

## Twenty-First-Century Contract Law Is a Law of Agreements, Not Debts: A Response to Lewinsohn

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**ABSTRACT.** Jed Lewinsohn's excellent new article on the consideration doctrine seeks to explain consideration by offering a more sophisticated account of the concept of exchange. In particular, he explains the concept of exchange in contract law without reference to the motivation of the promisor and argues that the shift in the late nineteenth-century discussions of the consideration doctrine to a focus on the motivation to induce a return performance was a mistake. In this Essay I praise his account of exchange as a general matter. His focus on exchanges rather than promises is novel, at least in recent decades, and his paper lays the groundwork for a more sophisticated understanding of the nuances of exchange. But I also critique his claim that the motivational account of exchange does not fit well with contract doctrine. I argue that while his account of consideration may fit well with the old common law action of debt, it does not explain our modern contract law, which is focused not just on the payment of debts but the enforcement of agreements, even executory contracts. While Lewinsohn's historical account of the shift is probably accurate, we should see this shift as contract law evolving to fit modern needs rather than as a misstep. Modern contract law's focus on the motivation of the promisor to induce a return promise or performance is no accident, but rather a gradual shift as contract law became a tool to empower individuals to take on complex projects, enlisting the help of others acting in their own self-interests. Lewinsohn should be praised for seeking to better understand exchanges, but in modern contract law the best explanation for the consideration doctrine is that it picks out a *subset* of exchanges—bargained-for exchanges—and does so for good reason. This motivational account has the power to explain not only consideration, but the point and purpose of contract law as a whole.

### INTRODUCTION

In recent decades, much of the scholarship exploring the theoretical foundations of contract law has focused on promising, as a moral concept and social practice. The last decade or so, in particular, has given rise to explorations of the correspondence between our legal rules and our moral and societal norms of

promising.<sup>1</sup> By contrast, Jed Lewinsohn barely mentions promising in his excellent article on the consideration doctrine, *Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration*.<sup>2</sup> Instead, he focuses on another prelegal concept: exchange.

It is beyond debate, and has been for well over one hundred years now, that the consideration doctrine deems a promise eligible for enforcement when the promise has, in some sense, been given in exchange for something else.<sup>3</sup> By contrast, promises that have been given merely as gifts are (largely) unenforceable. Yet despite its central place in the law of contract, the concept of exchange, unlike promise, has received very little close analysis in either contract theory or philosophical literature. Exactly what is an exchange? And to what degree does, and should, the consideration doctrine track our prelegal concept of exchange? Because consideration is the principal dividing line between the promises we enforce and those we do not, answers to these questions may tell us much about the very purpose of contract law itself. Lewinsohn's philosophical treatment of exchange fills this important gap.

Lewinsohn points out a shift in the definition of consideration that occurred almost without notice in the late nineteenth century.<sup>4</sup> Writers of that period, most notably Oliver Wendell Holmes and Christopher Columbus Langdell, began to define the consideration doctrine in terms of bargained-for exchanges, by which they (eventually) meant promises that had been given in order to induce a return promise or performance.<sup>5</sup> In Lewinsohn's view, this is a different conception of exchange from the one that had informed the consideration doctrine prior to Holmes and Langdell.<sup>6</sup> Previously, the concept of exchange had included remuneration — one's promised performance was to pay off a debt in some

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1. See, e.g., Gregory Klass, *Promise, Etc.*, 45 SUFFOLK UNIV. L. REV. 695-717 (2012); Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801 (2008); Seana Shiffrin, *Are Contracts Promises?*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 241 (Andrei Marmor ed., 2012); Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV., 708-53 (2007); Robin Bradley Kar, *The Art of Promise and Power of Contract*, JOTWELL (June 13, 2016), <https://juris.jotwell.com/the-art-of-promise-and-power-of-contract> [<https://perma.cc/XUP9-GLQC>]. Of course, the book that started it all came earlier: CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).
  2. Jed Lewinsohn, *Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration*, 129 YALE L.J. 690 (2020).
  3. For an early definition of the consideration doctrine, see RESTATEMENT OF THE LAW OF CONTRACTS § 75 (AM. LAW. INST. 1932). This definition has remained more or less unchanged since that time. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).
  4. Lewinsohn, *supra* note 2, at 704-15.
  5. *Id.* at 705-10.
  6. *Id.* at 705-15.

sense—but did not require that a given promise be motivated by a desire for a return promise or performance.<sup>7</sup>

Having described this shift, Lewinsohn takes on three primary tasks. First, he argues that the motivational conception of exchange is at odds with many details of our consideration doctrine, leading to several doctrinal problems.<sup>8</sup> Second, he seeks to explain the concept of exchange without reference to the idea of reciprocal inducement or any other motivation of the promisor.<sup>9</sup> Finally, he gives a brief normative defense of the consideration doctrine based on this thinner conception of exchange.<sup>10</sup> For Lewinsohn, the consideration doctrine is justified not by the promises to which it applies, but rather by the ones it screens out, namely the vast majority of agreements among intimates.<sup>11</sup> Society has an interest, he argues, in exempting these latter agreements from legal enforcement. The consideration doctrine, then, is justified by protecting agreements among loved ones from being treated like payments for services.

In what follows, I will briefly address Lewinsohn's work on each of these three fronts, leaving aside his historical account of the shift to the motivational conception. I will argue that Lewinsohn's account of exchange does indeed better fit with the hundreds of years of English common law that preceded Holmes and Langdell, but that the newer concept of a bargained-for exchange is better suited to modern contract law, which has catered more to the commercial context (whether business-to-business or consumer-to-business) than to agreements between intimates (like family members) or near-intimates (like neighboring farmers in the eighteenth century). Both contract law and theory have moved on, and rightly so. The idea of reciprocal inducement picks out a certain subset of exchanges, the kind of agreements that we as a society have found worthy of enforcement. These exchanges include not only the payment of debts, but also shared plans and forward-looking agreements, the enforcement of which enhances our ability to embark on complicated, coordinated projects over time. Lewinsohn's definition of and justification for the consideration doctrine do not account for modern contract law's focus on enforcing the plans to which contracting parties commit (as opposed to merely the debts they have accrued).

This Essay proceeds as follows. In Part I, I will briefly explain Lewinsohn's conception of exchange and suggest that it might have even more to offer than he has yet shown. In Part II, I will critique Lewinsohn's doctrinal objections to the motivational account of exchange and argue that his account of exchange

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7. *See id.* at 708 n.32.

8. *Id.* at 720-24.

9. *Id.* at 724-39.

10. *Id.* at 739-67.

11. *Id.* at 754-67.

fails to explain modern developments, such as the rejection of nominal consideration and the enforcement of purely executory contracts. Finally, in Part III, I will conclude by making a broad case for a law of contract that does care about motivations as indicators of the kind of exchanges worth enforcing. I will contrast this approach with contract theories that, like Lewinsohn's, explain and justify contract law in terms of its impact on individual interpersonal relationships. The best explanation for the consideration doctrine lies not in the agreements it screens out, but rather in the ones it selects for enforcement. By enforcing shared commitments, not just payments for obligations owed, contract law empowers individuals and organizations to accomplish together what they would likely struggle to accomplish alone.

### I. WHAT IS AN EXCHANGE?

According to Lewinsohn, the concept of exchange includes two components: remuneration and no residue.<sup>12</sup> First, remuneration is a necessary part of contractual exchange because an exchange necessarily involves a quid pro quo, or what he calls "reciprocal debt satisfaction."<sup>13</sup> When two performances are exchanged, each is, in an important sense, payment for the other.

The idea that remuneration is central to exchange is neither surprising nor novel (Lewinsohn does not pretend otherwise). If we take the long view, consideration is a relatively new concept in the history of what we now think of as contract law.<sup>14</sup> Prior to the expansion of *assumpsit* in the sixteenth and seventeenth centuries, most actions at law of which we would now think as contract could be described as either covenant or debt.<sup>15</sup> Covenant involved promises under seal and required no exchange.<sup>16</sup> But the action of debt was, in a sense, for half-completed exchanges.<sup>17</sup> It would lie in cases where, say, a worker had provided a service but had not been paid, or a vendor had delivered goods but had not been compensated. Importantly, a mere exchange of promises without performance (what we would now call an executory contract) did not suffice.<sup>18</sup> The action of debt was thus, of necessity, backward-looking. The remedy addressed the injustice of work done or goods delivered for which payment had not been

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12. *Id.* at 718.

13. *Id.* at 720.

14. *See id.* at 693, 706 n.31.

15. *Id.* at 706 n.31.

16. *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 318-25 (4th ed. 2007).

17. *See id.*

18. Lewinsohn, *supra* note 2, at 706 n.31.

made. The action was indifferent to completely unperformed agreements repudiated by one party before performance by either.

Eventually, for reasons that have more to do with historical contingencies than philosophical principle, the less stringent action of *indebitatus assumpsit* developed.<sup>19</sup> Descending from trespass on the case,<sup>20</sup> *assumpsit* did not have the natural bounds of covenant (a promise under seal) or debt (a half-completed exchange). Nevertheless, it was not thought that just any promise would be sufficient for enforcement. Rather, the factors that favored enforcement had to be listed. Early on, they looked much like the factors that favored enforcement in debt—for instance, “in consideration of the fact that the field had been plowed.” But nothing in *assumpsit* strictly required a half-completed exchange. Gradually, it became possible to enforce executory promises where neither side had performed, and where the only consideration a plaintiff could show to support enforcement of the defendant’s promise was the plaintiff’s own promise to perform when the time came.<sup>21</sup> But the enforcement of executory promises was a fairly late development, as was the attempt to define a doctrine of consideration. We shall return to this point in Part III.

The second component of an exchange, according to Lewinsohn, is the “no residue” requirement.<sup>22</sup> According to Lewinsohn, it is distinctive of *quid pro quo* exchanges that, when completed, there is no remaining debt of obligation owed by the recipients of each performance.<sup>23</sup> Because my performance was given in exchange for yours, you have no obligation to express or even feel gratitude when you receive it. Just as we are able to deal with one another at arms’ length in bargaining, we may do so at performance as well.

Once the two components of remuneration and no residue are combined, they can distinguish the kind of *quid pro quo* exchange with which we are concerned in contract law from other kinds of exchange, for example the exchange of gifts. Suppose Jane and Sue are in the habit of exchanging holiday presents every year. Even though there is some sense in which they understand their giving to be an “exchange” of presents and might even use that word, it is not a *quid pro quo* exchange, as it would fail each of the two elements Lewinsohn identifies. Neither present would be given in order to pay a debt incurred by the giver by receiving a present from the other (or in anticipation of a present from the other). And neither party would be relieved of her obligation to be grateful for receiving a gift just because she gave the other a gift, too. If you send me a nice

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19. See *id.* at 707 n.31.

20. George F. Dreiser, *The Origin of Assumpsit*, 25 HARV. L. REV. 428, 428 (1912).

21. Lewinsohn, *supra* note 2, at 693-97, 696 n.9, 697 n.11.

22. *Id.* at 720.

23. *Id.*

present for my birthday, I should probably send a thank-you card, even if I also sent you a nice present for your birthday.

Lewinsohn's contributions in crystallizing the two components of exchange are significant. His second component of exchange – the “no-residue” requirement – is a novel insight. His first component – remuneration – while not novel in itself, still offers new depth and explanatory power. Lewinsohn begins to show how complicated the concept of remuneration can be. And I would argue that his conception of remuneration has even more explanatory power than he gives it credit for. For example, it may explain the legal-duty rule,<sup>24</sup> the requirement that settlements be based on colorable claims, and the refusal to enforce illusory promises. Such cases may include words that indicate exchanges, but when one party receives nothing of value, the law has typically not enforced the agreement for a lack of consideration. Requiring that there be a “quid pro quo,” that a performance be promised in exchange for something, ensures that there is a real something on both sides of the agreement. Lewinsohn also contributes a fascinating and novel discussion of what it means for payment to be payment of a debt. This too may explain those consideration categories and resolve their longstanding problems in novel ways.<sup>25</sup>

However, Lewinsohn's boldest claim is not his explanation of remuneration itself, but his exclusion of the inducement motivation as a necessary element of consideration. I will next turn to this exclusion of the inducement motivation.

## II. CONTRACT DOCTRINE AND THE MOTIVATIONAL CONCEPTION OF CONSIDERATION

As impressive as much of the article is, I find Lewinsohn's analysis of the doctrinal shortcomings of the motivational account (according to which consideration involves exchanges where one's promise is given in order to induce the

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24. Lewinsohn shies away from the idea that a promise to do what one already has a preexisting duty to do cannot count as consideration. But there is plenty of support for the claim, and even support for the proposition that contractual duties owed to a third parties will undermine the notion that the same performance could count as consideration. *See, e.g., McDevitt v. Stokes*, 192 S.W. 681, 682 (Ky. 1917). In that case, a jockey who had been hired to ride a racehorse for the horse's owner was promised a payment by a third party who had bet money on the race. When the jockey won the third party refused to pay up, and the court refused to enforce his promise on the ground that the jockey already owed a duty to the horse's owner to make his best efforts to win. To put the point in our terms, the third party received nothing in exchange for his promise because of the jockey's pre-existing duty.

25. For example, Lewinsohn's distinctions between “fulfillment” and “extinguishment” conditions, “repeatable” and “nonrepeatable” performances, and “strong” versus “weak” obligations may well form the basis of a better understanding of complicated problems like the legal-duty rule. Lewinsohn, *supra* note 2, at 725-28.

promisee's return promise or performance) to be one of its weaker elements. For example, Lewinsohn discusses an intriguing hypothetical in which two people each agree to enlist in the military if the other will as well. He seems to think that the motivational account would find consideration in such cases, whereas his quid pro quo remuneration account does not.<sup>26</sup> This is taken to be a mark in favor of his remuneration account, since presumably our intuition is that such agreements should not be enforceable.

The idea that the law would enforce such a contract is indeed odd, but I am not sure it is problematic so long as both parties really did see themselves as better off under the scenario where they both enlist, and so long as that is why they made the contract. I believe our intuition that the promises would not be enforceable is mostly grounded in the unlikelihood of our seeing the parties as intending for this agreement to be legally enforceable. It is commonplace that many bargained-for exchanges, especially among intimates, are not enforceable for the good and simple reason that they are not meant to be. The most-discussed examples are agreements among intimates in the home ("I'll do the dishes if you'll do the laundry").<sup>27</sup> There is nothing problematic with the idea that these are exchanges. We just simply do not expect the law to enforce all exchanges, even all bargained-for exchanges. Absent overwhelming evidence to the contrary, courts will assume that such contracts among intimates are not meant to be legally enforceable.<sup>28</sup> Parties are free to make exchange agreements that, by choice, are not legally binding, even if such agreements would otherwise qualify for enforcement.<sup>29</sup> More importantly, we should not place too much weight on how a particular theory of consideration fares against such unusual agreements as the mutual enlistment hypothetical. The test should instead be how a theory handles the everyday agreements that make contract law a workhorse of the common law.

Lewinsohn also spends a fair amount of time discussing how modern contract theory often deems one-sided modifications enforceable, at least in situations where the modification is fair and equitable in light of new and unforeseen circumstances.<sup>30</sup> Lewinsohn emphasizes the fact that the motivational account of consideration cannot justify enforcing such deals in the case of bilateral

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26. *Id.* at 754-56.

27. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.7 (3d ed. 2004); *id.* § 3.10 nn.8-12 and accompanying text. For an excellent theoretical discussion, see also Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1488-97 (2009).

28. See FARNSWORTH, *supra* note 27, at § 3.7 n.13 and accompanying text (citing *Morrow v. Morrow*, 612 P.2d 730 (Okla. App. 1980)).

29. See Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801 (2008).

30. Lewinsohn, *supra* note 2, at 698-700; 745-49; see also RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (AM. LAW INST. 1981).

agreements, leaving the Second Restatement (which also endorses the motivational view of consideration) simply to draw an “unprincipled” exception in Section 89.<sup>31</sup> I fail to see why this is problematic. The exception is only unprincipled in the sense that it cannot be explained in terms of consideration. Its justification simply lies elsewhere, presumably in the principles of fairness that override the consideration doctrine in some cases. Indeed, it is odd to make so much of this “unprincipled” exception while barely mentioning the much more important exception of Section 90, promissory estoppel. Promissory estoppel cases are much more common,<sup>32</sup> and do not satisfy either the motivational account of consideration or Lewinsohn’s account. In these cases, promises are enforced despite the lack of consideration under either definition simply because justice requires an exception to the general rule. If such cases are well decided, it need not indicate that we have the wrong theory of consideration. More likely, it means that sometimes the consideration doctrine is rightly trumped by other factors.

Finally, Lewinsohn dwells on conditional gifts at some length.<sup>33</sup> But in close cases, whether something is considered a conditional gift or a bargained-for exchange depends very much on the circumstances. And I would argue that whether there is consideration depends precisely on the motivation of the promisor. In Williston’s famous example, someone offers to buy a coat for a tramp if the tramp will go to the store to pick it up.<sup>34</sup> The coat is clearly given as a gift, with the condition that the gift must be picked up in a certain location. We know it is a gift rather than consideration because it is obvious that the gift was not given in order to induce the tramp to go to the store. Further, it is odd that Lewinsohn does not mention the example of *Allegheny College*<sup>35</sup> – an example that is all too frequently misunderstood.<sup>36</sup> In that case, Judge Andrews, in a dissenting opinion, argued that the promise was just a gift with a condition, but Judge Cardozo’s majority opinion highlighted what Mary Yates Johnston sought to achieve with her “gift”: a promise to pay \$5,000 upon her death to establish the Mary Yates Johnston Memorial Fund to support Christian education at Allegheny College. To be sure, generosity was also a motive, and this was not a purely commercial transaction. But it was also not so simple as the gift to

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31. Lewinsohn, *supra* note 2, at 748.

32. As an indication, a Westlaw search for § 89 revealed 405 citing references, including 59 cases. A Westlaw search for § 90 revealed 6,326 citing references, including 1,730 cases.

33. Lewinsohn, *supra* note 2, at 741-44.

34. 1 S. WILLISTON, CONTRACTS § 112, at 445-46 (3d ed. 1957).

35. *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank*, 159 N.E. 173 (N.Y. 1927).

36. See Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 151 (2005).

Williston's tramp, in which the giver is presumably indifferent as to whether the gift is accepted.

In Lewinsohn's own hypothetical, an aunt promises to give a gift to a nephew so long as the money is spent on art.<sup>37</sup> I would want to hear more facts about this, as there is an important difference between an aunt who is willing to give a gift of art but is relatively indifferent as to whether it is accepted, and an aunt who is willing to spend a sum of money to cultivate an interest in art in her nephew. There need not be a bright line between completely altruistic motives and completely arms'-length transactions. A promise made partly from altruistic motives can also be motivated by a desire to induce a result that might otherwise not happen. If the aunt in the hypothetical wants badly enough to ensure that her nephew develops an interest in art, then she can bargain for that result, and nothing about this circumstance should make us worry that our theory of consideration reaches too far.

Lewinsohn also gives an alleged counterexample to the reciprocal-inducement account where a promise is given without the goal of inducement and is nonetheless found to be binding.<sup>38</sup> In his example, a store clerk makes a mocking promise of a discount for an expensive item to a customer who does not appear to be in any position to accept the offer.<sup>39</sup> Because the offer is made to mock rather than to induce performance (a performance which, since discounted, the clerk does not even desire), Lewinsohn claims the motivational account cannot explain the enforcement of the promise.<sup>40</sup>

But such a case is actually no problem for the motivational theory. As any first-year law student who has read *Lucy v. Zehmer* will attest,<sup>41</sup> such promises are enforced because they appear sincere to an objective observer (and if not, they are not enforced). *Lucy* involved a promise to sell a plot of land. The promise was made by two acquaintances who were drinking in a bar—the defendant said he was “high as a Georgia pine”—and was memorialized on the back of the restaurant bill.<sup>42</sup> The defendant argued that his promise was made in jest and that he therefore should not be held to it, but he was held to it on the grounds that whatever he may privately have meant, the law holds us to what a reasonable person would understand our statements to mean under the circumstances.<sup>43</sup> Nor does this example trouble the motivational account of consideration. That

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37. Lewinsohn, *supra* note 2, at 722-23, 741-44.

38. *Id.* at 723-24.

39. *Id.*

40. *Id.*

41. *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

42. *Id.* at 519.

43. *Id.* at 522.

account need not explain absolutely every enforced promise. Rather, it need only explain the vast majority. Cases like *Lucy* are enforced despite the lack of a genuine intent to induce because the importance of relying on objective manifestations rather than secret motives trumps our concerns about restricting enforcement to cases of reciprocal inducement.

Still more troubling about Lewinsohn's doctrinal analysis is the collection of doctrines that he does not discuss. First is the example of nominal consideration, which is only briefly mentioned.<sup>44</sup> A full treatment would take a much longer discussion, but it certainly seems at first glance that Lewinsohn's remuneration account of consideration would find merely nominal consideration—even the infamous peppercorn—to be sufficient.<sup>45</sup> And, as is commonly known, there was much support for that view around the time of the shift to the motivational theory.<sup>46</sup> It seems to me that if the parties decide to exchange a promise to convey the family farm for one dollar, such an agreement would satisfy the concept of reciprocal inducement. Lewinsohn thinks otherwise, claiming that “there has been no genuine quid pro quo.”<sup>47</sup> But why not? Clearly the transaction is a conditional gift that the parties merely want to dress in the language of legal enforceability, but it is not at all clear how Lewinsohn's account of exchange can rule out such cases as not “quid pro quo.” Indeed, the “basic idea” of the remuneration theory is that “fulfillment of the consideration requirement is, in the first instance, a function of the *terms of the agreement* (objectively interpreted)” and not the motivation of the promisor.<sup>48</sup> If the terms of the agreement say that a dollar is given in exchange for a promise to give land, what tools does the remuneration theory have to deny those terms the status of quid pro quo?

By contrast, the motivational account handles the exclusion of nominal consideration quite neatly. The reason that a dollar given “in exchange for” a promise to give valuable land does not count as consideration is that the promisor is clearly not making the promise to give land in order to induce the promisee to hand over the dollar (as if, say, she were really thirsty and would give anything for a soda from a nearby vending machine). It is not a genuine quid pro quo because one thing is not given in order to get the other. Without the motivational element, it is not clear how a remuneration theory can make this distinction.

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44. Lewinsohn, *supra* note 2, at 699 n.16, 711, 732, 754, 760.

45. *Id.* at 759-60.

46. Compare RESTATEMENT OF THE LAW OF CONTRACTS § 84 cmt. b, illus. 1 (AM. LAW. INST. 1932) (stating that one dollar constitutes sufficient consideration for an offer to sell Blackacre, worth \$5,000), with RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. d (AM. LAW. INST. 1979) (“[S]ham or ‘nominal’ consideration does not satisfy the [consideration] requirement of § 71.”).

47. Lewinsohn, *supra* note 2, at 732.

48. *Id.* at 739.

Putting aside the motivation of the promisor, there is nothing else to look at to decide if the dollar is given for the land other than, as Lewinsohn suggests, the terms of the agreement. But instead of looking only to the terms of the agreement, the law looks to motivation: to evidence that the promise was made in order to induce the counterparty to do something she might not otherwise do.<sup>49</sup> In short, the long-established restrictions on nominal consideration in the common law are much better explained by the motivational account of consideration, and therefore it is surprising that there is so little discussion of the issue in Lewinsohn's article.<sup>50</sup>

Secondly, Lewinsohn barely mentions executory contracts. This is a striking omission. Informal executory contracts would not be enforced under the early common-law contract categories of covenant and debt, discussed above.<sup>51</sup> A plaintiff who has not performed yet, and who perhaps has not even been harmed, has a different claim to justice than one who has plowed a field or delivered cows without payment. Even if she cannot cite a particular harm to herself or enrichment to the defendant, in modern contract law she still has a right to the benefit of her bargain. To put the point another way, contract law is not corrective in the way that tort law is. Contract law enforces contemplated performances, so to speak, even in the absence of injury. It recognizes that the parties made an agreement in order to accomplish something and enforces their plan. It is one thing to talk about "debt satisfaction" in a case where one side has performed and the other has not; it is quite another to talk about debt satisfaction in a case where neither side has performed yet. Perhaps such a case can be made, but Lewinsohn does not make it here.

The routine enforcement of informal executory contracts marks a significant shift in the way we think about contract law (though the shift happened very gradually) and what we expect it to do. The move from a corrective, tort-like

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49. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW. INST. 1979).

50. Lewinsohn himself is probably unconcerned with such examples, partly because he would prefer that individuals simply be able to assume whatever legal obligations they want, whether donative or not, and as such criticizes, in passing, the move away from both the seal and nominal consideration. See Lewinsohn, *supra* note 2, at 760-61. In my view, one should be required to give a justification for why we should invest public resources in enforcing private agreements. All too often, contracts scholars are allowed simply to ask, as Williston did and Lewinsohn cites with apparent approval, "Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so." *Id.* at 760, quoting Samuel Williston, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 194 (1925). We need a stronger justification than "Why not?" for an investment of state resources and an intrusion by the state into private affairs, even with consent of the affected parties.

51. Covenant required formal promises in writing; debt required half-completed exchanges. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 318-25 (4th ed. 2007).

vision of contract law as a law of debt to an agreement-focused body of law has not been by accident. The era of contract theory for which Lewinsohn pines has not existed for over 140 years now.<sup>52</sup> To put that into perspective, at the time that Holmes and Langdell were writing, the role that limited-liability companies like corporations played in commerce was virtually unrecognizable to us today. In the last two centuries we have progressed from an era in which corporate charters were granted only rarely and for special purposes – an era, in other words, when there was very little corporate law as we know it today – to an era in which corporate law has flourished.<sup>53</sup> The law of corporations has developed to empower individuals to undertake complex projects that would be either impossible or much, much more difficult with only early nineteenth-century law as a framework. It is only natural that contract law would evolve in important ways over that same time. In fact, during the drafting of the Uniform Commercial Code, Karl Llewellyn famously scoffed at much of the older common-law doctrine as the law of “horse” and “hay stacks.”<sup>54</sup> I would argue, and to some extent have argued elsewhere,<sup>55</sup> that the motivational theory of consideration picks out for enforcement those agreements that are made specifically to assist individuals in coordinating their actions, not just those situations where a debt for a performance has not been paid. This is indeed a shift in the focus of contract law, but that does not mean it is a misstep. Far from it.

### III. WHAT IS THE CONSIDERATION DOCTRINE FOR?

That brings us to Lewinsohn’s principled defense of his own remuneration theory of consideration. Lewinsohn argues that the “point of the consideration rule, properly conceived, is to *keep contract in its place*,” protecting agreements made among intimates from the intrusion of unintended legal enforcement.<sup>56</sup> This rationale for the consideration requirement is unsatisfying in a few ways.

First, it does not seem to me that the intrusion on agreements among intimates is or ever has been a particularly pressing problem in the law. I find it hard to believe that, were it not for the consideration doctrine, there would be a rash of individuals seeking to enforce at law informal agreements with intimates that

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52. This era ended, according to Lewinsohn, in 1879, after Langdell introduced his new definition. Lewinsohn, *supra* note 2, at 705.

53. “The first modern general incorporation statute was adopted in New Jersey in 1875.” LARRY E. RIBSTEIN & PETER V. LETSOV, *BUSINESS ASSOCIATIONS* (4th ed. 2003).

54. Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503 (1987).

55. Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 380-81 (2009).

56. Lewinsohn, *supra* note 2, at 756 (emphasis added).

were never meant to be enforceable. Perhaps in an earlier time – say, in the pre-industrialized world – it was more difficult to tell commercial agreements from personal agreements. In small agrarian communities there may have been more of a premium on keeping track of the distinction between intimates and non-intimates. Which, for example, is my neighbor, from whom I bought hay and to whom I sold a horse, but who is also there in my time of need? Justifying a central doctrine of contract law on such grounds today, though, seems quaint.

Second, the manner in which the consideration doctrine supposedly accomplishes this purpose is unconvincing. Lewinsohn makes the “empirical and sociological claim” that friends and relatives tend not to “resort to quid pro quo transactions” to distribute goods and services among themselves.<sup>57</sup> Friends and loved ones tend not to characterize their dealings with each other in such instrumental terms; in fact, it would sometimes be “galling” to do so.<sup>58</sup> Similarly, friends and relatives may also find galling the idea that such transactions of necessity meet the “no residue” requirement.<sup>59</sup> Friends presumably do not treat each other at arms’ length in this way even if they do make trades.

I am happy to grant Lewinsohn this empirical and sociological claim about the preferences of intimates. What is puzzling is how this works as a defense of the consideration doctrine. Apparently, contract law actively requires consideration simply in order to avoid infringing on a set of transactions that we think should be free of legal enforcement. Thus, Lewinsohn sees the consideration doctrine as more about the agreements we wish to avoid enforcing than the ones we actively wish to enforce. Although there is no contradiction in doing so, it is odd that Lewinsohn emphasizes the importance of the agreements it does not pick out as the primary justification for the doctrine, while remaining silent about the importance of enforcing the exchanges he goes to great lengths to define.

Moreover, as explained above, the consideration doctrine is not even necessary to protect agreements among intimates from overenforcement. Such relationships can be, and are, protected by the simple presumption that intimates normally do not intend their agreements to be legally enforceable, even if bargained for. Friends and relatives can enter into legally enforceable agreements. But because we do not ordinarily expect them to want to, we require a higher standard of proof that such was their intention. Thus, the motivational account provides sufficient explanation and we do not need a particular definition of “exchange” in order to protect interpersonal relationships.

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57. *Id.* at 757.

58. *Id.* at 758.

59. *See id.*

The motivational account can also explain why we enforce the agreements we do enforce. It is a justification that Lewinsohn considers and rejects in passing,<sup>60</sup> and that is most famously associated with Adam Smith<sup>61</sup> and especially David Hume.<sup>62</sup> These thinkers highlight how parties can accomplish more by making commitments to each other than they can accomplish alone.<sup>63</sup> Hume imagines forging an agreement with a neighbor to help with the harvesting of crops, when the neighbors have no “love” for each other and thus no non-self-interested reason for performance.<sup>64</sup> Such parties make their promise in order to extract help from the other party that they would otherwise be unlikely to receive. The problem is that, because the parties have no love for one another, the party set to perform first would be at risk of performing without recompense. Thus, it is important that each party has a mechanism whereby she can commit to performance in a way that will allow the other party to trust her enough to justify the other party’s own performance. Otherwise, no one would want to perform first, and such mutually beneficial projects might never be accomplished. Hume seemed to think both that a moral obligation would suffice to assure the other party, and that the value of that assurance would create such an obligation (though of course he saw moral obligations as grounded entirely in human convention).<sup>65</sup> The latter point has proven particularly problematic, but contract law solves this problem nicely. It empowers the parties to undertake legally binding commitments, giving each party reason to trust that the other will have to perform, or at least pay damages for not doing so.

Under this way of thinking, the consideration doctrine can be explained as a method to pick out the kinds of agreements that may need the force of law in order for the parties to trust one another. In cases where the parties need to make commitments to one another and where the parties must induce the belief that such agreements will be enforced, the parties may need the law to step in as a third party to provide the trust that might otherwise be lacking. Presumably in some cases, such as among intimates, one may not need to induce the other party to perform (though sometimes even intimates need such inducement). But those who need to be induced may be, as Lewinsohn puts it, “indifferent to our wishes or welfare.”<sup>66</sup> By enforcing such agreements, self-interested parties

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60. *Id.* at 719-20.

61. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14-15 (Edwin Cannan ed., The Modern Library 1994) (1776).

62. DAVID HUME, A TREATISE OF HUMAN NATURE 520-24 (L.A. Selby-Bigge ed., 1978).

63. *Id.*; SMITH, *supra* note 61, at 14-15.

64. HUME, *supra* note 62, at 520-24.

65. *Id.*

66. Lewinsohn, *supra* note 2, at 720.

dealing at arms' length (even strangers) can undertake complex projects that are mutually beneficial but that might not otherwise happen due to a lack of trust, especially on the part of the party who would have to perform first.

Moreover, modern contract law does not just protect against the downside risk of half-performed agreements. Rather, it sees the value in parties pursuing complicated projects motivated in many, perhaps most, cases primarily by self-interest. Thus, it now enforces such plans even if neither side has performed yet. It empowers people to make binding commitments to each other that encourage the undertaking of such projects by allowing for expectation damages measured by the provable profit, not just the damages lost. It ignores promises to make gifts, since donors can accomplish their ends simply by performing their one-sided agreements; they need no help from the law if their promise was not made to induce a return performance.<sup>67</sup>

Note the difference in this justification from Lewinsohn's. This justification begins with a recognition of the value of self-interested parties working together to accomplish complex ends. It justifies the state's investment in contract law, and its intrusion into the private affairs of individuals who might otherwise be able to change their minds about their commitments, in terms of the value to individuals and society of these agreements. The need to induce other parties goes hand in hand with a very plausible justification for the entire enterprise of contract law. Lewinsohn's justification, by contrast, is in terms of the importance of agreements ruled out by the consideration doctrine, and thus in terms of the agreements that contract law does not enforce. His account of consideration says nothing about the value of exchanges, and it is justified only in terms of the value of something that is by definition not an exchange.

Lewinsohn does consider briefly the Humean account of consideration, but for some reason miscasts it as an account of "the most basic feature of exchange."<sup>68</sup> He notes that there are other ways to extract services from others — a point that is surely correct, but does not detract from the intuition that making commitments to others is an extremely effective way of doing so. It need not be the only way to induce others for its effectiveness to justify its central place in contract law and theory. Indeed, Lewinsohn himself goes so far as to admit that

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67. Lewinsohn joins Williston in wondering why individuals should not be able to enter binding commitments to make gifts if they want to. The answer may simply be that enforcement is expensive, both in terms of overburdened courts and in terms of the political capital of the state intruding on private affairs. The question is not "why not?" but rather "why?" A more compelling case needs to be made than, "I would like it to be so." By contrast, mutually beneficial agreements between self-interested parties may simply not happen unless there is the threat of legal enforcement on both sides, especially when the agreements call for performance over time. Such projects in many cases need help from the state, whereas one-sided gifts do not.

68. Lewinsohn, *supra* note 2, at 737.

[a]t the very least, no one would deny that there is a strong empirical generalization linking the exchange form and the apparent motives picked out by *reciprocal inducement*—that is, many or most exchanging parties in fact appear to perform or commit to perform partly in order to induce the counterparty's performance.<sup>69</sup>

Why, then, does Lewinsohn reject reciprocal inducement as a theory of consideration? I have mentioned above his complaints about its fit with doctrine, complaints that I have argued are unfounded. More fundamentally, though, Lewinsohn sees inducement as neither necessary nor sufficient for an account of *exchange*. And here we are back to the beginning. Lewinsohn's project is to understand exchanges, both as a legal and as a prelegal concept, and in so doing to better understand contract law. He further, and rightly, argues that consideration necessarily involves exchanges. His mistake, in my view, is to *equate* consideration with exchange. Consideration is best understood as a subset of exchanges, specifically bargained-for exchanges, meaning exchanges that were given in order to induce a return performance, even though not all exchanges by definition require such inducement.

## CONCLUSION

Contract law, at least in the twentieth and twenty-first century, is a law of empowerment.<sup>70</sup> It is a tool for inducing other people to work toward one's own ends, and the modern consideration doctrine specifically picks out the promises that seek to do so. Lewinsohn is almost certainly right that this view of contract law postdates Langdell and Holmes. But nearly all of American corporate law postdates them as well. Like corporate law, contract law allows parties to coordinate their actions in the undertaking of projects they could not accomplish on their own, to enlist the help of others in complex, forward-looking endeavors. It is no longer simply a matter of being paid for a half-completed exchange. The first cut of promises deemed to be enforceable since Holmes and Langdell has indeed been those given in order to induce a return performance. There is good reason to view inducement as central not only to the consideration doctrine, but also to contract law itself.

Lewinsohn's account of consideration has much to offer, including a good start to a more sophisticated understanding of what it means for one performance to be in exchange for another. He also may well be in accord with much

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69. *Id.* at 734-35 (emphasis added).

70. This point is, of course, debatable. For an excellent discussion, see Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726-1783 (2008).

of contract law prior to Holmes and Langdell when he excludes the requirement of inducement from the idea of consideration. But that in itself is no reason to label the shift towards a motivation-based account “Langdell’s folly.”<sup>71</sup> We should not find it surprising that an industrializing country would see significant shifts in its law of agreements and that it now in its post-industrial era has a different conception of the kinds of exchanges most worthy of enforcement.

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71. Lewinsohn, *supra* note 2, at 704.