note 89, at 948-49.

498. See Patterson, *supra* note 89, at 948-49.

499. *Id.* at 949.

500. *Id.* at 949-50; cf. Eisenberg, *Promises*, *supra* note 439, at 5 (arguing that, absent formality or explicit reciprocity, it is difficult to distinguish a promise from a statement of present intent, and that even the donative promisor may not know what he or she means or is understood to mean).

501. See SUTTON, *supra* note 76, at 226-27; Chloros, *supra* note 469, at 147; Gordon, *Dialogue*, *supra* note 76, at 995.

502. See Reiter, *supra* note 89, at 457, 494 n.235 (arguing that channeling and cautionary functions are served by business context in the case of gratuitous modifications); see also Havighurst, *supra* note 61, at 6-7 (arguing against Fuller's view that distinguishing between exploratory and legally effective expressions of intention is fundamentally easier in the business context than in the case of gratuitous promises).

503. Cf. Knapp, *supra* note 89, at 938-39 (permitting enforcement of intrafamilial promises in proposed restatement of promissory obligation and specifying ties of affection as

Once again, therefore, the doctrine of consideration proves to be an imprecise proxy for some other issue—in this case, serious legal intention—and one is left wondering why the latter issue is not addressed directly if it is of such importance.

More importantly, however, defenders of the doctrine of consideration seem to have misperceived the nature of the need for a channeling device. The previous discussion of the notion of autonomy suggests that what is necessary is a device for making promises enforceable when the doctrine of consideration does not do so.⁵⁰⁴ When the seal was in its heyday as a legal formality, use of a sealed instrument would make a gratuitous promise enforceable. The seal, however, was trivialized to death,⁵⁰⁵ and the problem of developing an alternative device that provides a purely formal sufficient condition of enforcement has proved extremely intractable.⁵⁰⁶ That problem, however, is generated by the very fact that

one basis for inferring seriousness of promise).

504. See *supra* text accompanying notes 462-70.

505. See Baron, *supra* note 430, at 187; Eisenberg, *Principles*, *supra* note 34, at 660; Eisenberg, *Promises*, *supra* note 439, at 9; Hays, *supra* note 467, at 851.

506. Eisenberg, *Promises*, *supra* note 439, at 9. Indeed, in my view, the fact that no reliable substitute for the seal has been developed signals a need for greater doctrinal creativity in contract law. Various possible formal validation devices have been suggested. Williston's Uniform Written Obligations Act, which made the recitation of an intention to be bound decisive, was a colossal failure in the legislatures, perhaps because the requisite recitation was too easy to hide in a mass of boilerplate language. See SUTTON, *supra* note 76, at 202-04; Eisenberg, *Promises*, *supra* note 439, at 12; Gordon, *Consideration*, *supra* note 67, at 311-12. At times, it has been suggested that putting a promise in a signed writing should be sufficient to create liability. See Hamson, *supra* note 89 (describing the proposal of the English Law Revision Committee of 1937); see also Eisenberg, *Promises*, *supra* note 439, at 10-11 (describing state legislation making a writing presumptive evidence of consideration and other statutes making written promises enforceable per se). That suggestion, however, has been attacked as both overinclusive and underinclusive. Some have suggested that writing is today very nearly as casual as ordinary speech, and thus performs neither cautionary nor channeling functions. See Hamson, *supra* note 89, at 247; Patterson, *supra* note 89, at 958. On the other hand, writing requirements can be used as instruments of fraud in situations in which one party knows of, and exploits, the existence of the requirement to the disadvantage of another who is ignorant.

The drafters of the *Restatement (Second) of Contracts*, at various points, suggest a recitation of consideration as a potential formal validation device for otherwise gratuitous promises. See RESTATEMENT (SECOND) OF CONTRACTS §§ 87(1)(a), 88(a) (1981). While I have no wish to contest that the promises in question should be enforceable, it has been observed that the recitation of consideration is not, at present, something accessible to laypersons. See Gordon, *Consideration*, *supra* note 67, at 294. Presumably, if one knows enough to recite consideration, one knows enough not to be frustrated by the doctrine of consideration. The problem is that too many people seem not to know that much.

consideration has, to some extent, retained its gatekeeping function, not by efforts to eliminate it.

The proponent of the doctrine of consideration, moreover, is suggesting that a different channeling problem, the avoidance of unintended legal consequences, is a major concern of contract law. That suggestion is, at the very least, a great exaggeration. Contract may be generally distinguishable from tort and other fields by the fact that a greater percentage of the duties in contract are voluntarily assumed, and it may be conceded that the core of most contracts consists of the dickered terms as to which the parties have reached subjective agreement. However, at least in the case of bargains, American law has never required proof of an additional element called "the intention to be bound" as a necessary condition of enforcement.⁵⁰⁷ Moreover, many of the operative rules governing any contract are "default rules," which the parties might have displaced but, in all probability, did not specifically even think about. The objective theory of assent, both in its role in determining when

The last point, incidentally, provides the basis for refuting another argument sometimes made against abolishing the gatekeeping function of the doctrine of consideration. It has been suggested that the doctrine of consideration need not be abolished because anyone who needs to make a gratuitous promise, or even a true gift promise, enforceable has devices other than the bare promise for doing so. See Baron, *supra* note 430, at 186 n.176 (describing the views of others); Havighurst, *supra* note 61, at 15; Patterson, *supra* note 89, at 955. The promisor may avail himself of the "peppercorn theory" of consideration and have the promisee supply some item of negligible value. See SUTTON, *supra* note 76, at 223; Chloros, *supra* note 469, at 155 (noting that the use of nominal consideration may make a donation pass as an enforceable bargain); Rose, *supra* note 326, at 308. Alternatively, the gift promisor may simply declare that he holds the subject matter of the gift in trust for the promisee or that the gift will be transferred by will. See Baron, *supra* note 430, at 186; Fellows, *supra* note 440, at 35-36. Of course, the case analysis of the preceding sections of this Article suggests that the empirical claim implicit in the argument is false. The problem may be that, though such devices may be familiar to lawyers, their technical aspects are not part of the general culture, and they are therefore unlikely to be known, or easily used, by those who most need them. A good "natural" channeling device should be both sufficiently ritualistic to be easily recognized and sufficiently accessible in the culture to be used by those who do not resort to lawyers. See Patterson, *supra* note 89, at 948. Informal promising, of course, is familiar to all, but it is not clothed in any particular ritual. Something akin to the Roman law *stipulatio*, which could be accomplished verbally but involved a recognizable ritual, would seem to be in order. See Farnsworth, *Past of Promise*, *supra* note 280, at 588-89. However, I am unaware of any broadly recognized equivalent in our culture. For a more detailed description of the Roman law *stipulatio* and its evolution, see REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 68-113 (1990).

507. See SUTTON, *supra* note 76, at 226; WILLISTON, *supra* note 432, § 3:5; Hamson, *supra* note 89, at 255; Patterson, *supra* note 89, at 958; Shatwell, *supra* note 91, at 314-15.

the parties have manifested sufficient agreement that legal consequences should attach and in its role as the arbiter of the specific terms included in a contract, makes a promisor's subjective intentions concerning legal consequences a great deal less important than what a reasonable person would conclude from his language and conduct.⁵⁰⁸ Similarly, liability under the theory of promissory estoppel makes a promisor's subjective intentions as to legal consequences far less important than the reaction of a reasonable person to the promise. All of these aspects of the common-law system of contracts create possibilities for unintended legal consequences. Thus, although most would probably agree that, other things being equal, unintended legal consequences should be avoided, the system of contract law seems to reflect an assumption either that the threat of unintended legal consequences is not particularly common or that, if common, it is not a harm of any great degree of magnitude. If that is true, the fear of inadvertent contracting is scarcely a reason to retain the gatekeeping function of the doctrine of consideration.⁵⁰⁹

5. Making gratuitous promises presumptively enforceable is incompatible with the fundamental human need to weasel

"Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience."⁵¹⁰ In the foregoing two sentences, Morris Cohen encapsulated an argument that, in various permutations, recurs in much of the literature on the doctrine of consideration specifically and the enforcement of promises generally.⁵¹¹ The argument, however, is inherently ambiguous, and it is important to distinguish among its various possible claims, as well as to distinguish what it asserts from what it does not.

Initially, the argument is not just an assertion that not all promises should be enforced. No one believes that all promises

508. See Shatwell, *supra* note 91, at 316-18.

509. See also Kull, *supra* note 441, at 54 (arguing that the gratuitous promisor has precisely the same linguistic resources as the bargain promisor for distinguishing between a promise and a mere statement of intent and thus avoiding unintended legal consequences).

510. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933).

511. See Farnsworth, *Past of Promise*, *supra* note 280, at 591; Fuller, *supra* note 77, at 813; Patterson, *supra* note 89, at 942-43; Reiter, *supra* note 89, at 440.

should be enforced. Quite apart from the fact that some promises are induced by improper means, some are simply too insignificant to enforce. Nor is the argument the somewhat less trivial claim that some promises are made without an intention to be bound legally. Everyone knows that, and the system of common-law contracts accommodates the fact.⁵¹² Nor, finally, is the argument confined to the uncontroversial claim that, particularly in the case of some large and complex business deals, the parties to certain transactions do not wish to be bound until all the details of the transactions in question are fully worked out.⁵¹³ There clearly are such transactions, but the appropriately qualified letter of intent, together with the objective theory of assent and the law of conditions, would seem to be quite adequate as vehicles for effectuating such intentions.

Rather, the interesting aspect of the argument is an assertion that there is something special about gratuitous promises or gift promises that makes it necessary or desirable to permit the gratuitous or donative promisor to renege more freely than the bargain promisor. In one version the argument relies on an analogy to civil-law systems, in which gratuitous promises are enforced to a greater extent than in common-law systems.⁵¹⁴ In civil-law systems, it has been argued, increased legal recognition of gratuitous promises is accompanied by increased recognition of special defenses to them, including improvidence and ingratitude.⁵¹⁵ Those defenses are complicated, and increased enforcement of gratuitous promises is probably not worth the effort of transplanting or developing the defenses in question.⁵¹⁶

The civil-law analogy, however, is a false one. As Dawson observed, the hostility to donative promises in civil-law systems

512. Although English law occasionally makes the intention to be bound a separate "element" of a valid contract, American law generally presumes such an intention, at least in the case of bargain promises, but gives effect to manifestations by the parties of an intention not to be bound. See WILLISTON, *supra* note 432, § 3:5; Patterson, *supra* note 89, at 958. Of course, because of the objective theory of assent, a party may sometimes be bound to a promise even in the absence of a subjective intention to create a legal obligation.

513. Clearly, however, the uncontroversial claim is at least *part* of what Cohen and Fuller meant when they articulated the argument in question. See Cohen, *supra* note 510, at 574; Fuller, *supra* note 77, at 813. If the argument were confined to the uncontroversial claim, however, it would be of little further interest.

514. See Eisenberg, *Principles*, *supra* note 34, at 660-65; Eisenberg, *Promises*, *supra* note 439, at 13-18.

515. Eisenberg, *Principles*, *supra* note 34, at 660-65.

516. *Id.* at 650; Eisenberg, *Promises*, *supra* note 439, at 15-16; see von Mehren, *supra* note 495, at 1078.

reflects a social commitment to the civil-law scheme of forced heirship, a scheme that has no equivalent at common law.⁵¹⁷ Civil-law experience thus provides no support for the view that recognizing gratuitous promises in common-law jurisdictions would require defenses in addition to those now available in the case of bargain promises. At the very least one may not conclude from the civil-law experience that the development of such defenses is an inevitable consequence of the legal recognition of gratuitous promises.

At this point the argument is likely to take a more normative turn. It is only fair, it might be argued, that the donative promisor have greater freedom to renege than the bargain promisor. As a result the development of special defenses like improvidence and ingratitude will be necessary even in a system in which there is no concern for the protection of a patrimony.⁵¹⁸ If a parent promises to pay for a child's car or the child's education, for example, the normal bonds of affection will, in most cases, induce the parent to keep the promise. However, if the child treats the parent particularly contemptuously, or if the parent suffers financial reverses that make performance particularly onerous, it is intuitively plausible to suggest that the parent should be excused.⁵¹⁹ The parent in reduced circumstances should not be driven to the wall for the sake of a gift. Enforcement of gift promises is thus likely to be either unnecessary or undesirable.

The argument is intriguing and, particularly when the examples on which it relies are taken from the family context, initially appealing. Nevertheless, it is possible to question whether the difference the argument posits between donative promises and bargain promises is as sharp as the argument suggests. After all, in the most extreme cases of reduced circumstances, even performance of bargain promises is excused. The discharge in bankruptcy operates in favor of gift and bargain promises alike, and defenses of impossibility or frustration may also reflect some concern for a contracting party in dire circumstances. The argument nonetheless suggests that the role of

517. See DAWSON, *supra* note 37, at 221-30; Baron, *supra* note 430, at 192-94; Kull, *supra* note 441, at 58-59.

518. Cf. ATIYAH, *supra* note 113, at 242-43 (suggesting broader range of excuses for gift promises); Knapp, *supra* note 89, at 944 (permitting broader range of excuses for nonbusiness promises in proposed "Restatement" of promissory obligation).

519. A similar example is used in Eisenberg, *Promises*, *supra* note 439, at 5-6, apparently for the purpose of showing that informal donative promises should be subject to a broad range of excuses quite apart from any analogy to civil law.

changed circumstances in excusing performance of a promise should be triggered at a lower threshold in the case of donative promises than in the case of bargain promises. Why should this be the case?

Though that question has not received a systematic answer, the only response to it to date is the descriptive claim that a broader range of excuses for donative promises is in accord with the expectations of most people, including most laypersons.⁵²⁰ The parent who promises a child a car or a medical school education only expects to be held to the promise if things remain roughly as they are,⁵²¹—if the parent's financial circumstances permit and if parent and child do not become estranged. Even the layperson, on the other hand, knows that "a deal is a deal"—that the range of excuses from performance of bargain promises is relatively small.⁵²² On the theory that it is normatively undesirable for contract law to be at variance with standard expectations, it is argued, the inherently "less binding" character of donative promises should be recognized by making them presumptively unenforceable and letting the promisor decide when there is an excuse.⁵²³

It is interesting that, at this turn in the argument, its linchpin has become an empirical claim about how seriously ordinary people take their own promises of various kinds. Such claims are notoriously difficult to prove, and there does not appear to be definitive empirical research on the alleged difference in social attitudes toward gift and bargain promises. P.S. Atiyah once suggested that, although moral philosophers and legal scholars who write about promising tend to be high-minded individuals with a strong sense of the duty to keep promises, the average contemporary Englishman did not regard *any* promise as a particularly strong form of moral obligation.⁵²⁴ My own suspicion is that there may be regional variations in the range of excuses people believe they are morally entitled to invoke in order to avoid keeping a gift promise,⁵²⁵ and I am not at all certain that all,

520. See Baron, *supra* note 430, at 184-86 (describing traditional arguments); Hamson, *supra* note 89, at 242-47, 256-57; Havighurst, *supra* note 61, at 12, 16; Patterson, *supra* note 89, at 942-43.

521. This argument is made most forcefully in Stoljar, *supra* note 431, at 18, 20, 34-36.

522. See Hamson, *supra* note 89, at 242-43; cf. Shatwell, *supra* note 91, at 329 (suggesting that the test of bargain corresponds with lay expectations).

523. Hamson, *supra* note 89, at 247; Patterson, *supra* note 89, at 942-43.

524. See P.S. ATIYAH, PROMISES, MORALS, AND LAW 138-42 (1981).

525. Like most propositions that are, for practical purposes, unprovable, my suspicion of regional variations is based only on anecdotal evidence. In the semirural Midwest, where I spent most of my youth, one component of the local culture seemed to be a fairly

or even most, people would regard a significant gift promise to a family member—for instance a promise to pay for medical school—as subject to a greater range of moral excuses than an ordinary business bargain. To those imbued with a strong enough sense of family loyalty, the permissible range of excuses may be precisely the reverse.

Moreover, even assuming that most people do, in fact, regard gift promises as “less binding”—subject to a wider range of excusing conditions—than bargain promises, it does not necessarily follow that gift promises should be screened out of the legal system entirely by retention of the gatekeeping function of the doctrine of consideration. Indeed, many critics have observed that the doctrine of consideration is overbroad as a device for screening out gift promises. Many socially desirable promises that the doctrine classifies as technically gratuitous are ancillary to exchanges and are in no sense gifts.⁵²⁶ The doctrine of consideration thus has its own built-in costs. Moreover, if the justification for retention of the doctrine of consideration is the allegation that a rule of presumptive enforceability for gift promises would be too complicated in light of the broader range of necessary excuses, the degree of additional complication alleged is open to dispute. Even if most people recognize that more conditions excuse performance of gift promises than bargain promises, and even if a rule of presumptive enforceability of gift promises would have to reflect the increased range of excuses, it may very well be that the doctrinal tools currently at our disposal are adequate to cope with the challenge. The law of implied conditions, the objective theory of assent, and, to a lesser extent, defenses of frustration or impossibility may be sufficiently adaptable to permit excuse under the requisite range of conditions.⁵²⁷

Finally, even if a rule of presumptive enforceability for gift promises would require the development of some new defense of changed circumstances, the argument under discussion may overstate the degree of difficulty in developing it. A system capable of evolving the unforeseen circumstances exception to the pre-existing duty rule is sufficiently flexible to develop a more general changed circumstanc-

strong belief in the duty to keep one's word. I now live in Louisiana. The current governor's name is Edwin Edwards. Need I say more?

526. See Eisenberg, *Principles*, *supra* note 34, at 652-56; Gordon, *Consideration*, *supra* note 67, at 289-90, 292-98; Reiter, *supra* note 89, at 456-57.

527. See Kull, *supra* note 441, at 63-64.

es defense to a gift promise, if such a defense is required.⁵²⁸ To a certain extent, the civil-law defenses of improvidence and ingratitude might serve as useful models, although in light of the unique civil-law purpose served by those defenses, borrowing might have to be careful and selective. Similarly, a changed circumstances defense to claims for restitution has long been recognized,⁵²⁹ and selective borrowing from the restitution context may likewise be possible. In the final analysis, therefore, the alleged need for increased freedom to change one's mind in the case of donative promises would not seem to be a conclusive reason to retain the gatekeeping function of the doctrine of consideration, particularly since there are other reasons to abandon it.

6. The seamless web argument

The final argument occasionally made in favor of retention of the gatekeeping function of the doctrine of consideration is somewhat more general. It is argued that the doctrine of consideration is part of a system of rules and principles. The system of which it is a part is not the only one to address the problems that generate the law of contract, and there are alternative systems without a doctrine of consideration. However, jettisoning the doctrine of consideration from the common-law system of contracts might create enormous and unpredictable strains elsewhere in the system. Systems of law are interrelated groups of rules, and they must be accepted or rejected more or less as wholes, with only marginal tinkering. Simply picking and choosing the bits from each system that appear desirable is a recipe for chaos.⁵³⁰

528. For a statement of the unforeseen circumstances exception to the pre-existing duty rule, see § 89(a) of the *Restatement (Second) of Contracts*.

529. See RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS §§ 69, 142 (1937).

530. The argument is seldom made in quite as stark a form as I have put it. Variations of it can be found in several articles, including Hamson, *supra* note 89, at 234-35 ("[I]f the notion of consideration is as fundamental as that of offer and acceptance, any radical alteration of the doctrine of consideration will necessarily alter a great part of the rules concerned with simple contract."); Havighurst, *supra* note 61, at 2-3 ("[I]t would be a mistake, productive of more harm than good, to amputate the single doctrine of consideration and leave the rest untouched."); Llewellyn, *Complexity*, *supra* note 467, at 780-81 ("[U]nless attention is paid not to the 'consideration' phase alone, but to any other phases of law which have silently become intertwined with that particular aspect of 'consideration,' the engagements which rightly claim admission will not come in alone, and their companions are likely to be no people to have in the house."); Mason, *supra* note 469, at 847-48 ("The question therefore presents itself whether we should not change our

At this level of generality, the argument is not very useful and invites primarily rhetorical responses. Those who invoke the argument have been branded "timorous souls"⁵³¹ who fail to recognize the obligation of legal academics to bring some rational order to the law.⁵³² Indeed, at this level of generality, there may very well be no way to resolve the dispute between those who assert that the law is a seamless web and those who assert that the law only seems to be webbed.

However, the seamless web argument is useful if it is simply an exhortation to humility for legal reformers. It is beneficial to remember that the various rules of a system are related and that doctrinal tinkering can have unintended consequences. It does not follow, however, that the appropriate response is doctrinal paralysis. Instead, it may imply that any revision to the doctrine of consideration must be statutory, in order that any necessary adjustments to other doctrines may be made simultaneously.⁵³³ Nevertheless, I would have thought that the need for a statute would have been obvious in any event, in light of the tenacity with which judges seem to cling to the doctrine of consideration in the face of academic criticism.⁵³⁴

Moreover, it is to be hoped that a study of the existing legal materials would enable proponents of reform to be sensitive to the strains that changes in one part of a legal system may cause in others. In my view one of the reasons to study large numbers of cases is that it offers some hope that the interrelated functions of various branches of doctrine will become observable and amenable to analysis. It may

rules, and particularly whether we should not adopt or imitate some of the French rules. I believe that any such course would be unwise We must work with what we have Starting with the rules we have we must search out the principles that inspired these rules and we must build up new rules to the measure of those principles.""); Shatwell, *supra* note 91, at 326-28, 329-31 ("To minimise or remove the doctrine of consideration is to minimise or remove the Prince from Hamlet.").

531. See SUTTON, *supra* note 76, at 244.

532. Cf. Chloros, *supra* note 469, at 157-58 (rejecting piecemeal reform in favor of codification on the grounds that common law has reached the stage of rationalization).

533. Indeed, there have been attempts to draft such a statute. See, e.g., SUTTON, *supra* note 76, at 198-243 (describing New York statutory modifications to the doctrine of consideration, modifications effected by the Uniform Commercial Code, statutory reforms of the doctrine of consideration in the British Commonwealth, and the 1938 recommendations of the English Law Revision Committee); Chloros, *supra* note 469, at 163-64; see also Knapp, *supra* note 89, at 938-41 (regarding proposed Restatement of law of promissory obligation without the doctrine of consideration).

534. See SUTTON, *supra* note 76, at 248.

then be possible, within limits, to predict the additional adjustments that must be made if the gatekeeping function of the doctrine of consideration is to be abandoned.

Indeed, the conclusion that seems compelled by actual study of the cases in which consideration functions as a gatekeeper is that the seamless web argument is, at best, a gross exaggeration. The high percentage of such cases in which consideration is simply redundant suggests that elimination of its gatekeeping function would produce neither enormous nor catastrophic results. This conclusion is reinforced by Sutton's 1974 comparative study, which revealed that many of the subrules embraced within the doctrine of consideration have been abandoned somewhere in the world without producing chaos.⁵³⁵ The world may indeed be in a state of disarray, but it apparently has little to do with the law of contract. Yet the doctrine of consideration continues to deny enforcement to classes of promises it would be desirable to enforce, and it continues to do so in apparent defiance of ad hoc attempts to qualify and limit it. This suggests that further tinkering with the doctrine of consideration is futile and that something would be gained by abandoning the gatekeeping function of the doctrine. A rule of presumptive enforceability for both gratuitous and exchange promises would seem to be a viable alternative, provided the necessary parallel adjustments to other doctrines are not too numerous or severe.

Moreover, the cases examined for purposes of this Article suggest that the necessary parallel changes would not be extensive. The precise nature and extent of the adjustments necessary if the doctrine of consideration is abandoned is, of course, a subject worth further study in its own right if the conclusions drawn in this Article are accepted. Based on the foregoing study of the recent consideration cases, it is nevertheless possible to identify four specific areas of potential change, some of which clearly require revision and some of which simply should be addressed, one way or another, by some collective decision.

First, some adjustments will be required in the law concerning the burden of proof of contractual defenses such as fraud, mistake, duress, and undue influence. In the course of examining cases in which consideration doctrine appeared to be redundant because the facts

535. *See id.* at 244. In this connection it should be noted that the abandonment of the pre-existing duty rule in § 2-209 of the U.C.C. has not produced untoward consequences.

suggested some misconduct-based defense, it was observed that, in some cases, the judicial description of the facts was not sufficient to establish the defense conclusively. Whether this reflected merely judicial brevity of description or a paucity of supporting facts, of course, could not be determined. It may be that, if consideration doctrine is currently used to dispose of promises that "smell bad," even if they are not clearly subject to a vitiating defense, the burden of proof on such defenses should be relaxed to some extent if consideration requirements are abandoned. This, of course, is incompatible with the requirement in many jurisdictions that reform or rescission of a contract on grounds of fraud or other similar defenses requires proof by clear and convincing evidence.⁵³⁶ However, those heightened proof requirements seem to reflect a concern either for the integrity of commercial contracts or for the integrity of written instruments.⁵³⁷ Accordingly, it would not be incompatible with the spirit of such requirements to abandon them in the case of gift promises, particularly if the gift promises were informal. A demonstration that consideration was absent, or even merely nominal, could either signal a shift to a preponderance of the evidence standard, with the burden of persuasion as to the defense remaining on the promisor, or an actual shift in the ultimate burden of persuasion to the promisee.

Second, the study of the pre-existing duty rule cases suggests that the defense of duress must assume an increased role in policing modifications if the doctrine of consideration is abandoned.⁵³⁸ This, in turn, would require some substantive clarification of the defense itself. I do not mean to suggest that defining duress in terms of general, somewhat vague notions such as "improper threat" or "no reasonable alternative" is improper or even avoidable.⁵³⁹ However, the defense of duress, in some jurisdictions, may still carry old

536. *Weiner v. Fleischman*, 54 Cal. 3d 476, 483-84, 816 P.2d 892, 896, 286 Cal. Rptr. 40, 44 (1991); *Pyne v. Jamaica Nutrition Holdings*, 497 A.2d 118 (D.C. Cir. 1985); *Annon II, Inc. v. Rill*, 597 N.E.2d 320, 328 (Ind. Ct. App. 1992); *DiVincenti v. McIntyre*, 611 So. 2d 140, 146 n.4 (La. Ct. App.), *writ denied*, 614 So. 2d 1264 (La. 1993); *Estate of Whitlock*, 615 A.2d 1173, 1176 (Me. 1992).

537. *Pinnacle Peak Dev. v. TRW Invest. Corp.*, 631 P.2d 540, 544 (Ariz. Ct. App. 1980); *Kentucky v. Reyes*, 764 S.W.2d 62, 66 (Ky. 1989); *Haines v. Mensen*, 446 N.W.2d 716, 719-20 (Neb. 1989); *Karkaria v. Karkaria*, 592 A.2d 64, 68-69 (Pa. 1991); *First Nat'l Bank v. Scalzo*, 235 N.W.2d 472, 477 (Wis. 1975).

538. *Cf. SUTTON*, *supra* note 76, at 244-54.

539. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175.

common-law burdens—for example, the notion that the means employed must be criminal—and those burdens may require elimination.⁵⁴⁰

Third, particularly in the case of intrafamilial gift promises, elimination of the doctrine of consideration would require a social decision on whether to create a new defense when a donative promisor's circumstances subsequently change for the worse or the promisor and promisee become estranged. Current doctrines, such as the objective theory of assent, the law of implied conditions, or defenses of impracticability or frustration may make a new defense unnecessary. Further study of this question appears desirable if the suggestions made in this Article are accepted.

Fourth, if consideration is abandoned, some thought must be given to the question whether there are certain classes of gratuitous promises so subject to fraudulent assertion that they should only be enforceable if they satisfy certain formal requirements. Gift promises made by one who has since died, promises to make a bequest, and promises to share an estate in a manner inconsistent with either a will or intestate succession are all fairly obvious candidates, but there may be others.⁵⁴¹ At the same time, it is necessary to address the type of formality to be required. Some form of writing requirement is the most intuitive solution. However, because writing requirements can operate harshly or be used exploitatively, it is necessary to consider whether some more general requirement of corroboration by evidence other than the mere word of the promisee should suffice.

Obviously, all four of these topics require more extended treatment than can be given in an Article that is already of some length. However, there is no apparent reason why the resolution of the questions raised should present any insuperable difficulty. Indeed, any changes required seem much more like tinkering at the margins than a full-scale overhaul of contract doctrine. If so, the seamless web argument has been given its due as a cautionary instruction but rejected as an impediment to the abandonment of the gatekeeping function of the doctrine of consideration.

540. Dawson argues that the requirement that the threatened conduct be illegal should be excised in any event. See John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 281, 287-88 (1947).

541. Chloros's attempt at codification of a system of contract law without a doctrine of consideration devotes some attention to this question. See Chloros, *supra* note 469, at 163-64.

VII. CONCLUSION

In the final analysis both an examination of the current operation of the doctrine of consideration and an examination of the reasons that have been mustered for and against enforcing various kinds of promises suggest that something would be gained, and very little lost, by abandoning the gatekeeping function of the doctrine of consideration. I have suggested that it would be desirable to adopt a presumptive rule that gratuitous promises are enforceable, subject to the same defenses that are available with respect to exchange promises, and perhaps one or two new defenses.⁵⁴² Does it follow that consideration doctrine should no longer play any role in contract doctrine? Obviously not. I have emphasized that one of the major branches of consideration doctrine—the proposition that the presence of substantial consideration should presumptively constitute a sufficient condition for enforcement—remains completely intact and should continue to do so.⁵⁴³ Moreover, even if, as I am suggesting, the gatekeeping branch of the doctrine—the proposition that consideration is a necessary condition of enforcement—is abandoned, the concept of consideration may retain one other residual function. Even if an absence of consideration for a promise should not doom the promise's chances for enforcement, it may indicate that judicial inquiry should be channeled in a new direction. In the modification context it might signal a court to look for duress or fraud. In the case of intrafamilial gift promises, it might signal a court to look for undue influence. In the case of promises to make bequests, promises to share estates, or promises made by one who has died, it might signal a court to look very strictly at the evidence that the promise was made. Even if consideration is no longer used as a gatekeeper, it may thus be retrained to play a useful, if somewhat less decisive, role as a signalman.⁵⁴⁴

542. See *supra* part V.B.6.

543. See *supra* part I.

544. Mason once described the role of the French civil-law notion of "cause" in much the same way. See Mason, *supra* note 469, at 825-28. He suggested that the "requirement" of cause was "pleonastic," by which he meant that it lacked independent significance as a test of contractual obligation but nonetheless served a useful function by reduplicating, and directing attention selectively, to other legal issues that varied in significance depending upon the transaction type at issue. *Id.* It is my suggestion that the concept of consideration be relegated to a similar function in the common-law system.

