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Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration

ABSTRACT. I scratch your back, you scratch mine—how must these services relate in order to constitute a quid pro quo exchange? In the ordinary quid pro quo exchange, each party agrees to do their part in order to get the other party to do theirs; each conditions their own willingness to perform on the willingness of the other; and each regards the other as obligated to do their part in light of their agreement. But not all exchanges are ordinary, and a proper analysis is of considerable practical and theoretical significance. In the law alone, quid pro quo figures prominently in a wide range of contexts—civil as well as criminal, public as well as private—and lies at the core of a number of raging controversies concerning official corruption, insider trading, and other matters. This Article offers the first philosophical analysis of quid pro quo exchange in the Anglophone tradition.

This analysis is framed by an investigation of the doctrine of consideration in contract, the site of the law's most influential treatment of quid pro quo. The textbook definition of consideration relies on a conception of exchange—first elaborated by Oliver Wendell Holmes, Jr.—that is couched in the motivational terms of reciprocal inducement. On this motivational conception, a quid pro quo is defined in terms of the instrumental motives that typically animate it, where each service is rendered as a means of bringing about the other. This Article argues against the motivational account of exchange and offers an original account in its place. This account takes as a starting point the traditional common-law definition of exchange as reciprocal payment. On the reciprocal payment account of exchange that emerges, two performances constitute a quid pro quo when the parties regard those performances as satisfying two conditions: first, that each performance satisfies the debt incurred by the other, and second, that after the sequence of performances neither party shall owe the other anything on account of the other's performance. Together, these conditions imply that, in the wake of the performances, the parties will be "all paid up" as far as the performances are concerned. Finally, this Article offers an alternative consideration rule that incorporates its definition of reciprocal payment. This alternative rule locates the required element of bargain or exchange within the apparent terms of the agreement, and not in the motives—actual or apparent—that led the parties to assent to those terms. The reciprocal payment conception of consideration is superior to the textbook definition at the levels of both justification and fit, and sidesteps the problems that have made the doctrine an object of pillory in so many quarters.

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INTRODUCTION

Under the common law, contractual liability attaches to commitments made to others. Unlike the law of property, which lays down not only the legal consequences of the various forms of ownership but also the conditions of ownership itself, the common law of contract piggybacks on an independent social practice that it does not purport to create or define—namely, the practice of committing to courses of conduct by making promises or entering into agreements.[1] Since interpersonal commitments are pervasive features of social life—they are made in all contexts in which humans interact cooperatively and in every medium in which they communicate—the most basic task confronting this body of law is to demarcate the sphere of legally enforceable commitments and thereby to determine the domain of the contractual. In the common-law tradition, the broadest and most visible line separating enforceable and unenforceable commitments is drawn by the doctrine of consideration, a fact that explains the doctrine's enduring position in the law-school curriculum. Like the doctrines of first possession in property, assault in tort, and nondelegation in administrative law, consideration's prominence is due not to the frequency with which it arises in litigation but to the fundamental position it purports to occupy in the structure of a major area of law.

Notwithstanding these pretensions, it cannot be said that the doctrine of consideration, in its modern form, has performed this basic demarcating function in a consistent or principled manner. At least since the late nineteenth century, and quite likely since its origins in the sixteenth, the doctrine of consideration in contract law has been understood to rest on a distinction between exchange transactions (i.e., bargains) and gratuitous transactions, and to limit the legal enforcement of promises and agreements, unless under seal, to those belonging to the former category.[2] This general conception of consideration—

1. To draw out the contrast a little further, we may note that a deeds-registration system of land management, for example, does not constitute an independent social practice but one that is established and maintained by law. This contrasts with the case of contracts, where a practice of interpersonal commitments is presupposed and endowed with legal significance. Thus, the Second Restatement of Contracts defines "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty," RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981), and defines "promise" as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding *that a commitment has been made*," *id.* § 2 (emphasis added).

2. For historical background concerning the doctrine of consideration (and the common law of contracts more generally) I rely primarily on the work of J.H. Baker, D.J. Ibbetson, and A.W.B. Simpson. *See generally* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 338-85

what is known as the bargain theory of consideration—has been reduced in modern times to a more specific rule, which can be traced to Christopher Columbus Langdell's textbook definition of consideration as "the thing given or done by the promisee *in exchange for* the promise."[3] This modern consideration rule, requiring as a condition of contractual validity that the promisor receive something in exchange for her promise, has been handed down to at least four generations of students together with a number of well-known problems that continue to hamper the doctrine, both in theory and in practice.[4] These problems include certain undesirable or counterintuitive applications of the rule (in areas such as conditional gift promises, contract modifications, option contracts, guarantee agreements, and social and domestic agreements) as well as a failure to identify a plausible rationale that can be used to make sense of it. As a result of these problems, many have called for the wholesale eradication of the bargain requirement.[5] The principal aim of this Article is to open up space between the general conception and the specific rule and to show that many of the familiar difficulties with consideration result from the specific rule rather than from the general conception. My purpose is not so much to defend the bargain requirement as it is to render it intelligible; only then will we be able to ask whether consideration is a doctrine worth keeping and what, if anything, might take its place.

By claiming that the modern rule badly implements the bargain requirement, I mean more than that the rule emphasizes the wrong aspects of a bargain, or takes too narrow a view of the range of objects whose exchange would satisfy the requirement. Rather, my claim is that the modern rule implicitly relies on a seductive but altogether mistaken conception of what a bargain or exchange is.

(5th ed. 2019) [hereinafter BAKER, ENGLISH LEGAL HISTORY]; D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 24-38, 71-94, 126-51, 202-61 (1999) [hereinafter IBBETSON, A HISTORICAL INTRODUCTION]; A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 199-488 (1975); J.H. Baker, *Origins of the "Doctrine" of Consideration, 1535-1585*, *in* ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 336 (Morris S. Arnold et al. eds., 1981) [hereinafter Baker, *Origins of Consideration*]; David J. Ibbetson, *Consideration and the Theory of Contract in Sixteenth Century Common Law*, *in* TOWARDS A GENERAL LAW OF CONTRACT 67 (John Barton ed., 1990) [hereinafter Ibbetson, *Consideration and the Theory of Contract*].

3. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES 1011 (Boston, Little, Brown, & Co. 2d ed. 1879) (emphasis added).

4. This is not to say that the consideration rule has not changed during this time. Most notably, this period includes, in the United States, the rise and fall of the benefit-detriment requirement conceived of as independent of the exchange requirement. *See* E. ALLAN FARNSWORTH, CONTRACTS § 2.2, at 47 (4th ed. 2004).

5. *See, e.g.*, ANDREW BURROWS, UNDERSTANDING THE LAW OF OBLIGATIONS 197 (1998).

While this conception was implicit in Langdell's definition, it was rendered explicit the following year by Oliver Wendell Holmes, Jr., and later codified (and slightly modified) in the Second Restatement of Contracts.[6] Thus, in its boldest formulation, my claim is that two giants of the common law, Langdell and Holmes, mangled a central doctrine of contract law by severing the link between the doctrine of consideration and the proper conception of a bargain. This error, in my view, spawned confusion that has impeded contract law to this day. Given a better understanding of the notion of bargain or exchange and a doctrine of consideration refashioned so as to make contact with it, many of the problems associated with the modern rule can be resolved.[7]

Quite apart from consideration, there is ample independent reason to want an adequate account of quid pro quo exchange, and it is another central aim of this Article to use the doctrine of consideration to develop and anchor such an account. Quid pro quo exchange is one of the basic modes of giving and receiving benefits, and it is both broader and narrower than is sometimes supposed. On the one hand, the category includes more than narrowly economic activity (such as the sale and barter of the marketplace or wage labor arrangements in the workplace), and embraces transactions as varied as plea bargains, prisoner exchanges, and bribes. On the other hand, while quid pro quo is a species of reciprocity (that is, of "returning kindness with kindness"), it should not be conflated with the more general category. There are many ways in which two individuals can confer benefits upon one another without carrying out a quid pro quo. For example, when, without any discussion of reward, an individual in distress receives help from a sympathetic passerby, the recipient may later be moved to send a gift (for instance, chocolate or wine) to the helper in a gesture of gratitude. Although each person has given something to the other, in the form of goods or services, no quid pro quo has occurred, and it would be incorrect (and not merely cynical) to say that the help was given in exchange for the gift, and vice versa.[8]

The theoretical challenge, then, is to identify the species of reciprocity that constitutes an exchange. This is a task well worth pursuing, as it is difficult to overstate the practical and theoretical significance of the exchange form. In the

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6. *See infra* notes 28-50 and accompanying text.

7. Despite the specificity of these allegations, I hasten to clarify that my central concerns are conceptual, not historical. If Langdell and Holmes had precursors, my charges would apply to them as well. However, regardless of what was original to them, there is no denying Langdell and Holmes's massive influence in the modern development of this body of law.

8. Thus, if the helper had been a public official acting in an official capacity, accepting the gift in such a situation might amount to an unlawful gratuity, but—if the help was genuinely rendered gratuitously and not on the understanding that the gift would follow—it would not constitute bribery.

law alone, quid pro quo figures prominently in a wide range of legal contexts—civil as well as criminal, public as well as private—and lies at the heart of a variety of raging legal controversies concerning official corruption, insider trading, and other matters. Although quid pro quo is a transsubstantive concept in the law, we find the law's most developed and influential account of it in the context of the doctrine of consideration. Indeed, one finds in the legal literature surrounding this doctrine two fundamentally different conceptions of quid pro quo. Developing these accounts and subjecting them to critical scrutiny will allow us to produce an adequate theory that captures the essential elements of the exchange form.

In keeping with the norms of the law-review genre, the remainder of the introduction summarizes, in broad outline, the arguments that follow. As we have seen, Langdell's definition of consideration insists on an exchange relation between the consideration and the promisor's *promise* (rather than the promised performance). But this exclusive focus on the commitment itself as the object of exchange places it in tension with the traditional common-law conception of bargain or exchange, according to which the objects of an exchange are given in payment, or remuneration, for each other. For, on the one hand, the modern consideration rule is satisfied only if the parties' acts of assent themselves stand in an exchange relation to one another.[9] And yet, on the other hand, there are many valid contracts—for example, ordinary sales contracts contemplating the transfer of goods for money—where neither the parties themselves nor outside observers would regard the parties' acts of assent (in contrast with their ensuing performances) as constituting payment or remuneration for anything. The modern consideration rule thus required the development of a new conception of exchange, which was rendered explicit first by Holmes and then in the Second Restatement. According to this account, classifying two performances as a quid pro quo is a way of characterizing the apparent motives of the parties rendering those performances. Specifically, to subsume two acts (promissory or otherwise) under the exchange concept is to describe each one as rendered with the apparent

9. This is because it is not enough that a promise was made in the hope or expectation of getting something in exchange for it; rather, a promise satisfies the modern consideration requirement just in case the promisor actually does receive something in exchange for making it. Since all agree that the formation of any valid contract is coterminous with the acceptance of the offer, the consideration the promisor receives must be given when the offer is accepted. It follows that in a bilateral contract (where the offer is accepted by a counterpromise) the modern consideration requirement is satisfied just in case each promise is given in exchange for the other, while in a unilateral contract (where the offer is accepted by a nonpromissory act) it is satisfied just in case the act which constitutes the acceptance of the offer stands in an exchange relation to the promise. For a characterization of the distinction between unilateral and bilateral contracts, see *infra* note 29.

aim of inducing the other.[10] Combining Langdell's definition with this account of exchange, which I will call the reciprocal-inducement account, allows us to reformulate the modern consideration rule: for an agreement to satisfy the rule, the offer must be made with the apparent aim of inducing the acceptance (whether counterpromise or performance) and the acceptance must be extended with the apparent aim of binding the offeror to her terms.[11]

Although there is evidently some connection between *doing* A *in exchange for* B and *doing* A *in order to get* B, this motivational account of exchange is both overinclusive and underinclusive. Counterexamples to the theory will be discussed in Part II, but we may observe at the outset that its conditions are frequently satisfied by plans to coordinate activities between friends and family

10. I am here using "acts" in its broad sense to refer to courses of conduct that might consist in some combination of acts or omissions.

11. In saying that the modern rule requires an alternative conception of *exchange* (other than the payment conception), I am of course assuming that the parties themselves, and outside observers, would be correct in denying that the acts of assent in typical sales contracts (among other valid contracts) stand in payment relations to each other. Although I will argue for this assumption below—as I will show in Part I, the relevant intuitions have considerable force, and I am aware of no plausible explanation for them other than that they reflect correct applications of our concept of payment—I hasten to clarify that none of the main claims of this Article rely on it. Accordingly, if one is unwilling to be guided by ordinary usage (however firm), one may say that the modern rule requires an alternative conception of *payment* (different than the one implicit in the reported intuitions) rather than an alternative conception of *exchange* (different than the payment conception). And if one were to take this course, one may then view Part II of my paper as an elaboration and evaluation of competing conceptions of payment (instead of just competing conceptions of exchange), and Part III as the elaboration of a non-Langdellian consideration rule fashioned out of my preferred conception of payment. Additionally, I fully acknowledge that some writers who have adopted the modern rule have attempted to preserve the connection between consideration and payment by substituting "price" for "exchange" in the Langdellian formula. Most prominently, in the first of the editions of Pollock's influential *Principles of Contract* to follow the publication of Langdell's definition (i.e., Pollock's third edition, published in 1881), Pollock adopts Langdell's definition but substitutes "price" for "exchange": "An act or forbearance of the one party, present or promised, i[s] the price for which the promise of the other is bought, and the promise thus given for value is enforceable." FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 179 (London, Stevens & Sons 3d ed. 1881). And Samuel Williston adopted the same terminology in his influential treatise. *See, e.g.*, 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 574, at 1097-98 (1st ed. 1920). However, calling a tail a leg does not make it one, and it is instructive that the most distinguished students of the subject have demonstrated discomfort with Pollock's terminology. Patrick Atiyah, for example, occasionally paraphrases Pollock's definition, but, silently and without comment, consistently places the term "price" within scare quotes so as to signal the incorrect usage. *See, e.g.*, P.S. ATIYAH, *Consideration: A Restatement*, *in* ESSAYS ON CONTRACT 179, 207 (1990) ("[C]onsideration, in short, is the 'price' of the promise."). See also Atiyah's earlier use of the same quotation mark in an uncited formulation in the same paper. *Id.* at 181.

members (indeed, between members of preexisting cooperative units more generally) even when neither the parties themselves nor outside observers would regard such plans, or their execution, as constituting a quid pro quo. This is worth highlighting since it bears considerably on the challenge of identifying a plausible rationale for the consideration rule. As I will argue in Part III, its most plausible justifications regard its distinction between the bargained-for and the gratuitous as a legally tractable (albeit rough and ready) way of capturing an important distinction between social contexts or spheres. Consideration, according to this family of views, serves chiefly to exempt promises and agreements formed in certain social contexts from legal enforcement. Such explanations are not available to proponents of the modern rule, however, since its conditions are satisfied pervasively by agreements lying on both sides of any relevant social divide (such as that between personal and impersonal domains). By obscuring these explanations, the modern rule fairly exposes the doctrine to the charge, frequently made, that it is a senseless historical anachronism.[12]

The philosophical mistake at the heart of the modern consideration rule is also the source of many of the well-known problems concerning concrete cases. Some of these difficulties relate to counterintuitive results: given that it embodies a mistaken conception of bargain, the modern rule unsurprisingly treats transactions that are patently gratuitous as though they were bargains, and vice versa. For example, if a genuine bargain requirement rules out anything at all, it surely rules out informal donative promises—that is, commitments to give someone a gift or do someone a favor without expectation of payment—as candidates for legal enforcement.[13] However, as I will show, the modern rule is satisfied by many genuinely donative promises, namely, those involving conditions imposed by a donor who is eager to donate (for instance, a parent, eager to help a child pursue some project, promises to gift a thousand dollars provided the child agrees not to spend any of it on wine). Another perennial problem for the doctrine concerns "fair and equitable" modifications of contractual terms, such as a promise to pay more for a service than the price originally agreed upon due to an unanticipated rise in the cost of providing that service. In such cases of

12. This was indeed Holmes's own take on the matter. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 228-47 (Belknap Press of Harvard Univ. Press 2009) (1881). For another prominent expression of the historical-anachronism view, see Chief Judge Cardozo's opinion in *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

13. I follow many others in marking a distinction between the broader category of the gratuitous promise (that is, of a promise that does not belong to a bargain) and the narrower category of the gift (donative) promise (that is, the promise to give a gift or perform an unremunerated favor). *See, e.g.*, Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 933 n.24 (1958).

preexisting duties, a strict application of the modern rule often fails to find consideration. Courts have reasoned, for example, that the promise to pay a higher price could not be made in exchange for the promise to perform the service because the latter promise had already been bargained for and secured in the initial contract.[14] This outcome is both a counterintuitive application of a bargain requirement—after all, the transaction clearly remains a quid pro quo exchange of money for a service after the modification of the terms—and a target of heavy criticism on policy grounds.[15] Other well-known problem cases include garden-variety commercial agreements that would not qualify as bargains on any characterization, such as firm offers (that is, commitments not to rescind a particular offer) or guarantee agreements (that is, commitments to another's creditor to serve as the debtor's guarantor). The Second Restatement makes an exception of these cases, but cannot explain the special treatment on principled grounds.[16]

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14. *See, e.g.*, Davis & Co. v. Morgan, 43 S.E. 732, 732 (Ga. 1903) ("[The evidence] proved a promise to give more than was due, and to pay extra for what one was already legally bound to perform. The employer, therefore, received no consideration for his promise to give the additional money at the end of the year.").

15. To be sure, grounding the preexisting-duty rule in the consideration doctrine predates the publication of Langdell's treatise, and is usually traced to Lord Ellenborough's (somewhat notorious) opinion in *Stilk v. Myrick* (1809) 170 Eng. Rep. 1168; 2 Camp. 317. However, Lord Ellenborough's sparse remarks do not include a definition of consideration, and it would be rash to impute to him Langdell's definition. (Too many alternative definitions of consideration are consistent with the holding; in particular, it might derive solely from a commitment to some version of a "legal benefit-detriment" requirement.) In any event, it is worth noting that Ellenborough's consideration analysis marked a deviation from prior common-law practice of deciding preexisting duty cases solely under the rubric of public policy (and not consideration). For a classic analysis, critical of Ellenborough's deviation, see James Barr Ames, *Two Theories of Consideration: I. Unilateral Contracts*, 12 HARV. L. REV. 515, 521, 524-25 (1899) [hereinafter Ames, *Unilateral Contracts*] ("[T]he [preexisting-duty] rule is commonly thought to be a corollary of the doctrine of consideration. But this is a total misconception. The rule is older than the doctrine of consideration and is simply the survival of a bit of formal logic of the mediæval lawyers. . . . Lord Ellenborough, unaware of the true origin of the rule and unacquainted with [the relevant] cases of the seventeenth century, put forward the novel view that the rule was based upon the doctrine of consideration. . . .This [position of] Lord Ellenborough, false gloss though it be, has been generally followed by the courts, and is responsible for the greater part of the objectionable applications of the doctrine of consideration, whereby the reasonable expectations of business men have been disappointed."). *See generally* Ames, *Unilateral Contracts*, *supra*; James Barr Ames, *Two Theories of Consideration: II. Bilateral Contracts*, 13 HARV. L. REV. 29 (1899) [hereinafter Ames, *Bilateral Contracts*].

16. In the case of firm offers (option contracts) the Second Restatement still requires the recitation of "a purported consideration." RESTATEMENT (SECOND) OF CONTRACTS § 87 (AM. LAW INST. 1981). But it makes an exception of the consideration rule both in recognizing that nominal consideration is "regularly held sufficient" and in holding that "the option agreement is not invalidated by proof that the recited consideration was not in fact given." *Id.* § 87 cmts. b & c.

Gestures are made in the direction of Lon Fuller's functional explanation—appealing to the alleged evidentiary, cautionary, and channeling functions of the bargain requirement—with the intimation that, bargains or not, these functions are anyway served by the agreements in question.[17] However, as I demonstrate in Part III, Fuller's functional explanation is not only unconvincing, but also unavailable to proponents of the modern rule. For, although it is not immediately apparent, Fuller's account also relies on the idea that the distinction between the bargained-for and the gratuitous tracks an important divide between social contexts, a view that cannot be accommodated by a motivational account—such as the modern reciprocal-inducement account—whose conditions lack any sensitivity to social distinctions. Accordingly, in the absence of any plausible rationale, the Restatement's exceptional treatment can only be viewed as ad hoc.

The defects of the modern consideration rule can be traced to the defective conception or bargain lying at its core. Formulating a better rule is possible, but doing so requires a better grasp of the concept of bargain or exchange. The venerable common-law definition of bargain or exchange as reciprocal payment or remuneration, according to which two performances constitute a quid pro quo exchange if each performance serves as payment or remuneration for the other, provides the basis of this better account. The traditional authorities left the crucial notion of *payment* undefined, however, which has allowed the law to lose its handle on the exchange concept. Accordingly, Part II provides an original theory of quid pro quo exchange that doubles as a theory of reciprocal payment. On this reciprocal-remuneration account, classifying performances as an exchange is a way of characterizing the normative significance of the performances, and not the motives of the parties. More precisely, according to this view, two performances constitute a quid pro quo when the parties regard those performances as satisfying two conditions: first, that each performance satisfies the debt incurred by the other, and second, that after the sequence of performances neither party shall owe the other anything on account of the other's performance. Together, these conditions imply that, in the wake of the sequence of performances, the parties will be "all paid up" as far as the performances are concerned.

The first condition makes reference to the notion of debt, a species of obligation. While the English language distinguishes between debt and nondebt obligations (one's obligation to repay a loan is a debt, while one's obligation to ensure that one's child has lunch money before leaving the house is not), there has been, as far as I am aware, no substantial effort by theorists to identify debt's

17. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 779, 800-01 (1941).

distinctive features.[18] Without a proper understanding of debt, however, it is not possible to differentiate quid pro quo exchanges from the broader class of "I will if you will" agreements or mutually beneficial collaboration more generally. Part II, accordingly, provides an account of debt in service of its account of exchange. According to this account, the mark of a debt is that performance—for example, paying a creditor the sum of money owed on account of a particular loan—does not guarantee satisfaction. For example, one may pay a creditor the exact sum that one owes without discharging one's debt, as when one's payment is for the purchase of additional merchandise sold by the same creditor. What is needed to satisfy a particular debt is not merely a rendition of the required performance, but a rendition in satisfaction of *that specific debt* (and not some other one). This, in turn, raises the question of how one succeeds in matching particular performances with particular obligations, and the answer may lie in either conventional rules or the mutual understanding of the parties. This distinguishing feature of debt explains both the possibility of accumulating multiple debts (each calling for its own rendition of the same type of performance) and widely observed strictures against "double counting."

The second condition adds to the first that following the performances each party emerges with no lingering obligations arising from the other's performance. In particular, this condition rules out lingering debts of gratitude and duties to reciprocate, unless these arise from aspects of the transaction that are distinct from the required performance.

This account of exchange can be used as the basis of a bargain requirement that avoids many of the well-known defects that plague the prevailing account. According to the remuneration theory of consideration, a promise satisfies the consideration requirement if it can be inferred that the parties regard either the promised performance, or the promise itself, as standing in a relation of reciprocal payment (that is, in an exchange relation) to either the performance, or the promise, of the promisee.[19] This formulation, while registering that a promise

18. Alexander Douglas's *The Philosophy of Debt* does not squarely address the question of how to understand the distinction between those obligations that are, and those that are not, characterized in terms of debt, instead focusing, inter alia, on "what we should do about the many things we call debt in each of many various sorts of circumstance." ALEXANDER DOUGLAS, THE PHILOSOPHY OF DEBT, at xiii (2016). Moreover, Douglas's rich discussion in Part I concerning the relation between a debt and a duty to pay consistently fails to distinguish between the conceptual and normative questions. *See id.* at 1-25.

19. This formulation of the doctrine of consideration is intended to incorporate the account I have given of the relationship of reciprocal payment. Thus, although some advocates of the modern rule continue to regard the reciprocal-inducement account of consideration as describing a species of payment, *see supra* note 11, and might therefore view this statement of my position,

can be exchanged—as it arguably is when an insurance policy, or a bond, is issued for value[20]—also reflects that it is often the contemplated performances, rather than the promises themselves, that lend the transaction the character of an exchange.[21] This version of the consideration rule does not result in treating bargains as though they were gratuitous transactions or vice versa. Conditional donative promises (when genuinely donative) do not satisfy the consideration test, since the donee's fulfillment of the condition does not stand in a (reciprocal) payment relation to the donor's gift (or commitment to give it). Likewise, the doctrine of consideration poses no obstacle for contract modifications: when two parties agree to alter the price of a particular service, they do not thereby dislodge its status as an exchange. What is contemplated, before and after the modification, is a quid pro quo exchange—money for a service.

The remuneration theory of consideration also has an intelligible rationale—one that enjoys substantial historical corroboration and that provides a principled basis for the traditional exceptions in cases such as firm offers and guarantee agreements. As many have observed, friends and family members tend to shy away from the quid pro quo form in favor of other modes of reciprocity when conferring and receiving benefits among themselves.[22] This empirical observation receives support from the remuneration theory of exchange, which exposes the *reasons* friends and family sometimes have to avoid the exchange form.[23] This observed tendency, together with the contestable, but plausible, normative assumption that the law ought not to enforce promises between intimates unless those intimates expressly enlist the law, typically by invoking legal formalities at the time of formation, provides a rationale for the bargain requirement. On this

on its own, as consistent with their views, the analysis I will give of reciprocal payment does present a genuine alternative to the orthodox view of consideration.

20. As I will explain below, it is possible to characterize these transactions differently, such that what is purchased is a conditional performance rather than a promise to perform if a condition is met. *See infra* note 92. If such alternative characterizations are correct, a nondisjunctive statement of the consideration rule is possible. According to the nondisjunctive version, a promise satisfies the consideration requirement if it can be inferred that the parties regard their performances as standing in a relation of reciprocal payment (that is, in an exchange relation) to each other. That said, I see no problem with the disjunctive formulation, which is, despite appearances, simpler and less restrictive than the nondisjunctive version. After all, the disjunctive formulation may be reformulated as follows: if the apparent terms of an agreement contemplate an exchange between the parties, then that is sufficient.

21. Of course, this does not mean that the performances need to be carried out for the agreement to satisfy the consideration requirement. Rather, it is enough that an objective interpretation of the agreement construes the performances not merely as required, but required as payment for the other.

22. *See infra* note 137.

23. It also explains the exceptions to the observed tendency by exposing the reasons they sometimes have to use the form.

interpretation, the consideration rule does not identify conditions that give the law *reason* to enforce a promise. That is, the rule does not rest on the normative position that a promise ought to be enforced *because of* its relation to a bargain. Rather, the point of the bargain requirement is to identify (however roughly) a class of promises—informal promises in social and domestic contexts—that the law has reason *not* to enforce, either because the law's general reasons for enforcing agreements do not apply in these contexts or because features of these contexts override the law's general reasons in favor of enforcement. This rationale not only renders the rule intelligible, but also explains why the law draws (and should draw) exceptions for forms of commercial commitment that, while not belonging to an exchange, tend not to be used by intimates. As I have said, the rationale also receives significant historical corroboration. I have already observed that the modern rule of consideration is not sensitive to social context, and so not up to the task of screening for informal social and domestic agreements. Accordingly, if the rationale is correct, one would expect that the adoption of the modern rule by legal authorities would lead to the introduction or invocation of some other doctrinal mechanism to perform this function. When we consult the historical record, this is indeed what we find. In particular, the legal-intent requirement (requiring an intent to establish legal relations as a condition of liability), or some variation of it, has been consistently wheeled in by legal authorities in both England and America to avoid enforcement of informal social and domestic agreements as soon as the modern consideration rule was adopted.

This Article proceeds as follows. Part I addresses in more detail the relation between the textbook definition of consideration and the textbook specification of that definition in the motivational terms of reciprocal inducement. It demonstrates that by insisting, in all cases, upon an exchange relation between the consideration and the promisor's promise (rather than his or her performance), the textbook definition of consideration commits the theorist to rejecting this traditional definition of bargain or exchange and to embracing instead the motivational alternative (in terms of reciprocal inducement). Part II criticizes the motivational theory of quid pro quo exchange and provides in its place an original philosophical account that doubles as a theory of reciprocal payment. Analyzing quid pro quo exchange requires analyzing in turn the notion of *debt*, which, like quid pro quo exchange, is as socially important as it has been philosophically neglected. Finally, Part III shows that the conception of exchange as reciprocal payment can be used to fashion an alternative consideration rule, one that avoids many of the well-known difficulties associated with the prevailing rule, and that can be rendered intelligible by a plausible, historically compelling rationale.

I. LANGDELL'S FOLLY

The doctrine of consideration conditions a promisor's liability on some suitably related, ostensibly desired course of conduct on the part of the promisee. In so doing, it enshrines a form of mutuality or reciprocity at the heart of the common law of contracts. But there are many forms of mutuality and reciprocity, and not all can lay claim to an association with the doctrine of consideration. Although a sequence of good turns between neighbors or the alternating, synchronized movements of rowers attempting to reach a distant shore may be paradigmatic examples of reciprocity and mutuality, neither one falls within the ambit of the doctrine. At least since the late nineteenth century, and quite probably from the doctrine's origins in the sixteenth century, the requirement of consideration has been understood to rule out informal, gratuitous promises or agreements as candidates for legal enforcement.[24] On this understanding, the form of reciprocity singled out by the doctrine of consideration is the doing or giving of something in exchange for something else, also known as quid pro quo exchange.

To say that the doctrine of consideration imposes some exchange (alternatively, bargain) requirement on enforceable promises marks no departure from prevailing understandings. There is perhaps no single definition in all of contract law—perhaps all of private law—more familiar to law students than the Second Restatement's definition of consideration, which is couched plainly in terms of exchange.[25] And while there has been considerable debate among historians concerning whether, at its advent, the doctrine of consideration had anything to do with reciprocity at all, both sides of that debate take for granted that, if the early

24. The restriction to *informal* promises reflects the traditional rule that "[a] gratuitous promise becomes legally binding if it is made under seal or if it is made in exchange for 'nominal' consideration, such as a peppercorn or £1." STEPHEN SMITH, CONTRACT THEORY 217 (2004). Of course, when such formalities are not recognized in a given jurisdiction—as they are not in the majority of American jurisdictions, *see* FARNSWORTH, *supra* note 4, § 2.11, at 72, §§ 2.16-.17, at 86-88—the practical significance of this limitation becomes nil. In modern times, promissory estoppel has also been used to enforce certain promises absent consideration. However, the nature and content of the estoppel principle, as well as its relation to the consideration doctrine, have been greatly debated and lie beyond the scope of the present inquiry. For one conception of the estoppel doctrine that is fully compatible with the theory of consideration elaborated in this paper, see Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985).

25. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) ("(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

doctrine was related to any form of reciprocity, it was to quid pro quo exchange.[26] Nevertheless, if it is a commonplace that the line drawn by the doctrine of consideration is drawn around exchange, it is, I believe, one that has not been sufficiently borne in mind by those pursuing either positive or normative analysis. As I will show, many of the well-known difficulties that have become associated with the doctrine are due to a failure to reckon with the notion of *exchange* that lies at the core of the rule.[27]

The modern understanding of the consideration requirement may largely be traced to the definition of consideration put forth by Christopher Columbus Langdell in 1879 in the summary appended to the second edition of his famous

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26. Although his view is not widely accepted—for some prominent dissents, see generally BAKER, ENGLISH LEGAL HISTORY, *supra* note 2; IBBETSON, A HISTORICAL INTRODUCTION, *supra* note 2; Baker, *Origins of Consideration*, *supra* note 2; and Ibbetson, *Consideration and the Theory of Contract*, *supra* note 2—Simpson has argued at length that the requirement of consideration, prior to the late nineteenth century, had little to do with reciprocity at all, but was rather a means of ensuring that the law would enforce only those promises made for "good reasons"—to ensure, in other words, that the *considerations* which motivate enforceable promises are in some sense worthy. In so arguing, Simpson expressly sets himself in opposition to the "bargain theory" that he attributes to Holmes's followers, who are accused of "link[ing] their theories about the modern law to their account of the history of the subject." SIMPSON, *supra* note 2, at 417 n.1.

27. This is not to suggest that no one has recognized the importance, for the study of the law of consideration, of providing such an account of exchange. In his seminal paper *Consideration and Form*, Lon Fuller observes that

> [i]n the executory bilateral contract . . . the element of exchange stands largely alone as a basis of liability and its definition becomes crucial. Various definitions are possible. . . . The problem of choosing among these varying conceptions may seem remote and unimportant, yet it underlies some of the most familiar problems of contract law.

Fuller, *supra* note 17, at 817 (footnote omitted). Unfortunately, while recognizing the problem, Fuller makes no serious effort to provide an analysis of the pivotal concept. The "[v]arious definitions" he canvasses are marked by their vagueness and imprecision, and Fuller unfortunately makes no attempt to improve upon them:

> We may define exchange vaguely as a transaction from which each participant derives a benefit, or, more restrictively, as a transaction in which the motives of the parties are primarily economic rather than sentimental. Following Adam Smith, we may say that it is a transaction which, directly or indirectly, conduces to the division of labor. Or we may take Demogue's notion that the most important characteristic of exchange is that it is a situation in which the interests of the transacting parties are opposed, so that the social utility of the contract is guaranteed in some degree by the fact that it emerges as a compromise of those conflicting interests.

Id.

casebook: "The consideration of a promise is a thing given or done by the promisee in exchange for the promise."[28] According to this definition, which remains the textbook formulation to this day, the consideration that supports a promise (consideration that is comprised of the promisee's performance, when the contract is unilateral, and the promisee's counterpromise, when bilateral) stands, necessarily and in all cases, in an exchange relation to the *promise* itself.[29] Langdell's definition quickly took root in the legal establishment, and by 1899, James Barr Ames, Langdell's successor as dean of Harvard Law School, could correctly assert in the pages of the *Harvard Law Review* that "[E]veryone will concede that the consideration for every promise must be some act [including a counterpromise] or forbearance given in exchange for the promise."[30]

And yet, despite this reception, there is surprisingly little precedent for Langdell's definition of consideration, either in case law or secondary sources on either side of the Atlantic.[31] More importantly, and quite apart from the historical

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28. LANGDELL, *supra* note 3, at 1011.

29. I am helping myself to the traditional distinction between unilateral and bilateral contracts, even though the Second Restatement has abandoned these terms on account of "doubt as to the utility of the distinction." RESTATEMENT (SECOND) OF CONTRACTS § 1, reporter's note to cmt. f. As Farnsworth observes, "[E]ven the Restatement Second recognizes that an offeror may make an offer that 'invites an offeree to accept by rendering a performance and does not invite a promissory acceptance.'" FARNSWORTH, *supra* note 4, § 3.4, at 206 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 45). I will follow Farnsworth and use the term "unilateral contracts" to refer to those that are formed by such nonpromissory acceptances, and "bilateral contracts" to refer to those formed by promissory acceptances.

30. Ames, *Bilateral Contracts*, *supra* note 15, at 31.

31. Williston, although an early champion of Langdell's definition, acknowledged its uncertain relation to the history of the doctrine: "No doubt, during its development consideration meant something more or different than something given by the promisee in exchange for the promise, but that is the end to which it gradually tended, and which it now may be held to have reached." Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 33 (1894).

It is crucial to avoid being misled by those earlier definitions that identify consideration with the *causa* or *cause* of the civil law. For example, Powell, who frankly acknowledged in his note to the reader that "many of the observations and general remarks here submitted for [the reader's] consideration, have been taken . . . from the civil law writers," 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS, at xii (London, J. Johnston & T. Whieldon 1790), defines consideration as "the *material* cause of a contract or agreement; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties," *id.* at 330. While the posited motivational relation is a relation between the consideration and the promise, there is no reason to interpret this relation as a relation of quid pro quo exchange. As Pollock and other bargain theorists of consideration have pointed out, the civilian *causa* (or *cause*) embraces many kinds of gratuitous agreements. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 118-19 (London, Stevens & Sons 1st ed. 1876) (describing how, in Roman law, "[i]nformal agreements (pacta)

did not give any right of action without the presence of something more than the mere fact of the agreement. This something more was called *causa*. Practically the term covers a somewhat wider ground than our 'consideration executed'"); *id.* at 148 (explaining, in comparing consideration with the modern French *causa*, that "nothing would at first sight seem more natural to an English lawyer than simply to translate *cause* by *consideration*. But let him turn to a French commentary on the Code, and he finds no distinct and comprehensive definition of *cause* as a legal term of art, but a scholastic discussion of *efficient*, *final*, and *impulsive* causes. Going on to see what is in fact included in the *cause* of the French law, we find it wider than our Consideration in one way and narrower in another. On the one hand the existence of a natural [i.e. moral] obligation, or even of a real or supposed duty in point of honour only, may be quite enough. Nay, the deliberate intention of conferring a gratuitous benefit, where such intention exists, is a sufficient foundation for a binding unilateral promise.").

The clearest historical antecedent to Langdell of which I am aware is in the opinion of *Eagan v. Call*, 34 Pa. 236, 237 (1859) ("Want of consideration can only be, where the promissee parts with nothing in exchange for the promise. The consideration *fails*, when the promissor does not get that which the promissee agreed to give, as a motive for the promise.") Three points are in order. First, there is no evidence, as far as I know, that this definition had any impact on the development of the law or on Langdell. (It is perhaps relevant that, somewhat notoriously, the only cases included in Langdell's casebook come from England, Massachusetts, and New York.) Second, assuming the second quoted sentence from *Eagan* is a reformulation of the preceding one, it corroborates my argument, offered below, that Langdell's definition relies on a motivational conception of exchange. *See infra* text accompanying note 38. Third, *Eagan* concerned a sales case where payment was tendered using a bill. 34 Pa. at 236. As I discuss below, all accounts of exchange could agree that *in a case like that* it is the promise (merged with the bill) that is given in exchange for the performance. *See infra* note 92 and accompanying text. Thus, although these sentences use general terms, it is possible that the definition should be implicitly restricted to the facts of the case (i.e., that it should be read, "want of consideration [in cases like this] can only be . . .").

Finally, one must not be misled by the well-worn phrase, used to describe unexecuted bilateral contracts, that "mutual promises are consideration for each other," the proper import of which was well captured by Henry Ballantine many years ago:

> When the [contractual] action of *assumpsit* was first introduced in the sixteenth century, the only consideration recognized was an executed consideration, value actually given or detriment incurred. To extend the action to [wholly unexecuted] bilateral contracts without appearance of change, it was said that "mutual promises are consideration for each other," and this became the language of pleading and of the courts. But the courts have never stopped to analyze what they meant by "promise." They simply meant that executory consideration was sufficient. It is therefore not necessary to take this loose and uncritical language of the judges and pleaders literally. . . . Like many legal mottoes and catch phrases, the easy and time-honored formula that promise is consideration for promise is but a legal "bromide," which is ordinarily used as a substitute for thought, to disguise a lack of analysis under vague and specious words.

Henry Winthrop Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 125-26 (1914).

Admittedly, there is one pocket of early English law—namely, the doctrine of independency as it related to the purely executory contract—that might conceivably be taken as precedent for Langdell's position, insofar as the cases explicating that doctrine appear to put to

question whether it constituted an innovation, Langdell's definition is as a purely conceptual matter in tension with the traditional common-law conception of bargain or exchange as reciprocal remuneration (alternatively, recompense), a conception that figures repeatedly in discussions of the doctrine of consideration from the sixteenth century until Langdell's definition took root.[32] This traditional conception of bargain or exchange is well articulated by Edmund Plowden, in what Frederick Pollock characterized as "the first full discussion of Consideration by that name,"[33] a case report of *Sharington v. Strotton*.[34] Accord-

work the idea that mutual promises are given *for* one another. Here, too, though, there is considerable room for doubt. After all, the doctrine regarding mutual promises may well have resulted from a decision to extend to contract the relevant principles governing mutual covenants rather than from a commitment to Langdell's later conception of consideration. As S.J. Stoljar explains,

> [S]tarting with the principle that mutual covenants were independent unless express words of condition made one covenanted performance dependent upon, or prior to, the other, the courts had no other method of construction . . . . The law [of contracts] . . . took as its model not the sale by mutual grants where concurrency was the natural solution, but the mutual covenants for service where concurrent performance was impossible; the law followed the latter analogy because, executory agreements being by covenant, "covenant" thus appeared to map out the area of relevant precedent.

S.J. Stoljar, *Dependent and Independent Promises: A Study of the History of Contract*, 2 SYDNEY L. REV. 217, 220-21 (1957). In any case, if the doctrine of independence indeed reflected an early commitment to Langdell's conception of consideration, the law's subsequent movement away from independency and toward concurrency can perhaps be conceived of as a move away from that conception.

32. By way of contrast, three years before the publication of Langdell's definition, in the first edition of arguably the first systemic treatise of the common law of contract, Frederick Pollock approvingly quoted the definition of the Exchequer Chamber: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." POLLOCK, *supra* note 31, at 147 (quoting Currie v. Misa (1875) 10 LR Exch. 153 at 162 (Lush J)). While this has been correctly understood to express a bargain conception of consideration, the definition neither says nor implies that the valuable consideration stands in an exchange relation with the promise it supports (as opposed to the promised performance). As I discuss below, Pollock does not adopt (a variant of) Langdell's definition until the 1881 edition of his treatise. *See infra* notes 153-155 and accompanying text. Similarly, the definition of consideration given in the 1879 edition of Anson's important treatise does not say or imply that the bargained-for benefit is given in exchange for the promise: "Consideration [is] some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee." WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 29 (Oxford, Clarendon Press 1879).

33. POLLOCK, *supra* note 31, at 151.

34. Sharington v. Strotton (1565) 75 Eng. Rep. 454; 1 Plowden 298.

ing to Plowden, "a bargain . . . is, when a recompense is given by both the parties, as if a man bargains his land for money, here the land is a recompense to the one for the money, and the money is recompense to the other for the land, and this is properly a bargain and sale."[35] According to this definition—advanced not only by Plowden, but also by other preeminent authorities such as Christopher St. German and William Blackstone—reciprocal transfers of goods or services constitute a bargain or exchange just in case each transfer is viewed as payment for the other.[36]

This definition of exchange is incompatible with Langdell's definition of consideration. More precisely, if the promisee's performance (in the unilateral contract) or counterpromise (in the bilateral contract) stands always in an exchange relation to the promisor's promise, then, if ordinary usage is any guide, the exchange relation cannot be identified with the relation of reciprocal payment or remuneration.[37] This can be seen most easily by considering ordinary sales contracts (an agreement to transfer goods for money), paradigm cases of contracts with good consideration. Let us start with the unilateral case: a seller of goods makes an offer to Jones to deliver certain goods if Jones pays the seller

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35. *Id.* at 461; 1 Plowden at 303. Commenting on this definition, Simpson notes that "[t]hough contemporaries did not call an agreement to build a house for money (for example) a bargain, but a covenant, the same analysis will fit such a transaction." SIMPSON, *supra* note 2, at 416-17. While Simpson recognizes that bargain or exchange agreements satisfy the sixteenth-century consideration requirement, he nevertheless insists that the requirement can be satisfied in other ways as well, and so concludes that consideration should not be characterized as a doctrine that requires bargain as a condition of enforcement. *See id.* at 417-24.

36. 2 WILLIAM BLACKSTONE, COMMENTARIES *446 ("Sale or exchange is a transmutation of property from one man to another, in consideration of some recompense in value: for there is no sale without a recompense; there must be quid pro quo."); *cf.* CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 228 (T.F.T. Plucknett & J.L. Barton eds., Selden Society 1974) (1530) ("[S]uche bargaynes and sales be called contractes/ & be made by assent of the partyes vppon agrement betwene theym of goodes or landes for money or for other recompence . . . ."). In addition to identifying bargain or exchange with reciprocal recompense (i.e., payment), St. German and Blackstone, in the same chapters, also treat consideration as equivalent with recompense. *See* 2 BLACKSTONE, *supra*, at *441 ("[H]e did it without any consideration or recompence . . . ."); *id.* at *444-45; ST. GERMAN, *supra*, at 228 ("[A] nude contracte is where a man maketh a bargayne or sale of his goodes or landes wythout any recompence appoynted for yt. As yf I saye to a nother I sell the all my lande or all my goodes & nothynge is assygned that the other shall gyue or paye for yt/ that ys a nude contracte/ and as I take yt: it ys voyde in the lawe and conscyence . . . .").

37. On my use of the traditional distinction between unilateral and bilateral contracts, see *supra* note 29 and accompanying text. As discussed earlier, the modern consideration rule requires that the promisor *receive* something in exchange for the promise, which implies that, in the case of bilateral contracts, the relevant exchange relation is that between promise and counterpromise (rather than promise and performance). For further discussion, see *supra* note 9.

fifty dollars. Jones pays the money and the goods are delivered as promised. Now, we may ask, does Jones's transfer of funds constitute remuneration for the transfer of the goods or for the promise to transfer them? No one whose understanding has not been distorted by confused doctrines of consideration would have any difficulty answering that, in the usual case, the payment is for the goods and not the promise to give them. Since the payment, in this example, *does*, for Langdell, constitute consideration for the promise, it follows, on pain of inconsistency, that Langdell's definition relies on an alternative sense of exchange. The same result is even more clearly reached in the case of ordinary bilateral sales agreements. As long as the agreement remains unexecuted on both sides—that is, before either the goods or the money has changed hands—no one who aims to be speaking proper English would say that a payment (much less two of them) has already been made merely on account of the handshake.[38]

Although Langdell himself did not articulate the alternative conception of exchange upon which he implicitly relied, strides were made the following year, 1880, in Oliver Wendell Holmes's seminal lectures on the common law. Holmes put forward a definition of consideration that purported to precisely specify the relation between promise and consideration in terms of motivational concepts:

> [I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.[39]

It is important to grasp the precise meaning of Holmes's definition. *X* is a "motive or inducement" for *Y* if *X* is done with the aim, though not necessarily the sole or exclusive one, of producing *Y*; *X* and *Y* are reciprocal inducements if each is done with the aim of producing the other.[40] In the terms of contract law's theory of offer and acceptance, an acceptance serves to bind the offeror and thereby serves to transform the offer into a binding promise. Returning to the

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38. As I have acknowledged, some may question the significance of ordinary usage on these issues. As I have discussed, such skepticism has little bearing on the overall claims of this article. *See supra* note 11. In Part II, however, I offer a theory of reciprocal remuneration that vindicates the ordinary linguistic intuitions, thereby showing the incompatibility of Langdell's definition with a conception of consideration as reciprocal payment.

39. HOLMES, *supra* note 12, at 265. The lectures were delivered in the fall of 1880, and the contract lectures were drafted in the summer of 1880. *See* Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1682 (2000).

40. Instead of "with the aim of," I could have written "as a means of" or "in order to." These are equivalent formulations.

earlier example of the unilateral sale, in which the seller's offer is accepted by means of the buyer's payment, the seller's promise stands in a relation of reciprocal inducement to the payment if the offer is made in order to induce the payment and the payment is made with the aim of binding the seller. Likewise, in the bilateral case, where the offer is accepted by the counterpromise, the offer and acceptance stand in a relation of reciprocal inducement if each is made with the aim of binding the other party to the deal.

Holmes's definition of consideration does not require that the parties actually possess the motives that would satisfy a so-called subjective reciprocal-inducement condition. One would instead expect, given his well-known views about mental-state requirements in the law, a so-called objective construal of the condition: that is, one would expect him to say that the promisor must merely *manifest* the aim of inducing the consideration, while the promisee must merely *manifest* the reciprocal aim of binding the promisor. But he does not say this; rather, by invoking what Grant Gilmore has rightly called a "mysterious phrase"[41]—that is, "reciprocal *conventional* inducement"—Holmes replaces an objective motive requirement with a "conventional" one, which can be satisfied by the "terms of the agreement" even when objective manifestations are absent. It is clear from the context that Holmes avoided offering the objective construal only to accommodate the traditional allowance for nominal consideration.[42] Assuming, as Holmes did, that the allowance was to follow from the definition of consideration, some such accommodation was clearly necessary: when someone "sells" their nephew the family farm for a dollar, it is abundantly manifest that they do not hand over the keys (or commit to doing so) as a means of obtaining the dollar (or the commitment to give it). Accordingly, for one who is prepared either to disallow nominal consideration, or to recognize it as an exception to, rather than a fulfillment of, the requirement of consideration, there would be no reason to go beyond the objective construal of the requirement.

Although Holmes offers this motivational account of the relation between promise and consideration, he stops just shy of explicitly identifying the relation of "reciprocal conventional inducement" with the relation of exchange. However, in the previous lecture, he explicitly identified "our peculiar and most important doctrine . . . [of] consideration" with "the rule . . . that there must be *quid pro quo*."[43] It is, perhaps, possible that Holmes intended to put forward "reciprocal conventional inducement" only as a sufficient condition of exchange,

41. GRANT GILMORE, THE DEATH OF CONTRACT 22 (Ronald K.L. Collins ed., 1995).

42. In the sentence immediately preceding the quoted definition, he says, "A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding." HOLMES, *supra* note 12, at 265.

43. *Id.* at 234; see also *id.* at 243 ("Wherever consideration was mentioned, it was as *quid pro quo*, as what the contractor was to have for his contract.").

and not as a complete analysis. However, this possibility is remote enough that we may safely say that Holmes's theory of consideration is an application of a general theory of quid pro quo exchange. This interpretation gains further support from, first, its hand-in-glove fit with Langdell's definition of consideration—it supplies the definition of "exchange" that appears to substantiate Langdell's view of the matter—and, second, the air of plausibility that reciprocal inducement enjoys as a theory of quid pro quo exchange. After all, when parties sell or trade goods or services, it is at least usually the case that each gives (partly) in order to receive, or at least appears to do so. And, in any case, even if Holmes stopped just short of explicitly identifying the relation of "reciprocal conventional inducement" with the exchange relation, the drafters of the Second Restatement had no such qualms. Putting two and two together, they both adopted Langdell's definition of consideration, cast in terms of exchange, and repackaged Holmes's motivational definition of consideration as a definition of exchange.[44] This was made fully explicit in the comments:

> Consideration requires that a performance or return promise be "bargained for" in exchange for a promise; this means that the promisor must manifest an intention to induce the performance or return promise and to be induced by it, and that the promisee must manifest an intention to induce the making of the promise and to be induced by it.[45]

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44. They employed the objective rather than conventional variant of reciprocal inducement, reflecting their reversal on nominal consideration.

45. RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. a (AM. LAW INST. 1981). For an especially full-throated statement of the Holmesian theory, see RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. b (AM. LAW INST., Preliminary Draft No. 2, 1961) ("'Bargained for and given in exchange.' In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. . . . But it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain."). The story of what happened between Holmes's seminal lectures and the Second Restatement's adoption of his definition is an interesting one involving the Holmesian theory of exchange "working itself pure." The simplified version is that Williston, the chief Reporter of the First Restatement, wanted to have it both ways, holding both that consideration is always given in exchange for the promise and that the exchange relation is a relation of reciprocal payment. That he was serious about the latter proposition is clear not only from his repeated statements that consideration is the "price" or "payment" of the promise; more importantly, he had a good enough grip on the concept of payment to use it to explain, as we shall see in Part III, the unenforceability of informal social and domestic arrangements that plainly satisfy

In a well-known discussion, Gilmore called Holmes's "bargain theory" of consideration "revolutionary doctrine" and maintained that in propounding it Holmes "was not in the least interested in stating or restating the common law as it was."[46] Yet Gilmore did not capture the nature of the revolution he set out to describe. If he was referring merely to a new technical definition of a consideration requirement cast in the terms of reciprocal inducement, then his claims were overstated, as this alone hardly amounts to "a revolutionary change in legal thought."[47] If, alternatively, he was suggesting that, in Holmes's hands, the consideration doctrine came to embody, for the first time, a requirement of bargain, he faces the powerful arguments to the contrary offered by some of our most distinguished historians of the common law, such as J.H. Baker, D.J. Ibbetson and others. What truly did amount to a revolutionary change in legal thought, however, was the silent substitution of one conception of bargain or exchange for another, a revolution so silent that it has evaded detection by historians of even Baker's and Ibbetson's stature, who have, I believe, read Langdell's conception back into the older sources.[48] And this "new day dawned" not "with

reciprocal inducement. *See infra* notes 133-135 and accompanying text. The story of these intervening years also involves the rise and fall of the "benefit-detriment" requirement, conceived of as an independent requirement that serves to supplement the exchange requirement. Although I will not argue the point here, this too should be seen as the natural culmination of Holmesian theory of exchange. In this light it is significant, and unsurprising, that the benefit-detriment rule met its demise in a 1918 Corbin paper, *see* Arthur L. Corbin, *Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions*, 27 YALE L.J. 362 (1918), and was explicitly negated in the Second Restatement, *see* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. a (AM. LAW INST. 1981).

46. GILMORE, *supra* note 41, at 22.

47. *Id.* at 122 n.36 (quoting 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS: 1870-1882, at 245 (1963)).

48. In saying this, I am not relying on the more general claim that Langdell's definition marked an innovation. Rather, my present claim is the narrower one that some of our best historians have read Langdell's definition of consideration (a definition that characterizes consideration as that which is given in exchange for the *promise*) into particular earlier sources that neither said nor implied it. Thus, Baker offers the following gloss on a fifteenth-century report: "One of the clerks of the King's Bench actually described the payment for the promise as *quid pro quo*." Baker, *Origins of Consideration*, *supra* note 2, at 355. Baker cites to Simpson's transcription, which reads as follows: "BROWN (the second clerk): If a man prepays any sum of money that a house be built for him etcetera and he does not do it, now he will have an action of trespass on his case because the defendant has *quid pro quo* and so the plaintiff is damaged. And this was privately denied to him, etc." SIMPSON, *supra* note 2, at 626. As far as I can see, nothing in this quotation says or implies that the prepayment was payment for the promise and not the house. Moreover, Baker's general descriptions of sixteenth-century developments bear the same marks of Langdell's influence: "Consideration, like cause, was a conveniently ambiguous word to choose for the purpose. On the one hand, *the consideration for a promise could mean that which was given in return for it . . . .*" BAKER, ENGLISH LEGAL HISTORY, *supra*

Holmes," but with Langdell, and culminated in the work of Arthur Corbin and the Second Restatement Reporters.[49] All revolutions have their casualties. In this case, as I will show in Part III, the casualty was nothing less than the intelligibility of the doctrine of consideration. Armed with an account of exchange that eschews Holmes's motivational focus and instead analyzes the notion of payment central to the older definition of bargain, we will be in a position to take up, also in Part III, the constructive task of formulating a new doctrine of consideration. The revised doctrine will allow us to place the consideration requirement in its best light by ascribing to it a rationale that is both intelligible and historically compelling, and to avoid the unfortunate doctrinal results associated with the prevailing theory. Before reaching these doctrinal issues, however, we must consider and evaluate the alternative theories of exchange on their own terms. In

note 2, at 361 (emphasis added). As far as I can discern, none of the sources he goes on to discuss in the passage justifies the choice to use this variant of the Langdellian formula in a general characterization of sixteenth-century law. Similarly, in summarizing his defense of the bargain theory as a historical theory of consideration, Ibbetson writes that "[i]n developed law [of the sixteenth century and beyond] the idea behind . . . consideration was . . . the principle of mutuality: A's promise had been given in exchange for the performance of some act by B," adopting Langdell's formula even when no single source quoted in that article compelled him to do so. Ibbetson, *Consideration and the Theory of Contract*, *supra* note 2, at 69. Likewise, in his important book on the history of the law of obligations, Ibbetson remarks, in the context of a discussion of Lord Gilbert's early eighteenth-century contracts treatise, that "[Gilbert] gave 'consideration' its orthodox [c]ommon-law meaning of something given in exchange for the promise." IBBETSON, A HISTORICAL INTRODUCTION, *supra* note 2, at 237. Although Ibbetson once again invokes the Langdellian formula, Gilbert's treatise does not quite have the meaning he ascribes to it. The definition referred to states that "consideration is defined by the lawyers [to be] a cause or occasion meritorious that requires a *mutual recompence* in fact or in law." 1 Lord Chief Baron Gilbert, A Collection of Manuscript Law Tracts 77 (early 18th century) (British Library Hargrave MS No. 265 fol. 40r) (scanned copy on file with author). It is not just that this definition neither says nor implies that consideration stands in an exchange relation to the promise it supports; more significantly, Gilbert's definition is cast in the traditional terms of reciprocal remuneration that, as a purely conceptual matter, are at odds with Langdell's formulation. I am grateful to Michael Lobban and David Ibbetson for their help in researching this matter. Gilbert's formulation also appears in JOHN DODERIDGE, THE ENGLISH LAWYER 131 (photo. reprt. 2005) (London, Assigns of I. More 1631). Finally, even Simpson, who bases many of his arguments against the bargain theory on the claim that certain enforceable promises can't be construed as promises to remunerate, occasionally slips into the Langdellian mode: "*By recognizing the rule that a promise was enforceable if given in return for [money] payment or some other recompense the common law came to enforce bargains*—two-sided agreements in which performance by one party is paid for by the other party, and vice versa. In such bargains things of value are exchanged—land for money, chattels for money, services for money, and so forth." SIMPSON, *supra* note 2, at 416 (emphasis added). Simpson does not seem to recognize that the (italicized) Langdellian gloss is inconsistent with the sentences that immediately follow, which go on to characterize the payment relation as holding between the performances, rather than the promises to perform.

49. GILMORE, *supra* note 41, at 21.

particular, if the history uncovered in this Part (a history of conceptual appropriation) teaches us anything, it is that it is not enough to define bargain or quid pro quo in terms of reciprocal payment if the latter term is as in need of definition as the former.[50]

II. QUID PRO QUO EXCHANGE: A PHILOSOPHICAL ACCOUNT

It is, in some ways, no surprise that the law of consideration has been tainted by a failure to reckon with its leading concept, quid pro quo exchange. For despite its immense practical and theoretical significance, quid pro quo exchange is perhaps the least understood of the most basic modes of human interaction. To be sure, it can hardly be doubted that exchange involves the mutual provision of goods or services among discrete individuals or groups. Yet the bilateral performance of ostensibly desired services no more establishes that an exchange has occurred (rather than a pair of good turns, say) than does the utterance of a sentence in the indicative mood establish that an assertion has been made (rather than a guess or a joke, say). And while one who wishes to understand what endows an utterance with assertoric force has recourse to a vast philosophical literature, the determinants of exchange, over and above the bilateral provision of goods or services, remain shrouded in darkness. As with the speech act, we may expect individual motives, shared understandings, and normative practices to

50. Although I have just observed the incompatibility between the notion of reciprocal payment and the sense of "exchange" that figures in Langdell's definition, one may reasonably wonder whether there are any other candidates, besides reciprocal inducement, that might fit the Langdellian bill. The challenge is to identify some other sense of "exchange" that holds both between promise and counterpromise *and* between the ensuing performances in the typical bilateral sales contract, as no one would wish to deny that the money and the goods typically stand in an exchange relation. (Williston makes this explicit. *See infra* note 66.) The reciprocal-inducement theory of exchange, as I will develop it in Part II, meets this criterion, which is precisely what makes it such a good companion for Langdell's definition. I may further note that an otherwise tempting "I will if you will" account of exchange—specifically, one that identifies two acts as standing in an exchange relation just in case they together fulfill an "I will if you will" agreement—does not seem to meet the stated criterion, since it would not seem to apply to the relation between the commitments themselves in the typical case. Nevertheless, since some might be attracted to such an "I will if you will" theory of exchange irrespective of its compatibility with Langdell's definition, I will note here, and again in Part II (where relevant), that several of the counterexamples that I will put forward against reciprocal inducement are also effective against the "I will if you will" theory of exchange. Finally, it is noteworthy that an "I will if you will" theory of exchange, unlike both the reciprocal-inducement and reciprocal-payment theories, cannot explain the conceptual connection between exchange and instrumental motivation.

figure centrally in an account of exchange. Yet the contents of these motives, understandings, and practices, as well as their configuration in an explanation of the transactional form, remain utterly obscure.[51]

If the exchange form has received less than its due from philosophers, it is not because it is lacking in either practical or theoretical significance. In the practical realm, legal and social norms lean heavily on the concept of exchange. It is not just the doctrine of consideration; in the United States, at the time of this writing, legal rules governing situations as varied as the receipt of benefits by public officials,[52] the regulation of campaign contributions,[53] the recourse of victims of theft or fraud to the assets of the perpetrators ahead of competing creditors,[54] the deduction of taxable income,[55] and even the trading of financial securities on the basis of inside information[56] all prominently invoke the notion of exchange, such that legal outcomes frequently turn on whether or not something was done or given in exchange for something else. Additionally, most legal regimes in the world, including both common- and civil-law regimes, define "gift"

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51. One of the only discussions of exchange—certainly the most interesting and significant—in contemporary Anglophone philosophy is A.J. Julius's *The Possibility of Exchange*, 12 POL. PHIL. & ECON. 361 (2013). However, the closest Julius comes to a general characterization of the exchange form is his claim that exchange is "a pair of services each performed because its author takes it to bear some important relation to the other." *Id.* at 365. Moreover, in my view, the final sections of that paper ought to be recharacterized: Julius's hopeful appeal to joint agency is better seen, not as a form of morally legitimate exchange, but rather as a proposal for how we can get some of the same benefits of exchange through other (less problematic, by his lights) modes of collaboration. *See id.* at 369-72.

52. McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) ("Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an 'official act.'").

53. Citizens United v. FEC, 558 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." (citing McConnell v. FEC, 540 U.S. 93, 296-98 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II))).

54. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. a (AM. LAW INST. 2011) ("Subsections (1) and (2) describe features of the common law of property that yield the transitivity of ownership rights. If A has a right to restitution of X in the hands of B, and B obtains Y in exchange for X, A has the same rights in the substitute as in the original.").

55. Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) ("[W]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." (quoting Robertson v. United States, 343 U.S. 711, 714 (1952)).

56. Salman v. United States, 137 S. Ct. 420, 423 (2016) (describing how insider trading liability may be found "where the tipper receives something of value in exchange for the tip"); Dirks v. SEC, 463 U.S. 646, 664 (1983) (holding that a breach of duty may be inferred from "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter").

partly in terms of quid pro quo, lending conceptual priority to the latter. This is typically achieved by a requirement of gratuitousness, which is in turn usually defined as a lack of quid pro quo or consideration.[57] Similarly, because widely held social norms make the proper deployment of the exchange form to a considerable degree dependent on social context, the choice of whether to deploy the form is often used as an opportunity to clarify the context. For example, in the context of friendship (and also philanthropy) we often take pains to resist characterizing even our reciprocated services in exchange terms, while commercial actors who want to establish their arm's length relationships often take pains to do the opposite.

In the realm of theory, exchange figures explicitly in the standard textbook definitions of two of the most important concepts for socioeconomic theorizing: market and commodity. Debra Satz aims to capture the common understanding when she characterizes markets as "institutions in which *exchanges* take place between parties who voluntarily undertake them."[58] And as Friedrich Engels famously wrote, "[T]o become a commodity, the product must be transferred to

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57. *See* RICHARD HYLAND, GIFTS: A STUDY IN COMPARATIVE LAW 129-32 (2009). I am indebted to Hyland's monumental work, but would like to register a minor, but important, quibble with his suggestion that the anthropological definition of gift is different from the legal one. More specifically, he says that if the law were to have adopted the anthropological definition it may have defined gift as "the transfer of an object in the context of a relationship that implies obligations to give, to receive, and to reciprocate." *Id.* at 128. He is of course referring to Marcel Mauss's classic work, but Mauss is clear that he was describing a conceptual scheme that didn't differentiate, as ours does, between the notions of gift and quid pro quo exchange. In other words, notwithstanding the title of his work, Mauss is admirably clear, as we would put it today, that the practices he describes do not reflect a different *conception* of our concept of gift, but rather a different *concept* altogether. *See* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES 93 (W.D. Halls trans., Routledge Classics 2002) (1950) ("The terms that we have used—present and gift—are not themselves entirely exact. We shall, however, find no others. [The] concepts of law and economics that it pleases us to contrast . . . it would be good to put them into the melting pot once more. We can only give the merest indications on this subject. Let us choose, for example, the Trobriand Islands. There they still have a complex notion that inspires all the economic acts we have described. Yet this notion is neither that of the free, purely gratuitous rendering of . . . services, nor that of production and exchange purely interested in what is useful. It is a sort of hybrid that flourished.").

58. DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 15 (2010) (emphasis added) (citing Samuel Bowles, *What Markets Can—and Cannot—Do*, CHALLENGE, July/Aug. 1991, at 11). Defining markets in terms of exchange is prevalent. *See, e.g.*, JASON BRENNAN & PETER M. JAWORSKI, MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS 4 (2016) ("A market is a relationship where the mode of interaction is consensual exchange. Broadly speaking, a market is the voluntary exchange of goods and services for valuable consideration." (footnote omitted)).

the other person, for whom it serves as a use-value, through the medium of exchange."[59] And yet the concept of exchange itself has received practically no attention from theorists working on these topics, an omission that has not only rendered our theoretical grasp of markets and commodities deficient, but that has also stood in the way of efforts to settle the normative question of whether or not certain goods and services ought to be for sale. In particular, while participants in debates about market structures—either writ large or concerning the commodification of specific, controversial goods and services—often take for granted a close connection between exchange and instrumental motivation, the nature of the relation is never articulated or clarified, and certainly never argued for, making it difficult to determine whether certain objections presuppose features of exchange that are merely contingent aspects of contemporary markets, or whether the objections run deeper.[60]

Thus, notwithstanding its great theoretical and practical significance, it remains obscure what it takes to subsume two performances under the exchange concept such that we may truly say of each that it was done in exchange for the other. In what follows, I will fill this gap by providing an account of quid pro quo exchange that seeks to characterize the relation between the two performances (or, in other words, that seeks to elucidate the middle term of the quid pro quo formula). On this view, quid pro quo is a normative concept that makes essential appeal to the notion of debt. In brief, acts stand in an exchange relation, according to this account, when the parties regard those acts as satisfying two conditions[61]: first, that each satisfies the debt incurred by the other, and, second, that after the sequence of acts neither party shall owe the other anything on account of the other's act. That is, two acts constitute an exchange when it belongs to the mutual understanding of the parties that they will each be "all paid up" as far as those acts are concerned once they are completed. I will call the first condition "Reciprocal Debt Satisfaction," and the second condition "No Residue."

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59. 1 KARL MARX, CAPITAL 131 (Ben Fowkes trans., Penguin Classics 1990) (1867) (definition inserted by Engels).

60. For recent criticism of markets (whether markets generally, or only in specific goods) that emphasizes the role of instrumental motives in exchange, see especially ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); G.A. COHEN, WHY NOT SOCIALISM? (2009); and MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012). Brennan and Jaworski base their defense of markets on the contingency of certain of the objectionable features of markets, but rest their case partly on the testimony of historical anthropologists rather than on a philosophical account of exchange. BRENNAN & JAWORSKI, *supra* note 58.

61. Once again, I am here using "acts" in its broad sense to refer to courses of conduct that might consist of some combination of acts or omissions. I will dispense with this disclaimer henceforth, allowing context to clarify when this sense is intended.

These conditions are individually necessary and jointly sufficient for the relation of reciprocal remuneration, the traditional conception of a bargain. The appeal to debt in the first condition supplies me with motive and opportunity to provide an account of that most interesting species of obligation, every bit as important and neglected as exchange itself. Although the significance of debt obligations transcends the narrower context of exchange, it is, I believe, our failure to come to terms with the former that has stood in the way of an adequate understanding of the latter.

Although this account is chiefly motivated by the counterexamples to competing theories, it is reinforced and illuminated by a particular genealogical explanation, elaborated elsewhere at greater length,[62] that sees the quid pro quo exchange form as an attempt to provide a practical solution to a practical problem. I am not the first to explain the exchange form by appeal to a problem it was in some sense designed to solve. David Hume and Adam Smith, for example, employed a similar strategy.[63] For these thinkers of the Scottish Enlightenment, exchange solves the problem of how to extract services from nonintimates who, bereft of the care and concern that might otherwise provide a motive, lack sufficient incentive to lift a finger. Quid pro quo exchange solves this problem by furnishing others with an incentive to serve—namely, by sweetening the deal—and it is this function that, on the Scottish Enlightenment conception, explains its features.[64] Although it is of course true that we commonly resort to offers of exchange to extract services from those who require an incentive, this is not particularly illuminating as an explanation of the distinctive features of the exchange form. For one thing, we may often care a great deal about the fates of people who lie beyond our narrow circle and yet reasonably insist on getting something in exchange for our services to them. More importantly, quid pro quo exchange is hardly distinctive in being a form or norm of reciprocity that can be used, given the right circumstances, to extract services from those who are not disposed to help out of affection for the beneficiary or other benevolent motives. As I have noted, quid pro quo exchange is a distinctive species of reciprocity, and it is

62. Jed Lewinsohn, Quid Pro Quo*:* A Theory of Exchange (Nov. 2019) (unpublished manuscript) (on file with author).

63. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 331-37 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739-40); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14-15 (Edwin Cannan ed., The Modern Library 1994) (1776).

64. *See* HUME, *supra* note 63; SMITH, *supra* note 63, at 15 ("Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of.").

hardly the only one that can be used to help elicit favors from self-interested strangers—a fact made vivid by the distinctive intertribal transactional practices brought to light by Marcel Mauss, as well as by the manifestly nonaltruistic, yet occasionally effective, adoption of tit-for-tat policies in certain iterated game scenarios.[65]

While the problem singled out by Hume's and Smith's accounts does not illuminate the distinctive nature of quid pro quo exchange, there is another problem that does. This problem, which is not only solved by exchange but also explains its distinctive features, is that of facilitating the giving and taking of beneficial services without incurring lasting bonds and responsibilities—duties that might otherwise be generated if services were provided gratuitously. In this view, it is the applicability of expressions such as "we're good" or "we're done" in the wake of the performances that is the hallmark of exchange, not the inducement of services from those who are indifferent to our wishes or welfare. This function explains, most obviously, the significance of the second condition of the account, No Residue, as that condition explicitly states, as an element required if the parties' understanding is to constitute an exchange agreement, that in the aftermath of both performances there will be no remaining obligations owing to either performance. It also sheds light on the first condition, Reciprocal Debt Satisfaction, for when services are rendered in the course of an exchange, the debts of gratitude that otherwise might arise if the services had been gratuitously rendered are displaced by payment obligations that are reciprocally satisfied.

A. The Motivational Theory of Exchange: A Critique

Before introducing and defending the remuneration theory of exchange, I will consider and reject the reciprocal-inducement alternative. As we have seen, the prevailing doctrinal orthodoxy (reflected in the Second Restatement) appeals to the reciprocal-inducement theory of exchange as the basis of the reciprocal-inducement account of consideration: if a promise must stand in an exchange relation to the promisee's act (whether counterpromise or performance), and the exchange relation is equivalent to the relation of reciprocal inducement, then it follows that the promise must stand in the relation of reciprocal inducement to the promisee's act. Thus, while I will, in the next Part, offer reasons to reject reciprocal inducement as a theory of consideration on grounds of justification and fit, this Section's rejection of reciprocal inducement as a theory of exchange will serve to undermine the textbook derivation of the corresponding theory of consideration.

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65. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (2d ed. 2006); MAUSS, *supra* note 57.

I will first state the motivational theory in its strongest form by refining a rudimentary but intuitive formulation into a more sophisticated and plausible one. According to the simplest version, *B*'s act *X* and *A*'s act *Y* stand in a quid pro quo relation if each is done with the aim—at least the partial aim, as there may be other motivating reasons too—of bringing about the other. Note that this simplified definition is subjective, in the sense that satisfying it requires actually possessing the relevant motives. The first modification will be to recast the condition objectively—to require the manifestation, rather than the possession, of the motives in question. The reason to prefer the objective version is simply that it better accords with our intuitions about the cases. No one would deny that in an ordinary sale of goods for money, the transfer of the goods and payment of the money stand in a quid pro quo relation.[66] And yet it is not difficult to conjure cases where the actual presence of the relevant motives is lacking. For example, *B* might order something from *A*'s store solely because she knows *A* could use the money and will not accept handouts. In this case, the delivery of the goods (goods that *B* disposes of as soon as they arrive) is a side effect, not an aim, of *B*'s transfer of the money. If the goods had gotten lost in the mail, none of *B*'s aims would have been frustrated. Hence the modification to an objective formulation.

To motivate the second modification, let us consider bilateral sales agreements that specify, as they often do, the sequence of performances (such as payment upon delivery). Supposing that performance *X* (delivery of the goods) comes before performance *Y* (payment of the money), we cannot say that the latter was done in order to bring about the former. After all, the goods had already been received by the time payment was tendered. It is not difficult to modify the theory in light of such cases; the key is to realize that although *Y* was not done with the aim of bringing about *X*, it was done knowingly in fulfillment of

66. Even Williston—whose dual commitments to Langdell's definition of consideration and the remuneration conception of exchange led him to the tortured position that each promise in a bilateral sales contract is payment for the other—did not deny that the fulfillments of those promises *also* typically stand in payment relations to each other:

> Doubtless it is almost universally true that the performance promised by one party to a bilateral agreement is intended as the consideration for the performance on the other side. A double exchange is contemplated. Promise is the price or exchange for promise and later performance for performance, but this is not always true.

Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 504 n.2 (1914). Williston's caveat is designed to accommodate those contracts, such as insurance or surety contracts, in which a party will be called upon to perform only given some further condition that may not come to pass. *See id.* ("If A. promises B. to guarantee a debt of one hundred dollars due B. from X. in return for B.'s promise to A. to guarantee payment of five hundred dollars due A. from Y., the performances are in no sense in exchange for one another, or the consideration of one another, and yet there is a contract."); *see also infra* note 92 and accompanying text.

an obligation that was itself assumed in order to bring about *X*. Accordingly, we must say that act *X* stands in a relation of reciprocal inducement to act *Y* if each is done with either the apparent aim of bringing about the other or (knowingly) in fulfillment of a commitment which was itself undertaken with the apparent aim of bringing about the other.

Further questions arise for the reciprocal-inducement theory of exchange, most importantly whether it is a necessary condition of exchange that either or both parties be (apparently) willing to perform only if they expect to get something in return. But we need not address this further question of whether a threat to withhold performance unless payment is rendered is a necessary feature of an exchange in order to offer decisive counterexamples to the theory. Indeed, the theory provides neither necessary nor sufficient conditions for quid pro quo exchange (with or without this extra condition). I will begin by challenging the sufficiency claim, showing that the theory is too weak (in that it is overinclusive).

Consider, first, the case of two individuals who are considering whether to enlist in the armed forces. *A* and *B* are close friends, and each would rather enlist in the army (enroll in the club, jump off the cliff, etc.) than not enlist at all, *provided that the other enlists as well*; but each would also rather not enlist than enlist if the other does not. In such circumstances, each might commit to enlisting so long as the other does—a commitment manifested by a firm handshake after a series of "I will if you will" pronouncements. They execute the plan, and each enlists. I assume that no one, least of all *A* and *B*, would say that their respective enlistments constitute a quid pro quo—that is, were done in exchange for the other. And yet the reciprocal-inducement conditions are plainly satisfied, as would be the further condition that each would not have enlisted absent the expectation that the other would too.

For another important example, consider a loving aunt who, wishing to encourage her nephew's growing interest in fine art, offers to gift him thousands of dollars provided that he promises to use the money to purchase art (and not wine, diapers, or other things). The nephew accepts the generous offer by making the promise, and the two proceed to follow through on their commitments: the aunt transfers the money, and the nephew uses it to enhance his collection. The question to consider is whether the conditions of reciprocal inducement have been satisfied by what is patently a gift transaction. Now, there are certainly cases where someone makes a conditional gift offer in the avowed hope that it will be rejected. (For instance, "I'd prefer if you found someone else to help you; however, I'll do it if you want me to, so long as you promise to hold the ladder while I'm up there.") In such cases of reluctant gift offers, the offeror manifestly lacks the aim of inducing acceptance. But there are also cases where a gift offer is made eagerly—that is, with the hope and aim of getting the offeree to accept—and we may suppose that the aunt's promise to her nephew belongs to this class.

More exactly, the aunt makes the promise with the aim of getting her nephew to buy art, and goes on to transfer the money for the same reason (and also in fulfillment of her promise). Turning to the nephew, his purchase of the art is made in fulfillment of a promise that was itself made with the aim of getting his aunt to transfer the money. So the money transfer and the nephew's purchase satisfy the conditions of the reciprocal-inducement theory of exchange. And yet the execution of this agreement does *not* involve a bargain or quid pro quo exchange by ordinary lights, and thus the case serves as another counterexample revealing reciprocal inducement to be too weak.[67]

Turning to the necessity claim, the reciprocal-inducement theory of exchange is also too strong (in that it is underinclusive). A student looking for bookshelves frequents a Vitra store to purchase the iconic midcentury design. He makes several inquiries to the store manager, whose enthusiasm diminishes with every question. Eyeing the student, he reaches the conclusion that the student is unlikely to be able to afford the exorbitantly priced item. Allowing his annoyance to get the better of him, he taunts the student, revealing his incredulity in explicit terms. Indeed, the manager is so sure of the student's modest financial position that he commits to selling the piece to the student at a significantly discounted rate, feeling certain that the student will be unable to purchase the item, even at the lower rate, before the offer expires. As it happens, the student's appearance is not reflective of his financial condition. Reaching into the pockets of his (stained) pants, he produces the money and, with relish, accepts the offer. The manager is bound and must deliver the shelves at the lower rate (even if it will cost him his job). A sale has occurred, and the ensuing delivery of the shelves and payment of the money constitute a quid pro quo. Yet the manager performed only because he was bound by a commitment that he manifestly undertook for reasons other than a wish to receive the student's money. Indeed, his aims, actual and apparent, were frustrated when the student accepted the reckless offer.[68] The

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67. I digress to observe that each of the previous two cases also serve as counterexamples to the weaker, and less plausible, "I will if you will" theory of exchange—discussed *supra* note 50—according to which two acts stand in an exchange relation just in case they are executions of an "I will if you will" agreement. Indeed, even the reluctant gift offer case constitutes a counterexample to the "I will if you will" theory, even though it can be handled by reciprocal inducement. On the other hand, the next counterexample is effective only against reciprocal inducement, and not against the "I will if you will" account.

68. Observe the difference between this case and the case of so-called nominal or sham consideration. When you "buy" the family farm for a dollar, the scare quotes are entirely appropriate. In this case, by contrast, there is nothing problematic about saying that the student bought the bookshelves at a steep discount, and scare quotes are neither necessary nor proper. Indeed, any legal regime's allowance of nominal consideration must be seen as an exception to, rather

conditions of reciprocal inducement are not met and are therefore too strong, ruling out genuine instances of exchange.[69]

B. Remuneration Theory of Exchange: A Defense

By contrast, the remuneration theory of quid pro quo locates the dispositive element of exchange in the (perceived) normative significance of the performances, not in the actual or apparent motives that led the parties to perform them. Specifically, two acts constitute an exchange when the parties regard each act as payment for the other. The task that remains is to explain this relation of reciprocal payment. Again, I believe that it is our failure to articulate the distinction between debt and nondebt obligations that has been the source of our difficulty isolating and articulating the relevant element of exchange. For as we have seen, the mere presence of obligations, even mutual ones, is not sufficient to differentiate quid pro quo exchanges from the broader class of "I will if you will" agreements. Armed with the more fine-grained notion of debt obligation, however, we will at last be able to cordon off exchanges.

The first element of quid pro quo, Reciprocal Debt Satisfaction, invokes the notion of debt obligations. The category of debt is reflected in our ordinary language, which reserves the language of "debt" and "indebtedness" for some obligations (e.g., the obligation to repay incurred upon borrowing or upon negligently damaging another's property) while withholding it from others (e.g., the obligation to provide incurred upon procreating or to go home for the holidays

than a fulfillment of, a consideration, justified, if at all, by the manifested intentions to be *legally* bound.

69. A more important class of cases that could be used to establish the same point (the underinclusivity of the motivational conception of exchange) is the class of so-called "prove me wrong" contracts, where sellers of goods or services demonstrate their faith in their product by offering to provide something of value to anyone who can detect some particular flaw. Here, too, the offerors may be serious but are manifestly not aiming for acceptance. For a final counterexample, showing that the conditions of reciprocal inducement are too strong, consider an independently wealthy artist who finds the idea of selling art disgusting. Notwithstanding these views, the artist puts a painting on auction because he believes that it will only garner critical attention if enough people commit to buying it at a high price. This is a compromise for him, and so, in the wake of the auction, he executes a prior, publicly broadcasted plan and flushes the money down the drain as soon as the highest bidder's check clears. Here, too, receipt of the money was only a side effect, and not an aim (actual or apparent), of the artist's prior commitment to give the art to the highest bidder. If the check had not cleared, the artist's apparent aims would not have been frustrated in the slightest. While the artist's promise to transfer the art was made with the apparent aim of inducing the counterpromise, it was not made with the apparent aim of inducing the performance of that counterpromise (i.e., receiving the payment). And yet, when the money and the painting are transferred, they stand in an exchange relation.

upon giving assurance to a nagging parent). More significantly, debt obligations are distinguished by a logical structure that can be given precise articulation.

To understand the mark of debt, we must distinguish between an obligation's performance, fulfillment, and extinguishment conditions. An obligation's performance condition, in my terminology, designates the element in common between two outstanding debts, each requiring payment of five dollars to the same individual. Intuitively, we may say that an obligation's performance condition specifies the course of conduct called for by the obligation. An obligation's fulfillment conditions are the necessary and sufficient conditions for fulfilling the obligation. When obligations are fulfilled, they are typically extinguished—that is, they cease to exist. But fulfillment is not the only way to eliminate an obligation. Just as the desire for food may be extinguished either by eating or by getting punched in the stomach, so too are there other ways of eliminating an obligation beyond fulfilling it. Some that are especially relevant in the context of debt are forgiveness (that is, waiver), set-off, death, and discharge in bankruptcy.[70]

Armed with these distinctions, we may state the distinguishing mark of debt obligations. In brief, what serves to differentiate debts from other obligations is that satisfaction of a debt's performance conditions does not guarantee the debt's fulfillment (herein, the debt's satisfaction). Suppose, for example, that *B* has an outstanding debt in the amount of five dollars due to *A* on account of a loan. We cannot infer, merely from *B*'s payment of five dollars to *A* (that is, merely from the satisfaction of the performance conditions), that *B* has satisfied the debt. After all, *B* may be paying the purchase price to acquire additional merchandise from *A*, or *B* may be satisfying some other preexisting debt owed to *A* (or to some third party who directed payment to *A*). This, of course, raises the question of just what is needed, beyond performance, to satisfy a debt. What is needed to fulfill a debt obligation is not just performance, but performance in satisfaction of *that* particular obligation and not some *other* debt. This distinguishing feature of debt—that is, the distinctive mode of self-reference that figures in the fulfillment conditions—furnishes the possibility of accumulating multiple debts, each calling for the same conduct, and explains ordinary strictures against double counting (for instance, that a single payment of five dollars cannot satisfy two five-dollar debts). This, in turn, raises the question of how one performs in satisfaction of some particular obligation. But before we address this question, let us first consider the contrasting case of nondebt obligations, as well as an important objection to my position.

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70. I do not mean to suggest that these are always possibilities—whether they are will depend on the subject matter as well as on the rules of customary or legal regimes. But when they are possible, they are alternative ways, distinct from fulfillment, of extinguishing obligations.

Although gratuitous promises or assurances can, I believe, generate debts, they often do not, and so we may look to them for illuminating, contrasting examples. In these cases, there is usually no distinction between an obligation's performance and fulfillment conditions. This is because there is typically no self-referring element in the obligation's fulfillment condition—that is, no reference to "*that* particular obligation" within the conditions of fulfillment—which means that there will be no question raised about double counting, and no possibility of stacking one such obligation on top of another.[71] If I gratuitously assure someone that I will be present at a certain event, or that I will sing a certain song at a karaoke party, or that some child will have lunch money in their pocket before setting off for school, whether I have done these things is usually all we need to know to determine whether I have fulfilled the obligation. Of course, this is not to say that the reasons for which I followed through (or, more to the point, my conception of my own performance) are utterly irrelevant in such cases—they will be most relevant for an assessment of my character and will indicate, in particular, whether I take my obligations seriously. (Additionally, depending on the case, my motivating reasons for conforming may also cast light on my level of care and concern for the people who have reasonably relied on me.) But these are distinct from the question whether I have fulfilled the obligation to perform that I incurred when I gave someone my word, and, in particular, these matters will not raise the question whether I need to perform again in order to conform to the understanding that had been reached when I gave my word.[72]

In order to get a better grasp on the conceptual structure of debt, and in order to consider an objection to my account of quid pro quo exchange, we must introduce a distinction between performance conditions that are repeatable and those that are not. Repeatable performance conditions are ones that can, in principle, be satisfied more than once. Transferring a certain sum of money to a certain person is a ready example, but repeatable performances are not limited to money payments. I may owe you five (generic) bushels of corn or one hundred push-ups, and these too are examples of obligations with repeatable performance conditions. By contrast, if I am obligated to do something that can be done only once (for instance, destroy some particular idol or remove *this* pile of snow from *this* driveway on *this* occasion), this would be an example of an obligation with a nonrepeatable performance condition. Given this distinction, some might be tempted to deny that the normative concept that I have identified as

71. Of course, in particular cases one may build the self-referring element into the content of a gratuitous promise or assurance. This would be a way of generating a debt by a gratuitous commitment, and I certainly do not mean to suggest that no such gratuitous commitments give rise to debts.

72. For a powerful statement of this general position regarding obligations in general, see T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME (2010).

the concept of debt can apply at all to obligations with nonrepeatable performance conditions. After all, they might argue, the distinction between debt and nondebt obligations that I have drawn has practical import only where it is *possible* to accumulate, and satisfy, multiple debts, each one calling for its own rendition of the same type of performance. And since this is only possible with respect to obligations with repeatable performance conditions, the class of debt obligations ought to be viewed as limited accordingly.

Such a view of the scope of debt obligations certainly would be incompatible with my account of quid pro quo exchange: after all, the possible objects of exchange are surely not limited to repeatable acts (for instance, you may offer me a sum of money to smash some particular idol to smithereens, and we may complete the exchange). However, such a position regarding the scope of debt takes too narrow a view of the practical significance of an obligation's classification as debt and should be rejected. To be sure, the advantages of being able to create debt obligations are particularly salient in cases involving repeatable performance conditions: when multiple debts of this kind are accumulated, each one can receive its own separate rendition of the same repeatable performance.[73] But, as I will show, this by no means trivializes the significance of the distinction between debt and nondebt obligations when the performance conditions are nonrepeatable. On the contrary, reflection on exchanges involving obligations with nonrepeatable performance conditions shows not merely that determining such obligations to be debts carries practical significance; stronger still, our intuitions concerning such cases can only be explained on the assumption that the relevant obligations, despite having nonrepeatable performance conditions, are genuine debts. Thus, consideration of these cases does not merely serve to rebut an objection against my position but also constitutes a positive argument in favor of the thesis that all quid pro quo exchanges (whether involving repeatable performances or not) fulfill Reciprocal Debt Satisfaction.

My analysis of such cases relies on a final distinction between species of debt. I have said that in order to satisfy a particular debt obligation one must satisfy the obligation's performance conditions in satisfaction of *that* particular obligation and not in satisfaction of any *other* debt. "Any other debt" in this formula is susceptible to two interpretations, corresponding to two different species of debt. On the weak reading, "any other debt" means any other debt owed to the same creditor. On the strong reading, "any other debt" means any other debt *tout*

73. Indeed, this is presumably why the language of "debt" is most naturally invoked in reference to those debts with repeatable performance conditions. In my view, however, this should be seen as a superficial, if understandable, feature of the language, on par with the general tendency to restrict usage of the term "payment" to remunerative acts consisting of money payments (rather than the transfer of goods, say).

court, whether owed to the same creditor or another one. There is no reason to think that all debts fit the same mold, and it will be a function of the understanding of the parties—at least when the debts are the product of consensual agreement—whether the debt is a strong or a weak one.[74]

With this distinction in view, I will proceed to demonstrate the significance of the distinction between debt and nondebt obligations even in cases involving nonrepeatable performance conditions. Let us begin with a case. Suppose that *B*, a shop owner, has an interest in having snow removed from a common lot that her customers use for parking when frequenting her shop. *B* calls *A*, who has a private snow-removal business, and expresses an interest in hiring him to do the job. *A* quotes *B* his rate (listed on his website), and *B*, agreeing to pay at that rate, hires *A* to do the (nonrepeatable) job. *A* proceeds to do the job and sends *B* the bill. Before paying the bill, however, *B* learns that *C*, another storekeeper in the neighborhood with a similar, independent interest in having the snow removed from the same particular lot, had independently hired *A* to do the same job and had already paid the bill that he, too, had been sent. The question, then, is whether *B* must pay *A*, or whether she can say, as a valid defense, "you've already been paid." Opinions will differ, but I speculate that many will say that the latter is a valid defense against *A*.[75] Rather than offering an opinion about whether *B* ought to pay, my present claim is merely that "you've already been paid" can be a valid defense in this case only given two conditions. First, each of *A*'s commitments, made to *B* and to *C*, must have been the undertaking of a debt obligation to remove the snow from the particular lot. Second, *A*'s commitment to *B* must have been the undertaking not just of a debt obligation, but of a *strong* debt obligation. Given this understanding of *A*'s commitments, *A* cannot fulfill both debt obligations by the single act of removing the snow from the lot, since a strong debt obligation cannot be fulfilled by an act performed in satisfaction of a different debt obligation. Accordingly, having already collected payment from *C* on account of completing his end of the deal (by removing the snow from the lot), *A* cannot also claim to have fulfilled the obligation owed to *B*, and hence cannot demand payment from *B* for having done so. This, in turn, shows the significance of understanding the obligation to perform as a debt even when the performance condition is nonrepeatable.

Defending the claim that *B* has a valid defense *only if A*'s obligation to her was a strong debt requires eliminating a competing explanation: the alternative theory that *B* has a valid defense because, before entering into the agreement

74. Whether a tortfeasor's obligation to compensate a victim is a strong or a weak debt will be a function of either the practice (of the tort regime) or of the moral principles underlying the practice.

75. Notice, though, that this verdict still leaves open the question whether *B* owes anything to *C*.

with *B*, *A* was anyway planning to do the job to fulfill a previous commitment. This competing explanation can be rejected on two grounds. First, the original description of the case, while specifying that *C* was first to pay the bill, was silent about the sequence of contracting; accordingly, we may enrich the description of the case and specify that *B* was first to contract with *A*, even though *C* was first to pay. When we enrich the description in this way, the earlier intuition, I submit, loses none of its force. Second, we may establish the same point by introducing a variation of the original case. In this variation, before paying the bill *B* learns not that *C*, who has an independent interest in *A*'s doing the job, had already paid the bill that was sent to him but rather that *A* (or *A*'s agent) had, prior to *A*'s contracting with *B*, already gratuitously committed to *C* that *A* would do the job. In this case, opinions might differ as to whether *A* is a scoundrel for not informing *B* about his prior plans and commitments (if *A* was, indeed, aware of them at the time of contracting with *B*). But what is clear enough is that *B* is obligated to pay *A*, notwithstanding *A*'s prior commitment. Whereas "you've already been paid" has considerable force as a defense, "you didn't tell me you were going to do it anyway" does not.

As I stated, not everyone will share the judgment that *B* has a valid defense in the original case. Even those who resist this judgment, though, cannot plausibly deny either that *A*'s obligation is a debt or that this fact carries normative significance; rather, their judgment that the defense is not valid depends on the view that *A*'s obligation is a weak debt rather than a strong one. To see this, we need only consider another variant of the original case, in which *C* is not some other storekeeper with an independent interest in clearing the lot but rather is *B*'s agent (perhaps the store manager). Due to a failure of coordination (perhaps owing to the snowstorm), *B* and *C* each call *A* and separately enter into agreements with him to clear the lot. After doing the job, *A* sends bills to their separate addresses. Sometime *after C* has paid the bill that was sent to him but *before B* has paid the bill that was sent to her, they confer and become apprised of the situation. Surely in this case, "you've already been paid by my agent" is a valid defense. But this could only be explained if *A*'s obligation is understood as a debt, albeit a weak one.[76] If it were not, the prospect of "double counting" would

76. These intuitions do not depend on *A*'s fraudulent misrepresentations: they do not change if we suppose that one of the contracts was conducted by *A*'s agent, who likewise suffered from a failure of communication with his principal, so that no fraudulent misrepresentations occurred. Likewise, we must not think that the intuitions can be explained by positing that only a single agreement was forged, despite the two job orders. It is untenable to say that there was only one "agreement in fact," for the agreements have different properties (e.g., they occurred at different times). Indeed, in analogous cases involving repeatable performances—for example, when a failure of communication leads both a principal and her agent to each purchase

raise no concerns, and *A* would be able to claim that he has performed his side of each of the two agreements. Only if the obligations are debts could *B* resist paying on the grounds that *A* cannot fulfill each of the two agreements with a single performance.[77]

Having established the significance of classifying an obligation as a debt, even when the performance conditions are nonrepeatable, we are nearly done with our treatment of Reciprocal Debt Satisfaction, the first element of quid pro quo exchange. We are left only with the question of how to interpret the self-referential component in the definition of debt—that is, to determine what is needed to perform in satisfaction of *this* debt (and not some *other* one). We may immediately reject, as too demanding, a view that would require, as a condition of satisfying a particular debt obligation, that the performance be rendered with the *aim* of satisfying that particular obligation. After all, a debt could surely be satisfied when its satisfaction is just a foreseen side effect, rather than an aim, of the performance. (My aim, suppose, is solely that you have five dollars in your pocket on a given day, and I know that you do not accept handouts.) It is tempting, therefore, to retreat to a knowledge requirement, according to which the

the same fungible commodity on Amazon, even though only one is needed—there is no impulse to say that only a single agreement had been forged with Amazon. (Even if the mistake entitles them to money back—and it is by no means clear that it does—the explanation for this would not be that only one agreement had been forged; rather, the explanation would be that they had *intended* to forge only one such agreement.)

77. There are many other cases of quid pro quo exchanges involving weak debt. One such case, important for contract law, involves three-party versions of "preexisting duty" cases, which are discussed in their two-party versions in Section III.B.2 *infra*. In such three-party preexisting-duty cases, discussed *infra* note 121, a promisor enters into an agreement to pay for a performance that the promisee has already contracted with a third party to provide. In some such cases, the promisor is aware of the promisee's outstanding obligation before making the commitment, but promises to pay for the performance, usually as a result of the promisee's credible threat not to fulfill the preexisting duty unless he gets more than what was originally promised by the third party. Sometimes such threats will be "fair and equitable," as when the cost of performance has, unforeseeably, risen considerably. With respect to the "fair and equitable" cases, the promisor surely cannot use the "you've already been paid" defense to avoid making the additional payment, as she was apprised of the preexisting debt in advance. Since this defense is not available, we cannot say that the promisee's second promise to perform created a strong debt. But even in this case, we must conceive of the promisee's obligation as a weak debt rather than a nondebt obligation. After all, here too, if the promisor's agent had—due to a failure to communicate with his principal—gone on to make the same deal with the same promisee (the one threatening not to do the job unless he received more), the promisee would not be entitled to collect from both the agent and the principal after completing the job. (And here, too, we needn't suppose that the explanation of our intuitions has anything to do with fraud or misrepresentation. After all, let us suppose that one of the renegotiations was conducted with the *promisee's* agent, who likewise suffered from a failure of communication with *his* principal.)

performance must be accompanied by an understanding—perhaps a manifested one—that in performing, the debtor is satisfying *this* obligation (and not some other debt). This might be right—and, if it is, it would be perfectly consistent with everything else I say in this Article. However, I believe that even this requirement is too demanding. It must be recalled that the motivation for differentiating debts from the broader class of obligations is *not* a concern with whether the agent has more virtuous mental states when fulfilling a particular class of obligations. Rather, the motivation is to explain why, in some circumstances, double counting of obligations is ruled out—that is, why multiple distinct obligations cannot always be discharged by a single performance.[78] Accordingly, I suggest that we should simply interpret the "in satisfaction" clause of the fulfillment conditions as weakly as possible while meeting this motivating concern. Thus, if a debtor has only one outstanding debt with a given performance condition, then performance is sufficient for satisfaction of the debt, provided the debtor does not specify that his or her performance is *not* rendered in satisfaction of the debt (for instance, as when he specifies that the performance is the creditor's birthday gift or for some new merchandise). It is only when the debtor has multiple debts calling for the same performance that specification (that is, an expression of an understanding that one's performance is satisfying a particular obligation) might be required. Even here, acts of specification may not be needed when custom or law dictates which performance pays off which debt.[79]

Before turning to the second element, one more observation is in order. It is, I have said, a necessary condition of quid pro quo exchanges that the parties understand their performances as satisfying Reciprocal Debt Satisfaction, a relation I have tried to explicate. But it does not follow from any of this that the law's decision regarding the *legal* rights and obligations that result from such understandings must perfectly hug the contours of the understandings themselves. For the law might have its own reasons for deviating from the parties' own understanding even in cases when it requires that understanding as a condition of enforcement.[80] So, for example, if the distinction between strong debt and weak

78. Very roughly, this double counting will be a relevant concern when the obligated performance is seen as in some sense a substitute for what the other party *gave* (in the case of contractual debts) or *gave up* (in the case of torts).

79. For example, a custom might adopt a first-in, first-out rule on which a given performance satisfies the oldest debt calling for a particular kind of performance if multiple such debts exist.

80. Even Seana Shiffrin, who has prominently criticized the law of contracts for allowing divergences between contractual obligations and promissory ones, acknowledges that divergence may be acceptable when there are "distinctively law-regarding grounds [for the divergence], such as the difficulty and expense of" enforcing the promise in a given case. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 733 (2007). I argue

debt is too refined to be easily ascertained, the law can treat all debt like weak debt.

Reciprocal Debt Satisfaction serves to explain why the nondonative collaborative agreements considered earlier (such as "I'll enlist, if you enlist") do not qualify as quid pro quo exchanges. When friends or members of preexisting cooperative units commit to plans involving the coordination of their activities, the ensuing obligations are not typically regarded as debts, and so do not typically give rise to problems related to double counting or to the possibility of stacking. While this first element states a necessary condition of exchange, however, it is not sufficient. The second element, as I have indicated earlier, specifies that the parties understand that, following the sequence of performance, no outstanding obligations (debt or otherwise) will remain on account of either performance. This second condition is not only motivated by the theoretical considerations regarding the function of the quid pro quo transactional form considered at the outset of this Part; it is also motivated, more concretely, by intuitions about particular cases.

One may show that the first condition is not sufficient by considering transactions that satisfy it even though one of the performances is mutually understood by the parties to constitute a gift. One sort of example involves nominal consideration (in jurisdictions that recognize such consideration). As I have already observed, when, merely in order to make a contract binding in law, one "sells" the family farm to a nephew for a dollar, the scare quotes are in order because there has been no genuine quid pro quo.[81] However, even in such a case, the parties may regard their performances as satisfying Reciprocal Debt Satisfaction. After all, it may be important to the donor that the transaction satisfies the prerequisites for legal recognition, which may include payment to the donor of the nominal amount agreed upon. Other conditional gift arrangements might illustrate the same point more vividly, as when a promise to give someone exclusive access to a huge tract of valuable land is made conditional only on the promisee's promise to reimburse the owner for the costs generated by the former's activities on the property (such as reimbursement for electricity bills). Depending on the context, the parties may reasonably insist that a quid pro quo has not transpired, even though the respective obligations would seem to stand in reciprocal debt relations. The promisee must make the reimbursement payments, and, in doing so, all strictures against double counting would seem to apply. Again, the common feature of these examples is that one of the performances in each case is regarded by the parties as a gift. On ordinary social understandings

against Shiffrin's position in Jed Lewinsohn, "By Convention Alone": Assignable Rights, Dischargeable Debts, and the Distinctiveness of the Commercial Sphere (Nov. 2019) (unpublished manuscript) (on file with author).

81. *See supra* note 68.

(and I do not mean nor need to defend these widespread understandings), gifts are precisely the sorts of transactions that generate lasting normative bonds—in particular, debts of gratitude or duties to reciprocate. Accordingly, No Residue is able to explain why such transactions are not genuine quid pro quo exchanges in spite of the debt relations.[82] More generally, No Residue ensures that in quid pro quo agreements, the exchanged performances are understood by the parties to give rise to no persisting debts of gratitude or duties to reciprocate.[83]

According to the remuneration theory, performances constitute a quid pro quo because the parties to the agreement understand those performances to satisfy Reciprocal Debt Satisfaction and No Residue. But on what basis do the parties reach this understanding? In the case of the first condition, we might say that they understand their agreement itself to be the explanatory ground of the debts contemplated therein. That is, the reciprocal debt obligations that the parties recognize are the product of mutual assent to stipulated terms. In other words, the terms describe reciprocal debt obligations that the parties take to obtain in virtue of their assent. The more difficult question is how they reach the understanding captured by No Residue—namely, that no debts of gratitude persist in the aftermath of the performances. The reason this question is difficult is that debts of gratitude can be contested (with such phrases as "oh, it was nothing," "it was a pleasure," "I was planning to do it anyway"), but they cannot be created by fiat or eliminated by waiver.[84] So if it belongs to the parties' understanding that the ensuing performances give rise to no such debts, it must also

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82. While I have emphasized that the donee's obligation can have the character of a debt, I am also assuming that the obligation undertaken by the donor can also have that character. Suppose that Smith, the owner of a valuable tract of land (Blackacre), agrees to gift to her friend Jones exclusive use rights to Blackacre (rights that have a high market value), on the occasion of Jones's wedding, provided only that Jones agrees to reimburse Smith for any taxes that accrue from the transfer. Jones gratefully agrees, but, before performing, Smith incurs a debt ($debt_2$), owed either to Jones or to a third party, which can be satisfied by transferring to Jones the use rights over Blackacre (absent any commitment to reimburse for the taxes). If Smith transfers Blackacre to Jones in satisfaction of $debt_2$ she cannot also claim to have fulfilled her wedding day commitment, and, accordingly, cannot demand reimbursement payments from Jones for the taxes.

83. We may also note that fulfillment of No Residue does not entail fulfillment of Reciprocal Debt Satisfaction. To see this, consider again the case of the two friends who agree to enlist together in the army, and then subsequently carry out the plan. Here, debts of gratitude do not arise and No Residue is satisfied. The same may be true of many genuinely shared, mutually beneficial activities, like the execution of a plan to play tennis on a certain occasion.

84. This was recently emphasized by Barbara Herman. *See* Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 391 (2012). In conversation, Ben Eidelson has suggested to me a plausible explanation for the nonwaivability of debts of gratitude: the gratuitous waiving of such a debt would be pointless, since it would simply result in the creation of a new debt of gratitude, this time incurred by

belong to their understanding that there are features connected with either the performances themselves, or their agreement to perform them, that preclude those debts from existing.

But what are these vitiating features? The mere fact that each party stands to gain from the execution of the agreement cannot be enough. To see this, consider two friends, *F* and *G*. *F* helps *G* edit *G*'s long article one weekend, while *G* helps *F* research wedding venues the following weekend. While the reciprocity these friends exhibit is hardly an insignificant feature of their relationship, the parties will not typically walk away from this sequence with *no* debts of gratitude; rather, at least in many cases, they will walk away with two. These debts, unlike commercial ones, are not only impervious to waiver but also unsusceptible to elimination via set-off. We may note that nothing changes at all if we add the fact that the parties agreed to this plan in advance. That is, the parties agreed to a plan involving two favors on successive weekends, provided that they do not adopt the plan with the understandings that constitute a quid pro quo agreement. And they may have subsumed the favors under a single plan for many reasons other than an understanding that each one is payment for the other. For example, subsuming both favors within a single plan may have been the only way to coordinate busy schedules or may have merely reflected anxiety that the friendship was becoming too imbalanced. In many such cases, the friends will each walk away feeling appropriately grateful on account of the other's performance. Accordingly, we have not yet located the bases upon which the parties reach the understanding that satisfies No Residue.

This problem, I believe, explains the connection between quid pro quo exchange and instrumental motives—that is, between doing *X* in exchange for *Y* and doing *X* in order to get *Y*. The connection runs very deep. One of the oldest surviving records of the oldest-known Greek script (Linear B) is a report of an exchange transaction ("[fourteen female] slaves of the priestess" in exchange for "sacred gold"), and the term for "exchange" that is used (transliterated as "e-neka," typically translated as "on account of") is a motivational one.[85] There are also common-law authorities within our purview that refer, albeit loosely, to the "price" and "motive" of a contract in a single breath, thereby drawing a connection between the notion of remuneration and that of inducement.[86] At the very

the preceding waiver. Of course, this supposes that the waived debt and the new debt would be identical in magnitude, an assumption that may be contested.

85. COLIN RENFREW, ARCHAEOLOGY & LANGUAGE: THE PUZZLE OF INDO-EUROPEAN ORIGINS 61 (1988) ("At Pylos: slaves of the priestess on account of [eneka] sacred gold: 14 women.").

86. For example, Blackstone remarks that "[t]he civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration." BLACKSTONE, *supra* note 36, at *446.

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. But I believe that the connection is even stronger and of a conceptual nature. Although, as we have seen, the apparent motives that reciprocal inducement picks out are neither necessary nor sufficient for quid pro quo exchange, I submit that they often serve as the basis of the parties' understanding that satisfies No Residue. After all, on standard conceptions of gratitude, debts of gratitude are sensitive to the motives and attitudes that move a benefactor to confer the benefits. Accordingly, in many cases it is precisely each party's conception of the instrumental, nonaltruistic motives of their counterparty that supports their common understanding concerning the absence of debts of gratitude. In these cases, parties who understand themselves to be "all paid up" following the sequence of beneficial performances also understand themselves, rightly or wrongly, to possess these instrumental motives and attitudes.

Several further observations are in order. First, the instrumental motives in question are not the only possible vitiating factors that can support the parties' understanding concerning the absence of debts of gratitude. Indeed, the earlier example of the student in the Vitra store is a case in point. The sale in that case demonstrated that reciprocal inducement is *not* a necessary condition of quid pro quo exchange. But notice that there are other features of that case to which the parties could readily appeal in reaching their understanding concerning the absence of debts of gratitude. Most obviously, it is not just that the manager was not trying, or expecting, to benefit the student or to satisfy his wishes; stronger still, what the manager was aiming for, and expecting, was to embarrass or expose the student by making an attractive offer he would be unable to accept.[87]

Second, while these imputed motives are strong enough to vitiate a debt of gratitude, they are weak enough to coexist alongside the noninstrumental valuing of one's service and one's counterparty, and do not entail or presuppose an

87. When the apparent motives picked out by reciprocal inducement do serve as vitiating factors, these apparent motives must correspond to the strengthened version of that theory, considered earlier, on which each performance would not have been given but for the fact that it would induce a reciprocal performance. This is because a debt of gratitude would still arise were a desired service rendered with the partial aim of promoting the provider's own independent ends unless the provider *would not have performed* the service had it not been expected to promote his or her independent ends. This is defended at length in my book-length treatment of quid pro quo, *see* Lewinsohn, *supra* note 62, and is related to similar claims made by Seneca, *see* LUCIUS ANNAEUS SENECA, ON BENEFITS (Miriam Griffin & Brad Inwood trans., Univ. of Chi. Press 2011) (c. 60 C.E.), and Hume, *see* HUME, *supra* note 63, at 225-27, 331-37. In applying this to the case of exchange, some finesse is needed on the plausible assumption that not every exchange offer is represented as a final offer.

attitude of indifference toward either the service or the counterparty. For example, a sculptor (or even a banker) may insist on receiving payment from a beloved customer only because she needs to support her own family or because she does not wish to treat her customers differently on the basis of her affections, not because she treats either the customer or her own sculpture with indifference.

Although this completes the elaboration of the remuneration theory of quid pro quo, we may briefly consider a class of potential counterexamples. I have in mind cases involving quid pro quo transactions that nonetheless give rise to debts of gratitude. Some examples might include: a seller who gratuitously offers someone the opportunity to purchase something (at market rates) before offering the product to an eager public, or one who offers an individualized discount, or an editor's acquisition of a fledgling writer's first novel after all the other editors have passed. These cases can be dealt with in either of two ways. In some cases, we can distinguish between the performance under the contract and some other element of the transaction that gives rise to the debt of gratitude. This is obviously true, for instance, with respect to offers of first refusal—that they are distinct from the performance is evidenced by the fact that rights of first refusal can be separately purchased. In such cases, what we are grateful for is getting the first crack at the apple, which is given gratuitously apart from any quid pro quo, not for the subsequent quid pro quo transfer of merchandise at market rates. And No Residue speaks only to the performance proper. I submit that this strategy will serve to neutralize most putative counterexamples.

Nevertheless, I am prepared to accept that there *may* be cases where a debt of gratitude is generated by a performance in a quid pro quo exchange, even when the service provider would not have performed if he did not stand to gain. These cases will be fewer in number than we might at first think, especially once we take pains to distinguish between apt or intelligible gratitude, on the one hand, and gratitude that is in some sense required (on pain of rendering one liable to a charge of ingratitude), on the other, since only the latter could constitute a counterexample to my theory. Perhaps the case of the editor would be one example, though it seems that even here the recognition of talent in a writer, by way of making an offer to publish the work, would be distinguishable from the editor's performance under the ensuing contract—or the services of a brilliant surgeon or psychotherapist who changes the life of his or her patient for the better. In other words, perhaps in cases like these the service provided (that is, the service that is owed and not something above and beyond the call of duty) is so meaningful to the recipient that it will generate a debt of gratitude even when the provider would not have provided those services if the recipient had not paid for them.

In some of these cases (if there are any), the recipient of the meaningful service may not have recognized, at the time the agreement was made, the debt they would come to incur. Such cases, too, pose little difficulty for No Residue, since it is the understandings at the time the agreement is made that are dispositive. But perhaps there are cases where, even at the time the agreement is made, the parties know, at least on some level, that a debt of gratitude will persist after the performances. What I would say about such cases is that they are only genuine instances of quid pro quo exchanges if the parties, at the time the agreement is made, look past the relevant debts in the way conversing adults sometimes look past disagreeable odors or sounds, choosing not to acknowledge what is blowing in the wind. In such cases, there may be a discrepancy between the official ledger, constitutive of the parties' shared understanding, and what they know but choose not to acknowledge—that is, they may act as though no debt of gratitude exists even if they know that it does. And, in such cases of discrepancy, the account I have offered follows the official ledger. To be sure, what I am calling the official ledger is in some sense a social and conventional artifact; but, then again, so are transactional forms.[88]

Although I have claimed that Hume and Smith were wrong to view the extraction of services from strangers as the most basic feature of exchange,[89] they were right to see quid pro quo exchange as in some way alien to the sphere of friendship—a judgment that, I believe, is confirmed by prevailing social norms. The remuneration theory is able to render these norms intelligible, explaining why intimates have reason to be reluctant to resort to quid pro quo in their dealings with each another, even if such reasons can be overridden in appropriate contexts. In particular, several aspects of quid pro quo exchange are prima facie at odds with the values of friendship. These aspects warrant a fuller discussion than I am able to give on this occasion, so I will simply articulate the elements of the transactional form that might be the source of concern, leaving it for another time to explain exactly why.

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88. The form of pretense at issue in this paragraph (one that occurs at the time the agreement is forged) is related to, and interacts in complex ways with, another familiar form of pretense involving exchange. It is an important social fact that parties to explicit exchange agreements sometimes attempt to obscure, or look past, the quid pro quo ("transactional") character of their relationship, not when the agreement is formed, but rather in the course of the ensuing performances. This is especially recognizable in the context of care professions, as well as so-called professions of higher calling, and might have understandable causes as well as mixed results.

89. *See supra* text accompanying notes 63-64.

First, in cases where there is nothing else around that could vitiate debts of gratitude, the exchange form would only be available to friends who could impute to one another the motives picked out by the strengthened version of reciprocal inducement. That is, the parties must be able to impute to each other not only the instrumental aims of serving partly in order to be served; more strongly, they must understand one another as conditioning their willingness to help on this occasion on the prospect of getting something in return.[90] Moreover, the distinguishing feature of quid pro quo, as I have described it, is that it allows the transacting parties to give and receive benefits without incurring lasting duties to reciprocate and debts of gratitude. But if friends see these residual obligations to one another as more than mere liabilities, but instead as positive, albeit constraining, contributions to their valuable relationship, this would give them reason to choose a different transactional form when one is available. Finally, if the genealogical explanation I have suggested is on the right track, then quid pro quo is a transactional form that came into the world to facilitate a certain kind of arm's-length noninvolvement that would otherwise be difficult to achieve among givers and takers of wanted services. If this explanation is correct, it is little wonder that friends, whose lasting bonds and ties are a source of meaning and value, would want to employ a different form in their distribution of goods and services to one another.

The account I have offered is also well positioned to explain the exceptional cases in which friends appropriately employ the form in their dealings with one another. Many of these cases involve transactions that, for one reason or another, guarantee continued involvement and lingering debts. This is true, for example, of transactions involving gratuitous offers of first refusal or of special discounts extended to individuals on the basis of friendship. In such cases, even if the exchanged performances themselves do not give rise to lasting debts of gratitude, the gratuitous elements of the transaction do, and the reasons friends have to avoid the form will be correspondingly diminished. In other cases, friends use the form to avoid debts that their friendship cannot bear. It is an interesting question why friends calibrate the degree of favors they are comfortable receiving to the strength of their bond, but it is undeniable that they do. When a friendship cannot bear the weight of a particular debt—for example, I would not feel comfortable accepting an offer from many of my friends for a rent-free sublease of their house or apartment, even if they are not in need and will be away for the year—the account that I have offered explains why the resort to exchange might be acceptable. For in cases like these, it is important to the friendship that the debt be avoided, and exchange provides the means of achieving that desirable

90. To be clear, I do not mean to suggest that this is *necessarily* inimical to the values of friendship, only that it might bear on such values, depending on the context.

outcome. Of course, even in cases such as these, we will often prefer to get the service from a stranger (for example, by consulting Craigslist or the Yellow Pages) rather than from an exchange agreement with a friend. This common preference likely owes to many factors, but one of them might be the wish to avoid having to communicate one's views about the limits of what the friendship can bear.

III. TWO DOCTRINES OF CONSIDERATION

In Part II, I articulated and defended a theory of exchange as reciprocal payment (or remuneration), distinct from the relation of reciprocal inducement (objectively construed). The present Part begins to make the case that a remuneration theory of exchange provides the materials for a consideration doctrine far superior along the dimensions of both fit and justification. Before discussing the problems with the orthodox approach, I will first introduce the alternative remuneration theory of consideration, which will enable us to compare the two versions of the consideration rule.

A. The Remuneration Theory of Consideration

The basic idea behind 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 of what may have induced the promisor, actually or apparently, to assent to those terms.[91] Specifically, as long as the par-

91. In constructing this theory, I stand on the shoulders of the almost-forgotten Henry Ballantine. In a pair of extremely insightful law review articles from 1913 and 1914, Ballantine, a former student of Williston at Harvard who would go on to become a professor of law at Berkeley, bucked the emerging orthodoxy and maintained, as I do, that the consideration requirement governs the "terms of the bargain"—claiming, in other words, "[T]he rule of consideration is a mere test of the nature of the agreement, and the element of consideration may exist from the start in the nature of the agreement as a bargain." Henry Winthrop Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?*, 11 MICH. L. REV. 423, 432 (1913); *see also* Ballantine, *supra* note 31, at 132-33. Despite a brilliant paradigm shift and several forceful arguments against the orthodoxy of his (and our) day, Ballantine's articles, while garnering responses from the leading contract scholars of his day, had no significant impact on the development of the law. This poor reception was not entirely unearned, however, as Ballantine was unable to articulate the relevant feature of the terms or substance of the agreement in virtue of which it would qualify as a bargain and pass the consideration test. He frequently refers to "mutuality" and "reciprocity" as the essential elements—reflected in the title of his *Harvard Law Review* article, *Mutuality and Consideration*. For example, he says that "the doctrine of consideration is a not very successful attempt to generalize and reduce to a rule of thumb that

ties assent to an agreement that appears to contemplate reciprocal payment relations, relations which may, in turn, be understood in terms of Reciprocal Debt Satisfaction and No Residue, the agreement satisfies the consideration requirement, regardless of what seems to have motivated the parties to lend their assent. Furthermore, the element of exchange in virtue of which an agreement satisfies the consideration rule may be found in the contemplated relation between the promised performances. In a typical bilateral sales contract, for example, the parties each assent to an agreement that not only requires the seller's delivery of the goods and the buyer's transfer of the money, but that requires each performance *as payment* for the other, with all the implications of this designation (such as those involving strictures against double counting) that were laid out in Part II. It follows from this that, so long as the agreement to which the parties assent contemplates payment relations, the consideration rule may be satisfied long before any payment has actually been made. So far as the consideration rule is concerned, what matters is that the parties have agreed to an exchange, not that an exchange has occurred.

Of course, nothing in the remuneration theory rules out the possibility that the parties may, on occasion, regard the promise itself—that is, the undertaking of an obligation—as constituting one side of the relevant exchange relation. When I buy an insurance policy, for example, my payment is arguably for the insurer's incurring an obligation to reimburse in the event of some accident, not for any recovery that may or may not ever be made.[92] And the same is arguably

reciprocity which must exist in an agreement to make non-performance a legal wrong on the part of the promisor," Ballantine, *supra*, at 424, and that "[i]t would seem to be a sound principle of law which demands some mutuality or reciprocity of engagement as the basis of a contract," Ballantine, *supra* note 31, at 132. When pressed to identify the species of mutuality or reciprocity, however, the best he could come up with was that "[a]ny mutual promises which contemplate the possibility of a required performance on each side constitute a contract, since they involve mutuality or reciprocity in the things promised." *Id.* at 126. Contrary to Ballantine's intentions, this definition severs the link between consideration and bargain altogether, since, as I have already shown, the condition it states would be satisfied by all "I will if you will" agreements, including those commitments to plans that few would categorize as bargains. *See supra* Section II.A. Having recovered the concept of quid pro quo exchange, we are in a position to improve on Ballantine's account by offering a precise statement of the features of the (apparent) terms of an agreement that must be present in order to satisfy the consideration test.

92. Some might wish to resist this characterization and instead construe the insurer's promised performance conditionally: that is, the insured pays the premium, and in exchange the insurer pays out coverage if a covered event occurs. (According to this construal, the insurer performs even if the covered event never occurs.) Adopting this alternative characterization would in turn allow us to replace the disjunctive definition of consideration, *see infra* text accompanying note 93, with the following nondisjunctive version: *A promise is supported by sufficient consideration if it can be inferred that the parties regard the promised performance as standing in a relation*

true of other classes of contracts, such as the issuance of bonds (or other negotiable instruments) for value. The lesson here is that just as it is a mistake to single out the relation between the acts of assent as the exclusive site of exchange (in virtue of which an agreement may pass a bargain test), so too is it a mistake to focus exclusively on the relation between the promised performances.

With this in mind, we may advance the following statement of the consideration rule: a promise is supported by sufficient consideration if it can be inferred that the parties regard either the promised performance, or the promise itself, as standing in a relation of reciprocal payment to either the performance, or the promise, of the promisee.[93] This can be restated using the language of quid pro quo exchange: a promise is supported by adequate consideration if it can be inferred that the parties regard either the promised performance, or the promise itself, as standing in a quid pro quo relation to either the performance, or the promise, of the promisee.[94]

B. Testing the Theories

I will briefly postpone discussion of the rationale for the consideration rule, cast in terms of reciprocal remuneration, in order to consider several doctrinal difficulties facing the reciprocal-inducement account (that is, the modern rule). We have already demonstrated, in Part II, that the modern rule embodies a flawed conception of a bargain or exchange. Accordingly, it comes as no surprise to learn that the modern rule treats some patently gratuitous agreements as though they belong to an exchange, and vice versa. I will proceed by giving two well-known examples of such difficulties, followed in each case by a demonstration of how the remuneration conception of consideration avoids the problem.

1. Conditional Gift Promises

The first such difficulty relates to whether the modern rule is compatible with the view, universally held, that donative promises—promises to give a gift

of reciprocal payment to the performance of the promisee. However, despite appearances, there is no reason to think that the nondisjunctive version is simpler. *See supra* note 20.

93. The phrase "it can be inferred" is meant to capture the fact that the definition is "objective" and does not require the actual subjective understandings. Also, I reiterate that the disjunctive formulation can be replaced with a nondisjunctive one if one is willing to accept a conditional performance account. *See supra* note 92.

94. This way of restating the test assumes that if the parties mutually understand their acts as satisfying the two conditions of reciprocal remuneration, then they also mutually understand one another as so regarding their acts. None of my substantive claims rely on this assumption.

to, or perform an unpaid favor for, the promisee—fail to satisfy the consideration requirement.[95] The problem is easiest to grasp in the context of *conditional* gift promises, where the offeror conditions a gift promise on receipt of a return promise from the offeree. The example involving the loving aunt will serve us again here,[96] though we will now shift our focus to the relation between the mutual promises of the aunt and her nephew. The beneficent aunt promises to gift her nephew a sum of money if the nephew agrees to spend the money on art (and not on alcohol), and the nephew agrees. The aunt's offer was made eagerly, in the sense that it was made with the aim of inducing her nephew's acceptance of the offer (and subsequent purchase of the art), and the nephew accepted with the aim of satisfying the condition of his aunt's commitment (and receiving the funds). Whereas we previously observed that the motivational account of quid pro quo (erroneously) classifies the ensuing performances as standing in a quid pro quo relation, we may now observe that the modern rule cannot avoid finding consideration in this agreement: each party's promise was made for the apparent purpose of inducing the other promise, which is precisely the relation that, by the lights of reciprocal inducement, must exist between the two promises themselves for consideration to be present.[97]

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95. Atiyah, describing that view, notes that "orthodoxy insists that a promise to make a gift is not enforceable as a contract at all. The fact that the promise is conditional does not, according to orthodox doctrine, render the promise enforceable." ATIYAH, *supra* note 11, at 210. Atiyah goes on to challenge the orthodoxy, but his grounds for doing so are not relevant here, as the case under consideration involves no detrimental reliance.

96. *See supra* Section II.A.

97. Peter Benson has recently proposed an "independence" condition that, he says, will do the job of explaining at least some of the conditional gift cases. Peter Benson, *The Idea of Consideration*, 61 U. TORONTO L.J. 241, 250-51 (2011). On his view,

> consideration must be *independent* of the first promise in the following way: it must be possible to construe the content of the consideration as something that genuinely originates with the promisee, not the promisor, and that is not simply reducible to an aspect, condition, or effect of the first promise. It must be something that is, as it were, initially on the promisee's side and that is, therefore, not produced by the promisor. *Even if the consideration is, in fact, given after the promise, there must be no reason in principle why it could not possibly have initiated the interaction and so have come first*.

Id. at 250 (second emphasis added). Now, if there were such a requirement, perhaps it could explain why the sort of conditional gift promise under discussion (involving the loving aunt and her nephew) does not pass the consideration test, even when it satisfies reciprocal inducement. However, any requirement strong enough to yield this result is also too strong to be an element of the consideration rule, as it would also rule out agreements that are undoubtedly supported by consideration. For instance, if a violin collector offers to loan a talented violinist a different Stradivarius each month provided that the violinist promises to use

If contract law were strictly an intellectual exercise and not also a practical affair, then the failure to explain cases involving conditional-gift promises would be a knock-down argument against the orthodox theory of consideration. For if there is ironclad consensus on any one proposition concerning the consideration requirement, it is that it is not satisfied by donative promises, including conditional ones.[98] One can hold on to the judgment that the aunt's promise is supported by consideration only at the cost of abandoning all pretense that the modern consideration rule is an expression of a quid pro quo exchange requirement, or by making believe that the aunt's promise is not genuinely donative. In the absence of a better rule of consideration, however, it is no surprise that the drafters of the Second Restatement, committed as they are to the bargain requirement, have, in the face of counterexample, chosen to grin and bear it, resorting to subterfuge and obfuscation.[99] The remuneration theory of consideration provides that better rule and thereby obviates the need for subterfuge. In the case we have considered, neither the nephew's acceptance of his aunt's condition, nor his subsequent fulfillment of it, constitutes payment either for the aunt's gift or

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that violin in a monthly private concert for the collector and her friends, the resulting agreement may surely qualify as a bargain and satisfy the consideration requirement, even though it appears to fail Benson's independence test. And if, for whatever reason, it would *not* fail Benson's test, *then neither would the aunt's gift promise to her nephew*, as the two cases share all relevant features: in each case, the promisee promises to do something with that which the promisor promises to give (whether money or violins). I may also note that Benson's formulation of his test, in the italicized sentence, seems to overlook the fact that it is the promisee's *counterpromise* (rather than subsequent performance) that is the consideration in bilateral contracts. After all, Benson explicitly intends his test to rule out the offer to give a gift that is made conditional on the promisee's promise to accept the gift. However, there is no reason in principle why the sequence of *promises* in such a case could not have been reversed: that is, there is no reason that the donee could not have first made a promise to accept a certain gift conditional on the donor's counterpromise to give the gift. Accordingly, Benson must intend for the independence requirement to apply to the promisee's (promised) *performance* (even in the bilateral case).

98. *See supra* note 95 and accompanying text.

99. The Second Restatement does not deal with this difficulty in its most general form. However, the comments do discuss the specific (and somewhat arcane) class of cases involving promises to give a gift that are made conditional on the offeree's return promise to accept the gift, something sometimes done (as the drafters observe) when the gift carries substantial burdens and responsibilities (e.g., a transfer of real estate):

> [A] promise to make a gift is not made a bargain by the promise of the prospective donee to accept the gift, or by his acceptance of part of it. This may be true even though the terms of gift impose a burden on the donee as well as the donor. In such cases the distinction between bargain and gift may be a fine one, depending on the motives manifested by the parties.

RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (AM. LAW INST. 1981) (citation omitted). This treatment sheds no light whatsoever on the problem.

her promise to give it. This is true by the lights of our ordinary intuitions and is borne out by the theory of exchange that was put forward in the previous Part. Indeed, neither condition of the reciprocal-payment account of exchange is fulfilled in this case. The nephew's purchase of art with the funds received from his aunt fulfills an obligation owed to his aunt, but it does not constitute the satisfaction of a debt.[100] And, more obviously, since the aunt's transfer of money is a gift, a debt of gratitude survives the transaction.

2. *Contract Modifications*

I will now consider an example of an exchange that is wrongly classified as a gratuitous agreement under the modern rule—one-sided contract modifications and the preexisting-duty rule. The question raised by these cases is whether the promise to do a thing, or the actual doing of it, may be a good consideration if the party is already bound to do that thing in virtue of a prior contract with the other party. More specifically, where *B* threatens not to fulfill an obligation existing under a prior contract with *A* unless *A* promises to make some additional payment that the original agreement did not require, the question is whether *A*'s promise to pay the higher rate is supported by consideration.[101] I will limit my focus to "fair and equitable" modifications called for in light of circumstances "not anticipated by the parties when the contract was made."[102] To take a stock example, suppose *B* had a preexisting duty to construct a house for *A*, but due to an unanticipated rise in the price of building material, performance of that duty (at the original contract price) would be extremely costly and might even place *B*'s business in peril. If *A* values *B*'s performance more highly than she does a right of action against *B*, or for some other reason, *A* may well agree to pay more than the rate originally agreed upon in order to secure *B*'s performance. Satisfied with the modified terms, *B* goes on to build the house, and the question

100. Consider that his aunt would have no legitimate grievance if he had previously promised a collector, in exchange for some pieces of art, that he would thereafter spend all his disposable income on the purchase of art. That his obligation to his aunt may be discharged by a performance that also discharges the (debt) obligation to the collector indicates that the former obligation is not a (strong) debt obligation.

101. This formulation is meant to include cases where *B* says she won't perform, and *A* responds by sweetening the deal if *B* performs.

102. RESTATEMENT (SECOND) OF CONTRACTS § 89(a).

left to consider is whether *A*'s promise to pay the higher rate is legally enforceable.[103]

Following the opinion of Lord Ellenborough in 1809 in *Stilk v. Myrick*, and for many years after, the doctrine of consideration was wielded to deny enforcement of the second promise, as *A* received no more, as a result of her promise, than what was originally owed to her.[104] This holding gradually came to be viewed as unjustified, as it was both contrary to commercial needs and unsupported by higher moral values. As one commentator has put it, "[T]his rule is, on the whole, that adjunct of the doctrine of consideration which has done most to give it a bad reputation."[105] Wishing to spare the law this embarrassment, the drafters of the Second Restatement, while affirming the preexisting-duty rule,[106] put forward an exception to that rule that would allow for "fair and equitable" contract modifications.[107] The Restatement explicitly treats its allowance of such modifications as an exception not only to the preexisting-duty rule, but also to the consideration requirement, and accordingly places the relevant rule under the topic "Contracts Without Consideration."[108] The comments rationalize the exceptional treatment by cursory appeal to the functional justification of the consideration doctrine offered by Lon Fuller—functions that, the Reporters claim, are served in the modification cases at issue.[109] As I will show below, however,

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103. The history of such cases is extremely complicated. For one slice of this history, see Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387 (1996).

104. Stilk v. Myrick (1809) 170 Eng. Rep. 1168; 2 Camp. 317. As explained earlier, there is no reason to infer from Ellenborough's brief remarks that he espoused Langdell's definition of consideration. *See supra* note 15.

105. Patterson, *supra* note 13, at 936. Of course, the critics of the preexisting-duty rule have never disputed that the law needs a way of screening off those promises to pay a higher price that have been induced by coercive or exploitative threats not to perform at the original rate. Rather, the critics maintain that the bargain requirement is too blunt a tool for the task, as using it to deal with the coercive cases would also bar the fair and equitable ones. *See, e.g.*, *id.* at 937 ("However, not all second bargains are induced by coercion; and it would be better (I submit) in the long run to drop the rule as to a preexisting contractual duty and decide the grounds for avoidance of each second bargain on its facts, *i.e.*, by reference to coercion, deception, or lack of good faith in cases where a special relation between the parties imposes such an obligation.").

106. RESTATEMENT (SECOND) OF CONTRACTS § 73.

107. *Id.* § 89.

108. *Id.* ch. 4, topic 2.

109. "As in cases governed by § 84, [the modification's] relation to a bargain tends to satisfy the cautionary and channeling functions of legal formalities." *Id.* § 89 cmt. a; *cf. id.* § 72 cmt. c (describing the cautionary and channeling justifications of the doctrine of consideration).

Fuller's functional argument is not just implausible as a justification of the doctrine of consideration, but, more importantly for present purposes, it is incompatible with the prevailing reciprocal-inducement conception of the rule.

Although the Restatement adopts the position that one-sided modifications are unsupported by consideration, the Reporters record a contrary view, writing that the allowance of fair and equitable modifications is "sometimes reached on the ground that the original contract was 'rescinded' by mutual agreement and that new promises were then made which furnished consideration for each other."[110] The Reporters' implicit reference here is to a position taken by Ames, who had influentially argued, many years earlier, that a consideration requirement cast solely in terms of exchange poses no obstacle to fair and equitable modifications, provided that the modification is characterized as a rescission.[111] On this characterization, when the parties assent to the modification, they agree to substitute a new contract (reflecting the higher, renegotiated rate) for the original one, thereby rescinding the first contract and forming the second in a single showing of mutual assent. The Reporters rejected the rescission characterization (though it is by no means obvious that they were correct to do so).[112]

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110. *Id.* § 89 cmt. b.

111. Ames, *Unilateral Contracts*, *supra* note 15, at 528-29.

112. Following Williston, the Second Restatement rejected the rescission characterization of the modification on the ground that the theory "is fictitious when the 'rescission' and new agreement are simultaneous." RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b. This charge of fiction is hardly convincing, at least if the only alternative characterization is the one considered by Williston. This alternative involves conceiving of the modification agreement as the formation of a second, bonus contract that would supplement, but not replace, the original contract, binding the promisor to pay a bonus if the original contract, still intact, is fulfilled by the promisee. *See* Williston, *supra* note 31, at 31 (describing the modification agreement as a promise of "something additional" to "induce" the performance of the original contract). While Williston endorsed this bonus characterization of modifications (and in doing so sought to defend the preexisting-duty rule), he provided no reason why it is any more realistic a construal of the parties' intentions than the rescission characterization. Indeed, there are modifications that are plainly incompatible with the bonus characterization. For such a characterization is not possible unless paying the total renegotiated rate involves making (but going beyond) the payment that was originally required. However, this condition will not always hold. If, for example, the original agreement required payment of a certain quantity of cultured pearls, and the renegotiated term required, instead, transfer of the same quantity of natural pearls, Williston's alternative "bonus" characterization would not be possible.

It is also worth noting that there is another alternative to the rescission characterization that neither Williston nor Ames considered (as far as I am aware). On the alternative *amendment* characterization, the modification changes the terms of the original contract without either replacing or supplementing it. The failure to consider this alternative perhaps reflected a shared assumption (on the part of Williston and Ames) that a contract cannot survive a material change in its terms. I will not separately discuss the amendment characterization in the

But they took no clear stand on the question of whether a rescission characterization of the modification entails, as Ames thought it did, that such modifications satisfy the consideration requirement after all.

Once the effort is made to apply the (Second Restatement's) reciprocal-inducement theory, however, it becomes clear that such a characterization of modification only supports Ames's conclusions (finding consideration in all such modifications) when the second agreement is unilateral; when the second agreement is bilateral, applying the theory often reaches the contrary result.[113]

Let us begin with the unilateral case. Suppose *B* announces that, due to a price hike in building materials, she is planning to breach; *A* responds by offering to pay a higher rate if *B* finishes the job; satisfied with the higher rate, *B* finishes the job and demands payment. As I have said, the reciprocal-inducement account reaches the right result in this case. The promise to pay the higher rate is made in order to induce the performance, which is in turn rendered in order to obligate the promisor to pay at the higher rate.

In the case of bilateral contracts, the analysis comes out differently. Here, it is not enough that *A*'s promise to pay the higher rate is made with the ultimate aim of inducing the performance. Rather, according to the orthodox account of consideration, each party's promise in a bilateral contract is exchanged for the other's *promise*, so in order to satisfy the reciprocal-inducement account, *A*'s promise to pay the higher rate must be made with the more immediate aim of procuring *B*'s *promise* to perform. The difficulty with ascribing the latter aim to *A*'s assent to the modification, however, is that, at the moment immediately prior to that act of assent, A *already has* B*'s promise to perform*: *B* promised to perform in the original agreement, and the continued existence of the obligations and claim rights that resulted from that agreement were (by hypothesis) never called into question. Since *B* is already on the hook immediately prior to *A*'s promise

text, as all of my arguments concerning the rescission characterization apply, *mutatis mutandis*, to the amendment characterization.

113. In making this argument, I am siding with Williston, who took issue with Ames's conclusions concerning the significance of a rescission characterization of the modification, on the ground that "calling an agreement an agreement for rescission does not do away with the necessity of consideration." Williston, *supra* note 66, at 516. In reaching their respective views on the matter, neither Ames nor Williston engaged with the reciprocal-inducement conception of exchange. Ames spoke only of an exchange requirement, but, while using the Langdellian formula, left the notion of exchange unanalyzed, never mentioning inducement. *See* Ames, *Bilateral Contracts*, *supra* note 15, at 42 ("It is not yet too late to abandon this modern invention and to return to the simple doctrine of the fathers, who found a consideration in the mere fact of a bargain, in other words, in any act of forbearance given in exchange for a promise.").

to pay at the higher rate, we cannot say that such a promise is made with the aim (actual or apparent) of getting *B* on the hook.[114]

What the foregoing analysis reveals is that proponents of the reciprocal-inducement account can uphold the validity of one-sided contract modifications only by either misapplying their definition of consideration or by drawing a largely unprincipled exception to the consideration requirement.[115] Given these choices, it is little wonder that many jurisdictions have refused to follow Section 89 of the Restatement, while others have relied on legislative intervention to accomplish what could not be achieved otherwise. While treatise writers have long proclaimed that "[t]he pre-existing duty rule is undergoing a *slow* erosion and, as a general rule, is *destined* to be overturned,"[116] the rule stubbornly persists in many jurisdictions.[117] It also persists, more widely, in specialized contexts, such

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114. It is worth noting that a divergence between social and legal norms, regarding the effect of the unanticipated event that precipitated the modification, would complicate the analysis. For example, if by the lights of prevailing social norms such events have the effect of extinguishing the contractor's obligation (i.e., if she wouldn't be criticized for breaching in such conditions), then the contractor's recommitment might sensibly be sought after as a means of ensuring performance. Additionally, Kevin Davis has suggested to me that parties might enter into a modification agreement (at t_0) that contemplates a two-stage, sequentially ordered process, under which the rescission of the original contract (at t_1) precedes the formation of the second (at t_2). Since, in this version, the modification agreement contemplates a time where the promisor has lost the original claim right but has not yet acquired the new one, one might think that the promisor can enter into such an agreement with the *aim* of getting the claim right back at t_2. However ingenious, I do not think that such a restructuring of the agreement would bypass the difficulty, as the assent to such an agreement would still occur at a time (t_0) when the promisor still has the original claim right, which he would not risk losing if he were to decline to enter into the modification agreement. By way of analogy, if *A* were looking for reasons to loan his bike to *B* for a day, we would not say (in the typical case) that *A* should loan *B* the bike *in order to* get the bike back the following day. Getting the bike back is a condition, not an aim, of the loan.

115. I set aside alternative bases of liability, such as reliance.

116. 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 7.1, at 342 (rev. ed. 1995) (emphases added). According to a more recent study, "*[s]ome* courts, in states like Alabama, Minnesota, Mississippi, New Hampshire, and Wisconsin, have become so disenchanted with the [preexisting-duty] rule that they have abandoned its application altogether. Further, [*only*] five other states, California, Michigan, New York, Oklahoma, and South Dakota, have effectively abolished by statute the pre-existing duty rule by providing that a promise or agreement modifying a contract need not be supported by consideration, *so long as the modification is in writing*." Corneill A. Stephens, *Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary*, 8 HOUS. BUS. & TAX L.J. 355, 362-63 (2008) (emphases added).

117. The Supreme Court of the United Kingdom has recently clarified, in dicta, that the preexisting-duty rule articulated in *Foakes v. Beer* [1884] UKHL 1, 9 App. Cas. (HL) 605 (appeal taken from Eng.) remains valid, though it is "probably ripe for re-examination." Rock Advert. Ltd. v. MWB Bus. Exch. Ctrs. Ltd. [2018] UKSC 24, [18], [2019] AC 119 at 131 (appeal taken from

as the modification of at-will employment contracts by employers.[118] In stark contrast with the reciprocal-inducement theory of consideration, the remuneration theory easily reaches the desired outcome in these cases.[119] For, according to that theory, the element of consideration is found within the terms of the agreement and not in the apparent motives that lead the parties to assent to those terms. By providing their mutual assent to the change of terms, the parties assent both to the rescission of one contract and the formation of another.[120] Since the new one is, according to its terms, an exchange contract requiring payment for a performance, it does not matter that the party undertaking the obligation to pay at the higher rate lacks the aim of inducing the counterparty to assume an already-existing obligation. Mutual assent to an agreement that by dint of its terms qualifies as a bargain is sufficient.[121]

Eng.). Various jurisdictions in the United States continue to apply the preexisting-duty rule. *See, e.g.*, Johnson v. Seacor Marine Corp., 404 F.3d 871, 875 (5th Cir. 2005) (recognizing the existence of the preexisting-duty rule in two-party cases); Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 857, 864 (2d Cir. 1995) (noting that the performance of a preexisting duty "cannot suffice as consideration for a valid agreement"); United States *ex rel.* Youngstown Welding & Eng'g Co. v. Travelers Indem. Co., 802 F.2d 1164, 1167 (9th Cir. 1986) ("[I]n Arizona, performance of a preexisting legal duty is not sufficient consideration."). *See generally* 3 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:36 n.1, at 664-70 (4th ed. 2008) (citing these and other cases).

118. For a general treatment, see Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427 (2016).

119. It should be clear, particularly in the case of modifications of at-will employment contracts, that what is desirable is that the promises at issue be scrutinized only for fairness and voluntariness, not for consideration.

120. Although this formulation assumes the rescission characterization to be the correct one, the remuneration theory does not rely on it. On the alternative amendment characterization, the sole contract is an exchange contract both before and after the amendment of the term.

121. In addition to contract modifications involving two parties, there has been considerable debate about the application of the preexisting-duty rule to situations involving three parties. In three-party cases, a promisor enters into an agreement to pay for a performance that the promisee has already contracted with a third party to provide. In some such cases, the aforementioned promisor was the intended beneficiary of the original agreement, who (on the prevailing view of the legal rights of intended third-party beneficiaries) already acquired a claim-right from the original agreement and who is therefore agreeing to pay more for a service he is already owed. In a recent, stimulating article, Nico Cornell has argued at length that we can only make sense of the authorities that find consideration in such three-party cases by positing a distinction between having a claim-right and being the party to whom an obligation is owed. Nicolas Cornell, *The Puzzle of the Beneficiary's Bargain*, 90 TUL. L. REV. 75 (2015). In Cornell's view, while an intended third-party beneficiary of a contract is owed an obligation, in that he would be wronged (and would have a cause of action) upon breach, he does not acquire a claim right. *Id.* at 117-20. The remuneration theory of consideration, however, can easily accommodate the holdings in question without resorting to such strained formalism. In all three-party cases, as in the two-party variations considered above, the second agreement

satisfies the consideration requirement just in case it is an agreement that contemplates an exchange. As far as consideration is concerned, it makes no difference whether the promisor in question already had a preexisting claim-right to the service.

Cornell also misconceives the significance of a relational conception of promissory obligation for this body of law. There has been great development in the law concerning three-party cases, which, in this country, has traveled roughly in the same direction as in the two-party cases. While late nineteenth- and early twentieth-century American courts (unlike their English counterparts) held that such performances, or promises to perform, would not qualify as sufficient consideration, the tide (at least among elites) began to turn after Judge Cardozo's influential opinion in *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917), and Corbin's influential article the following year, Corbin, *supra* note 45. Cornell accounts for these developments as follows:

> The central reason for this shift is a new understanding of rights and duties in a relational way. Whereas the earlier rule [holding that the performance of, or promise to perform, a preexisting duty does not count as good consideration for a counterpromise, even in three-party cases] was based on the idea that the party in question was under a [preexisting] duty to perform the promised act, the new rule [finding consideration in such three-party cases] is based on the idea that the party in question is . . . under a [preexisting] duty *to the other party* to perform the promised act. In other words, once one shifts from focusing on merely whether the party in question is under a duty [simpliciter] and focuses instead on whether the party is under a duty *to the other party*, the modern rule seems much more natural. The new promise, even if it is redundant with regard to what is required of the promisor, makes the requirement personal to the promisee in a way that it was not before.

Cornell, *supra*, at 95 (omitting a "not" in the original text that is, in context, clearly an erratum).

Cornell gives credit for this "new understanding" to Wesley Newcomb Hohfeld's landmark work on legal relations: "This shift in perspectives may be considered Hohfeldian. As already noted, it is no coincidence that the change in rules corresponds with the emergence of Hohfeld's work." *Id.* at 96. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (introducing a highly influential theory of rights, duties, and other legal relations). Cornell's account is at odds with my understanding of the developments. As Cornell himself recounted in an earlier section, long before Hohfeld's seminal papers, as early as the late 1870s, Langdell and Pollock prominently held that the promise to perform a preexisting duty counts as good consideration for a counterpromise (i.e., in the bilateral case) even though the actual performance of that preexisting duty would not (i.e., in the unilateral case). Cornell, *supra*, at 88-90. Their position in the bilateral case was based explicitly on the relational idea that the second promise to perform creates a new legal relation with the promisee, a relation that could qualify as a detriment precisely because it was distinct from, and not entailed by, the relation created by the first promise to a different promisee. *Id.* As Cornell puts it, "Discussing the case in which a party promises to do what he has already promised another he will do, Pollock argued that the second promise would be consideration because '[i]t purports to create a new and distinct right, which must always be of some value in law.'" *Id.* at 89 (alteration in original) (quoting FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 163 (Cincinnati, Robert Clarke & Co. 1881) (1876)).

Moreover, Langdell and Pollock's position was rejected by Williston (the leading proponent of the pre-1917 rule denying that consideration is given in three-party cases, whether bilateral or unilateral) *not* because of any doubts about the relational claim (i.e., that the promise to perform the preexisting duty, if valid, would create a new legal relation, distinct from the first, because owing to a different party) but because of the disparate treatment accorded by Langdell and Pollock to unilateral and bilateral contracts: Williston thought it was "intrinsically unreasonable that a promise of an act should ever be regarded as greater value by the law than actual performance of that very act." Williston, *supra* note 66, at 524. Whatever its merits, this position plainly had nothing to do with a failure to perceive that the legal relations contemplated by the second promise were not equivalent to those created by the first promise and thus had nothing to do with a failure to grasp the relational character of promissory obligations. (We may surmise that it stemmed from Williston's doomed effort to at once retain the idea that consideration (always) stands in an exchange relation to the promise, and that the exchange relation is a relation of reciprocal payment. *See supra* note 45. For, without taking a position on the matter, it does seem at least odd to say that a promise to do something could be acceptable payment when actually doing it could not be—such a position would seem to imply, as Williston observes, that "a bird in the hand is worth less than [the same] bird in the bush." Williston, *supra* note 66, at 525 (alteration in original) (quoting Ballantine, *supra* note 91, at 427, although the metaphor was in fact first used in this context by Ames, *Bilateral Contracts*, *supra* note 15, at 40).)

Finally, I may observe that the only element that is clearly owing to Hohfeld in Corbin's argument that consideration is present in three-party preexisting-duty cases—a debt Corbin himself records—has little to do with the relational character of promissory obligations, and is also the weakest part of Corbin's influential argument in support of the modern rule. *See* Corbin, *supra* note 45, at 371 & n.16. Williston had claimed, with Langdell and Pollock, that performance of a preexisting duty does not count as good consideration on the ground that such performance does not constitute a legal detriment. *See* Williston, *supra* note 31, at 27. Corbin argued for the opposing view (i.e., that performance of a duty does constitute a detriment to the performer) on the ground that such performance entails a surrender of two "legal powers," a power to wrongfully breach a contract (a "power" one surrenders on the ground that one can no longer wrongfully breach a promise that one has already fulfilled) and a power to make an offer of rescission to the promissee (since one cannot ask the promisee to waive a promissory obligation one has already fulfilled). Corbin, *supra* note 45, at 371-72. The first "power" rests on Hohfeld's overly broad characterization of legal power as a mere ability to do something that would affect one's legal relations with another. *See* Hohfeld, *supra*, at 44. Those otherwise attracted to Hohfeld's scheme have recognized that this is too loose and deny that a promisor has a power to wrongfully breach. *See, e.g.*, Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 PROC. ARISTOTELIAN SOC'Y 79, 80-81 (1972). The second idea, like the first, is not just risible but mistaken even by the lights of a proper Hohfeldian analysis. For in many cases, when performance must be rendered at a given time, one would lose this power to offer rescission at that time regardless of whether one performs or breaches. (For example, if *A* has contracted with *B* to wash *B*'s car at a given time, and *A* breaches, *A* cannot then proceed to offer rescission.) And if one would lose the relevant power regardless of whether one performs, we cannot say of one's performance that it constitutes a legal detriment on account of the power one has lost.

3. The Rationale of the Consideration Requirement

As I have said, the Second Restatement endorses Fuller's functional justification for the consideration doctrine and appeals to those functions to justify the exceptions it recognizes. I will criticize this approach by showing that Fuller's justification is not open to proponents of the reciprocal-inducement view, and in the course of doing so, I will also cast doubt on that justification more generally.[122] I am, of course, hardly alone in failing to be convinced by prominent extant justifications of the rule; indeed, the doctrine has come under much fire for lacking any plausible rationale whatsoever. In an important paper, T.M. Scanlon argues that the grounds that confer legitimacy on the practice of enforcing contracts "provide[] no moral basis for the idea that [consideration] is always required."[123] And in a seminal discussion, Charles Fried accuses the doctrine of being "internally inconsistent" on the grounds that it abstains from regulating the adequacy of contract terms, thereby "affirm[ing] the liberal principle that the free arrangements of rational persons should be respected," but it restricts the class of enforceable promises to bargain promises, thereby "hold[ing] that individual self-determination is not a sufficient ground of legal obligation."[124] And suffice it to say that the evaluation of the doctrine by legal economists has been similarly grim.[125] All the opprobrium is, I believe, well-earned when heaped at the modern conception of consideration as reciprocal inducement. However, following my discussion of Fuller, I will show that the remuneration theory can do substantially better on this score insofar as it can be rationalized

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122. For additional criticism of Fuller, see Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39 (1992).

123. T.M. Scanlon, *Promises and Contracts*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 86, 107 (Peter Benson ed., 2001).

124. CHARLES FRIED, CONTRACTS AS PROMISES: A THEORY OF CONTRACTUAL OBLIGATION 35 (1981).

125. As a recent handbook chapter by leading figures in the field puts it:

> Although its grounding in exchange would seem to suggest a close connection between the consideration doctrine and the promotion of economic welfare, the doctrine would seem to diverge from simple efficiency in at least two respects. First, many nonexchange promises also enhance economic welfare. A donor's commitment to make a gift, for example, enables the beneficiary to engage in specific anticipatory investment, thus lowering the donor's cost of providing the beneficiary with any given level of utility. Second, the lawyer's understanding of what counts as an exchange [in the context of the law of consideration] is narrower in practice than an economist's would be.

Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 3, 50 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (citations omitted).

by an intelligible, historically compelling functional explanation that the dominance of the reciprocal-inducement conception has obscured.

In a classic paper, Fuller argued that the bargain requirement serves three rationalizing functions, which it shares with legal formalities such as a seal: an evidentiary function, insofar as commitments made in the course of an exchange are more likely than other kinds of commitments to leave an evidentiary trail in their wake; a cautionary function, insofar as commitments made in the course of an exchange are less likely than others to be made rashly or imprudently; and a channeling function, insofar as we can infer from the exchange context that the parties intended to create legally binding relations.[126] The conception of exchange that underwrites Fuller's functional claims does not seem to have been made explicit, but it is one of a voluntary, cooperative arrangement between individuals who do not trust each other, in the sense that neither can assume that the other is solicitous of his interests or disposed to honor promises in the absence of external incentive.[127] Such individuals would enter into a cooperative scheme most guardedly, only after scrutinizing the terms and taking precautions to provide the other party with self-interested reasons to conform to the deal. For these reasons, the thought must go, they will exercise caution before committing (cautionary), keep records of the agreed-upon terms (evidentiary), and recruit a coercive enforcement mechanism to supply the necessary incentive (channeling). The grounds, in turn, for ascribing these attitudes of mistrust to the exchanging parties is that the resort to bargain as a mode of performing beneficial services (whereby I condition my willingness to serve you on the prospect of receiving something in return) itself indicates the absence of robust social or affective ties that are prerequisites for the relevant species of trust.

Fuller's functional justification is hardly convincing. Whatever truth there once was to the claim that we do not record our nonexchange commitments (e.g., our commitments to plans, or our promises to give gifts or perform favors), this no longer holds in our age of electronic communication. Moreover, the idea that we do not enter into exchange agreements imprudently is given the lie by a moment's reflection on consumer contracts, where it is precisely the allure of a tempting product or experience that leads so many of us to incur debts

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126. Fuller, *supra* note 17, at 800-01. For a more recent elaboration and defense of Fuller's functional explanation, see Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); and Melvin Aron Eisenberg, *Principles of Consideration*, 67 CORNELL L. REV. 640 (1982) [hereinafter Eisenberg, *Principles of Consideration*].

127. It will not be lost on readers that such a conception coheres very nicely with the genealogical account of exchange offered by Hume and Smith, considered (and rejected) above. *See supra* notes 63-64 and accompanying text.

that we would be better off avoiding. Finally, setting aside nominal consideration, it is difficult to seriously defend the view that we can infer (even to the extent necessary to support an empirical generalization) an intent to establish legal relations merely from one's participation in an exchange transaction. In particular, the idea that parties to an exchange transaction would not, in general, rely on one another and so would not enter into exchange relations with one another, absent a belief that their agreement could be legally enforced, is at odds with a growing mountain of evidence testifying to alternative bases of commercial trust.[128]

Quite apart from these general difficulties, however, there are special reasons that bar proponents of the reciprocal-inducement account from appealing to Fuller's justifications. For the agreements and commitments that satisfy the conditions of reciprocal inducement apply to a very wide range of agreements made in personal (that is, social and domestic) contexts, as well as among members of preexisting cooperative units more generally (whether business or domestic), all of which enjoy the kind of ties that are at odds with the attitudes of mistrust that Fuller's account relies on. We have already observed that (conditional) gift promises would often satisfy those conditions, but this is the least of what I have in mind. In order to glimpse the problem, we need only reflect on the many occasions friendship and family life afford for collaboration and coordination. Many of these involve commitments to mutually beneficial plans of action. In many of these cases (particularly those involving games with multiple equilibria, to adopt a different parlance) the commitments will be made conditionally, via the familiar process of offer and acceptance, and will also satisfy the reciprocal-inducement condition, insofar as each party commits in part as a means of getting the other party to commit to the mutually beneficial plan. Many significant plans regarding the divvying up of resources or labor would fit the bill, at least in cases where coordination between the parties is desired. So, too, would commitments to coordinate significant activities, including ones we have already considered in Part II. Recall the two close friends, *A* and *B*, who are entertaining the prospect of enlisting in the army. Each would rather enlist in the army together than not enlist at all; but each would also rather not enlist than enlist without the other. In such circumstances, the two may well commit to a plan

128. See, for example, the literatures spawned by Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); and Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

according to which each will enlist.[129] If we are to say that such commitments are supported by consideration, as any proponent of the reciprocal-inducement account must, this rules out, even prima facie, the empirical generalizations that Fuller makes to justify the doctrine.[130] For these reasons, conceptualizing consideration as reciprocal inducement deprives the consideration requirement of a rationale and renders the exceptions to it ad hoc.[131]

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129. To be clear, I need not say (as some philosophers would) that the adoption of every joint, mutually beneficial plan is accompanied by an implicit or explicit commitment to abide by its terms, only that many are. In recent times, Margaret Gilbert has prominently analyzed shared agency in terms of commitments on the part of the parties. *See* MARGARET GILBERT, *What Is It for* Us *to Intend?*, *in* SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY 14, 19-22 (2000). Michael Bratman, who has provided an alternative analysis of shared agency, nonetheless explicitly maintains that such commitments are often made, implicitly or explicitly. *See* MICHAEL BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER 107-20 (2014). We would expect commitments when the stakes, as well as the costs of changing plans midcourse, are sufficiently high.

130. I take it that Fuller would not have seen this as an objection to his view, because, as far as I know, he did not endorse reciprocal inducement as an account of exchange.

131. Daniel Markovits has recently offered a defense of the received consideration doctrine. *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1477-91 (2004). I said earlier that normative (like positive) analyses of the consideration doctrine have suffered from a failure to stay trained on the central notion of exchange, and Markovits's brave effort at justifying the unpopular doctrine is, I believe, an instructive example. After arguing that "the morality of contract derives from the value of the collaborative community that contracts engender"—more fully, that it derives from the fact that "[c]ontracts establish relations in which persons do not just negatively refrain from using each other merely as means but also, and affirmatively, treat each other as ends in themselves"—Markovits aims to leverage this analysis to explain the consideration requirement. *Id.* at 1482. Although he recognizes that this aim requires him to distinguish between bargain promises and gratuitous ones on collaborative grounds, I submit that the account of collaboration he offers does not allow him to do so, as the relevant species of collaboration does not cleave to only one side of the line dividing exchange agreements and gratuitous promises. Quoting James Penner, Markovits observes that "bargains are bilateral" in the sense that they relate to "mutual decisions—that is, decisions made by more than one person—and they each concern 'joint' projects or concerns of some kind where the parties *each participate* to some extent in whatever the agreement contemplates." *Id.* at 1482-83 (quoting J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325, 329 (1996)). Even if Markovits were to embrace the conclusion that the nondonative collaborative agreements highlighted above (e.g., "I'll enlist if you'll enlist") satisfy the consideration requirement, he would presumably not dispute that gift promises (including promises to do the promisee a favor) fail the consideration test. But if Markovits's (previously quoted) characterization of bargains does not apply to *all* gift promises, it at least applies to the very many of them that result from the acceptance of offers to, or requests for, help, and that concern a joint activity (e.g., when you agree to pick me up from the airport or to help me move my house next Saturday after I ask for your help). Moreover, once such a commitment has been made, it gives rise to a "scheme of interlocking intentions," underwritten by an assumed obligation, that should invoke Markovits's "collaborative ideal"

Once the traditional conception of bargain is recovered, however, and the consideration requirement is accordingly revised, an intelligible rationale quickly emerges. The point of the consideration rule, properly conceived, is to keep contract in its place; more specifically, the function is to invalidate promises and commitments made in personal, intimate contexts when the parties to such agreements have not expressly manifested an intention to establish legal relations.[132] Although this function is, I believe, the most intelligible and historically compelling rationale for the doctrine of consideration that can be offered, it rests on a number of controversial premises that I do not mean to defend, only to reveal.

I begin with the connection drawn by Samuel Williston between the consideration requirement and the requirement of intent to establish legal relations:

> In a system of law which makes no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was contemplated, but in a system of law which does not enforce

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no less than the case of valid enforceable contracts. *Id.* at 1483. Furthermore, no less than bargains, such gratuitous commitments "are in their nature wanted by, and invoke the intentions of, all participants"—after all, barring undue pressure (a possibility that does not distinguish gratuitous from bargain promises), why would the favor have been offered (or requested) and accepted if it was not wanted by the participants? *Id.* To be sure, it is not true of *all* gift promises that they give rise to mutual obligations, that is, that "[e]ach party to a bargain expressly intends to give the other authority to require performance, and [that] each party expressly intends to exercise the authority that she enjoys in this connection." *Id.* However, as we have seen in the case of the aunt and the art-collecting nephew, many conditional gift promises *do* involve mutual obligations. Moreover, on the traditional analysis, unilateral (exchange) contracts (for example, a contract that is formed by a payment of ten dollars that is made in acceptance of a prior offer to serve the payor a sandwich upon receipt of ten dollars) are equally marked by a one-sided relation of obligation, yet satisfy the consideration requirement. (Indeed, it is partly on account of such unilateral contracts that modern commentators have rejected a "mutuality of obligation" requirement. *See* 2 PERILLO & BENDER, *supra* note 116, § 6.1, at 196-212.)

132. I allude to Stephen Hedley's important article, *Keeping Contract in Its Place*—Balfour v. Balfour *and the Enforceability of Informal Agreements*, 5 OXFORD J. LEGAL STUD. 391 (1985). Hedley argues persuasively that the entire function (as well as operational content) of the English legal-intent requirement is to bar enforcement of (informal) social and domestic promises. Although it serves to corroborate his account, Hedley fails to notice the role played by the doctrine of consideration in the development of the legal-intent requirement. As I explain below, the English did not adopt the legal-intent requirement until (Pollock's version of) Langdell's definition of consideration took root, at which point consideration could no longer fulfill the relevant function. Hedley's account of the legal-intent requirement is echoed by Stephen Smith in the latter's justification of the legal-intent requirement. SMITH, *supra* note 24, at 213-15.

> promises unless some [consideration] has been asked [for] and given, there is no propriety in such a limitation.[133]

In a post-Fullerian age, it is all too easy to read these remarks as reflecting the position that consideration serves as a proxy for a promisor's intent to establish legal relations, and that this justifies the doctrine. However, as a matter of interpretation, this would be a mistake, for Williston clarifies that it would be "unfortunate" to let the validity of a promise "depend upon the accident of the promisor's reflection on his legal situation."[134] In any case, Fuller's proxy claim is, as I have already observed, unconvincing. But there is a better argument in the vicinity, one that is suggested by Williston's remarks. The rationale that I ascribe to the doctrine of consideration assumes the background legal regime that Williston describes: specifically, it assumes that an intent to be legally bound is not required as a condition of contractual liability, even if manifested intentions *not* to be legally bound will be effective. By stating that the rationale for consideration assumes this rule, I do not mean that I assume such a rule to be defensible—again, as with the other assumptions that I will go on to discuss, I take no stand on the matter. Rather, I mean only that the most plausible and attractive rationale for the consideration requirement takes the background rule for granted.[135]

The explanation I put forward conceives of the consideration doctrine as a proxy rule and rests on the general view that the transactional forms that we employ when performing beneficial services to others are profoundly sensitive to social context and relationship type.[136] More specifically, it rests on the empirical and sociological claim that we tend not to resort to quid pro quo transactions in personal, intimate contexts. In the context of friendship and family, we tend to resort to other modes of reciprocity and mutuality. Although there are modes

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133. 1 WILLISTON, *supra* note 11, § 21, at 21-22. Williston is here drawing from a footnote in his earlier 1914 paper. Williston, *supra* note 66, at 506-07 n.13. His substitution of "propriety" for the earlier "necessity" is most revealing.

134. 1 WILLISTON, *supra* note 11, § 21, at 22.

135. There are two further remarks worth making. First, we may surmise that this is why Scanlon was unable to find more to say on behalf of the consideration requirement, *see supra* note 123 and accompanying text, for his discussion explicitly assumes a scheme of contract law that imposes a legal-intent requirement. Scanlon, *supra* note 123, at 104. Second, it is perhaps worth emphasizing that the "English rule" requiring legal intent is, according to our leading historians, a late nineteenth-century phenomenon that wasn't accepted by the English courts until 1919. *See, e.g.*, IBBETSON, A HISTORICAL INTRODUCTION, *supra* note 2, at 233 ("It did not, however, reach the doctrinal heartland until it was borrowed by Pollock from Savigny and incorporated in his textbook in 1876.").

136. This general view has been influentially propounded by Viviana Zelizer. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY (2005).

of exchange that are characteristically "friendly" (e.g., individualized discounts, or offers of first refusal, extended to friends as favors), friends are generally reluctant to characterize their services to one another in quid pro quo terms, and it would often be galling to respond to a favor request from a friend with a quid pro quo counteroffer, even in contexts when it would be acceptable to refuse the request outright.

It is worth contrasting this sociological claim—an empirical generalization—with a similar one familiar from the economic literature on donative promising. Several classic papers in the law and economics tradition have suggested that the law might assume that donative promises are generally confined to intimate contexts and that this might explain the law's reluctance to enforce such promises, given the availability of less costly extralegal enforcement mechanisms.[137] The empirical proposition I rely on is subtly, yet importantly, different. Rather than attributing to the law the view that gratuitous promises (that is, nonexchange commitments, whether donative or not) tend to occur only among intimates, I am attributing to it the view that quid pro quo exchanges tend not to occur among intimates.[138] Moreover, although I put this forward as an empirical and

137. Richard Posner, for example, has surmised that "the real reason for the law's generally not enforcing gratuitous promises is . . . an empirical hunch that gratuitous promises tend . . . to be made in family settings where there are economically superior alternatives to legal enforcement." Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 417 (1977). Similarly, Charles Goetz and Robert Scott have put forward the view that "[e]xtralegal sanctions are likely to be effective in the donative context because promisors generally care about the welfare of promisees. In contemplating a promise, the promisor may regard costs suffered by the promisee as equivalent to costs suffered by himself." Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1304 (1980). The empirical claim is also sometimes put forward by those outside the law and economics tradition. See, for example, Eisenberg's observation that "[a]n inquiry into ingratitude involves the measurement of a maelstrom, because many or most donative promises arise in an intimate context in which emotions, motives, and cues are invariably complex and highly interrelated." Eisenberg, *Principles of Consideration*, *supra* note 126, at 662. Similarly, Mindy Chen-Wishart has recently offered a defense of consideration centered around the claim that "[g]ratuitous promises are normally embedded in a framework of ongoing [personal] relationships with normative implications, which provide the code for interpreting the significance of acts and omissions." Mindy Chen-Wishart, *In Defence of Consideration*, 13 OXFORD U. COMMONWEALTH L.J. 209, 223 (2013).

138. It is likely that the economists are tacitly assuming my empirical generalization as well. At the very least, if our exchange promises to friends and family were to swamp our donative ones, then even if their empirical thesis about donative promises were correct, it would not be clear that the administrative costs of applying a bar against donative promises would outweigh the savings to which they refer. *See supra* note 137. Relatedly, it would seem that anyone endorsing the Fullerian proxy discussed earlier also presupposes my empirical claim. For the assumption on which that proxy rests—as discussed previously—seems to fail most obviously in intimate contexts, contexts which are of course chock-full of commitments.

sociological generalization, susceptible to falsification and contingent upon values that might not be endorsed universally, I do not merely offer it as an "empirical hunch."[139] The theory of quid pro quo exchange that was put forward in Part II went some of the way toward explaining why friends and family often have reason to be squeamish about quid pro quo exchange notwithstanding its great potential to distribute goods and services in mutually beneficial ways.

I will not attempt to define the notion of personal, intimate relationship to which I have appealed. Indeed, it is in part because the notion (unlike the somewhat more restrictive "family") does not lend itself to ready definition that the law might have reason to prefer a proxy rule.[140] Two other factors would appear to weigh in favor of using a proxy rule instead of a more direct one. First, although I will not argue the point, the burdens that a more direct rule would place on courts in determining, and on individuals in clarifying, the nature and quality of personal relationships would seem to count in favor of a proxy. Second, and more importantly, a more direct rule that invoked the notions of friend and family would have greater difficulty bracketing off those occasions, not necessarily infrequent, where friends and family members confront one another, appropriately, at arm's length in the marketplace. In other words, it would have greater difficulty restricting the rule to those instances where family and friends are not merely engaging with one another but doing so as family and friends. Indeed, although I do not myself go so far as to endorse the claim, some might see the use of the exchange form as not merely indicative, but also partly constitutive, of a nonintimate context. To the extent that one does hold such a view, the bargain rule would amount to more than a proxy that merely tracks, however inexactly, important social divides; on such a view, the rule could be viewed instead as one that carves up our social world directly at the joints.

Given the foregoing, I submit that the reasons that justify, or at least explain, the consideration rule are the same as the apparent reasons we have to effectively replace the background rule regarding legal intent with the contrary rule (one that requires the manifestation of legal intent as a condition of liability) when it

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139. Posner, *supra* note 137, at 417.

140. It is worth noting that the Supreme Court, in *Salman v. United States*, 137 S. Ct. 420 (2016), has recently adopted a rule in the law of insider trading that turns on whether the recipient of a tip from an insider (i.e., "tippee") is a "trading relative or friend," thereby using a direct nonproxy rule to demarcate the personal, intimate space. *Id.* at 427-28. However, it is noteworthy that there has been considerable uncertainty about how this term will or ought to be construed. In particular, although the Court, in *Salman*, extensively discussed a recent Second Circuit decision, *United States v. Newman*, it conspicuously failed to express a view about how its holding would apply to the facts in that case, involving tips by insiders to fellow congregants of a church as well as to professional acquaintances. *See Salman*, 137 S. Ct. at 425 (citing United States v. Newman, 773 F.3d 438 (2d Cir. 2014)).

comes to those promises and agreements made in personal, intimate contexts. That is, the consideration requirement rests on the view that commitments made in these contexts should not be legally enforceable when the parties do not expressly manifest a contrary intent. I will not argue for such a view, except to say that I do not believe that its appeal derives only, or even primarily, from considerations such as the availability of cheaper enforcement mechanisms or the difficulties involved when outsiders must interpret the agreements of intimates.[141] Furthermore, it is worth emphasizing that the opt-out provision—which gives intimates a meaningful opportunity to voluntarily assume legal obligations to one another if and when they choose to do so—is an important element of the justification. To once again quote Williston, "It is something, it seems to me, that a person ought to be able to do, if he wishes to do it—to create a legal obligation to make a gift. Why not? . . . I don't see why a man should not be able to make himself liable if he wishes to do so."[142] The force of these words does not diminish in the slightest when applied to the personal domain. Moreover, the costs of adopting a proxy rule rather than a direct one—in particular, the effects of this design choice on gratuitous commitments (donative and nondonative alike) that are made outside of personal contexts—are mitigated substantially by provisions allowing individuals to legally bind themselves if and when they choose to do so. In this connection, it is worth highlighting that the consideration rule has historically always operated alongside the availability of formalities (such the seal or nominal consideration) that allow individuals easy and affordable ways to voluntarily assume legal obligations.[143] To the extent that the widespread ban on nominal consideration in the United States (but not elsewhere in the common-law world), together with the fairly recent abolishment of the seal

141. While I will not make the case, other obvious factors to consider include our distinct interests in the *reasons for which* commitments are honored in this domain, as well as the much more vexed question concerning the domain's appropriate and desirable degree of insulation from state interference. Mindy Chen-Wishart has recently argued in favor of this special treatment of agreements in the private domain. *See* Chen-Wishart, *supra* note 137. The view has also been subjected to a feminist critique, in connection with the English requirement of legal intent, in Mary Keyes & Kylie Burns, *Contract and the Family: Whither Intention?*, 26 MELB. U. L. REV. 577, 585-87 (2002). It is worth noting that the feminist critique (of the legal-intent requirement) is often centered around cases of quid pro quo exchanges between spouses. Since these agreements *would* satisfy the doctrine of consideration, such considerations provide additional reason for preferring the proxy rule.

142. SAMUEL WILLISTON, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 194 (1925).

143. From its sixteenth-century origins, the consideration requirement only applied to simple contracts (i.e., those not under seal). As Simpson has explained, using the seal at that time was as easy and cheap as fixing a signature to a document is today. *See* SIMPSON, *supra* note 2, at 90.

in many jurisdictions, has effectively eliminated this possibility, the rationale I have ascribed to the doctrine provides the basis for a criticism of these developments and a call for reform.[144]

A second way of mitigating the costs of using a proxy to demarcate spheres of interaction involves allowing exceptions, and the rationale I have offered for the doctrine allows us to do so on a principled basis. That rationale does not extend to those types of commitments that, while strictly gratuitous, are both infrequently used by friends and family in their dealings with one another and describable in general terms that do not directly invoke the notions of friends or family. A case in point concerns the law's treatment of innovative mercantile and banking transactions, such as the bill of exchange in the seventeenth century.[145] Once we appreciate the rationale of the consideration rule, we can recognize the law's willingness to enforce such transactions for what it is: a principled exception to the consideration rule rather than an unprincipled concession owing to pressures from the commercial class or the economic needs of the hour. The same rationale can also be used to explain the validity of a promise to serve as a surety or guarantor for a debtor. Such guarantee agreements often involve genuine exchanges (as when, in exchange for the guarantee, the creditor agrees to extend funds or to forbear from suing the debtor), but when they do not they may still be enforced on the assumption that the relationship between surety and creditor (as opposed to surety and debtor) is rarely an intimate one. Finally, a principled exception can also be drawn for ancillary or collateral commitments, such as firm offers involving an offeror's promise not to rescind his or her exchange offer for a given time, on the ground that such commitments inherit the relevant properties of the underlying exchange offer—in other words, if an offer is unlikely to be made in a personal context, then so is the promise not to rescind such an offer.[146]

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144. On the seal and nominal consideration in U.S. jurisdictions, see GREGORY KLASS, CONTRACT LAW IN THE UNITED STATES 74-75, 88-89 (2d ed. 2012).

145. *See* IBBETSON, A HISTORICAL INTRODUCTION, *supra* note 2, at 204 ("The bill of exchange normally arose in the following situation: *X* owed money to *Y*; *X* gave to *Y* a bill drawn on *Z*; *Y* took the bill to *Z*, who accepted it thereby agreeing that he would pay it. If *Z* refused subsequently to pay, *Y* would wish to bring an action against him. So long as *X* had been acting as *Z*'s agent, this form of transaction created no difficulty: the acceptance of the bill did no more than concretize the obligation that already existed. The problem arose if there was no such agency relationship, for it could be objected that the acceptor, *Z*, had not received any consideration. From the early years of the seventeenth century actions in assumpsit are found against such acceptors in this type of case . . . ." (footnote omitted)).

146. Of course, this is just put forward as an empirical generalization compatible with occasional exceptions.

Similarly, the rationale allows us to respond to the claim that the bargain theory, at least as an interpretation of the historical doctrine, "leads to a strained emphasis upon the commercial element in contract law (for not all important contracts are commercial)."[147] Elaborating on this idea, A.W.B. Simpson argues as follows:

> It is natural to seek, behind the rules of law, for some general explanation in terms of contemporary social conditions or ideas, and this is right. Hence it has been suggested, notably by Mr. Fifoot, that the evolution of the doctrine of consideration reflects the idea that the courts should only hold commercial agreements actionable, and concern themselves with the bargains of businessmen . . . . Direct evidence for his view is not to be found, and indirect evidence hardly supports it; it hardly seems to be the sort of idea which sixteenth-century men would find appealing. The courts dealt with cases involving commerce, though the contractual instrument of the commercial world was the bond, not the informal promise . . . . More radically, the view that the law of contract is the handmaid of commerce seems to me to be mistaken if it is opposed to the view that the law of contract expresses, in a form thought appropriate (bearing in mind the practicalities of litigation), moral ideas. For commerce, like other areas of life, must be conducted morally if the general good is to be furthered, and there is no special set of principles of commercial morality.[148]

The rationale of the bargain theory that I have offered renders it immune to these charges, since it purports to justify the doctrine not by appeal to commercial needs or interests, but rather to the significance of valuable personal relationships. Nevertheless, despite (or precisely because of) this overarching justification, the doctrine also serves to explain why certain commercial transactions that do not meet the letter of the rule should nevertheless receive exceptional treatment.[149]

Finally, this functional explanation allows us to answer Fried's charge, noted above, concerning the doctrine's internal consistency. The reason the doctrine

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147. SIMPSON, *supra* note 2, at 417.

148. *Id.* at 487-88.

149. By the same token, it justifies the Uniform Commercial Code's willingness to discard the consideration requirement altogether. *See, e.g.*, U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM'N 2017) ("An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration . . . ."). Since the U.C.C. applies only in commercial contexts, it has no need for a requirement meant to screen off social and domestic agreements. *See id.* § 2-102.

requires the existence of a bargain, but does not police the adequacy of its terms, is simply that its motivating rationale—in particular, the empirical generalization at its heart—concerns the parties' mere utilization of the bargain form and not the adequacy of the terms of the agreement.[150]

I do not claim originality for the rationale I have proposed. Although I do not know of anyone who has explicitly offered it exactly as I have, I believe, as I have said, that it is the best interpretation of Williston, and that it is also closely related to explanations of the doctrine recently put forward by Douglas Baird and Mindy Chen-Wishart.[151] What has not been noticed, however, is that, for reasons we have already considered, this justification is not available to proponents of the reciprocal-inducement theory of consideration (a company that includes Baird).[152] As we have seen, the reciprocal-inducement theory of consideration rules out the justification for the rule by rendering the empirical claim at its heart totally implausible. For if reciprocal inducement supplies the content of the consideration requirement, then that requirement, as I have explained, does not serve to screen off the personal domain, a domain marked by collaboration

150. To be sure, people sometimes engage in "mixed transactions" in intimate contexts, as when sellers give their friends or family a gift in the form of an individualized discount. But even if we were to set aside the judicial burdens of having to determine, in every case, whether the terms of a bargain reflect such a discount, the rationale I have assigned would not support barring such mixed transactions unless the existence of a discount were a sufficiently reliable sign that the transaction had occurred in a personal context. But the claim that such discounts are a reliable sign of a friendship between buyer and seller is highly doubtful, as there are ample legitimate reasons that discounts are given outside the contexts of friendship and family.

151. *See* DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 29 (2013) ("A bargain must exist for a promise to be legally enforceable. Inside the family, explicit bargains are the exception. Hence, most intrafamilial promises are, in this world, not legally enforceable. *Hamer* is an exception that proves the rule."). Aside from the restriction to the family, attention should be drawn to the qualification in "*explicit* bargain." *Id.* (emphasis added). Since the law enforces implicit bargains, as well as explicit ones, the qualification mars the analysis; in any case, I do not believe it is needed. The reason that intimates are uncomfortable with explicit bargains is that they are uncomfortable with bargains. As I have already noted, Chen-Wishart's justification rests on the (dubious) empirical claim that gratuitous promises are generally confined to the personal domain. *See* Chen-Wishart, *supra* note 137, at 211.

152. Baird explicitly endorses the reciprocal-inducement theory of consideration. *See* BAIRD, *supra* note 151, at 26-27 ("There just has to be an exchange. A legally enforceable promise could not exist in the absence of a bargain. As Holmes put it, '. . . . The root of the whole matter is the relation of reciprocal conventional inducement . . . .' Legal enforceability turns on whether there was consideration, and this, in turn, requires a bargained-for exchange." (omission added) (footnote omitted) (quoting O.W. HOLMES JR., THE COMMON LAW 293-94 (Boston, Little, Brown, & Co. 1881)).

and coordination of the sort that commonly results in joint commitments to mutually beneficial plans of action that satisfy the conditions of reciprocal inducement. Indeed, this incompatibility between the justification and the modern theory has led to a historical development of contract law that both corroborates the functional explanation for consideration that I have put forward and serves as basis for a further substantial criticism of both the English system of contract law and the approach of the Second Restatement. In both cases, the positions on the doctrine of consideration and the legal-intent requirement have developed in uncanny parallel. In particular, the acceptance of a motivational conception of consideration results in the adoption of a legal-intent requirement that serves the screening function that a distorted doctrine of consideration is no longer able to serve.

I will begin with the English case, with which I shall be brief. Frederick Pollock published two editions of his influential contracts treatise prior to Langdell's publication of his definition of consideration. In each of these editions (of 1876 and 1878), Pollock adopted Savigny's rule, derived from his Kantian Will Theory, requiring legal intent as a condition of liability.[153] However, neither of those editions contained any trace of Langdell's definition of consideration. In the third edition of his treatise (1881), published after, and in light of, both Langdell's *Summary* and Holmes's lectures, Pollock incorporated a version of Langdell's formula that, as we have seen, effectively entails Holmes's motivational construal.[154] In the very same edition, Pollock puts forward a new argument in support of the rule requiring legal intent as a condition of liability: he claims that only "Savigny's view" requiring legal intent can explain the legal invalidity of social and domestic agreements.[155] This sequence is fully explicable in light of the fact that the motivational conception of consideration entailed by Langdell's formula, in contrast with the remuneration conception, is unable to rule out all the humdrum social and domestic agreements that satisfy the conditions of reciprocal inducement. Accordingly, before Pollock adopted Langdell's formulation of the consideration rule, this argument in favor of Savigny's rule was not

153. POLLOCK, *supra* note 31, at 1-2; FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 1-2 (London, Stevens & Sons 2d ed. 1878). In the first two editions, general credit is given to Savigny, *see, e.g.*, POLLOCK, *supra* note 31, at 2 n.*b*, while the intent requirement is referred to as "Savigny's view" in the third edition, POLLOCK, *supra* note 11, at 2 n.*a*.

154. POLLOCK, *supra* note 11, at 179; *see supra* note 11 and accompanying text (analyzing the definition given in Pollock's third edition). I am, once again, assuming that a weaker, and less plausible, "I will if you will" theory of exchange is not available. *See supra* note 50. None of my arguments in this section depends on this view, however.

155. POLLOCK, *supra* note 11, at 2 n.*a*.

available to him. The English courts, meanwhile, did not adopt (Pollock's version of) Langdell's definition until 1915.[156] Up until then, the English courts, apparently unmoved by Pollock's embrace of Savigny, also declined to adopt the rule requiring legal intent as a condition of enforcement. However, only four years after adopting Langdell's definition, they went on to adopt the legal-intent requirement. And they did so in *Balfour v. Balfour*, which involved a domestic agreement lacking consideration according to the remuneration conception of exchange, but satisfying the consideration requirement by the lights of the modern conception.[157]

Let us now consider the (American) case of the Restatement. As we have seen, the remuneration theory of consideration has little difficulty ruling out informal social and domestic agreements; when two friends commit to a dinner engagement, neither their commitments nor their fulfillments stand in payment relations to each other. Indeed, it is precisely on this basis that Williston argued, against Pollock, that the doctrine of consideration was up to the task of excluding these commitments, a view reflected in the silence of the First Restatement (over which Williston presided as Chief Reporter) on the matter.[158] Corbin, however, grasped the fact that Langdell's definition (with its implicit motivational conception of exchange) plainly gets the wrong result in these social and domestic cases, necessitating a workaround. Accordingly, in his treatise, in what might be seen as a rather unabashed display of his legal-realist orientation, Corbin seeks to reach the right result by introducing a "rule" that says, simply, that the cases

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156. Specifically, Pollock's version of Langdell's formula was adopted by Lord Dunedin in *Dunlop Pneumatic Tire Co. v. Selfridge & Co.* [1915] UKHL 1, [1915] AC 847 (HL) 855 (Lord Dunedin) (appeal taken from Eng.).

157. Lord Justice Atkin clearly implies that the agreement at issue in *Balfour* is supported by consideration. In *Balfour*, the lower court had held in favor of the plaintiff, Mrs. Balfour, on the ground that her husband's promise was supported by consideration. Balfour v. Balfour (1919) 35 TLR 476 (KB) (Eng.). Lord Justices Warrington, Duke, and Atkin of the Court of Appeal reversed unanimously. After observing that "it constantly happens" that agreements between spouses satisfy the consideration requirement even when the spouses "did not intend that they should be attended by legal consequences" and that such agreements "are not contracts because the parties did not intend that they should be attended by legal consequences," Lord Justice Atkin goes on to say that "*[t]he only question in this case* is whether or not this promise was of such a class [of promises made without legal intent] or not." Balfour v. Balfour [1919] 2 KB 571 (CA) 578-79 (Atkin LJ) (Eng.) (emphasis added).

158. 1 WILLISTON, *supra* note 11, § 21, at 24 n.19 ("[T]he promise of the guest to attend the dinner is not given or asked for as the price of the host's promise."); *see also* Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1489 (2009) (describing Williston's treatment of social and domestic agreements in the First Restatement). Recall that Williston took seriously the payment conception of exchange, while also, inconsistently, adopting the Langdellian definition of consideration. *See supra* note 45.

in this domain should be decided as they have always been decided. More exactly, the rule he offers says that "[i]f the subject matter and terms are not such as *customarily* have affected legal relations, the transaction is not legally operative unless the expressions of the parties indicate an intention to make it so."[159] This, of course, is a retreat from principled explanation insofar as it does not articulate the basis of the decisions that constitute the custom.[160]

If the remuneration theory is correct, those past decisions (the ones that constitute the custom) are to be explained by appeal to the doctrine of consideration. Since Corbin was unable to appeal to consideration to explain these cases (given his commitment to Langdell's definition), he was forced to look elsewhere. Pollock, as we have seen, explained the results in question by reversing the legal-intent rule across the board (requiring legal intent in all cases), but Corbin, reflecting American opinion, was unwilling to follow suit. Accordingly, the natural place for him to look was to a direct (that is, nonproxy) rule that would replace the background rule in what I have been calling personal and intimate contexts. But Corbin, perhaps to his credit, did not attempt to define such contexts and so settled on his appeal to past practice.[161]

The drafters of the Second Restatement added a comment to Section 21 on "social engagements and domestic arrangements" that reflects Corbin's position but avoids the appeal to custom: "In some situations the normal understanding is that no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract. Traditional examples are social engagements and agreements within a family group."[162] Gregory Klass has surmised that they may have changed the formulation because of the explanatory shortcomings of Corbin's appeal to custom.[163] In light of the open-ended appeal to "normal [judicial] understanding," however, there is little reason to credit the new formulation as marking an improvement in this respect.[164] In any case, there is a better explanation available for the change in formulation. Corbin's rule, instructing courts to carry on doing what they have been doing all along, presumably implies

159. 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 34, at 138 (2d ed. 1963) (emphasis added).

160. In a discussion to which I am indebted, Gregory Klass says that Corbin's rule is "arguably circular." Klass, *supra* note 158, at 1490. I do not think circularity is the best charge here, since I do not think Corbin implied, or meant to imply, that *this* rule was what accounted for the previous decisions. But it *is* a retreat from principle, insofar as Corbin does not articulate a principle that can be used to distinguish the classes.

161. 1 CORBIN, *supra* note 159, § 34, at 141.

162. RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. c (AM. LAW INST. 1981).

163. Klass, *supra* note 160, at 1490.

164. RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. c.

that well-established cases like *Hamer v. Sidway*,[165] which involved a genuine quid pro quo exchange in a personal context, should not be overruled. Although this is a result that accords with the remuneration theory and with the justification I have offered for it—on the grounds, at the very least, that the proxy rule is, by definition, an approximation that does not perfectly capture the target class of social and domestic agreements—it is not a position available to the Second Restatement, for the simple reason that the Restatement lacks the resources to cordon off the relevant class of cases. That is, it lacks the resources to distinguish cases like *Hamer*, involving genuine exchanges, from those involving social and domestic agreements that are not genuine exchanges, but which nevertheless satisfy the conditions of reciprocal inducement. Accordingly, the Reporters opted for consistency and adopted a direct (i.e., nonproxy) rule which, I believe, clearly implies that *Hamer* should be reversed. They did this by resorting to the blanket description of "social engagements and agreements within a family group," a formulation that effectively leaves it to judges to determine not whether there was legal intent in a given case, but whether the nature and quality of the relation in a given case are sufficiently personal so as to fall under the description.[166]

The remuneration theory elaborated here allows us to use the consideration doctrine as an alternative to leaving this determination in the hands of judges. But even setting aside the advantages of applying a sufficiently reliable proxy in lieu of such a case-by-case judicial determination, we may marvel at what Corbin and the drafters have wrought. If my justification of the consideration rule is correct, even at the level of explanation, they have added a direct (nonproxy) rule without eliminating the antecedent proxy rule of consideration, and have, in turn, distorted that antecedent proxy rule beyond recognition. These mistakes could be avoided by discarding a defective theory of bargain, as well as a definition of consideration that effectively entailed it.[167]

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165. 27 N.E. 256 (N.Y. 1891).

166. Although very little turns on it, I do not believe that the comment's appeal to "normal understanding" can refer to the understanding of the general population. For there is certainly no reason to think that laymen possess the "normal understanding" that the so-called "English rule" (requiring a showing of legal intent across the board) does not obtain on these shores. Indeed, in my experience, many people are surprised to learn that legal intent is not a condition of liability. Thus, the "normal understanding," if it is to track the relevant distinction between spheres, must refer to the understanding of judges.

167. *See supra* note 50. It follows from the arguments given in this Section that if a legal regime (such as England's) is wedded to a legal-intent requirement, then such a regime has no compelling grounds for upholding a consideration requirement.

CONCLUSION

In offering the foregoing account of consideration, I have attempted to strike a path between two diametrically opposed modes of doctrinal analysis. On the one hand, I have eschewed a prominent "realist" understanding of the doctrine. On the other hand, I have avoided treating the doctrine as an embodiment of noncontingent principles of right. According to the realist understanding, a judicial finding concerning consideration amounts to no more than the statement of a conclusion—namely, that the agreement at issue is either enforceable or not—reached not by the application of an independently specifiable bargain requirement, but rather by the exercise of a broad discretionary power based on an open-ended list of factors such as good faith, reliance, and substantive fairness.[168] While there is little doubt that the term "consideration" has been stretched beyond the province of bargain (on any conception of the form) to embrace gratuitous promises that judges, rightly or wrongly, have wished to enforce, the proper theoretical (and pedagogic) response to this is to make the exceptional character explicit and not to leap to a premature conclusion that the exception has swallowed the rule.[169] Of course, exceptions *can* swallow rules, or

168. For an influential statement of this position, see ATIYAH, *supra* note 11. Atiyah was avowedly influenced by Corbin, whose realism is evidenced throughout his influential writings on consideration. For example, in an important discussion, Corbin urges his contemporaries to quit trying to square the validity of bilateral contracts with the legal-detriment requirement, not because it cannot be done, but rather because the basis of liability lies elsewhere and does not need to clear any bar created by technical rules.

> Mutual promises create a legal obligation because—in English-speaking countries, at least—the customary notions of honor and well-being cause men to perform as they have promised, and the lawmaking powers have decreed that in such cases promise-breakers shall make compensation. Our prevailing credit system in business requires such a rule. The basis for the enforcement of bilateral contracts lies in mutual assent and fair dealing.

Corbin, *supra* note 45, at 375-76. Although, in this passage, he urges us to dispense with the legal-detriment requirement, the reasoning applies more generally to any technical bargain requirement. The familiar empirical and normative criticisms of the realist position—namely, that courts rarely invent or ignore consideration in a manner inconsistent with the literal application of the technical bargain requirement, and that the open-ended discretionary power is at odds with the rule of law—are carefully rehearsed by Stephen Smith. *See* SMITH, *supra* note 24, at 227-32.

169. This has long been a standard way of analyzing judicial language concerning the validity of the seal. Pollock, for example, explained that although

> we are now accustomed to bring contracts under seal within the terms of the condition by saying that where a contract is under seal the consideration is presumed. . . . [T]his is a transparent fiction. . . . The ancient reason why a deed

indicate an absence of commitment to them, but whether they do is a function not just of the amount of flesh left on the bone after the cuts have been made, but whether the reasons for the exceptions are compatible with the underlying reasons or principles for adopting the rule in the first place. The deepest harmony between a rule and its exception is achieved when the very reasons for adopting the rule also count in favor of recognizing the exception (as when the reasons for the rule do not apply to a class of cases that are accordingly treated exceptionally). When the exceptions are drawn on this basis, they do not threaten the integrity of the rule even when the ground that they cover is quite vast; for this reason, one cannot infer from a willingness to draw exceptions that a rule is not taken seriously. This is precisely the situation with regard to many of the traditional exceptions to the bargain requirement: as we have seen, although the exceptions are substantial, they align perfectly with the functional rationale I have ascribed. Of course, if one is (as Patrick Atiyah and Corbin were) caught in the grip of a conception of the bargain requirement that obscures the underlying rationale—indeed, a conception of the requirement that does not enjoy the benefit of *any* rationale—one may then understandably infer from the breadth of the exceptions that they have been drawn without regard for the (so-called) requirement. But this serves only to underscore the importance of obtaining a tighter grip on our central concepts in law—none more central or significant than bargain, or quid pro quo exchange.

In differentiating my position from the realist one, I risk overstating the significance of the functional rationale for the overall account I have provided. Even if one were to reject, or supplement, the rationale I have given, the account of bargain or exchange would survive. So would the reconceptualization of consideration that incorporates it and, in so doing, avoids the traditional difficulties related to conditional gift promises and preexisting duties. Indeed, those who are inclined to view the central doctrines of common law as embodiments of noncontingent principles of right (Kantian or otherwise) might view my efforts as a preliminary purification: by purging the doctrine of its Holmesian dross, and exposing its crystalline structure, perhaps consideration is now ripe for a treatment revealing that it, too, is a corollary of an abstract principle of right.

This is not the course I have taken, and I embrace the contingency that is woven into my analysis. According to my account, the bargain performs a function that, while open to challenge, is widely perceived as important: namely, ensuring that the commitments made in personal, intimate contexts are not enforceable absent a manifest intent to be legally bound. Even if we take this goal for granted, the contingency of the rule derives from the fact that there are other

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> could be sued upon lay not in a consideration in our present sense of the word being presumed from the solemnity of the transaction, but in the solemnity itself.

POLLOCK, *supra* note 31, at 116.

ways of achieving it. If the legal system has reasons for choosing this way of achieving the goal rather than some other way (for example, rather than imposing a direct, nonproxy rule requiring, as a condition of liability, a showing of legal intent in social and domestic agreements) these are reasons that might change over time, ungrounded in the inherent promissory rights of the parties to the agreement. Recognizing this contingency strikes me as an appropriate position to adopt, and not only for the familiar reason that other legal systems with their own distinct ways of achieving similar functions do not seem to be susceptible to a rights-based criticism on those grounds alone.[170] More fundamentally, the line separating (unexecuted) exchange agreements from gratuitous promises does not seem to possess the kind of intrinsic significance that could directly justify their differential treatment within contract law. Perhaps I am wrong and fail to grasp the full potential of the account I have offered. Perhaps the reciprocal-payment relation that I have identified possesses just the kind of significance that could justify the requirement without appeal to other factors. I am open to that possibility but have not yet seen how the case can be made. In any event, the line between exchange and gratuitous agreements *does* have considerable social significance; indeed, it bears a very close relation—whether indicative or constitutive—to social distinctions that, it is widely believed, the law of contracts has reason to heed. And so I conclude that it is *these* social lines that are the objects of the law's concerns when it imposes a bargain requirement. The resulting account is, to be sure, a functional one, assigning the doctrine the independently specifiable goal of screening off informal social and domestic agreements. But we must not think that such an explanation in any way denigrates the doctrine.[171] I would say that to harbor such a thought is to commit the error of treating the common law as though it were divine law; however, even divine law frequently receives a functional justification from even its most devoted adherents.[172]

In closing, I would like to gesture, however inadequately, toward a final respect in which the doctrine serves its function only contingently. A bargain requirement is a sensible way of marking off the distinction between the personal

170. For comparative approaches that emphasize the functional commonalities between the diverse systems, see THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW (James Gordley ed., 2001); and Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959).

171. This is especially true when we consider that the goal is not restricted to the satisfaction of preferences but rather relates to the noninstrumental value of personal relationships.

172. For example, the Babylonian Talmud records the view that the prohibition concerning the consumption of wine produced by non-Jews is to be explained by the rabbinic policy of discouraging intermarriage. *See* KOREN TALMUD BALVI, NOÉ EDITION: AVODA ZARA & HORAYOT 191 (Tzvi Hersh Weinreb & Joshua Schreier eds., Koren Publishers Jerusalem 2018) (c. 3d-6th centuries C.E.).

and nonpersonal domains only insofar as the exchange form is widely used in the nonpersonal domain. It is one thing to derive exceptions to a bargain requirement for discrete kinds of nonexchange transactions in the commercial realm (such as surety agreements); it would be quite another to apply a bargain requirement to screen for social contexts if bargains had fallen out of use entirely. Of course, quid pro quo exchange is at no risk of extinction, and this is not to be lamented. However, once the nature of exchange has been exposed—and Reciprocal Debt Satisfaction and No Residue articulated—we can appreciate that the appeal of the form depends on both the desirability and availability of the species of closure that it promises. And it is important to see that background norms and collective decisions can make an impact on each of these things. This is easiest to observe by considering the extreme cases. Where individuals (or groups) take themselves to be without normative constraints in their interactions with strangers, the prospect of leaving unsettled the status quo ante with particular strangers might be a frightening one, and people living in such conditions might generally welcome modes of service that establish lasting ties. At the other extreme, where a strict egalitarianism of resources prevails, and everyone must end up with an even share at the end of the day, many exchanges are rendered futile, subject to unwinding at day's end.[173] Just as Rawls, following Hume, identified "circumstances of justice" in which human cooperation is both possible and desirable (indeed, necessary)—namely, limited altruism, moderate scarcity of resources, and a rough equality in mental and physical capacities[174]—so too are there circumstances of exchange, yet to be identified.

Beyond its role in hastening or preventing the extreme cases, the law may otherwise impact the desirability of exchange by limiting the degree of closure that may be produced by the transactional form. The infamous 1842 decision of *Winterbottom v. Wright*,[175] as well as the subsequent development of the law of negligence, is a case in point, and a fitting close to this Article. In *Winterbottom*, the injured driver of a defective coach (owned by the driver's employer, the English postmaster) sued the coach's manufacturer, and the Exchequer of Pleas dismissed the suit for lack of "privity" between the driver and the manufacturer. What is interesting, for our purposes, is the analysis of Lord Chief Baron Abinger:

173. This is related to Robert Nozick's well-known Wilt Chamberlain example. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160-61 (1974).

174. *See* HUME, *supra* note 63, at 317-18; JOHN RAWLS, A THEORY OF JUSTICE 109-10 (rev. ed. 1999).

175. Winterbottom v. Wright (1842) 152 Eng. Rep. 402; 10 M&W 109.

> By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of [the postmaster], *and after all matters between them had been adjusted, and all accounts settled on the footing of their contract*, we should subject them to be ripped open by this action of tort being brought against him.[176]

Chief Baron Abinger grasped that parties to exchange agreements regard each performance as discharging the duties generated by the other, and concluded (questionably) that a finding of liability would be at odds with this understanding.[177] However, Chief Baron Abinger drew the wrong conclusion about the legal significance of the parties' understandings, and seventy-five years later a tort duty grounded in foreseeability of harm was firmly established by Judge Cardozo in his opinion for the New York Court of Appeals in *MacPherson v. Buick Motor Co.*[178] Judge Cardozo explained the court's rejection of the privity rule as follows:

> We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[179]

While Judge Cardozo's decision is justly celebrated (and Chief Baron Abinger's rightly maligned), we must also give Chief Baron Abinger his due by recognizing that locating such a duty of care "in the law" *does*, to some extent (however justifiably), interfere with the ability of exchange to facilitate the redistribution of goods and services in such a way that leaves the parties' rights and duties in all other respects undisturbed. Corresponding with the law's recognition of the responsibilities owed towards the strangers with whom we interact is a diminishment in the appeal of a particular transactional form—the exchange agreement—that allows us to remain at arm's length in those interactions.

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176. *Id.* at 405, 10 M&W at 115 (Abinger CB) (emphasis added).

177. I say this conclusion is questionable, given that the plaintiff was a third-party stranger to the exchange. On my account, each party to an exchange regards their performance as discharging all duties owed *to the other party* on account of *the other party's performance*, and this understanding is not strictly incompatible with a duty owed to a third party on account of one's own performance.

178. 111 N.E. 1050 (N.Y. 1916).

179. *Id.* at 1053.