

3-1-2005

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Julie M. Philippe

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Recommended Citation

Julie M. Philippe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 *Tulsa J. Comp. & Int'l L.* 357 (2005).

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FRENCH AND AMERICAN APPROACHES TO CONTRACT FORMATION AND ENFORCEABILITY: A COMPARATIVE PERSPECTIVE

By Julie M. Philippe*

“Ignoring the always present role of the social matrix in contract is akin to ignoring the role of DNA in the interaction of parts of a living body.”

- Ian Macneil, *The Many Futures of Contracts*¹

I. INTRODUCTION

This study focuses on certain comparisons of American and French contract law, particularly questions of formation and enforceability. To that end, this study is divided into two parts: Part I will set out the common features in formation of contracts in U.S. and French law. Part II will focus on characteristic differences concerning enforcement of contracts with special reference to the doctrine of consideration under U.S. law. Differences and similarities between French and American approaches to the issues covered in parts I and II will be highlighted as appropriate.

It is important to remember that there are problems inherent in any comparative study of two legal systems. First, the fundamental differences within the general structure of each legal system affect the approach to and the conceptualization of the subject at hand. The legal systems of the western world are, for purposes of comparison, frequently divided into two groups, as referring to two traditions: the common law tradition (to which the United States belongs)

* J.D., University of Caen (France), L.L.M., University of Orleans (France), L.L.M., Paris-Sorbonne University (France), L.L.M., St. Louis University (U.S.A., MO) Ph.D. (Law) Candidate, Assistant-Professor, University of Orleans (France). The author would like to thank the Tulsa Journal of Comparative and International Law staff for the great work they undertook in working on the final editing of this paper.

1. Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 710 (1974).

and the civil law tradition (to which France belongs). The word "tradition" should not evoke a static past; rather, it denotes a dynamic and ongoing system.

Although there are important differences between these traditions, these points of difference should not be allowed to obscure the extent to which both systems, as products of western civilization, share many values. Similarities in socio-economic conditions may in the end bring the two legal systems closer to each other in functional term, but through separate routes. This is particularly true in the realm of contract law. Despite differences in the process of formation and in the enforceability of a contract, comparable economic needs in the United States and in France have led to many similarities.

"Civil law did not become a constituent element of English common law acknowledged and enforced by the courts, but it exercised a potent influence on the formation of legal doctrines during the critical twelfth and thirteenth centuries, when the foundations of common law were laid."² The history of law is a part of the general history of the economic, political, and intellectual development of Western Europe. From the end of the eleventh to the beginning of the fourteenth century, two differences appeared in the general legal situation of the Continent and in England, both of which were to be of crucial importance for the later history of civil and common law. On the Continent, revived Roman law based on the study of the *Corpus Juris Civilis*, had a much greater impact than in England.³ During this same period, the English kings, in striking contrast to their French counterparts, created an effective, centralized system of courts for the administration of royal law. In the twelfth and thirteenth centuries the development of the law of contracts on the Continent and in England began to diverge as different forces came into play in molding the common and the civil laws.⁴ In England, the common law of contracts was developed pragmatically and judicially.

At first sight, the most striking difference between civil law and common law systems is that the law is primarily to be found in codes and statutes in the civil law system, while it is to be found primarily in the decisions of the Courts in the common-law system. However, as far as contract law is concerned, this assertion must be attenuated. While principles of French contract law are codified in the French Civil Code of 1804,⁵ in the United States the First Restatement of Contracts was published in 1932.⁶ It constitutes an attempt by the American Law Institute to compile a comprehensive statement of the

2. PAUL VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 97 (2d ed. Oxford Univ. Press 1929) (1909).

3. *See generally id.* at 71-96.

4. *See generally id.* at 97-103.

5. CODE CIVIL arts. 1101-1369 (Fr.) [hereinafter C. CIV.].

6. RESTATEMENT OF CONTRACTS (1932).

principles of contract law, but it is not a statute. The second edition, begun in 1960, reflects the evolution of contract law and changes due to the adoption of the Uniform Commercial Code concerning the sale of goods. The Restatement (Second) of the Law of Contracts is authoritative because judges and lawyers refer to it for guidance when a point of law is not settled in a particular jurisdiction.

While some differences can be explained by the fundamental distinction between common law and civil law, federalism is also an important factor to take into account. France is a member of the European Union, and the legal nature of the European Union is subject to much debate. Winston Churchill said, "We must build a kind of United States of Europe."⁷ Maybe this view could be used in a legal approach, since some people consider the European Union as a kind of federation. Others prefer to view the European Union as an international organization.⁸

The future route to European integration remains an open and difficult question. It must be remembered that many decisions of European Institutions have legal force, i.e. they are hard law. This law is not only valid at the European level, but increasingly at the national level as well, creating an intertwining of the legal orders. The European legal order is one common to all of the Member States and is to be applied uniformly by the national courts. The decisions of the European Court are inspired by common traditions of the Member States, which include the United Kingdom, a nation of common law tradition. Therefore, even within the European Union, civil law and common law inspiration may be mixed. In contract law, the Commission on European Contract Law was founded by the Danish law professor Ole Lando at the end of the 1970s.

The Commission included legal scholars from all European Union Members; they undertook the task of drafting a set of general rules of European contract law. The result of this process was the *Principles of European Contract Law*.⁹ In addition to the Principles, a network of scholars under the chairmanship of Italian law professor Guiseppe Gandolfi, are drafting a proposed European contract code.¹⁰ Moreover, one should notice that some countries

7. WINSTON S. CHURCHILL, *A Speech at Zurich University*, in *THE SINEWS OF PEACE: POST-WAR SPEECHES 197, 199* (Randolph S. Churchill ed., Houghton Mifflin Company Boston 1949) (1948).

8. Herbert Burkert, *About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN*, 36 *LOY. L.A. L. REV.* 1185, 1187 (2003).

9. See generally *COMM'N OF EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II* (Ole Lando and Hugh Beale, eds., 2001) [hereinafter PECL].

10. See generally Ana M. López-Rodríguez, *Towards a European Civil Code Without a Common European Legal Culture? The Link Between Law, Language and Culture*, 29 *BROOK. J. INT'L L.* 1195 (2004).

would approach the same situation with entirely unfamiliar tools, but arrive nevertheless at almost the same result. The same can be said concerning U.S. contract law. In the United States there is not a uniform contract law. In most States the law follows a model code, while in others it deviates from that code considerably.

In this work, I will limit my discussion to French contract law rather than European contract law since this is an aspect of the European unification process that has not been completed. Comparing the French and American legal systems is also complicated by differences in linguistic representation and conceptual treatment. The French and American ways of analyzing and framing a legal concept are significantly different. The approach adopted in this work is to adhere to the original texts as much as possible but at the same time to explain the implications of the significance beyond the literal representation.

The overall organization of this work follows the common patterns of both U.S. and French contract law. Accordingly, the main objective of this work is to explain the salient features of each legal system concerning the formation and the enforceability of a contract as well as a theoretical and functional comparison between them. A recurrent question in the United States as well as in France is "which promises should the law enforce?" One of the purposes of contract law in both countries is to draw a line between enforceable and unenforceable promises.

A contract is a relationship, a link between two people: a promisor and a promisee. The relational theory of contract law is attributed to Professor Ian Macneil, who focused on the primal roots of the concept of exchange and emphasized the relational character of contracts.¹¹ Some relations involving promisors and promisees are governed by culture and are enforced by social means: people feel the importance of respecting a promise given. However, one should admit that little attention has been paid to the relation between contract law and morality. According to Stanley Fish, "[m]orality is something to which the law wishes to be related, but not too closely."¹² In recent years there has been more concern with the relationship between contract law and economics.

In France, according to the classic doctrine, the "honor-only" deal cannot produce legal effects. Ripert wrote that these deals concern only the duty of conscience which the judge cannot enforce so long as he has any soul.¹³ In the past, these "honor-only" agreements seemed to be confined to family or friendly relations.¹⁴ However, nowadays, a lot of "honor-only" agreements exist

11. Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

12. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 141 (1994).

13. GEORGES RIPERT, LA REGLE MORALE DANS LES OBLIGATIONS CIVILES, 144 (4th ed. 1949).

14. See generally Etienne Ernest Hippolyte Perreau, *Courtoisie, Complaisance et Usages, Non Obligatoires Devant la Jurisprudence*, 13 RTD. CIV. 481 (1914).

especially in commerce, corporate, and international relations. Thus, there are some situations in which, without binding themselves legally, the parties still intend to bind themselves, and each party expects that the other will carry out the obligation to which they have consented.

Contracts are sanctioned by the means of the law; a contract is a legally binding agreement. The French Civil Code emphasizes this idea in ascribing to a contract "the force of law."¹⁵ Article 1101 of the French Civil Code provides that "[a] contract is an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something."¹⁶ The Restatement Second of Contracts, provides a widely recognized definition of contract: "[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹⁷ The Uniform Commercial Code, which applies to the sale of goods, broadens the meaning of contracts beyond the agreement¹⁸ of the parties to include the "total legal obligation,"¹⁹ which encompasses the bargain of the parties in fact as well as their course of dealings,²⁰ trade usage,²¹ and course of performance.²²

French contract law falls within the wider purview of *obligations*. The term *obligation* derives from the latin *ob-ligare* which means to unite or to tie together. In Roman law, obligations arose *ex contractu*, *ex delicto*, *quasi ex contractu* or *quasi ex delicto*. French law has adopted, with certain modifications, this classification. We will refer to contractual obligations. The range of contract law is extremely wide in the United States as well as in France. While under the French system there is a great number of contractual types derived from the heritage of Roman law; U.S. contract law has fewer categories.

In France, contracts are subject to statutory classifications. Articles 1102 and 1103 of the French Civil Code distinguish between *bilateral* and *unilateral* contracts.²³ In bilateral contracts, the obligations of contracting parties are reciprocal.²⁴ In unilateral contracts, the obligation undertaken by one party has

15. C. CIV. art. 1134 («*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.*»).

16. C. CIV. art. 1101 («*Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire, ou à ne pas faire quelque chose.* »).

17. RESTATEMENT (SECOND) CONTRACTS § 1 (1981).

18. U.C.C. § 1-201(3) (2004).

19. U.C.C. § 1-201(11) (2004).

20. U.C.C. § 1-205(1) (2004).

21. U.C.C. § 1-205(2) (2004).

22. U.C.C. § 2-208(1) (2004).

23. C. CIV. art. 1102-03.

24. C. CIV. art. 1102.

no corresponding obligation undertaken by the other party.²⁵ It must be noticed that despite similar terminology, American unilateral and bilateral contracts do not have the same meaning. In U.S. contract law, a bilateral contract is one where both parties make a promise and a unilateral contract is one where only one party makes a promise.²⁶ A unilateral contract consists of a promise given for some act to be performed.²⁷

Article 1105 of the French Civil Code defines the *gratuitous* contract as one through which one of the parties procures a purely gratuitous advantage for the other.²⁸ Article 1106 of the French Civil Code defines an *onerous* contract as one which obligates each of the contracting parties to give or to do something.²⁹ It is noteworthy that the American concept of bargain corresponds to only one category of contract in French law: the onerous one.³⁰ Moreover, this last classification has a practical consequence concerning the French doctrine of *cause* and the American doctrine of consideration.

We now take up the first part of this study focusing on the common features of contract between the United States and France.

II. COMMON FEATURES BETWEEN U.S. LAW AND FRENCH LAW CONCERNING THE FORMATION OF CONTRACTS

The complexity of business relations often necessitates long periods of negotiation before the closing of a contract. This pre-contractual period is not neutral, and it must be determined whether some binding obligations have been created, while the freedom to contract should be preserved. (I will not address the question of liability for fault committed during the negotiations). The line between a contractual situation and this pre-contractual period is so thin that some concepts and rules that apply to a contractual situation may also apply to this negotiation period. One of these rules is the duty to negotiate in good faith.³¹

The duty to negotiate in good faith arises in two kinds of cases. The first are cases involving an explicit agreement concerning the conduct of negotiations.³² Parties promise either to negotiate in good faith or promise not to negotiate with others during a designated period of time, e.g. in a lock out agreement. The second are cases in which there is an implicit agreement to

25. C. CIV. art. 1103.

26. E. ALLAN FARNSWORTH, ET AL., *CONTRACTS, CASES AND MATERIALS* 67 (6th ed. 2001).

27. *Id.* at 32.

28. C. CIV. art. 1105.

29. C. CIV. art. 1106.

30. See FARNSWORTH, *supra* note 25, at 32.

31. See *generally* Teachers Ins. & Annuity Assoc. of Am. v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987).

32. See *Jamsports v. Paradama*, 336 F. Supp. 2d 824, 848 (N.D. Ill. 2004).

negotiate in good faith.³³ In *Teachers Insurance & Annuity Assoc. of America v. Tribune Co.*, Judge Pierre Leval developed an extensive analysis of the duty to negotiate in good faith in the context of such an implicit agreement.³⁴ To decide the case, Judge Leval created a tripartite classification of preliminary agreements.³⁵ The first category consists of preliminary agreements that create no binding legal obligation.³⁶ The second category consists of agreements that are “preliminary only in form—only in the sense that the parties desire a more elaborate formalization of the agreement.”³⁷ Judge Leval called these agreements preliminary contracts.³⁸ A preliminary contract “occurs when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation.”³⁹ Execution of a later document is not necessary, but merely desirable.⁴⁰ The final agreement is simply a formalization of an agreement that has already been reached.⁴¹ The third category of preliminary agreements are those that express a “mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated.”⁴² The parties, Judge Leval said, “can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement.”⁴³ Judge Leval called such agreements binding preliminary commitments.⁴⁴

One of the functions of contract law is to establish procedures for the formation of contracts. Some rigid, formal procedures exist. However, under contemporary U.S. and French contract law, most contracts (at least in quantitative terms) are binding even if they are made without using any special form, i.e., orally or by way of conduct. One can observe an evolution common to both countries of civil and common law tradition: the principle of freedom of form is now widespread.

For the EU, contracts that are governed by the Principles of European Contract Law are not subject to any form requirement to determine their

33. See *Teachers Ins. & Annuity Assoc. of Am.*, 670 F. Supp. at 498-99.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 498.

38. *Id.*

39. See *Teachers Ins. & Annuity Assoc. of Am.*, 670 F. Supp. at 498.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

validity.⁴⁵ Even if the Uniform Commercial Code (U.C.C.) requires written evidence in order to prove the existence of contracts of more than 500 dollars, it means only that a writing is needed not for its formation, but rather, for its enforceability.⁴⁶ The same idea applies in France, where Article 1341 of the French Civil Code requires a written form for contract as a matter of proof for contracts of more than 800 euros.⁴⁷

Pursuant to Article 1108 of the French Civil Code, four conditions are essential for the validity of a contract: the *consent* of the party who binds himself, his *capacity* to contract, a certain *object* which forms the subject-matter of the contract, and a lawful *cause*.⁴⁸ This thesis will compare two of these conditions from the viewpoint of U.S. and French contract law: *consent* and *cause*. It should be noted that requisites of contract formation under U.S. law cannot be easily spelled out in the same way.

During the nineteenth century, contract law in both the United States and France was governed by the subjective "will theory." Under this theory, the creation of a contract requires a "meeting of the minds" of the contracting parties. Therefore, whatever the outward appearance of the conduct of the parties, no contract is made if the parties are not in agreement. At the end of the nineteenth century and during the twentieth century, a shift occurred from the subjective theory to the objective theory. Under the objective theory, whenever a reasonable person in the position of promisee could have understood the conduct of the promisor to have reflected the intention to create a contract, the promisor will be held responsible to that effect, even if factually, the promisor did not actually intend to enter into a contract.

In *Hotchkiss v. National City Bank of New York*, the Court decided that "[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."⁴⁹ The contractual process can be reduced to two manifestations of wills: the offer and the acceptance. Attention to these events is particularly useful in order to determine the timing of the conclusion of the contract. As will be discussed below, offer and acceptance also create the outward appearance of an agreement, and despite what was noted above, study

45. PECL, *supra* note 8, at 137, art. 2:101(2) ("A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.").

46. U.C.C. § 2-201 (2004).

47. C. CIV. art. 1341; *see also* Decree No. 2001- 476 of May 30, 2001, J.O., June 3, 2001, p. 8886.

48. C. CIV. art. 1108.

49. 200 F. 287, 293 (D.C.N.Y. 1911).

of case law shows that reference to the intent of parties to be legally bound is necessary.⁵⁰

A. *Function of Offer and Acceptance in the Formation of Contracts*

There is no specific article of the French Civil Code that requires the existence of an offer and an acceptance. What is called the doctrine of "offer and acceptance" was shaped in the eighteenth century at the hand of Pothier. At the turn of the nineteenth century, English law of contract was influenced by Pothier's *Traité des obligations*,⁵¹ which was translated by Evans into English as *Treatise on the Law of Obligations* and published in England in 1806.⁵²

Planiol and Ripert address the chronological order of offer and acceptance as the consecutive expression of the wills of the parties: "[n]ecessarily it is one of the parties who . . . manifests his will first; one person proposes to deal on determined lines; this is the offer or sollicitation. The other agrees to the proposition which is made to him, he consents to it: this is the acceptance."⁵³ While this sequential approach likely oversimplifies a real business transaction, it does permit one to follow the step-by-step process of contract formation. The same reasoning is used in U.S. contract law to analyze a situation in which the question is either the existence of a contract or the moment at which the contract came into existence.

It is not always easy to discern offer and acceptance. This is especially true in cases of protracted and complex contract negotiations in which agreements are reached by degrees. Sometimes expressions of consent are simultaneous, as in a tacit renewal of a lease.

Under French law, future parties to a contract can be alternatively offeror and offeree except in two contracts: the *mandat* (agency) and the *donation* (gift). In these two contracts, the agent⁵⁴ and the beneficiary of the gift⁵⁵ are necessarily the offerees. Moreover, French law protecting consumers gives to the professional the role of the offeror and to the consumer the role of the offeree. For example, in a contract of loan between a professional and a consumer, the offeror is the professional-lender and the offeree is the consumer-borrower. In this example, the person who is the qualified "offeror" (professional) is generally not the one who initiates the contract. But he is

50. *Teachers Ins. & Annuity Assoc. of Am.*, 670 F. Supp. at 497.

51. See generally ROBERT JOSEPH POTHIER, *TRAITÉ DES OBLIGATIONS* (1727).

52. ROBERT JOSEPH POTHIER, *TRAITÉ DES OBLIGATIONS* [A TREATISE ON THE LAW OF OBLIGATIONS] (William David Evans trans., Strahan 1806) (1727).

53. MARCEL PLANIOL & GEORGE RIPERT, *CIVIL LAW TREATISE* § 970 (La. State L. Inst. trans., St. Paul West Pub. Co. 1959).

54. C. CIV. art. 1984; see also C. CIV. art. 1985.

55. C. CIV. art. 894; see also C. CIV. art. 932.

generally the one who has the power to determine the terms of the contract, which can explain why he is named "offeror."⁵⁶

1. The Notion of Offer

The first requirement for the formation of a contract is an offer, which is defined as

[a] promise to do or refrain from doing some specified thing in the future; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.⁵⁷

The offer creates a power for the offeree since the offer permits the offeree to create the contract if he agrees. But the offeror confers this power because in return he will obtain the counterpart of the offer. In bilateral contracts, the promise of the counterpart suffices to conclude the contract, while in unilateral contracts, the actual counterpart is required.

In general, no formalities are required for an offer.⁵⁸ Obviously, an offer should be sufficiently manifested to have legal effect. According to Carbonnier an express manifestation of will is to be understood by "any action done for the purpose of bringing the will to the knowledge of another."⁵⁹ The offer can be oral, written, or can be inferred from other conduct. In this last situation, the conduct has legal consequences if it would lead a reasonable person in the position of the offeree to believe that a power to create a contract is conferred upon him. Many means of expression may be used for the formation of a contract. In France, there is no statutory classification of the means of expression as there is a classification of contracts under U.S. law. Nevertheless, there is a common doctrinal classification between "express" and "tacit" expression. Declaration is "express" when the means convey in themselves, without regard to other circumstances, the existence of willingness to be bound. When we have to look to the circumstances, and from that context, see that the behavior of a person necessarily implies the existence of a contractual intention, then the manifestation is "tacit." For example, a display of items in shop windows or a taxi waiting at a cab-station are held to be tacit offers. American law may consider the same situations not as an offer, but rather as an "invitation

56. See generally Georges Rouhette, *Droit de la Consommation et Théorie Général du Contrat*, in *ÉTUDES OFFERTES A RENE RODIERE* NO. 14, 247 (Daloz 1981).

57. BLACK'S LAW DICTIONARY 1111 (7th ed. 1999).

58. There are some exceptions to the formalities imposed by the Statute of Frauds. The same can be said in France concerning offers to enter into certain types of contracts, e.g., offers relating to certain kinds of loans.

59. 4 JEAN CARBONNIER, *DROIT CIVIL* 82 (Presses Universitaires de France, 22d ed. 2000) («*toute action accomplie afin de porter la volonté à la connaissance d'autrui.*»).

to make an offer.” Proposals made to the public through advertisement are not generally held to be an offer. The justification is that if a seller were sold out of an item for which people made a request, the customers would have a right of action against the seller for not performing his contract.⁶⁰ There are some exceptions to the general rule that an advertisement is not an offer. In *Lefkowitz v. Great Minneapolis Surplus Store*,⁶¹ the Court said “[w]hether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances.”⁶² In this case, the advertisement contained the sentence: “First Come First served.”⁶³ This constitutes identification as well as a limitation of the person who can accept the offer, which ultimately contributes to the definiteness of the offer. The Court concluded that an offer existed, because the advertisement “was clear, definite, and explicit, and left nothing open for negotiation.”⁶⁴

In French contract law, the same consequences are attached whenever the offer is addressed to a definite person or to the public.⁶⁵ The contract is formed with the first person that accepts the offer. Whatever the form of the offer, it must be sufficiently definite to be accepted without more. The requirement of definiteness permits us to determine if we are in the presence of an offer and to distinguish an offer from a mere intent to open negotiations. A case by case approach prevails to determine the existence of an offer. Williston suggests that “[t]he only general test which can be submitted as a guide is the inquiry whether the facts show that some performance was promised in positive terms in return for something requested.”⁶⁶

In French law, the same reasoning applies: a proposal is an offer if it contains all the essential elements of the contract. May an offer, once made in definite terms, at any time be retracted before acceptance is made? At common law, as a logical consequence of the doctrine of consideration, the general rule is that an offer has no binding force. This means that the offeror may withdraw his offer at any time before it is accepted. If the offeror can reasonably notify everyone who might accept the offer, revocation is not effective as to a particular offeree unless it has been communicated to that offeree.⁶⁷ If the offer is too

60. FARNSWORTH, *supra* note 25, at 138.

61. 86 N.W.2d 689 (Minn. 1957).

62. *Id.* at 691.

63. *Id.* at 690.

64. *Id.*

65. Cass. 3e civ., 28 nov.1968, RTD. Civ. 1969, 348, note Cornu («*L'offre faite au public lie le pollicitant à l'égard du premier adoptant dans les mêmes conditions que l'offre faite à personne déterminée.* »).

66. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 27 (3d ed. 1957).

67. *Long v. Chronicle Publ'g Co.*, 228 P. 873 (Cal. 1924).

general (e.g., if it is made to the public by means of an advertisement in a newspaper) an equal publicity of the revocation should be given.⁶⁸

Under French law, the offer has to be maintained during a period of time sufficient to permit the offeree to think about the offer.⁶⁹ This period of time may have been expressly agreed⁷⁰ or it may result from the circumstances. In the first case, if the offeror revokes his offer during the time during which the offer should have been maintained, he commits a fault, and he may be subject to pursuits under tort law. When no time has been expressly agreed, the judge will decide whether or not the offeree had enough time to make up his mind. In a French case,⁷¹ the proprietor of a chalet had, by a letter dated August 11, 1954, let Mr. Chaston know of his intent to sell him the chalet for 2,500,000 francs. On the 15th of August, Mr. Chaston visited the chalet, and sent a telegram of acceptance during the evening. The Court decided that there was a contract because the proprietor could not have revoked his offer on the 14th. Under American law, if the offer fails to specify a period, it lapses after a reasonable time.⁷² Thus, basically the same rationale applies under American and French law.

When the parties bargain by correspondence, the "mailbox rule" applies the same way in France as in the United States. In general, "a revocation of an offer is ineffective if received after an acceptance has been properly dispatched."⁷³ "[D]ispatch of the acceptance is the crucial point at which the contract is made . . ."⁷⁴ Once the offeree has dispatched an acceptance, it is too late for the offeree to change his mind and reject the offer.⁷⁵

In contracts concluded between a professional and a consumer, the French Consumer Code permits a consumer to change his mind up to seven days after the conclusion of the contract, and to terminate it.⁷⁶ Under French law, there is no special provision that applies to merchants comparable to § 2-205 of the

68. *Shuey v. United States*, 92 U.S. 73 (1875).

69. PHILIPPE MALAURIE & LAURENT AYNES, *DROIT CIVIL, LES OBLIGATIONS* 221 (1998).

70. Cass. 3e civ., May 10, 1968, 1968 Bull. Civ. III, No. 209 («*Si une offre de vente peut en principe être rétractée tant qu'elle n'a pas été acceptée, il en est autrement au cas où celui de qui elle émane s'est expressément engagé à ne pas la retirer avant une certaine époque.*») (on file with author).

71. Cass. 1e civ., Dec. 17, 1958, 1958 Bull. Civ. I, No. 579.

72. See *Starkweather v. Gleason*, 109 N.E. 635 (1915) (holding that an offer to buy stock could no longer be accepted five months after it was made, even though it said it could be accepted at any time).

73. See *RESTATEMENT (SECOND) OF CONTRACTS* § 63 cmt. a (1981); see also Cass. Com., Jan. 7, 1981, 1981 Bull. Civ. IV, No. 14.

74. FARNSWORTH, *supra* note 25, at 191.

75. *Id.* at 192.

76. *CODE DE LA CONSOMMATION* arts. 121-25, 311-15 (Fr.).

U.C.C.⁷⁷ concerning the revocation of firm offers. “The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding.”⁷⁸ The lack of such “codification” in French law can be explained by the absence of requirement of consideration and by its corollary that parties are bound by their agreement without any more as long as it does not violate public policy. “The offeror’s death terminates the power of the offeree without notice to him.”⁷⁹ The same solution is sustained by the French courts: the offer is terminated by the death of the offeror and his heir cannot be bound by the offer.⁸⁰ Once an offer has been made and if it is neither terminated nor rejected by the acceptor, a further step is necessary to form the contract: the offer must be accepted.

2. The Condition of Acceptance

The test to know if there has been correspondence between offer and acceptance is objective⁸¹ rather than subjective. Therefore, the most important question is not the state of mind of the parties because there may still be a contract if, objectively, the parties can be said to have agreed. In *Lucy v. Zehmer*,⁸² the Court took into account numerous factors that create the appearance of a contract: the fact that it was under discussion for forty minutes before it was signed;⁸³ Lucy’s objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer;⁸⁴ the discussion of what was to be included in the sale; the provision for the examination of the title; the completeness of the instrument that was executed; the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back.⁸⁵ The Court concluded that all of these facts “furnish persuasive evidence

77. U.C.C. § 2-205 (1979);

An offer by a merchant to buy or sell goods in a signed writing which by its terms give assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Id.

78. U.C.C. § 2-205 (2004) cmt. 2.

79. RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a (1981).

80. Cass. soc., Apr. 14, 1961, RTD. Civ. 1962, 349, note Cornu.

81. *Whittaker v. Campbell*, 1 Q.B. 318, 326 (Eng. D.C. 1984).

82. 84 S.E. 2d 516 (Va. 1954).

83. *Id.* at 518.

84. *Id.* at 519.

85. *Id.* at 520.

that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend."⁸⁶

The contractual expression of intention must be unequivocal. Despite the French proverb⁸⁷ to the effect that silence signifies consent, legally the general principle is the reverse. In the French Civil Code there is no comprehensive formulation on the efficacy of silence, but in 1870 the French *Cour de Cassation* laid down a principle: "the silence of a person to whom an obligation is imputed is not, in default of other circumstances, a proof against him of the alleged obligation."⁸⁸

Some exceptions to this principle exist. Notably, when the offer is formulated in the exclusive interest of the person to whom it is addressed. In this case, the judge can decide that his silence constitutes an acceptance.⁸⁹ Another category of exceptions includes cases where some prior relationship exists between the parties. In this case, failure by the acceptor to protest constitutes evidence of an agreement.⁹⁰ Another exception is related to categories of contracts such as contracts of insurance⁹¹ or tenancy,⁹² which can be renewed at the expiration of the original stipulated period if neither of them objects. These last exceptions are designed to protect the person insured and the tenant.

The general principle is the same in American law: a promise will not be inferred from the offeree's mere inaction.⁹³ However, there are exceptional situations in which silence has been held to be acceptance. There is an American exception very similar to the French exception that applies when prior dealings make it reasonable for the offeree to notify the offeror that the offeree does not intend to accept.⁹⁴

In unilateral contracts, acceptance is given by the performance of the act required. However, an acceptance through performance of the act, but in

86. *Id.*

87. «*Qui ne dit mot consent.*»

88. Cass. Civ., May 25, 1870, D. 1870. I. 258 («*en droit, le silence de celui qu'on prétend obligé ne peut suffire, en l'absence de toute autre circonstance, pour faire preuve contre lui de l'obligation alléguée.*»).

89. Ch. Req., Mar. 29, 1938, D. 1939. I. 5, note Voirin («*Si, en principe, le silence gardé par le destinataire d'une offre ne vaut pas acceptation, il est cependant permis aux juges du fond, dans leur appréciation souveraine des faits et de l'intention des parties, et lorsque l'offre a été faite dans l'intérêt exclusif de celui à qui elle est adressée, de décider que son silence emporte acceptation (remise partielle de dettes de loyers échus.)*»).

90. CA Paris, 25 nov. 1920, D. 1922. II. 41.

91. CODE DES ASSURANCES art. L112-2 (Fr.).

92. C. CIV. art. 1738.

93. *McGlone v. Lacey*, 288 F. Supp. 662 (D.S.D. 1968) (holding that a lawyer's silence was not assent to handle case).

94. *Hobbs v. Massasoit Whip Co.*, 33 N.E. 495 (Mass. 1893).

ignorance of the promise made by the offeror, will not generate a contract.⁹⁵ There are two explanations given for this rule. The first one is based on the idea of *consensus*. Anson said: “[a] person who does an act for which a reward has been offered in ignorance of the offer cannot say either that there was a *consensus* of wills between him and the offeror, or that his act was done in return for the promise offered.”⁹⁶ The second explanation is based on the absence of consideration.

Because of the difference in meaning of the expression “unilateral contract” between French and U.S. law, and the absence of consideration under French Law, the same mechanism cannot apply in French law. Indeed, in French “unilateral contracts,” only the promisor is bound and so no specific performance is required from the beneficiary.

In a U.S. bilateral contract, the acceptance is constituted by a return promise. Three general requirements for an acceptance by a promisee can be identified.⁹⁷ First, there must be an expression of commitment. Second, the commitment must not be conditional on any further act by either party. Third, the commitment must be made on the terms proposed by the offer without the slightest variation. The same reasoning applies in France. The acceptance should be a mere adhesion to the terms of the offer and should not be conditional, otherwise it would constitute a counter-offer. Nevertheless, it is possible to subordinate the acceptance to the realization of a *condition* (e.g., the obtaining of a loan). This condition can be *suspensive* or *résolutoire*. In the first case there is no contract up to the realization of the *condition*; in the second case there is a contract as soon as the agreement but which is subject to voidability if the *condition* comes into reality. In both cases, the *condition* must be constituted by an event which is external to the power of the parties. Otherwise it would constitute an illusory condition.

In order to determine if the offeror must be notified of the acceptance, it is necessary to determine what kind of acceptance is required. According to the Restatement Second of Contracts, “[w]here an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.”⁹⁸ In *Carlill v. Carbolic Smoke Ball Co.*,⁹⁹ the defendants were the manufacturers of a contraption called a Carbolic Smoke Ball, which was claimed to be capable of preventing influenza. By the means of an advertisement, the defendants offered to pay £100 to any person who used the smoke ball and nevertheless caught the

95. *Fitch v. Snedaker*, 38 N.Y. 248 (1868).

96. WILLIAM R. ANSON, *LAW OF CONTRACT* 30 (Anthony G. Guest ed., 26th ed. 1984).

97. See generally FARNSWORTH, *supra* note 25, at ch. 2, §§ 3, 5.

98. RESTATEMENT (SECOND) OF CONTRACTS § 54(1) (1981).

99. 1 Q.B. 256 (Eng. C.A. 1892).

flu. The plaintiff used one smoke ball according to the instructions but caught influenza. She then claimed payment of the £100. The Court of Appeal upheld plaintiff's claim. The Court decided that the fact that she had not notified the Company of her acceptance was not fatal to her claim.¹⁰⁰ It decided that the offeror impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance.¹⁰¹

When the offeror seeks an acceptance by means of a promise, it is essential "either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably."¹⁰² Sometimes a person cannot accept an offer before a certain period of time after receiving it. For example, a person who borrows money in order to invest in real estate cannot accept an offer of credit before ten days after receiving it.¹⁰³ The purpose of this rule is to protect the consent of the person before she becomes legally bound.

B. Consent to Be Legally Bound

Both American and French contract law assign a role to some psychological elements in the formation of a contract. American law requires the intention to create a legal relation.¹⁰⁴ It means that even if a valid offer has been accepted, the parties must have intended to create legally binding relations. French law considers the will (*volonté*) of the parties to be the basic element and refers to their consent (*consentement*) to determine defects therein (*vices du consentement*), which include mistake, duress, and fraud; while in American law, these questions are not generally treated in close connection with assent.

In France, the *consentement* is one of the essential conditions of contract formation.¹⁰⁵ The requirement of intention as an element in the formation of contract has been challenged on the grounds that it is a continental notion alien to the common-law system where the idea of bargain is the basis of contract, and consideration provides a sufficient test for deciding the existence of such a bargain.¹⁰⁶ However, the notion of intention is a more intimate one and, like assent, it has an individual character. In contrast, the notion of bargain necessarily involves two people. Intention is a state of mind like the one that provides assent. Bargain is closer to the notion of mutual assent that appears in the process of offer and acceptance. To pursue the comparison, the French

100. *Id.* at 270.

101. *Id.* at 269.

102. RESTATEMENT (SECOND) OF CONTRACTS §56 (1981).

103. CODE DE LA CONSOMMATION art. L312-10.

104. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §2 (1981).

105. C. CIV. art. 1108.

106. P. S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 161 (Oxford University Press, 4th ed. 1989) (1961).

«*consentement*», which etymologically is derived from the Latin *cum sentire* (“consenting together”), corresponds to “mutual assent.” However, the term “consentement” often refers to the intent of one party, making it closer to the American assent.

We think that the requirement of intention should not be presumed from a binding contract. Indeed, offer and acceptance, as well as the doctrine of consideration, do not alone always provide a satisfactory solution. Therefore, the intention test is always helpful – particularly when the question is to prove that the consent has not been freely given, e.g., due to duress or undue influence, or not given with full awareness, e.g., in an adhesion contract.

1. Duress, Undue Influence and *Violence*

The intention cannot have effect if never expressed. Even when it is exteriorized, this expression must correspond to the person’s intent. The goal of controlling the contractual relations of people in the community requires us to look to factors surrounding such an expression. It is a common vision shared by both American and French law that the choice to consent must be free from external pressures or other adverse influences. In this way, some social and legal parameters will be taken into account to determine the legal effect that should be given to the appearance.¹⁰⁷

The question is to determine what weight should be given to appearance in determining if it reflects the internal reality concerning the state of mind of a contracting party. As far as French law is concerned, Article 1156 of the French Civil Code, dealing with the interpretation of conventions, directs the courts to determine the common intention of the contracting parties rather than stopping at the literal sense of the terms.

It is unrealistic to have a Manichean vision of “objectivity” and “subjectivity” because they are often mixed even relative to a specific topic. There is no realm, which is dominated solely by “objective” or “subjective” theory. It should be noted that as far as the correspondence between the offer and acceptance is concerned, an objective standard is taken into account rather than the actual accord of the minds of the parties. Treitel wrote, “the law is often more concerned with the objective appearance, than with the actual fact, of agreement.”¹⁰⁸ The justification for this is that “in most cases, the appearance corresponds with the fact of agreement.”¹⁰⁹ But Jackson suggests “[i]t is somewhat clumsy to start with propositions involving will and intent, and then

107. C. CIV. art. 1156 («On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s’arrêter au sens littéral des termes.»).

108. G. H. TREITEL, *THE LAW OF CONTRACT* 1 (Steven & Sons, 7th ed. 1961) (1987).

109. *Id.*

explain that 'the law imputes to a person an intention corresponding to the reasonable meaning of his words and actions.'" ¹¹⁰

We can note that both systems apply the test of "reasonableness" and give a prominent role to the interpretation of appearance. The appearance is sometimes pierced in order to reveal the reality of the process of formation for a given contract. The law wants to ensure that the entrance into a contract has been free and that one party has not been coerced by the other. The doctrines of duress (developed in common-law) and undue influence (which is a creation of equity) are concerned with pre-contractual relations, which is a crucial period in contract formation since it determines the willingness to enter into the contract. Even if these doctrines can appear *prima facie* equitable, their justification is not without philosophical and social questions. Indeed, if we take Aristotle's side, people are always able to make free choices. If we transpose this idea in contract law, it means that people always have the choice to refuse to contract, even if it would be difficult to avoid. Even if a person is not totally free, she can always retain at least a slight degree of freedom. Therefore, the problem with duress is to understand why a party who claims that he entered into a contract under coercion did in fact decide to contract. In that sense, duress does not involve an absence of consent, in which the contracting party did not know what he was doing, but rather an absence of his freedom of choice.

Most of the time contracts are made under a kind of pressure. The range of possible pressures extends from threats of violence to insidious social pressure. Nevertheless, the law has to deal with those difficulties and distinguish between legitimate and illegitimate pressures. In the United States, duress was first recognized in the form of physical duress to the person, then in relation to property, and finally to economic interests. The courts have elaborated a hierarchy of interests that, in their eyes, deserve protection: physical integrity, protection of property, and commercial interests. This list should not be static since the courts should follow the needs of society. This raises the question of the role of courts and the legitimacy of the justifications of their decisions. Indeed, as far as duress to persons was concerned, there was little discussion whether or not such pressure should be tolerated. The solution seemed obvious, although one can always argue that a person threatened by a gun to sign a contract still has the choice to refuse. However, the legitimacy of such a doctrine can appear more ambiguous as far as property and economic interests are concerned.

The same question of legitimacy can be raised as far as the doctrine of undue influence is concerned. It involves the exercise of influence by one party over the other. This influence must be "undue." Thus the question is what kind

110. R. M. Jackson, *The Scope of the Term 'Contract'*, 53 LAW Q. REV. 525, 535 (1937) (quoting S. MARTIN LEAKE, A DIGEST OF PRINCIPLES OF THE LAW OF CONTRACTS 2 (3d ed. 1892)).

of influence should be considered “undue” or unacceptable? Negotiations preceding the conclusion of a contract involve necessarily some influences from both parties; exercise of influence is inherent to bargaining positions. This explains why Courts are sensitive to the relative positions of the parties. Some people are better equipped than others to exercise free choice. It can be due to a more favorable bargaining position, professional conditions, developed skills, better knowledge or easier access to legal advice. However, duress can also exist when the two parties are apparently in very similar positions such as in commercial dealings between businesses. In *Austin Instrument, Inc. v. Loral Corporation*, the Court established a test for economic duress:

[a] contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will. The existence of economic duress or business compulsion is demonstrated by proof that ‘immediate possession of needful goods is threatened’ However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress.¹¹¹

In *Selmer Co. v. Blakeslee-Midwest Co.*, the Court decided that “[t]he fundamental issue in a duress case is . . . whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a ‘threat.’ . . . If contractual protections are illusory, people will be reluctant to make contracts.”¹¹²

The purpose of the doctrines of duress and undue influence is to prevent one party from interfering with the other party’s freedom to form an independent judgment about the contract. The same can be said concerning the French *violen*ce whose meaning extends to both duress and undue influence. Under French law, *violen*ce¹¹³ is also sanctioned because it vitiates the consent of the victim party. A particularity is that it is condemned even if the other party did not participate in it, and whatever the means employed (physical threats, moral pressure, etc.), it must be the result of a human action. The constraint that results from events is not *violen*ce. However, in certain situations, some statutes allow the reduction of excess agreement concluded in emergency situations (e.g., contract of sea rescue).¹¹⁴

*Violen*ce is deemed to vitiate consent only if several conditions are met. First, it must be illegitimate. It is interesting to note that in almost the same situation, the notion of legitimacy is not the same from both sides of the Atlantic.

111. 272 N.E.2d 533, 535 (N.Y. 1971) (quoting *Mercury Machine Importing Corp. v. City of New York*, 144 N.E.2d 400, 403 (N.Y. 1957)).

112. 704 F.2d 924, 927 (7th Cir. 1983) (citations omitted).

113. C. civ. arts. 1111-15.

114. Law of Apr. 29, 1916; see also Law No. 67-545 of July 7, 1967, art. 15.

In *Alaska Packers' Ass'n v. Domenico*,¹¹⁵ workmen agreed with Alaska Packers to do a job. Under the agreement, Alaska Packers was to pay each of the workmen fifty dollars for the season, but the workmen stopped work in a body and demanded 100 dollars for their services, stating that unless they were paid this additional wage they would stop work entirely. Because it was impossible to get substitute workers, the superintendent signed an agreement to pay the larger amount. Nevertheless, Alaska Packers paid them in accordance with the first agreement. The Court decided that:

when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor; and although, by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.¹¹⁶

In France, a Court decided that an agreement concluded between an employer and the employee was enforceable although concluded under the pressure of a strike because a strike is legitimate unless the means employed are illicit.¹¹⁷ Second, *violence* must have been a determinative factor of the consent. *Violence* has to be appreciated *in concreto*. Age, gender, and other personal conditions are taken into account.¹¹⁸

An American court detected a "marked shift in emphasis from the subjective effect of a threat to the nature of the threat itself."¹¹⁹ Some resistance is required to restrict relief for duress by denying it to persons who yield to pressure too easily. The standard of duress and resistance suggested by one court is "restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness."¹²⁰

As far as undue influence is concerned, the courts look at the relative status of the parties. In *Odorizzi v. Bloomfield School Dist.*, the court said that "[b]y statutory definition undue influence includes 'taking an unfair advantage of another's weakness of mind; or . . . taking a grossly oppressive and unfair advantage of another's necessities or distress.'"¹²¹ In both American and French

115. 116 F. 99 (9th Cir. 1902).

116. *Id.* at 103 (quoting *Lingenfelder v. Wainwright Brewery Co.*, 15 S.W. 844 (Mo. 1891)).

117. T. Civ. Nantes, Jan 6, 1956, *Gaz. Pal.* [1956] I. 61.

118. C. civ. art. 1112.

119. *Food Fair Stores, Inc. v. Joy*, 389 A.2d 874, 882 (Md. 1978).

120. *Carrier v. William Penn Broad. Co.*, 233 A.2d 519, 521 (Pa. 1967).

121. 54 Cal. Rptr. 533, 539 (Cal. Dist. Ct. App. 1966) (quoting from Cal. Civ. Code § 1575 (West 1872)).

law, a threat of lawful action does not constitute duress.¹²² The French *Cour de Cassation* decided that the threat of an action does constitute *violence* only if there is an abuse either in twisting it or in using it to obtain a disproportionate advantage.¹²³

In this part we were concerned with unfair means by which a contract has been procured; now we shall see how the unfairness of terms may also vitiate a contract. In both cases, the balance of negotiations has been disturbed.

2. Contracts of Adhesion

The term "contract of adhesion" comes from the French expression "*contrat d'adhésion*" coined by Raymond Saleilles to describe contracts "in which one predominant unilateral will dictate its law to an undetermined multitude rather than to an individual . . . and all those contracts which, as the Romans said, resemble a law much more than a meeting of the minds."¹²⁴ It was first used in the United States by Professor Patterson.¹²⁵ The expressions "standardized contract" and "form contract" are also often used to designate the same reality: a take-it-or-leave-it proposition in which the only alternatives are adherence or outright rejection. A general definition was given by Justice Tobriner: "[t]he term signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."¹²⁶ The question is whether a party who has signed a standardized contract can reasonably be held to have seen, understood, and assented to its unfavorable terms and accordingly be bound by them.

We may wonder if the doctrine of consideration would be helpful to answer this question. The traditional response has been that the requirement of bargain under the bargain theory of consideration was plainly met by simple adherence to a standard form. Indeed, the bargain theory of consideration does not require that the parties actually bargain over the terms of their agreement. Thus, the doctrine of consideration offers no grounds for the party who seeks to be relieved of her agreement in claiming an imposition. The common law rule is that "in the absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not or whether he can read or not."¹²⁷

122. See *Chouinard v. Chouinard*, 568 F.2d 430, 434-35 (5th Cir. 1978) (explaining that a lawful demand or insistence on a legal right, even as against a necessitous person, is not duress).

123. Cass. 3e civ., Jan. 17, 1984, 1984 Bull. Civ. III, No. 13.

124. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 530 (1970).

125. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

126. *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Cal. Dist. Ct. App. 1961).

127. *Cohen v. Santoianni*, 112 N.E.2d 267, 271 (Mass. 1953).

In France, adhesion contracts do not have a specific regime and the regular law of contracts applies to them. Nevertheless, a practical view limits this principle. Indeed, it has been noticed that the majority of *clauses abusives* could be found in adhesion contracts. The *clauses abusives* are clauses that can only be found in contracts which are concluded between a professional person and a non-professional person or consumer. These clauses are excessive because they create a significant imbalance between the professional and the non-professional or consumer concerning their rights and duties derived from the contract.¹²⁸ If clauses in such contracts are qualified by the judge as *clauses abusives*, these clauses are void.¹²⁹

Under American law, the concept of adhesion contracts is linked to the notion of unconscionability and to the broader one of public policy. In *Jackson v. First National Bank*, the Court pointed out that contracts, by which one seeks to relieve himself from the consequences of his own negligence (in this case the Court considered the validity of an exculpatory clause in a lease of property for business purposes), are generally enforced "unless . . . it would be against the settled public policy of the State to do so, or . . . there is something in the social relationship of the parties militating against upholding the agreement."¹³⁰

Moreover, a two-step analysis can be followed concerning the judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. "The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him."¹³¹ This idea is close in its result to the French rule concerning the interpretation of contracts between professionals and consumers, which says that the judge must interpret the clause in favor of the consumer.¹³² This demonstrates that public policy of protection of the consumer led to abandoning classical rules of interpretation of contracts based on the willingness of the parties. The second step "is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'"¹³³

Under French law, the concept of "unconscionability" does not exist in and of itself, but both French and American law have moved away from permitting unlimited freedom of contract to protecting weaker contracting parties from

128. CODE DE LA CONSOMMATION art. L132-1 («*Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.*»).

129. *Id.*

130. 114 N.E.2d 721, 725 (1953).

131. *Graham v. Scissor-Tail, Inc.*, 171 Cal. Rptr. 604, 612 (1981).

132. CODE DE LA CONSOMMATION L133-2.

133. *Graham*, 171 Cal. Rptr. at 612.

exploitation by more economically powerful ones. Presently, there are few fields not affected by this phenomenon, including, among others, insurance, leases, credit, building, environment, labor law, and advertising.

Legislation has been the traditional means of curbing abuses of economic power. For example, the Consumer Credit Protection Act of 1968 had a significant effect. Numerous statutes impose some mandatory information disclosures to decrease the inequality in the bargaining process¹³⁴ and to favor a better informed adhering party.¹³⁵ Taking into account the modern means to conclude a contract, the Federal Trade Commission has examined how its own consumer protection rules and guidelines apply to advertising and sales made via the internet. Disclosures are required “to ensure that consumers receive material information about the terms of a transaction, or to further public policy goals. These disclosures also must be clear and conspicuous.”¹³⁶

The ultimate goal of the doctrine of unconscionability and of the multiplication of regulations concerning adhesion contracts is to protect the consent of parties in order “to prevent freedom of contract from becoming a one-sided privilege.”¹³⁷ The statutory efforts tend to favor better information, but in a system of common law, they do not exclude the role of courts. In France, the risk is that the proliferation of statutes will take away responsibility from the consumer in such a way as to almost place them in the category of being legally incapable. The degree of available information is not always easy to determine to ensure the quality of assent. The question of the genuineness of consent through the problem of disclosure is also raised by the doctrine of concealment, misrepresentation, and *dol*.

3. Concealment, Misrepresentation, and *Dol*

A misrepresentation is a false representation of fact.¹³⁸ During negotiations, a party lies about some facts concerning the future contract in order to induce the other party to contract. In concealment, a party is aware of information, but she hides it and does not communicate it. These two notions correspond to the French *dol*. Article 1116 of the French Civil Code says that

134. See, e.g., *Le Contrat d'Enseignement à Distance*, Law No. 71-556 of July 12, 1971, arts. 8-9, J.O., July 13, 1971; see also CODE DE LA CONSOMMATION art. L313-12; see also CODE DE LA CONSOMMATION art. L311-9; see also CODE DE LA CONSOMMATION arts. L312-6, 7, 8, 9; U.C.C. §§ 2-205, 2-201(2) (2004).

135. See, e.g., *The contract of life-insurance*, CODE DES ASSURANCES art. L132-5-1 (requiring the delivery of an information note).

136. Steven P. Tapia, *Dot Com Disclosures—Information About Online Advertising*, 712 PLI/PAT 321, 329 (2002) (citations omitted).

137. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

138. FARNSWORTH, *supra* note 25, at 361.

dol is a cause of nullity of the agreement when the artifices practiced by one party are such that it is evident that without those artifices the other party would not have contracted. It constitutes a fault which was linked, in Roman law, with the idea that dishonest acts should be repressed. In the conception of the French Civil Code, the point is not so much to punish the author of the *dol*, rather it is to protect the consent of the victim.

We think that the notion of *dol* includes concealment as well as misrepresentation because the *dol* may be constituted by a lie or by silence. Even without fraudulent schemes, a simple lie may constitute a *dol*,¹³⁹ as well as the simple effort to peddle one's wares. Inaccurate advertisement was once considered a *bonus dolus* (a positive *dol*) but is now punished by law.¹⁴⁰ Keeping silence may constitute a *dol* when a party possessed information that he should have disclosed but instead did not reveal in order to encourage the other party to contract. This solution supposes that the party who kept silent had a duty to speak and to inform the other party. This duty may be implied from the nature of the contract. For example, in an insurance contract, the person who is insured has the duty not to conceal information about his health.¹⁴¹ American courts sustain the same solution. "[A] misrepresentation by a policy buyer relating to health is a commonplace ground for rejecting a claim."¹⁴² The duty to give some information may also come from the professional skills of one party when the other party is a lay person.¹⁴³ However, the Supreme Court of Massachusetts, in *Swinton v. Whitinsville Sav. Bank*,¹⁴⁴ said that the rule is non-liability for bare nondisclosure.¹⁴⁵ In this case, the defendant sold the plaintiff a house to be used as a dwelling. At the time of the sale the house was infested with termites, and the defendant knew the house was infested but he did not disclose that information. The Court said that "[t]he charge is concealment and nothing more; and it is concealment in the simple sense of mere failure to reveal, with nothing to show any peculiar duty to speak."¹⁴⁶

The *dol* causes a victim's mistake, even if it creates a mistake that otherwise would not have led to the voidability of the contract. Because the mistake is caused by the other party, it is possible to consider that there is no contract if this mistake has determined the consent of the victim of the *dol*. American law is more demanding because some degree of diligence is required

139. Cass. 3e civ., Nov. 6, 1970, 1970 Bull. Civ. III, No. 587. («un simple mensonge, non appuyé d'actes extérieurs, peut constituer un dol») (on file with author).

140. CODE DE LA CONSOMMATION art. L121-1, 2, 3.

141. CODE DES ASSURANCES art. L113-8.

142. FARNSWORTH, *supra* note 25, at 361.

143. For example, a contract of sale of used car by a professional.

144. 42 N.E.2d 808 (Mass. 1942).

145. *Id.* at 809.

146. *Id.* at 808.

of a party who relies on another's statement. The complainant must show justifiable reliance.¹⁴⁷

In this first part, we have been concerned with the technical conditions necessary to the formation of the contract. Some of them deal with the fairness of the process of formation, but they are not necessarily sufficient to ensure the fairness of the outcome. In the next part, we take up the question of differences between U.S. and French contract law concerning the enforceability of contracts with specific reference to the doctrine of consideration.

III. THE FUNDAMENTAL DIFFERENCE BETWEEN U.S. AND FRENCH CONTRACT LAW CONCERNING THE ENFORCEABILITY OF CONTRACTS: THE ROLE OF CONSIDERATION

The most obvious difference between American Law and French law concerning the enforceability of contracts is the absence in French law of the requirement of consideration for the validity of a contract. It is sometimes thought that the concept of *cause* performs a function akin to that of consideration in determining whether or not an agreement is binding in law. However, it would be a mistake to translate "consideration" as "*cause*" first because these two terms do not cover the same meaning, and second because consideration presents numerous features in its application that allow it to be distinguished from the French *cause*. Some comments on the notion of consideration follow.

A. *The Notions of Consideration and French Cause*

How can we define the French concept of *cause* so that it can be understood by an American lawyer, and how can the concept of consideration be understood by a French lawyer? I think that despite their differences, it is possible to affirm that the underlying policy behind these two notions is the willingness to find a measure of contractual justice.

Another similarity is that the validity of a contract under French contract law requires that *cause* exists just as an American contract requires the existence of consideration. The statement is sometimes made that *cause* is the germ of the English doctrine of consideration.¹⁴⁸ Salmond has attempted to show that the American doctrine of consideration was a modification of the Roman *causa*, which was adopted by equity and was then borrowed by the common law courts.¹⁴⁹ However, it has also been established that the doctrine of

147. FARNSWORTH, *supra* note 25, at 361.

148. GEORGE T. MORICE, ENGLISH AND ROMAN DUTCH LAW 78 (Grahamstown & Co., 2d ed. 1905).

149. John W. Salmond, *The History of Contract*, 3 L.Q. REV. 166, 178 (1887).

consideration is an outgrowth of common law and remained uninfluenced by principles of Roman or continental law, except when the action of *assumpsit* was developed.¹⁵⁰ It designated those agreements which were unenforceable because they lacked consideration.

Consideration entered the law around 1539 as a central element of the common law form of action called *assumpsit*.¹⁵¹ *Assumpsit* is the past tense form of the Latin verb meaning "to undertake." To promise was to undertake. Ibbetson has argued that the core of the consideration doctrine and the *assumpsit* action generally was exchange and reciprocity.¹⁵² The doctrine of consideration came to embody the concept of bargain.

Today, we can still find this notion of exchange in § 71 of the Restatement of Contracts which provides that "[t]o constitute consideration, a performance or a return promise must be bargained for. . . . A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."¹⁵³ This definition may lead us to think of the French *cause*, more precisely; the *cause* is often referred to as the *objective cause* in order to determine whether or not the *cause* does exist. In the seventeenth century, Domat expressed the idea that the *cause* is always the same in the same category of contract. For example, in a bilateral contract, the *cause* of the obligation of one party is the obligation expected from the other party.¹⁵⁴ In a contract of sale, the *cause* of the obligation of the seller is the obligation of the purchaser to pay the price.¹⁵⁵ The *cause* of the obligation of the purchaser is the conveyance of the merchandise sold. In a gratuitous promise, the *cause* is the "willingness to give."¹⁵⁶

It should be noted that in the conception described above, the *mobiles* or motives of the contractors are not taken into account. What prompted their action to contract is not significant. The only field in which the motives of a contractor are taken into account is when the question is to determine whether his motivation to enter into a contract fits with the conception of public policy or morality. Article 1131 of the French Civil Code provides that "[a]n obligation without *cause* or with a false *cause*, or with an unlawful *cause* [*cause illicite*],

150. JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 129, 147-48 (1913).

151. David Ibbetson, *Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count*, 41 CAMBRIDGE L.J. 142 (1982).

152. David J. Ibbetson, *Consideration and the Theory of Contract in Sixteenth Century Common Law*, in TOWARDS A GENERAL LAW OF CONTRACT 67 (John Barton ed., 1990).

153. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

154. JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 161, § 147 (William Strahan trans., Luther S. Cushing ed., Rothman and Co. 1980) (1689).

155. *Id.*

156. *Id.* at 162, ¶ 149.

may not have any effect.”¹⁵⁷ So, the concept of “*cause illicite*” must be distinguished from “absence of cause.” If the contract is motivated by the expectancy of realization of an immoral end, it is what French law calls “*cause illicite*.” So the equivalent in American law of “*cause illicite*” or “*cause immorale*” cannot be found in the concept of consideration but rather in the doctrines of illegality and public policy.

Louisiana is unique in its assimilation of the doctrine of *cause* and consideration. In Louisiana, there is an admixture of *cause* and consideration in the treatment of conventional obligations. “The concept of *cause* makes its first recorded appearance in the law of Louisiana in the earliest codification of her laws, ‘A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808).’”¹⁵⁸ That Digest reproduces in French the articles of *cause* found in the French Civil Code. The English version of the Digest presents a literal translation of the fourth essential condition to validity of an agreement, “[u]ne *cause licite dans l’obligation*.”¹⁵⁹ It is translated as “[a] lawful purpose in the obligation.”¹⁶⁰ This version of *cause* is continued in the Codes of 1825 and 1870.¹⁶¹

Capitant made clear the impropriety of speaking of the *cause* of a *contract*. Cause is that element of the will which presupposes the attainment of the end desired, or the presupposition of performance performed. As such, it is the *cause* of the *obligation*, inseparable from it and indispensable to its validity until the final moment of execution.¹⁶² What is striking for a French lawyer in the Civil Code of Louisiana is that the terms *cause*, consideration and motive are made practically interchangeable.¹⁶³ As mentioned above, French scholars make a distinction inside the concept of *cause* between the *cause* seen from the perspective of its existence and the *cause* seen from the perspective of its morality, this last one could be seen as the equivalent of the motive.

157. C. CIV. art. 1131.

158. George M. Snellings, Jr., *Cause and Consideration in Louisiana*, 8 TUL. L. REV 178 (1934).

159. CIV. LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, art.8 (1803) (replaced by the 1825 act).

160. *Id.* at 260.

161. LA. CIV. CODE art. 1772 (1825); *see also* LA. CIV. CODE art. 1779 (1870).

162. *See generally* HENRI CAPITANT, DE LA CAUSE DES OBLIGATIONS 26 (Daloz, 3d ed. 1927).

163. LA. CIV. CODE art. 1825 (1870) (“The error in the cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several: this principal cause is called the motive, and means that consideration without which the contract would not have been made.”); *see also* LA. CIV. CODE art. 1896 (1870) (“By the cause of the contract, in this section, is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made.”).

Article 1893 of the Civil Code of Louisiana is the twin of Article 1131 of the French Civil Code.¹⁶⁴ The same can be said if we read together Article 1895 of the Louisiana Civil Code and Article 1133 of the French Civil Code.¹⁶⁵ In Louisiana, as in France, unlawful purposes are reprobated in any contract just as one may not sanction the enforcement of any agreement, which in common law terminology, is tainted with illegality. For example, the Court has refused to recognize an action to settle a partnership, which operated as a gambling enterprise.¹⁶⁶ In both countries the solutions will depend on the notions of morality and illegality, and more broadly, they depend on public policy. In view of strict morality, it is surprising to observe the matters relating to prostitution. In *Kathman v. Walters*,¹⁶⁷ recovery for rent of a house, which was allowed to be used as a brothel, was denied on the ground that the claim was founded upon a contract reprobated by law. Two years later this case was expressly overruled in *Lyman v. Townsend*,¹⁶⁸ which marked the emergence of an apparently strong desire to safeguard the security of transactions. Thus, the lease of a house for purposes of prostitution became enforceable. In 2002, the French Government envisaged the re-establishment of brothels.¹⁶⁹

Performance, like a promise, can constitute consideration; if we stop here, the same can be said concerning *cause*: a performance as well as a promise can constitute a valid cause. But American contract law adds another requirement as far as a promise is concerned. A promise can be consideration only if the performance of the promise can be consideration.¹⁷⁰ Moreover, when a promise is deemed to constitute consideration, this promise must not be illusory. For example, a promise to forbear may constitute consideration; if there is no agreement to forbear for a fixed period of time, but for a time that the creditor should elect, there is no consideration.¹⁷¹ Faced with a promise, a good test would be the following question: "Has the promisor bound himself to do

164. LA. CIV. CODE art. 1893 (1870) ("An obligation without a cause, or with a false or unlawful cause, can have no effect."); see also C. CIV. art. 1131 («*L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*»).

165. LA. CIV. CODE art. 1895 (1870) ("The cause is unlawful, when it is forbidden by law, when it is contra bonos mores (contrary to moral conduct) or to public order."); see also C. CIV. art. 1133 («*La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs ou à l'ordre public.*»).

166. *Martin v. Seabaugh*, 54 So. 935, 938 (La. 1911).

167. 22 La. Ann. 54 (La. 1870).

168. 24 La. Ann. 625 (La. 1872) (Howell, J., dissenting).

169. Lilian Mathieu, *Women beyond the pale*, LE MONDE DIPLOMATIQUE, Oct. 2003, available at <http://mondediplo.com/2003/10/14prostitution> (last visited Mar. 8, 2005).

170. RESTATEMENT (SECOND) OF CONTRACTS § 75 (1981) ("Except as stated in §§ 76 and 77, a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.")

171. *Strong v. Sheffield*, 39 N.E. 330 (N.Y. 1895).

something?" If the answer is no, the promise is illusory and there is no consideration. The Restatement (Second) of Contracts § 77 affirms this principle.¹⁷²

One should pay attention to the use of "termination clauses." Contracting parties often use termination clauses to reduce the risks that they assume by contracting. If a termination clause is read as giving a party the power to terminate at any time at will, without more, the party's promise will be held to be illusory. The same concerns arise concerning the "satisfactory clauses." In *Lawrence Block Co. v. Palston*,¹⁷³ the provisions "'O.P.A. Rent statements to be approved by Buyer'; '[s]ubject to buyer's inspection and approval of all apartments,'"¹⁷⁴ were said to give the purchaser "unrestricted discretion" in deciding whether he would be bound to the contract and to provide no "standard" which could be used in compelling him to perform.¹⁷⁵

This case, although dealing with the problem of consideration, may make the French lawyer think of the *potestative condition*. Such a condition is comparable to the common law's illusory promise. In both cases, the promisor has, in substance, a free way out, which is contrary to the essence of obligation. Article 1174 of the Civil Code¹⁷⁶ declares an obligation void when it has been contracted subject to a *potestative condition* on the part of the person who obligates himself. For example, the promise of a person to sell a car if he so desires is subject to a *potestative condition*, that is to say, depends on the single will of he who obligates himself. A close, but permissible situation, is the French unilateral promise of sale. In a unilateral promise of sale, one party did not bind himself but can rely on the promise of the other. The promisor, proprietor, promises to the promisee to sell him a building if the promisee wishes to buy it. The promisee has the choice to buy or not to buy the building. Nevertheless this option cannot be endless. There are two steps to reach the definitive contract. At the time of the promise, only the promisor is bound. At the time of the exercise of the option, the promisee binds himself.

This situation is distinct from an offer since there is an agreement between the promisor and the promisee. With his promise, the promisor gives his definitive consent to be bound, which cannot be withdrawn. Quite often, a financial counterpart exists (*indemnité d'immobilisation*) for the exclusivity that the promisor gives to the promisee. However, even in this situation, though

172. RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981) ("A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances").

173. 266 P.2d 856 (Cal. Dist. Ct. App. 1954).

174. *Id.* at 858.

175. *Id.* at 861-62.

176. C. CIV. art. 1174.

tinted with bilateralism, the contract remains a unilateral one since the beneficiary of the option has a real liberty of choice given the small amount of the financial counterpart. Such a situation should be unlikely to exist or at least should lead to unenforceability in American contract law due to the requirement of consideration. Nevertheless, U.C.C. § 2-205 appears to lump both situations as firm offers, granting enforcement even though consideration cannot be shown.¹⁷⁷

In the last third of the nineteenth century, American legal theorists revolutionized the doctrine of consideration.¹⁷⁸ The idea was to present consideration as the answer to the question of which promises the law should enforce.¹⁷⁹ Today, it is still this question which underlies the doctrine of consideration.¹⁸⁰ Classical theorists made consideration into the axis around which all of contract revolved. Before the classical period, consideration was a minor issue in contract theory. Parsons, for instance, devoted less than five percent of his treatise to the combination of consideration and assent.¹⁸¹

The Comparison between French *cause* and American consideration can only sensibly be made with respect to French bilateral and onerous contracts. It is only for those categories that the promise itself, which constitutes the *cause*, can also constitute the American consideration. Indeed, unilateral and gratuitous promises are incompatible with the concept of bargain, which underlies the concept of consideration.

Both benefit and detriment work within the fully developed notion of consideration, because one or the other had to be present for the requirements of consideration to be satisfied. It is possible to say that the French *cause* is often

177. U.C.C. § 2-205 (2004);

An offer by a merchant to buy or sell goods in a signed writing which by its terms give assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Id.

178. See generally OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 267-97 (Little, Brown & Co. 1943) (1923); see also CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACT, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES* 1011-39 (2d ed. 1879); Christopher Columbus Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496, 496-98 (1901).

179. Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876 (2001).

180. See generally LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 6-163 (6th ed. 1996).

181. See generally THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 353 (1853); see also *id.* at 408.

constituted by the expectation of a benefit derived from the contract or by a detriment imposed on the other party, but there is no statute that requires the presence of one of these two conditions.

In this part we have been concerned with delineating the notions of American consideration and French *cause*. Now we will analyze some characteristics of consideration that give it its specificity.

B. Distinctive Features in the Application of the Notions

Some distinctive features of the concept of consideration can be explained by the concept of bargain, while others come from mechanisms allowed by American law and do not exist under French law.

1. Distinctive Features Due to the Concept of Bargain for Exchange

Numerous distinctive features can be explained by the concept of bargain which is central to American contract law.

a. Past Consideration Does Not constitute Consideration Whereas Cause Can be Constituted by a Past Action

By the latter half of the sixteenth century, courts had accepted the general principle that "past consideration" could not be consideration.¹⁸² An action already taken before a promise is made, for example, a promise made by an employer to a former employee to pay money for good work and faithful services, would be past consideration and this past consideration cannot be consideration for the promise. A promise based upon past services would be without consideration.¹⁸³ So, in this case, the promise is not enforceable. This can be explained by the fact that there is no bargain, no actual obligation on each side. The only possibility for the parties to make the promise enforceable is to restructure the transaction. In this example, the requirement of consideration will be met if the employer bargains for some future performance by the employee or for a return promise by the employee to do something. The conclusion that past consideration cannot be consideration is inevitable under the bargain theory.

French contract law does not sustain the same solution: a past action can constitute a valid cause for an obligation. Even if the promise is motivated by something which has its source in the past and therefore could not constitute a valid consideration, it can still constitute a valid cause. The same difference in approach applies for a moral obligation.

182. ALFRED WILLIAM BRIAN SIMPSON, HISTORY OF THE COMMON LAW OF CONTRACT 452-58 (1987).

183. See generally *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959).

b. Moral Obligation Cannot Constitute Consideration, Whereas Moral Obligation Can Constitute a Valid Cause

In *Mills v. Wyman*,¹⁸⁴ Mills had cared for Wyman's son for several weeks after the son had fallen ill on his return from a voyage.¹⁸⁵ The father, in gratitude, wrote Mills a letter promising to reimburse him "for the expenses he had incurred."¹⁸⁶ Wyman refused to pay and Mills sued. The Supreme Court of Massachusetts held that the father's promise was unenforceable because it appears to have been made without any legal consideration.¹⁸⁷ In the same situation the *Cour de Cassation* would have decided that regardless of his reasons, if Wyman had promised to pay he was bound by this obligation.

In some exceptional situations common law does enforce a promise on the grounds that it was made in recognition of what could be viewed as a "moral obligation." One example is a promise to pay a debt that is no longer legally enforceable because the statutory period of limitations has expired. Another example is a promise by an adult to perform a duty imposed by a promise that the adult made as a minor and could have avoided on that ground.¹⁸⁸

In *Webb v. McGowin*,¹⁸⁹ Webb saved McGowin's life by an act of heroism that left Webb crippled for life.¹⁹⁰ Webb sued McGowin's estate alleging that McGowin had, in gratitude, promised to pay him a certain amount of money regularly for the rest of Webb's life.¹⁹¹ Payments had been made for several years, until after McGowin's death, but his executors refused to continue them.¹⁹² The Court of Appeals of Alabama, noting that McGowin had "complied with this agreement up to the time of his death,"¹⁹³ held that the promise was enforceable, since McGowin, "having received a material benefit from the promisee, is morally bound to compensate him for the services rendered."¹⁹⁴ Restatement Second of Contracts § 86(1) recognizes that a moral obligation can be a basis for enforcement "to the extent necessary to prevent injustice."¹⁹⁵

184. 20 Mass. 207 (1825).

185. *Id.* at 209.

186. *Id.*

187. *Id.* at 212.

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

189. 168 So. 196 (Ala. Ct. App 1935).

190. *Id.*

191. *Id.* at 197.

192. *Id.*

193. *Id.*

194. *Id.* at 198.

195. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

*c. As Far as Unsolicited Action is Concerned, the Bargain Theory
Applies in France as Well as in the United States*

If the promisee takes some action subsequent to a promise but the action was unsolicited by the promisor, that action was not bargained for and therefore cannot constitute consideration. The same bargain reasoning applies in French law: subsequent action that differs from that sought by the promisor does not make the promise enforceable. It is a question of fact whether, when making a promise, a promisor was bargaining for some action that was later taken by the promisee. To determine whether a promisor is bargaining when making a promise, it is useful to look at the promisor's purpose and at the promisor's means.

We can readily observe that when we look to the promisor's purpose we look, in the French theory, at the *mobiles*, in the subjective cause. Although it is said that the *cause* should not be confused with motive, it is also said that consideration should not be confused with motive, one should concede that motive is an element of bargain which is in turn an element of consideration as well as an element of cause.

Under French law, it is not certain that this problem would be one of cause. It could also be analyzed as a problem of *objet*. *Objet* is another condition of the formation of contracts.¹⁹⁶ The French Civil Code sometimes mentions the *objet* of the obligation¹⁹⁷ and sometimes the *objet* of contract.¹⁹⁸ In this last case, some French scholars say that the *objet* of a contract is the legal purpose of the parties, the operation that they seek to achieve.¹⁹⁹

d. Bargaining Process and Gratuitous Promise

Considering whether a promisor is bargaining for a promise or performance in return for the promisor's own commitment, leads to the question of whether the promisor conditioned the commitment on that promise or performance. The use of the word "if" is generally indicative of a bargaining process. For example, if a seller says "I promise to deliver this furniture if you pay me 1000 dollars," the conditional form of the promise seems to make it clear that the seller is bargaining for the buyer's promise to pay 1000 dollars. In this case the seller means: "If you do pay me 1000 dollars, you shall have my commitment to deliver this furniture."

Nevertheless, the language of the condition alone is not determinative, because the same language may also be used where there is no bargain. A

196. C. CIV. art. 1108.

197. C. CIV. art. 1129.

198. C. CIV. arts. 1110, 1128.

199. See generally PHILIPPE MALAURIE, LAURENT AYNES, DROIT CIVIL, LES OBLIGATIONS 277 (1998).

promise may be conditioned by the same words even though it is clearly gratuitous, and a gratuitous promise is not enforceable. Today, this solution can again be explained by the doctrine of bargain.

Traditionally, a promise made between family members is not enforceable. Gifts or services between family members are assumed to be motivated by altruism. As we moved into the twenty-first century, the differences between intimate agreements and commercial agreements narrowed, and the concept of exchange was central in the adopted solutions. The concept of exchange is relatively broad in the sense that it includes a benefit and/or a detriment for both parties. The bargain-for exchange is the test to decide whether or not a promise, which can appear gratuitous at first sight, can be actually enforced. In the case of *Hamer v. Sidway*,²⁰⁰ an uncle promised his nephew 5000 dollars if the nephew "refrain from drinking liquor[,] using tobacco, swearing, and playing cards or billiards for money until [he] should become twenty-one years of age."²⁰¹ The nephew fully complied with the conditions.²⁰² The Court rejected the argument that there was no consideration for the uncle's promise.²⁰³ The uncle had the benefit of seeing his nephew abstain from the enumerated vices.²⁰⁴ At the same time, the nephew suffered a detriment by denying himself the pleasures of those vices.²⁰⁵

If there is no exchange at all, the promise is a purely gratuitous promise and unenforceable. The French approach to the problem of gratuitous promises differs in important respects from that of common law. First, in American contract law, it is linked to the concept of consideration; second, French law is based on detailed and comprehensive legislative provisions, so the risks inherent in gratuitous promises are anticipated by the law²⁰⁶ and there is no need for the "cautionary"²⁰⁷ function of consideration. Moreover, the notarial contract, which requires the participation of a lawyer who holds a special appointment from the state and is charged with handling and recording various types of transactions, has no counterpart in common law.

200. 27 N.E. 256 (N.Y. 1891).

201. *Id.* at 257.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. C. CIV. art. 955 (stating that a gift can be revoked on several grounds: that the *donee* attempted to kill the donor; that the *donee* abused the *donor*, wronged him, or committed a *delict* against him; or that the *donee* has refused needed support to the donor).

207. Fuller, *supra* note 187, at 800.

e. The Problem of Rewards

In order to evaluate the specificity of the concept of consideration, it is particularly useful to look at the problem of rewards. In *Broadnax v. Ledbetter*,²⁰⁸ Sheriff Ledbetter offered a reward for the capture of a murder suspect. Broadnax sued for the reward, and Ledbetter demurred on the ground that Broadnax had not alleged that he knew of the offer of the reward when he captured the prisoner. The Supreme Court of Texas upheld the demurrer because the service that Broadnax rendered was not given by Broadnax in exchange for Ledbetter's promise, since Broadnax did not know of that promise. Again we can see that it is necessary to keep in mind the basic principle of consideration (an action is not bargained for unless it is given by the promisee in exchange for the promise) to justify this solution.

A comparable situation would be resolved in a different way by French contract law. The reward would be considered an offer to members of the public or a unilateral promise subordinate to a condition, and the capture, an acceptance or the realization of the condition, thus all requirements for a binding contract would be met. The notion of "*objective cause*" would not play any role, and the notion of "*subjective cause*," understood as motive, would be taken into account only if the reward could be considered a threat to public policy.

2. There is a Substitute for Consideration, Whereas There is No Substitute for the French *Cause*

In French contract law, either *cause* exists or does not exist, without *cause* the contract is not enforceable. There is no legal means that can compensate for the absence of *cause*. In contrast, American contract law contains a substitute for consideration: reliance. Reliance can operate as a separate basis for the enforcement of a promise. After playing its role in the development of the doctrine of consideration,²⁰⁹ reliance played no important part for four centuries, until the twentieth century. The coexistence of promissory estoppel and the bargain theory of consideration is relatively uneasy. But it permits one to overcome the defects of the doctrine of consideration. Reliance is an alternative to bargain-for exchange, and can act as a distinct basis for the enforcement of promises.

As stated in the Restatement (Second) of Contracts:

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does

208. 99 S.W. 1111, 1111-12 (Tex. 1907).

209. Since the misfeasance cases that had originally given rise to the action in *assumpsit* were characterized by a detriment incurred by the promisee in reliance on the promise, it was natural to formulate an analogous test and to allow enforcement if the promisee had changed position on the faith of the promise and had been consequently damaged by its non performance.

induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.²¹⁰

First, the promisee must actually rely on the promise. So an employer's promise of a pension did not induce the employee's retirement where "he made the decision on his own initiative" and "had reached that decision long before" the promise was made.²¹¹ If the claimed reliance consists of the promisee's forbearance rather than affirmative action, proof that this forbearance was induced by the promise requires showing that the promisee could have acted.

Second, the promisor must have had reason to expect that reliance had occurred although the promisor may not have bargained for it. So, in the example of the employer's promise of a pension on retirement, the promisor should reasonably have expected the employee to retire. The standard for testing expectation is an objective one, under which the promisor is bound if the promisor had reason to expect reliance, even if the promisor did not in fact expect it.²¹²

Third, recovery should be limited as justice requires. The fact of reliance argues in favor of enforcement both because it indicates that an underlying understanding existed between the parties and because it raises here again a question of fairness. The absence of cause is thus fatal to the validity of a contract whereas the absence of consideration does not inevitably have the same consequence if a substitute for consideration can be found.

Generally speaking, whenever there is a valuable consideration in the American sense, the contract will be valid also under the doctrine of *cause*. But many agreements, which cannot be supported in American Law for want of consideration, can be enforced under the broader doctrine of *cause* in French Law. There is no doubt that the existence of consideration indicates in the great majority of cases that the parties seriously contemplated a legal relation, but the lack of consideration does not necessarily indicate the absence of such an intention. Nevertheless, the will of the parties to create a legal relation, however clearly expressed, will be ignored by American courts in the absence of a technical consideration to support the agreement.

210. RESTATEMENTS (SECOND) OF CONTRACTS § 90 (1981).

211. *Hayes v. Plantations Steel Co.*, 438 A.2d 1091, 1096 (R.I. 1982).

212. *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1270 (6th Cir. 1980).

C. *Comments on the Notion of Consideration*

We may question the doctrine of consideration. What is the rationale that can explain that a promisor is not able to make a binding promise without receiving something in return from, or without reliance by, the promisee? While this question has not been directly confronted, some attempts have been made to mitigate the harshness of the rule requiring the automatic invalidation of a contract due to a lack of consideration. For example, the Uniform Written Obligations Act, proposed by the National Conference of Commissioners on Uniform State Laws, facilitates the making of a binding gratuitous promise as long as there is some form of writing showing an intention to be bound.²¹³ But, it has not had a lot of success among the States.²¹⁴ A more recent attempt is codified by a California statute that makes a writing “presumptive evidence of a consideration.”²¹⁵

Why did common law adopt the principle of bargain, while the French system developed a principle of agreement that enabled it to deal more simply and directly with promissory situations in which there is no element of bargain? Some historical arguments can certainly be made. During the early experiments of *assumpsit*, the idea of reciprocity was constantly asserted. It is thus understandable that judges came to insist, through the doctrine of consideration, on an element of bargain in the transaction that they were asked to enforce. The development of *assumpsit* was basically due to pressures from important commercial interests and was carried on by the practicing legal profession. Such interests, and such lawyers, did not seek a general sanction for all executory agreements, including charitable gifts, but only for business enterprise.²¹⁶ The doctrine of consideration was not supposed to be “as wide as morality and as warm as conscience,” but should rather be “commercialised into the price of a bargain.”²¹⁷ Bargain has been defined as “the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U.S.S.R.) for apportionment of productive energy and of product.”²¹⁸

213. UNIFORM WRITTEN OBLIGATIONS ACT § 1 (1925) (“A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.”).

214. Only Pennsylvania and Utah adopted this act, and Utah later repealed it.

215. CAL. CIV. CODE § 1614 (West 2001).

216. C. H. S. FIFoot, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 399 (Stevens & Sons Ltd. 1965) (1949).

217. *Id.* at 398.

218. Karl N. Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L.J. 704, 717 (1931).

The doctrine of consideration emphasizes the notion of exchange. Thus we can question this notion; why is the concept of exchange so important in the doctrine of consideration? First of all, it can be justified by economic considerations. The economists tend to think that the making and the enforcement of contracts are a part of the process of exchange of goods and values. They constitute a means to move "from less to more valuable uses."²¹⁹ The counterpart in American law is the principle that promises are not enforceable unless supported by consideration, in the sense that a promise will not create an enforceable contract unless it is made in exchange for something of value such as goods, money or another promise. From this standpoint it is easy to understand the general rule that gratuitous promises are not enforceable. "[I]t has been said that the enforcement of gratuitous promises is not an object of sufficient importance to our social and economic order to justify the expenditure of the time and energy necessary to accomplish it."²²⁰

It is remarkable to notice that Fuller quoted²²¹ Bufnoir's²²² lectures, delivered at the Sorbonne in 1884, considering gratuitous promise as "sterile transmission." But first, this assertion cannot be demonstrated. Secondly, this economic justification fails to explain why the requirement of consideration disappears as far as promises of charitable donations are concerned. We can say that it is just a special judicial partiality for charity, or that more generally, it reflects a political choice based on the interest (which can be economic) of the society. One court explained "[t]his promise was made to a charitable corporation, and for that reason, we are not confined to . . . orthodox concepts."²²³ Moreover Restatement Second § 90(2) continues the policy favoring charitable subscriptions by making such promises enforceable without proof of reliance.²²⁴ So maybe it would not be useless to reconsider gratuitous promises, because "[t]he argument that gratuitous promises do not merit enforcement cannot depend, therefore, on the proposition that the gratuitous transfer is itself unmeritorious."²²⁵

Why would it not be possible to enlarge the concept of consideration to affirm that there is a consideration for gratuitous promises? This consideration would consist of altruism. This idea would make consideration close to the French *cause* in gratuitous promise. But it would imply enlarging the doctrine of consideration beyond the board of the bargained- for exchange.

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

220. Fuller, *supra* note 187, at 799.

221. *Id.* at 815.

222. C. BUFNOIR, PROPRIÉTÉ ET CONTRAT 487 (2d ed. 1924).

223. *Danby v. Osteopathic Hosp. Assn.*, 104 A.2d 903, 907 (Del. 1954).

224. RESTATEMENTS (SECOND) OF CONTRACTS § 90 (1981).

225. Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 50 (1922).

The Roman law doctrine of *laesio enormis* refused enforcement of certain contracts in which the disparity of values comprised in a bargained-for exchange was objectively very great. In Medieval society, the requirement of fair exchange of values, in its economic aspects, was the *just price*, a concept appropriate to a static economic order. Today, French law still recognizes classes of transactions in which an agreement can be set aside on the ground of mere objective disproportion in the value of counterparts.²²⁶ Out of this limited category of contracts, a disproportion between performances should not be condemnable.

Fuller proposed that a significant relationship exists between consideration and form.²²⁷ His idea is that the doctrine of consideration contains both "formal" and "substantive" elements;²²⁸ and that there are three functions performed by legal formalities. First, is an "evidentiary function" and Fuller thinks that a lack of evidentiary safeguard is obvious in the case of gratuitous promises.²²⁹ The formal requirement of consideration evidences the making of a promise. We do not think that this suggestion is supported. We do not think that the problems of proof are necessarily exacerbated if the promise is gratuitous. The second function is the cautionary safeguard.²³⁰ It is claimed that those who promise gifts do not really know what they are doing. The formal requirement of consideration cautions the promisor about its seriousness.²³¹ Here again, we do not think that spontaneity and a lack of deliberation necessarily apply to gratuitous promises. Rather, we think that a gratuitous promise can be the result of a prolonged reflection. Third, according to Fuller, consideration has a channeling function.²³² As expanded by Eisenberg, "in a context that involves neither formality nor explicit reciprocity, it may often be difficult to distinguish a promise from a statement of present intent."²³³ We believe that the same means can be used by a promisor and by a gratuitous promisor to distinguish a promise from a statement of intent. To conclude this explanation, we believe that it is worthwhile to justify a rule, which can appear arbitrary, but we think that it reposes on assumed hypotheses that we think are not actually demonstrated.

Another explanation could be that a doctrine based upon the notion of bargained-for exchange is, in its very nature, inclusive and expansive. It is called on often to handle a variety of problems. Among them, one should notice

226. C. CIV. art. 1674 (stating that the seller of immovable property can, if the price received is less than seven-twelfths of the value, obtain rescission).

227. Fuller, *supra* note 187, at 799.

228. *Id.* at 800.

229. *Id.*

230. *Id.*

231. *Id.* at 814.

232. *Id.* at 801.

233. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979).

the weight of policy concerns and its relationship to handling problems of unfairness. Consideration is important in the policing of individual transactions with a view to refusing enforcement if the arrangement is too unfair. In this view the doctrine of consideration is interconnected to the idea of mutuality. If a contractual relationship seems too unfair, the courts intervene on the ground that consideration is lacking. On the other hand, if the court does not sense an element of overreaching in the situation, it is likely that consideration will be found and the agreement upheld. Kessler remarked that courts saw the potential of the doctrine "as an instrument of social control."²³⁴

We have drawn the same conclusion in the first part of this work concerning the protection of the assent through the means of public policy and fairness concerning both the procedural and the substantive aspects of the contract. In general, the requirement of consideration is justified as a guarantee of the reasonableness of a particular transaction. The law sets up certain limits in the interest of society or of certain categories of parties, beyond which they cannot contract. But within the limits so outlined the will of the parties to assume legal relation should control.

The doctrine of consideration can be viewed as a limitation of the free will of people to bind themselves as they wish. Limitation is correlative to the addition of external requirements to the parties' mere agreement. It is noteworthy that in Principles of European Contract Law, Article 2:101, "[a] contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement."²³⁵ One "implies that the contract can be concluded without the existence of the . . . requirement of . . . consideration."²³⁶

Grant Gilmore dismissed the bargain theory of consideration. He posited that nonconsensual tort law absorbed the bargain theory and permitted recoveries in the absence of an enforceable contract.²³⁷ He concluded that the "death of contract" was inevitable.²³⁸

To conclude, we can raise a paradox: although it encompasses a lot of different matters, the doctrine of consideration is actually very narrow. In response to the strictures of consideration, the courts are obliged either to deny that the promises in question were gratuitous (and to find sometimes artificial

234. Friedrich Kessler, *Introduction: Contract as a Principle of Order*, in FRIEDRICH KESSLER ET AL., *CONTRACTS* (3d ed. 1986), reprinted in PETER LINZER, *A CONTRACTS ANTHOLOGY* 4, 8 (Peter Linzer ed., 1989).

235. PECL, *supra* note 8, at 137.

236. Maria del Piler Perales Viscasillas, *The Formation of Contracts & Principles of European Contract Law*, 13 PACE INT'L L. REV. 371, 374 (2001).

237. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* 87-94 (1974).

238. *Id.* at 3.

bargained-for exchange) or that they have induced detrimental reliance to reach the outcome of enforcement of the promise.

IV. CONCLUSION

Contracts are legally binding promises. But they are binding only if they have been freely and voluntarily entered upon. The promise should be a genuine act of free will. This explains why both U.S. and French law have been concerned with developing means to reach this goal. By and large, they have adopted numerous similar mechanisms. Nevertheless, French law's concept of agreement provides a more consensualistic approach, while American law has an approach which is linked to the bargain theory.

Despite this difference in approach, we can observe a common trend in U.S. and French contract law. They both reveal a realization that all parties cannot always bargain at arm's length. And they both try to instill a balance between the parties to a contract. They both recognize that the theory of freedom of contract does not always lead to fair situations because the freedom does not really exist in and of itself, which is a reflection of society. They both assume that freedom would be reached by means of equality or at least a lesser inequality.

It remains to be determined who will assume the task of intruding in private relations such as contracts. In both countries, legislators as well as courts are solicited. They both try to curb offenses to their sense of justice. In this way the rules cannot be neutral and are necessarily tainted, and the line between public policy and fairness is often blurred. The role of judges has increased, although they have not always had the legitimacy and the tools to solve the problems. In France this has led judges to stretch some notions such as the notion of *good faith*, sometimes misrepresenting the notion in order to make it fit with a predetermined sense of justice. Sometimes some positive duties were discovered such as the duty of disclosure. Giving a party sufficient information before entering into a contract is, at the same time, imposing on the other a duty (of disclosure) whereas the interests of contracting parties are often antagonistic. It is difficult to justify this duty and the implicit restrictions to the principle that consensus is the foundation of contract.

Moreover, in deciding cases, courts should be concerned with the imperatives of certainty and predictability. Certainty is required for stable transactions. The proclivity of courts to discover rules with sufficient certainty and predictability is now supported by a "flurry of neoformalism in contracts scholarship."²³⁹ The proposed solution, therefore, is to restrict judicial

239. William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 1004 (2001).

speculation by emphasizing the language of the static record of agreement.²⁴⁰ In the facts, they ask “that the court respect the literal and explicit terms of the contract.”²⁴¹ In the opposite view, Llewellyn insisted that the “text” of the bargain should no longer be the sole basis for discerning obligations. Rather, “dynamic, legally unformulated, fact patterns of common life” provide an “immanent law” from which the parties’ obligations are derived.²⁴² The U.C.C. emphasizes an anti-technical, anti-formalist and relational identification of the agreement. Under the U.C.C. § 1-201(11), contract is defined in terms of effect: “the total legal obligation which results from the parties’ agreement.”²⁴³

Contract making is future-oriented. Contracting parties enjoy the assurance that if necessary, the mechanism of enforcement will work for them to be put in the future condition envisioned under their contract. Like contract-making, trust is future-oriented. Contract-making is a functional equivalent of trust.²⁴⁴ It would be reasonable to expect judges to carry over the logic of trust into their judgment about a default in the process of contract-making in order to avoid a systematic voidability.

In France, there is a distrust of the judge. It is a heritage from the abuse of judicial power during the *Ancien Regime*. The distrust of the equity of the *Parliaments* is summed up in a well-known proverb “May God preserve us from the equity of Parliaments.”²⁴⁵ This adage refers to the suffering of the people at the hands of judges who abused the proper functioning of a court. It means that the power to judge in equity was arbitrary, partial, and unpredictable. The perception of arbitrariness may have been intensified by the fact that the rationality of equity was not and could not be explained. The Parliament operated in total secrecy in their deliberation. The judges were under a sworn duty not to reveal the grounds of their decisions. There were no reports of cases published before the seventeenth century. Thus the entire reasoning which justified transforming the existing law was kept from litigants.

Today, it can be said that the laconic decisions, the anonymous authorship of decisions without dissents, and the authoritarian tone, confines judges to the language of assertion and logical inevitability that prevents them from developing a full reasoning which could be educational and thus better

240. Eric A. Posner, *A Theory of Contract Law under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000).

241. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 851 n.12 (2000).

242. Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 782 (1999).

243. U.C.C. § 1-201(11) (2004).

244. Menachen Mauter, *Contract, Culture, Compulsion, or: What is so Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545 (2002).

245. «Puisse Dieu nous préserver de l'équité de parlements.»

understood and accepted. It prevents judges from having an eye upon the consequences of their decisions. But the power to decree new laws as solutions to individual cases would violate the doctrine of separation of powers and Article 5 of the French Civil Code which states that “[j]udges are forbidden to decide cases submitted to them by way of general and regulatory provisions.”²⁴⁶ Following the French vision of the separation of powers, the role of the judge is only to apply the statutes.

But the theory that the legislature can constantly formulate the law in accordance with social and economic needs is unrealistic. This idea is not a new one. Even in 1899, Francois Geny in *Methode d'Interpretation et Source en Droit Prive Positif*²⁴⁷ presented a critique of the mechanical, formalistic judicial practice of his day. Geny's critique inveighed against what he called fetishism of the codified and written statutory law.²⁴⁸ He dismissed “the fatuous notion”²⁴⁹ that the codes provided complete legal coverage and that all legal solutions could be found therein. Rather Geny called for free scientific research and for recognition of the reality that the codes inevitably contain gaps, conflicts and ambiguities produced by the evolution of modern society.²⁵⁰

As recognized in common law, judges have in fact a fundamental role in the establishment and development of legal norms. They are witnesses of economic changes in society and reformulate the law in accordance with economic needs. If the legal order does not furnish an adequate legal rule for the case, then the judge should forge a rule as though he were acting as legislator.²⁵¹ French judges could well draw a lesson from common law judges in this regard. This would go a long way in reviving and reestablishing the sagging reputation of French judges.

246. C. CIV. art. 5 («Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.»).

247. See generally FRANCOIS GENY, *METHODE D'INTERPRETATION ET SOURCES EN DROIT PPRIVE POSTIF* [METHOD OF INTERPRETATION AND SOURCES IN POSITIVE PRIVATE LAW] (2d ed. 1954).

248. See generally *id.*

249. See generally *id.*

250. See generally *id.* at 17-96.

251. JEAN CARBONNIER, *DROIT CIVIL* [CIVIL LAW] 35-36 (Presses Universitaires de France, 5th ed. 1967).

