

2002

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Recommended Citation

C.M.A. McCauliff, *A Historical Approach to the Contractual Ties that Bind Parties Together*, 71 Fordham L. Rev. 841 (2002).

Available at: <https://ir.lawnet.fordham.edu/flr/vol71/iss3/9>

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A HISTORICAL APPROACH TO THE CONTRACTUAL TIES THAT BIND PARTIES TOGETHER

C.M.A. Mc Cauliff^{*}

No system of law, Roman, Anglo-American, or any other, begins with even a small number of rules, principles, doctrines, or generalizations of any kind They are all the creations of men, proliferating like the leaves of the trees as population expands, transactions multiply, conditions of life change, and the opinions of men as to what makes for their welfare and survival also change.¹

INTRODUCTION

Professor Arthur L. Corbin, author of the now-classic treatise, *Corbin on Contracts*, had a vision. He wanted to return reliance and benefit conferred to the area of liability in contracts. In the period leading up to the first Restatement of Contracts in 1932, many prominent lawyers in the American Law Institute disagreed with Corbin. They saw contract liability as limited to promises arising from bargaining for future reliance. The concepts of reliance and benefit conferred were therefore separated from the concept of consideration in the first Restatement by different section numbers as fact patterns without consideration. This division into separate sections of first and second class liability has had profound consequences for contracts. Although the other sections in the Restatement lead to liability (for example, witness the use of section 90 on reliance), the separation into different sections has given contracts liability a fragmentary quality not overcome to this day. Society's decisions on what promises should be enforced were diluted by the centrality the Restatement accorded to the market model of the bargained exchange.

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1. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 U. Kan. L. Rev. 183, 186 (1964) [hereinafter Corbin, *Sixty-Eight Years*].

While unbargained reliance and benefit conferred were acknowledged, they were deemed inferior to the main thrust of the Restatement which saw contractual promises as enforceable only when they were the product of bargained-for consideration. Thus, unbargained reliance and benefit conferred were relegated to the status of exceptions. Contracts without consideration were to be reluctantly enforced, and when they were enforced, it was only to avoid injustice. Nevertheless, Corbin acquiesced to the Restatement, which provided functional utility without theoretical unity. He continued to hope that the Restatement would evolve in future revisions to a more coherent position on liability. His conditional acceptance is understandable. The Restatement brought complete contractual liability fractured into different sections; without his efforts, the Restatement would have provided theoretical contractual liability only for reliance after mutual promises supported by bargained consideration.

Perillo and Bender's volume on the formation of contracts in the revised edition of Corbin's treatise adopts the Restatement's division, which was not made in Corbin's original edition. Indeed, history and the Restatements were good reasons for Perillo and Bender's taking the route they did. Corbin would have appreciated these reasons, although he may not have abandoned pursuit of a unified theoretical contractual liability. This article explores the road not taken and traces in general terms what Corbin might have wished to see if more of the Restaters had agreed with him. Ironically, although American contracts theory does not seem headed toward Corbin's desired unity, the current English law of obligations does, covering contracts, torts, and restitution influenced by the European Union.

Prosaic and serviceable, contracts remain at the center of our personal, professional, and business arrangements. Reinventing itself, the field of contracts adjusts over time to strike a more suitable balance between parties. Contract theory encompasses not only doctrinal clarity but is also concerned with a moral component. Fairness to the parties is an important constituent in a contractual relationship: one party should not be ruined in the interest of the other receiving a windfall. Today, various serviceable theories tied to the capital market and other utilitarian values support the centrality of the bargained exchange. They reflect a narrowly focused view of what a theory of contractual liability should be.

Corbin had a broader vision, based on reasonable expectations but also reflecting equity, harkening back to the views of Lord Mansfield.² In his day, Corbin saw the viability of reuniting discrete strands of

2. William Murray, first Earl of Mansfield (1705-93), is most noted for his work in commercial law and unjust enrichment. His attempt in *Pillans v. Mierop*, (1765) 3 Burr. 1663, to treat consideration as evidentiary only was rejected in *Rann v. Hughes*, (1778) 7 Term Rep. 346 n.a, 101 Eng. Rep. 1014 n.a (K.B.).

contract law into a comprehensive concept of liability.³ Corbin wished to restore the more complete vision embodied in several of Lord Mansfield's opinions. Starting in 1925, Corbin went about this self-appointed task by working on his treatise and the Restatement of Contracts.⁴ Corbin realized that "the reasoning of common law lawyers has preserved a way of argument already investigated in antiquity under the name of rhetoric or dialectical reasoning. It was well known to Roman jurists and throughout the middle ages until it waned with the advent of Cartesian philosophy."⁵ Thus, Corbin's analyses were based on the premise that rules are fashioned to the times and embody both change and continuity.⁶ For that reason, Corbin, having retired in 1943, continued to read the advance sheets for contracts cases until he was eighty-nine.⁷ As becomes clear from reading Corbin's works, primary emphasis on the bargain underlines the autonomy of the individual in accordance with Enlightenment philosophy. The principles of promissory estoppel and benefit conferred add a corrective emphasis on the relationships and obligations between parties to a contract arising from the broad, inclusive definition of consideration as a reason for contracting. The Restatement, however, kept these principles separate from consideration by inserting them in different sections from that which discussed consideration. We have kept them separate ever since. Thus, Perillo and Bender start the Revised Edition of Corbin's treatise on consideration from the point of view of the Restatements and not with Corbin's argument for unity of liability.⁸ Surely, Perillo and Bender have taken the right approach. It is no more possible to use Corbin's scheme today than it was when the first Restatement of Contracts was

3. Arthur Linton Corbin (1874-1967), one of the early teachers at Yale Law School, wrote a classic treatise on contracts that continues to be in demand and is now in the process of revision. Joseph M. Perillo is the general editor of the new edition of Corbin on Contracts, published in a multivolume series by West starting in 1993 and continued after Lexis acquired the treatise from West.

4. Friedrich Kessler, *Arthur Linton Corbin*, 78 Yale L.J. 517, 519 (1969). Corbin also worked on the Revised Sales Act. In another context, Peter A. Alces, in *Regret and Contract "Science,"* 89 Geo. L.J. 143, 144 (2000), observes that "a unified theory of contract would make sense of much of our jurisprudence. Such coherence is [a] desideratum. Few matters of human engagement admit of a single animating theory or principle... much can be learned even in an ill-fated effort to discover the underlying cause."

5. Kessler, *supra* note 4, at 523.

6. Arthur Corbin, *Principles of Law and Their Evolution*, 64 Yale L.J. 161 (1954) [hereinafter Corbin, *Principles of Law*].

7. Thomas W. Swan, *Professor Arthur L. Corbin, Creator of the Present-Day Yale Law School*, 74 Yale L.J. 207, 208 (1964); cf. Arthur Goodhart, *Professor Corbin's Eightieth Birthday*, 71 Law Q. Rev. 201, 202 (1955) (noting that Corbin had read more than 50,000 contracts decisions). For a fascinating picture of Corbin at work in his later years, see Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher Annotated*, 50 Wash. & Lee L. Rev. 755 (1993).

8. Joseph M. Perillo & Helen H. Bender, 2 Corbin on Contracts (rev. ed.): Formation of Contracts §§ 5.1-7.21 (1995) (dealing with consideration, while treating contracts without consideration in a separate volume).

being drafted and adopted.

What makes a contract binding depends, for the most part, on the time period in which the transaction took place. Procedural, societal, and political climates, changing through the centuries, have shaped and molded contract doctrines so that whether a contract is considered binding needs to be determined in the context of the era in which the agreement was made. Despite these surface differences and some philosophical division about what should be deemed a contractual relationship, the nature or essence of contract—what we may call the contract morality question—has persisted through the centuries. The battle has not been about contract doctrines, such as offer and acceptance, but has been about things of human value, a broader understanding of what contract means. The nineteenth-century alternative route to contract through equitable concepts exemplifies this struggle. Categories of human interaction that arise out of these concepts are conceived on a broad scale and include different positions along the spectrum of economic transactions, which embody the basic policies for awarding damages.

These equitable concepts include bargain, reliance, benefit conferred, and consideration. They are often expressed in philosophical and sometimes in Aristotelian terms to relate fundamental interests of justice for the identification of situations that are categorized as contractual.⁹ Bargain assumes the contemplation of an exchange between two parties; reliance confusingly refers to both bargained and unbargained detriment; benefit again may mean either a bargained or an unbargained exchange, although benefit conferred has come to refer only to an unbargained exchange; and consideration expresses the reason the two parties had for getting together. These are the ties that bind the parties together.

To sketch the historical development of the ties that bind, we begin with the old writ system and forms of action accompanied by the considerations of justice inhering in and informing the writs with underlying societal notions of civil liability. The shared learning of prior

9. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 Yale L.J. 52, 56-57 (1936). There are of course other formulations of twentieth-century contract development and other histories of how we got there. For example, Richard Craswell focuses on the assessment of damages, not the parties' respective interests when the contract was formed. Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99 (2000). Among modern priorities, Craswell cites economic efficiency and retributivist and distributional goals as considerations that do not always coincide with Fuller and Perdue's classification. *Id.* at 109-21. For an earlier example, during the nineteenth century, Langdell and Holmes wanted to shape the category of contract, not by synthesizing all the relevant ties that could bind contractually, but by saying this one principle embodying the bargained-for-exchange case amounted to a contract. That view influenced the development of contract law, and, as a result, promissory estoppel was created to allow recovery when Langdellian contract liability was denied. Again, if some large-scale merchants were helped by narrow liability rules other small-scale merchants were hurt by the narrower scope.

writers shows us that during the writ period, several different procedures existed to service economic transactions and recover money, including the writs of debt, covenant (contract under seal), and assumpsit (an undertaking of an obligation). While no unified theory of contracts existed to knit together all the concepts covering contractual liability among the writs, many methods were available for recovering damages. Corbin's vision of unity can be most easily linked to the eighteenth-century cases that Lord Mansfield decided from the viewpoint of moral obligation. The three strands of consideration—detriment, benefit, and mutual assent—had come together by the end of the sixteenth century, working flexibly as a loose theory accommodating many types of contractual transactions. This loose theory was linkable to principles of Aristotelian justice, until a shift in the nineteenth century moved the focus to offer and acceptance, thereby excluding many consensual transactions from the purview of contract and disassociating many of the ties that had formerly succeeded in binding the parties. A partial theory, however, emerged to guide notions of civil justice, and it was brought directly to bear on contracts.

Many factors played a role in shaping the nineteenth-century view, from Langdell's concerns for training young lawyers with simplified concepts, to applying political theory, to the needs of large merchants. For these various reasons, the scope of contracts was narrowed and did not reflect the broader vision of civil obligation accompanying the writ system. A general theory of contract liability emerged to replace the various writs dealing with contract issues, but it was much less comprehensive than the writs taken together. The effect was as though the policies of only one of the writs—assumpsit—was made the limit of contract. That narrow approach of confining contracts to the most obvious situation left a large gap.

As the nineteenth century waned, the courts had simply left the old bargain principle of consideration in place, and shifted the focus to contractual procedures by concentrating on the assent principle of offer and acceptance.¹⁰ The scope of contracts had become very narrow as Mansfield's routes to contract became closed off from the common law and were channeled into equity or quasi-contract. Intent and estoppel were shunted to the equity side.¹¹ Contract was reached solely through a

10. Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 Yale L.J. 343, 366 n.123 (1969). In turn, offer and acceptance caused its own difficulties. In *L'Estrange v. F. Graucob Ltd.*, a cafe owner, persuaded to buy a slot machine, signed a printed order form with disclaimer of all warranties in small print, and was held to have assented. *L'Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394. Karl N. Llewellyn observed that acceptance of a contract should not be extended to cover acceptance of all conditions. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (1960).

11. A.W. Brian Simpson, *Innovation in Nineteenth Century Contract Law*, 91 Law Q. Rev. 247, 263 (1975). Offer and acceptance law became more important because a number of problems arose when an accepted offer was later not acted on. Equitable

bargained-for exchange after an offer and acceptance, and could no longer accommodate the Mansfeldian notion of consideration that encompassed both detriment and benefit conferred, unless the offer and acceptance requirements had also been satisfied. The doctrine of consideration was itself a reformulation: "Ironically, the rise of assumpsit—the source of the need for the consideration doctrine—was itself due to the inability of the then existing process-based writ system to accommodate enforcement of informal, but serious promises."¹² Sometime later, during the twentieth century, reliance came to be seen as a separate theory within contract while benefit conferred remained under the rubric of quasi-contract. Reliance dealing with unbargained detriment in consideration came to be called promissory estoppel, at least informally.

These three ties that bind parties together form the proper subject matter of contracts. The set of logical unitary principles of justice underlies these arguably separate, or at least separable notions. We can find cohesion in the concept of monitoring exchange relationships. This article examines classical contract law and the protectionist stance it took against placing liability on parties unless the parties had entered into a bargained-for exchange. As such, contract was kept far from tort by emphasizing the bargain, symbolized by the exchange of promises. The classical scheme limited liability to situations involving the parties' agreement beforehand to be bound. Finally, this article examines contract doctrine from the viewpoint of philosophy of contract.¹³

CLASSICAL CONTRACT DOCTRINE

Before the nineteenth century, no single body of rules applied to all contract transactions.¹⁴ Indeed, during most of the long history of contracts we had neither much contract law nor theoretical discussion

estoppel turned out to be the old detriment consideration with a new name. For a discussion of Christopher Columbus Langdell's case method of teaching, see Forum. *That Impecunious Introvert from New Hampshire: Re-Imagining Langdell*, 17 Law and Hist. Rev. 57-159 (1999).

12. Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 290 (1986).

13. While several commentators have different basic approaches for their difficulties with promissory estoppel, their philosophical approaches to contracts also differ. See, e.g., Patrick S. Atiyah, *Consideration in Contracts* 55-59 (1971) [hereinafter Atiyah, *Consideration*]; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 9-10, 16, 56 (1981) [hereinafter Fried, *Contract as Promise*]; Atiyah, *Consideration and Estoppel: The Thawing of the Ice*, 38 Mod. L. Rev. 65 (1975) [hereinafter Atiyah, *Consideration and Estoppel*]; Charles Fried, *The Rise and Fall of Freedom of Contract*, 93 Harv. L. Rev. 1858, 1862-68 (1980) [hereinafter Fried, *Freedom of Contract*] (reviewing Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979)).

14. Patrick S. Atiyah, *The Rise And Fall of Freedom of Contract* 400 (1979) [hereinafter Atiyah, *Rise and Fall*]; David J. Ibbetson, *A Historical Introduction to the Law of Obligations* 10 (1999).

about contract law.¹⁵ To see the unity of contracts in the writ system we must look not at each separate writ but at the cultural assumptions and world view that informed the scheme of forms of action and writs. The operation of contracts before the nineteenth century was largely hidden from our eyes by the "uncontrolled discretion of juries,"¹⁶ thereby obviating judicial opinions addressing these questions.

A. A Historical Perspective on Consideration

Consideration has been described as "just the label on a package containing many of the separate rules about the liabilities which may arise in the context of a transaction."¹⁷ But that label has kept in balance the disparate elements in the package of contract relationships.¹⁸ Corbin attacked the principle that consideration is a clear-cut term and that courts should therefore apply only deductive reasoning in determining whether there is consideration. He instead argued that a set definition of consideration had never been indispensable, and that the real question for a court is one of social policy, namely, whether in this case there is a good reason to enforce this promise.¹⁹ Corbin further noted that the Restatement set forth a much narrower definition of consideration than common usage of that period would have allowed

15. John H. Baker, *From Sanctity of Contract to Reasonable Expectation?*, 32 Current Legal Probs. 17, 20-21 (1979) [hereinafter Baker, *Reasonable Expectation*]. Brian Coote traces the phrase "*reasonable expectations*" to Adam Smith's Lectures on Jurisprudence 93 (R.L. Meek et al. eds., 1978): because intent was too subjective, *reasonable expectation*, by referring to external standards, appraised the promisee's inducement. Brian Coote, *The Essence of Contract* (pt. 1), 1 J. Cont. L. 91, 103 (1988). Joseph M. Perillo updates Corbin's use of *reasonable expectation*, noting the growth of reliance. Joseph M. Perillo, 1 Corbin on Contracts § 1.1, at 2-4 (rev. ed. 1993). The language of section 90 of the Restatement (Second) of Contracts is, however, also couched in terms of *reasonable expectation*: "[a] promise which the promisor should reasonably expect." Restatement (Second) of Contracts § 90(1) (1981). Anthony Mason and Stephen J. Gageler use the phrase "reasonable perspective on contract" in the same way as an earlier culture may have used natural law to describe "the continuing responsiveness of legal institutions to varied and changing social need." The Hon. Sir Anthony Mason & S. J. Gageler, *The Contract, in Essays on Contract* 34 (Paul D. Finn ed., 1987).

16. Baker, *Reasonable Expectation*, *supra* note 15, at 20.

17. Stroud F.C. Milsom, *Historical Foundations of the Common Law* 356-60 (2d ed. 1981).

18. Cf. Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 801 (1941).

19. Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 Harv. L. Rev. 449, 453 (1937) [hereinafter Corbin, *Recent Developments*].

The fact is that the function of the courts is not to create a definition and a rule and then to apply them mechanically and dogmatically by a process of severe deductive logic; instead, it is to determine whether a sound and sufficient reason exists for the enforcement of the promise. When the court finds such a reason, it cheerfully calls it a sufficient consideration. The real question for the courts is what promises shall be enforced, not what is a sufficient consideration.

Id. at 454.

and, indeed, than many courts did allow. The Restatement definition required that the subject of the contract be “bargained for and given in exchange for the promise” thereby excluding past consideration, moral obligations, and actions stemming from the promisee’s reliance as just reasons for finding sufficient consideration. Corbin observed that, nevertheless, many courts across the country continued to enforce promises based on past consideration and reliance, universally calling these reasons “consideration” or proxies for consideration.²⁰

The doctrine of consideration has, for the most part, remained the same since the seventeenth century, but the uses to which it was put and its importance in contract law have changed as contract law has reinvented itself over the centuries.²¹ Reliance was an essential ingredient in the development of consideration as “the keystone” of traditional contract law.²² Both benefit and detriment worked within the fully developed notion of consideration, because one or the other had to be present for the requirements of consideration to be satisfied.²³

The early law compensating a promisee who had suffered a loss by relying on an unfulfilled promise was “superseded in the 16th century by the concept of bargain or exchange and the protection of disappointed

20. Corbin concentrated on the historical development of the law through society’s formulation of working rules over long periods of time, using consideration as an illustration of the slow development of the law of contracts. *Id.* at 453-57. Corbin took the trouble to show that although Justice Oliver W. Holmes had a narrow definition of consideration, his was a minority judicial view:

According to judicial opinions, there are many past transactions, never bargained for by the promisor, that are sufficient to make his promise binding. Also, there are very many cases that hold that a promise may become binding by reason of action by the promisee in reliance on the promise, even though such action was never bargained for by the promisor. Also, in a considerable number of states, a preëxisting moral obligation is a sufficient reason for the enforcement of a subsequent promise to perform it. All of these various reasons for enforcing the promise are almost universally called “consideration” and are held to be sufficient to make the promise binding.

Id. at 454. For a recent treatment of some of these cases, see Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 Am. Bus. L.J. 289, 362-71 (2002).

21. Ibbetson, *supra* note 14, at 203.

In its essentials, the fundamental shape of contractual liability fixed by the beginning of the seventeenth century was little different from the medieval model of exchange: there had to be an agreement; there had to be consideration, in the sense that the transaction had to be broadly reciprocal; and only the parties to the agreement were affected by it. This model underpinned contractual thinking through the seventeenth and eighteenth centuries, though it was only around 1800 that it was given any more detailed articulation.

Id. (footnote omitted).

22. Fuller, *supra* note 18, at 810-12.

23. Edwin W. Patterson, *An Apology for Consideration*, 58 Colum. L. Rev. 929, 933 (1958).

expectations.”²⁴ Corbin emphasized that reliance was not a new development when it was incorporated into the Restatement of Contracts but had persisted since the time the writ of assumpsit was used.²⁵ By the beginning of the seventeenth century, assumpsit became the contract action par excellence. Reliance remained at the core of assumpsit and consideration reflected that reliance in the concept of detriment.²⁶

Meanwhile, benefit, which eventually became another element of

24. Kenneth C.T. Sutton, *Promises and Consideration*, in *Essays on Contract* 35, 45 (Paul D. Finn ed., 1987).

25. “The present writer believes that the rule [in section 90 of the Restatement of Contracts] is substantially in harmony with judicial decisions going back to the very origin of the action of assumpsit. If this belief is correct, the rule is not a new development.” Corbin, *Recent Developments*, *supra* note 19, at 456. The rise of consideration roughly occurred as follows: consideration first appeared in English legal literature during the fifteenth century as a vague notion reflecting reliance in the form of detriment. Gradually the writ of assumpsit emerged as the most useful and general vehicle for litigating contract questions. Assumpsit allowed enforcement of informal contracts when injury occurred to a person or to the property of one who justifiably relied on the undertaking of another. Samuel J. Stoljar, *A History of Contract at Common Law* 37-38 (1975) (noting that motive induced the promisee to rely); James B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 53 (1888). By the end of the fifteenth century, a litigant could bring an action in assumpsit for nonfeasance if she had paid for something that then was not done. John H. Baker, *An Introduction to English Legal History* 384-86 (3d ed. 1990) [hereinafter Baker, *English Legal History*].

The notion here was not so much that the promise should be enforced, for the promise in itself was not actionable, but that the damage incurred in reliance on the word of another should be restored. . . . It was also a principle of moral philosophy, closely akin to the modern doctrine of promissory estoppel.

Id. at 386. Assumpsit was an attempt to create a remedy for those who suffered loss by relying on promises not enforceable in themselves. Baker, *Reasonable Expectation*, *supra* note 15, at 25-26; *see also* Sutton, *supra* note 24, at 40. As Corbin was well aware, the measure of damages in assumpsit was reliance. 1A Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* § 205, at 238-40 (1950) [hereinafter Corbin, *Contracts*]. Assumpsit emphasized prepayment (*pro quodam pecuniae summa*—for a certain sum of money paid to him beforehand), consequential damages, and a notion of good faith in promising (*fideliter*—faithfully).

26. For example, in some of the earliest cases, which involved construction contracts, the homeowner engaged a contractor who promised to come and do the job. The courts distinguished between a promise to build and a promise to repair a roof. No action lay in the first situation because no harm was done to existing structures. The would-be homeowner's reliance was not apparent. In the roof-repair case, however, the contractor's failure to do the work foreseeably resulted in possible rain damage to furniture or the structure itself because while the homeowner relied on one builder, it became too late to avoid damage by engaging another builder who might actually have done the work. The court's basis for granting recovery was promissory estoppel but without the use of that terminology. Thus, the tort of deceit “meant nothing other than that a person had been disappointed in expectations founded on the conduct of another.” Baker, *Reasonable Expectation*, *supra* note 15, at 25 (citing the *Watkins* case (1425), reprinted in John H. Baker & Stroud F.C. Milsom, *Sources of English Legal History: Private Law to 1750*, at 380-83 (1986)); *see also* 2 *The Reports of Sir John Spelman*, in 94 *Selden Soc'y* 269-70 (John H. Baker ed., 1978); *cf.* Milsom, *supra* note 17, at 327-32.

consideration, had been developing separately. For example, when a seller of land accepted a down payment and then sold her land to another purchaser, presumably for more money, the disappointed purchaser complained that the seller "craftily schemed" to defraud the purchaser of the land. The concept of exchange, *quid pro quo*, persuaded the court to permit the purchaser to recover in assumpsit against the defaulting seller, because the purchaser had paid the seller for her land. Assumpsit recognized the reciprocal nature of a bargain and permitted reciprocity of remedies.²⁷ Consideration acted as the element of exchange that effected the passing of property and was the reason why a promise was actionable.²⁸

During the sixteenth century, both meanings appeared together in assumpsit, and consideration rose to prominence as the analogue of the canonist doctrine of *causa*, which medieval chancellors used to mean good grounds for a promise.²⁹ In the seventeenth century, the courts did not focus on the acceptance of an offer because consideration was what made the promises binding, indeed even finding it reasonable to infer the promises in a bargain and sale situation.³⁰ In the seventeenth century, consideration meant "all those requirements which were necessary in . . . special pleading."³¹ Those requirements had plaintiffs forego the general issue in favor of stating every matter they felt necessary to their action. Bargain was overshadowed in the seventeenth and eighteenth centuries by notions of natural law and moral obligation.

This understanding did not last. Lord Mansfield, the Chief Justice of the King's Bench,³² had tried to bring equitable considerations to bear on contract law. Mansfield's philosophy of contracts was based on

27. John H. Baker stated that "the consideration in *indebitatus assumpsit* never was the *quid pro quo* of the debt-creating contract, but was either the indebtedness itself or something collateral (such as the fictional shilling, or a forbearance)." J. H. Baker, *Origins of the "Doctrine" of Consideration: Essays in Honor of Samuel E. Thorne, 1535-85*, in *On the Laws and Customs of England* 336, 355 (Morris S. Arnold et al. eds., 1981) [hereinafter Baker, *Origins*]. As Richard Hooley observed, "[t]he cases based on an action in *assumpsit* and those in debt may have different historical origins but they are now intimately linked in the theory and public policy which seek to justify them." Richard Hooley, *Consideration and the Existing Duty*, J. Bus. L. 19, 21 (1991).

28. Baker, *Origins*, *supra* note 27, at 352-54.

29. W.T. Barbour, *The History of Contract in Early English Equity*, in IV Oxford Studies in Social and Legal History 59-65 (P. Vinogradoff ed., 1914); David J. Ibbetson, *Assumpsit and Debt in the Early 16th Century: The Origins of the Indebitatus Count*, 41 Cambridge L.J. 142 (1982).

30. Simpson, *supra* note 11, at 258. As examples of intent not to perform during the seventeenth century, Simpson cites *Lea v. Exelby*, (1602) Cro. Eliz. 888, and *Portage v. Cole*, (1669) 1 Williams Saund. 319. *See id.* For various seventeenth-century developments in consideration and contract law, see Kevin M. Teeven, *A History of Anglo-American Common Law of Contract* 65-111 (1990).

31. Theodore F.T. Plucknett, *A Concise History of the Common Law* 655 (5th ed. 1956).

32. Lord Mansfield (William Murray) was Chief Justice of the King's Bench from 1756 to 1788.

principles symbolized by two phrases from one of his opinions.³³ The "ties of conscience upon an upright mind" constituted a sufficient consideration which allowed promises to be honored while "the honesty and rectitude of a thing" permitted equitable obligations of payments to be met. Mansfield's opinion contains this famous language:

Where a man is under a legal or equitable obligation to pay, the law implies a promise, although none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of a thing is a consideration.³⁴

Lord Mansfield played "a notable part in the absorption of ideas and principles from without the common law."³⁵ In a reaction against the views that Mansfield held, bargain came into vogue again during the nineteenth century. While Mansfield wanted to get rid of consideration in favor of enforcing agreements, the bargain theory was devised for the opposite purpose, namely to prevent the enforcement of some agreements that did require consideration.

By 1840, much of Mansfield's vision of consideration was lost.³⁶ The bargainers in the market in this half-industrialized age³⁷ seemed not to know how to accommodate open-ended moral obligations common in Roman law³⁸ and ecclesiastical law.³⁹ The nineteenth-century jurists who reacted against Mansfield emphasized the "will theory" (the consent of the parties to the contract), the bargaining process, and freedom of contract, which they expected would provide a solution to society's industrial and social problems.⁴⁰ Indeed, consent was often the

33. *Hawkes v. Saunders*, (1782) 1 Cowp. 289, 290, 98 Eng. Rep. 1091 (K.B.). Mansfield also wrote that the "ties of conscience upon an upright mind are a sufficient consideration." *Id.*

34. See, e.g., *Eastwood v. Kenyon*, (1840) 11 Ad. & El. 438, 113 Eng. Rep. 482. In this case, a minor, whose guardian advanced money to take care of the minor, promised after attaining majority to repay the money. *Id.* at 438-40. Chief Justice Lord Denman found "no consideration but a past benefit not conferred at the request of the defendant." *Id.* at 452.

35. Sutton, *supra* note 24, at 45.

36. James C. Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 Geo. L.J. 1949, 1962 (1989), reprinted in J. Oldham, 1 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 213, 224 (1992).

37. Kevin Teeven, *Mansfield's Reform of Consideration in Light of the Origins of the Doctrine*, 21 Mem. St. U. L. Rev. 669, 699 (1991).

38. Peter B. H. Birks, *English and Roman Learning in Moses v. Macferlan*, 37 Current Legal Prob. 1 (1984) (stating that the quasi-contractual doctrine of "money had and received" had its remedial roots in civil law); see also Alfred Thompson Denning, *The Recovery of Money*, 65 Law Q. Rev. 37 (1949).

39. Richard Helmholz, *Assumpsit and Fidei Laesio*, 91 Law Q. Rev. 406, 418-21 (1975) (*fidei laesio* in ecclesiastical law may have given rise to common-law language reflecting this breach of faith in *assumpsit*).

40. Atiyah, *Rise and Fall*, *supra* note 14, at 614; see also Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 16 (1981); Elizabeth Mensch, *Freedom*

only ancient jurisprudential concept the will theorists retained, but without the accompanying explanations of why the will of the parties to a contract should be binding, such as the importance of promise keeping, commutative (compensatory) justice, and the general context of other Aristotelian virtues.⁴¹

While the differences of opinion on the outcome of particular cases may not have been very great, serious difficulty did arise for the will theorists in explaining the results in the cases satisfactorily.⁴² From the perspective of civil law, the failure of the will theorists is interpreted as the failure to find a commitment to do something for the promise in their theory of promise, so that they could not explain why contracts are binding. The will theorists "could not, for example, analyze whether an offer had to be accepted. Instead, they packed the need for an acceptance into their definition of contract and tried to extract from it a conclusion as to when a contract was formed."⁴³

Consideration had been a wider notion until the bargain theory cut it down.⁴⁴ Corbin noted that the definition of consideration was in a state of disarray because courts were applying consideration in a way that defied any meaningful or ascertainable definition of the term.⁴⁵ Further, he criticized the then draft definition of good consideration in section 75 of the Restatement of Contracts.⁴⁶ He argued that this definition ("any act or forbearance is a consideration if it was in fact bargained for and given in exchange for a promise") was narrower than common usage would have allowed at the time because courts held that "past consideration" and "reliance" create sufficient consideration even though no bargaining occurred.⁴⁷ Because the Restatement employed a narrow definition, Corbin argued that consideration was no longer the test for determining whether or not a promise is enforceable.⁴⁸ In other words, the bargained-for-exchange model had replaced the old consideration with its balance between detriment and benefit. After

of Contract as Ideology, 33 Stan. L. Rev. 753 (1981) (book review); Samuel Williston, *Freedom of Contract*, 6 Cornell L.Q. 365 (1921).

41. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* 162 (1991) [hereinafter Gordley, *Modern Contract Doctrine*]; cf. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 382-83 (1990).

42. Gordley, *supra* note 41, at 181; Atiyah, *Rise and Fall*, *supra* note 14, at viii (suggesting that the dominance of the bargained-for-exchange contract gives rise to different results only in the small number of wholly executory contracts).

43. Gordley, *supra* note 41, at 233. Nevertheless, the seventeenth-century natural lawyers may have contributed to these difficulties, insofar as they obscured the basis of contractual obligation on the promisee's actual or probable reliance. For another point of view see Patrick S. Atiyah, *Essays on Contract* 33, 80 (1986) [hereinafter Atiyah, *Essays on Contract*].

44. Arthur L. Corbin, *Some Problems in the Restatement of the Law of Contracts*, 14 A.B.A. J. 652, 653-54 (1928) [hereinafter Corbin, *Problems in the Restatement*].

45. *Id.* at 653.

46. *Id.*

47. *Id.*

48. *Id.*

that happened, unbargained detriment was excluded from contracts and the benefit the promisor received had to move "from the promisee."⁴⁹

In the new life of contracts, the elements in the older approach to contracts were unbundled. The concept of benefit in consideration remained part of the core of contract law, but was less important as the focus on acceptance became central to the newly dominant bargain theory. Unbargained detrimental reliance, however, was not immediately picked up in a new doctrine or procedure or given any role in the new scheme. Therefore, detriment was left free floating. *Reliance now had a separate, if undercover, existence, serving an independent function.* By definition, then, reliance did not receive recognition in contracts. Nevertheless, during the nineteenth century, unbargained detriment continued to have an influence working unnoticed under the guise of reasonable expectations: "Promissory estoppel is a means of bringing about reasonable expectations; and, far from being a post-war aberration, it enjoyed its finest hours in the Victorian House of Lords."⁵⁰ The exiled unbargained detriment set about to recover its missing constituents and replicate the severed doctrines under the respectable pedigree of equity. Meanwhile the stripped down, but acceptable, bargain theory of consideration also set out to regenerate the concepts that it had lost. Together, like the uncauterized hydra, they gave us a plethora of rich but confusing and arguably duplicative theories.

Thus, the doctrinal antecedents of promissory estoppel trailed along with the old words "detriment" and "benefit" beside the new regime of offer and acceptance in the bargain theory.⁵¹ When the narrower concept of consideration could not cover enough fact patterns, detriment was called into play. "Though not inevitable, it was predictable that, instead of rejecting the estoppel notion and developing the doctrine in accordance with its substantive basis, detrimental

49. Ibbetson, *supra* note 14, at 204.

50. Baker, *Reasonable Expectation*, *supra* note 15, at 29. Victorian equity cases include: *Dillwyn v. Llewellyn*, (1862) 4 De G. F. & J. 517, 45 Eng. Rep. 1285 (holding that expenditure on another's land in reliance was a promise); *Yeomans v. Williams*, (1865) L.R. 1 Eq. 184; *Hughes v. Metropolitan Railway*, (1877) 2 App. Cas. 439, [1874-80] All E. R. Rep. 187 (finding that waiver by conduct of claim to forfeit a lease supported by consideration); *Birmingham and District Land Co. v. London & N.W. Railway Co.*, (1888) 40 Ch.D. 268, [1886-90] All E.R. Rep. 620 (noting that lessor agreed to suspend tenant's obligation while the railway considered acquiring the land); *Fenner v. Blake*, (1900) 1 Q.B. 426 (stating that variation of date for notice of termination of lease generates its own consideration). Lord Justice Denning, as he then was, commented on some of these cases as follows: "But strict legal rights are always capable of being modified by the interposition of equity; . . . The courts have repeatedly invoked equitable principles so as to neutralise ill effects of the common law doctrine of consideration." Alfred Thompson Denning, *Recent Developments in the Doctrine of Consideration*, 15 Mod. L. Rev. 1, 4 (1952). For a view that places promissory estoppel in the context of its earlier history, see K.C.T. Sutton, *Consideration Reconsidered*, *passim* (1974).

51. Barnett, *supra* note 12, at 287-91. The courts did nothing to abolish the old terminology but simply left it there with the new concepts of offer and acceptance.

reliance, courts and scholars would permit the doctrinal antecedents to persist in modified fashion. The modern doctrine, therefore, is known as 'promissory estoppel.'⁵²

B. Nineteenth-Century Concerns

The classical nineteenth-century depiction of a contract envisioned two individuals of equal bargaining power, for example, the baker and the wheat farmer voluntarily exercising their wills by exchanging their promises to buy and sell wheat flour.⁵³ This theory of the bargained-for exchange emphasized the law of offer and acceptance and focused on the moment of the contract's formation, which gave rise to the parties' expectation rights. An offer is an "expression of willingness to contract on specified terms, made with the intention that it shall become binding as soon as it is accepted."⁵⁴ Some flexibility in application tempers the rigidity of the classical doctrine: "having committed itself to a rather technical and schematic doctrine of contract, [the common law] in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."⁵⁵

For classical contract law, offer and acceptance provided "the moment of responsibility" which limited the scope of contract law "to agreements for reciprocal performances," that is, to bargains or exchanges of "equivalents."⁵⁶ The commercial freedom to sell on the

52. John E. Murray, *Murray on Contracts* § 66, at 312 (4th ed. 2001). Professor Perillo shows how Corbin was associated with the proposal to add promissory estoppel to the Restatement as a basis of contractual liability: Corbin wrote that Williston "often said that § 90 was my Section; but the fact is that it is now in exactly the form in which he first submitted it. Every other advisor opposed it; but we bludgeoned them until they seemed to be convinced." Perillo, *supra* note 7, at 768-69; see also Daniel J. Klau, Note, *What Price Certainty?* Corbin, Williston, and the Restatement of Contracts, 70 B.U. L. Rev. 511 (1990).

53. Atiyah, *Rise and Fall*, *supra* note 14, at v-vii; Mensch, *supra* note 40, at 755-56, 760. The possibility of successive deals played no part in classical analysis, and each deal was considered in splendid isolation.

54. Guenter H. Treitel, *The Law of Contracts* 8 (10th ed. 1999).

55. *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*, *The Eurymedon* [1975] A.C. 154, 167, [1974] 1 All E. R. 1015, 1020 (stating that bill of lading was an offer and the stevedore's unloading of the goods was sought as the *quid pro quo* for the consignor's offer of exemption from liability for negligent unloading).

56. Atiyah summarizes classical contract theory as follows: "Classical theorists insisted that contract law and the promise principle were the exclusive sources of the rights and duties of the parties to a contract." Atiyah, *Essays on Contract*, *supra* note 43, at 138. Hugh Collins, *The Law of Contract* 45, 71 (1986), is the source of the first two quoted phrases. The third quoted word is from Corbin, who recognized the existence of "many agreements that are not bargains," which he defined narrowly as "a definite exchange of equivalents, of a *quid pro quo*." Arthur L. Corbin, *Corbin on Contracts* § 10, at 15 (1952). Michel Rosenfeld says that corresponding to the "shift in what constitutes an enforceable promise is a shift in what constitutes a contract's most crucial moment. Under the older law, the paradigm was the executed or partially executed contract Under freedom of contract, on the other hand, the paradigm is

market assumed great cultural importance, but the legal model of the bargained-for exchange did not encompass the facts of all types of commercial relationships. A leading American hornbook on contracts indicates the enormity of the change in legal perspective since the nineteenth century's exclusive adherence to bargained-for exchange:

The idea of "exchange" is central to the law of contracts, as it is to any advanced economic system. Should it, however, set the boundaries of the law of contracts? . . . Twentieth century lawyers seem less inclined to ideological dogmatism of any school and more inclined to ask whether the community conscience would deem a particular promise worthy of enforcement. Although the exchange requirement still remains central to the law of contracts, lawyer-influenced legislation and the development of the doctrine of promissory estoppel dispense with the exchange requirement in a number of instances. These instances will doubtless increase in the future.⁵⁷

Over the years, many cases brought on a theory of contract have shown that the concept of a market can be limiting and unserviceable when applied in literal terms to the law outside its natural milieu in economics. In preclassical contract theory, promises were deemed to have been made in order to "enable the promisor to direct his actions in advance to the benefit of another person."⁵⁸ In Charles Fried's conception, however, promise has to be reciprocal rather than altruistic.⁵⁹ The perhaps contradictory values of trust and individual autonomy make promise important.⁶⁰ Fried invokes the rationale of the eighteenth-century German philosopher Immanuel Kant for defining promise as "a way of enlarging the scope of one's will, by allowing one morally to bind oneself effectively so that what is promised for the future can be counted among the present possessions of the promisee."⁶¹

Before the nineteenth century, the model for binding a promise concerned an obligation that the promisor was already required to perform. In the earlier period, "the promise did not create the

the executory contract . . ." Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 Iowa L. Rev. 769, 822-23 (1985).

57. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 4.3, at 172 (4th ed. 1998).

58. Gordley, *Modern Contract Doctrine*, *supra* note 41, at 233.

59. Fried, *Contract as Promise*, *supra* note 13, at 39. Compare Herbert L.A. Hart, *Are There Any Natural Rights?*, in *Political Philosophy* 53, 61 (A. Quinton ed., 1967), who, as a moderate positivist, looked to reciprocity. When two parties enter a contract, and so restrict their liberty, each party has the right to expect the other party to be similarly bound for their mutual benefit.

60. Fried, *Contract as Promise*, *supra* note 13, at 16.

61. Fried, *Freedom of Contract*, *supra* note 13, at 1863 n.15 (citing I. Kant, *Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* 248-49 (J. Ladd trans., 1965)).

obligation, but merely confirmed its existence.”⁶² Once the classical theory of freedom of contract came into vogue, a promise to perform a pre-existing obligation was no longer generally enforceable.⁶³ “While the positive school drew a sharp line between positive law on the one hand and morals and ethics on the other, the advocates of the will theory saw in law a rational means of attaining a spiritual end through the freedom of the will.”⁶⁴ Therefore, it was not surprising that secular lawyers in the nineteenth century placed great emphasis on contract as fostering individual freedom.⁶⁵

The notion of autonomy, however, causes a problem for the classical contract because, in some root sense, one is only bound as long as one wishes to be bound. According to the most literal interpretation, once one no longer wishes to be bound, there is no more freedom for that party if she is held to her prior contract. Therefore, under the aegis of freedom of contract, it is difficult to find that a contract had been made at all, and the moment when each party promised the other assumed heightened significance. As many situations as possible were excluded from the ambit of contract, and offer and acceptance doctrine protected freedom from contract so that a party was not charged with contractual liability unless that party clearly wished to enter into a contract.⁶⁶ On balance, historical studies indicate that consideration was used in nineteenth-century America to control and facilitate market transactions.⁶⁷ In a sense, if one party later changed his or her mind after a firm offer, the classic view often protected that moment from consequences, by finding that no contract had ever been made.

C. Reliance to One's Detriment: Reprise on Pre-Classical Consideration

Consideration “means a reason for the enforcement of a promise,” or in Atiyah’s broader gloss on this definition, consideration is “a reason

62. Rosenfeld, *supra* note 56, at 822; *see also* Atiyah, Rise and Fall, *supra* note 14, at 141-43.

63. Rosenfeld, *supra* note 56, at 822 (citing Restatement (Second) of Contracts § 73 (1979)).

64. David H. Parry, *The Sanctity of Contracts in English Law* 17 (1959).

65. *Id.* at 18.

66. Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 Stan. L. Rev. 1161, 1179-81 (1975) (book review); *cf.* Hart, *supra* note 59, at 61. Hart expects that if one party to a contract is willing to submit to the contract, that party has a right to expect the other party similarly to submit to the contract. *Id.* This point concerns mutual cooperation rather than individual autonomy and the scope of the right to change one’s mind. Murray Rothbard finds that promising restricts autonomy, and, taking the premise to its logical conclusion, agreements beyond transfers of property should be unenforceable. Murray Rothbard, *The Ethics of Liberty* 133-48 (1982).

67. Speidel, *supra* note 66, at 1170-71 (citing the work of Lawrence Friedman and J. Willard Hurst).

for the recognition of an obligation.”⁶⁸ A more neoclassical definition is that consideration “is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value).”⁶⁹ Promissory estoppel is not like old detriment consideration but it is similar. Looking at the long sweep of the history of consideration, one observer concluded,

Now it would be a distortion to claim that nothing has changed My point is only that there remains a sufficient congruence for mutual intelligibility. Christopher St. German [sic] would have little difficulty in understanding the case of *Central London Properties Ltd. v. High Trees House Ltd.*; this is not an area in which the basic principle has altered, perhaps because of the intimate connection between the institution of promising and a rationale in terms of induced reliance.⁷⁰

In some sense, we want Christopher St. German who wrote in the 1520s and 1530s to be able to understand what we are doing today, despite the many lives contract has had since that time. Similarly, we look back on what lawyers did in the 1530s, as we try to keep some continuity within our legal tradition.⁷¹ Over time, a number of different definitions of consideration were held adequate to support an action for breach of promise. In the later use of consideration, there was a single

68. Atiyah, *Essays on Contract*, *supra* note 43, at 182, 183. Compare Karl N. Llewellyn, *What Price Contract: An Essay in Perspective*, 40 *Yale L.J.* 704, 741 (1931) (noting that consideration is “any sufficient justification for court-enforcement”), with Treitel, *supra* note 54, at 66 n.31 (criticizing this working standard as too vague).

69. Treitel, *supra* note 54, at 64.

70. Simpson, *supra* note 11, at 249. In *High Trees*, Denning, J. dealt with reliance. *Central London Properties Ltd. v. High Trees House Ltd.*, 1947 K.B. 130; see also Baker, *Reasonable Expectation*, *supra* note 15, at 25. He felt that nineteenth-century contract law unnecessarily and unfairly restricted recovery because consideration had been severely limited, and that an equity approach, which had originally arisen to mitigate the injustices of strict rules, was again needed to rescue the common law from inflicting injustice. *High Trees*, 1947 K.B. at 133-35. His approach left behind the old terminology and started afresh with equity.

71. See Christopher St. German, *Dialogue Between Doctor and Student*, reprinted in 91 *Selden Soc’y* 230 (Theodore F.T. Plucknett & John L. Barton eds., 1974), which makes reference to the notion of reliance. Michael P. Furmston explains,

The use of the word detriment, in particular, obscures the vital transformation of assumpsit from a species of action on the case to a general remedy in contract. So long as it remained tortious in character, it was necessary to prove that the plaintiff had suffered damage in reliance upon the defendant’s undertaking. When it became contractual, the courts concentrated, not on the consequences of the defendant’s default, but on the facts present at the time of the agreement and in return for which the defendant’s promise was given.

Michael P. Furmston, *Cheshire & Fifoot’s Law of Contract* 76 (13th ed. 1996). To the same effect, Baker says that the delictual history and the substantive principles do not fit in with consideration. Baker, *Origins*, *supra* note 27, at 357.

technical doctrine.⁷² Historically, great common lawyers of all periods, ranging from Bracton and Christopher St. German to Mansfield, have incorporated general learning and wisdom into their thinking about, and development of the law.⁷³

Corbin looked back to the early availability of reliance, as did Robert Braucher, a Reporter for the Restatement (Second) of Contracts, who did not find the terminology of promissory estoppel helpful. Braucher said, "the expression, 'promissory estoppel' . . . tends to confusion rather than clarity."⁷⁴ Braucher also agreed with Fuller on the ancient heritage of reliance.⁷⁵ In light of Justice Braucher's criticism of the term "promissory estoppel," we would expect the Restatement (Second) of Contracts not to use promissory estoppel. Indeed, the term is mentioned in comment a to section 90 only to emphasize its historical roots in the action of assumpsit which measured damages by the extent of reliance injury, and not the value of the promised performance.

According to Corbin, promissory estoppel is not a term of much value because estoppel is too "widely and loosely used."⁷⁶ Reliance was categorized among the "informal contracts binding without assent or consideration" in sections 85-94. Besides reliance in section 90, promises to pay debts barred by a statute of limitations or discharged by bankruptcy or to perform a voidable duty were set forth. These categories are reminiscent of the fact patterns in Mansfield's moral obligation cases. Corbin, writing about the new definition of consideration in section 75 of the first Restatement, suggested that its function was no longer to determine the enforceability of a contract. Rather, section 75 now meant that "any consideration whatever is sufficient to make a promise binding."⁷⁷

72. See Simpson, *supra* note 11, at 262.

73. For further discussion of Henry de Bracton (judge coram rege d. 1268), see H. G. Richardson, Bracton: The Problem of His Text (1965); for the barrister Christopher St. German (d. 1540), see *supra* note 71; for Mansfield's civil law learning and historical background, see Christopher P. Rodgers, *Continental Literature and the Development of the Common Law by the King's Bench: c. 1750-1850*, at 188-89, in *The Courts and the Development of Commercial Law* 161, 190 (Vito Piergiovanni ed., 1987) and the text accompanying notes 35-39 *supra*.

74. *Loranger Construction Co. v. E.F. Hauserman Co.*, 384 N.E.2d 176, 179 (Mass. 1978). Samuel J. Stoljar cogently explains that "estoppel, notwithstanding its special language suggesting a separate doctrine, turns out to be little more than a contract-supplementing exercise as it reveals an additional agreement not included in the formal contract, or one which modifies the latter . . . not having gone through the usual offer and acceptance stages." Samuel J. Stoljar, *Estoppel and Contract Theory*, 3 J. Cont. L. 1, 21-22 & n.97 (1990).

75. See Fuller & Perdue, *supra* note 9, at 70 & n.25 (1936) (noting that although section 90 applies especially to non-commercial situations, the reliance interest was protected at common law).

76. Corbin, *Contracts*, *supra* note 25, § 204, at 232-34, § 205, at 238-40.

77. Corbin, *Problems in the Restatement*, *supra* note 44, at 653. Corbin summarized the position on consideration as a member of the Committee of Advisors for the Restatement. It is worth reproducing extensively:

The term has been used in a great variety of ways for the past five

There were no comments to section 90 in 1932. Since Braucher was the Reporter in 1965 for the Restatement (Second), the ancient, more inclusive notion of consideration, which had been dispossessed during the nineteenth century, was restored. The symbolic point about pedigree in comment a is made to assert the legitimacy of this broader definition: the coat of arms, as it were, of section 90 is displayed at the entrance hall in comment a to indicate the ancient lineage of reliance. "When a promise is enforceable in whole or in part by virtue of reliance, it is a 'contract,' and it is enforceable pursuant to a 'traditional contract theory' antedating the modern doctrine of consideration."⁷⁸ Braucher carefully refrained from using the term promissory estoppel, which had

hundred years, and the definitions that have been suggested are far from in agreement. . . .

After a great deal of discussion, therefore, it was deemed advisable to define consideration without reference to . . . whether or not it would be legally operative to make a promise binding. It is, therefore, declared in Section 75 that any act or forbearance is a consideration if it was in fact bargained for and given in exchange for a promise. By this definition, the existence of "consideration" no longer appears to be a test for determining whether or not a promise has become an enforceable contract. Some considerations, as so defined, are sufficient to make a promise binding and others are not sufficient. Starting with this definition, however, the Institute is able to say in the following Section that any consideration whatever is sufficient to make a promise binding. . . .

It should be observed that the definition adopted in Section 75 is very considerably narrower than the usage of many courts and text writers. It has been common enough to use the term "past consideration," and also to say that subsequent action in reliance upon a promise many constitute a sufficient consideration therefor. It is obvious that the facts commonly described as "past consideration" were never bargained for and given in exchange for the subsequent promise. It is equally obvious that subsequent action in reliance upon the previously made promise may not have been bargained for and given in exchange for it It would not be at all safe to say, however, that facts of these kinds have not properly been held to make promises enforceable These promises are enforceable, although nothing whatever is bargained for in exchange for them.

Id. at 653-54. Finally, Corbin said that section 90 "is believed to be in substantial harmony with the actual weight of judicial decision and with the interests and convictions of the business community." *Id.* at 654.

78. *Loranger*, 384 N.E.2d at 179. The court below, in fact, had applied a promissory estoppel theory to uphold the jury's award of damages. *Loranger v. Hauserman*, 374 N.E.2d 306, 309-10 (Mass. App. 1978). Promissory estoppel had not previously been accepted in Massachusetts as a basis for imposing contractual liability. *Id.* at 308. Patrick S. Atiyah points out that the separate development of promissory estoppel "obscures the very close similarity between promissory estoppel and ordinary cases of consideration. For detrimental reliance seems to be the key to promissory estoppel, and it is also, of course, one of the twin legs of the doctrine of consideration itself." Patrick S. Atiyah, *An Introduction to the Law of Contract* 153-54 (4th ed. 1989). The court in *Greenstein v. Flatley*, 474 N.E.2d 1130, 1134 (Mass. App. 1985), observed that in *Loranger*, Justice Braucher disapproved of the expression "promissory estoppel," but did not disapprove of the principle.

been the name for reliance during its exile under classical theory.⁷⁹

D. Analysis of Changes Before and After Classical Contract Law

Scholars have responded to changes in classical contract law from two basic perspectives, fairness and efficiency, by looking to the disciplines of philosophy and economics to make sense out of the nineteenth-century separation of consideration into bargain and reliance. There has been an explosion of contract-theory scholarship throughout the common-law world and in the European Union with treatises and comparative work.⁸⁰ A theory of historical development enables us "to evaluate the relative suitability of legal practices for a particular society."⁸¹

Philosophy also looks to reasonable expectation (updated Aristotelian reason) or to some deontological, duty-based theory as Kantian autonomy or utility (the consequentialist Benthamite greatest happiness for the greatest number), which Veatch has dubbed collectively the desire-and-duty ethic.⁸² As far as modern philosophy is concerned, Rawls is the starting point for the duty to keep promises.⁸³

79. In *Loranger*, Justice Braucher ruled that in order to protect the reliance interests of the promisee, the definition of consideration could include an inference of a bargained-for-exchange. *Loranger*, 384 N.E.2d at 180. Justice Braucher noted that there is a reciprocal relation between the promisee and the consideration in a typical bargain. *Id.* at 180. The consideration induces the promisee to furnish the consideration. *Id.* The parties do not need to be in equal control of the bargain, but consideration is found if the promisor is, in effect, unilaterally setting the choices available to the promisee. Although relying on a traditional common-law analysis, Justice Braucher did not depart from the conventional definition of consideration and expanded it to include an implied-in-fact inference. Justice Braucher's analysis enlarged the definition of consideration to find a contract that classical, nineteenth-century consideration would not have recognized. The Restatement (Second) of Contracts § 71 (1981), describes consideration to include some right, interest, profit, or benefit accruing to one part or some forbearance, detriment, loss, or responsibility given suffered or undertaken by the other. Melvin A. Eisenberg observed that this definition of consideration moves from the high ground of "general principle" to the low ground of "particularized rules." Melvin A. Eisenberg, *The Principles of Consideration*, 67 Cornell L. Rev. 640, 642 (1982).

80. "The literature on the theory of contract is accumulating beyond the power of an ordinary person to keep up with, let alone . . . understand all the distinctions between the various lines of thought being pursued." L.J. Priestly, *Contract—The Burgeoning Maelstrom*, 1 J. Cont. L. 15, 17 (1988). Common law and European legal systems had greater occasion for interaction leading up to the Maastricht Treaty on European Union, which became effective November 1, 1993. *The Maastricht Recipe*, *The Economist*, Oct. 23, 1993, at 15. For examples of the cooperation and effort among scholars internationally, see the continuing series *Comparative Studies in Continental and Anglo-American Legal History*, especially volume 8, *Towards a General Law of Contract* (John Barton ed., 1990); and Christian Larroumet, *Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law*, 60 Tul. L. Rev. 1209 (1986).

81. David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* 154 (1989).

82. Henry B. Veatch, *For an Ontology of Morals* 153-58 (1971).

83. John Rawls, *A Theory of Justice* 342-45 (1971).

This principle of allegiance to promise requires a morally compelling connecting factor between the individual promisor and the duty to keep promises. The three contract concepts of assent, reliance, and benefit received are not by themselves strong enough connecting factors, and, therefore, rights theorists posit a moral value in keeping promises.⁸⁴ The right to choose is itself important in liberal theory, but no one particular choice is set forth as the best or a good in itself in the way Aristotle had postulated an abstract concept of *summum genus*.⁸⁵

The major conceptions about the enforceability of promises have revolved around either this notion of individual choice to assume an obligation of recompense for harm incurred in reliance on a promise, as Fuller advocated.⁸⁶ Before reaching a concept of personal responsibility for contract, Fuller departed from the full implications of modern liberal reliance theory to remain with the Aristotelian notion of distributive justice, which corrects harm resulting from a disequilibrium in the relationship between contracting parties.⁸⁷ True liberalism involves both moral autonomy and a balance of the conflicting economic liberty of individuals.⁸⁸ Indeed, the concepts of agreement, consideration, and what we recognize today as reliance, expectation, and benefit received, or moral obligation, existed long before liberalism in its libertarian and welfare guises emerged, as the records and voluminous literature on pre-liberal contract law abundantly show.⁸⁹ Both reliance and expectation have a much older history than liberal philosophy and fit in with Aristotelian distributive justice rather than liberalism. Based on a balance of individual economic liberties, liberalism, instead of referring to expectation or reliance, would have circumscribed the scope of autonomous individual action by reference to the need to respect the liberty of others.⁹⁰ Despite its strength, liberalism did not displace the older remedial notions of reliance and expectation, which remain in

84. See Francis H. Buckley, *Paradox Lost*, 72 Minn. L. Rev. 775, 776, 778, 785 (1988).

85. Hugh Collins, *Contract and Legal Theory*, in *Legal Theory and Common Law* 136, 138 (W. Twining ed., 1986) (citing Rawls, *supra* note 83, at 31); Veatch, *supra* note 82, at 103 n.3 (critiquing contemporary ethical theory from an Aristotelian perspective). For the effect of the seventeenth-century scientific method, see Stephen A. Siegel, *The Aristotelian Basis of English Law: 1450-1800*, 56 N.Y.U. L. Rev. 18 (1981). Apart from the language that gave rise to the legal concepts of equity, distributive and commutative justice, and the division of civil obligation into tort and contract, the *Nicomachean Ethics* is more generally known for the application of the mean to the various virtues, the relation between external goods and the inward happiness of the spirit, and the importance of habituation in moral development. *Id.* at 43; see also Alisdair Mac Intyre, *A Short History of Ethics* 57-83, 98-99 (2d ed. 1998) (1966). See generally The Symposia Read at the Joint Session of the Aristotelian Society and the Mind Association at the University of Hull (1972).

86. Fuller & Perdue, *supra* note 9, at 56-57.

87. *Id.*; Collins, *supra* note 85, at 146.

88. Collins, *supra* note 85, at 146.

89. See *supra* notes 33, 38, 52 (citing works dealing with these concepts).

90. Collins, *supra* note 85, at 147.

place.

Heirs of the philosophical and political economy of Jeremy Bentham concentrate on efficiency and autonomy. For the operation of the market, contract law has structured a set of institutions that compose the market system of allocating goods and services in the economy.⁹¹ The market place, according to the Aristotelian definition of exchange, was not expected to provide exhaustive or perfect equality. As far as fair exchange was concerned, natural law theory in the seventeenth and eighteenth centuries figured the market broadly because value was not precisely knowable.⁹² Since the market was a rough mechanism, there was no need for more specific calibration. Need, scarcity, and cost were reflected adequately at a range of prices, and the market was not necessarily thought to be determinative of price or reflective of cost.

Adam Smith, by relying on the self-interest of each person to constitute the common good, as expressed in free market distribution, prepared the way for the utilitarians to erect an economic interpretation of contract law. Today the behavior of the market itself is no more precise, although we have better techniques for calculating its volatility.⁹³ But the greater drawback of Benthamite market theory is that the market does the assessments, and the law remains incidental because all individual differences are standardized in a paradigm actor.⁹⁴ The current economic theorists refocused attention on traditional doctrines of contract, tort, and property as the most efficient means of ordering society and accommodating the market.⁹⁵

Aristotle, in the *Nicomachean Ethics* spoke about just price as

91. *Id.*

92. James Gordley, *Equality in Exchange*, 69 Cal. L. Rev. 1587, 1608-09 (1981) [hereinafter Gordley, *Equality in Exchange*].

93. In the quest to measure value, the difficulties in attempts to reduce market volatility have been documented. See Robert Shiller, *Market Volatility* (1989) (volatility is much greater than changes in dividends indicates); cf. Louis Lowenstein, *Sense and Nonsense in Corporate Finance* 13 (1991) (observing that estimating the right level for stock prices is hard, "given the lack of a sufficient basis for calculated mathematical projections").

94. Michael Sandel, *Liberalism and Its Critics* 5-7 (1984). For an economic approach to law, see Richard A. Posner, *Economic Analysis of Law* 286 (5th ed. 1998) ("[E]conomics, in its normative dimension, can be thought of as a form of applied utilitarianism."); A. Mitchell Polinsky, *An Introduction to Law and Economics* (2d ed. 1989); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 Hofstra L. Rev. 509 (1980); Daniel A. Farber, *Contract Theory and Modern Economic Theory*, 78 Nw. U. L. Rev. 303 (1983).

95. Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 Harv. L. Rev. 1223, 1229 (1984); cf. Collins, *supra* note 56, at 3-7, 11-13, 32. For criticism of Collins' naive faith in the market, see Jack M. Beerman, *Contract Law as a System of Values*, 67 B.U. L. Rev. 553, 555 (1987) (reviewing Hugh Collins, *The Law of Contract* (1986)). But see John Gray, *The Moral Foundations of Market Institutions* (Institute of Economic Affairs Health and Welfare Unit 1992) (taking into account the concerns of those who point out the injustices of the unregulated market, emphasizing the moral basis of the market).

explaining exchange transactions.⁹⁶ Therefore, he was symbolically credited with originating the notion of substantive fairness as the justice of the exchange.⁹⁷ Adequacy of consideration and unconscionability law are inspired by the *Nicomachean Ethics*.⁹⁸ Heirs of Aristotle use reasonable expectation, which “invites the resolution of contract disputes by reference to external standards of reasonableness rather than to the provisions of the contract itself,” to channel Aristotle’s ideas.⁹⁹ In short, consideration in the nineteenth century focused on the process of making the agreement while by the end of that century promissory estoppel looked toward expectations arising from agreement. Agreement is a broader notion than bargain which shifts the focus of the inquiry to the manner in which the parties reached their agreement.¹⁰⁰

Property and contracts together formed the bases of consent and notions of agreement for autonomy and freedom of and from contract. Historically, until Thomas Hobbes’s *Leviathan* was published in 1651, contract lay hidden under the shadow of property, which had been the preeminent legal, philosophical and economic organizing principle.¹⁰¹ In 1797, Kant wrote about the moral value of a right to promise but Kant’s promises are noncontractarian: the duty to keep promises is a moral imperative derived from the autonomy of the individual and the intrinsic worth of each person.¹⁰² Consent is merely evidentiary and does not make that contract just or unjust.¹⁰³ With the end of the industrial age

96. See, e.g., Aristotle, *Nicomachean Ethics*, in Introduction to Aristotle 403 (Richard McKeon ed., Modern Library 1947) (“[W]hat is just in distribution must be according to merit . . .”). Raymond de Roover deals with medieval just price theory. Raymond de Roover, *The Concept of the Just Price: Theory and Economic Policy*, 18 J. Écon. Hist. 418 (1958).

97. Gordley, *Equality in Exchange*, *supra* note 92, at 1589; Barnett, *supra* note 12, at 283-84.

98. Barnett, *supra* note 12, at 283-84.

99. Coote, *supra* note 15, at 103-04, 112. Compare Lord Russell’s use of reasonable standards in *Williams*, [1990] All. E.R. 524. In contrast, reliance “in seeking to base contracts on injury suffered, points towards torts and restitution and away from personal choice.” Coote, *supra* note 15, at 112. Economic theorists similarly direct our attention to torts and away from personal choice. See *supra* text accompanying note 95.

100. Barnett, *supra* note 12, at 287.

101. Rosenfeld, *supra* note 56, at 791 (citing Thomas Hobbes, *Leviathan* 132 (Everyman’s Library ed. 1973)). “Even as late as the eighteenth century, contract law was subordinated to the law of property, serving primarily as a mode of transferring title.” *Id.* at 821.

102. *Id.* at 793 n.110, 862-63; see also Gary Lawson, *Efficiency and Individualism*, 42 Duke L.J. 53 (1993); Ernest J. Weinrib, *Corrective Justice*, 77 Iowa L. Rev. 403, 424 (1992) (differentiating Kantian-Hegelian thoughts on private law relationships from an Aristotelian perspective). In private law, Kant treats “from the standpoint of action what Aristotle describes as a structure of interaction. With interaction as his starting point, Aristotle elucidates the other-directedness of justice and links the parties through the notion of equality.” Weinrib, *Corrective Justice*, *supra*, at 424.

103. Compare this idea with Mansfield’s notion that consideration was evidence of an agreement. Oldham, *supra* note 36, at 1961.

and the advent of the information age, the law needs to give contracting parties the assurance that their updated methods of structuring their relationships will be honored, using the underlying substance of general agreement as the organizing principles for contract law.

Concepts of paternalism, reason, experience, and tradition are broad standards repeated in different theories with slightly different meanings. Like Adam, who named the animals, we enjoy inventing categories, thereby suggesting that we have isolated a different concept under each new category. Simpson, Gilmore, and Dawson noticed this phenomenon in relation to offer, acceptance, and consideration on modification and discharge. Assent, intent, and consent are all various versions of the nineteenth-century notion of agreement, cut down: each scholar chooses a word and invests it with particular significance for the theory in question. Categories proliferate because many people are not connected to what everyone else is doing. In other words, those who do not know the existing theories and their meaning are condemned to repeat them with different words.

CONCLUSION: PROMISSORY ESTOPPEL'S PLACE IN TRADITIONAL CONTRACT LAW

When mainstream judicial and legal opinions focus on the equitable aspects of a transaction, as Corbin suggested happened in the years before the Restatement,¹⁰⁴ the major vehicle for contracts liability is expanded to accommodate that notion received from the values of the community at large. If, instead, as in the nineteenth century, conditions in society restrict the circumstances under which contractual obligations are deemed to exist, the validity of the contracting process itself and the voluntary nature of contract law are emphasized. Corbin wanted to retreat from some of the most severe pruning of nineteenth-century contract law and set it back on its course from that point.¹⁰⁵ "Promissory estoppel" is a version of the broad concept of consideration, or in Simpson's terminology, is one of many considerations. Only its new, equitable name concealed its origins in consideration, perhaps to protect it from those in the ascendancy who denied its role in contract. When the common law grew too stiff or narrow, equity often came to the rescue, allowing old doctrines to survive with changed names. Promissory estoppel is simply consideration, cloaked in a new name.

104: Corbin, *Recent Developments*, *supra* note 19, at 453.

105. According to Professor Baker, at common law, "relationships are governed by rules rather than by uncertain notions of fairness." Baker, *Reasonable Expectation*, *supra* note 15, at 35. Are we back to the choice of imperfect laws or broad standards exercised under the discretion of just judges? Priestly suggests we may choose both: "whether or not there is one satisfactory theory capable of explaining contract decisions in a consistent way, the fact is that the cases and the contract texts are full of rules of the most detailed kind relating to contractual situations which are used at least as a guide by the legal profession and the courts . . ." Priestly, *supra* note 80, at 31.

The rise of promissory estoppel in the late nineteenth and early twentieth centuries shows how inventive the law was when the notion became dominant that contract liability was limited only to bargained detriment. The disfavored idea of unbargained detriment was expressed in a different way, as the House of Lords did in *Hughes v. Metropolitan Railway*.¹⁰⁶ That is, when consideration was limited to bargained detriment, the remaining functions of the full learning of consideration were channeled into another set of concepts, most notably “promissory estoppel.” Succeeding generations of lawyers simply did not remember that the new terminology embodied the concept of consideration their ancestors disfavored. That return to a more accommodative theory is the genius of the Restatement of Contracts, which permitted inclusion of other definitions of consideration besides the one describing the favored bargained-for exchange, although these other definitions of consideration had to travel incognito under separate section numbers and without acknowledgment of their heritage in consideration.¹⁰⁷

Scholarly concentration on the different channels that opened up in the nineteenth century after consideration was cut down created its own new splintering allegiances. We have invested emotionally in some of these notions, and that may keep us from seeing congruences and identities between the concepts. It is therefore no surprise to find the frequent observation in contract scholarship that the unity of nineteenth-century classical contract law is gone. Nostalgia for its unity, if not for its doctrines, is still a common sentiment among contract scholars. On the one hand, Fried jettisons what he considers ancillary provisions intruding from other fields of law to reach pure contract in the distilled essence of the moral promise; on the other hand, many fear the death of contract by its absorption into delictual and restitutional remedies. The Restatement, which provides a general gauge of the vibrancy and reasonability of our broad approach to contracts, reflects the journey of contract law during the nineteenth and twentieth centuries.

The Restatement, like Cardozo’s characterization of an agreement, “‘instinct with an obligation’ imperfectly expressed,” sets forth a basically contractual, broad definition of consideration, “[n]ot withstanding its semi-delictual overtones.”¹⁰⁸ The remedial edge of

106. Cf. *Hughes v. Metropolitan Railway*, (1877) 2 App. Cas. 439, [1874-80] All E. R. Rep. 187.

107. Randy E. Barnett, *Foreward: Is Reliance Still Dead?*, 38 San Diego L. Rev. 1, 3 n.6 (2001) (stating that “a large part of [promissory estoppel] . . . [lies] squarely within contract law”). But cf. Eric M. Holmes, *The Four Phases of Promissory Estoppel*, 20 Seattle U. L. Rev. 45, 48 (1996) (strongly supporting the continued need for equitable relief recognized independently as promissory estoppel).

108. Judge Benjamin N. Cardozo made the statement in *Moran v. Standard Oil Co.*, 105 N.E. 217 (N.Y. 1914) (“There are times when reciprocal engagements do not fit each other, like the parts of an indented deed, and yet the whole contract . . . may be ‘instinct with . . . an obligation’ imperfectly expressed.”) and *Wood v. Lucy, Lady*

bargain, reliance, benefit conferred, and equity does not devalue the content of contract law in its promissory, detrimental, or moral obligations, for those notions of promise, need, and benefit have always been the ties that bind us to contract. The remedial edge merely means that to be complete, contract must include not only theories of liability but also relief, resolution, and reconciliation.¹⁰⁹ In view of the difficulty the world over “in developing any general basis at all for enforcing promises, it is perhaps less remarkable that the common law developed a theory that is logically flawed than that it succeeded in developing any theory at all.”¹¹⁰ The flaw lies in our desire to cut down the role of one or two of the elements in contract at the expense of the balance produced by recognizing the roles of promise, benefit, and need in an integrated theory.

The history of liability in contracts demonstrates the purpose the doctrines of consideration, benefit, and detriment served at different points in time. The same battle is fought again and again, giving rise to the many lives of contract, as successive generations realize for themselves what their ancestors learned. The point of these successive battles is quite clear and consistent. If, however, one element becomes dominant in the mixture (for example, as benefit did in the nineteenth century) at the expense of other elements, the subordinated concepts may be expected to go underground and re-emerge with new names.

Duff-Gordon, 118 N.E. 214 (N.Y. 1917) (“The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed. If that is so, there is a contract.” (citing *Scott, J. in McCall Co. v. Wright*, 117 N.Y.S. 775 (1878))). The second phrase is quoted from Samuel J. Stoljar, *Estoppel and Contract Theory*, 3 J. Cont. L. 1, 22 n.97 (1990).

Corbin has stated that the term “Restatement” is not a misnomer. *See Corbin, Sixty-Eight Years*, *supra* note 1, at 186-87. Law is in fact uniformity of conduct. “In spite of complexity, in spite of some diversity and conflict, there is in fact a high degree of uniformity; and the predictions of a broadly educated lawyer are worth buying.” Klau, *supra* note 52, at 528-29. Moreover, the Weight of Authority is also the Weight of Uniformity, of which law is constituted. *See id.* Much of the confusion and conflict in the law is directly due to a confused and variable terminology; and one of the major problems of the American Law Institute is the clarification of our fundamental legal concepts by the use of a uniform and definite terminology.

109. *See* Randy Barnett, *The Death of Reliance*, 46 J. Legal Educ. 518 (1996); Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99 (2000); Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 Hastings L.J. 1191 (1998) (dealing with current trends in contracts scholarship). For example, Craswell’s version of modern contract theory focuses on the assessment of damages, not on the parties’ respective interests when the contract was formed. Result reigns, not circumstance. Among modern priorities, Craswell cites economic efficiency, retributivist and distributional goals as considerations that do not always coincide with Fuller and Perdue’s classification. *Id.* at 1199-1200; *see also* Andrew Kull, *Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts*, 79 Tex. L. Rev. 2021 (2001).

110. E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576, 599 (1969).

Thus, the need for a wide notion of consideration as it appeared in the sixteenth century found expression again and again. In Lord Mansfield's time when consideration grew narrow, the concepts of moral obligation and equity were treated expansively. Under the Victorian law lords, when bargain appeared exclusive, equitable estoppel was expanded. During the twentieth century in the wake of freedom of contract, promissory estoppel "flourished like the green bay tree," as Grant Gilmore was fond of saying. The underlying thread of broad contracts liability was often obscured but it held the garment of contract together as composed of promise, benefit, and need. This history should give us courage to pay heed to the functions balanced in the integrated theory of contract liability and prune away whatever duplication in terminology and thought obscures recognition of these basic contract needs. The same impulses to raise one element over the other, which gave rise to our duplicative terminology in the first place, will not wane, however, assuring contracts of at least nine lives.

Corbin optimistically trusted in the then new American Law Institute to clear up these difficulties, despite the fact that he and Williston had difficulty getting the other Restaters to accept informal contracts as binding without assent or consideration, even in the face of judicial acceptance of these arrangements as contracts. This treatment of the history of liability in contracts traces Corbin's theory in the original treatise. Perillo and Bender's volume in the revised edition departs from that vision but is true to Corbin's desire to unify and simplify the theory of liability in contracts while retaining the core concepts as the law evolves. With that, Corbin, if he were with us, should have been pleased.¹¹¹

111. Corbin observed that

The author is not downgrading the "authority" of his own treatise when he invites every reader to make a critical study of the sources on which its many "tentative working rules" are based [S]tudents and writers and other judges will create new rules and principles and doctrines to modify and supplant those that have served earlier days. What industry, what clarity of mind, and what nobility of conscience are required in this judicial process!

Corbin, *Sixty-Eight Years*, *supra* note 1, at 195.

Notes & Observations