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Geoffrey R. Watson

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In the Tribunal of Conscience: *Mills v. Wyman* Reconsidered

Geoffrey R. Watson*

In this Article, Professor Watson explores the historical record surrounding Mills v. Wyman, 20 Mass (3 Pick.) 207 (1825), one of the leading American cases on moral obligation in contract law. In Mills, the Massachusetts Supreme Judicial Court refused to enforce a father's promise to compensate a Good Samaritan who had cared for the father's dying son. Professor Watson combs the historical evidence—court records, census reports, genealogical data, probate records, military rolls, and so on—and argues that the Mills court got both the facts and the law wrong. According to Professor Watson, the father did not make the promise in question, the son did not die until years later, and the law did not mandate the holding in the case. Professor Watson then evaluates modern theories of moral obligation and argues that none of them fully explains or justifies the result in cases like Mills. He concludes by arguing for reform of moral obligation doctrine, and more generally, of consideration doctrine. He contends that promises should be binding if they are made with formalities indicating intent to be legally bound.

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|------|--|------|
| I. | INTRODUCTION | 1749 |
| II. | THE FACTS OF <i>MILLS V. WYMAN</i> | 1752 |
| III. | THE LEGAL PROCEEDINGS IN <i>MILLS V. WYMAN</i> | 1768 |
| IV. | <i>MILLS</i> AND THEORIES OF MORAL OBLIGATION..... | 1789 |
| | A. <i>Explaining Moral Obligation Cases</i> | 1790 |
| | B. <i>Reforming Moral-Obligation Doctrine</i> | 1797 |
| V. | CONCLUSION..... | 1804 |

I. INTRODUCTION

A hundred years ago, Holmes admonished lawyers not to confound law and morality. According to Holmes, a “business-like understanding” of the law requires a sharp distinction between the legal and the moral.¹ “Nowhere is the confusion between legal and

* Visiting Associate Professor of Law, Catholic University School of Law; B.A. Yale College, J.D. Harvard University. I would like to thank my research assistants, Michael Kaibni and Roxana Wizorek, whose tireless treasure-hunting made this Article possible. My thanks also for the helpful comments of Max Bloomfield, Lisa Lerman, Tony Perez, Heidi Schooner, and Bill Wagner. Finally, I would like to thank Gary Powell, who sparked my interest in this project.

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

moral ideas more manifest than in the law of contract," he said.² Contract law, he argued, simply compensates for breach; it does not punish for moral failure. Either you perform or you pay damages. One must look at the law as a "bad man" who wants to know simply whether he will be liable, not as a good one who finds reasons for his actions "in the vaguer sanctions of conscience."³ "But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can."⁴

The moral obligation rule is a particularly pungent manifestation of Holmes's theory of law and morality. This doctrine holds that moral obligation alone is not consideration for a promise. The leading American case espousing this doctrine is *Mills v. Wyman*,⁵ a staple of contracts casebooks since Langdell's first casebook was published in 1871.⁶ As reported by the Supreme Judicial Court of Massachusetts, the facts of *Mills v. Wyman* were fairly simple. Twenty-five-year-old Levi Wyman became ill and was cared for by a Good Samaritan, Daniel Mills. Mills housed Wyman for two weeks and attempted to nurse him back to health, but, despite his efforts, Wyman passed away.⁷ Levi's father, "influenced by a transient feeling of gratitude," promised in writing to compensate Mills for his time and trouble.⁸ Thereafter the father reneged on the promise, and Mills sued for breach.⁹

Chief Justice Parker's opinion in the case foreshadowed the theory of law and morality articulated by Holmes, who would sit in Parker's seat seventy years later. The first sentence of the opinion suggests Holmes's "bad man" theory. "General rules of law established for the protection and security of honest and fair-minded men . . . will sometimes screen men of a different character from

2. *Id.* at 462.

3. *Id.* at 459.

4. *Id.* at 462.

5. 20 Mass. (3 Pick.) 207 (1825).

6. Compare C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS 367 (Boston, Little, Brown & Co. 1871) (reprinting *Mills* in its entirety), with CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 165 (3d ed. 1993) (same), and JOHN P. DAWSON ET AL., CASES AND COMMENTS ON CONTRACTS 234 (6th ed. 1993) (same). Oddly, the most recent edition of the casebook I use has stripped *Mills* down to one page. See E. ALLEN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 67 (5th ed. 1995). It is an otherwise excellent book. See Geoffrey R. Watson, *A Casebook for All Seasons?*, 20 SEATTLE U. L. REV. 277 (1997).

7. See *Mills*, 29 Mass. (3 Pick.) at 209.

8. *Id.*

9. See *id.*

engagements which they are bound in *foro conscientiae* to perform.”¹⁰ Justice Parker identified the father, Seth Wyman, as a bad man: “[H]e has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.”¹¹ The court concluded that Wyman was morally, but not legally, bound to compensate Mills, since Mills did not promise or do anything in exchange for the father’s promise.¹² The court referred the moral question to “the interior forum,” the “tribunal of conscience.”¹³

A close reading of the historical record reveals a starkly different version of the facts of *Mills v. Wyman*. Part II of this Article combs the available evidence, including the original court records, genealogical data, probate records, census reports, military records, and newspapers, in search of the real facts of the case.¹⁴ This section concludes that Seth Wyman never made the promise that the court said he made, and that young Levi Wyman did not meet the untimely death that the court said he had met. Thus the court rightly absolved Seth Wyman, but for the wrong reasons. Part II also uncovers other records from the period, including evidence of Seth Wyman’s considerable wealth, that raise new questions about the motivations of the parties.

Part III traces the legal proceedings in *Mills* and argues that the law did not mandate the result the court said was required. In an era in

10. *Id.* at 208.

11. *Id.* at 209.

12. *See id.* at 212.

13. *Id.*

14. An explanation of my research methodology is in order. First I obtained copies of the original record in *Mills v. Wyman*; those records are available at the Massachusetts States Archives in Boston. I then obtained copies of every case and treatise cited in the headnotes and opinions in *Mills*. I also obtained copies of later cases and treatises citing *Mills*, as well as later law-school casebooks reprinting the supreme judicial court’s opinion in *Mills*. Much of this material is available in law-school libraries.

I next conducted a thorough genealogical study of all the major figures in *Mills v. Wyman*, including the parties themselves, the witnesses to the events in *Mills*, the doctor who treated Levi Wyman, the attorneys at trial and on appeal, the trial and appellate judges, and the court clerk. Much of this genealogical research was carried out at a Family History Center of the Church of Latter-Day Saints just outside Washington, D.C. I also made extensive use of the genealogical materials in the Daughters of the American Revolution Library in downtown Washington, in the Library of Congress, and in the National Archives. In addition, my research assistant traveled to New England to study the papers of the attorneys involved in the case and to obtain further genealogical data on the Wyman family.

This genealogical research turned up relevant information in a wide variety of sources, including birth, death, and marriage records; military records; college records; census records; records of the Worcester County bar; probate records; and deeds, wills, mortgages, and other documents.

which law-making power had only recently passed from juries to judges, the court missed an opportunity to shape a more sensible doctrine of promissory liability. Part IV evaluates competing theories of moral-obligation doctrine and concludes that none of them fully explains or justifies the result in cases like *Mills*. This section argues that a promise should be binding if it is made with intent to be bound, regardless of whether a moral obligation or consideration exists. The Article concludes with a discussion of *Mills's* place in our legal culture.

II. THE FACTS OF *MILLS v. WYMAN*

Levi Wyman was born on November 25, 1795, in Shrewsbury, Massachusetts, a suburb of Worcester.¹⁵ He was the seventh and last child of Seth and Mary Wyman.¹⁶ This Levi Wyman was almost certainly the same sick young man whose medical expenses became the center of the controversy in *Mills v. Wyman*. Levi's birth date

15. See ANDREW H. WARD, FAMILY REGISTER OF THE INHABITANTS OF THE TOWN OF SHREWSBURY, MASS. FROM ITS SETTLEMENT IN 1717 TO 1829, AND OF SOME OF THEM TO A LATER PERIOD 276 (Boston, Samuel G. Drake 1847) [hereinafter WARD, FAMILY REGISTER]; VITAL RECORDS OF SHREWSBURY, MASSACHUSETTS, TO THE END OF THE YEAR 1849, at 114 (Franklin P. Rice 1904) (LC Call # F74.S63 S6) [hereinafter VITAL RECORDS OF SHREWSBURY]; see also MASSACHUSETTS VITAL RECORDS (manuscript on file at the Library of Congress Microform Reading Room) (recording the birth of Levi Wyman to Seth and Mary Wyman on Nov. 25, 1795).

16. See WARD, FAMILY REGISTER, *supra* note 15, at 276 (listing children as Sarah, Ross, Seth, Oliver, Mary, Clarissa, and Levi); VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 114 (listing children as Sally, Ross, Seth, Oliver, Polly, Clarisa, and Levi).

Levi Wyman and his father Seth were descendants of the brothers Francis and John Wyman, who were born in England and arrived in Massachusetts in 1642. Most of Seth's direct ancestors settled in Massachusetts, particularly in the Worcester County area. See, e.g., SAMUEL SEWALL, THE HISTORY OF WOBURN, MIDDLESEX COUNTY, MASS. 651-57 (Boston, Wiggin and Lunt 1868) (providing a genealogy from Francis Wyman to Seth Wyman, grandfather of our Seth Wyman); 3 HISTORIC HOMES AND INSTITUTIONS AND GENEALOGICAL AND PERSONAL MEMOIRS OF WORCESTER COUNTY, MASSACHUSETTS 33-34 (Ellery Bicknell Crane ed., 1907) (linking Seth's son, Seth, Jr., to Francis Wyman); JOHN HILL OF DORCHESTER, MASS., 1633, AND FIVE GENERATIONS OF HIS DESCENDANTS 78 (1904) (linking Seth's father, Ross, to John Wyman); THOMAS BELLOWS WYMAN, THE GENEALOGIES AND ESTATES OF CHARLESTOWN IN THE COUNTY OF MIDDLESEX AND COMMONWEALTH OF MASSACHUSETTS, 1629-1818, at 1057 (1879) (linking Seth's uncle, cousin, and grandfather to Francis); see also C.E. WYMAN & R.W. HUBBARD, GENEALOGY OF THE WYMAN FAMILY FROM ITS FIRST SETTLEMENT IN AMERICA, TO THE PRESENT DATE 5-9, 20-23 (Grand Haven, Mich., Harold Book and Job Printing House 1883) (describing the early family); BELLA RISTINE WYMAN, WYMAN AND ALLIED FAMILIES GENEALOGICAL AND BIOGRAPHICAL 8 (1931) (describing John, Francis, and their issue); VINCENT D. WYMAN, WYMAN HISTORIC GENEALOGY ANCESTORS AND DESCENDANTS (1595-1941) OF ASA WETHERBY WYMAN 15-43 (1941) [hereinafter VINCENT D. WYMAN, WYMAN HISTORIC GENEALOGY] (listing descendants of Asa Whetherby Wyman).

would have made him twenty-five-years-old at the time of his illness in 1821, and the report of the case indicates that Levi was “about twenty-five years of age” at that time.¹⁷

Not much is known of Levi’s childhood. He grew up in a relatively prosperous household, on a homestead of more than a hundred acres.¹⁸ It is not known what, if any, schooling he received. Rolls of the Massachusetts Militia do indicate that one “Levi Wyman” was called into service in 1814, at the end of the War of 1812, when our Levi was eighteen years old.¹⁹ But this Levi did not come from our Levi’s hometown of Shrewsbury, making it unlikely that he is our Levi.²⁰ Other evidence suggests that Levi was still living with or near his parents when he was nineteen years old. In June 1815, “Levi Wyman” and Levi’s sister Clarissa witnessed their mother’s signature on a deed of sale.²¹

Sometime between 1815 and 1821, Levi left home. By 1821, according to the trial court in *Mills v. Wyman*, Levi “had long ceased to

17. *Mills*, 20 Mass. (3 Pick.) at 207.

18. See VINCENT D. WYMAN, WYMAN HISTORIC GENEALOGY, *supra* note 16, at 17-20 (describing Seth Wyman’s land holdings).

19. See Muster Roll & Pay Roll, 2 Regiment (Waugh, Jr.’s), Mass. Militia (War of 1812) (unpublished document on file with the National Archives in Washington, D.C.) [hereinafter Muster Roll & Pay Roll]. This Levi Wyman served a grand total of 11 days in Captain Nathaniel Russell’s Company of Infantry in the second Regiment (Waugh, Jr.’s) of the Massachusetts Militia, from September 14, 1814 to September 24, 1814. See *id.* Although he was called into an infantry company, he had the rank of ensign, a traditional naval designation. See *id.* He was paid at a rate of \$20 per month, but his pay was prorated to account for his service of less than two weeks. See *id.* Thus the amount of wages is listed as \$8.00, plus another \$7.20 apparently allocable to “rations due.” See *id.*

20. This Levi Wyman listed his home address as Bloomfield. See Muster Roll & Pay Roll, *supra* note 19. A Levi Wyman apparently did live in Bloomfield (later Skowhegan), Maine, at about this time, and his father’s name was indeed Seth Wyman. See 29 BIOGRAPHICAL REVIEW 566 (1898). But this Seth settled in Maine, not Massachusetts, and his first wife’s name was Annie Stewart, not Mary Brown. Compare *id.* (describing the Seth Wyman of Bloomfield), with WARD, FAMILY REGISTER, *supra* note 15, at 276 (describing Seth Wyman and Mary Brown of Shrewsbury).

21. See 205 WORCESTER COUNTY DEEDS 202-03 (June 1, 1815). The deed conveys 60 acres of land from Seth and Mary Wyman to a John Davis of Holden in exchange for the impressive sum of \$1,200. See *id.* at 202.

The grantee, John Davis, probably was not the same John Davis whose partnership later represented Daniel Mills in his suit against Seth Wyman. The John Davis named in the deed lived in Holden; in 1815, John Davis the attorney (and later governor of the Commonwealth) lived in Worcester, having moved there from Yale after his graduation in 1812. See ALONZO HILL, THE PERFECT MAN. A SERMON ON THE DEATH OF HON. JOHN DAVIS PREACHED AT WORCESTER, MASS. APRIL 23, 1854 (New York, Charles B. Norton 1854). Moreover, the deed describes the grantee John Davis as a “yeoman”—a farmer—not an attorney. See 205 WORCESTER COUNTY DEEDS 202 (June 1, 1815).

be a member of his father's family."²² Where he went, and why, is a mystery.²³ The next we hear of him, Levi was in Hartford, Connecticut in February 1821, "on his return from a voyage at sea"²⁴—indeed, on his return from a "foreign country"²⁵—when he became very ill.

Precisely when Levi became sick is unclear. By some accounts, Levi fell ill on February fifth at the house of Daniel Mills, the Good Samaritan of *Mills v. Wyman*: "one Levi Wyman at Hartford . . . on the fifth day of February [1821] was at the house of [Mills] and then and there fell dangerously sick . . ."²⁶ Other accounts agree that Levi became sick at Mills's house, but not until February twentieth.²⁷ None of the accounts says he became ill while abroad or at sea, though this is surely a possibility.

The nature of Levi's illness is also a mystery. Court papers provide some tantalizing details. The illness was a protracted one: by

22. Record, *Mills v. Wyman* (Ct. Comm. Pleas, Dec. Term 1824) (Howe, J.) (unpublished manuscript on file with the Massachusetts State Archives, Boston, Mass., Box 203, 33.B.5, 826-28) [hereinafter Record, *Mills*].

23. A Levi Wyman does appear in the 1820 federal census for Connecticut. This Wyman lived in Union, Connecticut, in Tolland County. See CONNECTICUT 1820 CENSUS INDEX 123 (Ronald Vern Jackson et al. eds., 1977). But it is unlikely that this was our Levi Wyman, for a similar entry appears in the 1810 Connecticut census, when our Levi—then age 15—probably still lived with his parents. See CONNECTICUT 1810 CENSUS INDEX 109 (Roland Vern Jackson et al. eds., 1977). No Levi Wyman appears in the 1800 Connecticut census index. See CONNECTICUT 1800 CENSUS INDEX 167 (Ronald Vern Jackson et al. eds., 1977).

Massachusetts census records do show two Levi Wymans living in Massachusetts in 1820, both in Worcester County. One lived in Winchendon, the other in Hubbardston. See MASSACHUSETTS 1820 CENSUS INDEX, *supra*, at 222. Neither appears in the 1830 census. See MASSACHUSETTS 1830 CENSUS INDEX 274 (Ronald Vern Jackson & Gary Ronald Teeple eds., 1977).

Oddly, these same records show a Seth Wyman living in Marblehead, on the North Shore and far from Worcester, but no Seth Wyman in Worcester County. See MASSACHUSETTS 1820 CENSUS INDEX, *supra*, at 222. The 1830 census shows a Seth Wyman living in Shrewsbury and no Seth Wyman in Marblehead. See MASSACHUSETTS 1830 CENSUS INDEX, *supra*, at 274. Presumably this was Seth Wyman, Jr., Colonel Seth Wyman's oldest son, who served as administrator of the elder Wyman's estate and inherited much of his property.

24. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 207 (1825).

25. *Id.* at 209.

26. Record, *Mills*, *supra* note 22 (Report of Abijah Bigelow, Clerk of the Worcester County Courts). An essentially identical account appears in the Writ of Attachment. See *id.*; see also *id.* (Judgment) (noting that Levi was "taken suddenly sick in Hartford").

27. See *id.* (Deposition of Nathaniel Wales and Norman Pease, Nov. 29, 1824). Indeed, the doctor who treated Wyman once said he was not called upon until February 20. See *id.* (Deposition of J.L. Comstock, Nov. 29, 1824). Comstock's bill, however, says he treated Wyman from 13 to 20 February. See *id.* (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821).

all accounts it lasted at least two weeks.²⁸ Daniel Mills, the Good Samaritan who housed and cared for Levi Wyman, arranged for two men to guard Levi for four days and nights while Levi “was in this derang’d state.”²⁹ Levi was so sick that “he leaped out of a chamber window to the imminent hazard of his life, and to the very great alarm of the family and the boarders.”³⁰ Mills provided Wyman with “1 gallon Spirits”³¹ and with “pills” provided by a Doctor Linde.³² Mills also hired John Lee Comstock,³³ a prominent Hartford physician, to care for Wyman.³⁴ Comstock found Levi “in a state of indisposition” and, for some time, “in a state of delirium” that required two or three persons “to prevent him from injuring himself.”³⁵ Although Dr. Comstock published dozens of books on subjects ranging from mineralogy to Greek history to philosophy,³⁶ he left little further record of his diagnosis and treatment of Levi Wyman.

28. See, e.g., *id.* (Depositions of Wales and Pease).

29. *Id.* (itemized expenses of Daniel Mills, in Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821); see also *id.* (Depositions of Wales and Pease) (noting that Mills “procured a Mr. Morton and a Mr. Powers to attend upon Mr. Wyman”).

30. *Id.* (Depositions of Wales and Pease).

31. *Id.* (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821).

32. *Id.* (Bill from Daniel Mills to Col. Seth Wyman, Apr. 5, 1824).

33. Comstock was born in Lyme, Connecticut in 1789 and died in 1858. He served as an assistant surgeon in the War of 1812 and eventually settled in Hartford. See generally CYRUS B. COMSTOCK, A COMSTOCK GENEALOGY 106-06 (1907); II FLORENCE S. MARCHY CROFUT, GUIDE TO THE HISTORY AND THE HISTORIC SITES OF CONNECTICUT 677 (1937); WHEELER PRESTON, AMERICAN BIOGRAPHIES 185 (1974); J. HAMMOND TRUMBULL, THE MEMORIAL HISTORY OF HARTFORD COUNTY CONNECTICUT 1633-1884, at 142, 172 (1886). In 1817 he married Mary E. Chenward, the daughter of a U.S. Senator for Connecticut. See LUCIUS BARNES BARBOUR, FAMILIES OF EARLY HARTFORD, CONNECTICUT 194 (1977); EDWIN POND PARKER, HISTORY OF THE SECOND CHURCH OF CHRIST IN HARTFORD 373 (1892) (church record of the marriage).

Comstock was a “prominent” physician. See JOHN ADAMS COMSTOCK, A HISTORY AND GENEALOGY OF THE COMSTOCK FAMILY IN AMERICA 83 (1949); see also CHARLES W. BURPEE, HISTORY OF HARTFORD COUNTY CONNECTICUT 395 (1928) (noting that Comstock had a “national reputation”). He was best known, however, for his huge volume of publications. See TRUMBULL, *supra*, at 142; see also *infra* note 36 (listing some of his works). He also had an eye for drawing, and he made most of the illustrations for his books. See 1 APPLETONS’ CYCLOPAEDIA OF AMERICAN BIOGRAPHY 702 (James Grant Wilson & John Fiske eds., 1968). He died on November 21, 1858. See 59 BOSTON MEDICAL AND SURGICAL JOURNAL 408 (1858).

34. See Record, *Mills*, *supra* note 22 (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821).

35. *Id.* (Deposition of John Lee Comstock).

36. See, e.g., JOHN LEE COMSTOCK, HISTORY OF THE PRECIOUS METALS (1849); JOHN LEE COMSTOCK, INTRODUCTION TO MINERALOGY (1832); JOHN LEE COMSTOCK, SYSTEM OF NATURAL PHILOSOPHY (1831); JOHN LEE COMSTOCK, HISTORY OF THE GREEK REVOLUTION (variously dated at 1828 or 1829), cited in APPLETONS’ CYCLOPAEDIA OF AMERICAN BIOGRAPHY, *supra* note 33, at 702. His *System of Natural Philosophy* went through 94

Perhaps the most interesting aspect of Levi's illness was the end of it. The Supreme Judicial Court pronounced Levi dead. It said that Mills "acted the part of the Good Samaritan, giving [Levi] shelter and comfort until he died."³⁷ This finding might influence one's view of the case, since Mills is a less sympathetic plaintiff if his ministrations were ineffective.³⁸ But the court's report of Levi's death was somewhat exaggerated.³⁹ All available evidence suggests that Levi in fact recovered and eventually settled in Springfield, Massachusetts. On March 3, 1821, Mills wrote to Levi's father, Seth Wyman, stating that "[i]t is with satisfaction that I can announce to you—that he has recovered his health in a measure so far that he has left this place a day or two since."⁴⁰ In a postscript, Mills added: "Levi Started from here and contemplated on going home by the way of Springfield should his health admit—was tolerable smart when he left here."⁴¹ Two of Mills's acquaintances, Nathaniel Wales⁴² and Norman Pease,⁴³ also spoke of Levi's "recovery."⁴⁴

Moreover, there is evidence that Levi survived for years or even decades after the illness. In 1829 one Levi Wyman executed a quitclaim deed in favor of Seth Wyman, Jr., administrator of the estate of Colonel Seth Wyman.⁴⁵ In exchange for five hundred dollars, this Levi Wyman quitclaimed all his rights in the "Real Estate whereof *my Hon. Father Seth Wyman . . . died seized.*"⁴⁶ Colonel Seth Wyman had

editions, was translated into many languages, and sold nearly 900,000 copies. *See id.*; CROFUT, *supra* note 33, at 677.

37. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 209 (1825).

38. *But cf.* *Cotnam v. Wisdom*, 104 S.W. 164, 167 (Ark. 1907) (permitting restitutionary recovery by doctor even when patient died).

39. *Cf.* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 625 (Emily Morison Beck ed., 14th ed. 1968) ("The reports of my death are greatly exaggerated." (quoting Mark Twain, *Cable from London to the Associated Press* (1897))).

40. Record, *Mills*, *supra* note 22 (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821).

41. *Id.*

42. Census records do show a Nathaniel Wales living in Hartford in 1810 and 1820. *See* CONNECTICUT 1820 CENSUS INDEX, *supra* note 23, at 114; CONNECTICUT 1810 CENSUS INDEX, *supra* note 23, at 101.

43. Census records show that many people named Pease lived in Connecticut in 1820 but that only a few lived in Hartford. No Pease in Hartford had a given name of Norman. *See* CONNECTICUT 1820 CENSUS INDEX, *supra* note 23, at 85.

44. Record, *Mills*, *supra* note 22 (Depositions of Wales and Pease); *see also* Curtis Nyquist, *Contract Theory, Single Case Research and the Massachusetts Archives*, 3 MASS. L. HIST. 53, 79-81 (1997).

45. *See* 264 PROBATE RECS. OF WORCESTER COUNTY 392 (Quitclaim Deed from Levi Wyman to Seth Wyman, Jr., dated Jan. 9, 1829) [hereinafter *Quitclaim Deed*].

46. *Id.* (emphasis added).

only one son named Levi, the Levi Wyman of *Mills v. Wyman*. What's more, the deed mentions that this Levi Wyman lived in Springfield, Massachusetts, the town to which he headed after leaving the home of Daniel Mills.⁴⁷ Incidentally, the deed also mentions that Levi now had a wife named Lucinda.⁴⁸ One history of Springfield families indicates that he married her on September 19, 1824, just seven months after he left Hartford.⁴⁹

Other evidence also suggests that, while Levi outlived the Supreme Judicial Court's pronouncement of his death, he did not outgrow his habit of getting into trouble. Worcester County probate records from the 1820s and 1830s indicate that a Levi Wyman, a spendthrift and drunkard, had been assigned a legal guardian.⁵⁰ In 1829, the Worcester County Probate Court appointed Henry Snow of Shrewsbury as guardian of "Levi Wyman of said Shrewsbury, who spends and wastes his estate by excessive drinking and idleness."⁵¹ The guardian's accounting of Levi's assets suggests that this is indeed our Levi Wyman, for the accounting mentions "One Bond for one hundred and fifty Dollars, signed by Seth Wyman"—presumably Seth Wyman, Jr.—and dated January 8, 1829.⁵² This was the day before Levi executed the quitclaim deed releasing his claims to any of the estate of his father.⁵³ The only other property in Levi's name was "an old riding Saddle worth about one Dollar."⁵⁴ This Levi, like the Levi Wyman in the 1829 deed, was married.⁵⁵ He also had one or more daughters.⁵⁶ Again, it seems likely that this was the Levi Wyman of *Mills v. Wyman*.

It is not clear why the Supreme Judicial Court thought Levi was dead. No surviving court records suggest that he had died. Perhaps a

47. Compare *id.*, with Record, *Mills*, *supra* note 22 (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821).

48. See Quitclaim Deed, *supra* note 45, at 392.

49. See 3 THOMAS B. WARREN, SPRINGFIELD FAMILIES 782 (1934-1935) ("Levi Wyman m 19 Sept 1824 Lucinda Edwards").

50. See 142 PROBATE RECS. OF WORCESTER COUNTY 103 (Mar. 3, 1829) (Docket No. 67894); 194 PROBATE RECS. OF WORCESTER COUNTY 196 (Mar. 3, 1829); 67 PROBATE RECS. OF WORCESTER COUNTY 557 (May 28, 1829) (inventory of Levi Wyman's possessions).

51. 194 PROBATE RECS. OF WORCESTER COUNTY 196 (Mar. 3, 1829) (Docket No. 67894).

52. 73 PROBATE RECS. OF WORCESTER COUNTY 468-69 (Apr. 1, 1834) (Docket No. 67894) (Levi Wyman's Guardians Acct.).

53. See *id.*

54. *Id.*

55. See *id.*

56. See *id.* (describing arrangements for clothing and schooling of at least one daughter).

stray suggestion of counsel at oral argument influenced the court; only the plaintiff's attorneys appeared in person.⁵⁷ But it would hardly have been in Mills's interest to suggest that Levi had died while under his care.

Whatever his physical health in 1821—sick or well, dead or alive—Levi's financial health was indisputably wretched. He was a "stranger" in Hartford, "totally unable to pay" for his room, board, and medical expenses.⁵⁸ Those expenses amounted to about twenty-two dollars—a considerable sum in those days—and included six dollars for fourteen days' board and lodging, three dollars for "Room pine & Candles," one dollar for a gallon of "Spirits," six dollars in expenses for the two men hired to restrain Levi, and six dollars for Dr. Comstock's fee.⁵⁹ Levi apparently did, however, volunteer that his father Seth Wyman would reimburse Mills. He was "confident that his father, Col. Seth Wyman, would readily pay" the bill.⁶⁰ This confidence was either misplaced or feigned.

Levi Wyman left Hartford without paying Daniel Mills a penny. As Mills's acquaintances put it: "We never have known of any property of Levi Wyman since his sickness nor have we ever seen him since."⁶¹ The date of Levi's departure is uncertain. That date is of interest because it roughly corresponds with the date on which Seth Wyman supposedly promised to pay for Levi's expenses. Mills billed Seth for fourteen days lodging, but Mills didn't clearly indicate which fourteen days were involved. One bill carries the date February 20; another carries the date February 27.⁶² But on March 3, Mills reported to Seth Wyman that Levi Wyman had "left this place a day or two since,"⁶³ suggesting that Levi had left Mills's house at the very end of February or even early March.

57. See *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 208 (1825) (noting in a headnote that defense counsel furnished a written argument "in vacation").

58. Record, *Mills*, *supra* note 22 (Report of Abijah Bigelow, Clerk of the Worcester County Courts).

59. See *id.* (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821 and bill of Dr. Comstock). These figures changed slightly as the dispute progressed. In April, 1824, Mills calculated the total expenses at \$22.93, plus \$4.50 interest. Levi's 14 days' room and board was now assessed at \$6.15. The bill reflected only two quarts of "Spirits," at a cost of 50¢. It also reflected 13¢ "cash paid for Laudanum" and 15¢ for "pills." See *id.*

60. *Id.* (Depositions of Wales and Pease).

61. *Id.*

62. Compare *id.* (Letter of Daniel Mills to Seth Wyman, Mar. 3, 1821), with *id.* (Bill of Daniel Mills to Seth Wyman, Apr. 5, 1824).

63. *Id.* (Letter of Daniel Mills, to Seth Wyman, Mar. 3, 1821).

Daniel Mills was not willing to let this bill go unpaid. He does not appear to have been wealthy. Court papers identify Mills as an “innkeeper” and a “yeoman,”⁶⁴ a term that usually meant a farmer. Unlike Seth Wyman, Mills is never referred to as a “gentleman” in the papers.⁶⁵ Little else about Mills is certain. A “master mariner” named Daniel or D.A. Mills lived with a Hetta Mills at a boarding-house at 118 Front Street in Hartford, near the Connecticut River, in the 1830s and 1840s, but it is not clear that this was our Mills.⁶⁶ This Mills captained a steamship that shuttled between New York and Hartford.⁶⁷ Census records are also inconclusive. They show a number of men named Daniel Mills living in Connecticut at the relevant time, but none in the town of Hartford.⁶⁸ Military records are similarly

64. *See id.* (Report of Abijah Bigelow, Clerk of the Worcester County Courts).

65. *See id.*

66. *See* GARDNER’S HARTFORD CITY DIRECTORY FOR 1838, at 32 (1838). A map in this directory places Front Street about two blocks from the Connecticut River. Front Street no longer exists.

The listed names and occupations of the inhabitants of 118 Front Street fluctuated over time. In 1838, Hetty Mills’s occupation is listed as “boarding house.” *Id.* An 1844 Directory lists a “Hetta” Mills but no Daniel Mills, at that address, although a mariner named Andrew H. Mills lived next door. *See* ISAAC N. BOLLES, DIRECTORY AND GUIDEBOOK, FOR THE CITY OF HARTFORD. 1844. WITH A MAP OF THE CITY AND A GREAT VARIETY OF USEFUL MATTER 55 (1844). In 1847 a “D.A. Mills” is listed at 118 Front Street. This Mills is described as the captain of a steamship and a boarder, not a landlord. Hetty Mills still lived there; she is now listed as “widow, boarding house.” *See* GEER’S HARTFORD CITY DIRECTORY FOR 1847, at 83 (Hartford, Elihu Greer 1847) [hereinafter GEER’S DIRECTORY].

67. *See* GEER’S DIRECTORY, *supra* note 66, at 83, 150. D.A. Mills was captain of the steamship *UNCAS*. *See id.* It was a steam schooner that, along with two other ships, shuttled between State Street, Hartford, and the Old Slip at New York. *See id.* at 150. The *UNCAS* was part of “Buck’s New York Steam Transportation Line.” *Id.* Two agents are listed: E. Wadsworth of State Street, Hartford, and J. & N. Briggs of No. 40 South Street, New York. *See id.* A nifty logo of a steamboat with fore-and-aft sails accompanies the listing. *See id.*

Was this steamship captain the same Daniel Mills who sued Seth Wyman? There is at least one reason for doubt. The captain was always listed with middle initial “A,” and this middle initial does not appear in any of the court records in *Mills v. Wyman*, even though middle initials of other people—notably of Mills’s first lawyer, John W. Hubbard—are routinely recorded. *Compare id.* at 83, 150, with Record, *Mills*, *supra* note 22.

68. The 1790 census shows a Daniel Mills living in Fairfield town; his household included two boys and six girls. *See* DEP’T. OF COMMERCE AND LABOR, BUREAU OF THE CENSUS, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790: CONNECTICUT 12 (1908) [hereinafter 1790 CENSUS]. It also shows a Daniel Mills in Newtown; his household included one boy and one girl. *See id.* at 20.

The 1800 census has a Daniel Mills in Litchfield County, but none in Hartford. *See* CONNECTICUT 1800 CENSUS INDEX, *supra* note 23, at 104. The 1810 census shows three men named Daniel Mills living in Connecticut: two in Litchfield County, and one in Fairfield County, but none in Hartford or Hartford County. *See* CONNECTICUT 1810 CENSUS INDEX, *supra* note 23, at 68.

unrevealing. They show that a number of men named Daniel Mills served in the War of 1812 and in the Revolutionary War, but none of these men came from Hartford.⁶⁹ Likewise, land records show that a Daniel Mills sold property repeatedly in the town of Hartford between 1816 and 1825, but that is all that they reveal about this man.⁷⁰

Anxious to be paid, Mills did not wait to contact Levi's father until Levi had departed. In early or middle February, Mills contacted Seth Wyman and advised him of Levi's condition. We don't have the text of Mills's first communication to Wyman, but Mills apparently suggested that Seth Wyman come see his son.⁷¹ On February 24, while Levi was probably still at Mills's house, Seth Wyman responded. This was the ostensible promise to pay Mills for services already rendered and the writing on which the litigation in *Mills v. Wyman* turned. It is worth quoting in full:

Dear Sir

I received a line from you relating to my Son Levi's sickness and requesting me to come up and see him, but as the going is very bad I cannot come up at the present, but I wish you to take all possible care of him and if you cannot have him at your house I wish you to remove him to some convenient place and if he cannot satisfy you for it I will.

Although our Daniel Mills clearly lived in Hartford in early 1821, the 1820 census shows no Daniel Mills living there. CONNECTICUT 1820 CENSUS INDEX, *supra* note 23, at 76. Instead, it records one Daniel Mills living in Litchfield County and another in Fairfield County. *See id.* The 1830 census does show a Daniel Mills in Hartford County, but in Burlington and not the town of Hartford. It also shows two other men named Daniel Mills, one in Fairfield County, the other in Litchfield County. *See* CONNECTICUT 1830 CENSUS INDEX 85 (Ronald Vern Jackson et al. eds., 1977).

69. A Daniel Mills served in the Connecticut Militia in the War of 1812 under the command of Walter Sherwood. He served in Fairfield from April 15, 1814, to April 17, 1814. *See* THE RECORD OF CONNECTICUT MEN IN THE MILITARY AND NAVAL SERVICE DURING THE WAR OF THE REVOLUTION 1775-1783, at 89 (Henry P. Johnston ed., Hartford, Press of Wiley, Waterman and Eaton 1889). A Daniel Mills deserted Captain Andrew's Company during the Revolutionary War. *See id.* at 515. Another served for two months in Captain Bell's Company of the Connecticut militia in late 1776. *See id.* at 488.

70. *See* LAND RECORDS OF THE TOWN OF HARTFORD 392 (Hartford, Wiley, Waterman & Eaton 1873) (listing Daniel Mills as the grantor on five mortgage deeds, three quitclaim deeds, and one warrantee deed). Interestingly, this Daniel Mills never appears to have acquired property; his name does not appear in this index as a grantee. *See id.*

One hint that this Mills might be our Mills is the name of one of the grantees: Harvey Pease, who received a quitclaim deed from this Daniel Mills on May 10, 1822. *See id.* One of Mills's witnesses was a man named Norman Pease, who testified in a deposition that Mills attended to Levi Wyman. *See* Record, *Mills*, *supra* note 22 (Deposition of Wales and Pease).

71. *See* Record, *Mills*, *supra* note 22 (Letter of Col. Seth Wyman to Daniel Mills, Feb. 24, 1821).

I want that you should write me again immediately how he does and greatly oblige your most obedient servant

Seth Wyman

Shrewsbury Feb 24th 1821
Mr. Daniel Mills⁷²

By this letter, Seth Wyman supposedly promised to pay Mills for services already rendered, for so-called "past consideration." But the letter does not clearly promise to pay for the services *already* rendered. It seems more directed at procuring *future* services from Daniel Mills—*i.e.*, that he either "have him at your house" or "remove him to some convenient place."⁷³ Wyman can be more fairly said to have been bargaining for future conduct and for real consideration than to have been making a sterile promise to pay for past services. The letter is understandably preoccupied with ensuring his son's safety hereafter, not in settling his debts heretofore. Not surprisingly, when the case

72. *Id.* The letter was copied into the record by Abijah Bigelow, Clerk of Worcester County Courts. That copy is reproduced below.

Dear Sir
I received a line from you relating to my son Lewis sickness and requesting me to come up and see him, but as the going is very bad I cannot come up at the present, but I wish you to take all possible care of him and if you cannot have him at your house I wish you to remove him to some convenient place and if that cannot satisfy you for it I will,
I want that you should write me again immediately how he does and greatly oblige your most obedient servant
Seth Wyman

Shrewsbury Feb 24th 1821

Mr. Daniel Mills

A copy,
Attest: Abijah Bigelow, Clerk

73. *See id.*

came to trial, Wyman's first defense was that he never promised to pay Mills for past expenses.⁷⁴

Mills, however, interpreted Wyman's letter as a promise to pay Levi's existing debt, not just an offer to pay for future services. Mills was not concerned with arranging future accommodations for Levi. Mills wanted Levi's bill paid. By the time Mills received Seth Wyman's letter, *i.e.*, in late February or even early March, Levi Wyman was leaving or perhaps already gone. Anxious to collect on his debt, Mills interpreted Wyman's letter as a guarantee of Levi's existing obligations.⁷⁵ After advising Seth of Levi's departure, Mills wrote:

[Levi] did not nor was not in any situation for to compensate me or the Phisitian in the Senst [?] For my trouble and expense I shall therefore agreeable to your Letter of guarantee make out any bill against you which you will find annexed to this—amounting to—\$16.00—Which I can assure you is more reasonable than it otherwise would have been—had it not been so unfortunate on your part—you will have the goodness to enclose said amount and forward it to me by mail as soon as convenient and oblige yours etc.

Daniel Mills

City of Hartford 3d March 1821⁷⁶

The letter included Mills's itemized expenses and Dr. Comstock's bill for six dollars. There is no record of any response from Seth Wyman. Mills repeated his demand, to no avail, one month later.⁷⁷

Why did Seth Wyman decline to visit his son? Was he just an uncaring father? His age may offer an explanation. Seth was born on April 5, 1758⁷⁸ in Shrewsbury.⁷⁹ Thus, when Mills invited him to

74. *See id.* (Report of Abijah Bigelow, Clerk of Worcester County Courts).

75. *See id.*

76. *Id.* (Letter of Daniel Mills to Col. Seth Wyman, Mar. 3, 1821).

77. *See id.* (Bill of Apr. 5, 1824).

78. *See* VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 114; MASSACHUSETTS VITAL RECORDS, *supra* note 15 (listing Seth's birth date as April 5, 1758). Seth had several siblings, one of whom died in infancy. *Compare* VITAL RECORD OF SHREWSBURY, *supra* note 15, at 114 (recording births of three children named "Seth" to Ross and Dinah Wyman, as well as the births of two other children), *with id.* at 282 (recording death of "Seth" at age six months in 1752).

Seth Wyman's parents were Ross and Dinah Wyman, also of Shrewsbury. *See id.* at 114, 282. Dinah passed away on November 15, 1759, when her son Seth was only 19 months old. *See id.* at 282. She was in her early 30s. *See id.* (stating she was "in her 34th year"); WARD, FAMILY REGISTER, *supra* note 15, at 275 (stating she was "aged 32 and 8 mos."). But Seth's father Ross remarried and lived into his 92d year, dying in Shrewsbury on September 11, 1808. *See id.* at 275-76.

Hartford in 1821, Seth Wyman was almost sixty-three years old—not a young man for his day. Perhaps when Seth wrote “the going is very bad,” he meant he was too frail to travel to Hartford, a trip of several days.⁸⁰ Indeed, Seth died on December 29, 1827, less than seven years after the events in question, and just three months before his seventieth birthday.⁸¹ There is no evidence that he traveled much at all in his last years; he died at his home and birthplace, Shrewsbury.⁸² By that time Seth’s wife, Mary (Brown) Wyman, mother of Levi, was also weary with age. She declined to serve as administrator of his estate “as I am aged and infirm and not able to undertake the task myself.”⁸³ She also may have been too weak to visit Levi in 1821.

Even when they were healthy, Seth and Mary were hardly world travelers. Seth came of age during the War of Independence and may have left home to serve in that war. Seth was often referred to as “Colonel” Seth Wyman,⁸⁴ and at least one source asserts that he did serve in the militia.⁸⁵ But military records do not indicate unequivocally when or where he saw military service.⁸⁶ Apart from

According to one account, Ross, grandfather of the sickly Levi, was a blacksmith, a “stout, athletic man” who supported the Revolution and refused to work for Tories. He once defended himself from impressment onto a British man-of-war by “snatching up a cod fish with both hands in the gills, [and] beat[ing] them off by slapping them in the face with its slimy tail!” *Id.* at 274 n*.

79. Shrewsbury was founded in 1717. See ANDREW H. WARD, A HISTORY OF THE TOWN OF SHREWSBURY 1 (1826).

80. See Record, *Mills*, *supra* note 22 (Letter of Col. Seth Wyman to Daniel Mills, Feb. 24, 1821).

81. See WARD, FAMILY REGISTER, *supra* note 15, at 484. Another source suggests he was “aged 70” when he died. See AMERICAN ANTIQUARIAN SOCIETY, WORCESTER, MASS., INDEX OF DATES IN MASSACHUSETTS CENTINEL AND COLUMBIAN CENTINEL 1784-1840 (available in the Genealogy Section of the Library of Congress).

82. See WARD, FAMILY REGISTER, *supra* note 15, at 484.

83. 211 PROBATE RECS. OF WORCESTER COUNTY 345 (Jan. 2, 1828) (Letter of Mary Wyman to Hon. Nathaniel Paine, Assent to appointment of administrator, in the matter of Seth Wyman, Case 67929). The couple’s second-oldest son, Seth, Jr., was appointed administrator instead. See 174 PROBATE RECS. OF WORCESTER COUNTY 274 (Jan. 17, 1828) (Administrator’s Bond, *In re* Seth Wyman).

84. See, e.g., VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 282.

85. See IV HISTORIC HOMES AND INSTITUTIONS AND GENEALOGICAL AND PERSONAL MEMOIRS OF WORCESTER COUNTY MASSACHUSETTS WITH A HISTORY OF WORCESTER SOCIETY OF ANTIQUITY 136 (Ellery Bicknell Crane ed., 1907) [hereinafter HISTORIC HOMES] (stating that Seth was a “colonel in the militia”).

86. Revolutionary War records show that at least two Seth Wymans of Massachusetts did serve in that war, but that neither was from Shrewsbury. See SECRETARY OF THE COMMONWEALTH, 17 MASSACHUSETTS SOLDIERS AND SAILORS OF THE REVOLUTIONARY WAR 991 (1908). One Seth Wyman was from Haverhill, the other from Luenburg. See *id.*

Seth's possible stint in the militia, there is little evidence that he traveled much at all. After Seth and Mary were married at Shrewsbury in August of 1782,⁸⁷ the newlyweds settled in Buckland, Massachusetts and stayed for six years.⁸⁸ In 1788, they returned to Shrewsbury,⁸⁹ where they lived the remaining forty years of their lives.⁹⁰

It is also possible that Seth and Mary may have refused to visit Levi because he had become estranged from his family. This

Records of the Massachusetts Adjutant-General from the War of 1812 show no Seth Wyman enlisted in the Shrewsbury Company of the Massachusetts militia, or for that matter in any other company of the Massachusetts Militia. *See, e.g.*, RECORDS OF THE MASSACHUSETTS VOLUNTEER MILITIA CALLED OUT BY THE GOVERNOR OF MASSACHUSETTS TO SUPPRESS A THREATENED INVASION DURING THE WAR OF 1812-14, at 48 (1908) (showing no Seth Wyman in the company from Shrewsbury and vicinity); *id.* at 446 (showing no Seth Wyman in the Massachusetts militia at the time).

As this account suggests, the name Seth Wyman was rather popular in the nineteenth century. Perhaps the most prominent Seth Wyman was a rogue who published a book on his exploits. *See* SETH WYMAN, THE LIFE AND ADVENTURES OF SETH WYMAN: EMBODYING THE PRINCIPAL EVENTS OF A LIFE SPENT IN ROBBERY, THEFT, GAMBLING (1843), *cited in* W.J. BURKE & WILL D. HOWE, AMERICAN AUTHORS AND BOOKS 1640-1940, at 850 (1943).

87. *See* VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 237 (listing the intended wedding date as August 17, 1782); WARD, FAMILY REGISTER, *supra* note 15, at 276 (listing year of marriage as 1782). As to Seth's religious background, *see infra* text accompanying notes 170-171.

88. *See* WARD, FAMILY REGISTER, *supra* note 15, at 276. The couple's first child, Sarah, was born in June of 1784, less than two years later. *See id.*

89. *See id.* By this time Seth and Mary had three children. *See id.* Their seventh and last child, Levi, was born in Shrewsbury in 1795. *See* VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 114; WARD, FAMILY REGISTER, *supra* note 15, at 276. Thus, the seven children were Sarah (born June 9, 1784); Ross (born July 7, 1785); Seth (born July 23, 1787); Oliver (born Apr. 9, 1789); Mary (born Feb. 28, 1791), Clarissa (born Apr. 7, 1793), and Levi (born Nov. 25, 1795). *See id.* For a different account of the given names for Sarah (Sally) and Mary (Polly), and a different spelling of Clarissa (Clarisa), *see* VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 114.

In 1790, according to census records, there were nine people in the Wyman household. *See* 1790 CENSUS, *supra* note 68, at 235 (listing a "Seth Wyman" in Shrewsbury, along with four free white females, three free white males under age 16, and, in addition to Seth, one free white male aged 16 and older). By 1800, census records showed ten people in the household. *See* THE NATIONAL ARCHIVES, POPULATION SCHEDULES OF THE SECOND CENSUS OF THE UNITED STATES 1800 (1959).

90. Deeds and probate records from Worcester County support this conclusion. Seth Wyman was involved in at least 30 real estate transactions in Worcester County between 1780 and 1827. *See* GRANTEE INDEX 1731-1839 WH.--WY.-Y.Z. OF WORCESTER COUNTY; GRANTOR INDEX 1731-1839 WH.--WY.-Y.Z. OF WORCESTER COUNTY. In every deed after 1800, he lists his home as Shrewsbury. *See, e.g.*, 184 WORCESTER COUNTY DEEDS 6 (Deed from Seth Wyman to Benjamin Goddard, Jr., Jan. 5, 1811; recorded Jan. 28, 1811) (referring to "Seth Wyman of Shrewsbury"); 236 WORCESTER COUNTY DEEDS 304 (Deed from Seth Wyman to Joel Nurse, May 5, 1815; recorded Jan. 20, 1824) (same); 263 WORCESTER COUNTY DEEDS 573-74 (Deed from Jonas Hastings, Jr., to Seth Wyman, Apr. 6, 1824; recorded Dec. 25, 1828) (same).

possibility cannot be discounted, especially given the evidence that Levi was later adjudicated a spendthrift who needed a guardian to manage his affairs.⁹¹ Nonetheless, Seth's letter suggests that the father still cared for the son. "I wish you to take all possible care of him," Seth wrote.⁹² "[I]f you cannot have him at your house I wish you to remove him to some convenient place . . . I want that you should write me again immediately how he does . . ."⁹³ If Seth had disowned his son, he might not have bothered to write back at all, and he certainly would not have offered to pay for any further expenses. Even the Supreme Judicial Court, no friend of Seth Wyman, thought he liked his son enough to experience a "transient feeling of gratitude."⁹⁴

Whatever his reason for not visiting Levi, why did Seth refuse to pay the man who nursed Levi back to health? When Seth spoke of the "going being bad," did he mean his financial rather than physical health? Poverty seems an unlikely explanation for Seth's refusal to pay Mills. Seth Wyman was a man of means who became a moderately prominent citizen of his small home town. One source offers this laconic description of his life: "He had a farm and built the grist mill and saw mill. He was colonel of the militia, and selectman of the town. He was a large lumber dealer."⁹⁵ Wyman's political career was short-lived; he served as a selectman for only one term, from 1814 to 1815.⁹⁶ But he owned a considerable amount of property right up to the end of his life. Property records from Worcester County, for example, indicate that he bought and sold substantial amounts of real estate throughout his life.⁹⁷ After his death in 1827, his real estate holdings were appraised at \$7,924 and his personal property was valued at \$2,033.76, for a grand total of almost

91. See *supra* text accompanying notes 50-56 (describing guardianship for the "spendthrift" and "drunkard" Levi Wyman in the 1820s and 1830s).

92. Record, *Mills*, *supra* note 22 (Letter of Col. Seth Wyman to Daniel Mills, Feb. 24, 1821).

93. *Id.*

94. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 209 (1825).

95. HISTORIC HOMES, *supra* note 85, at 136.

96. See WARD, FAMILY REGISTER, *supra* note 15, at 81. Wyman was one of five selectmen. See *id.* Seth Wyman did not leave office because of any term limit; other selectmen held office for more than a single one-year term. See *id.*

97. See GRANTEE INDEX, *supra* note 90; GRANTOR INDEX *supra* note 90. Some of the deeds involved significant amounts of land and money. See, e.g., 205 WORCESTER COUNTY DEEDS 202-03 (Deed from Seth Wyman to John Davis, June 1, 1815; recorded Feb. 19, 1817) (recording sale of 60 acres of land for \$1,200); 198 WORCESTER COUNTY DEEDS 476 (Deed from Seth Wyman to Elijah Brigham, Nov. 1, 1815; recorded Nov. 23, 1815) (recording sale of 38 acres for \$1,000).

\$10,000.⁹⁸ That was a large sum of money in those days, far more than most people earned in a year or even a decade. The probate court's inventory of the couple's possessions suggests they led a very comfortable life in the country.⁹⁹

Still, Seth's financial situation was not perfect. He had sizable debts. The administrator of his estate was ordered to sell \$3,400 worth of property to satisfy Seth's creditors.¹⁰⁰ In fact, the administrator ended up selling almost \$5,000 worth of real and personal property to meet Seth's debts.¹⁰¹ Nor was Mary Wyman wealthy. She died with assets appraised at \$246.78.¹⁰² Moreover, although Seth bought and sold property actively up until 1817, from 1817 until his death in 1827 he continued to sell real estate, but stopped buying it.¹⁰³ Perhaps he sold land to keep cash flowing in as he grew too old to manage the family farm and the mills he had erected on it. What's more, he died intestate, even though he was survived by his wife, several children,

98. See 63 PROBATE RECS. OF WORCESTER COUNTY, 614 (Jan. 29, 1828) (Seth Wyman's Inventory).

99. In addition to Seth's substantial real estate holdings, his inventory lists hundreds of personal items, including the following: three yokes of oxen; one bull; nine cows; two calves; one horse; one mare; 27 sheep; 24 lambs; 27½ tons of hay; all sorts of farming tools, including rakes, wheelbarrows, screwdrivers, sickles, and a gun; one buffalo robe; two barrels of feathers; three barrels of vinegar; 11 bushels of wheat; 75 bushels of potatoes; four wine glasses; a loom; four pewter platters; several sets of clothes; and a healthy array of furniture. See *id.* at 612-14.

Mary Wyman's inventory includes "One black Silk Gown"; a collection of other clothing; "Seven Silver Tea Spoons" a cherry table; various kitchen items including a coffee mill, kettle, and wine glasses; and a variety of linens and the like. See 67 PROBATE RECS. OF WORCESTER COUNTY 457-59 (Mar. 27, 1829) (Mary Wyman's Inventory).

100. See 263 PROBATE RECS. OF WORCESTER COUNTY 431 (May 1828) (Seth Wyman Esq. Estate, Petition for Sale).

101. See The Account of Seth Wyman Administrator on the Estate of Col. Seth Wyman Late of Shrewsbury Deceased 3 (undated unpublished manuscript on file at Massachusetts State Archives, Boston, Mass.). Much of it was sold at a public auction on June 7, 1828. See, e.g., 264 WORCESTER COUNTY DEEDS 418 (Deed from Seth Wyman, Jr., to Lewis Barnard, June 7, 1828; recorded Dec. 26, 1828; recording auction sale of pasture land for \$770.56); 262 WORCESTER COUNTY DEEDS 659 (Deed from Seth Wyman, Jr., to Calvin Howe, June 7, 1828; recorded Dec. 23, 1828; recording auction sale of woodland for \$673.07).

102. See 67 PROBATE RECS. OF WORCESTER COUNTY 457, 459 (Mar. 27, 1829) (Mary Wyman's Inventory).

103. Seth Wyman bought land in Worcester County no less than 17 times between 1780 and 1817. See GRANTEE INDEX, *supra* note 90. During same period, he sold land in Worcester County eight times. See GRANTOR INDEX, *supra* note 90. Between 1818 and his death in 1827, he stopped buying land in Worcester County altogether, but sold five different pieces of property. Compare *id.*, with GRANTEE INDEX, *supra* note 90.

and a number of other living relatives.¹⁰⁴ The absence of a will again suggests uncertainty about his financial situation. While Seth could doubtless afford to pay Mills his \$25, perhaps Seth's financial circumstances had deteriorated sufficiently that he was willing to fight a debt he did not think he owed. He took that determination with him to his grave: Seth's estate did not pay Daniel Mills anything.

One question of motive remains. Why did these two men take a twenty-five dollar dispute all the way to the Supreme Judicial Court of Massachusetts? Granted, twenty-five dollars was a significant sum of money, the equivalent of a month's pay or more, but it was not that large a sum when compared to court costs and attorney's fees. Moreover, not only did the Massachusetts court award costs to the victor, as is the practice today;¹⁰⁵ it also still followed the English rule on attorney's fees,¹⁰⁶ thereby magnifying the risks of litigation for both parties. At the trial level, for example, Daniel Mills was ordered to pay Wyman's costs and fees, which totaled \$10.74, \$1.50 of which represented the attorney's fee.¹⁰⁷ When Mills lost again on appeal, he was saddled with Wyman's costs in the Supreme Judicial Court as well; these totaled an additional \$9.94, \$2.50 of which represented defense counsel's fee on appeal, for a total of \$20.68.¹⁰⁸ In addition to

104. Seth's wife, Mary, inherited a third of his property as her dower interest. See 65 PROBATE RECS. OF WORCESTER COUNTY 371 (Sept. 22, 1828) (Seth Wyman's Widow's Dower).

105. See, e.g., FED. R. CIV. P. 54(d)(1) (stating that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs").

106. Precisely why American courts moved away from the English rule is unclear. See, e.g., RICHARD A. FIELD ET AL., CIVIL PROCEDURE 165 (6th ed. 1990) ("[T]he historical reasons for [America's] early departure from the English rule are murky and largely obsolete.").

107. See Record, *Mills*, supra note 22 (Defendant's Costs). This itemization was submitted by David Brigham, counsel for Seth Wyman at trial and on appeal. Mr. Brigham practiced in Shrewsbury and thus had to travel to and from Worcester for proceedings in the Court of Common Pleas. The costs included four charges from proceedings during the June term of court: "Travel 20 miles" (\$0.66), "attendance 6 days" (\$1.98), "Travel 20 m" (\$0.66), and "attendance 6 days" (\$1.98). They also included three charges from the December term, during which the trial was held: "Travel 20 m." (\$0.66), "attendance 10 days" (\$3.30), and "Atty's fee" (\$1.50). These charges total \$10.74. See *id.*

108. See Record, *Mills v. Wyman* (Sup. Jud. Ct., Apr. Term 1826) (unpublished manuscript on file at the Massachusetts State Archives) (Defendant's Costs). Again, attorney Brigham claimed costs for travel to and from Worcester for proceedings before the supreme judicial court, which was riding circuit in Worcester. These costs include the following four charges from proceedings in 1825, some or all of which were apparently incurred during October term: "Travel 20 mi" (\$0.66), "attendance 1 day" (\$0.33), "Travel 20 m" (\$0.66), and "attendance 5 days" (\$1.65). *Id.* In addition, Brigham claimed charges for five costs in April term 1826: "Travel 20 m" (\$0.66), "attendance 1 day" (\$0.33), "Atty's Fee" (\$2.50), "Copies of the Case" (\$2.75), and "taxing & filing" (\$0.40). *Id.* All

all this, Mills presumably had to pay his own attorneys; he was represented by respected counsel at trial and by fairly prominent attorneys on appeal, and they presumably charged similarly for fees and costs.¹⁰⁹ Thus he paid out more than he expected to win. In retrospect, it seems remarkable that either Mills or Wyman took the risk of being saddled with costs and fees that exceeded the actual amount in controversy. But they did.

III. THE LEGAL PROCEEDINGS IN *MILLS V. WYMAN*

Daniel Mills brought his suit in the Worcester County Court of Common Pleas in Worcester, Massachusetts in 1824.¹¹⁰ A writ of attachment issued in May, 1824,¹¹¹ and the case was set for trial in June. It was continued until December, 1824, when it finally went to trial before a jury.

together, these nine charges amount to \$9.94, for a grand total of \$20.68—all apparently paid by the losing party, Daniel Mills. *See id.*

109. A fee schedule adopted by the Worcester County Bar shortly after *Mills v. Wyman* gives a sense of the prevailing rates. A “writ on demand” between \$20 and \$100 cost \$2.50; a continuance cost between \$2.00 and \$5.00, depending on the court and matter; a demurrer in the court of common pleas cost \$4.00; arguing fees in that court cost not less than \$5.00; and arguing fees in the supreme judicial court cost not less than \$10.00. *See generally* Rule 10, Bar Rules, Worcester County, Mass., Sept. 2, 1828 [hereinafter Bar Rules] (unpublished manuscript on file at the American Antiquarian Society, Worcester, Box/Volume 6, Folder 3) (setting forth a two-page fee schedule for actions in the court of common pleas and supreme judicial court). These were set fees, and members of the bar signed the document to indicate their adherence to them. The document bears the signatures of all the attorneys involved in *Mills v. Wyman* except John W. Hubbard, who died after trial. *See id.* (signature page). For the history of the local Worcester County Bar Association, see GERALD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 46-47, 186-87 (1978) (describing its rise and fall).

Minimum fee schedules persisted into the twentieth century in many American jurisdictions, but in 1975 the U.S. Supreme Court held that such schedules constituted unlawful price-fixing under the Sherman Antitrust Act. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-93 (1975). Some foreign states still permit such schedules, however. *See, e.g.,* MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 173 & n.8 (1994) (citing German Federal Statute on Attorneys’ Fees [*Bundesgebührenordnung für Rechtsanwälte*] of July 26, 1957, as amended (establishing a basic fee for many legal services)).

110. Although Mills was from Connecticut and Wyman from Massachusetts, federal diversity jurisdiction was unavailable because the amount in controversy did not exceed \$500, then the required minimum. *See* Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78 (“[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature . . . where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”).

111. *See* Record, *Mills*, *supra* note 22 (Writ of Attachment). The writ reads in part: “To the Sheriff of our County of Worcester or his Deputy, Greeting. We Command you to attach the goods or estate of Seth Wyman of Shrewsbury in the said County, Gentleman, to the value of Fifty dollars . . .” *Id.* It continues with a two-page summary of Daniel Mills’s allegations against Seth Wyman. *See id.*

The presiding Judge was Samuel Howe,¹¹² who had been appointed to the newly established court of common pleas three years earlier. Before his appointment, he was regarded as a leading member of the bar of western Massachusetts.¹¹³ He was a solid but not flamboyant attorney. Howe was a more effective advocate before a judge than a jury; he relied on “sound reasoning,” not “display.”¹¹⁴ Howe’s mind was more noteworthy for its “discipline” than its “original intuition.”¹¹⁵ Descriptions suggest that he possessed the steady temperament of a good judge, if not the brilliant imagination of a great one.¹¹⁶ Even so, he did not find his work on this “court of

112. See generally RUFUS ELLIS, MEMOIR OF THE HON. SAMUEL HOWE 7-11 (Boston, Wm. Crosby and H.P. Nichols 1850) (describing Howe’s early years). Samuel Howe was born in Belchertown, Massachusetts, on June 20, 1785. See *id.* at 7. His mother died when he was only three months old. See *id.* at 7-8. His father, a doctor, was a surgeon in the Revolutionary War. See *id.* at 7. Young Samuel entered Williams College at age 16, “carrying with him correct moral principles, a vigorous, healthy mind, and an ardent love of learning.” *Id.* at 11. He apparently had a knack for mathematics. See *id.* In 1805 he attended the law school at Litchfield, Connecticut, and in August 1807 he was admitted to the bar. See *id.* at 11-14.

Howe began practicing law in Stockbridge, Massachusetts, and he married Susan Tracy, daughter of a U.S. Senator from Connecticut. See *id.* at 15. Shortly thereafter the family moved to Worthington, Massachusetts, where Howe practiced law for 13 years. He also served one term as a state legislator. Susan Tracy died in 1811, a day after the birth of the couple’s second child. See ELLIS, *supra*, at 19. In 1813 Howe remarried. See *id.*

In 1820 Howe moved to Northampton, and the following year he was appointed a judge of the newly established Commonwealth Court of Common Pleas. Howe became active in the Unitarian church and played an important role in the establishment of a separate Unitarian congregation in Northampton from 1824-1825. See *id.* at 28-35 (describing the religious conflict in detail). Howe’s part in the controversy was “one of the most important events in the life of Judge Howe.” ELLIS, *supra*, at 28.

Judge Howe rendered his decision in *Mills v. Wyman* in December 1824. See Record, *Mills*, *supra* note 22 (Judge Howe’s decision). A little more than three years later, in 1828, he died of illness in Boston. See ELLIS, *supra*, at 36-42 (describing Howe’s illness and death); see also 2 WILLIAM T. DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS 289 (1974) (noting his death); COLUMBIAN CENTINEL, Jan. 26, 1828, item no. 4570 (providing an obituary). He was only 42 years old. At his death he was remembered fondly in a speech by Isaac Parker, then Chief Justice of Massachusetts and author of the Supreme Judicial Court opinion affirming Judge Howe in *Mills v. Wyman*. See ADDRESS OF CHIEF JUSTICE PARKER 9 (Boston, Nathan Hale 1828) (lavishing praise on Judge Howe).

113. See, e.g., CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 318 (1912) (citing Howe as an example of leading lawyers in Massachusetts outside of Boston).

114. ADDRESS OF CHIEF JUSTICE PARKER, *supra* note 112, at 8.

115. ELLIS, *supra* note 112, at 51-58 (letter from Samuel Willard to Rufus Ellis).

116. Nonetheless, Howe’s appointment to the reorganized bench apparently provoked some resentment. It was “a trying situation, because the order of things was new, and the friends of the old judges were dissatisfied.” *Id.* at 25. Judge Howe eventually did earn the respect of the bench and bar, however. See ADDRESS OF CHIEF JUSTICE PARKER, *supra* note 112, at 9 (noting that Judge Howe was a “popular judge” and that the bar was “full of his praises”).

despatch" to be "enough to satisfy his love of judicial investigation."¹¹⁷ The job "rarely offer[ed] occasion for the deeper researches" because the docket was full and his was not a court of last resort.¹¹⁸

Judge Howe's "court of despatch" heard *Mills v. Wyman* in December, 1824. As was the norm in an era without court reporters and photocopiers, no briefs or records of testimony or oral argument appear to have survived. The existing record consists of nine documents, all of them handwritten copies of important documents: the correspondence between the parties, the depositions of various witnesses, the expenses of each party, a summary of the proceedings, a copy of the jury's verdict, and a copy of the court's opinion.¹¹⁹ The copies are in the flowing hand of Abijah Bigelow,¹²⁰ clerk of the courts

117. ADDRESS OF CHIEF JUSTICE PARKER, *supra* note 112, at 9.

118. *Id.* at 10. Judge Howe was so eager for "deeper researches" that he decided to teach law. In 1823, he and Elijah Mills, a U.S. Senator, established a law school in Northampton. The school was modeled after the lecture style of Howe's alma mater, the Litchfield Law School. Howe was an "excellent teacher" who "attracted many students." FOSTER W. RUSSELL, MOUNT AUBURN BIOGRAPHIES 90 (1953). After Howe's death, Elijah Mills "lost interest" in the Northampton Law School, and it disbanded. See GAWALT, *supra* note 109, at 153. Thereafter Harvard Law School hired John L. Ashmun, Howe's colleague at Northampton Law School, as a law professor. A collection of Howe's law lectures was published posthumously. See SAMUEL HOWE, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW, IN MASSACHUSETTS (Boston, Hillard, Gray, and Co. 1834).

Attempts were made to establish three other law schools in 1828, the year of Howe's death, but all three failed. Gawalt attributes their failure not to competition from the Harvard Law School, which had only two students in 1829, but to onerous residency and other requirements imposed by the Massachusetts bar and courts. See GAWALT, *supra* note 109, at 154.

I know of no evidence that Howe's teaching colleague, Elijah Mills, was related to Daniel Mills, the plaintiff in *Mills v. Wyman*. Nor is there any record of any motion that Howe recuse himself from Mills's lawsuit on account of his affiliation with Elijah Mills.

119. See Record, *Mills*, *supra* note 22.

120. Bigelow was born in Westminster, Massachusetts, on December 5, 1775. He studied at Leicester Academy and at the Academy at New Ipswich in New Hampshire, and thereafter at Dartmouth, from which he graduated in 1795. He read law in Boston, was admitted to the bar of Worcester County, and began practice in Leominster. He served as town clerk and selectman in Leominster, then as a state representative. In 1810 he was elected to Congress, where he served until 1815. In 1817 he was appointed clerk of the courts for Worcester County, the position he held when *Mills v. Wyman* was litigated. He resigned this post in 1833 and returned to the practice of law. He died on April 5, 1860. See Letters of Abijah Bigelow, Member of Congress, to His Wife, 1810-1815, in 16 AAS PROCEEDINGS 305-10 (1930); FRANKLIN P. RICE, THE WORCESTER BOOK 40 (1884); A.G. Waite, A Biography of Abijah Bigelow (June 18, 1952) (unpublished typewritten manuscript, on file at American Antiquarian Society, Worcester, Box/Volume #1, Folder #1); 1 WILLIAM T. DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS 267 (1974) (putting his death at Aug. 21, 1857). His portrait is below. FIVE HUNDRED PAST AND PRESENT CITIZENS OF WORCESTER, MASSACHUSETTS (Boston, Claflin, Worcester, and Black 1870) (providing the portrait).

of Worcester County, who had served two terms as a Federalist member of Congress from 1811-1815. Although Bigelow kept detailed private records of his work in the Congress, mostly in the form of letters to his wife,¹²¹ his personal papers do not contain any further details on the litigation in *Mills v. Wyman*.¹²²

Daniel Mills's lawyer at trial was John Williams Hubbard. Hubbard was born in Brookfield, Vermont, on November 22, 1793. He graduated from Dartmouth in 1814.¹²³ After studying law in Vermont and in Worcester, he was admitted to the bar in 1817 and practiced in Worcester until his death in 1825—while the appeal in *Mills v. Wyman* was pending.¹²⁴ During the 1820s he was an officer of the town of Worcester. He served several terms as a hog-reeve and he also served on committees of some local importance, including a



121. See Letters of Abijah Bigelow, Member of Congress, to His Wife, 1810-1815, *supra* note 120, at 310-406. The letters are especially memorable for their vivid description of Washington, D.C., after it had been burnt by British troops:

The walls of the two wings of the Capitol remain, but the inside is completely burnt out, and will probably be tumbling down. . . . The Presidential house, built of stone, like that of the wings of the Capitol, has its outside walls remaining, but the inside is thoroughly burnt, and much of the furniture in the house was burnt with it. The long brick buildings on each side of it . . . which were occupied by the different departments of government, are also thoroughly burnt. . . . The British officers rode about the City with as little apprehension of danger, as if they were in their own country

Id. at 389-90.

122. See Abijah Bigelow Papers (unpublished manuscripts, available at Manuscript Division, American Antiquarian Society, Worcester, Massachusetts) (making no mention of the case).

123. See GEORGE T. CHAPMAN, SKETCHES OF THE ALUMNI OF DARTMOUTH COLLEGE: FROM THE FIRST GRADUATION IN 1771 TO THE PRESENT TIME, WITH A BRIEF HISTORY OF THE INSTITUTION 173 (Cambridge, Riverside Press 1867).

124. See INSCRIPTIONS FROM THE OLD BURIAL GROUNDS IN WORCESTER, MASSACHUSETTS, FROM 1727 TO 1859: WITH BIOGRAPHICAL AND HISTORICAL NOTES 97-98 (1878) [hereinafter INSCRIPTIONS] (providing a biographical sketch). A two-sentence sketch is provided in 2 DAVIS, *supra* note 112, at 434.

committee to audit the town's books. Hubbard was a man of at least moderate means; he held a Worcester municipal bond and owned real estate in Worcester.¹²⁵ One source says he was “[o]ne of the founders of the Central Church in 1822. He was a promising young lawyer of much ability.”¹²⁶ Another adds: “He possessed a strong and well cultivated mind, and had given evidence of talents and acquirements, which, with health and longer life, would have ensured distinction.”¹²⁷

David Brigham was counsel for the defendant, Seth Wyman, both at trial and on appeal. Not much is known about Brigham. Town records show that two David Brighams were born in Shrewsbury in the late eighteenth century.¹²⁸ One of these was probably counsel for the defense in *Mills v. Wyman*. Brigham apparently practiced in Shrewsbury for a number of years before and after the case.¹²⁹ But he did not leave a large mark on Worcester County history.

The plaintiff's case focused on Wyman's letter of February 24. On that day, Seth Wyman “undertook and faithfully promised” to reimburse Mills if Levi could not pay.¹³⁰ Consideration for this promise was the father's “natural affection” for his son; the “great expense, and trouble in providing for and assisting” Levi; and the plaintiff's undertaking to “take all proper care of the sd. Levi and procure medicine and medical and other attendance.”¹³¹ Brigham's main line of defense was that Wyman never promised to reimburse Mills for expenses already incurred. Brigham said “he never promised the plaintiff in manner and form as he in the declaration of his writ has

125. “He owned an estate on Main street, comprising several acres on each side of what is now Austin street.” INSCRIPTIONS, *supra* note 124, at 98.

126. *Id.*

127. WILLIAM LINCOLN, HISTORY OF WORCESTER, MASSACHUSETTS, FROM THE EARLIEST SETTLEMENT TO SEPTEMBER, 1836, at 247 (Worcester, Moses D. Phillips and Co. 1837).

128. See VITAL RECORDS OF SHREWSBURY, *supra* note 15, at 21 (listing David Brigham born on Aug. 6, 1777 and Aug. 15, 1786). A David T. Brigham was born in Shrewsbury on August 5, 1806, and he did become an attorney, but not until after *Mills v. Wyman*. See 2 DAVIS, *supra* note 112, at 411. Yet another David Brigham reportedly died in Shrewsbury on the eve of *Mills v. Wyman*. See MASSACHUSETTS SPY, Dec. 1, 1824 (reprinting an advertisement, dated Nov. 2, 1824, providing notice of probate of David Brigham's estate).

129. For example, his signature appears on the Worcester County Bar's rules, promulgated in Sept. 1828. See Bar Rules, *supra* note 109 (signature page).

130. Record, *Mills*, *supra* note 22 (Writ of Attachment).

131. *Id.*; see also *id.* (Report of Abijah Bigelow, Clerk of the Worcester County Courts) (“In consideration” of Wyman's promise, Mills “had before that time, viz. between the fourth and twenty first days of the same February, incurred great expense and trouble in providing for” Levi Wyman.).

alleged against him, and of this he puts himself on the Country.”¹³² The record contains no evidence that Brigham argued lack of consideration during the trial itself.

After a “full hearing,” the case was submitted to the jury, and the jury returned a verdict for the plaintiff.¹³³ The record contains two versions of the jury verdict. One, on a separate sheet copied by clerk Bigelow, reads: “The Jury agree that the Plaintiff has supported his action and have assessed damages to the amount of \$26.95. Bernard Fowler foreman.”¹³⁴ The other is more interesting. The record of the case reports that the jury “find that the defendant did promise in manner and form as the plaintiff in the declaration of his writ has alleged, and assess damages for the plaintiff in the sum of twenty six dollars and ninety five cents.”¹³⁵ In other words, this version of the verdict contains a finding that Seth Wyman made the promise alleged. This verdict cites no evidence to support this finding.

Wyman moved that the verdict be set aside. From Judge Howe’s opinion, it appears that Brigham argued that Wyman’s supposed promise lacked consideration.¹³⁶ The record does not disclose whether Brigham also argued that the jury’s factual finding, that Wyman made the promise, was supported by sufficient evidence. After a hearing, Judge Howe granted the motion and directed a nonsuit.¹³⁷ Judge Howe explained that he “suffered the Jury . . . to assess” plaintiff’s damages to save the expense of a new trial in the event the judgment was reversed on appeal.¹³⁸ Apparently too busy to engage in the

132. *Id.*

133. *See id.*

134. *Id.* (Verdict). Not much is known about Bernard Fowler, the foreman. A Bernard Fowler of “a very respectable family” lived in Northbridge, Massachusetts, in Worcester County, in the late eighteenth century. WILLIAM A. MOWRY, *THE DESCENDANTS OF NATHANIEL MOWRY OF RHODE ISLAND* 127-28 (Providence, Sidney S. Rider 1878). We don’t know whether this man was the same Bernard Fowler who sat on the jury in *Mills*.

No Bernard Fowler appears in relevant census records from the period. *See MASSACHUSETTS 1820 CENSUS INDEX*, *supra* note 23. Little information on him was gleaned from a search of genealogical records of various institutions, including the International Genealogical Index of the Church of the Latter-Day Saints, the Daughters of the American Revolution Family Research Library in Washington, D.C., the Library of Congress, and the Worcester Town Records. Fowler’s name does not appear on an 1825 list of jurors for the town of Worcester. *See Town Records of Worcester 1817-1832*, reprinted in *COLLECTIONS OF THE WORCESTER SOCIETY OF ANTIQUITY* (Worcester, Mass., The Worcester Society of Antiquity 1893).

135. Record, *Mills*, *supra* note 22 (Report of Abijah Bigelow, Clerk of the Worcester County Courts).

136. *See id.* (Judgment).

137. *See id.* (Report of Abijah Bigelow, Clerk of the Worcester County Courts).

138. *Id.* (Judgment).

"deeper researches" he preferred, Judge Howe provided a brief, one-page opinion that cited no authority for its conclusion.¹³⁹

His opinion began by asserting that Seth Wyman had in fact made the promise alleged: "[A]fter all the expenses had been incurred the defendant wrote a letter to the plaintiff promising to pay him said expenses."¹⁴⁰ As noted, the letter is more plausibly read as a promise to pay for expenses incurred *after* the date of the letter. It is not clear why Judge Howe let the jury's finding on this point stand. There is no surviving evidence that Seth made the promise alleged. True, early American judges generally paid more deference to juries than is the case today.¹⁴¹ In the colonial era, for example, juries had the power to find the law as well as the facts.¹⁴² But the jury's law-finding role had largely disappeared by the 1820s.¹⁴³ Even if the jury's finding was purely a conclusion of fact, it could have been overturned if it was "manifestly against the weight of the evidence."¹⁴⁴ Indeed, Howe's own treatise on civil procedure supported the use of a sufficiency standard in reviewing verdicts.¹⁴⁵ Moreover, since the Revolution, Massachusetts courts had become increasingly vigilant in enforcing the express terms of a contract over any implied terms. The law would "not imply a promise, where there was an express promise."¹⁴⁶ It is thus surprising that Judge Howe found sufficient evidence to support the jury's finding that Wyman had promised to pay Mills for past

139. *See id.*

140. *Id.*

141. *See generally* WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 3-4, 20-30 (1975) (describing the power of colonial juries).

142. *See id.* at 21 (stating that pre-Revolutionary juries had "vast power to find both the law and the facts").

143. The Massachusetts judiciary greatly curtailed the jury's law-finding power in the first decade of the nineteenth century. *See id.* at 168-69; GAWALT, *supra* note 109, at 105 & n.62.

144. *Hammond v. Wadhams*, 5 Mass. 353, 355 (1809). This rule again reflected a recent diminution in the power of juries. In the colonial era, courts set aside verdicts only if they had "no support" in the evidence. *See NELSON, supra* note 141, at 170. But just as the jury's law-finding powers had waned by 1810, the jury's fact-finding powers had come under closer supervision by judges. *See id.* at 169-70. Why this happened is a complex question that invites further research. *Cf. A. W.B. Simpson, The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) ("[W]hat needs to be explained is this progressive dethronement of the jury . . .").

145. *See SAMUEL G. HOWE, LECTURES ON THE PRACTICE OF COURTS* 351 (1825) (available at the Harvard Law School Library, Cambridge, Mass.).

146. *NELSON, supra* note 141, at 140 (quoting *Whiting v. Sullivan*, 7 Mass. 107, 109 (1810) ("One set of cases articulated more precisely than had been necessary in the colonial period the dominance of express over implied contract")).

services when Wyman's letter is more plausibly read as bargaining only for future services.

Having found that Wyman made the promise, Judge Howe declared: "There was no evidence of any consideration for this promise except what grew out of the relation which existed between Levi Wyman & the defendant & thinking this not to be sufficient to support the action I directed a non suit."¹⁴⁷ Thus in one sentence Judge Howe found the promise lacked consideration. The brevity of this reasoning brings to mind the famous analysis from *Kirksey v. Kirksey*, decided only twenty-two years after Judge Howe's opinion in *Mills*: "My brothers . . . think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach."¹⁴⁸

Daniel Mills appealed. After the death of his first attorney, John W. Hubbard, Daniel Mills hired new counsel for appeal: the prominent partnership of John Davis and Charles Allen of Worcester.¹⁴⁹ Whether Davis or Allen or both argued the appeal in *Mills v. Wyman* is unknown. The Supreme Judicial Court did not keep regular records of oral or written pleadings at that time. Charles Allen's surviving papers make no mention of the case.¹⁵⁰ Neither do those of John Davis.¹⁵¹

We do know quite a bit about these new lawyers for the plaintiff-appellant. Charles Allen¹⁵² was in his late twenties when he and Davis

147. Record, *Mills*, *supra* note 22 (Judgment).

148. FARNSWORTH & YOUNG, *supra* note 6, at 85 (quoting *Kirksey v. Kirksey*, 8 Ala. 131 (1845)).

149. See *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 208 (1825) (listing "J. Davis & Allen" as counsel for the plaintiff-appellant).

150. See Charles Allen Papers (unpublished manuscripts, available at Manuscript Division, American Antiquarian Society, Worcester, Mass.).

151. See John Davis Papers (unpublished manuscripts, available at Manuscript Division, American Antiquarian Society, Worcester, Mass.).

152. Charles Allen was born in Worcester on August 9, 1797. See LINCOLN, *supra* note 127, at 248. Allen was born into a prominent family; his father had served as clerk of courts and a member of Congress, and his grandfather Sam Adams was a household name. See WORCESTER BANK & TRUST CO., FORTY IMMORTALS OF WORCESTER & ITS COUNTY 30 (1920) [hereinafter FORTY IMMORTALS]. Allen entered Yale in 1811 but soon withdrew. See *id.*; LINCOLN, *supra* note 127, at 248. One account adds that he nonetheless graduated from Harvard College, but others omit any mention of his attending Harvard. Compare ENCYCLOPEDIA OF MASSACHUSETTS 29 (American History Society ed. 1916) (mentioning a Harvard education), with LINCOLN, *supra* note 127, at 248 (not mentioning a Harvard education), and FORTY IMMORTALS, *supra*, at 30-33 (same). Thereafter he studied law with Samuel L. Burnside, and in 1818 or 1821 he was admitted to the Bar. Compare LINCOLN, *supra* note 127, at 248 (mentioning 1818), with ENCYCLOPEDIA OF MASSACHUSETTS, *supra*, at 29 (mentioning 1821). He practiced in New Braintree until July 1824, when he moved to

took Mills's case. At that time, Allen had been in practice less than ten years, perhaps less than five.¹⁵³ Still, he was known as a "leading member of the bar."¹⁵⁴ A grandson of the fiery revolutionary Samuel Adams, Allen became known for his own "revolutionary nature" and "marvelous power as an orator."¹⁵⁵ He was a staunch abolitionist and

Worcester and became a partner of John Davis. He became a "leader of the bar." FORTY IMMORTALS, *supra*, at 30.

Allen represented Worcester in the Massachusetts state legislature for several terms between 1829 and 1840. See DAN MORRIS & INEZ MORRIS, WHO WAS WHO IN AMERICAN POLITICS 13 (1974); ENCYCLOPEDIA OF MASSACHUSETTS, *supra*, at 29; FORTY IMMORTALS, *supra*, at 30. In 1842 he served on the Northeastern Boundary Commission, whose delimitation of the U.S.-Canada border led to the Webster-Ashburton Treaty between the United States and Britain. That same year he was appointed to the court of common pleas, on which he served for three years. See ENCYCLOPEDIA OF MASSACHUSETTS, *supra*, at 29. While he was on the bench, he presided over the "celebrated Wyman trial," during which he clashed with the great Daniel Webster, counsel for the defense. See FORTY IMMORTALS, *supra*, at 30-31. It is not known whether Seth Wyman was related to Webster's client, William Wyman.

Allen served as a delegate to the Whig national convention in 1848, but his disenchantment with the Whigs' stand on slavery led him to help establish the Free Soil Party, and from 1849 to 1853 Allen served in Congress as a member of that party. In 1858 he became Chief Justice of the Suffolk County Superior Court and, shortly thereafter, Chief Justice of the Superior Court of the Commonwealth. In 1860 he declined an offer to serve as Chief Justice of the Supreme Court of Massachusetts, citing ill health. See FORTY IMMORTALS, *supra*, at 31. He died on August 6, 1869, in Worcester, just three days before his 72d birthday. See MORRIS & MORRIS, *supra*, at 13.

For more on Allen, see Charles Allen Papers, *supra* note 150. His picture is below. FIVE HUNDRED PAST AND PRESENT CITIZENS OF WORCESTER, MASSACHUSETTS, *supra* note 120.



153. He was admitted to the Bar in either 1818 or 1821. Compare LINCOLN, *supra* note 127, at 248 (mentioning 1818), with ENCYCLOPEDIA OF MASSACHUSETTS, *supra* note 152, at 29 (mentioning 1821).

154. FORTY IMMORTALS, *supra* note 152, at 30.

155. *Id.* at 31.

later entered politics and served in Congress as a member of the Free Soil party, which opposed the expansion of slavery.¹⁵⁶

John Davis¹⁵⁷ was even more prominent than Allen. By the time he and Allen had taken Mills's case, Davis had been elected to

156. See DICTIONARY OF WORCESTER (MASSACHUSETTS) AND ITS VICINITY 74 (Worcester, F.S. Blanchard & Co. 1889) (noting that Charles Allen served in Congress from 1849-1853); FORTY IMMORTALS, *supra* note 152, at 31 (same).

157. John Davis, the son of Isaac and Anna (Brigham) Davis, was born on January 13, 1787, in Northborough, Massachusetts. See FORTY IMMORTALS, *supra* note 152, at 27. He attended Leicester Academy and then Yale, from which he graduated in 1812. See 6 FRANKLIN BOWDITCH DEXTER, BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE 461 (1912). He studied law with Francis Blake of Worcester and was admitted to the bar in 1815. See *id.* Davis married Eliza Bancroft of Worcester in 1822. See *id.* at 462. By 1824, when he formed his partnership with Charles Allen, Davis had become "the acknowledged head of the profession in Worcester County." *Id.*; see also GAWALT, *supra* note 109, at 114 (noting that in 1834 Davis, like Allen, was one of the wealthiest lawyers in Worcester); WARREN, *supra* note 113, at 408-09 (1912) (listing John Davis as one of a handful of lawyers who "brilliantly represented" Massachusetts before the Federal Bar after 1830).

In the fall of 1824, before the appeal in *Mills v. Wyman*, Davis was elected to the U.S. House of Representatives. He served in Congress until 1834, when he became governor of Massachusetts. In 1835 he was elected to the U.S. Senate, where he served until 1841. See 2 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY, *supra* note 33, at 103-04. From 1841 to 1843 Davis served again as governor of the Commonwealth. One highlight of his governorship was the visit of Charles Dickens to the Governor's Mansion in Worcester, an event described in great detail by contemporary accounts. See, e.g., WORCESTER BANK AND TRUST CO., HISTORIC EVENTS OF WORCESTER 31-34 (1922) (excerpting accounts from local newspapers). A photograph of the mansion is set out below.



From a photograph

Taken for the book

THE GOVERNOR DAVIS MANSION
Liscoln Street

In 1845 Davis returned to the Senate and remained there until 1853, when he retired from public life. See 2 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY, *supra* note 33, at 103-04; MORRIS & MORRIS, *supra* note 152, at 183; DEXTER, *supra*, at 462.

Davis was by temperament a conservative, first a Federalist and then later a National Republican and a Whig. He was a consistent protectionist and, like Allen, staunchly antislavery. See ENCYCLOPEDIA OF MASSACHUSETTS, *supra* note 152, at 80-81; DEXTER, *supra*, at 462-63. He died in Worcester on April 19, 1854. See *id.* at 463.

For more on Davis, see, for example, John Davis Papers, *supra* note 150; THOMAS F. O'FLYNN, THE STORY OF WORCESTER MASSACHUSETTS 82-83 (1910); ALBERT FARNSWORTH & GEORGE B. O'FLYNN, THE STORY OF WORCESTER MASSACHUSETTS 210 (1934); LINCOLN, *supra* note 127, at 246-47, 326; FIVE HUNDRED PAST AND PRESENT CITIZENS OF WORCESTER, MASSACHUSETTS, *supra* note 120 (providing the photograph above).

Congress, beginning a quarter-century of public service as a congressman, senator, and governor of Massachusetts.¹⁵⁸ It is not clear whether his duties in Congress, then not full-time, would have prevented his active involvement in *Mills*.¹⁵⁹ In any event, he was a more cautious and reserved lawyer than his partner Allen. "Although he had little grace of manner and, because of his shaggy locks, reminded people of 'a great white bear,' Davis possessed a kind of awkward dignity which was impressive. Without being showy or brilliant, he was convincing because of his sincerity and earned the nickname of 'Honest John.'"¹⁶⁰ Still, even Davis's admirers concede that "[a]s a lawyer, Mr. Davis was not remarkable for extensive reading,"¹⁶¹ and that he was more distinguished as a statesman than as



John Davis

158. See *DICTIONARY OF WORCESTER (MASSACHUSETTS) AND ITS VICINITY*, *supra* note 156, at 74, 78, 80.

159. Certainly he remained active in local affairs. On May 2, 1825, for example, he spoke at the dedication of Worcester's new town hall. See *JOHN DAVIS, AN ADDRESS DELIVERED AT THE DEDICATION OF THE TOWN HALL IN WORCESTER* (Worcester, William Manning 1825).

160. *ENCYCLOPEDIA OF BIOGRAPHY*, *supra* note 157, at 134. Indeed, the "Honest John" moniker is repeated in most recollections of his life. See, e.g., *DEXTER*, *supra* note 157, at 462; *FORTY IMMORTALS*, *supra* note 152, at 27.

At his death, Davis was remembered as "The Perfect Man." See *HILL*, *supra* note 21 (title of his sermon on the death of John Davis: *The Perfect Man*). Not everyone thought he was perfect, however. Levi Lincoln, a former partner of Davis and governor of Massachusetts, thought that Davis had used his office as governor "improperly" to achieve election to the Senate. See *15 PROCEEDINGS OF THE MASS. HISTORICAL SOCIETY 235* (1902) (Letter from Levi Lincoln to U.S. Senate, Feb. 14, 1827).

161. Thomas Kinnicutt, *Memoir of Hon. John Davis, LL.D.* (Apr. 26, 1854), in *3 TRANSACTIONS AND COLLECTIONS OF THE AMERICAN ANTIQUARIAN SOCIETY 345, 348* (Cambridge, Bolles and Hayhton 1850).

an attorney. His strength was clarity and organization, not imagination or brilliance. But he was successful with New Englanders, who were purportedly more interested in substance than style.¹⁶²

Davis and Allen were not successful with the three New England justices who heard their appeal. Chief Justice Isaac Parker,¹⁶³ writing for a unanimous panel,¹⁶⁴ held that Seth Wyman was not liable to Daniel Mills.¹⁶⁵ Like Judge Howe, Justice Parker assumed that Seth Wyman made the promise at issue.¹⁶⁶ Nowhere in the opinion does he quote the actual text of Seth's February 24 letter, the only document that even arguably evidences a promise to pay for Levi's expenses.¹⁶⁷ Justice Parker even attributed motives to Seth Wyman that may not fairly explain Wyman's behavior. Wyman, he wrote, was "influenced by a transient feeling of gratitude."¹⁶⁸ He made a promise and then was "determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes

His mind was well stored with legal principles; and he seldom failed of making a just application of them in practice. . . . [T]hough he never permitted himself to be surprised by the citation of cases which he had not seen, he relied more upon well-settled principles, and the deductions logically made from them by his own mind, than upon the citation of any number of analogous authorities.

Id.

162. *See id.*

163. Justice Parker was born in Boston on June 17, 1768. He graduated from Harvard in 1786, entered the practice of law, and in 1796 was elected a member of Congress. He declined re-election in 1798 and was instead appointed Marshal of the District of Maine. In 1806 he was appointed to the supreme judicial court, and in 1814 he was appointed Chief Justice of Massachusetts. He was the first Royall Professor of Law at Harvard University, and his plan for the establishment of a Harvard Law School was adopted in 1817. Parker served as Chief Justice until the end of his life, in 1830, when he was suddenly taken ill while at his home in Boston. *See* FREDERIC HATHAWAY CHASE, LEMUEL SHAW CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1830-1860, at 53, 79, 134 (1918) (describing various events in Parker's life). *See generally* JOHN G. PALFREY, A SERMON PREACHED IN THE CHURCH IN BRATTLE SQUARE (Boston, Nathan Hale and Gray & Bowen 1830) (containing a eulogy and a biographical sketch); RUSSELL, *supra* note 118, at 126; Lemuel Shaw, *Address*, MASS. L.Q., Sept. 16, 1930, at 1 (giving an account of Parker's life by Parker's successor).

This Isaac Parker is not to be confused with the "hanging judge" Isaac Parker of the American West. *See, e.g.*, HENRY SINCLAIR DRAGO, OUTLAWS ON HORSEBACK 114 (1964) (noting that the western Judge Parker sentenced 88 men to death by hanging).

164. The other two justices on the panel were Samuel Wilde and Robert Putnam.

165. *See* Mills v. Wyman, 20 Mass. (3 Pick.) 207, 212 (1825).

166. *See id.* at 209.

167. *See id.*

168. *Id.*

necessary resulting from the operation of general rules.”¹⁶⁹ As noted, the facts suggest less despicable motives. Wyman did not make the promise and thus never “determined” to break any promise. Wyman’s “transient feeling of gratitude” might have been a sincere expression of willingness to pay for Levi’s future expenses, but not his past ones. Wyman’s “willingness” to stand as an example of an “injustice” was more likely a determination to fight for his rights.

One of my former colleagues once speculated that Seth Wyman might have been Jewish and that Chief Justice Parker’s characterization of Seth was influenced by anti-Semitism. It appears, however, that Seth was Christian. Probate records indicate that Seth Wyman owned a “pew at the Congregational Church.”¹⁷⁰ Moreover, a Wyman genealogy, though it records no baptism of Seth or Levi themselves, refers to baptisms of Seth Wyman’s siblings and older relatives. For example, according to this source, Seth’s half-sister Susanna was “baptized” on September 30, 1764, and died young.¹⁷¹

For whatever reason, Chief Justice Parker assumed that Wyman had made a promise and callously reneged on it. Justice Parker then turned to the central legal question in the case: whether the ostensible promise was supported by consideration. As most first-year law students learn, his answer was no. He began by acknowledging that “some authorities” lay down a broad rule that “a moral obligation is a sufficient consideration to support an express promise.”¹⁷² He added, however, that this “rule” applied only to promises reviving past obligations that had become “inoperative by positive law.”¹⁷³ Thus, the courts would enforce a promise to pay a pre-existing debt otherwise barred by the statute of limitations, infancy, and bankruptcy, even if no new consideration were given for the promise. Like some earlier authorities, Chief Justice Parker explained these cases with a “revival” or “waiver” theory: “They are not promises to pay something for nothing; not naked pacts, but the voluntary revival or creation of obligations which before existed in natural law”¹⁷⁴ In

169. *Id.* More generally, the requirement of consideration “cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.” *Id.* at 209.

170. Interestingly, in accordance with the dower rules, Seth’s wife Mary inherited one-third of his interest in this pew upon his death. *See* 65 PROBATE RECS. OF WORCESTER COUNTY 371 (Sept. 22, 1828) (Seth Wyman’s Widow’s Dower).

171. *See* IV HISTORIC HOMES, *supra* note 85, at 136.

172. *Mills*, 20 Mass. (3 Pick.) at 209.

173. *Id.*

174. *Id.* at 210.

other words, the promisor can unilaterally waive a technical defense to enforcement of an otherwise valid claim against him or her, just as a party to a contract can unilaterally waive a condition that otherwise might provide him or her with a technical defense. Because Seth Wyman himself owed no prior debt to Daniel Mills, he could not voluntarily “revive” it. “[T]he law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called.”¹⁷⁵

This result was right even if the facts were wrong. If Seth Wyman did not make the promise in question, he certainly would not have been liable for breach of contract and probably would not have been liable in restitution either. Daniel Mills would have had to overcome both the traditional requirement that Seth Wyman himself benefited by Mills’s acts and the presumption that Mills acted gratuitously. Because Seth was no longer legally responsible for the necessities of his adult son, it seems unlikely that a court would have held him liable in restitution. Indeed the courts in *Mills* did not even appear to consider this a possibility. That Levi actually survived adds some weight to Mills’s restitution claim, but probably not enough to overcome these doctrinal hurdles.

If Wyman did make the promise in question, however, the court let him off too easily, and in so doing missed an opportunity to reform the doctrine of consideration. The law on moral obligation was not as settled at the time as the court implied. English authorities were still struggling with the scope of moral-obligation doctrine and indeed with the consideration doctrine itself. In a 1765 case, the influential Lord Mansfield announced a drastic reform of the doctrine of consideration. When an agreement was reduced to writing, he said, “there was no objection to the want of consideration. . . . In commercial cases amongst merchants, the want of consideration is not an objection.”¹⁷⁶

175. *Id.* The court also disposed of the plaintiff’s efforts to invoke a Massachusetts statute obliging family members to support their poor relations in certain circumstances. The court held the statute inapplicable because no court had found that Levi had a “legal settlement” in Massachusetts or that Seth had the ability to pay. *See id.* at 212. Incidentally, Davis and Allen cited the statute as the “statute of 1793, c. 59,” *see id.* at 207, but the provision in question seems to have been in chapter 58.

176. *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. 1663, 1669 (K.B. 1765). Oddly, the report of *Mills v. Wyman* indicates that Mills’s attorney did not cite *Van Mierop* but that Wyman’s attorney did—just the opposite of what one might expect. *See Mills*, 20 Mass. (3 Pick.) at 208. Brigham, counsel for Wyman, apparently sought to distinguish the case on the grounds that a promissory note is a “privileged contract” and not subject to the normal consideration rules. *See id.*

In 1778 this new rule was rejected by English authorities,¹⁷⁷ but Mansfield's view retained lingering importance in America, both because news of the rejection did not reach America until after the turn of the century¹⁷⁸ and because of the "congeniality of Mansfield's . . . views to American judges."¹⁷⁹

Moreover, Lord Mansfield kept up his assault on the consideration doctrine and, in particular, on moral-obligation doctrine. In a 1785 case he declared: "Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."¹⁸⁰ Lord Mansfield gave as examples promises to revive antecedent debts, but his statement of the "rule" was not explicitly limited to these cases. Lord Mansfield's broad statement of the rule met with resistance. In the early nineteenth century, writers went to great trouble to show that Lord Mansfield really intended to limit his dictum to cases of antecedent debt. In 1802, for example, the reporter of the English case *Wennall v. Adney* wrote, "Lord Mansfield appears to have used the term moral obligation not as expressive of any vague and undefined claim arising from the nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule."¹⁸¹

In fact, courts had often enforced promises involving nothing more than past consideration.¹⁸² True, many English and American cases, including most of those cited in the report of the attorneys' arguments in *Mills*, did distinguish between promises to revive past debts and "naked" promises to reward past good deeds.¹⁸³ Cases

177. FARNSWORTH & YOUNG, *supra* note 6, at 61 (quoting *Rann v. Huges*, 101 Eng. Rep. 1014 (1778) ("If [contracts] be . . . written and not specialties, they are parol, and a consideration must be proved.")).

178. See Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 943 (1974).

179. *Id.*

180. E. ALLAN FARNSWORTH & WILLIAMS F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* 120 (4th ed. 1988) (quoting *Hawkes v. Saunders*, 98 Eng. Rep. 1091 (1782)).

181. *Wennall v. Adney*, 3 Bos. & Pul. 247, 249 n. (1802). He added this: "[H]owever general the expressions used by Lord Mansfield may at first sight appear, yet the instances adduced by him as illustrative of the rule of law, do not carry that rule beyond . . . its proper limits" of antecedent debt. *Id.*

182. See 1A ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 231, at 349 (1963); 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 142, at 319 (1920).

183. See, e.g., *Edwards v. Davis*, 16 Johns. 281, 283 n. (N.Y. Sup. Ct. 1819) (asserting that moral obligation is consideration only where "there was an original consideration . . . which might have been enforced . . . had it not been for some statute provision, or some positive rule of law"); *Wennall*, 3 Bos. & Pul. at 249 n. (asserting in

enforced not only promises reaffirming debts barred by infancy, the statute of limitations, and bankruptcy, but also promises reaffirming debts barred by the statute of frauds, statutes against usury, and the common-law incapacity of married women, or coverture.¹⁸⁴ Conversely, some decisions rejected claims based in part on moral obligation.¹⁸⁵ In some of these cases, however, the court did not reach the moral-obligation claim, finding instead no promise or other grounds for decision.¹⁸⁶ In other cases denying liability, the supposed "moral obligation" sprang from a gratuitous promise itself and not from any specific favor granted earlier to the promisor.¹⁸⁷ In still others, the courts dispensed with a requirement of consideration altogether when there was other evidence, such as formality, of intent to be bound.¹⁸⁸ The doctrinal landscape following Lord Mansfield's dictum was hardly as fixed as the *Mills* court suggested. But Chief Justice Parker chose to side with the reporter in *Wennall*, adopting his theory that moral-obligation doctrine extended only to promises based on pre-existing debt.

In so doing, Chief Justice Parker explicitly rejected his own opinion in *Bowers v. Hurd*,¹⁸⁹ in which the supreme judicial court enforced a promise based solely on past good deeds. In *Bowers*, one Sarah Thompson gave promissory notes to three of her friends, including the plaintiff.¹⁹⁰ Thompson wished to leave something for the plaintiff because the plaintiff had been a good friend and had

dictum that moral obligation renders enforceable only those promises affirming "imperative duties" that would otherwise be unenforceable).

184. See, e.g., *Davenport v. Mason*, 13 Mass. 83, 93 (1818) (holding that subsequent promise revived prior obligation otherwise barred by statute of frauds); *Seago v. Deane*, 4 Bing. 459, 461 (1828) (statute of frauds); *Wells v. Horton*, 2 Car. & P. 383, 385 (1826) (statute of frauds and statute of limitations); *Barnes v. Hedley*, 2 Taunt. 184, 194 (1809) (usury); *Lee v. Muggeridge*, 5 Taunt. 36, 38 (1813) (coverture); see also *Glass v. Beach*, 5 Vt. 170, 173 (1833) (enforcing promise reaffirming prior obligation to pay third party).

185. See, e.g., *Fink v. Cox*, 18 Johns. 145, 145 (1820) (refusing to enforce deceased father's note promising son money because he was not as wealthy as his brother); cf. *Smith v. Ware*, 13 Johns. 257, 258 (N.Y. Sup. Ct. 1816) (holding seller of land was not liable for subsequent promise to compensate buyer for inaccuracies in the deed, which itself made clear that it contained only estimates); *Fowler v. Shearer*, 2 Mass. 14, 22-25 (1810) (refusing to enforce promissory note).

186. See, e.g., *Andover & Medford Turnpike Corp. v. Gould*, 6 Mass. 39, 42-44 (1809) (finding no promise).

187. See, e.g., *Fink*, 18 Johns. at 145.

188. See, e.g., *Bowers v. Hurd*, 10 Mass. 427, 429-30 (1813) (Parker, J.) (promissory note).

189. 10 Mass. 427 (1813).

190. See *id.* at 427.

“frequently attended” Thompson when she ill.¹⁹¹ Indeed, Thompson felt an “obligation” to leave something for the plaintiff even though no antecedent debt was involved.¹⁹² Thompson gave promissory notes in order to avoid the expense of drafting a will.¹⁹³ After she passed away, her executor refused to honor the notes, and one of the promisees sued.¹⁹⁴ At trial, the defense pleaded lack of consideration, but the judge “directed the jury to lay that evidence out of the case, and that a verdict might notwithstanding be found for the plaintiff.”¹⁹⁵ It was.

On appeal, the Supreme Judicial Court affirmed.¹⁹⁶ Judge Parker, writing for the court, rejected the executor’s contention that the promise lacked consideration.¹⁹⁷ He acknowledged that consideration was a defense to enforcement of a note between the original two parties.¹⁹⁸ Instead, he offered a radical theory of consideration:

Now, we do not admit that, when one voluntarily makes a written promise to another to pay a sum of money, the promise can be avoided merely by proving there was no legal and valuable consideration subsisting at the time; any more than, if he actually paid over the amount of such note, he can recover it back again because he repents of his generosity.¹⁹⁹

In other words, Parker analogized a promise to delivery of a gift. This is precisely the analogy that consideration doctrine supposedly rejects. A gratuitous promise is revocable absent reliance; a gratuitous gift is irrevocable. Parker went on to justify enforcement of this gratuitous promise by stressing the sham recital of consideration in the note. By this recital, the promisor has “precluded himself and his representatives from denying a consideration, when he has under his hand acknowledged one.”²⁰⁰ The court’s refusal to weigh parol evidence showing lack of consideration was later overruled, though the Massachusetts courts insisted the *Bowers* case itself was correctly decided on “other principles.”²⁰¹ The reporter of *Bowers* was left wondering what those “other principles” were. Perhaps the case

191. *Id.*

192. *Id.*

193. *See id.*

194. *See id.*

195. *Id.* at 428.

196. *See id.* at 430.

197. *See id.*

198. *See id.* at 429.

199. *Id.*

200. *Id.*

201. *See Hill v. Buckminster*, 5 Pick. 393 (1828).

reflects confusion about the role of consideration in promissory notes. Perhaps it simply reflects sympathy for a deserving plaintiff. Whatever the explanation, it doesn't fit neatly into the universe of moral obligation described by the same Justice Parker in *Mills v. Wyman*. *Bowers* suggests that moral obligation could bind a gratuitous promise that did not revive an antecedent debt.

Not surprisingly, Daniel Mills's counsel cited *Bowers* prominently in support of his position. "[I]f there was no moral obligation on the part of the defendant, it is sufficient that his promise was in writing, and was made deliberately, with a knowledge of all the circumstances."²⁰² Davis and Allen added: "A man has a right to give away his property," to which Chief Justice Parker replied, "There is a distinction between giving and promising."²⁰³ Mills's counsel responded by pointing out that *Bowers* "does not take that distinction."²⁰⁴ To which Justice Parker replied ominously: "That case has been doubted."²⁰⁵ David Brigham, counsel for Seth Wyman, distinguished *Bowers* in his written pleadings by contending that a promissory note that recites consideration is a "privileged contract."²⁰⁶ It is not clear whether Justice Parker accepted this distinction or simply thought his own earlier opinion was wrong. His opinion in *Mills* did not discuss his opinion in *Bowers*. Thus Parker passed up an opportunity to build on his holding in *Bowers* and to establish that a promise founded on moral obligation should always be binding if there is sufficient evidence of intent to be bound.

One unanswered question is whether Chief Justice Parker's narrow doctrine of moral obligation comported with the view taken by early American juries, who until 1810 had enjoyed broad powers to find the law as well as the facts.²⁰⁷ The anecdotal evidence from *Mills v. Wyman* itself might suggest not. Despite doubts that Seth Wyman made the promise at all, Bernard Fowler and the other citizens on the jury in *Mills v. Wyman* had no trouble finding him liable. Without a thorough study of the behavior of juries in the eighteenth and early nineteenth centuries, no definitive conclusion can be reached. However, the demise of the jury's law-finding power suggests that there was a vacuum in American common law and that Justice Parker

202. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 207 (1825).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See NELSON, *supra* note 141, at 165-71.

and his contemporaries had a unique opportunity to fill that void. As Professor Simpson puts it, the “dethronement of the jury” was “accompanied by the generation or reception of law in order not so much to replace or transform older doctrine as to provide law where before there was little or none.”²⁰⁸

Insofar as there was doubt about the “reception” of Mansfield’s broad rule into American law, *Mills* helped seal its fate. Certainly that is how *Mills* would later be remembered by Massachusetts courts and, even later, by national commentators—as the case that settled doubts about the scope of the moral-obligation rule.²⁰⁹ In the 170 years since the decision in *Mills*, there is no mistaking its influence. It is one of the two or three leading American cases on moral obligation, along with *Webb v. McGowin*²¹⁰ and perhaps the short per curiam decision in *Harrington v. Taylor*.²¹¹ *Mills* is a staple of the first-year contracts curriculum and is reprinted in virtually every American casebook on the subject.²¹² Its facts are the basis of the first illustration to section 86 of the most recent *Restatement of Contracts*.²¹³

And yet *Mills* is more prominently featured in casebooks and restatements than in actual contract cases. This is partly because moral obligation cases are unusual, and therefore the doctrine, like consideration doctrine generally, has more theoretical than practical importance. While *Mills* may be the leading case on the doctrine in Massachusetts,²¹⁴ it is also occasionally cited in other jurisdictions.²¹⁵ Of the hundreds of reported American contract cases involving moral-obligation doctrine since 1826, *Mills* has been cited in only twenty-

208. Simpson, *supra* note 141, at 600.

209. See *Dearborn v. Bowman*, 36 Mass. 155, 158 (1841) (“The rule of law seems to be now well settled—though it may have formerly been left in doubt . . .”) (citing *Mills* and its progeny).

210. 168 So. 196, 148 (Ala. Ct. App. 1935) (enforcing promise to reward another for having saved the promisor’s life).

211. 36 S.E.2d 227, 227 (N.C. 1945) (declining to enforce promise to reward another for having saved the promisor’s life).

212. See, e.g., RANDY E. BARNETT, *CONTRACTS* 688 (1995); FARNSWORTH & YOUNG, *supra* note 6, at 67.

213. See *RESTATEMENT (SECOND) OF CONTRACTS* § 86, cmt. a, illus. 1 (1981).

214. See *Parish v. Stone*, 28 Mass. 198, 202-03 (1833); *Loomis v. Newhall*, 15 Pick. 159, 163-64 (1833) (Putnam, J., who also sat on *Mills*); *Dodge v. Adams*, 19 Pick. 429, 431 (1837); *Valentine v. Foster*, 1 Metc. 520, 521-22 (1840). These cases sometimes point to *Mills* as the case that settled doubts about the scope of moral-obligation doctrine. See *Dearborn v. Bowman*, 3 Metc. 155, 158 (1841); *Mellen v. Whipple*, 67 Mass. (1 Gray) 317, 321 (1854).

215. See, e.g., *Kent v. Rand*, 5 A. 760, 761 (N.H. 1886) (citing *Mills* and a half-dozen other cases).

seven cases, and eleven of those were Massachusetts cases.²¹⁶ Even in Massachusetts, *Mills* appears most prominently in nineteenth-century decisions and is quoted at length only in decisions in the first couple of decades subsequent to the decision.²¹⁷ It has not been cited by a Massachusetts court since 1906.²¹⁸ Except for one Connecticut decision,²¹⁹ no reported case cited *Mills* until 1883.²²⁰ In the four decades that followed, *Mills* was cited more than a dozen times outside Massachusetts, but then gradually slipped into Shepard's version of oblivion. It has not been cited by any American court since 1944.²²¹

But counting citations underestimates the influence of *Mills*. Like other famous cases, it achieved its fame through repeated citation not in case law but in commentaries and, especially, casebooks. As Richard Danzig has shown, for example, the renowned *Hadley v. Baxendale*²²² owes its fame at least in part to the vigorous "marketing" of the case by treatise editors who were themselves involved in the litigation in *Hadley*.²²³ Although there is no evidence that David Brigham, Charles Allen, or John Davis clamored to make *Mills* famous, the case quickly became a fixture of the treatise world. *Mills* figured prominently, for example, in the discussion of moral obligation in *Kent's Commentaries*. The *Commentaries*, while acknowledging that *Mills* did not end debate about the subject, treat *Mills* as the leading case on moral obligation. Shortly after *Mills*, the second edition of *Kent's Commentaries* intoned confidently that moral obligation was consideration only where a "prior legal obligation had once existed."²²⁴ But by the twelfth edition, the *Commentaries* were rather less categorical. "[I]t has been an unsettled point whether a

216. See States Database, Cases File, LEXIS.

217. See cases cited *supra*, note 214.

218. See *Widger v. Baxter*, 76 N.E. 509, 510 (Mass. 1906) (refusing to enforce promissory notes for lack of consideration).

219. See, e.g., *Cook v. Bradley*, 7 Conn. 57, 64 (1828) (quoting *Mills*).

220. See *Fruitt v. Anderson*, 12 Ill. App. 427 (1883) (holding that father had no duty to maintain an adult son).

221. See *Sandelli v. Duffy*, 38 A.2d 437, 438 (Conn. 1944).

222. 156 Eng. Rep. 145 (Ct. Exch. 1854).

223. See Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 250, 257-58 (1975).

224. KENT'S COMMENTARIES ON AMERICAN LAW 465 (2d ed. 1830) (citing *Mills*, among other sources). By contrast, Blackstone seemed to envision a somewhat broader role for moral consideration. Compare *id.*, with 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (1766) ("A good consideration . . . is that of blood or natural affection between near relations." (emphasis in original)).

mere moral obligation be, of itself, a sufficient consideration for a promise" in cases not involving antecedent debt.²²⁵ "The weight of authority," it continued, "is that it is not sufficient."²²⁶

The most important factor in *Mills*'s rise to prominence was its inclusion in Langdell's first casebook on contracts.²²⁷ Langdell devoted sixty-seven pages of his casebook to the subject of "Moral Consideration" and included a full report of *Mills*.²²⁸ Although *Mills* was just one of more than a dozen cases in this section of the book, it was the first American case encountered by the student and its facts were among the most accessible.

Mills has not left the contracts curriculum since. Langdell's sixty-seven pages have been whittled down to more modest sections. *Mills* is typically one of just a handful of cases presented. It is usually contrasted with *Webb v. McGowin*, in which an Alabama court enforced McGowin's alleged promise to pay Webb for having saved McGowin's life.²²⁹ Surely *Mills*, like *Webb*, deserves its place in the casebooks. The facts of *Mills*, even if falsely rendered, are compelling, and the opinion, even if misguided, is provocative. But does the rule in *Mills* still deserve its place as a "fixed star in the jurisprudential firmament"?²³⁰ What, if any, theory of moral obligation justifies the *Mills* doctrine?

IV. MILLS AND THEORIES OF MORAL OBLIGATION

A close reading of *Mills* helps answer two important questions about moral-obligation doctrine. The first question is an empirical one: Why do courts decide cases like *Mills* one way and cases like *Webb* another? The second question is a normative one: Is moral obligation doctrine just, and, if not, how should it be reformed? This part takes up each question in turn.

225. KENT'S COMMENTARIES ON AMERICAN LAW 465 (12th ed. 1873) (citing *Mills*). Holmes edited this edition of the *Commentaries*.

226. *Id.* Of course *Mills* also found its way into Corbin, Williston, and Farnsworth. See CORBIN, *supra* note 182, § 231; E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.8, at 57-58 (1990); WILLISTON, *supra* note 182, § 148.

227. See LANGDELL, *supra* note 6, at 367.

228. See *id.* at 339-406.

229. 168 So. 196, 198 (Ala. Ct. App. 1935).

230. GRANT GILMORE, THE DEATH OF CONTRACT 83 (1974) (referring to *Hadley v. Baxendale*).

A. *Explaining Moral Obligation Cases*

Courts and commentators have proposed several theories to explain the structure of moral-obligation doctrine. These include a waiver, or revival, theory; a theory based on the primacy of promise; a restitutionary theory; a theory about the public/private distinction in the law; and an economic theory.

The waiver theory was favored by *Mills* and other courts of its day. Under that theory, a gratuitous promise is not normally enforceable, no matter how compelling the attendant moral obligation, but such a promise is enforceable if it revives a prior debt. On this view, a debtor should have the power unilaterally to remove a technical bar to enforcement of her own promise, just as a party to a contract may unilaterally waive a condition that would otherwise protect her from liability. This approach implies that the original obligation is the paramount source of liability. The subsequent promise is a mere ratification, subsidiary to the original wish of the debtor. The best expression of the debtor's intent is the original contract; that agreement is unenforceable not because of the debtor's will, but because of the operation of some rule of public policy over which the debtor had no control.²³¹

One problem with the waiver theory is that it assumes the promisor always has the power to remove a bar to enforcement of a claim against him. It is true that some promisors possess such a power. An adult may ratify the contracts of his infant self, for example. But the power to waive is not so readily justifiable when waiver implicates the interests of third parties. The *Mills* court, for example, posited that a bankrupt should be able to reaffirm debts discharged in bankruptcy. But if a bankrupt promises payment of only some of his debts, he gives preferential treatment to some creditors over others, possibly cutting against a public policy in favor of equal

231.

Express promises founded on such preexisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. . . . They are not . . . naked pacts, but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with . . . principally for the public convenience.

Mills v. Wyman, 20 Mass. (3 Pick.) 207, 209-10 (1825).

distribution of assets among all creditors.²³² Even waiver of a defense of the statute of limitations might implicate the interests of third parties, including witnesses who would prefer not to be cross-examined about the distant past and taxpayers who wish to save judicial resources for fresher claims.²³³

Another problem with the waiver theory is that waivers are supposedly retractable if they do not induce justifiable reliance, but in fact the “waivers” in moral obligation cases are treated as irrevocable. In other words, if the promisor “waives” a defense of the statute of limitations or bankruptcy, why can’t the promisor later retract the waiver? One who waives a condition can arguably retract the waiver before the other party relies on it, on the theory that no one has yet been injured by the waiver.²³⁴ If the waiver induces justifiable reliance, it becomes an irrevocable estoppel, at least in theory.²³⁵ Unfortunately, there seems to be some confusion about whether waivers are generally retractable. Cases occasionally speak of binding waivers even when there is no apparent reliance.²³⁶ In other words, there may be some support in the law for *Mills’s* suggestion that a waiver can be irrevocable even if it does not induce reliance.

There is one other problem with the waiver theory, however. As Steve Thel and Edward Yorio point out, despite judicial rhetoric about reviving old debts, courts treat the subsequent promise as a primary source of liability and not as a technicality that permits suit on the

232. See 11 U.S.C. § 547 (1994) (prohibiting preference payments and establishing a cause of action for return of preferences).

233. Indeed, states tend to look skeptically on private efforts to set aside statutes of limitations. For example, “a clause inserted at the inception of a contract, by which a party agreed not to plead the statute of limitations in the event of breach, would probably be held void everywhere.” JOHN DAWSON ET AL., *CONTRACTS: CASES AND MATERIALS* 237-38 (6th ed. 1993). Moreover, most states require “waivers” of limitations defenses to be in the form of a signed writing. See *id.* at 239.

234. See FARNSWORTH, *supra* note 226, § 8.5, at 589-90.

235. See, e.g., *Wood v. State*, 186 N.E.2d 406, 408 (N.Y. 1962) (acknowledging defense of justifiable reliance). Moreover, the reliance must be objectively verifiable. A party seeking to enforce an estoppel must prove more than “some secret operation of his own mind” in reliance on the other party’s waiver. *Id.*

236. See, e.g., *Phoenix Ins. Co. v. Ross Jewelers, Inc.*, 362 F.2d 985, 987-88 (5th Cir. 1966) (enforcing insurance company’s waiver of a condition that insured maintain an inventory of jewelry, even absent any evidence of insured’s reliance on the waiver). Compare *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1287 (7th Cir. 1986) (Posner, J.) (asserting that reliance is an element of a waiver in U.C.C. § 2-209(5)), with *id.* at 1291-92 (Easterbrook, J., dissenting) (arguing that reliance is not an element of such a waiver).

antecedent debt.²³⁷ Thel and Yorio correctly note that the courts tend to focus on the promise itself, and on whether it has consideration, rather than on the terms of the antecedent debt. Plaintiffs in these cases seek to enforce the terms of the promise—the expectancy measure, the hallmark of promise-based liability.²³⁸ One possible response to this argument is that the courts focus on the promise only because it defines the scope of the waiver. But that response does not dispose of the rhetorical point. Courts almost invariably speak of these cases as consideration cases, regardless of whether the original debt itself sprang from contract law, tort law, or some other source. Courts focus on the promise.

But Thel and Yorio go too far in stressing the primacy of the promise in moral obligation cases. They argue that “[t]he cases may simply show that courts are willing to enforce serious, well-considered promises, but not rash and ill-considered promises.”²³⁹ This proposition may someday be proven true, but currently available historical evidence does not support it. In support of their thesis, Thel and Yorio contrast the supposedly well-considered promise in *Webb v. McGowin* with the supposedly hasty promise in *Mills*. Noting that Wyman himself repudiated his promise, whereas Webb’s estate repudiated his, Thel and Yorio suggest that “the promise in *Mills* was more likely a response to a fleeting emotion of gratitude than the promise in *Webb*.”²⁴⁰ They argue that, since McGowin’s life was saved at considerable detriment to Webb, McGowin had more significant reasons to make his promise than did Wyman, whose son died while Mills supposedly incurred minimal detriment.²⁴¹

A close reading of the actual record in *Mills* does not bear out these suppositions. As we have seen, Wyman’s son apparently did *not* die during the pendency of *Mills v. Wyman*. Even if Levi did die, Seth Wyman certainly did not know that when he made his supposed promise. He had every reason to believe that Daniel Mills had nursed Levi back to health. More to the point, Wyman did not make a promise to pay Levi’s past debts at all. He bargained for *future* services from Mills. Far from a hasty, off-the-cuff promise to pay

237. See generally Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045 (1992) (arguing that promise, not restitution, explains moral obligation cases).

238. See *id.* at 1100.

239. *Id.* at 1072.

240. *Id.*

241. See *id.*

Levi's past debts, Seth's letter seems a carefully worded offer to pay for new expenses. True, Justice Parker may not have entirely appreciated this last point, but perhaps it influenced his view of the case or that of his colleagues on the bench. And while Daniel Mills's sacrifice pales next to that of Joe Webb, twenty-five dollars was still a considerable sum in Mills's day; it hardly seemed "minimal" to him.

As for McGowin's promise, his attorneys say he never made the promise in question.²⁴² The irony is unmistakable: in both *Mills* and *Webb*, the two leading cases on enforcement of promises via moral obligation, the defendants say they never made any promise at all. Recall, too, that McGowin's case was decided on demurrer, without full fact-finding.²⁴³ Without further research into the background of the McGowin case, it seems premature to conclude that his promise was more carefully considered than that of Seth Wyman. The facts of *Mills* point in the other direction. As an empirical matter, then, it is far from clear that courts decide moral obligation cases on the quality of the promise.

Another explanation for these cases is a theory of promissory restitution. According to this theory, courts are actually granting the plaintiff restitution for provision of services or goods in the past. Courts emphasize the defendant's later promise, not because it "waives" a technical defense or because it is binding in and of itself, but because it negates the traditional presumption that the services rendered were gratuitous.²⁴⁴ This theory was apparently endorsed by the Second (though not the First) *Restatement of Contracts*. Section 86 provides:

- (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
- (2) A promise is not binding under Subsection (1)
 - (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

242. See FARNSWORTH & YOUNG, *supra* note 180, at 121 n.a ("It was . . . the estate's position that McGowin never made the promise alleged in Webb's complaint.").

243. See *id.*

244. See Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 644-47 (1982); Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1157-61 (1971) (arguing that a promissory "confession" enhances the "impressiveness" of a restitution claim); Thel & Yorio, *supra* note 237, at 1071 (describing the restitution view). As to the presumption of gratuitousness, see FARNSWORTH, *supra* note 226, § 2.20, at 152-53.

(b) to the extent that its value is disproportionate to the benefit.²⁴⁵

The provision is apparently intended to explain and codify the results in cases like *Mills* and *Webb*.²⁴⁶ It distinguishes the cases on the grounds that the benefit to Seth Wyman was not received "directly" by him from Daniel Mills, whereas the benefit to McGowin was received directly from Webb.²⁴⁷ Its link to restitution is evident from subsection (a), which bars a cause of action if the promisor was not "unjustly enriched."²⁴⁸

As a theory of recovery, this notion has some appeal, but as an empirical explanation for the actual behavior of courts, it is imperfect. The theory is rhetorically inconsistent with the case law. Before the advent of section 86, courts rarely spoke of moral obligation cases in terms of "unjust enrichment" or restitution.²⁴⁹ They instead handled these cases as consideration cases. This was true whether or not the courts enforced the promise. Even after section 86, some courts continue to conceptualize these cases as consideration cases more than restitution cases.²⁵⁰

The promissory-restitution theory also shares some of the defects of the "waiver" theory espoused by *Mills* itself. The restitution theory suggests that the real cause of action is based on the services rendered in the past, not on the promise made in the present, even though the contemplated remedy is enforcement of the promise rather than restitutionary recovery for past services. It is the promise that is held "binding" by section 86, not the earlier debt. Moreover, "a promise to pay a liquidated sum may serve to fix the amount due if in all the circumstances it is not disproportionate to the benefit."²⁵¹

245. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

246. See *id.* cmt. a, illus. 1; Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 n.10 (1981).

247. See Thel & Yorio, *supra* note 237, at 1070-71.

248. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

249. See *supra* notes 209-211, 214-215 & 218-221 (citing cases).

250. See, e.g., *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468, 473-74 (Ill. App. Ct. 1985) (stating that "a moral obligation yield[s] an implied consideration" for a subsequent promise).

251. RESTATEMENT (SECOND) OF CONTRACTS § 86, cmt. i (1981). This comment does add that enforcement of the promise will be limited by the amount of the benefit conferred, if the benefit was a liquidated sum of money. See *id.* "A promise which is excessive may sometimes be enforced to the extent of the value of the benefit, and the remedy may be thought of as quasi-contractual rather than contractual." *Id.* In other words, the expectancy remedy would give way to the restitution remedy if the latter were smaller. But, of course, it is unusual for the promisor to promise *more* than the amount of the antecedent debt.

Perhaps this remedial discrepancy can be explained away by arguing that the promise is like a limited waiver of the presumption of gratuity. The promisor acknowledges that some services were done in expectation of payment but maintains that other services were gratuitous and thus not compensable. This scenario may be plausible in those cases, like *Mills*, in which the Good Samaritan's initial actions in an emergency are gratuitous but his extended service is done in expectation of payment.²⁵² But in many cases the services are either gratuitous or they are not. Can it really be maintained that McGowin acknowledged that some part of Webb's life-saving service was done in expectation of payment and that the rest was gratuitous?

Thus, there is some disjunction between the right described by section 86 and the remedy normally contemplated for it. This, in itself, is not a fatal flaw in a theory of liability. Contract law is riddled with remedies that don't match rights. The expectancy interest is sometimes awarded in reliance cases.²⁵³ The reliance interest is sometimes awarded in consideration cases.²⁵⁴ But the lack of connection between right and remedy does suggest that the *Restatement* formulation is an incomplete explanation of what in fact courts were doing before section 86. It is not fully consistent with either the rhetoric (consideration) or the remedy (expectancy) typically employed by those courts. Like its more famous cousin, section 90, section 86 is not so much a restatement of existing law as a blueprint for future law. As international lawyers say, it is more an example of progressive development than of codification.²⁵⁵

Duncan Kennedy offers still another explanation for moral-obligation doctrine. He suggests that the doctrine is motivated by a desire to avoid litigation and its attendant "legalization" of family relations.²⁵⁶ Viewed in this light, the doctrine of moral obligation is but one of many designed to preserve the public/private distinction and

252. Cf. FARNSWORTH, *supra* note 226, § 2.20, at 106 n.29 (suggesting that *Mills* might have had a restitution claim against Levi because *Mills's* services lasted for a long time).

253. See, e.g., *Ricketts v. Scothorn*, 77 N.W. 365, (Neb. 1898) (finding liability based on reliance, but awarding the amount promised rather than the amount of the promisee's reliance).

254. See generally L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 373 (1937) (collecting cases).

255. Cf. U.N. CHARTER, art. 13, para 1 (charging the General Assembly to encourage progressive development and codification of international law principles). The wisdom of section 86 is taken up *infra* Part IV.B.

256. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1727 (1976).

to keep some private injustices out of the courts. This is an accurate description of much of the rhetoric of the moral obligation cases. *Mills* explicitly consigns such cases to a private "interior forum," the tribunal of the conscience. Still, Kennedy's formulation is both under- and over-inclusive. On the one hand, it does not explain why courts sometimes enforce family promises when consideration is technically present.²⁵⁷ On the other, it does not explain why courts do not enforce business and other "public" promises when consideration is technically absent.

On the other end of the ideological spectrum, Richard Posner offers an economic explanation for moral-obligation doctrine. In those cases involving promises that revive uncollectable debts, "the utility of the promise to the promisor is often great and the costs of enforcement low."²⁵⁸ Utility is often high because the promise may convey information about the promisor's creditworthiness that will later inure to the promisor's benefit by enhancing her reputation for owning up to her debts. Enforcement costs may be no higher than the presumably acceptable costs associated with enforcing the original debt.²⁵⁹ As for promises to rescuers and Good Samaritans—cases like *Webb* and *Mills*—Posner argues that enforcement makes the promise worth more to all parties involved, at relatively little cost. If the promise is not enforceable, the promisor will be tempted to give a one-time lump-sum transfer instead, and this transfer might have a much smaller present value than a promised stream of payments, for example the fifteen dollars per week in *Webb*.²⁶⁰ This is a variant of his argument for enforceability of gratuitous promises generally: enforcement enhances the value of the promise.²⁶¹

257. See, e.g., *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (uncle's promise to nephew); *Ricketts v. Scothorn*, 77 N.W. 365, 366 (Neb. 1898) (grandfather's promise to granddaughter). But cf. FARNSWORTH & YOUNG, *supra* note 6, at 85 (quoting *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (declining to enforce brother-in-law's promise to let sister Antillico "have a place" to raise her family "[i]f you will come down and see me")).

258. Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 418-19 (1977).

259. See *id.* at 418.

260. See *id.* at 418-19.

261. See *id.* at 411-13.

[I]f A cannot bind himself to make a series of future gifts, he may be led to substitute a one-time transfer, the present value of which is less than that of the series of future gifts, although greater than that of a declared but unenforceable intention to make a series of future gifts. Thus, nonenforceability of gratuitous promises could tend to bias transfers excessively toward immediacy.

Id. at 413 (citation omitted).

Like the *Restatement* formulation, this economic analysis is more useful as a normative than an explanatory tool. There is no hint in any of the pleadings or opinions in *Mills* that it ever occurred to anyone that it might be more efficient to enforce gratuitous promises. Moreover, the “invisible hand” of the marketplace of judicial ideas has not moved courts toward the supposedly more efficient solution: courts stubbornly cling to precedent instead. Posner’s analysis presents a persuasive case for what the law *should* be but does not explain what courts in fact have done to date.

What, then, does explain the behavior of courts in moral obligation cases? A complete answer to this question requires a rigorous historical analysis of all the relevant cases, not just of *Mills v. Wyman*. Nonetheless, the disparity between the reported and the historical facts of *Mills* suggests some interesting lines of inquiry. Most intriguing is the possibility that the “moral obligee” tends to misinterpret an ambiguous statement by the “moral obligor” as a promise to satisfy the moral obligation. In the two leading moral obligation cases, *Mills* and *Webb*, the supposed promisor asserted that he never made the promise in question. Perhaps this is a pattern in moral obligation cases.²⁶² If such a pattern exists, it might suggest that moral obligees tend to misconstrue statements of gratitude by moral obligors as promises, or, conversely, that moral obligors tend to lie about their promises, or that the estates of moral obligors are consistently less generous than the obligors themselves. Any one of these conclusions might suggest that most moral obligation cases involve some basic misunderstanding about the obligor’s intentions and that courts are not likely to impose liability if they doubt that the promise was made in the first place. In other words, further research might prove Thel and Yorico correct—that these cases depend primarily on the quality of the moral obligor’s promise.

B. *Reforming Moral-Obligation Doctrine*

A close study of *Mills* has implications for the normative aspects of moral-obligation doctrine as well. In absolving Seth Wyman from liability, the Massachusetts courts focused on whether he got

262. In a third leading case, the supposed promisor did not clearly admit that he made the promise; the case was resolved on demurrer. See *Demurrer, Harrington v. Taylor*, No. 8442, Superior Court of Richmond County, North Carolina (1944), para. 5, reprinted in *Record, Harrington v. Taylor*, No. 594, Supreme Court of North Carolina (1945), at 8 (“[I]t appears from the complaint that whatever promise the defendant made to the plaintiff as to payment was for a past consideration, is not enforceable in law and is *nudum pactum*.”).

consideration for his promise, not on whether he intended to be legally bound, whether he was liable in restitution, or indeed whether he was morally bound to pay Mills. This raises three normative questions. First, should morality be the controlling principle in these cases? Second, should the law instead stress their restitutionary component? Finally, should the moral obligor's promise be the primary basis for liability, and if so should it be subject to a requirement of consideration?

The first question is the easiest. It is doubtful that moral obligation alone can be the touchstone of enforceability. Holmes and Parker are right: there will always be a distinction between moral and legal obligations. In part, this is so because there are some relatively minor moral duties that are too costly to enforce. Few people would want to enforce a moral duty to keep a dinner date, for example; the social and monetary costs of enforcement far outweigh any benefit to the disappointed diner.²⁶³

But the distinction between the legal and the moral also reflects concern that a "rule" of moral obligation would make everyone liable for everything. There are far too many moral duties for the law to enforce. In most moral systems, moral obligations spring from all sorts of human statements and actions, not just from promises. Ronald Dworkin gives some examples of statements that are not promises: statements of intention, expressions of preference, explanations of conduct, or even legislative history.²⁶⁴ These statements might create lesser moral duties than promises do, since they might induce reliance or raise expectations on the part of others, even if they do not involve a clear personal commitment to do something.²⁶⁵ However, they still create some lesser degree of moral duty. Wyman's letter may fall into this "intermediate"²⁶⁶ category of moral responsibility. Although it does not explicitly promise to pay Mills's past expenses, it does promise to pay future expenses, and, more importantly, it suggests an explanation for this promise: Wyman's concern for his son's well-being. Wyman asks Mills to "take all possible care" of Levi and to

263. See, e.g., FARNSWORTH & YOUNG, *supra* note 6, at 150 n.a (citing *Horsley v. Chesselet*, Small Claims Action No. 346278, Municipal Court, San Francisco (1978) (denying claim for \$32 expended for gasoline and theater tickets for a date, on grounds that "the promise to engage in a social relationship for one evening" was unenforceable)).

264. See RONALD DWORKIN, *LAW'S EMPIRE* 344-45 (1986).

265. See *id.* ("[M]y earlier explanatory statement is part of my moral record, something for which I must take responsibility because I made the statement knowing others would probably rely on it and encouraging them to do so.").

266. See *id.* at 344.

“write again immediately” to report on Levi’s health.²⁶⁷ These statements may not amount to promises, but they might justify Mills hope for payment for the services already rendered.

Actions, too, might create moral duties. Even relationships can create moral duties. If Seth Wyman’s words did not create such a moral duty, Seth may still have been morally responsible by virtue of his relationship to his son. Quite simply, it is impractical to enforce all moral duties; there are too many of them.

Conversely, there are some nonmoral duties that should be enforced because enforcement is efficient—that is, because the benefits of enforcement outweigh the costs. It is hard to imagine a moral system that demands that people drive on the right side of the road, or that acceptance be effective on dispatch, but legal systems routinely enforce such obligations. As H.L.A. Hart said, “[t]he rules of international law, like those of municipal law, are often morally quite indifferent.”²⁶⁸ This is not to say that rules of law are always or usually morally indifferent. There must be some overlap between law and morality, even if that overlap is more complete in some areas than others. But some statements and actions should give rise to legal liability even if they do not involve moral obligations. Some division between law and morality is inevitable.

If morality cannot be the sole basis for determining liability, should it play any role in “moral” obligation doctrine? Morality has been imported into the Second *Restatement* but ironically serves only to limit recovery of the deserving plaintiff. Section 86 of the *Restatement* says a promise based on “past consideration” is enforceable *unless* the plaintiff was not “unjustly” enriched.²⁶⁹ Thus, a defendant’s promise, a statement that usually creates a moral obligation, is made nonbinding if the plaintiff is not morally deserving. As Thel and Yorio point out, this approach tends to be underinclusive.²⁷⁰ Judges, trained to think rationally rather than emotionally, resist imposing their (or the plaintiff’s) morals on the defendant.

267. Record, *Mills*, *supra* note 22 (Letter of Seth Wyman to Daniel Mills).

268. H.L.A. HART, *THE CONCEPT OF LAW* 223 (1961). Hart made this point to demonstrate that international law is not just a collection of moral precepts, as some critics imply. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 133, 201 (1954) (asserting that international obligations “are enforced by moral sanctions,” not by legal ones).

269. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

270. See Thel & Yorio, *supra* note 237, at 1074-85.

In addition to incorporating a moral component, section 86 incorporates restitution law. This brings us to our second major question: Should restitution be the primary basis for liability in moral obligation cases? At first blush, restitution would seem to be an underinclusive theory of liability. It has traditionally been an unduly stingy source of recovery. It is axiomatic that Daniel Mills had no restitution claim against Seth Wyman; his restitution claim, if any, was against Levi.²⁷¹ Under some moral systems, however, Seth Wyman was “unjustly” enriched by Mills’s services even if he didn’t promise to pay for them, since a good father would have provided the same services for the son regardless of the son’s age. Similarly, McGowin was “unjustly enriched” by Webb, but restitution doctrine traditionally treats Webb’s heroics as gratuitous; if McGowin had not made his promise, Webb might not have recovered.

Still, restitution doctrine could be readily reformed to make it, and thus section 86, more fair and efficient. Take the traditional presumption that nonprofessionals act gratuitously when they help others in an emergency. Joe Webb’s nonprofessional status supposedly distinguishes his case from *Cotnam v. Wisdom*,²⁷² in which a doctor did recover in restitution for unsuccessful efforts to save the life of an injured man in an emergency.²⁷³ This distinction belies common sense. The law should encourage rescue, not ignore it. Why should it matter whether the rescuer is an amateur or an expert? Economic analysis says restitution doctrine is really an effort to recreate the deal the parties *would have made* had they had the opportunity to bargain.²⁷⁴ In an emergency, most people would hire whatever help was available, professional or otherwise, and would probably pay exorbitant prices for it. Yet the restitution plaintiff is denied even the reasonable value of her services.

What’s more, the law does not just ignore efforts to rescue, it punishes negligent rescue. The bad man who ignores the baby drowning in a lake is generally not liable for anything.²⁷⁵ The Good

271. See FARNSWORTH, *supra* note 226, § 2.20, at 106 (“Mills may have had a claim in restitution against the son.”).

272. 104 S.W. 164 (Ark. 1907).

273. See FARNSWORTH & YOUNG, *supra* note 180, at 115.

274. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 97-98 (2d ed. 1977) (arguing that restitution doctrine attempts to replicate the deal the parties would have made had the transaction costs of bargaining not been prohibitive).

275. See, e.g., *Hurley v. Eddingfield*, 59 N.E. 1058, 1058 (Ind. 1901) (declining to hold physician liable for refusing to aid a person suffering from “violent sickness” leading to death).

Samaritan who attempts to rescue the baby will get nothing in restitution if successful, and will get slapped with liability if negligent.²⁷⁶ Gratuitousness simply should not bar recovery for services rendered in good faith by a nonprofessional in an emergency. It should instead be relevant primarily to the measure of damages. The doctor who treats the injured person on the street should recover at a higher rate than a layperson who attempts the same treatment. Of course the law should continue to discourage officious conduct by denying recovery to the intermeddler and by imposing liability on the negligent rescuer. But these disincentives should be offset by some incentive to rescue. Our society suffers more from apathy than altruism.²⁷⁷

In sum, a reformed restitution doctrine might be a plausible basis for recovery in moral obligation cases. Nonetheless, even a reformed restitution doctrine would inject needless uncertainty into these cases. The judicial costs of enforcement of a restitution-based rule will often be considerable. One arguable advantage of promissory liability is that it is easier and cheaper to administer. Restitution-based liability may often depend on detailed and costly fact-finding, whereas promise-based liability may simply require a judge to read the terms of a promise.

This raises the third question: Should a naked promise by the moral obligor be the primary source of legal liability? Usually our law maintains that a gratuitous promise is not binding absent bargained-for consideration or foreseeable reliance. Should the law recognize an exception for gratuitous promises by moral obligors?

The answer is a resounding yes. A promise to fulfill a moral obligation should be binding regardless of whether it is supported by consideration. It should be enough for the plaintiff to prove that the defendant's promise was made with intent to be legally bound. The existence of a past "moral obligation" should be treated as *prima facie* evidence that the moral obligor does intend to be bound. In other words, the moral obligation should establish a rebuttable presumption that the promise was made with intent to be bound. For that matter, even gratuitous promises that do *not* relate to a moral obligation

276. See, e.g., *Farwell v. Keaton*, 240 N.W.2d 217, 219 (Mich. 1976) (holding doctor liable for negligent rescue).

277. At least section 86 frees the plaintiff from one other traditional bar to recovery in restitution: measuring the benefit to the defendant. Section 86 contemplates enforcement of the defendant's promise, which is much simpler than calculating the benefit conferred by the plaintiff.

should be enforceable if there is other evidence of intent to be bound. This evidence might include formalities such as a particular type of writing, a certain set of words, or even legalization by a notary. Again, such evidence should establish a rebuttable presumption of intent to be legally bound. No additional requirement of consideration should be imposed.

Economic analysis furnishes a familiar but compelling justification for enforcing gratuitous promises, whether or not they are related to a pre-existing moral obligation. As Posner says, a naked promise is worth more if it is enforceable.²⁷⁸ The promisee will value it more highly. And the promisor will be able to structure the promise in a financially rational way, like promising a stream of payments into the future.²⁷⁹

One possible objection to this economic justification is that a rule of liability based on intent to be bound would be more costly to administer than the current rule of liability based on consideration. It seems likely, however, that a system of enforcing gratuitous promises would be less costly than the current system. To "opt in" to liability under the current system, the promisor must understand the consideration rule and must refashion her promise, perhaps by extracting nominal consideration from the promisee. McGowin can ask Webb for a peppercorn; Wyman can ask Mills to do something additional for Levi. This rigmarole imposes unnecessary transaction costs on the promisor. Those costs include not only the time and trouble of cobbling together some sham consideration but also the more significant costs of becoming aware of the consideration rule in the first place. This may require hiring an attorney. By contrast, it would be easier and cheaper to "opt out" of a system that enforced gratuitous promises. Any such system would rely on formal device, such as a writing or a seal, to make a promise binding. To avoid liability, one simply would avoid using the formal device. This rule would be more readily understandable than the consideration doctrine, which confounds lay people at least as much as it confounds attorneys.

Indeed, the simplicity of a "formality" rule is one of its greatest attractions. Most Americans probably think that formality, not consideration, is the linchpin of enforceability. A simple rule of form would be easier to understand than the consideration doctrine and thus would make it easier for people to plan and go about their business.

278. See Posner, *supra* note 258, at 418.

279. See *id.*

Such a rule could apply to all promises—to unilateral gratuitous promises as well as to bilateral contracts.

In other areas, commercial law has already responded to the reality of the workaday world. Contracts are interpreted in light of trade usage, course of performance, and course of dealing.²⁸⁰ This trend extends to the consideration doctrine as well. In sales contracts, options are binding without consideration, as are modifications.²⁸¹ And, of course, a few states have adopted statutes to enforce certain promises—usually written promises—given to satisfy past obligations.²⁸² The international law of business transactions has also dispensed with any requirement of consideration.²⁸³ In the civil-law world, the consideration doctrine is largely unknown.²⁸⁴ Other analogous bodies of law also reject it. The public international law of treaties, for example, imposes no consideration requirement.²⁸⁵ Indeed, public international law apparently recognizes that unilateral

280. See RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981); U.C.C. §§ 2-208, 1-205.

281. See, e.g., U.C.C. § 2-209(1) (“An agreement modifying a contract within this Article needs no consideration to be binding.”); U.C.C. § 2-205 (providing for option contracts without consideration).

282. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 1989) (providing for enforcement of a written, signed promise “if the consideration is expressed in the writing” and “would be a valid consideration but for the time when it was given or performed”); CAL. CIV. CODE § 1606 (Deering 1994) (stating that “a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise”). A few other western states and Guam have adopted statutes based on the California statute. See, e.g., 18 GUAM CODE ANN. § 85502; MONT. CODE ANN. § 28-2-802 (1995); N.D. CENT. CODE § 9-05-02 (1987); OKLA. STAT. ANN. tit. 15, § 107 (West 1983); S.D. CODIFIED LAWS § 53-6-2 (Michie 1990); see also GA. CODE ANN. § 13-3-41 (1982) (providing for good consideration where there is a “strong moral obligation”); LA. CIV. CODE ANN. art. 1760 (West 1987) (same).

According to Henderson, the California statute has been narrowly interpreted so that it now constitutes “nothing more than an expression of existing common law.” Henderson, *supra* note 244, at 1115, 1129-33.

283. See U.N. Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, arts. 14-24 (1980) (formation rules) (omitting any requirement of consideration); UNIDROIT Principles, Art. 1-5 (similar).

284. The civilian doctrine of *causa* bears only a passing resemblance to consideration doctrine. See generally Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959) (analyzing the techniques used in French and German law to resolve problems handled by the doctrine of consideration in common law).

285. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, art. 2(1)(a) (defining a treaty without reference to consideration as “an international agreement concluded between States in written form and governed by international law”).

gratuitous promises can be binding if there is evidence of a good-faith intent to be bound.²⁸⁶

Replacing consideration with some formal requirement, such as a writing, would better achieve the goals of the consideration doctrine. Such a formality can impose caution on the promisor, provide evidence of the transaction, and distinguish gift promises from business transactions. As Professor Fuller put it, "concern for formal guaranties justifiably diminishes where the promise is backed by a moral obligation to do the thing promised."²⁸⁷ The trend in the law is unmistakable: consideration doctrine is on the way out, and not a moment too soon. Consideration doctrine, if indeed it was ever useful, has outlived its utility. The next century will see the end of consideration as we know it.

V. CONCLUSION

How odd that Holmes thought that the confusion between law and morality was most pronounced in the law of contract.²⁸⁸ The opposite seems true. Contract law seems relatively amoral, as law goes. Punitive damages are generally not awarded for breach, not even for "willful" or deliberate breach.²⁸⁹ One-sided transactions are

286. See *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 267-70 (Dec. 20) (asserting that France was legally bound by its unilateral promises to halt nuclear testing, even though no other state had relied on those promises).

The literature abounds with grim warnings not to draw analogies between the law of treaties and the law of contract. See, e.g., EVANGELOS RAFTOPOULOS, *THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES* 207-54 (1990) (arguing that legislation, not contract, is a more useful analog to treaty law); SHABTAI ROSENNE, *THE MODERN LAW OF TREATIES* 128 (1989) (calling analogy "simply false"); cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (1987) (advising "caution"). I have gleefully disregarded these warnings. See generally Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781 (1994) (comparing the rise of international promissory estoppel with its contract-law counterpart).

287. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 821-22 (1941).

288. See Holmes, *supra* note 1, at 461-62.

289. See, e.g., *White v. Benkowski*, 155 N.W.2d 74, 77 (Wis. 1967).

Of course, there is some authority that a "willful" breach might affect a choice between competing compensatory measures. Compare *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, J.) (suggesting that lesser "diminution-of-value" damages were appropriate because the breach was neither "fraudulent nor willful"), and *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962) (awarding only diminution-of-value damages for deliberate breach), with *Groves v. John Wunder Co.*, 286 N.W. 235, 238 (Minn. 1939) (awarding "cost-of-repair" damages in arguably analogous circumstances).

enforced so long as there is some minimal consideration.²⁹⁰ Gratuitous promises are not enforceable, no matter how earnestly made.²⁹¹ And, as *Mills* decided, moral obligation is generally not consideration for a promise.²⁹² These things were as true in Holmes's day as today. The examples Holmes gives of excessive morality—the law of conditions, the law of interpretation—seem more devoid of moral content than most areas of criminal law, constitutional law, and even tort law. In contract law, the amoral approach of *Mills* seems more the rule than the exception.

This Article has proposed a reform that would put morality back into moral-obligation doctrine. I have argued that a moral obligor should be legally as well as morally bound to perform a promise to fulfill a pre-existing moral obligation; regardless of whether the promise is supported by consideration. For that matter, I have argued that a gratuitous promise should always be enforceable if the promisor intended to be legally bound, regardless of whether there is consideration for the promise. The Article has argued for these reforms principally on economic grounds: the new rules would be economically efficient because they would make promises more valuable at relatively little social cost. This increase in allocational efficiency is itself sufficient justification for the proposed change. But these reforms would have the added virtue of linking legal liability more closely to moral responsibility. The law cannot codify every tenet of morality. Some moral matters must indeed be left to the “tribunal of conscience,” just as some nonmoral questions must be adjudicated in the tribunal of the state. But moral-obligation law is one area of the law in which the supposed tension between economics and morality is a false dichotomy. The proposed reform of the *Mills* doctrine would be both efficient and moral.

Still, even if the rule of *Mills v. Wyman* is eventually discarded, the case itself will still deserve a prominent place in casebooks on contracts. The case will always have historical significance as the first major American doctrinal statement on the question. The opinion provides students with a colorful example of forceful legal writing. Perhaps most importantly, it provides contracts teachers with a simple but compelling hypothetical for discussion in class. It puts an abstract

290. See RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (1981) (dismissing any requirement of “equivalence in the values exchanged”).

291. See *id.* at § 17(1) (stating that “the formation of a contract requires a bargain”).

292. See generally FARNSWORTH, *supra* note 226, § 2.8, at 54-61.

question on the scope of promissory liability into an accessible factual context.

This last point will not sit well with critics of the case method. Some contend, not implausibly, that the case method is more effective at teaching the facts than teaching the holdings of cases. True enough, many lawyers remember great common-law cases more for their facts than their reasoning. Ask a lawyer about the holding of *Mills v. Wyman* and you probably get a blank look. Ask if the lawyer remembers the case about father promising to pay the Good Samaritan for caring for the sick son, and you may get a smile of recognition. A former public defender once told me that her clients sometimes asserted they were lawyers, and she would test them by asking if they recognized the facts—not the holdings—of great cases. *Mills v. Wyman* is such a case. Everyone remembers the facts; no one remembers the holding.

For *Mills*, perhaps that is the way it should be. The rule in the case is eminently forgettable: it is as incoherent as it is inefficient. It will be a dead letter in another hundred years. But the facts of the case are memorable. Indeed, the story told by Justice Parker—Seth's hasty promise in a fleeting moment of gratitude, the death of Levi Wyman, Seth's willingness to stand up in court and be counted as a scoundrel—is more compelling than the story told by the surviving documents, in which Seth makes no promise, Levi does not die, and Seth deserves to win. For the law teacher, the reported facts are more convenient than the historical truth because they more poignantly illustrate the tension between law and morality. For the law student, the reported facts stand as a morality play for lawyers and as a reminder of the limits of the profession. The mythical facts of *Mills* are an important part of our legal culture. They lurk somewhere in our collective interior forum, in the tribunal of conscience.