2010

Where is Emily Litella When You Need Her?: The Unsuccessful Effort to Craft a General Theory of Obligation of Promise for Benefit Received

Edwin J. Butterfoss
Mitchell Hamline School of Law, edwin.butterfoss@mitchellhamline.edu

Henry Allen Blair
Mitchell Hamline School of Law, allen.blair@mitchellhamline.edu

Publication Information
28 Quinnipiac Law Review 385 (2010)

Where is Emily Litella When You Need Her?: The Unsuccessful Effort to Craft a General Theory of Obligation of Promise for Benefit Received

Keywords

Promise (Law), Consideration (Law), Unjust enrichment, Contract theory

Disciplines

Contracts

WHERE IS EMILY LITELLA WHEN YOU NEED HER?: THE UNSUCCESSFUL EFFORT TO CRAFT A GENERAL THEORY OF OBLIGATION OF PROMISE FOR BENEFIT RECEIVED

Edwin Butterfoss[*] *& H. Allen Blair*[**]

I. INTRODUCTION

"Oh, that's very different. Never mind!"[1]

For the past fifty years, there has been a great deal of debate over how to state a generalized theory of obligation of promise for benefit received. Typically, of course, past consideration is no consideration at all.[2] But simple chronology, some commentators and a few courts

* Professor of Law, Hamline University School of Law. Thank you to my co-author for doing most of the work to convert my frustration with Section 86 and my glimmer of an idea into my first article in the contract jurisprudence area, and to Dean Jon Garon for his support of the research for this article through a grant from the Faculty Research Fund of Hamline University School of Law.

** Associate Professor, Hamline University School of Law. I would like to thank Krista Carlson and Ben Johnson for their exceptional research, my co-author for his endless patience with my theoretical musings, and my wife for learning more about consideration than she'd bargained for.

1. L. Gordon Crovitz, *Information Age: 'Network Neutrality'? Never Mind*, WALL ST. J., Dec. 22, 2008, at A17. These words were frequently spoken by Emily Litella, a character played by Gilda Radner on Saturday Night Live in the 1970s. *See, e.g., id.*

2. *See, e.g.*, Murray v. Lichtman, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) ("It is, of course, well settled that past consideration is no consideration."); E. ALLAN FARNSWORTH, CONTRACTS § 2.7, at 56 (4th ed. 2004) ("Such 'past consideration'—action already taken before a promise is made—cannot be consideration for the promise."); 4 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:11 (4th ed. 2008). This rule has, in fact, been well established since the famous 1568 decision in *Hunt v. Bate*, 73 Eng. Rep. 605 (1568). In the case, Hunt stood in for Bate's servant in debtor's prison so that Bate's work would not go undone. *Id.* at 605-06. When Bate learned of this, he promised to hold Hunt harmless should Hunt be required to pay the servant's debt. *Id.* at 606. Ultimately, Hunt was required to pay, but Bate refused to indemnify. *See id.* The Common Pleas court was unsympathetic. Chief Justice Dyer reported that Hunt would not be compensated because he was a mere volunteer: Hunt did it "of his own head." *Hunt*, 73 Eng. Rep. at 606. Any moral obligation created by Hunt's volunteering was insufficient to make Bate's promise actionable. *See id.*

suggest, occasionally leaves a deserving plaintiff without a remedy. There are times, these commentators and courts suppose, when a promisor should be legally bound to follow through on a commitment to do what she morally ought to do—to compensate a plaintiff for a performance completed before the promise was given.[3] The real trick has been distinguishing between the run-of-the-mill cases, where promises based on past consideration are unenforceable, and the exceptional case, where a promise based only on felt moral obligation is enforceable. Not only have some of the greatest contract scholars struggled to pull off this trick,[4] seeking to find innovative and consistent ways of justifying the so-called "material benefit rule,"[5] but virtually every law student has wrestled with explaining the existence of an unenforced promise in *Mills v. Wyman*[6] and an enforced promise in

3. *See, e.g.*, 1A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 231, at 349 (1963) ("[I]n every jurisdiction there are 'past considerations' that are held sufficient to support an express promise, for the reason that they appeal to the community sense of moral obligation."); FARNSWORTH, *supra* note 2, § 2.8, at 57 ("There was, however, pressure to allow exceptions for promises to perform what could be regarded as a 'moral obligation.'").

4. *See infra* Part II.

5. The doctrinal exception to the past-consideration rule has gone by many names: the material benefit rule, see, e.g., JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 67, at 298 (3d ed. 1990) (expressing support for the "material benefit" exception to the rule of past consideration); promissory restitution, see, e.g., E. ALLAN FARNSWORTH, CONTRACTS § 2.8, at 60 n.31 (2d ed. 1990) (citing Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1118 (1971) for the proposition that this exception should be properly labeled "promissory restitution"); or moral consideration, see, e.g., CORBIN, *supra* note 3, § 231, at 349 ("[I]n every jurisdiction there are 'past considerations' that are held sufficient to support an express promise, for the reason that they appeal to the community sense of moral obligation."); 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 150, at 332 (1st ed. 1920) ("In every jurisdiction whether or not it professes to accept the doctrine of moral consideration, there are certain promises which are enforceable without present consideration, however difficult it may be to explain the reason for their enforcement."). The section of the *Restatement (Second) of Contracts* that recognizes the exception is entitled "Promise For Benefit Received." RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981). A handful of jurisdictions have also enacted statutes purporting to codify the exception, usually blending one or more of these labels. *See, e.g.*, CAL. CIV. CODE § 1606 (West 1982) ("How far legal or moral obligation is a good consideration."); MONT. CODE ANN. § 28-2-802 (2009) ("Extent to which existing legal or moral obligation is good consideration"); N.D. CENT. CODE § 9-05-02 (2006) ("When legal or moral obligation good consideration"). Although each of these labels indicates a slightly different theoretical basis for recognizing and enforcing the exception, the common denominator is that promisees are sometimes entitled to enforce promises supported only by past consideration. *See, e.g.*, CAL. CIV. CODE § 1606; MONT. CODE ANN. § 28-2-802; N.D. CENT. CODE § 9-05-02.

6. 20 Mass. (3 Pick.) 207 (1825) (refusing to enforce a promise to compensate a stranger who cared for the promisor's dying son).

Webb v. McGowin.[7]

All the fuss, we maintain, overlooks the fact that most courts never intended for there to be a generalized rule creating an obligation of promise for benefit received in the first place. Such a generalized rule, in fact, cannot be adequately justified by court decisions or on theoretical grounds. In fact, even after scholars managed to manufacture such a rule in Section 86 of the *Restatement (Second) of Contracts*[8] and a few state statutes,[9] it has remained virtually unused. Given the rule's questionable historic basis, its theoretical limitations, and the fact that it has fallen into desuetude, we think that the time has long since come for commentators to issue the jurisprudential equivalent of Emily Litella's sheepish "never mind."

More particularly, we contend that the material benefit rule represents an unsuccessful assault on classic contract doctrine. The rule, especially as developed in Section 86 of the *Restatement (Second) of Contracts*, was meant to serve as a continued attack on what some commentators have viewed as an outmoded classical obsession with the bargain theory of consideration.[10] Instead of formalities evidencing a market transaction, many modern contract scholars have argued that contract law should be grounded on intent coupled with some sort of good reason for enforcement.[11] We contend, however, that even if one is sympathetic to criticisms of consideration and other formalities in contract law, continued debate about the significance of the material benefit rule can no longer be justified. The empirical reality is that, despite having been recognized by the *Restatement (Second) of Contracts* and despite having been codified as a statutory rule in several states, the material benefit rule has only been used by courts to enforce promises in a handful of cases during the past forty years.[12] Perhaps

7. 168 So. 196 (Ala. Ct. App. 1935) (enforcing a promise to compensate an injured worker who saved the promisor's life).

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

9. Our focus in this Article is on Section 86 of the *Restatement (Second) of Contracts*. Several states, and an American territory, however, have enacted legislation codifying variations on the moral obligation theme. *See, e.g.*, CAL. CIV. CODE § 1606; GA. CODE ANN. § 13-3-41 (West 1982); GUAM CODE ANN. tit. 18, § 85502 (2005); LA. CIV. CODE ANN. art. 1760 (2008); MONT. CODE ANN. § 28-2-802; N.D. CENT. CODE § 9-05-02; OKL. STAT. ANN. tit. 15, § 107 (West 1996); S.D. CODIFIED LAWS § 53-6-2 (2004). Despite remaining on the books in these states, there are few cases that have implemented the statutes since the *Restatement (Second) of Contracts* became widely available. In Part IV, we identify the few cases in the last forty years that do rely on one of these statutes.

10. *See infra* Part II.B.

11. *See infra* Part II.B.

12. *See infra* Part IV.A.

more intriguingly, during the past forty years only a few more reported cases even discuss the rule, indicating that litigants rarely attempt to use it.[13] Whatever the merits of the war on formalism generally, the material benefit rule attack has failed.

The extent of the failure suggests that there may be good reason why courts have all but refused to use the rule and litigants have seemed uninterested in trying to get them to do so. Notwithstanding the criticisms leveled against it, the bargain theory of consideration may serve as more than an arbitrary line in the sand demarcating the boundary between legally enforceable and unenforceable promises. The bargain theory of consideration may well reflect a commonly held, extra-legal view about the enforceability of promissory obligations. In short, the inability of the material benefit rule to capture the attentions of courts and litigants alike may reflect not only the notion that promisors and promisees expect and intend only those promises given as part of a bargain to be legally enforceable, but that rendering other non-bargained for promises enforceable might debase them and discourage promissory commitments.

Part II of this Article sketches the early history leading to the creation of the material benefit rule in Section 86 of the *Restatement (Second) of Contracts*. It briefly traces the origins of the rule from a select few cases, often referred to as the "moral obligation cases," embracing exceptions to the requirement of consideration. Part II argues, however, that these cases did not justify creation of the material benefit rule. Instead, the Restatement drafters, as well as subsequent commentators supportive of the rule, manufactured it by stretching these cases in order to fundamentally challenge classical contract doctrine. The Restatement drafters and subsequent supportive commentators sought to use the material benefit rule to help dislodge consideration from its central status as the primary mechanism of distinguishing between legally enforceable and unenforceable promises.

Part III turns to a close reading of Section 86 of the *Restatement (Second) of Contracts*. This section demonstrates some of the many theoretical shortcomings of the material benefit rule. In particular, Part III shows that the requirement of unjust enrichment in Section 86 at worst destroys the efficacy of the rule and at best aims at rectifying problems with burdens of proof in exceptional restitution cases. Either way, the focus on unjust enrichment begs the question: Why should the

13. *See infra* Part IV.B.

law of contracts focus on problems that are more appropriately addressed by the law of restitution? As Part III then demonstrates, the mere fact that Section 86 purports to address only unjust enrichment cases involving a promise does not obviate the problem. In fact, Section 86 confusingly lurches back and forth between suggesting that unjust enrichment or promise is the central concern, leaving only a few clues buried in the comments.

Given the confusing state of Section 86, it is perhaps unsurprising, as Part IV observes, that there have been paltry few cases analyzing, let alone applying, it since final drafts of the *Restatement (Second) of Contracts* were widely available in the late 1970s, and very few cases applying any of the similarly-worded state statutes. Part IV argues that most of the few cases that do apply some variant of the material benefit rule can, in fact, be best explained by some other rule or legal concept, such as unjust enrichment.

Part V wraps up by arguing that, given the fact that the material benefit rule is a dead letter, all the fuss commentators have made about it serves only to confuse contract law. There is little to be gained, and much, arguably, can be lost by continuing to focus time and energy on the material benefit rule. Additionally, we suggest that the spectacular failure of the rule may well indicate that the bargain theory of consideration captures, at least in part, a commonly held view about what promises should be enforceable.

II. A TRIUMPH OF SENTIMENT: THE IMPETUS BEHIND SECTION 86

In 1941, nearly forty years before Section 86 of the *Restatement (Second) of Contracts* was published, Lon Fuller noted that moral obligation cases—cases espousing an exception to the general rule that a promise to pay for a benefit already received is not legally enforceable—"have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic must inevitably make at times with sentiment."[14] Professor Fuller's references to "principle" and "logic" were, of course, references to what has come to be known as the classical theory of contract law.[15]

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

15. The classical conception of contract law (often referred to as "formalism") strove for scientific precision in the deduction and application of acontextual rules. *See, e.g.*, Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 416-17 (2004) (citing CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871)); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV.

Variously associated with Holmes, Williston, and the original *Restatement (First) of Contracts*,[16] the classical theory of contract law situated the bargain conception of consideration at its core.[17] According

607, 608-09 (1999) ("To the classical formalists, law meant . . . a scientific system of rules and institutions that were complete in that the system made right answers available in all cases; formal in that right answers could be derived from the autonomous, logical working out of the system; conceptually ordered in that ground-level rules could all be derived from a few fundamental principles; and socially acceptable in that the legal system generated normative allegiance."). It was an "[a]bstract conceptualism." DiMatteo, *supra* at 416. Melvin Eisenberg has described the classical model of contract as: "axiomatic and deductive. It was objective and standardized. It was static. It was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market. It was based on a rational-actor model of psychology." Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000). Lawrence Friedman has described the classical model of contract this way:

> [T]he "pure" law of contract is an area of what we can call abstract relationships. "Pure" contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. . . . Contract law is abstraction—what is left in the law relating to agreements when all particularities of person and subject-matter are removed.
>
> . . . The abstraction of classical contract law is not unrealistic; it is a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict untrammeled individual autonomy or the completely free market in the name of social policy.

LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 20 (1965).

It is worth noting, however, that despite the pejorative connotations often associated with the label affixed to their position, see, e.g., BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 69 (2004) ("The term ['formalism'] is usually used in a pejorative sense . . . ."), the early formalists were essentially pragmatists who believed that contract law should operate as a "rough-and-ready device to help practical people achieve their commercial goals with elementary justice." Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 216 (2005). Indeed, as Professor Movsesian has persuasively argued, Samuel Williston, at least, was essentially a consequentialist who believed only in fixed and certain rules as a means of promoting positive social consequences. *See id.*

16. *See, e.g.*, Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1285 (1990).

17. *See, e.g.*, ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE 16 (2007) (arguing that classical contract scholars sought to make consideration "the axis around which all of contract law revolved"); Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence on Anticodification*, 19 YALE J.L. & HUMAN. 149, 181 (2007) ("Langdell derived almost all of contract law from the principle of bargained-for consideration."); Jody S. Kraus, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VA. L. REV. 157, 159 (2008) (stating that the bargain theory of consideration paired with the objective theory of intent "comprised the doctrinal core of the nineteenth-century classical conception of contract law"); Donald J. Smythe, *The Scope of a Bargain and the Value of a Promise*, 60 S.C. L. REV. 203, 208 (2008) ("[T]he contours of modern contract law formed around the idea of bargained for consideration in the late nineteenth and early twentieth centuries . . . .").

to this conception, only those promises substantiated by a reciprocal, bargained-for exchange are legally enforceable.[18] The moral obligation cases, Professor Fuller was suggesting, do not square with a simple bargain theory of consideration and thus pose a challenge to classic contract orthodoxy.

Although Professor Fuller did not cite to any particular case in his discussion of the moral obligation principle, it seems likely that he was referencing a handful of mostly turn-of-the-century American cases.[19] As the next section briefly asserts, however, these cases were, in the main, either justifiable within the confines of classic consideration doctrine or merely applying a few specific exceptions to the general rule against past consideration. With few exceptions, they did not embrace a wide-ranging, general moral obligation principle. Instead, as the final section in this Part argues, Professor Fuller and the Restatement drafters after him were stretching the precedent of these scattered cases in order to justify the creation of a new rule designed to help oust consideration from its central place in contract doctrine.

A. The Early Moral Obligation Cases

The earliest instances of moral obligation exceptions to the rule against past consideration seem to appear in seventeenth century English decisions.[20] In *Ball v. Hesketh*,[21] the King's Bench altered the past

18. Holmes famously asserted that a promise was not binding as a contract unless a "reciprocal conventional inducement . . . [exists] between [the] consideration and [the] promise." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 293-94 (Little, Brown & Co. 1938) (1881). Holmes's vision, incorporated into the *Restatement (First) of Contracts*, see RESTATEMENT (FIRST) OF CONTRACTS § 75 cmt. c (1932) ("The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage there from, does not establish consideration without the element of bargain or agreed exchange . . . ."), ultimately became known as the bargain theory of consideration. *See* Kraus, *supra* note 17, at 159-60. The *Restatement (Second) of Contracts* retains this conception of consideration, noting that "[i]n the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration." RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

19. *See* Fuller, *supra* note 14, at 821-22. It is worth noting that the portion of *Consideration and Form* discussing moral obligation cases is a short two paragraphs in length. *See id.*

20. *See* FARNSWORTH, *supra* note 2, § 2.8, at 57-61 (discussing the early history of the moral obligation exceptions); Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 362 (2002) ("[I]nitial reforms of the past consideration rule were instigated in the latter part of the seventeenth century by Chief Justice Holt."). *But see* Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9

consideration rule by enforcing a minor's ratification of his promissory obligations after reaching the age of majority.[22] Similarly, in *Hyleing v. Hasting*,[23] the King's Bench enforced a debtor's reaffirmation of a promise to pay a debt after the statute of limitations had run.[24] Nevertheless, in both cases, the courts strove to justify the outcomes under the rubric of consideration, arguing that the subsequent promise merely revived the original promise, which was unenforceable only because of a procedural bar.[25] Thus, these cases were not, at least in the eyes of classic contract theorists, truly exceptions to the doctrine of consideration. Instead, they merely recognized that certain legal defenses could be waived and that particular legally discharged obligations could be ratified and thus revived.[26]

During the latter part of the eighteenth century, however, Lord Mansfield, Chief Judge of King's Bench from 1756 to 1788, used these waiver or ratification precedents to mount a concerted assault on the doctrine of consideration.[27] While a full discussion of Mansfield's

---

GEO. MASON L. REV. 99, 120 (2000) ("Elizabethan judges were the primary innovators when it came to the consideration requirement.").

21. 90 Eng. Rep. 541 (1696).

22. *Id.*

23. 91 Eng. Rep. 1157 (1699).

24. *Id.* at 1157-58.

25. *See* Kevin M. Teeven, *Origins and Scope of the American Moral Obligation Principle*, 46 CLEV. ST. L. REV. 585, 611 (1998) (referring to these exceptions as the "waiver and ratification precedents"). The *Restatement (Second) of Contracts* continues to recognize the vitality of these exceptions in §§ 82-85. *See id.* ("The *Restatement (Second) of Contracts* recognizes the modern vitality of these exceptions to the past consideration rule in sections 82 through 85.").

26. This construction of the moral obligation cases was first systematically advanced by the case reporter's note to *Wennall v. Adney*, 127 Eng. Rep. 137 (1802). This note maintained that common law support for the moral obligation principle originated with and was limited to those ratification and waiver exceptions that Lord Holt identified in the seventeenth century. *Id.* at 140 n.2 (reporter's note) ("An express promise . . . can only revive a precedent good consideration, which might have been enforced at law . . . had it not been suspended by some positive rule of law . . . ."). Early contract scholars agreed with this view. *See, e.g.*, C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 91 (2d ed. 1880) ("The contract of an infant, not being void, but merely voidable, can be ratified by the infant after he comes of age, and a new promise operates as a ratification. The action, however, must be brought on the original contract, and the new promise must be used simply to repel the defence [sic] of infancy in the event of its being pleaded."); 1 WILLISTON, *supra* note 5, §§ 143-44, at 319-24 (discussing the analytical significance of the antecedent legal obligation that was merely being revived by the subsequent promise); *id.* § 148, at 329 (concluding that moral obligation was insufficient to enforce a subsequent promise to pay for a benefit received).

27. *See, e.g.*, Teeven, *supra* note 20, at 363 ("Mansfield attempted a dramatic enlightened reform of common law contract . . . ."). Professor Teeven goes on to document Mansfield's "frontal assault on the doctrine" of consideration. *Id.* at 363-68. Other scholars

philosophy of contracts is beyond the scope of this Article, his basic ideas can be summarized by two phrases from one of his opinions: the "ties of conscience upon an upright mind" constituted a sufficient consideration for promises to be enforced while "the honesty and rectitude of the thing" permitted equitable obligations to be upheld.[28] Over the course of nearly two decades, following the dictates of this normative vision of contract,[29] Mansfield stretched the previous exceptions to the doctrine of consideration to cover essentially "all situations in which it might be said that the promisor is under 'moral obligation . . . .'"[30] Notwithstanding the ardor of his position, however, Mansfield's reforms, it turned out, were relatively short lived.[31] By the nineteenth century, the Court of Queen's Bench had unwound Mansfield's efforts and reasserted the primacy of the bargain theory of consideration.[32] In England, while the wavier or ratification precedents survived, the notion that moral obligation would replace consideration never resurfaced.[33]

In the United States, at least until the *Restatement (Second) of Contracts*, the story was similar. By the turn of the century, a number of

---

have likewise agreed that Mansfield undertook considerable efforts to change the doctrine of consideration. *See* Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 865-66 (1999) ("Mansfield believed that the consideration doctrine no longer served an essential function. . . . His attack on the consideration requirement highlighted a more flexible jurisprudence."); W. S. Holdsworth, *The Modern History of the Doctrine of Consideration*, 2 B.U. L. REV. 174, 186-95 (1922) (describing Mansfield's efforts to reformulate the doctrine of consideration to include moral consideration).

28. Hawkes v. Saunders, 98 Eng. Rep. 1091, 1091 (1782).

29. *See* Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunifed Theory*, 24 HOFSTRA L. REV. 349, 355 n.21 (1995) (arguing that Mansfield's view about the scope of enforceable promises constitutes an example of a "normative mind-set" used by judges when deciding contract disputes).

30. FARNSWORTH, *supra* note 2, § 2.8, at 59.

31. DiMatteo, *supra* note 27, at 866 ("The age of Adam Smith soon resulted in the reasserting of the consideration requirement and the end of Mansfield's attempt to unify contract theory around a moralistic core.").

32. *See, e.g.*, FARNSWORTH, *supra* note 2, § 2.8, at 60 (citing Eastwood v. Kenyon, 113 Eng. Rep. 482 (1840)); Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1329 (1994) (noting that "Lord Mansfield's efforts to infuse the common law with these equitable notions ultimately failed" and citing *Rann v. Hughes*, 2 Eng. Rep. 18 (1778) as delivering the coup de grace); Teeven, *supra* note 20, at 368 (describing the reaction of English and American courts to Mansfield's ideas as "conservative").

33. *See* Teeven, *supra* note 25, at 608 ("In English law, the moral obligation principle never recovered from the atrophy that set in during the middle decades of the nineteenth century.").

courts had adopted the logic of the waiver and ratification cases like *Ball* and *Hyleing*. They were, in other words, willing to enforce subsequent promises reviving a debt or ratifying a promise otherwise extinguished by some procedural bar.[34] A few additional courts, however, began to suggest that subsequent promises might be enforceable even if they were not linked to the revival of a past legally enforceable agreement. For instance, in *Drake v. Bell*,[35] a New York trial court directly criticized the ratification or waiver limitation on the moral obligation principle, finding that a promise founded on a moral obligation was, in effect, no different than a promise founded on an antecedent but extinguished legal obligation.[36] Similarly, the Washington Supreme Court, in *Muir v. Kane*,[37] noted:

> The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obligation. There is no legal obligation to pay such a debt, if there were there would be no need for the new promise. The obligation is moral solely, and, since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not.[38]

In addition, the South Carolina Supreme Court, in *Ferguson v. Harris*,[39] pointed out:

> [W]here an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay the same can be supported by the moral obligation to pay the same, although the legal obligation is gone forever; . . . and I am unable to perceive any just distinction between such a case and one in which there never was a legal, but only a

34. *See, e.g.*, Mills v. Wyman, 20 Mass. (3 Pick.) 207, 211 (1825) ("The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed"); Bolton v. King, 105 Pa. 78, 81 (1884) (finding that a new promise to pay a promissory note after a discharge of the debt in bankruptcy was supported by sufficient moral consideration to enforce the new promise); Stebbins v. County of Crawford, 92 Pa. 289, 292-93 (1879) ("A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by positive law.").

35. 55 N.Y.S. 945 (N.Y. Sup. Ct. 1899).

36. *See id.* at 946 (finding that past receipt by a promisor of value from a promisee served the same function as a past legal obligation disallowed only because of some procedural bar).

37. 104 P. 153 (Wash. 1909).

38. *Id.* at 155.

39. 17 S.E. 782 (S.C. 1893).

> moral, obligation to pay. In the one case the legal obligation is gone as effectually as if it had never existed, and I am at a loss to perceive any sound distinction in principle between the two cases. In both cases, at the time the promise sought to be enforced is made, there is nothing whatever to support it, except the moral obligation; and why the fact that, because in the one case there was once a legal obligation, which, having utterly disappeared, is as if it had never existed, should affect the question, I am at a loss to conceive.[40]

Most of the outcomes in these few cases articulating a broad conception of the moral obligation principle, however, can be explained more fittingly on grounds other than moral obligation.[41] For instance, in *Drake*, the New York Court of Appeals, while upholding the conclusion of the trial court, parted ways with the trial court's rationale and determined that consideration supported the defendant's promise to pay the plaintiff.[42] In *Drake*, the plaintiff had hired a carpenter to make some repairs on her house.[43] The carpenter, however, had mistakenly made the repairs on the defendant neighbor's house instead.[44] After learning of the mistake, the carpenter filed a lien against the defendant neighbor to secure payment for his services.[45] Following some negotiations, the defendant promised that if the plaintiff would pay the carpenter, he would repay the plaintiff.[46] The plaintiff, in fact, did pay the carpenter, and, not surprisingly, the defendant failed to keep his promise.[47] Rather than adopting the trial court's rationale that the

40. *Id.* at 786; *see also, e.g.*, Seymour v. Town of Marlboro, 40 Vt. 171, 179 (1868) ("The fact that the promise (vote) was made upon a past consideration does not affect its validity upon the facts. The consideration upon which it was made, moved from the plaintiff, was meritorious and beneficial."); Boothe v. Fitzpatrick, 36 Vt. 681, 682-84 (1864) (finding that moral obligation based on a promise given for a past benefit received was enforceable and criticizing the logic of the waiver or ratification precedents). For an annotated discussion of other late nineteenth and early twentieth-century cases, see Annotation, *Moral Obligation as a Consideration for an Executory Promise*, 17 A.L.R. 1299, 1317-76 (1922).

41. The precedential value of a case, of course, might rest on the express reasoning used by the court. *See, e.g.*, Kraus, *supra* note 17, at 160-62. Indeed, Grant Gilmore's strong criticism of classical contract theorists rests on this conception of precedent. *See id.* at 160-61. Another, and we believe more accurate, conception of the precedential value of cases assumes that only the outcomes are binding. *See id.* at 161-62. "[T]he express reasoning in a case is simply a theory of its precedential authority, which, like any theory, can be wrong." *Id.* at 157.

42. Drake v. Bell, 61 N.Y.S. 657, 658 (N.Y. App. Div. 1899) ("We are not now required to pass upon [the question of whether moral obligation rendered the defendant's promise enforceable], and we express no opinion thereon.").

43. *Id.* at 657.

44. *Id.*

45. *Id.*

46. *Drake*, 61 N.Y.S. at 657.

47. *Id.*

defendant had a moral obligation to pay, the Court of Appeals concluded that consideration existed.[48] In the Court's view, some of the repairs involved items that were not attached to the house and thus could have been removed by the plaintiff.[49] The plaintiff refrained from removing these items in exchange for the defendant's promise to pay her, thus supplying consideration for the defendant's promise.[50]

Similarly, cases like *Muir* can be explained as mere extensions of the ratification or waiver precedents. In *Muir*, the defendants had orally promised to pay the plaintiff real estate broker a $200 fee for his services in finding a purchaser for a certain parcel of land.[51] After the plaintiff had rendered these services, the parties signed a written document detailing the terms of their deal.[52] This document, the court noted, could not suffice as the statutorily required writing evidencing a real estate broker deal because it was executed after the broker services had been rendered.[53] Although failure to comply with the statute would normally render the broker services agreement unenforceable, the court found that the prior oral agreement coupled with the subsequent promise was sufficient consideration to support judgment for the plaintiff.[54] In short, the case did little more than add to the waiver or ratification precedents: a prior promise that, except for the procedural bar of statutory compliance, would have constituted an enforceable agreement, can be ratified by a subsequent promise that satisfies the procedural requirement.

Finally, many of these early turn-of-the-century cases can best be understood as simple restitution cases. In *Ferguson*, for instance, the defendant had contracted with Cline to have some work done on her estate.[55] Without previous authority from the defendant, Cline ordered lumber from a third party, who for various reasons, the defendant did not want to do business with.[56] After Cline used the lumber to make improvements to the defendant's estate, the defendant refused to pay for

48. *Id.* at 658.

49. *Id.* More precisely, the court found that the carpenter could have removed these items but that plaintiff "succeeded to the rights of [the carpenter]." *Drake*, 61 N.Y.S. at 658.

50. *Id.*

51. Muir v. Kane, 104 P. 153, 153 (Wash. 1909).

52. *Id.*

53. *Id.* at 154.

54. *Id.* at 154-55.

55. Ferguson v. Harris, 17 S.E. 782, 785 (S.C. 1893). The plaintiff in this case was the administratrix of Cline's estate. *Id.*

56. *Id.*

the lumber.[57] The defendant, although knowing the lumber had come from the disliked third party, nevertheless accepted it.[58] Under these circumstances, the plaintiff could recover from the defendant in restitution and her promise to pay simply sufficed as evidence of the damages.

In short, although there were scattered turn-of-the-century American cases at least purporting to embrace a wide-ranging moral obligation principle, in the main, these cases can be explained—in fact they can be better explained—as either limited extensions of the wavier or ratification precedents or on other grounds altogether.

B. Manufacturing the Material Benefit Rule

As the previous section argued, the moral obligation cases appear to have their roots in limited wavier or ratification exceptions to the past consideration doctrine. Although a few scattered American cases at the turn of the century employed broad language and reasoning suggesting expansions of the moral obligation principle beyond the scope of these limited exceptions, the actual outcomes in these cases can be better explained, for the most part, on other grounds. Notwithstanding their limited scope, however, Professor Fuller, in his seminal article, *Consideration and Form*, suggested that these cases posed a challenge to classic consideration doctrine—a challenge that the doctrine could not meet.[59] The moral obligation cases were not, in Professor Fuller's view, the concessions to sentiment that classical commentators supposed. Instead, the moral obligation cases were "capable of rational defense."[60]

Unfortunately, Professor Fuller provided scant detail about how such a defense might be mounted. The entire context of his article, however, provides some clues. Professor Fuller was no fan of legal formalism generally and pure classic contract doctrine specifically.[61]

---

57. *Id.*

58. *Ferguson*, 17 S.E. at 785.

59. *See* Fuller, *supra* note 14, at 821-22. Professor Fuller, certainly, was not the first to see the moral obligation cases as challenging the conventional consideration doctrine. *See, e.g.*, Note, *Promissory Obligations Based on Past Benefits or Other Moral Consideration*, 7 U. CHI. L. REV. 124, 124-25 (1939) ("The currently popular criticism of the doctrine of consideration can find few more vulnerable points than that rule which holds that past benefit or the moral obligation arising from its receipt is insufficient consideration to support a promise.") (footnotes omitted).

60. Fuller, *supra* note 14, at 821.

61. *See, e.g.*, Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1936 (2001) (noting that Fuller was writing as part

Consideration and Form may, in fact, be viewed as an influential example of a turn in legal scholarship from classic formalist efforts to elaborate consistent and thorough rules to a more modern effort to lay "bare the objectives that rules could serve . . . ."[62] In the article, Professor Fuller was picking up where Lord Mansfield had left off, challenging the primacy of the bargain theory of consideration by suggesting that consideration served multiple, sometimes competing objectives, some of which were substantive and some of which were formal.[63] In any given case, according to Professor Fuller, it is less important that a doctrinally required bargain is present than that the formal and substantive goals of the consideration are satisfied.[64] If good reason exists to enforce a promise and the promisor intends to be bound, courts need not fret about the absence of a bargain. In the context of moral obligation cases, courts can enforce promises subsequent to receipt of a benefit if the court is convinced that "the promisor ought to do the thing, plus the promisor[] . . . [admits] . . . his obligation . . . ."[65]

This normative justification for moral obligation as an exception to the rule against past consideration was untethered to any particular case law. Its spirit, however, animated the future work of the Restatement drafters. And, just as Professor Fuller had done, the Restatement drafters similarly broke free from precedent to fashion Section 86. Observing the early work of the Restatement drafters, for instance, Stanley Henderson recognized that support in case law for an expansive moral obligation exception to the requirement of consideration was, at

---

of a "wave of scholarship that presented a . . . challenge to classical contract theory"); William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law,"* 37 TULSA L. REV. 857, 864 (2002) ("Fuller took up his life's work as a critic of positivism and its separation of the 'is' from the 'ought' and its distinction between law and morals.").

62. KREITNER, *supra* note 17, 73. Importantly, however, Professor Fuller was not a legal realist. *See* L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 431 (1934) ("In what follows I make no claim to dispose of all the questions raised by the realist movement . . . . I have, however, attempted to select for discussion those problems which seem most intimately involved in the movement as a whole."). *See generally* Myres S. McDougal, *Fuller v. the American Legal Realists: An Intervention*, 50 YALE L.J. 827 (1941).

63. *See* Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 94-95 (2000) (arguing that *Consideration and Form* challenged classic conceptions of consideration by replacing a focus on doctrine with a focus on the conflicting objectives that the rule of consideration was meant to serve). Specifically, Professor Fuller identified three formal functions of consideration—evidentiary, cautionary, and channeling—and three substantive functions of consideration—supporting private autonomy, encouraging reasonable reliance, and preventing unjust enrichment. *See generally* Fuller, *supra* note 14.

64. *See* Fuller, *supra* note 14.

65. *Id.* at 822.

best, thin. According to Henderson, Section 89A, the precursor to eventual Section 86, represented "a fairly distinct break with heavily burdened precedent, both as to method of approach and formulation of substantive theory."[66] Even Robert Braucher, the Reporter for the *Restatement (Second) of Contracts*, conceded that the scattered decisions[67] addressing the moral obligation principle on which Section 86 was based "can be treated as representing a minority view and as rejecting the orthodox view that [moral obligation alone] is insufficient."[68]

It seems clear, then, that the Restatement drafters "were reforming as much as restating . . . ."[69] They were, in other words, "urging growth in the law based on a smattering of precedent . . . ."[70] Unencumbered by past case law, the work of the Restatement drafters was praiseworthy, at least in Professor Henderson's view, precisely because it could "function as a source of generating principle by which ordinary notions of bargain contract and value restitution are expanded."[71] The doctrine of consideration's consistency could be "eroded by the increasing number of enforceable promises which predicate their motivating forces on foundations other than bargain."[72] As one commentator hopefully proclaimed, "[i]f the proposed draft of the Restatement Second is adopted by the American Law Institute and followed by the courts," it will become necessary to reevaluate the doctrine and "either define consideration to include what are now treated as exceptions, or to

66. Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1116 (1971).

67. During the ALI Proceedings, the *Restatement* authors referred to the few moral obligation cases as "miscellany." 42 A.L.I. PROC. 273-74 (1965).

68. Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 604-05 (1969); *see also, e.g.*, Teeven, *supra* note 20, at 372 (finding that the drafters of the *Restatement (Second) of Contracts* "went beyond most jurisdictions to follow the doctrinal lead of those few courts that had departed from the bargain consideration model entirely"). Grant Gilmore described the text of Section 86 as "hesitant and cautious" because of the "uncertainties of the Reporter and his advisers." GRANT GILMORE, THE DEATH OF CONTRACT 82 (Ronald K. L. Collins ed., 1995).

69. Teeven, *supra* note 25, at 633, 640 ("The development of the American moral obligation principle is a story of the translation of a few narrow exceptions to the . . . past consideration rule into an independent egalitarian principle permitting recovery on restitutionary promises.").

70. *Id.* at 634.

71. Henderson, *supra* note 66, at 1118. Professor Henderson also wrote that Section 89A was "a reflection of changing attitudes about the range of enforceable promises." *Id.* at 1116.

72. W. Jack Grosse, *Moral Obligation as Consideration in Contracts*, 17 VILL. L. REV. 1, 26 (1971).

eliminate consideration as a contract requirement."[73]

More recent commentators supportive of the material benefit rule are no less direct about their view that the principle behind Section 86 can and should erode the requirement of consideration. Professor Geoffrey Watson, for instance, has asserted essentially the same justification for the material benefit rule as Professor Fuller advanced seventy years ago: "A promise to fulfill a moral obligation should be binding regardless of whether it is supported by consideration. It should be enough for the plaintiff to prove that the defendant's promise was made with intent to be legally bound."[74] Similarly, Professor Thel and the late Professor Edward Yorio have argued that enforcement of promises based on felt moral obligation should occur so long as the promisor intended to be bound and quality of the underlying obligation assures the enforcing court that the promise ought to be kept.[75] Professor Kevin Teeven goes even further in his several foundational articles about the moral obligation exception to the requirement of consideration, arguing that the rule expressed in Section 86 is not expansive enough. Instead, he contends that the moral obligation principle should override the bargain theory of consideration and enforce promises for benefits received by persons other than the promisor,[76] and promises to indemnify others for wrongs perpetrated by the promisor or harm suffered by the promisee because of the promisor's actions.[77]

---

73. *Id.*; *see also, e.g.*, Henderson, *supra* note 66, at 1116-17 ("The range of choice which section [86] legitimizes clearly equips the courts with broad and explicit power to bring about changes in the borderline area of contract occupied by previous obligation.").

74. Geoffrey R. Watson, *In the Tribunal of Conscience:* Mills v. Wyman *Reconsidered*, 71 TUL. L. REV. 1749, 1801 (1997).

75. Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1052-53 (1992); *see also, e.g.*, Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 12 (2004) ("[L]iability for . . . moral obligation is grounded upon a coalescence of the consensual theory and equitable notions of fairness.").

76. *See, e.g.*, Teeven, *supra* note 75, at 78 (arguing that community expectations justify an expanded understanding of the moral obligation principle that encompasses "restitutionary promises for benefits received by someone other than the promisor"); Kevin M. Teeven, *Conventional Moral Obligation Principle Unduly Limits Qualified Beneficiary Contrary to Case Law*, 86 MARQ. L. REV. 701, 701 (2003).

77. *See, e.g.*, Kevin M. Teeven, *Moral Obligation Promise for Harm Caused*, 39 GONZ. L. REV. 349, 398 (2004); Teeven, *supra* note 75, at 78 (arguing that community expectations justify an expanded understanding of the moral obligation principle that encompasses "promises to atone for harm caused.").

A number of other commentators also support an expansive material benefit rule. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 5.4, at 182 (2d ed. 1977) ("Despite the absence of a bargained for exchange, the Restatement rightly takes

Some of the commentators who support the material benefit rule follow in the footsteps of Charles Fried, and later Stephen Smith, and maintain that all seriously-made promises should be legally enforceable.[78] According to this view, people are morally obligated to keep their promises because of a Kantian duty not to treat others as means to an end but instead as ends in themselves.[79] Breaking a promise is like lying,[80] and lying "set[s] up "a relation which is essentially exploitative . . . . Lying violates respect and is wrong, as is any breach of trust."[81] "[S]ince a contract is first of all a promise, the contract must be kept because the promise must be kept."[82] Others follow the lead of Professor Fuller himself, and later Grant Gilmore, and argue that the enforceability of a promise should center on the need to compensate promisees for their justifiable reliance.[83] Still others argue, like Seana Valentine Shiffrin, that promises should be enforced without regard to bargains because promises are essential to valuable and respectful communities.[84] But, regardless of their particular theoretical stripes, these commentators share the goal of expanding the range of promises that are legally enforceable and thus limiting or eliminating the importance of the bargain theory of consideration to contract law.

We are not contending that there is anything inherently wrong with such efforts to push for reforms in contract law. We are, in fact, sensitive to the many incisive criticisms of formalism that rest at the core of such reform efforts. Reformers, however, particularly when they seek to break dramatically free from extant decisional practice, as the Restatement drafters did in fashioning the material benefit rule, bear, we

---

the position that an expressed intention to be bound founded upon receipt of a material benefit ought to be enforced . . . ."); MURRAY, *supra* note 5, at 298 ("[T]he 'material benefit' rule, supported by the RESTATEMENT 2d though not yet generally accepted by our courts, has much to commend it.").

78. *See* Thel & Yorio, *supra* note 75, at 1049-50 ("We argue, however, that promise is a more persuasive unifying principle for the moral obligation cases.").

79. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 9-10 (1981).

80. *See id.* at 7-17.

81. CHARLES FRIED, RIGHT AND WRONG 67 (1978).

82. FRIED, *supra* note 79, at 17 .

83. *See generally, e.g.*, GILMORE, *supra* note 68; L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937). Professor Gilmore, in fact, was a staunch supporter of Section 86, believing that it had given "overt recognition to an important principle whose existence *Restatement (First)* ignored and, by implication denied." GILMORE, *supra* note 68, at 84.

84. *See, e.g.*, Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 497 (2008).

think, a heavy dual burden to establish both the practical applicability of their proposals and the normative merit of those proposals. As the following sections argue, the material benefit rule has serious practical limitations and there are sound reasons to doubt that it has normative appeal.

III. TRANSCENDENTAL NONSENSE?: THE INCOHERENCE OF SECTION 86

Felix Cohen once famously derided the classical formalist approach to law, saying that "the language of transcendental nonsense . . . is entirely useless when we come to study, describe, predict, and criticize legal phenomena."[85] While it may strike some as brazen to use Professor Cohen's label to describe Section 86 of the *Restatement (Second) of Contracts*—after all, the Restatement drafters would, in all likelihood, align themselves with legal realists like Professor Cohen[86]—the shoe seems to fit. As we argue in this Section, perhaps one reason that courts have not used Section 86 (the point that we make in the next Part) is simply that it is not very useful, even for practical legal purposes. Section 86 has been described as setting forth not a rule, but a "vague,"[87] "fuzzy equitable"[88] principle that "fairly bristles with unspecific concepts."[89] To put a twist on Professor Cohen's charge, the words in Section 86 are unable to "pay up in the currency of fact . . . ."[90]

If this description is accurate, it should be no surprise that courts have not turned in great numbers to Section 86 for guidance.[91] But more than simply vague or fuzzy, Section 86 embodies a basic contradiction concerning the role of unjust enrichment in the enforcement decision and is inconsistent in treating the promise or the benefit conferred as the primary justification for providing a remedy.

85. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

86. *See, e.g.*, D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 6-7 (2009) (describing Arthur Corbin as a legal realist and the *Restatement (Second) of Contracts* as a legal realist project).

87. Henderson, *supra* note 66, at 1116.

88. Teeven, *supra* note 25, at 586.

89. Braucher, *supra* note 68, at 605.

90. Cohen, *supra* note 85, at 823.

91. *See* Henderson, *supra* note 66, at 1116 n.6 (noting that "Section 89A proceed[s] by means of a generalization in an area where the standard techniques are rule-oriented").

A. Unjust Enrichment: Now You See It; Now You Don't

Most confusing is the basic contradiction that Section 86 seems to embody. Section 86 was drafted to provide a remedy in situations where one party has been enriched or has benefited by the actions of another and injustice will result if the first party is not compensated for the benefit conferred.[92] Although Section 86 requires a promise,[93] it is generally accepted that the motivating force behind enforcement of the promise is the underlying unjust enrichment,[94] not the policies that generally call for enforcement of promises.[95] Subsection (2) expressly requires that unjust enrichment be present in order for a remedy to be provided under Section 86: "A promise is not binding under Subsection (1) . . . if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched . . . ."[96]

Of course, if the promisor has been unjustly enriched, a remedy in restitution (or "unjust enrichment") should be available.[97] The Restatement drafters recognize this general principle in comment b.[98] In the same sentence in which they do, however, they identify with apparent concern, a typical situation where a remedy is denied despite a benefit being conferred: "Although in general a person who has been unjustly enriched at the expense of another is required to make restitution, restitution is denied in many cases in order to protect persons who have had benefits thrust upon them."[99] The Restatement drafters seem to consider these cases where restitution is denied as cases where unjust enrichment is present but a remedy in restitution is nevertheless unavailable. This perception that restitution is being denied in deserving

92. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981) ("A promise . . . is binding to the extent necessary to prevent injustice.")

93. *Id.*

94. *See, e.g.*, Henderson, *supra* note 66, at 1116 ("There can be little doubt that the new category of binding promise created by Section 89A is anchored in the policy against unjust enrichment . . . ."); Jean Fleming Powers, *Rethinking Moral Obligation as a Basis for Contract Recovery*, 54 ME. L. REV. 1, 14 (2002) ("The drafters of the *Restatement* concede that the conceptual basis for the exception is in restitution, and suggest that it is the difficulties that are sometimes encountered in restitution that make the contract remedy necessary.").

95. *But see* Thel & Yorio, *supra* note 75, at 1049-50 ("We argue, however, that promise is a more persuasive unifying principle for the moral obligation cases.").

96. RESTATEMENT (SECOND) OF CONTRACTS § 86(2).

97. "A person who is unjustly enriched at the expense of another is liable in restitution to the other." RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (Discussion Draft 2000).

98. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b. (labeled "*Rationale*").

99. *Id.*

cases leads to their desire to provide a remedy. It seems more accurate, however, to view these cases as instances where a restitutionary remedy is denied because there has been no unjust enrichment. Restitution is denied based on the recognition that it is not unjust for one to retain a benefit that has been thrust upon them.

The Restatement drafters' view that unjust enrichment lurks just below the surface in these cases leads to the basic contradiction: the drafters identify a situation generally recognized as not presenting a case of unjust enrichment; they seek to provide a remedy in the situation, but they continue to insist that a remedy not be provided if "the promisor has not been unjustly enriched . . . ."[100] Thus, if established principles of restitution are utilized to determine whether the promisor has been unjustly enriched, the drafters have created a remedy that, by the terms of Section 86, should never be awarded because the promisor has not been unjustly enriched.[101] That obviously cannot be what the drafters intended, but as discussed below, the imprecise use of the term "unjust enrichment" leads to confusion when attempting to apply the limiting words of the Section 86(2).

The potential for confusion, which results from the drafters' imprecise use of the term "unjust enrichment," manifests itself most evidently in "good Samaritan" cases[102] in which benefits are conferred in emergency situations or situations of great need. The typical fact pattern is exemplified by the classic cases of *Mills v. Wyman*[103] and *Webb v. McGowin*[104]—two cases whose facts are utilized as illustrations by the drafters and which are the cases most frequently identified with Section 86.[105] In these "good Samaritan" cases, recovery historically

100. *Id.* § 86(2)(a). This contradiction resembles the sort of circular reasoning that Professor Cohen chided in formalist legal thought. *See* Cohen, *supra* note 85, at 814.

101. Charles M. Thatcher, *Complementary Promises for Benefits Received: An Illustrated Supplement to Restatement (Second) of Contracts Section 86*, 45 S.D. L. REV. 241, 262 (2000) (pointing out that if the party seeking to enforce a promise for benefit received had to actually prove the promisor has been unjustly enriched, "section 86 would be largely superfluous.").

102. Also less colorfully known as "nonprofessional volunteers."

103. 20 Mass. (3 Pick.) 207 (1825).

104. 168 So. 196 (Ala. Ct. App. 1935).

105. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981). Although the comments to Section 86 spell out six situations to which the section applies ("*Promise to correct a mistake*," *id.* § 86 cmt. c; "*Emergency services and necessaries*," *id.* § 86 cmt. d; "*Benefit conferred as a gift*," *id.* § 86 cmt. e; "*Benefit conferred pursuant to contract*," RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. f; "*Obligation unenforceable under the Statute of Frauds*," *id.* § 86 cmt. g; and "*Obligation unenforceable because usurious*," *id.* § 86 cmt. h), it is the "*Emergency services and necessaries*" cases that uniformly appear in contracts

has been denied because the actions of the individual conferring the benefit have been presumed gratuitous, which defeats any claim for restitution or unjust enrichment.[106] That presumption is likely based on the common understanding that individuals act to aid or assist in these situations out of kindness, not with the expectation of compensation.[107] The Restatement drafters drafted Section 86 with the goal of providing a remedy in some of the cases, yet Section 86 states that recovery is not permitted if the benefit was conferred "as a gift."[108] This means that applying Section 86 to provide a remedy requires identifying the situations the drafters had in mind in which the actions of good Samaritans—traditionally presumed gratuitous—are nevertheless not to be viewed as "gifts." Unfortunately, the drafters provided little guidance to courts that undertake that task. One way a court seeking to provide a remedy could accomplish that feat would be simply to focus on subsection (1) and ignore the limitation in subsection (2) against providing a remedy in a "gift" situation.[109] But what does it say about Section 86 if one of the main provisions must be ignored in order to achieve the result the drafters apparently intended?

Another approach could be to read the restriction "conferred . . . as a gift" to require a conscious decision to confer a gift rather than simply an absence of an expectation of compensation. In other words, a court could shift the presumption in these situations to that of non-gratuitous intent and require evidence that the party conferring the benefit affirmatively intended to provide the benefit without expectation of compensation. This seems to be what the drafters intended. In comment d, relating to "*Emergency services and necessaries*," the drafters

---

casebooks when this Section is covered and also that generate the bulk of the discussion in law review articles on the topic. *See, e.g.*, IAN AYERS & RICHARD E. SPEIDEL, CONTRACT LAW 108-27 (7th ed. 2008); RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 640-56 (4th ed. 2008); LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 152-60 (8th ed. 2006); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 286-301 (6th ed. 2007).

106. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 4.9(1), at 680 (2d ed. 1993) ("If there is a black-letter rule for unsolicited benefits it is that 'volunteers' and 'officious intermeddlers' cannot recover restitution. The Restatement says a volunteer is one who confers a benefit without mistake, coercion or request.").

107. FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI-CONTRACTS § 201, at 314 (1913) ("[T]here is an irrebuttable presumption, based either upon considerations of policy or upon knowledge of normal human conduct, that the service [of the nonprofessional volunteer] is intended to be gratuitous.").

108. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a).

109. *See* Teeven, *supra* note 25, at 637 ("Nevertheless, courts have regularly enforced the subsequent promise despite the fact that a gift seemed intended.").

recognize that "[t]he law of restitution . . . severely limits recovery for necessaries furnished to a person under disability and for emergency services," but assert that when a subsequent promise is made "[a] positive showing that payment was expected is not then required; an intention to make a gift must be shown to defeat restitution."[110] Thus, a court could conclude that an actor like Webb acted without thinking or without forming the intent to confer a gift, but that an actor like Mills consciously decided to confer the benefit gratuitously. But such a reading calls into question whether Section 86 has it right. It is not easy to see why morality favors the unthinking Webb over the good citizen Mills.[111]

Moreover, if the effect of Section 86 is simply to shift the burden of showing intent to make a gift when a subsequent promise is made, then by definition Section 86 is dealing only with marginal cases—cases where a shift in the burden of proof changes the result.[112] That calls into question whether the light of Section 86 is worth the candle. Why is a new cause of action being created in contract in order to remedy a

110. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d. The comment justifies this shift in the burden on intent to make a gift by asserting that the "subsequent promise . . . may remove doubt as to the reality of the benefit and as to its value, and may negate any danger of imposition or false claim." *Id.* For a discussion of the wisdom of according a subsequent promise such an effect, see *infra*, notes 125-45 and accompanying text.

111. Professor Powers suggests that recovery may be available for both under RESTATEMENT OF RESTITUTION § 112 (1937), which arguably permits recovery provided the person conferring the benefit has not manifested a desire to have compensation for their services. Powers, *supra* note 94, at 19-20 (quoting RESTATEMENT OF RESTITUTION § 112 cmt. b (1937)). One scholar has suggested that the questionable outcome in *Webb* may be attributed to tricky questions inherent in employment cases at the turn of the century. Bryce Yoder, Note, *How Reasonable is "Reasonable"? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1528 (2008) ("Contract law is often bent into bizarre shapes when forced to tend to employment issues; for example, the sticky concept of promissory restitution evolved from an attempt to 'do the right thing' in an employment case when no valid contractual remedy existed.").

112. That Section 86 deals largely with marginal cases can be seen in the comments discussing two situations intended to be covered by the new principle. In comment e, "*Benefit conferred as a gift*," the Restatement drafters reaffirm the unenforceability of promises to pay for a past gift and promises to pay a debt discharged by a binding agreement, but then explain Section 86 may apply in "marginal cases . . . in which both parties understand that what is in form a gift is intended to be reimbursed indirectly, or in which a subsequent promise to pay is expressly contemplated." RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. e. Similarly, comment g, "*Obligation unenforceable under the Statute of Frauds*," explains that the availability of other remedies means that the question of whether "[a] promise to pay a debt [otherwise] unenforceable under the Statute of Frauds" is enforceable under Section 86 will "seldom arise[]." *Id.* § 86 cmt. g. The comment goes on to state, however, that Section 86 is designed to provide a remedy if it does arise and additionally "if the policy of the Statute is satisfied." *Id.*

perceived deficiency in the allocation of the burden of proof in restitution? That is a clumsy way to deal with a perceived deficiency in restitution. Not only does it compromise and inject uncertainty in one of the most basic contract doctrines—the requirement of consideration[113]—it arguably has the effect of stunting the development of restitution, which likely could have dealt with the perceived deficiency more effectively.[114] In addition, if the Restatement drafters intended to shift one of the most settled presumptions in restitution, they should make a stronger case.

The justification for utilizing contract presumably is the presence of a promise, which sounds in contract and is a required element for a remedy under Section 86. If the promise is the key element, however, it is curious that the drafters suggest that the surviving claim is restitution. It seems more consistent with the provisions of Section 86 to say that "an intention to make a gift must be shown to defeat enforcement of the promise." Enforcement of the promise is the effect of Section 86 governing, not a claim of restitution. Yet, as discussed below, the function the promise plays under Section 86 only adds to the confusion. At times, the Restatement drafters place far too great a weight on the promise, particularly if the real motivation is to address cases of perceived unjust enrichment. At other times, the Restatement drafters seem willing to compromise the promise to achieve the goal of preventing unjust enrichment. This inconsistent emphasis on the promise has added to the confusion in attempting to apply Section 86, has spurned debate as to whether the promise or unjust enrichment is at the heart of Section 86,[115] and supports a charge that Section 86 adopts an unpredictable, results-oriented approach.[116]

B. The (Sometimes) Talismanic Power of the Promise

As discussed above, although Section 86 was drafted to provide a remedy in cases of perceived unjust enrichment, the justification for providing a remedy is a subsequent promise. In the Restatement

113. For a discussion of the possibility that injecting such uncertainty was, in fact, a motivating force behind Section 86, see Teeven, *supra* note 25, at 633-40.

114. *See* Powers, *supra* note 94, at 6 (noting that the moral obligation exception "perpetuates a lack of understanding and an underutilization of restitutionary remedies").

115. *Compare id.* at 8-9 (refuting the suggestion that the basis for enforcement is the promise), *with* Thel & Yorio, *supra* note 75, at 1049-50 (making the suggestion that the basis for enforcement is the promise).

116. Powers, *supra* note 94, at 6.

drafters' view, the promise is the reason cases typically denied a remedy in restitution should nevertheless be provided a remedy under Section 86. In comment b, after noting that restitution is denied "in many cases in order to protect persons who have had benefits thrust upon them," and that rules are in place to deny restitution in cases of "false claims, stale claims, claims already litigated, and the like," the drafters baldly state, "[i]n many such cases a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails."[117] The Restatement drafters seem to think that once a promise is made, those situations traditionally recognized as not being instances of unjust enrichment are suddenly transformed into situations of unjust enrichment. But it is not obvious why this is so; in this regard, the Restatement drafters seem to accord subsequent promises talismanic power that may be undeserved.

In the same paragraph of comment b, the Restatement drafters state that "[e]nforcement of the subsequent promise sometimes makes it unnecessary to decide a difficult question as to the limits on quasi-contractual relief."[118] But why is that so? It is true that if the difficult question is one of measuring the quasi-contractual relief, enforcing a promise of a specified figure avoids that measurement issue. The problem is that Section 86 also specifies that the promise is binding "to the extent necessary to avoid injustice."[119] If that directive contemplates partial enforcement of the promise based on "injustice," the measurement problem is back in virtually identical form. On the other hand, if the "necessary to avoid injustice" limitation is meant to limit which promises are enforced based on the presence of "injustice," the question has simply been shifted from a question "as to the limits on quasi-contractual relief" to a difficult question as to the limits of contractual relief.[120]

The next paragraph of the comment appears to address that question. The comment acknowledges that it is stating a "broader

117. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b.

118. *Id.*

119. *Id.* § 86(1). Comment i, labeled "*Partial enforcement*," discusses very limited situations in which partial enforcement is called for. *Id.* § 86 cmt. i. It may be that this comment was intended to suggest that these are the only situations in which partial enforcement is appropriate.

120. As Professor Powers points out in a similar context: "Nothing is gained if 'difficult question[s] as to the limits on quasi-contractual relief' are traded for difficult questions as to the limits of moral obligation." Powers, *supra* note 94, at 14 (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b).

principle"[121] than the "waiver and ratification" exceptions[122] permitting enforcement of a subsequent promise that were included in the First Restatement[123] and continued in the Second Restatement in the sections immediately preceding Section 86.[124] Because this "broader principle is not so firmly established" as the waiver and ratification exceptions, the Restatement drafters explain that it does not mandate enforcement "if there is doubt whether the objections to restitution are fully met by the subsequent promise."[125] This really is the key question: in what situations does a subsequent promise alleviate the traditional obstacles to restitution? In a rare burst of specificity, the comment explains that "[f]acts such as the definite and substantial character of the benefit received, formality in the making of the promise, part performance of the promise, reliance on the promise or the probability of such reliance may be relevant to show that no imposition results from enforcement."[126]

While this specificity is helpful, its location buried in the comments is not. There is no indication in Section 86 itself that a court should pause before enforcing a subsequent promise if these factors are not present. The only express consideration in Section 86 is whether enforcement is necessary to avoid injustice. The phrasing of the comment itself downplays the significance of the factors as well. The comment merely states the presence of one or more of these factors "*may* be relevant to show that no imposition results from enforcement."[127] A statement that the factors are critical or at least important (or even relevant) would have provided more guidance than the relatively meaningless pronouncement that they "may be" relevant. The factors should play a more prominent role in the enforcement decision. Without them, the power given the promise to justify a remedy is overstated.

Promises supported by consideration are enforced because the bargain provides confidence that the promise was in fact made and that it was a serious promise.[128] The presence of consideration gives us

121. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b.
122. *See supra* note 25.
123. RESTATEMENT (FIRST) OF CONTRACTS §§ 86-89.
124. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b; §§ 82-85.
125. *Id.* § 86 cmt. b.
126. *Id.*
127. *Id.* (emphasis added).
128. *See, e.g.*, Fuller, *supra* note 14, at 800 (describing the evidentiary and cautionary functions of consideration).

confidence that a remedy should be provided based on the promise. Section 86 seems to elevate the promise to the role that consideration usually plays. The promise, the Restatement drafters tell us, provides confidence that a remedy should be provided. But in the absence of consideration, how can we be confident that we are dealing with a serious promise? In comment d, "*Emergency services and necessaries*," the Restatement drafters assert only that a subsequent promise "*may* remove doubt as to the reality [and value] of the benefit" received and "*may* negate [the] danger of imposition or false claim."[129] But comment d provides no guidance to determine when a subsequent promise should be considered to have those effects. A variation on the classic case of *Webb v. McGowin*, on which illustration 7 to comment d is based, provides an example of the need to consider more than the existence (or alleged existence) of a promise.[130]

Consider a variation on one of the basic assumptions of the case: that by his actions Webb prevented serious injury or death to McGowin. Suppose this assumption was incorrect. After all, it seems extremely unlikely that at the time anyone could have been certain that had Webb not "fallen with the pine block to the ground below," McGowin definitely would have been struck and possibly killed.[131] If McGowin would not have been struck, then no benefit would have been conferred. Comment d suggests that the "subsequent promise in such a case may remove doubt as to the reality of the benefit . . . ."[132] But how does it do so in this case? Is it not more likely that the promise is the result of the horror of seeing Webb seriously injured attempting to prevent possible, but by no means certain, harm to McGowin and McGowin's likely feelings of responsibility as Webb's employer? If so, the situation is awfully close to a promise "based solely on gratitude or sentiment" which, according to comment a, are not "sufficient of themselves to support a subsequent promise."[133] If no benefit was conferred, presumably Mr. Webb would have faced denial of enforcement of the promise, much like Mr. Mills in *Mills v. Wyman*, the case on which illustration 1 (denying recovery) is based.[134]

The remarkable scenario of Webb falling with the block and

129. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d (emphasis added).
130. *Compare id.* cmt. d, illus. 7, *with* Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935).
131. *Webb*, 168 So. 196 at 197.
132. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d .
133. *Id.* § 86 cmt. a.
134. *Compare id.* cmt. a, illus. 1, *with* Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825).

apparently saving McGowin from serious injury or death seems the perfect recipe for an ill-considered, improvident promise. Consider if McGowin, still shaken by the experience, had promised, "Don't worry about anything but getting better; I promise to take care of you," as Webb was being taken away for medical treatment. Only later, upon calm reflection, might McGowin realize that it was unlikely that Webb's falling with the block necessarily diverted the flight so that it missed him. He might also realize that even if he were in the path of the unaccompanied block, and his life was saved by Webb's actions, the same result could have been accomplished by Webb yelling a simple, "Look out." He likely would feel less compelled to provide a lifetime benefit to Webb. Now we have a perhaps ill-considered promise to go with a possible absence of a benefit conferred.

In the actual case (and the illustration), McGowin made the promise later, after the excitement of the event had occurred, so it was less likely to be an ill-considered promise.[135] Additionally, he continued making payment as promised until his death eight years later, further suggesting he did not regret the promise.[136] It still seems doubtful, however, that despite McGowin standing by his promise, there is any certainty that a benefit was actually conferred. Importantly, the uncertainty of a benefit being conferred is not because it is difficult to measure the possible benefit—the issue the drafters seemed to suggest—but because it is difficult to know if Webb's actions actually spared McGowin.[137] The Restatement drafters' response to this might be that the remedy—enforcement of the promise—is not really an attempt to measure the benefit. According to Section 86, however, if there is no benefit conferred, there should be no enforcement of the promise.[138] It seems likely that enforcement is taking place not due to confidence that a benefit was conferred, but because, based in part on the factors specified in comment a—in particular, part performance of the promise and reliance or the probability of reliance on the promise—the Restatement drafters are confident it was a serious promise. The purported purpose of Section 86, however, is not to enforce serious promises, but to

135. *Webb*, 168 So. at 197; RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a, illus. 7.

136. *Webb*, 168 So. at 197.

137. On the other hand, in *Harrington v. Taylor*, 36 S.E.2d 227 (N.C. 1945), there was much greater certainty that a benefit had been conferred but no relief was granted, apparently due to concerns over whether the promise was a serious one.

138. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86(1).

provide a remedy in situations of unjust enrichment.[139] If the goal is to enforce serious promises, Mr. Mills should have fared better in illustration 1 to comment a when he received a formal promise in writing.[140]

The result in *Webb v. McGowin* illustrates the confusing and frustrating nature of Section 86. Without the benefit received, we are left with an unenforceable promise "based solely on gratitude or sentiment."[141] Without the promise, we are left with a benefit conferred that does not justify a remedy. Under Section 86, the promise justifies the conclusion that a benefit has been conferred, thereby justifying its own enforcement.

It can be argued that the strong possibility of a benefit conferred in *Webb v. McGowin* and the security that the promise was a serious one justify treating the promise similar to a promise supported by consideration through full enforcement. In other situations, however, Section 86 (or at least the comments) permits compromises in the enforcement of a promise that would never have occurred in the enforcement of promises supported by consideration. In these cases, compensating the benefit received, rather than enforcing the promise, takes precedence.

Comment i, "*Partial enforcement*," sets forth several situations in which the benefit limits the remedy despite the presence of a promise.[142] The comment explains that "where a benefit received is a liquidated sum of money, a promise is not enforceable under this Section beyond the amount of the benefit."[143] Further, where the value of the benefit is uncertain, a promise to pay a liquidated sum may be enforced provided "if in all the circumstances it is not disproportionate to the benefit."[144] If a court engaged in an inquiry into the proportionality of the benefit and the promise in a situation involving a promise supported by consideration, it would violate one of the most basic principles of contract law. Of course, the lack of consideration may justify such an inquiry in cases involving a subsequent promise. A complaint about disproportionate benefit in a setting of a promise supported by consideration would be met with the maxim that a court does not rescue a promisor from a bad bargain. In the subsequent promise situation,

139. *See id.* § 86 cmt. b.
140. *See id.* § 86 cmt. a, illus. 1.
141. *Id.* § 86 cmt. a.
142. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. i.
143. *Id.*
144. *Id.*

there is no bargain that a court must keep sacrosanct. This is supported by the explicit recognition in the comment that the remedy provided is not a true contractual remedy: "A promise which is excessive may sometimes be enforced to the extent of the value of the benefit, and the remedy may be thought of as quasi-contractual rather than contractual."[145]

The important point, however, is that by lurching back and forth between the primacy of the promise and the primacy of the benefit received, the Restatement drafters have again sown the seeds for confusion, opened Section 86 to the charge of an unpredictable, results-oriented approach, and likely diminished the attractiveness of Section 86 for courts. And all of this in order to address marginal cases in which the Restatement drafters may have overestimated the need for a remedy in the first place, either because the promisee is less deserving than the drafters imagine or other remedies are available.[146] The lack of clarity suggests the Restatement drafters might have been better off with a rule that simply stated "a promise not supported by consideration may be enforced in the interests of justice." But perhaps that would have been too direct an attack on the rule requiring consideration and appear to be simply a restatement of restitutionary principles. In any event, the lack of clarity and inconsistency may have been Section 86's undoing: as the next section demonstrates, courts simply are not utilizing the material benefit rule.

IV. A LOT OF FUSS BUT LITTLE MUSS: SECTION 86 UNUSED

As we have argued, the material benefit rule was manufactured by stretching the limited precedent of a few early American cases in an effort to remove consideration from its predominate position as the mechanism for distinguishing between legally enforceable and unenforceable promises. Section 86 of the *Restatement (Second) of Contracts*, however, is internally inconsistent and confused about its own scope. These two concerns about the rule might not matter all that much if courts and litigants were regularly employing it in an effort to work justice in individual cases. After all, as Professor Stanley

145. *Id.*

146. *See* Powers, *supra* note 94, at 3 ("For some situations . . . the deficiency is more perceived than real . . . . This is true for the 'moral obligation' exception . . . . [In the moral obligation cases] restitution often provides adequate remedies, and is actually more satisfactory than contract.") (footnote omitted).

Henderson noted during the drafting of Section 86, the theory of liability behind the material benefit rule "resists classification along conventional lines."[147] The point of Section 86, he believed, was to allow courts freedom to "range widely in search of factors relevant to the ultimate issue of imposition."[148] If Professor Henderson was right, the fact that Section 86 amounts to a "vague generalization" was unavoidable.[149]

As Professor Henderson also recognized, however, "[t]he ultimate question presented by the combination of ideas in Section 89A [Section 86] is whether . . . [it] will in fact enlarge the class of obligations enforceable in court."[150] He was no rule skeptic, and he understood that rules only matter to the extent that courts actually use them.[151] Writing as the earliest drafts of the *Restatement (Second) of Contracts* were circulating, Professor Henderson's empirical question was, of course, unanswerable. Now, nearly thirty years after the final version of the *Restatement* was adopted, a more definitive answer than he probably would have imagined possible can be given: Section 86 has not enlarged the class of obligations enforceable in court. To the contrary, our research has revealed merely eight cases since the adoption of Section 86, and merely an additional six cases since the *Restatement (Second) of Contracts* drafts were widely circulated, enforcing a subsequent promise made in recognition of a past benefit received.[152] Of these, most involve the historically accepted waiver or ratification exceptions to the rules against past consideration.[153] Moreover, Section 86 seems not even to have attracted the attentions of litigants. There are only a handful of additional reported cases even addressing the material benefit rule in passing, indicating that promisees do not view the predicate promises as entitled to legal enforcement despite the existence of the rule. In short, as the following two sections show, none of the few cases applying or

147. Henderson, *supra* note 66, at 1184.

148. *Id.*

149. *Id.*

150. *Id.* at 1117.

151. *See, e.g.*, STEPHEN A. SMITH, CONTRACT THEORY 33 (2004) (defining rule skepticism in contract theory as embracing the notion that "there is a difference between the legal and the true explanation of judicial rules" and "that there is a difference between the judicial expression of legal rules and how (and whether) those rules are *applied*").

152. These cases include both cases applying state statutes that are similarly worded to Section 86 and cases not directly citing Section 86 but applying some variation of the moral obligation principle. Our research covers the period from 1981 through August 2009. There are only six additional reported cases applying the material benefit rule during the ten years when Section 86 was widely circulated.

153. *See supra*, note 25.

discussing the material benefit rule suffices to justify its continued existence.

A. Cases Enforcing a Subsequent Promise Made in Recognition of a Past Benefit Received Since the First Drafts of Section 86 Were Widely Available

Since the adoption of Section 86 of the *Restatement (Second) of Contracts*, there have been only eight cases applying the material benefit rule to enforce a promise.[154] Even if one looks back an additional ten years, to the point when the *Restatement* drafts were widely circulated, there have only been a handful of additional cases—six to be precise—applying the material benefit rule to enforce a promise.[155] The vast majority of these fourteen cases—ten of them—fall into the wavier or ratification exceptions to the rule against past consideration. They are, in other words, promises to repay a debt discharged under bankruptcy rules or otherwise rendered unrecoverable because of some procedural bar like the statute of limitations.[156]

---

154. *In re* Prejean, 994 F.2d 706 (9th Cir. 1993) (applying California law); Ayres v. Baxter, No. Civ.A.3:99-CV-2641-L, 2001 WL 294224 (N.D. Tex. Mar. 27, 2001) (applying Nevada law); Azaretta v. Manalla, 768 So. 2d 179 (La. Ct. App. 2000); Gray v. McCormick, 663 So. 2d 480 (La. Ct. App. 1995); Thomas v. Bryant, 639 So. 2d 378 (La. Ct. App. 1994); Minn. Mut. Life Ins. Co. v. Anderson, Nos. C2-91-2151, C9-91-21, 1992 WL 89619 (Minn. Ct. App. May 5, 1992); Young v. Pileggi, 455 A.2d 1228 (Pa. Super. 1983); Jordan v. Bergsma, 822 P.2d 319 (Wash. Ct. App. 1992).

155. Slayton v. Slayton, 315 So. 2d 588 (Ala. Civ. App. 1975); Gen. Credit Corp. v. Pichel, 118 Cal. Rptr. 913 (Cal. Ct. App. 1975); Liberty Consumer Disc. Co. of Pa. v. Sech, No. 86-13, 1976, 1978 WL 139211 (Del. Com. Pl. Sept. 6, 1978); Super Chief Credit Union v. McCoy, 595 P.2d 346 (Kan. Ct. App. 1978); Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698 (La. Ct. App. 1976); Lawrence v. Worthington, 484 S.W.2d 601 (Tex. Civ. App. 1972).

156. *See In re Prejean*, 994 F.2d at 708 n.4 (applying California law and CAL. CIV. CODE § 1606 to find that a moral obligation provides consideration for a new promise to pay a time-barred debt only because that debt is, but for the statute of limitations, enforceable); *Ayres*, 2001 WL 294224, at *6 (recognizing support in other jurisdictions for the general rule that a subsequent promise to pay a debt discharged in bankruptcy or barred by some other procedural rule is enforceable); *Slayton*, 315 So. 2d at 590-91 (noting that, although there was an argument that consideration was present, it did not matter because a promise otherwise barred by the statute of limitations to pay interest on a loan could be subsequently ratified by a later promise); *Gen. Credit Corp.*, 118 Cal. Rptr. at 916 (recognizing that CAL. CIV. CODE § 1606 requires enforcement of a subsequent promise to pay a debt otherwise discharged by bankruptcy); *Sech*, 1978 WL 139211, at *1 (finding that a party may "renew a debt which has been discharged in bankruptcy" with a subsequent promise to pay); *McCoy*, 595 P.2d at 347 ("Since a discharge in bankruptcy does not extinguish the debtor's moral obligation to pay the debt, such moral consideration will constitute sufficient consideration for the new promise."); *Anderson*, 1992 WL 89619, at *3 ("A debt discharged in bankruptcy can be revived by a

Of the remaining four cases, one of them can be justified on very similar grounds to the ratification or waiver exception to past consideration. In *Muse v. St. Paul Fire & Marine Insurance Co.*,[157] the plaintiff was an indigent who was hospitalized for several months due to an accident.[158] After recovering benefits under a disability insurance policy, the plaintiff's attorney mistakenly told the plaintiff that he should pay the state-owned hospital.[159] Plaintiff did so, learning only later that state law prevented the state-owned hospital from seeking to collect from indigents receiving medical services.[160] When the plaintiff tried to recover the amounts that he had paid to the hospital, the court denied his request, saying that he had, effectively, waived his statutory right to avoid collection by the hospital.[161] The case, then, merely adds a different sort of procedural bar that can be overcome by a subsequent promise to pay. It does not radically enlarge the category of promises enforceable without consideration.

The final three cases, *Thomas v. Bryant*,[162] *Gray v. McCormick*,[163] and *Azaretta v. Manalla*[164] are from Louisiana. The impact of these decisions is negligible, however, because Louisiana is the only civil law state.[165] Although the reasoning in these cases suggests that a more thoroughgoing moral obligation principle is at work, none of them cite Section 86 of the *Restatement (Second) of Contracts* and they do not contain the sort of direct assault on the doctrine of consideration that the *Restatement* drafters might have endorsed.[166]

---

promise, in writing, to pay the discharged debt."); *Young*, 455 A.2d at 1232 ("A moral obligation to pay constitutes sufficient consideration to sustain a new promise to pay a debt barred by the statute of limitations."); *Lawrence*, 484 S.W.2d at 603 ("Although the debt is barred by limitations there remains a moral obligation to pay which constitutes a good consideration."); *Jordan*, 822 P.2d at 321 (finding that a subsequent promise can renew an obligation otherwise barred by the statute of limitations).

157. 328 So. 2d 698 (La. Ct. App. 1976).

158. *Id.* at 700.

159. *Id.* at 701.

160. *Id.*

161. *Muse*, 328 So. 2d at 701.

162. 639 So. 2d 378 (La. Ct. App. 1994).

163. 663 So. 2d 480 (La. Ct. App. 1995).

164. 768 So. 2d 179 (La. Ct. App. 2000).

165. *See, e.g.*, 15A AM. JUR. 2D *Common Law* § 10 (2008) (observing that Louisiana is the only civil law state).

166. In *Bryant*, the court determined that the defendant's moral duty to pay for an adult stepson's substance abuse treatment met the requirements of a "natural obligation" and thus constituted consideration for the defendant's promissory note given after the treatment was provided. *Bryant*, 639 So. 2d at 380 (applying LA. CIV. CODE ANN. art. 1967). In *Gray*, the court found that the plaintiffs, the daughter and son-in-law of the defendants, had a natural

B. Cases Discussing Any Variation of the Material Benefit Rule, Though Declining to Use the Rule to Enforce a Promise

Perhaps the most surprising finding of our research is that there are only a very few additional cases since the first drafts of Section 86 of the *Restatement (Second) of Contracts* were widely circulated that even discuss the material benefit rule.[167] In a limited set of these cases, courts seemed to assume that some form of moral obligation, most often of the ratification or waiver variation, might be a viable exception to the general rule that only promises supported by a bargained-for exchange are legally enforceable.[168] Most, however, reject the rule outright.[169]

---

obligation to pay monthly mortgage payments that the defendants incurred to build a house for the plaintiffs. *Gray*, 663 So. 2d at 485. Although the case has echoes of restitution throughout it, the court uses broad language suggesting that it is enforcing the plaintiff's promise because of a moral obligation. *See id.* In *Azaretta*, the court found that the defendant, who had promised to reimburse the plaintiff for her investments in his failed business venture, assumed a "natural obligation" to pay. *Azaretta*, 768 So .2d at 182.

167. *See, e.g.*, Mgmt. Search, Inc. v. Morgan, 222 S.E.2d 154, 157 (Ga. Ct. App. 1975) (declining to enforce a promise to pay a bonus for services rendered on the basis of moral obligation); *In re* Estate of Voight, 624 P.2d 1022, 1025 (N.M. Ct. App. 1981) (applying Illinois law and declining to enforce two promissory notes on the basis of moral obligation); *In re* Estate of Hales, No. 93-J-24, 1994 WL 149878, at *3 (Ohio Ct. App. Apr. 18, 1994) (recognizing that a mere "family obligation" was not legally enforceable because it created a moral obligation); D-- D. C-- v. T-- W--, 480 S.W.2d 474, 478-79 (Tex. Civ. App. 1972) (declining to enforce a father's promise to pay for support of his child in the absence of consideration because his "natural affection" and "moral obligation" cannot create a legal duty); Orsborn v. Old Nat'l Bank of Wash., 516 P.2d 795, 797-98 (Wash. Ct. App. 1973) (refusing to enforce a promissory note on the basis of moral obligation); Halliburton Co. v. Claypoole, 868 P.2d 252 (Wyo. 1994) (recognizing that the plaintiff was appealing the district court's failure to include an instruction regarding "moral consideration" but ruling in favor of the plaintiff on other grounds).

168. *See, e.g.*, E. Trading Co. v. Refco, Inc., 229 F.3d 617, 625 (7th Cir. 2000) (noting, in passing, that "'moral consideration' makes enforceable, without any fresh consideration, the promise of a debtor to pay a debt that is no longer enforceable" but declining to apply the doctrine because it was not raised by the parties earlier); San Diego Mun. Credit Union v. Smith, 222 Cal. Rptr. 467, 469 (Cal. Ct. App. 1986) (recognizing that under CAL. CIV. CODE § 1606, a promise to repay a debt otherwise discharged in bankruptcy or barred by the statute of limitations could be legally enforced, but declining to enforce a promise made under an extension agreement because the plaintiff bank was equitably stopped from asserting the existence of such an agreement); *Orsborn*, 516 P.2d at 797 ("The rule that a moral obligation unconnected with a legal obligation, liability or benefit is insufficient consideration for a subsequent promise is illustrated by various cases such as those involving agreements made in consideration of past cohabitation or to pay for the support of an illegitimate child.").

169. *See, e.g.*, *In re Estate of Hales*, 1994 WL 149878, at *3 (finding that moral obligation is not a substitute for consideration); *D-- D. C--*, 480 S.W.2d at 478-79 ("[I]n Texas, a moral obligation is not regarded as sufficient consideration for support of a contract."); DeMentas v. Estate of Tallas, 764 P.2d 628, 633 (Utah Ct. App. 1988) (criticizing the "moral obligation" concept, noting that the concept has not been "embraced in Utah" and

The fact that few courts even discuss the material benefit rule suggests that not only are courts reluctant to employ the rule, but plaintiffs are not, in mass, seeking to convince them that they should do so.[170]

V. NEVER MIND: THE FAILURE OF THE MATERIAL BENEFIT RULE AND WHAT THAT MAY TELL US ABOUT THE DOCTRINE OF CONSIDERATION

The title of this Article pays homage to the great Gilda Radner and her sense of comedic timing during her portrayal of Emily Litella on Saturday Night Live (SNL).[171] Ms. Litella was, for several years, a regular guest correspondent on SNL's Weekend Update.[172] She would invariably offer an overwrought opinion about a misunderstood bit of news or topic of the day.[173] After several minutes of her ridiculous diatribe, one of the anchors would correct her.[174] She would then shrug and, with slight embarrassment, admit her mistake with a sheepish, "Oh, that's very different . . . Never mind!"[175]

As we suggested at the outset, we think that it is high time commentators follow Emily Litella's lead. With all the theoretical confusion surrounding Section 86 and in light of the fact that courts and litigants are just not interested in it, commentators, even those supportive of challenges to formalism generally and the bargain theory of consideration more particularly, should wave the white flag. Professor Henderson, we believe, was right when he suggested, in thinking about

---

concluding that even it it were applied in Utah it would not apply in the case at hand); Miller v. Miller, 664 P.2d 39, 42 (Wyo. 1983) ("Perhaps appellant had a moral obligation to pay the note, but moral obligation alone is not a valid consideration for a promise to pay.").

170. Of course, there are other possible explanations. It is possible, for instance, that most cases involving the material benefit rule are unpublished or get resolved at the district court level. Alternatively, it is possible that plaintiffs are regularly seeking to use the doctrine but courts are systematically ignoring such efforts. Given that there are so very few cases even discussing the material benefit rule, however, we find both explanations unsatisfactory. And, in any event, even if one were to assume that there are five times the number of cases that we have uncovered discussing the rule, that would still amount to fairly little interest in it.

171. Steven Winn, *It's Like This—Oh, Never Mind*, S.F. CHRON., Dec. 24, 2007, at E1.

172. *See id.*

173. *Id.* Among her more memorable diatribes was her opposition to those who were trying to eliminate "violins on television"; Ms. Litella feared depriving kids of exposure to violins on television would lead to the kids wanting to play bongos and guitars and "join these rock and roll outfits." *Saturday Night Live: Weekend Update: Emily Litella on Violins on TV* (NBC television broadcast May 8, 1976), *available at* http://www.hulu.com/watch/2364/saturday-night-live-weekend-update-emily-litella-on-violins-on-tv.

174. *See* Winn, *supra* note 171.

175. *See* Crovitz, *supra* note 1.

the long-term effect of Section 86 of the *Restatement (Second) of Contracts*, "tension between rule and decisional practice may well determine the directions any attempt at doctrinal reform will ultimately take."[176] In writing those words, Professor Henderson offered a hopeful prognostication, suggesting that the decisional practice of courts in moral obligation cases seemed like it would favor challenges to orthodoxy of the bargain theory of consideration.[177] History, though, has proven the opposite to be true. Decisional practice, as the previous section demonstrates, could hardly be clearer. The material benefit rule is a dead letter. The direction that doctrinal reform should take—we think even Professor Henderson would have to concede—is to abandon the material benefit rule.[178]

In fact, the material benefit rule's failure has been so spectacular that we are led to wonder whether more is at work than simply the confusion of courts and litigants about the dimensions and scope of Section 86. Certainly, while it has had no end of critics,[179] the bargain

176. Henderson, *supra* note 66, at 1122.

177. *Id.* at 1123 ("The sheer volume of instances of invocation of the idea of moral obligation would seem to leave little doubt that the concept continues to serve contract purposes."). Grant Gilmore later made a similar prediction, suggesting that the principle embodied in Section 86 would grow: "By the time we get to Restatement (Third) it may well be that . . . [§ 86] will have flowered like Jack's bean-stalk in the same way that § 90 did between the *Restatement (First)* and *Restatement (Second)*." GILMORE, *supra* note 68, at 84 (alteration in original).

178. A good place to start would be to reduce the attention currently paid to the rule in Contracts casebooks. *See* Thel & Yorio, *supra* note 75, at 1051 ("[C]asebooks and treatises alike typically devote a great deal of attention to promises" based on moral obligation).

179. *See, e.g.*, SMITH, *supra* note 151, at 215 ("There is probably no rule in the common law of contract that has been subject to more criticism than the consideration rule."); Ricks, *supra* note 20, at 99 ("The doctrine of consideration has been a favorite target of contract law scholars for nearly a century."). Of course, some scholars, most notably Grant Gilmore, have provocatively argued that the bargain theory of consideration never actually existed in the first place. *See* GILMORE, *supra* note 68, at 22-37. It was, instead, an invention of nineteenth-century legal formalists like Langdell and Holmes. *See id.* (describing the bargain theory of consideration as "newly minted" by Holmes in *The Common Law*); KREITNER, *supra* note 17, at 9 ("Classical legal thinkers made order out of chaos. According to these scholars, everything in contract could be conceptualized around two things: promise, coupled with consideration."); Kraus, *supra* note 17, at 193 ("If we take Gilmore at his word, the lesson of his book is that the core legal principles of American contract law were virtually a complete fabrication, imagined by a few elite members of the nineteenth-century bar and legal academy and transformed into actual law through brazen and bald-faced lies backed by the sheer force of their influential personalities."); Teeven, *supra* note 20, at 306 (arguing that "[t]he triumph of the objective bargain consideration theory in the twentieth century" depended on the ability of commentators to reform the law through the advent of the Restatements). For a thoughtful response to Professor Gilmore's "fightin' words" in *The Death of Contract*, see Kraus, *supra* note 17 (arguing that classical contract theorists did not misrepresent past cases but instead

theory of consideration has also found supporters. Perhaps the failure of the material benefit rule helps bolster that support.

In the following two sections, we first briefly sketch one particular defense of the bargain theory of consideration founded on anticommodification norms. We maintain that this defense of the classic formulation of consideration recognizes that the doctrine is more than an abstract formalism used by parties to signal their choice to opt into a legally enforceable deal. Instead, if this defense has explanatory purchase, the bargain theory of consideration comports with a common, extra-legal sense about what commitments are deserving of legal enforcement and what commitments are better left informal. We then briefly examine how the failure of the material benefit might well provide some support from this defense of the bargain theory of consideration.

A. The Anticommodification Defense of Consideration

Bargains are linked, in the common understanding of laypersons, to expectations about the obligation of promisors to keep their word. This common understanding about the relationship between bargains and obligation is wonderfully illustrated by two scenes from the hit Disney movie, *Pirates of the Caribbean: The Curse of the Black Pearl.*[180]

Early in the movie, pirates are invading the town of Port Royal, with the goals of plundering the town and kidnapping the Governor's daughter, Elizabeth, who has a long-missing gold medallion of great importance to the pirates.[181] After storming the Governor's mansion, two pirates chase Elizabeth through the mansion.[182] It is clear that harm will come to her should they capture her.[183]

The pirates pursue Elizabeth into a room where she is hiding in a closet.[184] The first pirate announces, "We know you're here, puppet. Come out. And we promise we won't hurt you."[185] At this statement, the second pirate looks at the first incredulously.[186] The first gives him a

---

viewed precedents as outcomes, seeking to explain how legal rules and principles tie directly to the outcome of a case).

180. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003).

181. *Id.*

182. *Id.*

183. *Id.*

184. PIRATES OF THE CARIBBEAN, *supra* note 180.

185. *Id.*

186. *Id.*

knowing look that lets the second pirate (and everyone) know that he has no intention of keeping that promise.[187] Shortly thereafter, when the pirates find Elizabeth in the closet, she is saved only because she invokes the right of parlay[188] under the Pirate Code.[189]

Contrast that scene with the scene a short time later when Elizabeth is taken aboard the pirate ship to meet with the pirate captain, Captain Barbossa.[190] She tells Barbossa, "I'm here to negotiate the cessation of hostilities against Port Royal."[191] After chiding her for the formality of her request,[192] Barbossa asks specifically, "What is it you want?" to which Elizabeth responds that she wants the pirates "to leave and never come back."[193] When Captain Barbossa tells her (mocking her earlier use of fancy words), "I am disinclined to acquiesce to your request. It means 'No,'" Elizabeth threatens to drop the long sought after gold coin into the sea.[194]

After some savvy negotiating tactics by Elizabeth, Captain Barbossa says, "Very well. You hand it over and we'll put your town to our rudder, and ne'er to return."[195] Elizabeth hands over the coin and says, "Bargain?"[196] Captain Barbossa walks away, but the first mate orders the firing of the cannons to stop and tells the pirates to prepare to sail.[197] Evidently, Captain Barbossa intends to keep his promise.

What is difference between this promise and the earlier "we won't hurt you" promise? The obvious answer is the presence of a bargain. This is reinforced when Elizabeth panics because no orders are given to

187. *Id.*

188. Apparently, this is the right to be taken (and returned) unharmed to the captain in order for negotiations to take place. It also appears in the movie, *The Patriot*, when Mel Gibson's character, Benjamin Martin, invokes parlay to negotiate with the British commander, General Cornwallis. THE PATRIOT (Columbia Pictures 2000). When his nemesis, Colonel Tarrington, arrives on the scene he wants to kill Martin, but is told by the officer in charge, "He rode in under a white flag for a formal parlay . . . he cannot be touched." *Id.* Whether such a right exists outside the movies is beyond the scope of this article.

189. The more complete title, as explained by Elizabeth, is "The code of the brethren set down by the pirates Morgan and Bartholomew." PIRATES OF THE CARIBBEAN, *supra* note 180.

190. *Id.*

191. *Id.*

192. Barbossa explains, "There are a lot of long words in there, Miss. We're not but humble pirates." *Id.*

193. PIRATES OF THE CARIBBEAN, *supra* note 180.

194. *Id.*

195. *Id.*

196. *Id.*

197. PIRATES OF THE CARIBBEAN, *supra* note 180.

return her to shore.[198] She accosts Captain Barbossa and tells him, "Wait. You have to take me to shore," and starts to cite the Pirate Code.[199] Captain Barbossa interrupts, "[Y]our return to shore was not part of our negotiations nor our agreement, so I must do nothing."[200] The obvious implication being that had a promise to return Elizabeth to shore been part of the bargained-for exchange, Captain Barbossa would have honored it.[201]

This common, extra-legal view of the relationship between a bargain and the obligation of a promisor to keep his or her word, however, might mean one of two things as far as the law is concerned. The strong view of the relationship between bargains and promises would hold that only bargained-for promises should be enforced legally. The weak view of the relationship would hold that bargained-for promises should be enforced legally, but it would also recognize that there could be room to enforce legally other promises given outside of the bargain context as well.

Most courts and legal scholars accept at least the weak view. Promises made as part of a reciprocal bargained-for exchange should be legally enforced.[202] Bargained-for promises support value-enhancing exchanges and are thus legally enforceable in order to protect and encourage value-maximizing resource allocation.[203] The real controversy revolves around whether any other promises should also be entitled to legal enforcement. As Eric Posner has put it, "people exchange promises when both benefit from the exchange, but it does not follow that the law should enforce all promises."[204] Indeed, "people who make and receive promises often do not expect, and would not want, courts to provide legal remedies if the promisor breaks the

198. *Id.*

199. *Id.*

200. *Id.*

201. Captain Barbossa goes on to refute any possibility that he is bound to return Elizabeth to shore under the Pirate Code (presumably as part of the safe passage provided for under Parlay): "And secondly, you must be a pirate for the Pirate Code to apply, and you're not. And thirdly, the Code is more like what you would call guidelines than actual rules." PIRATES OF THE CARIBBEAN, *supra* note 180. With a flourish, he then informs Elizabeth of her fate, "Welcome aboard the Black Pearl, Miss Turner." *Id.*

202. *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 167-68 (1993); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1292 (1980) ("The enforceability of reciprocal promises is supported by a rich normative literature emphasizing the social utility of bargains.").

203. *See* Goetz & Scott, *supra* note 202, at 1265-66.

204. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 849 (2003).

promise."[205] The key is ascertaining which promises the promisor wants to make legally enforceable and the promisee justifiably expects to be legally enforceable.[206]

In this regard, consideration has been defended as a good proxy for contractual intent because "the existence of a bargain so frequently corresponds to the existence of a manifested intention to be legally bound."[207] Additionally, the existence of a reciprocal exchange functions as a "natural formality,"[208] which not only serves to induce a "circumspective frame of mind appropriate in one pledging his future,"[209] but also serves to put both parties on notice that legal enforceability is intended and expected.[210]

These sorts of positive, formalistic justifications of a bargain theory of consideration are unobjectionable. The bargain theory, in short, provides sufficient grounds for making a promise legally enforceable. Historically, however, arguments that a bargain is necessary for making a promise legally enforceable have not fared as well. It is, after all, one thing to say that the presence of a formality justifies enforcement of a promise. It is a different thing to say that the absence of a formality necessarily justifies non-enforcement. Nevertheless, in recent years, there have been several compelling efforts to justify the continued use of the reciprocal bargain test for consideration to distinguish between legally enforceable and unenforceable deals.[211]

One of the more persuasive of these arguments can trace its origins to Melvin Eisenberg's path-breaking article, *The World of Contract and the World of Gift*.[212] In addition to arguing that process concerns

205. *Id.*

206. *Id.*

207. Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1029 (1992); *see also* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 313 (1986) ("The fact that a person has received something of value in return for a 'promise' may indeed indicate that this promise was an expression of intention to transfer rights. Moreover, in some circumstances where gratuitous transfers are unusual, the receipt of a benefit in return for a promise should serve as objective notice to the promisor that the promise has been interpreted by the other party to be legally binding.") (footnote omitted).

208. Fuller, *supra* note 14, at 815 (internal quotations omitted).

209. *Id.* at 800.

210. *See id.* at 801-03 (discussing the "channeling function").

211. There is a wide range of literature offering arguments to support the doctrine of consideration or at least aspects of that doctrine. For some of the more compelling recent arguments, see Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997); David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299 (2006); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

212. Eisenberg, *supra* note 211.

militate against enforcing what he terms simple donative promises, Professor Eisenberg asserts that there are two substantive reasons not to enforce such promises.[213] First, he argues that donative promises are subject to a highly "fluid" range of implied moral excuses and conditions that can never be fully specified *ex ante*.[214] The legal system is not merely ill equipped to balance the validity of these excuses and conditions against the disappointment of a promisee, but endeavoring to have it attempt to do so would run the grave risk of putting "legal muscle" in the hands of undeserving promisees.[215]

Second, and perhaps more intriguingly, Professor Eisenberg essentially argues that making simple donative promises enforceable would "impoverish" the world of gift by commodifying it.[216] Simple gift promises, in Professor Eisenberg's view, are motivated by affective considerations that reflect or manifest "the relationship with the donee."[217] Accordingly, subjecting gift promises to legal enforcement, and thus subjecting a promisor to the choice between performance or the payment of expectation damages, would debase the promisor's motives at the time of performance.[218] The promisee (and other observers of the transaction) could no longer be assured of why the promisor was performing.

---

213. Importantly, Professor Eisenberg tailors his defense of consideration to account only for certain aspects of the doctrine and not others. To that end, he draws a distinction between gratuitous promises and donative promises. *See id.* at 824-25. Gratuitous promises include any "nonreciprocal or apparently nonreciprocal promises." *Id.* at 825. Although the category of gratuitous promises is thus fairly large—indeed, any promise not meeting the classical requirement of a bargained-for exchange falls into it—Professor Eisenberg has, in other articles, defended the propriety of enforcing at least some gratuitous promises. *See, e.g.*, Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 653-56 (1982). Donative promises, on the other hand, are a more particular type of gratuitous promise. Specifically, a donative promise, according to Professor Eisenberg, is a promise to make a gift. Eisenberg, *supra* note 211, at 825. Professor Eisenberg then makes one more critical distinction between donative promises that may be enforced through promissory estoppel because of a promisee's justifiable reliance and "a simple donative promise," which refers to a gift promise that cannot be justified by appeal to reliance. *See id.* at 822.

214. *Id.* at 829.

215. *Id.* at 850 n.70.

216. Eisenberg, *supra* note 211, at 847-49.

217. *Id.* at 844; *see also* Gamage & Kedem, *supra* note 211, at 1302 ("Many promises are made within relationships in which the parties are supposed to be guided by more than just self-interest and economic rationality. Within these relationships, a promisor who asks for something in return for her promise risks signaling that she views the relationship in instrumental terms.").

218. Eisenberg, *supra* note 211, at 848 (arguing that converting a gift into a "cash equivalent" would result in submerging "the affective relationship that the gift was intended to totemize.").

Although Professor Eisenberg offers these arguments as only a partial justification of the bargain theory of consideration, subsequent scholars have wielded the basic idea to offer a more thoroughgoing defense of the doctrine. For instance, David Gamage and Allon Kedem have argued that anticommodification norms support the continued centrality of the bargain theory of consideration in contract law.[219] According to Professors Gamage and Kedem, "there exist circumstances in which anticommodification norms block the use of consideration."[220] This is so because:

> [t]he consideration doctrine can only be activated when parties agree that a promise is made as part of a bargained-for exchange. But discussing promises using bargain-oriented language and behavior may be inappropriate within certain social contexts. To even suggest the use of nominal consideration might undermine the trust upon which these relationships are built.[221]

Professors Gamage and Kedem then contend that any reform that would alter this legal rule, rendering unbargained-for promises legally enforceable, would wind up forcing promisors, who would otherwise prefer to keep their commitments informal, into making their promises legally enforceable.[222] The easier it is to make promissory commitments legally enforceable, the more promisees will expect promisors to secure their commitments through the legal regime. Failure of a promisor to make her promises legally enforceable might make a promisee suspicious.[223] Promisors would thus be faced with a choice between two undesirable options. They could either choose to make a legally enforceable promise when they would have preferred not to do so, in order to meet the heightened expectations of promisees, or they could choose not to promise anything in the first place. In many instances, in short, it is possible and perhaps even likely that promissory activity would decline.[224]

Professors Gamage and Kedem's final move synthesizes these two

---

219. *See generally* Gamage & Kedem, *supra* note 211.

220. *Id.* at 1303.

221. *Id.* at 1302.

222. *Id.* at 1304 ("So as not to be seen as unreliable, promisors may be forced to render their promises legally binding, even if they would have preferred to avoid the potential legal entanglement.").

223. Gamage & Kedem, *supra* note 211, at 1304.

224. *See, e.g.*, Goetz & Scott, *supra* note 202, at 1266 ("[A] decision to enforce promises, and the subsequent choice of remedy, does not merely mold the performance behavior of contracting parties; it also shapes both the nature and amount of promise-making activity.").

claims. In their view, "anticommodification norms deny the option of legal enforcement to precisely those parties who benefit from excluding that option."[225] In other words, legal enforceability is unavailable when "[s]ocial norms prevent the parties from invoking consideration . . . ."[226] Anticommodification norms, then, operate to give promisors an excuse, if you will, or justification for not opting to make a legally enforceable promise. This allows promisors to make certain categories of promises without the threat of legal sanction for breaking them, and in turn, allows promisors and promisees to be certain that the motives for performing on such promises have nothing to do with a fear of paying damages.

This defense of consideration has the novel advantage of accounting not only for the sufficiency of a reciprocal bargain in making promises legally enforceable but also the necessity of such a bargain. If accurate, this defense of consideration suggests that enforcement of an unbargained-for promise standing alone does not meet any of our intuitive notions of incentive or justice.[227] The doctrine of consideration, then, is more than an abstract formalism allowing parties to express their intentions to be legally bound. It is rooted, instead, in communal expectations and, as we argue in the next section, seems to align with empirical evidence about the material benefit rule.

B. How the Material Benefit Rule's Failure Supports the Anticommodification Defense of Consideration

We think that the fact that the moral obligation principle enunciated in Section 86 of the *Restatement (Second) of Contracts* has not worked the revolutionary expansion of promissory liability that proponents of the rule wanted and predicted supports the anticommodification view of the bargain theory of consideration. Perhaps most tellingly, as Part IV of this Article observed, promisees have not beat down court doors in their rush to argue that unbargained-for promises, given to them after they provided a material benefit to a promisor, have been breached. The lack of cases even discussing the material benefit rule suggests that either

225. Gamage & Kedem, *supra* note 211, at 1304.

226. *Id.*

227. Craig Leonard Jackson, *Traditional Contract Theory: Old and New Attacks and Old and New Defenses*, 33 NEW ENG. L. REV. 365, 375 (1999). Professor Jackson goes on to argue that Charles Fried's call for the enforcement of intentionally made promises without regard to formalities like consideration "is not intuitive." *Id.* at 397. Professor Fried's thesis "lacks recognition of the way people behave—i.e., people do not expect to get something for nothing." *Id.*

there are paltry few circumstances where promisors break their subsequent promises to pay for a benefit received or, more believably we think, that promisees simply do not expect such promises to be subject to legal enforcement.

If the anticommodification defense of the bargain theory of consideration is accurate, this expectation makes sense. By necessity, the material benefit rule would only come up in circumstances where a benefited party, under no legal obligation to recompense the person providing the benefit,[228] decides to make a promise to pay for the benefit received. That decision, as the more apt label "moral obligation" suggests, must have been motivated by a sense of fairness or a recognition of social norms. At most, the promisee can ask to be compensated, but we suspect that the request, in many instances, would seem gauche. But even without an explicit request and without a legal obligation to do so, the promisor's sense of fairness or recognition of strong social norms suffices to incite a promise. This suggests that, like the simple donative promises that occupied Professor Eisenberg's attention in *The World of Contract and the World of Gift*, promisors in moral obligation contexts are acting out of affective considerations that reflect their relationship to the promisee and the community at large.[229]

If this is true, then the same considerations motivating the making of the promise in the first place will also motivate the performance of the promise. In addition, powerful non-legal sanctions, including reputational sanctions and norms of reciprocal fairness, may be wielded by the promisee should the promisor renege.[230] Accordingly, making subsequent promises to pay for benefits received legally enforceable will likely only create very small additional incentives, in most cases, for promisors to perform. But such a reform runs the serious risk, as the anticommodification defense of consideration suggests, of debasing the motivations for performance and thus devaluing the promissory act. Additionally, use of the material benefit rule to render subsequent promises to pay for benefits received might well deter promisors from making such promises in the first place.

In short, the failure of the material benefit rule makes sense if one

228. As Part III argued, if the benefited party has a legal obligation to recompense the person providing the benefit, then the situation is governed by restitutionary principles and the material benefit rule would be superfluous.

229. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1636 n.18 (2003).

230. *See, e.g., id.* at 1644-45 (discussing the power of such norms to enforce deals even in the absence of legal enforcement mechanisms).

believes that, in general, people expect only certain classes of bargained-for promises to be enforceable. While such a belief is hard to sustain based solely on the conception of consideration as a formality that cleanly signals whether a promisor is opting to make her promise legally binding or not, the anticommodification justification for consideration makes this belief easier to accept.

VI. CONCLUSION

Robert Braucher, the Reporter for the *Restatement (Second) of Contracts*, once suggested that the material benefit rule "probably has more theoretical interest than practical significance."[231] We could not agree more. Practically, the rule has proven to have almost no significance.

As we have argued, the Restatement drafters manufactured it in an effort to dislodge the bargain theory of consideration from its central role in contract theory as the mechanism for distinguishing between legally enforceable and unenforceable promises. In so doing, they stretched thin precedent to fashion a rule, in Section 86, that is internally inconsistent and confused in scope. Perhaps more importantly, courts and litigants alike seem uninterested in the rule. In the past thirty years, since the *Restatement (Second) of Contracts* was adopted, only a handful of courts have employed it to render a subsequent promise to pay for a benefit received enforceable. Additionally, only a few more cases have even discussed Section 86, indicating that litigants are simply not trying to get courts to use it.

The dramatic failure of the material benefit rule, we have argued, provides support for at least one defense of the bargain theory of consideration. Specifically, we have argued that the fact that courts and litigants have not used the rule demonstrates that the bargain theory of consideration functions as more that merely an abstract formalism. Instead, it reflects a commonly held understanding of the relationship between bargains and legal enforceability. Threatening to impose legal sanctions on promisors who offer to compensate those who have previously given them a benefit will not only run at odds with this commonly held understanding, but it may well discourage the making of promises in the first place.

231. Braucher, *supra* note 68, at 604.

In short, the material-benefit-rule attack on consideration has failed. Its failure may suggest that the motivations for the attack were misplaced. At the very least, however, the time has come for courts and commentators who have supported the rule to offer up a sheepish "never mind."