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Kevin M. Teeven

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A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation

Kevin M. Teeven[1]

I. INTRODUCTION

Over the past two centuries, formalist judges and commentators have tried in vain to suffocate the reliance and moral obligation alternatives to a monist bargain test of promissory liability. While treatise writers possess an understandable penchant to reduce to first principles the complexity and variability in scattered case law, case law reports since the birth of modern contract law in the sixteenth century document judicial recognition of three good reasons that common law courts have found to bind promisors. Two of those reasons are grounded upon reliance and moral obligation -- which are the focus of this study -- and lack the element of reciprocity. Promises that induce justifiable reliance and restitutionary promises on moral obligation promises are the only categories of unbargained-for promises binding at common law. The characterization of these promises as gratuitous does not mean a gift was intended; rather, it indicates that nothing was demanded in exchange for the promise. Judicial enforcement of these gratuitous promises constitutes an acknowledgement that a strict application of the bargain test to all promises does not fairly circumscribe all of the good reasons for enforcement of promises that arise in human consensual transactions.

The enforcement of gratuitous promises on reliance and moral obligation facts share a moral philosophy that promises which induce reasonable reliance or which acknowledge past moral obligations ought to be binding when necessary to prevent injustice. While at an abstract level justifiable reliance and moral obligation share the basic natural law notion that a promise should be binding if necessary to avert injustice, the concrete implementation of that impulse for reasons of reliance and moral obligation does not embrace all of the reasons recognized in Continental natural and

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1. J.D., University of Illinois (1971); Caterpillar Professor, Bradley University.

civil law for enforcement of gratuitous promises. The more limited common law solution has been to corral practices in equity into more structured principles for cases of induced reliance and moral obligation.

Both categories of remediable gratuitous promises are consensual and, though lacking in demands for reciprocity, do not contain donative intent. Both of them include a promise by only one of the parties and no provision for reciprocal exchange of promises or value. Often the circumstances surrounding these promises make the opportunity to strike a bargained-for exchange impossible. Since the bargain construct does not take into account special circumstances outside the context of a reciprocal market agreement, liability for reliance and moral obligation is grounded upon a coalescence of the consensual theory and equitable notions of fairness. Relief under the doctrines of justifiable reliance and moral obligation, today known respectively as promissory estoppel and the moral obligation principle, are consistent with community standards that promisors should be bound when expectations are raised by promises that induce reasonable reliance or that commit to restitution. Without these hardship theories, promises worthy of enforcement would fall through the cracks between the fields of bargain, tort, and restitution.

The doctrines of justifiable reliance and moral obligation of course apply in quite different circumstances. While the promise relied upon in justifiable reliance commits to future performance, a moral obligation promise commits to make restitution for a past receipt of a benefit. The two gratuitous promise doctrines facilitate relief from the strict demands of the bargain principle, one on the periphery of the detriment side and the other on the benefit side of consideration's split personality. Justifiable reliance facilitates relief beyond the outer perimeter of what detriment consideration can cover, and moral obligation provides restitutionary relief beyond the bounds of benefit consideration. The two doctrines can sometimes augment each other, as in the case of an inadequate moral obligation promise, in which relief may be given if the promise is relied upon. Likewise, where there are insufficient facts for justifiable reliance to apply, a subsequent moral obligation promise to atone for the induced reliance may save the day.

The legal history of both justifiable reliance and moral obligation has involved periodic attempts to extend earlier reliance and moral obligation precedents. Subsequent to Mansfield's tenure on the King's Bench, about every half century or so a staunch conser-

vative drive has been mounted against nearly all previous precedents binding gratuitous promisors. As a consequence, there have been ebbs and flows in how readily courts have granted reliance and moral obligation relief. Nevertheless the alternatives to bargain of justifiable reliance and moral obligation have steadfastly survived over the centuries to ameliorate the harshness that can come from the narrow requirement of reciprocity. To this day, the three alternative bases for enforcement of promises coexist uneasily, but necessarily, in common law contract.

What follows is a legal history of judicial enforcement of the only categories of binding gratuitous promises, justifiable reliance and moral obligation, from their sixteenth century roots to the publication of the modern restatements of contract law. The focus on the reliance remedy will be on case precedent leading up to the final draft of Section 90 of the first *Restatement of the Law of Contracts*; and for moral obligation, the study of case precedent will likewise focus on the precedents in support of the moral obligation theory that were in place before the first *Restatement,* though that principle was not enunciated by the drafters of the *Restatement* until the *Restatement Second* appeared a half century later.

II. DEVELOPMENT OF JUSTIFIABLE RELIANCE

The origins of promissory reliance hardship relief can be found in decisions at law and in equity since at least the Elizabethan period. At law, early assumpsit actions were effectively modern promissory estoppel actions for which actionability was found when tortious detrimental reliance facts were present to distinguish a case from the insufficient nonfeasance of merely not doing what was promised.[2] However, before the mid-sixteenth century,

2. *See* Doige's Case, Y.B. 20 Hen. VI, f.34, pl. 4 (1442) *reprinted in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 347 (1949) (Ayscough, J. emphasized that trespassory action was unavailable for breach of promise to build a house, but that it could be brought if the house was built badly); John Style's Case, B.M. MS., Hargrave 388, f. 215b (ca. 1527) *reprinted in* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 630, 631 (1975) (ruling that nonfeasance is *nudum pactum* but reliance on a person who failed to deliver payment entrusted to him is an actionable tort in assumpsit). *See also* S.F.C. MILSON, HISTORICAL FOUNDATION OF THE COMMON LAW 357 (2D ED. 1981); JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 384-86 (3d ed. 1990) (observing that assumpsit as reliance remedy was a principle of moral philosophy akin to promissory estoppel); SAMUEL J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 37-38 (1975). The tortious notion that reliance induced by a promise was remediable may have been borrowed from the church court action *fideo laesio* by both common law and chancery courts. *See* R.H. Helmholz, *Assumpsit and Fidei Laesio*, 91 L. Q. REV. 406, 426-31 (1975) (explaining that *fidei laesio*

assumpsit and its attendant consideration test, originally conceived as a reliance action, had been converted into a reciprocal contract action in the process of the King's Bench Court's action of assumpsit usurping the former dominant contract role of the Court of Common Pleas' action of debt.[3] As a result, justifiable reliance was transmuted into bargained-for detriment consideration; thereafter, reliance relief would continue in equity, but reliance notions would simmer beneath the surface at-law until they were reinvigorated later in cases of injustice in gratuitous and commercial promises. In the eighteenth century, assumpsit's reliance ground was resuscitated in decisions of common law courts under the leadership of King's Bench Chief Justices Holt and Mansfield. Holt resurrected assumpsit's tort origins in *Coggs v. Bernard* by ruling a gratuitous bailee liable because the bailor relied on the bailee's promise to carefully transport goods.[4]

Later in the eighteenth century, Justice Wilmot, a member of Mansfield's court, suggested an extension of Holt's reliance notion to a commercial undertaking in *Pillans v. Van Mierop*.[5] Although Wilmot justified reliance relief on the ground of natural law,[6] a reporter's case note claimed *Coggs* was authority for the reliance relief in *Pillans*,[7] and Langdell the author of Summary of the Law

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applied when promise reposed trust in the promisor by reliance and was later deceived by breach of faith). *See also* Willard T. Barbour, *A History of Contract in Early English Equity in* IV OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 163-67 (1914) [hereinafter Barbour, *Contract in Equity*] (concluding that chancery borrowed from ecclesiastical *fidei laesio*).

3. *See* ST. GERMAN'S DOCTOR AND STUDENT (2d Dial. 1530) in 91 SELDEN SOCIETY 228 (J.L. Barton ed. 1974) [hereinafter DOCTOR AND STUDENT] (Student of common law declared,: "A[a]nd a nude contracte is where a man maketh a bargayne or sale of his goodes or landes without any compensation appointed for yt."); John H. Baker, *Origins of the Doctrine of Consideration*, 1535-1585 *in* ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 339-41 (M. Arnold ed. 1981) (noting in pleadings an increasing emphasis on the need for reciprocity by around 1540); MILSOM, *supra* note 2, at 358; David J. Ibbetson, *Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Counts*, 41 CAMBRIDGE L. J. 142, 153 (1982); KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 40-41, 43-46 (1990) [hereinafter TEEVEN, HISTORY OF CONTRACT] (tracing competition between two common law courts for contract jurisdiction).

4. 92 Eng. Rep. 107, 113 (1703) (ruling "that the owner's entrusting him with the goods is a sufficient consideration to oblige him").

5. 97 Eng. Rep. 1035, 1039-40 (1765) (Wilmot noted that the plaintiffs had suspended their right to call on their debtor's performance in reliance upon the defendant financier's assurance that the debtor's draft would be honored). In 1927, Kellogg, J.'s dissent emphasized that proposed Restatement promissory estoppel Section 90 was not novel, since it had been a sufficient ground in *Pillans v. Van Mierop*. Allegheny College v. Chatauqua County Bank of Jamestown, 159 N.E. 173, 177-78 (N.Y. 1927).

6. *Pillans*, 97 Eng. Rep. at 1040 (invoking law of "nature" and of "nations" as bases for binding promise).

7. *Id.* at 1040.

of Contracts, later acknowledged the reliance logic in *Pillans*.[8] Wilmot's opinion was also notable for his observation that promises at common law had been held binding under the three alternative tests of bargain, moral obligation and reliance.[9] Dictum in a later English House of Lords decision denied the validity of *Pillans* because of Mansfield's heretical remarks regarding the doctrine of consideration unrelated to Justice Wilmot's reliance comments.[10] Influential nineteenth century treatise writers Kent,[11] Holmes[12] and Langdell[13] denied the validity, as precedent, of the justifiable reliance relief granted in *Coggs* and *Pillans*. Indeed, Kent derided recovery on both reliance and moral obligation when he declared in 1809 that justifiable reliance was a mere unenforceable moral obligation.[14] For market formalists, common law contract actionability was grounded exclusively on the need for a bargain regardless of the strain of reliance hardship precedents in the case books. The resistance to precedent not fitting one's theory contravenes the very nature of the common law as a precedent-driven construct, in contrast to the influence that academic theories have on a civilian jurisdiction.[15] Notwithstanding such opposition, nineteenth century republican support for natural law precepts made American courts receptive to the ameliorating ef-

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8. CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 79 (2d ed. 1880) [hereinafter LANGDELL, SUMMARY] (disagreeing with the dictum that reliance could be a ground for a binding promise).

9. *Pillans*, 97 Eng. Rep. at 1039-40.

10. Rann v. Hughes, 101 Eng. Rep. 1014 n.a. (1778). *Rann* did not address the reliance dictum of Justice Wilmot in *Pillans v. Van Mierop*, but instead rejected Mansfield's claims that consideration was not needed to support commercial contracts and that a writing could replace the need for consideration.

11. *See* Thorne v. Deas, 4 Johns. 84, 99 (N.Y. 1809) (claiming that *Coggs v. Bernard* required the misfeasance of negligence for a bailee's liability thus a gratuitous agent's breach of a promise to obtain insurance, which was relied upon by the property owner, was not actionable since mere nonfeasance had occurred); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 772 (9th ed. 1858).

12. *See* OLIVER W. HOLMES, JR., THE COMMON LAW 292, 294-96 (1881). Holmes disingenuously employed Holt's bailment decision *Coggs v. Bernard* to make the general claim that the use of reliance as a viable theory was doctrinally flawed despite bailment not fitting contracts traditionally governed by the doctrine of consideration. *See Coggs*, 92 Eng. Rep. at 113.

13. *See* LANGDELL, SUMMARY, *supra* note 8, at § 79 (2d ed. 1880) (rejecting reliance logic in Pillans v. Van Mierop as bad law since it did not conform to the bargain model).

14. *Thorne*, 4 Johns. at 97.

15. In corresponding with Holmes, English writer Frederick Pollock criticized Langdell, and obliquely Holmes, for theoretical claims regarding the common law contract that were out of step with actual precedent. *See* 1 HOLMES-POLLOCK LETTERS 80 (Mark D. Howe ed. 1942) (Pollock wrote to Holmes,: "But this is surely not now arguable except in the Langdellian ether of a super-terrestrial Common Law where authority does not count at all.").

fect of reliance relief on unbargained-for commercial and non-commercial promises.

Early practices in the court of equity contributed to the growth in justifiable reliance recovery as well. Chancery found a good reason, or *causa*,[16] to enforce a promise relied upon since at least the fifteenth century in order to protect a promisee's raised expectations to the extent of actual reliance.[17] Chancellors concluded that it would be equitable fraud to permit promissors to insist on strict application of contract doctrine after having induced injurious reliance. The most influential chancery practice, to which American courts drew analogies, was protection of the reliance interest in the part performance exception to the Statute of Frauds writing requirement for contracts to transfer interests in land.[18] Equity deemed it an equitable fraud to raise the defense of lack of a writing after an oral promise had induced a promisee's reliance of taking possession of the land and part payment.[19] The equitable part performance exception would engender nineteenth century common law extensions to cases of reliance on commercial contract modifications[20] and at-will business licenses and distributorships.[21] Justifiable reliance emerged in the nineteenth century along the two separate strands of promises made as subscriptions (mainly to charities) and as familial gifts, and, promises made in a market context. A body of precedent built up within each strand, but precedents were not transferred from one strand to the other.

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16. *See* SIMPSON, *supra* note 2, at 279, 389; MILSOM, *supra* note 2, at 357.

17. *See* Barbour, *Contract in Equity*, *supra* note 2, at 166-67 (giving examples of gratuitous bailments and marriage contracts); JAMES B. AMES, LECTURES ON LEGAL HISTORY142-44 (1913) (stating that equity gave reliance relief before 1500 to plaintiffs who incurred detriment on the faith of promise).

18. *See* An Act for Prevention of Fraud and Perjuries, 29 Car. II, c. 3, s. 4 (1677).

19. *See* Butcher v. Stapley, 23 Eng. Rep. 524, 525 (1686); Brown v. Hoag, 29 N.W. 135, 137 (Minn. 1886) (emphasizing the fraud of raising statute after reliance of part performance); Chicago, B. & Q. R. Co. v. Boyd, 7 N.E. 487, 489 (Ill. 1886). *See also* 5 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 2239 (4th ed. 1918) (characterizing it as a "virtual fraud").

20. *See, e.g.*, Le Fevre v. Le Fevre, 4 S.&R. 241, 244 (Pa. 1818) (modification of land license); Munroe v. Perkins, 26 Mass. 298, 303, 305 (1830) (modification of construction contract).

21. Rerick v. Kern, 14 S.&R. 267, 271 (Pa. 1826) (land license); Harris v. Brown, 51 A. 586, 587 (Pa. 1902) (business license); Bassick Mfg. Co. v. Riley, 9 F.2d 138, 139 (E.D.Pa. 1925) (business distributorship).

A. *Charitable Subscriptions and Familial Gift Promises*

Restatement of Contracts Reporter Williston declared in the early 1920s that instances of actionable justifiable reliance had generally been in cases of charitable subscription.[22] In fact, commercial justifiable reliance relief also was granted with some regularity by at least the sixth decade of the nineteenth century. The only market-related gratuitous promises directly influenced by charitable subscriptions were business and community subscriptions;[23] precedents for charitable subscriptions, business subscriptions, and other gift promises were cited interchangeably as authority within a *sui generis* field.[24] Victorian charitable, community, and business subscriptions facilitated the development of necessary infrastructure, in the absence of available state funding, for growing, energetic communities.

The analysis which follows will focus on the case law developments of justifiable reliance on charitable subscriptions prior to Williston placing the spotlight on this category of justifiable reliance in his commentary on the first *Restatement*. Common law courts' grant of reliance relief on charitable promises was recognized at common law since the early sixteenth century. This form of judicial relief was discussed in St. German's 1530 dialogue *Doctor and Student*,[25] which was cast as a comparative law dialogue between a student of the common law and a doctor of divinity. The

22. *See* 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139 (1921) [hereinafter WILLISTON, 1921 TREATISE] (claiming that actionable justifiable reliance had "generally been cases of charitable subscriptions"). *Accord* AMERICAN LAW INSTITUTE COMMENTARIES ON CONTRACTS, Restatement No. 2, 16 (1926) [hereinafter ALI COMMENTARIES 1926]. *See also* FREDERICK POLLOCK, WALD'S POLLCOK ON CONTRACTS 186 n.3 (Samuel Williston ed., 3rd ed. 1906) [hereinafter WILLISTON'S WALD'S POLLOCK] (giving only charitable and business subscriptions as examples of binding justifiable reliance).

23. *See, e.g.*, Bryant v. Goodnow, 22 Mass. 228, 230 (1827) (giving both charitable and business subscription reliance cases as authority for business subscription relied upon); Brown v. Marion Commercial Club, 97 N.E. 958, 961 (Ind. 1912) (stating that the issue of enforceability of subscription to encourage industries to move to community was "governed by rules for charitable subscriptions"). *Cf.* Curry v. Kentucky Western Ry. Co., 78 S.W. 435, 436 (Ky. 1904) (holding binding landowners' promises to induce building of railroad without reference to charitable subscription decisions).

24. Examples of charitable subscription decisions citing business subscription precedents include: Robertson v. March, 4 Ill. 198, 199 (1841); Pryor v. Cain, 25 Ill. 263, 265, 294 (1861). For an example of a business subscription decision citing a charitable subscription precedent, *see* Bryant v. Goodnow, 22 Mass. 228, 230 (1827). And for an example of a familial gift decision citing a charitable subscription precedent, *see* Ricketts v. Scothorn, 77 N. W. 365, 366 (Minn. 1898).

25. DOCTOR AND STUDENT *in* 91 SELDON SOCIETY. The first Dialogue was published in Latin in 1523; the second Dialogue, published in English in 1530 as the English Reformation heated up, is decidedly more anti-clerical.

doctor enunciated the practices followed in conscience by church courts and clerical chancellors. He observed that a promise to make a bequest to a university, a church, or clergy was a binding pious *causa* in conscience, without any reference to the need for reliance; whereas, the student remarked that such a promise was not actionable at common law unless reliance was induced.[26] The student gave the example of a promise to pay a surgeon, if he would heal a poor man, and emphasized that the promise was not binding at common law because the obligation was merely "spiritual" but that it would become actionable if the promise induced the surgeon to perform the act.[27] This early use of assumpsit as a tort remedy for reliance hardship on charitable promises would be revived in American contracts and charitable subscription decisions of the nineteenth century.

Nineteenth century American courts, many of them recently fused,[28] borrowed from practices in equity and thereby returned to the earliest use of assumpsit to relieve harm induced by charitable and commercial promises. Some courts rationalized the solution by manipulating consideration doctrine in order to smuggle in reliance relief under a disingenuous claim that reliance had been requested or bargained for. Other courts understood the consideration test to cover more than merely bargains and took the position that the presence of consideration simply meant that a good reason existed to bind a promisor and that justifiable reliance was

26. *Id.* at 230 (second Dialogue). In this Reformation-era dialogue, the student spoke critically of the canon law practice of ruling binding "entente inwarde in the herte," which moral obligation the student of the common law thought ought not be binding in the absence of reliance since intent was "secrete in hys owne conscience," but the promise was binding if relied upon, "thoughe he that made the promise have no worldely profyte by yt." *Id.*

27. *Id.* at 230-31 ("And more ouer though the thynge that he shall doo be all spyrytuall: Yet yf he perfourme yt I thynke an accyon lyeth at the common lawe.") The reliance offered proof of intent, which was lacking in the mere allegation of a spiritual promise. *See* SIMPSON, *supra* note 2, at 390-92 (commenting that the spiritual motive to fulfill charitable promise was converted into a secular common law theory in this Reformation era dialogue). *See also* Kevin M. Teeven, *Proving Fifteenth Century Promises*, 24 OSGOODE HALL L. J. 121, 132-38 (1986) (highlighting other decisions involving factual circumstances which supplied proof lacking in pure nonfeasance). In equity and ecclesiastical courts, the promisor was bound in conscience because the charitable promise was made, but at early common law the focus was on the tortious reliance harm to the promisee.

28. Fusion of law and equity existed in some states from the early years of the republic. *See* ANTHONY LAUSSAT, AN ESSAY ON EQUITY IN PENNSYLVANIA 153-57 (1826) (pointing out that at least ten states had fused courts in 1820s). By the middle of the nineteenth century, fusion was widespread in the U.S. and England. *See* Charles Hepburn, *The Historical Development of Code Pleading in America and England, in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 643, 655-680 (1908).

a good reason.[29] Still other courts couched their rationales upon the bases of the equitable theories,[30] independent of consideration, of pure reliance, and of equitable estoppel. Further afield, enforcement of policy-laden charitable subscriptions was justified upon equitable *causa,* irrespective of whether there was reliance.[31] Powerful policy reasons existed in Victorian days for enforcement of charitable and community subscriptions since the infrastructures of growing communities were financed, in the absence of available government funding, through subscriptions for hospitals, schools, courthouses, wharves, etc. In regard to the equitable reliance ground, Williston was correct that gratuitous gift decisions in the United States were forthright in recognizing an independent reliance theory;[32] however, commercial reliance relief was usually justified through an expanded definition of the doctrine of consideration.

Perhaps the young republic's earliest common law decision binding a charitable subscriber on reliance grounds was rendered by Massachusetts Supreme Court Chief Justice Parker in his 1817 opinion in *Trustees of Farmington Academy v. Allen.*[33] The defendant's subscription for construction of an educational building was held "sufficient" under an expanded definition of consideration in that the trustees had incurred expense "on the faith of the defendant's subscription."[34] Parker stated he was following the principle in the Massachusetts business subscription decision *Homes v. Dana* of two years before wherein the defendant was bound because plaintiff relied upon defendant's subscription.[35] Parker con-

29. Chief Justice Holt had introduced this notion in the bailment decision *Coggs v. Bernard* that reliance was a good reason in addition to bargain for finding consideration, but it had been rejected, beyond bailment facts, because of the prevailing absolutist bargain view. *See, e.g.,* Kirksey v. Kirksey, 8 Ala. 131 (1845); HOLMES, *supra* note 12, at 292, 294-96; LANGDELL, SUMMARY, *supra* note 8, at § 79.

30. *See* 3 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 359 (5th ed. 1866) (observing that reliance was binding in equity in much the same way that consideration operated at law).

31. *See* George v. Harris, 4 N.H. 533, 535-36 (1829); Trustees of the Methodist Episcopal Church v. Garvey, 53 Ill. 401, 403 (1870) (dictum); 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 453 (1866). *See also* RESTATEMENT SECOND OF CONTRACTS § 90 (2) (1981) (providing that a charitable subscription is binding without proof of reliance).

32. 1 WILLISTON, 1921 TREATISE, *supra* note 22, at § 139 (claiming that justifiable reliance relief found in case law had "generally been cases of charitable subscriptions").

33. 14 Mass. 172 (1817) (special assumpsit). Isaac Parker (1768-1830) was chief justice from 1814 to 1830 and adjunct professor of law at Harvard 1816-27.

34. *Trustees of Farmington Academy,* 14 Mass. at 176. The court appeared to say it was sufficient in response to defendant's argument that sufficient consideration was absent. *Id.* at 173.

35. *Id.* at 176; Homes v. Dana, 12 Mass. 190, 192 (1815).

verted the equitable explanation in *Homes v. Dana* that defendant was "bound in equity and good conscience"[36] into the basis at-law of sufficient consideration.[37] This justification, standing alone, was the common law solution stated by the student in *Doctor and Student* that justifiable reliance was a good reason under the promissory actionability test that would become known as the doctrine of consideration later in the sixteenth century.[38] In the absence of reliance, the subscription would have been the doctor's moral obligation, binding only in conscience.[39] Chief Justice Parker bolstered his reliance reasoning for finding sufficient consideration by adding a more conventional doctrinal explanation, though without explication, that the plaintiffs expended money on the defendant's "implied request."[40] This latter point was a disingenuous attempt to rationalize that the defendant had bargained for the trustees' reliance.[41]

A decade later in *Bryant v. Goodnow*, a Massacusetts court held a business subscription binding because of reliance on a common project that was beneficial to the subscribers.[42] The opinion cited as authority *Trustees of Farmington Academy v. Allen* as well as *Homes v. Dana*.[43] The *Bryant v. Goodnow* opinion made no reference to the doctrine of consideration; it conflated the equitable conclusion in *Homes v. Dana* that the promisor was "bound in equity and good conscience"[44] with *Trustees of Farmington's* finding of sufficient consideration[45] and stated that the defendant was "le-

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36. *Homes*, 12 Mass. at 192.

37. *Trustees of Farmington Academy*, 14 Mass. at 176.

38. DOCTOR AND STUDENT, *supra* note 3, at 230-31.

39. *Id.* Modern policy grounds given for binding charitable subscriptions are effectively moral obligations.

40. *Trustees of Farmington Academy*, 14 Mass. at 176.

41. The opinion in the landmark English decision *Hunt v. Bate* provided that consideration was present only when a bargain was established by the defendant's request for the plaintiff's act. Hunt v. Bate, 73 Eng. Rep. 605 (1568). New York courts introduced the fiction that the defendant's request could be implied in cases of restitutionary promises. *See* Hicks v. Burhans, 10 Johns. (N.Y.) 243, 244 (1813) (adopting the doctrinal solution suggested by Saunders in his 1798 reporter's note to an earlier case). *See* Osborne v. Rogers, 85 Eng. Rep. 318, 319 n. (1680) (1798) (per Saunders). *See also* KEVIN M. TEEVEN, PROMISES ONO PRIOR OBLIGATIONS AT COMMON LAW 106-09 (1998) [hereinafter TEEVEN, PRIOR OBLIGATIONS]. In *Trustees of Farmington Academy*, the benefit-based implied request fiction was borrowed to supply a promissory reliance solution.

42. Bryant, 22 Mass. at 229.

43. *Id.* at 230; *Homes*, 12 Mass. at 192; *Trustees of Farmington Academy*, 14 Mass. at 176.

44. *Homes*, 12 Mass. at 192.

45. *Trustees of Farmington* Academy, 14 Mass. at 176.

gally and equitably bound."[46] During the succeeding decades, Massachusetts' treatment of reliance on subscriptions acted as persuasive authority for other jurisdictions, such as Connecticut, Illinois, Indiana, Maine, Maryland, Michigan, Missouri, New Hampshire, Vermont, and Wisconsin,[47] and by the 1860s, the influential contracts treatise writers Parsons and Metcalf observed that reliance-based relief was generally accepted for subscription cases.[48] Since Illinois courts did a better job than most jurisdictions in elaborating the Massachusetts' position, Illinois' case law development of the Massachusetts rule will be highlighted as a means of understanding the impact of the Massachusetts principle elsewhere in the country.

The 1841 Illinois decision *Robertson v. March* treated the above discussed Massachusetts cases as persuasive authority in support of recovery for a construction contractor from a subscriber because the contractor relied on the defendant's subscription by building an addition to a church, which benefited all subscribers.[49] To the objection of lack of consideration, the court responded that the contractor's reliance overcame the rule that a gratuitous promise was *nudum pactum*.[50] The rationale in *Robertson v. March* did what the Massachusetts cases had done, and what a growing number of nineteenth century courts would do, in effectively resuscitating Holt's expansion of the doctrine of consideration to encompass justifiable reliance, but now gratuitous promises could

46. *Bryant*, 22 Mass. at 230.

47. *See* Somers v. Miner, 9 Conn. 458, 465 (1833); Robertson v. March, 4 Ill. 198, 199 (1841); Mansur v. The Indianapolis & Brownsburgh Plankroad Company, 8 Ind. 440, 441 (1857); The Trustees of Foxcraft Academy v. Favor, 4 Me. 382, 383 (1826); Gittings v. Mayhew, 6 Md. 113, 132 (1854); Underwood v. Waldron, 12 Mich. 73, 89 (1863); New Lindell Hotel Co. v. Smith, 13 Mo. App. 7, 10-11 (1882); George v. Harris, 4 N.H. 533, 534-35 (1829); University of Vermont v. Buell, 2 Vt. 48, 56 (1829); Lathrop v. Knapp, 27 Wis. 214, 231 (1870) (quoting from Judge Metcalf's treatise and concurrence from Parsons).

48. *See* THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS 185 (1868) (citing Massachusetts and Illinois precedents, among others, and stating that it was "the generally adopted doctrine, though not uniform, that subscriptions were binding once relied upon"); 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 453 (5th ed. 1866) (citing Massachusetts and Illinois precedents as well and saying that reliance on subscription, before withdrawal, was "deemed sufficient to make them obligatory"). Both Metcalf and Parsons noted in their introductions the contributions of their students to their treatises; Metcalf commented that his manuscript was originally developed in 1827-28 as an aid in teaching the students in his office, and Parsons thanked his student researchers, including Langdell, for their assistance.

49. 4 Ill. 198, 199 (1841) (citing *Bryant v. Goodnow* as authority).

50. *Robertson*, 4 Ill. at 199.

involve relationships beyond Holt's treatment of bailments.[51] By 1861, the opinion in *Pryor v. Cain* confidently declared it to be "well settled" that a charitable subscription to a common, beneficial project was binding and actionable by others who relied.[52] The opinion seemed to base the decision upon the pure equitable reliance ground in the 1815 Massachusetts case *Homes v. Dana*, which it cited among other authority;[53] it made no reference to the doctrine of consideration and stated that the defendant subscriber was "bound in good faith" because of the reliance.[54] Subsequently, Illinois decisions that enforced charitable subscriptions on reliance facts vacillated between the explanation that justifiable reliance was binding in equity[55] and that justifiable reliance constituted sufficient consideration.[56] In the twentieth century, both contracts restatements would ground actionability for justifiable reliance upon the pure reliance ground that a contract was binding without consideration. For charitable subscriptions, the *Restatement Second* departed from the first *Restatement* in supplanting the requirement of actual reliance with the policy justification that charitable subscriptions were binding "without proof that the promise induced action or forbearance."[57]

An alternative equitable theory to the pure reliance ground involved the manipulation of equitable estoppel, or estoppel *in pais*. The fitful adaptation of this equitable reliance technique to gratuitous promises was doctrinally unsound, but it gave comfort to courts uneasy about granting relief purely because of reliance in the absence of traditional doctrinal support. Whereas chancery had employed equitable estoppel as an evidentiary and pleading device to bar denial of a misrepresented fact relied upon,[58] it was

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51. *Coggs*, 92 Eng. Rep. at 113; *contra* HOLMES, *supra* note 12, at 292, 294-96; LANGDELL SUMMARY, *supra* note 8, at § 79.

52. *Pryor*, 25 Ill. at 294 (citing the earlier Massachusetts and Illinois cases as authority).

53. *Id.;* Homes v. Dana, 12 Mass. 190, 192 (1815).

54. *Pryor*, 25 Ill. at 294.

55. *See, e.g.*, McClure v. Wilson, 43 Ill. 356, 359-60, 362 (1867) (The plaintiff relied upon the defendant's subscription to fill the township's Civil War military draft obligation by paying for substitutes in the neighboring town of Olney.).

56. *See, e.g.*, Trustees of the Methodist Episcopal Church v. Garvey, 53 Ill. 401, 403 (1870); Thompson v. The Board of Supervisors of Mercer Co., 40 Ill. 379, 384 (1866). The Thompson court emphasized that the defendant's promise could be withdrawn if done before plaintiff relied. *Id.* at 383; *Accord* George v. Harris, 4 N.H. 533, 536 (1829).

57. RESTATEMENT OF THE LAW OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981).

58. *See* MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL 345 (2d ed. 1876).

quite another matter for courts to latch onto it to justify enforcement of promises about future performance.[59] In *Beatty v. The Western College of Toledo*, the defense of lack of consideration to support a subscriber's promissory note was met with the judicial response that the donor was bound "in good conscience" to pay because of the college's reliance of expenses in building construction.[60] This 1898 Illinois opinion stated that the promise would be "upheld upon the ground of estoppel, and not by reason of any valid consideration" on the "equitable principle" that after the donee incurred expenses in reliance on the note the "donor should be estopped from pleading want of consideration."[61] Notwithstanding the point that the function of equitable estoppel was to preclude denial of a represented fact, here it facilitated enforcement of a promise by precluding invocation of contract doctrine.[62]

The employment of estoppel *in pais* to bind charitable subscribers was extended to cases of reliance on familial gift promises as well. A Minnesota court held binding a promissory note to a granddaughter so she could quit work, which she did do in reliance on the promise.[63] The court cited, without hesitation, charitable subscription decisions as precedent for the familial gift promise.[64] The Minnesota court acknowledged that some decisions had held that charitable subscriptions were supported by consideration, once relied upon, but said, "The true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration."[65]

Promisees of familial gift promises had success in enforcement of land gift promises by drawing analogies to the reliance factor in

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59. Professor McGovney, drafter of the RESTATEMENT (FIRST) OF CONTRACTS, criticized the use of estoppel *in pais* to cover a situation for which it was not intended. Dudley O. McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 657 (1914); *cf.* BIGELOW, *supra* note 58, at 441 (observing the peculiar practice of using a technique for representations of fact to enforce promises).

60. Beatty v. The Western College of Toledo, Iowa, 52 N.E. 432, 436 (Ill. 1898) (Subscription was for college to construct Ladies' Boarding Hall.).

61. *Beatty*, 52 N.E. at 436.

62. In keeping with the court's general approach, the rationale would have been on more solid ground if it had employed the explanation in a Connecticut decision that stated that denial of validity of a promise, after reliance was induced, was an equitable fraud. *See* Rice v. Almy, 32 Conn. 297, 304 (1864) (commercial promise).

63. Ricketts v. Scothorn, 77 N.W. 365, 366 (Minn. 1898).

64. Ricketts, 77 N.W. at 366-67 (remarking that it is "grossly inequitable to not bind").

65. *Id.* at 366. *See also* Simpson Centenary College v. Tuttle, 33 N.W. 74, 76 (Iowa 1887) ("This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor should be estopped from pleading want of consideration.").

the equitable part performance exception to the Statute of Frauds, which barred the invocation of the statutory defense if defendant's oral promise induced part performance.[66] During the nineteenth century, this reliance exception to the Statute was translated into an exception to bargain demands of the doctrine of consideration in cases of specific performance actions to enforce familial promises to give land. In dictum in an 1866 Illinois chancery decision, an Illinois court glided from saying that possession and improvements took it outside the Statute to the declaration that the promise rested upon a "valuable consideration" on account of the reliance.[67] A generation later, Illinois courts accepted as gospel this seamless equation in equity of the reliance exception to the Statute with satisfaction of the consideration test or with a pure reliance ground for promissory actionability.[68] Thus, an exception to a writing requirement miraculously was converted into a reason to enforce a gratuitous promise. In *Irwin v. Dyke*, an Illinois court cited the above 1866 chancery decision in support of specific performance of a father's verbal promise to convey land to his son because his son had relied by moving on the land and making improvements and payments.[69] The court did not supply this reasoning to overcome a Statute of Frauds objection since the defendant had failed to plead the Statute and thus was barred from the defense;[70] rather, the induced reliance standing alone constituted the ground for promissory actionability.

B. *Commercial Justifiable Reliance*

Contrary to Williston's claim in the 1920s that actionable justifiable reliance had been generally applicable to cases of charitable subscriptions and a few other categories of promises not traditionally governed by common law contract,[71] justifiable reliance relief

66. *See* 5 POMEROY, *supra* note 19, at § 2239.

67. Bright v. Bright, 41 Ill. 97, 100-01 (1866) (noting that bill in chancery alleged that father promised to deed son land and son relied by taking possession and making improvements). It was dictum because there was no evidence that improvements were made. *Id.* at 101.

68. *See* Irwin v. Dyke, 1 N.E. 913, 915 (Ill. 1885) (declaring that case falls "within the rule of repeated decisions of this court" that promisor is bound when reliance on promise by possession and improvements).

69. *Id.* at 915-16 (explaining "that it was on the faith of the agreement" that the son "rendered the services").

70. *Id.* at 914.

71. 1 WILLISTON, 1921 TREATISE, *supra* note 22, at § 139 (claiming justifiable reliance had "generally been cases of charitable subscriptions" where courts became "dissatisfied" with "prevailing theories" of consideration); A.L.I. COMMENTARIES 1926, *supra* note 22, at

on commercial promises had been regularly granted during the nineteenth century. Indeed, a complete story of the origins of the justifiable reliance doctrine prior to the first *Restatement* cannot be told without substantial weight being given to the influence on the doctrine of decisions binding commercial promises on account of reliance. Williston's claim reinforced his position that the doctrine of consideration was grounded upon reciprocity of bargain, and his marginalization of past justifiable relief cases thereby insinuated that his proposed promissory estoppel section was only needed only for charitable and family promises that necessarily fell outside the bargain construct.[72] Williston's attempt to limit the scope of promissory estoppel would retard reliance relief for the subsequent generation. Williston would have been correct to say that, from a doctrinal standpoint, justifiable reliance failed the bargain test, but he was disingenuous to infer that commercial reliance relief was not a part of precedent rendered over the preceding half century or so. Most of those precedents contained rulings that justifiable reliance qualified as consideration, but Williston attempted to excise from the doctrine of consideration the reliance alternative to bargain.

Between the early 1860's and Williston's 1926 proposal for a promissory estoppel section in the *Restatement of the Law of Contracts*,[73] American courts had with some regularity, granted justifiable reliance relief on commercial promises designed to adjust to uncertain conditions inherent in a burgeoning environment of commerce and industry. The modern story begins by at least the early 1860s as business planners found it increasingly necessary to incorporate greater flexibility into their agreements in order to contend with economic unpredictability in the context of longer-term relations. Promissory innovations in the form of open-ended language, unilateral contract offers, at-will relations and the more frequent need to modify contract terms butted up against traditional contract doctrine developed during earlier static times.

16 (Williston referred to his 1921 treatise). A mishmash of other categories of promises not traditionally covered by contract law included oral land gifts, revocable land licenses, gratuitous bailment and gratuitous agency. *See* Benjamin F. Boyer, *Promissory Estoppel: Principles From Precedents: I*, 50 MICH. L. REV. 639, 654-56, 665-71 (1952); Benjamin F. Boyer, *Promissory Estoppel: Principles From Precedents: II*, 50 MICH. L. Rev. 873, 873-79 (1952); A.L.I. COMMENTARIES 1926, *supra* note 22, at 14-20.

72. 1 WILLISTON, 1921 TREATISE, *supra* note 22. The proposed promissory estoppel section was numbered as § 88 in the 1926 report, but the number was changed to the familiar § 90 during succeeding reports.

73. *See id.* at 16 and § 88.

Strict common law demands for definiteness, mutuality, reciprocity of bargain,[74] and its attendant preexisting duty rule scuttled attempts for more malleably structured relations. Mounting cases of reliance harm, caused by doctrinal barriers to these unorthodox arrangements, stimulated nineteenth century courts to ameliorate the harshness generated by traditional rules applicable to contract formation, modification, and termination. Courts justified granting reliance relief through extensions of theories found both at law and in equity; the theories in support of this relief were typically an admixture of legal and equitable notions. Archaic principles opposed to flexible promises fueled growth in the role of justifiable reliance in overcoming resultant unfairness.

In keeping with the focus of this study, the ensuing discussion will consider exclusively case law decided prior to the dissemination to the profession in early 1926 of the initial draft[75] of what became, in unaltered form, Section 90. The case law documents that justifiable reliance had been a judicially recognized ground for enforcement of commercial promises during at least the preceding seventy years, contrary to the claims of *Restatement* drafters and later legal commentators. Some of these pre-1926 judicial opinions held reliance binding within the confines of the doctrine of consideration, and others articulated justifiable reliance as an independent doctrine. Current studies of justifiable reliance decisions prior to the first *Restatement* have analyzed development of the actionability of justifiable reliance from the perspective of the categories of transactions involved, e.g., charitable subscription, familial gift, bailment, agency, etc.[76] In contrast, the approach taken in the present study will be to analyze the evolution of binding justifiable reliance from the perspective of its binding effect on commercial promises in ameliorating the harshness of specific traditional doctrine that denied enforcement of promises drawn to deal with uncertainty. Traditional contract rules were developed

74. *See* 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 449-51 (Samuel Williston ed., 8th ed. 1893); WILLISTON'S WALD'S POLLOCK, *supra* note 22, at 34 n.39; LANGDELL, SUMMARY, *supra* note 8, at § 79; HOLMES, *supra* note 12, at 292-94.

75. A.L.I. COMMENTARIES 1926, *supra* note 22, at § 88. The 1926 commentary to promissory estoppel was repeated verbatim in the 1928 commentary but with the section changed to § 90, and the black letter statement of the promissory estoppel principle remained the same in 1928. *Id.* at 15-19; THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONTRACTS, Proposed Final Draft No. 1, sect. 90, 246-49 (1928).

76. *See, e.g.*, Benjamin F. Boyer, PROMISSORY ESTOPPEL: PRINCIPLE FROM PRECEDENTS: *I*, 639, 649; 665 (1952); Warren Shattuck, *Gratuitous Promise - A New Writ?*, 35 MICH. L. Rev. 908, 913-35 (1937).

in the context of a static pre-industrial era to administer one-shot, discrete promissory transactions of short duration. The focus will be on decisions that emphasized the difference justifiable reliance made in overcoming traditional contract law requirements applicable to offer and acceptance and to contract modifications. Doctrinal obstacles under offer and acceptance involved indefinite offers and the revocability of unilateral and at-will offers, and contract modification problems concerned the bargain demands of the preexisting duty rule.

1. *Indefiniteness and Reliance*

Drafters of long-term contracts were reluctant to hem themselves in with the definite language mandated by traditional contract doctrine[77] due to the swirl of uncertainties in an industrial age. Complications inherent in an interdependent economy precipitated experimentation with flexible, open-ended contract language in the face of doctrinal demands for certainty and mutuality.[78] The doctrine of mutuality, with its origins in offer and acceptance, presented a hurdle for offers flexibly crafted to accommodate an uncertain future and for offers for unilateral contracts. Although a time lag existed between the introduced civilian notions of offer and acceptance,[79] it did not present a doctrinal challenge until Parsons, Harvard's influential contracts treatise writer, emphasized in 1853 that a promisor was not bound until there was "a promise for a promise, with entire mutuality of obligation."[80] Parsons' verbiage can be found in countless judicial de-

77. The origins of the requirement of certainty were associated with the need to plead a sum certain in the action of debt in the fifteenth century. *See* SIMPSON, *supra* note 2, at 61-63. The dramatic shift in the economy generated the need to assure supply and demand in an uncertain industrial market, thus making long-term contracts essential.

78. *See, e.g.,* Work v. Welsh, 43 N.E. 719, 721 (Ill. 1896) (leaving exact location of four acres on larger tract until later); Marion Water and Power Co. v. Town of Saucilito, 143 P. 767, 773 (Cal. 1914) ("best endeavors"); Whitman v. Worsted, 206 F. 549, 554 (1913) (postponing specification of exact sizes and styles of yarns).

79. Adams v. Lindsell. 106 Eng. Rep. 250, 251 (1818). *See* Kennedy v. Lee, 36 Eng. Rep. 170, 175 (Ch. 1817) (Chancellor Eldon addressed the simultaneity issue: "[I]f, within a reasonable time of the acceptance being communicated, no variation has been made by either party in terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer."). *Cf.* Routledge v. Grant, 130 Eng. Rep. 920, 923-24 (1828) (Chief Justice Best volunteered that it would be unacceptable that one party could be bound while the other was not); Bowen v. Tipton, 1 A. 861, 863-64 (Md. 1885) (ruling that a contract requires consensus reached by offeree "doing all that he is bound to do").

80. 1 PARSONS, THE LAW OF CONTRACTS 451 (1853) ("Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it.").

cisions during the second half of the century and beyond, and Williston would defend the requirement in his 1893 edition of Parsons and in his 1906 edition of Pollock.[81]

The flawed doctrine of mutuality notwithstanding, as courts came to realize that indefinite contract language mirrored the unpredictability of a modern economy, courts of law and equity found certainty in a promisee's specific reliance on a promise. The scope of the offer had to be certain in order to award expectation damages, but this was not vital in awarding reliance damages, which could act as a surrogate to protect the expectation interest.[82] In a 1910 opinion, an Arkansas court declared that indefiniteness and lack of mutuality in a promise to pay for the output of goods produced was certain at least to the amount of goods "actually delivered."[83] The defect of uncertainty alleged in a 1914 California case resided in plaintiff's contract obligations of "due diligence" and "best endeavors." The court concluded that even if the contract was at first indefinite and lacking in mutuality, the actual efforts of the plaintiff in performing his duties satisfied these demands.[84] Actionable justifiable reliance provided a bridge between the time when judicial demands of strict definiteness held sway, regardless of hardship, and the broader modern contextual rule that implied that consent to a duty of good faith performance can save some open-ended contract language, even in the absence of reliance.[85]

A trio of decisions emanating from the middle of the country, rendered between 1887 and 1904, exemplified the challenges con-

81. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 449-51 (Samuel Williston ed., 8th ed. 1893); WILLISTON'S WALD'S POLLOCK, *supra* note 22, at 34 n.39. Williston would not retract his support for mutuality until 1920. *See* 1 WILLISTON, 1921 TREATISE, *supra* note 22, at § 140 (concluding that mutuality was an unnecessary way of saying there must be consideration, giving guaranty contract as an example).

82. *See* Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 373, 376-77 (1937).

83. El Dorado Ice and Planing Mill Co. v. Kinnard, 131 S.W. 460, 461-62 (Ark. 1910) (saying certain and mutual as to that amount). *See* Caddo Oil & Mining Co. v. Producers Oil Co., 64 So. 684, 686 (La. 1913) (holding that certainty and mutuality issues posed by elective right of driller to determine number of drillings was solved by the number of wells actually drilled); Erskine v. Chevrolet Motors Co., 117 S.E. at 714 (stating issues overcome to extent of "reliance upon the representations and promises").

84. Marion Water and Power Co. v. Town of Saucilito, 143 P. 767, 773 (Cal. 1914) (describing contract to lay and maintain water pipe with due diligence).

85. New York introduced the notion of implied duty of good faith in contract performance. *See* Asahel Wheeler Co. v. Mendelson, 167 N.Y.S. 435 (1917); Wigand v. Bachmann-Bechtel Brewing Co., 118 N.E. 618 (N.Y. 1918). Wigand drew inspiration from a 1905 decision which required fiduciary obligations of railroad reorganization committee toward bondholders. *Id.* at 619 *see also* Industrial & General Trust v. Tod, 73 N.E. 7, 9-10 (N.Y. 1905).

tract drafters faced in contending with the rapidly-changing economy as the modern form of business corporation constructed the infrastructure necessary for industrialization to proceed westward across the continent.[86] All three cases concerned landowners' agreements to convey land for industrial projects, two for construction of railway lines and the third for a factory. In each case, the precise metes and bounds of the tract to be conveyed were kept indefinite until the industrial concern knew exactly where the installations were needed at the time of construction. After construction began, the landowners in each case raised the defenses of indefiniteness and lack of mutuality, and all three courts ruled that any indefiniteness or lack of mutuality before performance began was no longer thus impaired after the reliance of commencement of construction performance clarified the precise location intended. The hurly-burly of the late nineteenth century economy was further reflected in the fact that two of the three cases involved business interests which were moving so quickly that they had not been properly formed as corporations when the agreements were struck.[87]

In *Ottumwa, Cedar Falls & St. Paul Ry. Co. v. McWilliams*,[88] an Iowa court said uncertainty about metes and bounds of a planned railway right of way was justified because of the unknown contingencies the railway company had to allow for as the line wound its way toward the defendant's land. The defective legal description was cured once the railway actually took possession and laid the tracks. The court said, "Contracts are to be construed in light of the facts surrounding the transaction, and known to the parties."[89]

In the second case, an Illinois court also took the modern perspective that only "reasonable certainty" was needed and would depend on the subject matter, the contract's purpose, and the parties' relations.[90] The promise to sell the land for a factory site was no longer revocable for lack of mutuality and certainty once valuable improvements were made in reliance on the landowner's promise.[91] Relief was limited, however, to protection of the reli-

86. *See* Ottumwa, Cedar Falls & St. Paul Ry. Co. v. McWilliams, 32 N.W. 315 (Ia. 1887); Work v. Welsh, 43 N.E. 719 (Ill. 1896); Curry v. Kentucky Western Ry. Co., 78 S.W. 435 (Ky. 1904).

87. *Work*, 43 N.E. at 721; *Curry*, 78 S.W. at 436.

88. 32 N.W. 315 (Ia. 1887).

89. *Ottumwa*, 32 N.W. at 316.

90. *Work*, 43 N.E. at 721.

91. *Id.* (stating that construction work was "acceptance" and that consideration had passed).

ance interest for the amount of land occupied by the actual factory site rather than for the number of acres originally promised.[92]

In the third case, the method of overcoming the defenses of uncertain subject matter and corporate identity in *Curry v. Kentucky Western Ry. Co.*[93] was the use of "estoppel" functioning as promissory estoppel. The Kentucky court noted, "The doctrine of estoppel prevents a landowner who has encouraged, actively or passively, the appropriation of his land . . ." from revoking his promise to convey after the now-formed corporation had occupied his land.[94]

Uncertainties over supply and demand that cropped up before the end of the nineteenth century stimulated parties to design contracts to protect their interests, and these novel formats immediately raised definiteness and mutuality objections. Contractors drew requirement contracts to assure a buyer a supply of materials he might need or require in his business over a given period, and output contracts were drawn to assure demand for the products the seller could produce. Output arrangements proved attractive to producers who wanted to be sure of a market for goods produced but did not want to be bound to produce a specific amount for fear of the long-standing absolute contract principle.[95] In a 1906 Kentucky case, a producer of railway ties offered a railway company to sell "all that [he] could furnish" for the next year. After more than a thousand ties had been furnished and paid for, the railway refused to take more. When later sued, the railway defended on the grounds of lack of both certainty and mutuality, but the court ruled that the uncertainty had been cured by part performance of both parties[96] and that the plaintiff was eligible for expectation damages for the part the defendant refused.[97]

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92. *Id.* (concluding that remedy only needed to cover that part of land identified as certain by construction of factory building).

93. 78 S.W. 435, 436 (Ky. 1904).

94. *Curry*, 78 S.W. at 436. Quoting Thompson, Commentaries On The Law Of Corporations, § 5279. The Kentucky court emphasized underlying policy that did not support removal of the fully-installed tracks available for "public use." *Id.*

95. *See* Paradine v. Jane, 82 Eng. Rep. 897 (1647) (ruling that defendant had to pay land rent even though he had been ousted from the land by an invader during English civil war).

96. Louisville & Nashville R. Co. v. Coyle, 97 S.W. 772, 773 (Ky. 1906) ("The letters which were uncertain were made definite by the conduct of the parties in construing them and performing them.").

97. *Louisville*, 97 S.W. at 773-74 (holding that measure of damages for ties not yet manufactured was difference between contract and market price). In appropriate cases, specific performance could be available. *Id.* at 774.

However, some jurisdictions were only willing to order reliance damages for such open-ended output provisions. In *El Dorado*,[98] the defendant agreed to pay the plaintiff "for any" mill-cut yellow pine he could secure from "any mill" for a stated period. The plaintiff secured a mill, made preparations, produced lumber, and delivered it to the defendant. The defendant later refused to go through with the remainder of the deal on the grounds of indefiniteness,[99] but the Arkansas court said that the indefiniteness issue was resolved to the extent of lumber delivered and accepted, and granted reliance relief accordingly.[100] Subsequent to the part performance in *El Dorado*, the parties modified the terms of their relationship to cover the output plaintiff could generate from a specific mill which the plaintiff had secured. For this portion, the court protected plaintiff's expectation interest because the "entire output of a mill of a known capacity" was "capable of an approximately accurate estimation."[101] Thus the purchaser was only bound to pay for the amount actually delivered under the output terms of lumber from "any mill," but expectation damages could be recovered when the output could be calculated with certainty for a particular mill. Soon a producer in an output agreement was said to have to comply with an implied duty of good faith in production;[102] today recovery is permitted for "such actual output or requirements as may occur in good faith."[103]

Early requirement contracts cases also limited plaintiffs to reliance damages when contract terms were not tied to the buyer's needs, but courts would award expectation damages when the quantity and quality of contract subject matter were tied to the buyer's specific business requirements. When a buyer agreed to buy as much fertilizer as he "may want or desire in his business," a 1914 Maryland decision held that the uncertain agreement was binding only to the extent of fertilizer delivered.[104] No recovery

98. 131 S.W. 460 (Ark. 1910).

99. *El Dorado*, 131 S.W. at 461 (Ark. 1910) (noting that the defendant also argued lack of mutuality since the plaintiff was not bound to secure any lumber).

100. *Id.* at 462. In an 1879 New York case, an agreement to deliver the same quality of lumber as delivered the previous winter, without an indication of quantity, was binding only to extent of lumber actually delivered. Quick v. Wheeler, 78 N.Y. 300, 303-05 (1879).

101. *El Dorado*, 131 S.W. at 462.

102. *See* Wigand, 118 N.E. at 619-20 (ordering expectation damages). The plaintiff-buyer in this output contract could recover since he relied. *Id.*

103. UNIFORM COMMERCIAL CODE §§ 1-203, 2-306 (1952).

104. Parks v. Griffith, 91 A. 581, 585 (Md. 1914); *cf.* Bailey v. Austrian, 19 Minn. 535 (1873) (stating that promise to supply all pig-iron buyer might "want" lacked mutuality because no obligation on buyer to want).

was permitted for possible future deliveries, however, because the amount the buyer might "want" was not ascertainable. The court added in dictum that a seller could recover expectation damages for a definite amount that could be calculated based on a contract term for goods the buyer "needed" or "required" in his business[105] This approach was a precursor of the application of an implied good faith duty on a buyer to require an amount consistent with buyer's business needs.[106] And a buyer who had relied upon a requirement agreement could recover expectation damages based on the quantity the buyer needed in his business as well.[107]

2. *Revocability of Unilateral Offers Subsequent to Reliance*

Up to around a decade prior to publication of the first *Restatement*, plaintiffs experienced difficulties in enforcing offers for commercial contracts which were either unilateral[108] or indefinite because of the unfortunate requirement of mutuality. Since the mutuality notion provided that neither party to a transaction was bound until both parties were bound, an offeror could revoke unilateral, at-will, and indefinite offers even after an offeree was in the process of performance, irrespective of the offeree's hardship. Thus, throughout the second half of the nineteenth century, an offeror was generally not bound even once an offeree had partly performed because the offeree was not legally obliged to complete performance.[109] Despite the fact that the requirement of mutuality

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105. *Parks*, 91 A. at 585 (saying there was a lack of mutuality and consideration if based on what buyer might "want" but that a quantity determined by amount "required" was "ascertainable . . . with reasonable certainty"). The court cited *Wells v. Alexandre* in support of point that amount "needed" or "required" was sufficient. *Id.;* Wells v. Alexandre, 130 N.Y. 642, 644-45 (1891) (interpreting contract to base quantity on the actual business requirements of buyer).

106. *See* Asahel Wheeler, 167 N.Y.S. at 436-37; UNIFORM COMMERCIAL CODE §§ 1-203, 2-306 (1952). When a buyer ordered goods in requirement contract far in excess of his needs after market price had more than doubled, the court found that the buyer acted outside the parties' contemplation by taking undue advantage in absence of real business need. *Id.* at 437; *cf. Wells,* 130 N.Y. at 645 (emphasizing that rule of reason must apply when seller entirely at mercy of buyer).

107. *See* Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892) (holding that measure of buyer's damages was quantity buyer would have needed in transactions over the year stated). *See also* 1 Arthur L. CORBIN, CORBIN ON CONTRACTS, § 156 (1950) (saying to "require" is the equivalent of to "need").

108. The use of the term "unilateral" to identify an offer anticipating acceptance by performance was employed in the first *Restatement*, and, though it was present in the early discussions about a second restatement, it was ultimately dropped from *Restatement Second* due to the confusion it created. It is used in this study with that proviso.

109. *See* 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 448 (5th ed. 1866) (promoting the model of a promise for a promise where "there is an absolute mutuality of engagement,

had not been a part of contract law prior to the nineteenth century, mutuality's success from around the middle of the nineteenth century until the 1920s caused significant hardship for contractors who attempted to adapt their relations to the unpredictability of the modern economy by structuring their transactions in the form of unilateral contracts, at-will relationships, or with sufficient indefiniteness to permit flexible adjustments.[110] Mutuality was surely the single-most important doctrinal stimulus to the growth of equitable relief from justifiable reliance hardship during the fifty years after the Civil War.

Langdell and Williston strictly applied Parsons' mutuality notion to the issue of revocability of a unilateral contract offer despite the reliance hardship of an offeree's good faith part performance.[111] This dogmatic refusal to make provisions for reliance hardship can be seen in an 1890 Minnesota judicial opinion that offered solutions to the mutuality problem in either completion of performance before revocation or re-negotiation as a bilateral contract.[112] These suggestions were disingenuous, since it would be too late to complete performance once revocation occurred, and an offeror with market power might refuse to agree to loss of maneuverability.

Despite the attempts of formalist treatise writers to stamp out reliance relief for unilateral contract offerees, American case law rulings of the late nineteenth and early twentieth centuries continued mixed as some supported Parsons' position while others redressed justifiable reliance. The decisions that provided relief circumvented the mutuality requirement either by making an equitable exception for reliance hardship or by rationalizing that part performance cured the lack of mutuality or acted as an accep-

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so that each party has the right at once to hold the other to a positive agreement"); LANGDELL SUMMARY, *supra* note 7, at § 4; WILLISTON'S WALD'S POLLOCK, *supra* note 22, at 34 n.39; Shattuck, *supra* note 76, at 938 n. 93 (listing string of case citations).

110. *Cf.* Shattuck, *supra* note 76, at 935 (commenting that unilateral offers were usually structured for business purposes).

111. *See* LANGDELL, SUMMARY, *supra* note 8, § 4 (citing English guaranty decision *Offord v. Davies*); 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 449-51 (1853). Williston admitted that mutuality's sting was "troublesome" due to the "practical hardship" for the offeree, but "on principle" he was bothered that the offeree would not be bound to complete the performance commenced. WILLISTON'S WALD'S POLLOCK, *supra* note 22, at 34 n. 39. Theophilus Parsons (1797-1882), Christopher C. Langdell (1826-1906) and Samuel Williston (1861-1963) taught contracts at Harvard Law School during successive generations. *Id.*

112. Stensgaard v. Smith, 44 N.W. 669, 670 (Minn. 1890); *Accord* Gray v. Hinton, 7 F. 81, 84-85 (Cir. Ct. App. Nebr. 1881) (saying act of acceptance had to be fully performed to make promise "mutual and obligatory").

tance. Judicial opinions at the turn of the twentieth century in California and Kentucky exemplified this trend. In *Los Angeles Traction Co. v. Wilshire*, a California court ruled that, after a contractor had expended funds and started construction, "[i]t would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn."[113] A Kentucky court in *Louisville & Nashville Ry. Co. v. Coyle* observed that despite the lack of mutuality when a railroad company offered to buy the railroad ties the plaintiff could produce in one year, that by plaintiff electing to perform, "the want of mutuality is thereby eliminated."[114]

Some courts held that an offeror, who hindered an offeree's ability to complete performance, was barred from revoking[115] or that the hindrance was the equivalent of completion of performance.[116] When the facts were egregious enough, some courts concluded that conduct akin to fraud occurred when an offeror revoked after inducing part performance. A Wisconsin court reasoned in *Zwolanek v. Baker Manufacturing Co.*[117] that when a company induced workers to hire on and to stay in service with assurances of participation in the company's profit sharing plan, the company committed near fraud to fire plaintiff just before the eligibility period was reached. The employer further compromised its position by claiming that the benefits were intended only for officers and

113. Los Angeles Traction Co. v. Wilshire, 67 P. 1086, 1088 (Cal. 1902); *see* Blumenthal v. Goodall, 26 P. 906, 907 (Cal. 1891) (stating it would be "height of injustice" to permit offer to be revoked after reliance). A refusal to take into account the hardship of reliance left the offeree with the possibility of recovery in restitution, but unjust enrichment was often absent. *See* Bigger v. Owen, 5 S.E. 193 (Ga. 1887) (applying mutuality demand strictly); Fuller & Perdue (pt. 2), *supra* note 82, at 416 (lamenting that offeree of unilateral contract has no way to protect self). A unilateral contract is a stronger case for allowing reliance protection than a firm offer because a unilateral offeree can do nothing to protect himself except to complete performance, but an offeree can accept a firm offer.

114. Louisville & Nashville R.R. Co., 97 S.W. at 773 (Ky. 1906); *see* Phelps v. Townsend, 25 Mass. 392, 393 (1829) (part performance outweighed lack of mutuality defense); Williams v. Rogan, 59 Tex. 438, 439 (1883); (holding donor "became bound" when part performance of charity fulfilled "mutuality of engagement," citing Parsons' treatise); Plumb v. Campbell, 18 N.E. 790, 792 (Ill. 1888) (concluding that beginning part performance supplied mutuality); Hopkins v. Racine Malleable & Wrought Iron Co., 119 N.W. 301, 303 (Wis. 1909) (remarking that mutuality was "essential" but "rule has received modification to the extent" of performance); Watkins v. Davison, 112 P. 743, 745 (Wash. 1911) (explaining part performance of unilateral offer solved any mutuality issue); Cloe v. Rogers, 121 P. 201, 203 (Okla. 1912) (concluding that reliance cost and part performance answered want of mutuality).

115. *See* Brackenbury v. Hodgkin, 102 A. 106, 107-08 (Me. 1917) (saying offeree "primarily at fault"); *see also Blumenthal*, 26 P. at 908 (emphasizing offeror ought not take advantage of his own wrong).

116. *See* Louisville & Nashville R.R. Co. v. Goodnight, 73 Ky. 552, 554 (1874).

117. 137 N.W. 769 (Wis. 1912).

shareholders of the company.[118] Other types of wrongs found relevant included an offeror's negligence and violation of requirements set by the offeror himself.[119]

Judicial relief granted to offerees prior to the first *Restatement* was justified on scattered grounds, some of which were doctrinally indefensible. This muddled state was exacerbated by the absence of doctrinal guidance from leading contracts treatise writers because of their resistance to such relief until the second decade of the twentieth century. Without the lead of influential academic writers, who generated the mutuality mess in the first place, a growing number of court decisions provided equitable relief based on confused terminology and doctrine, and attorneys' arguments in support of offerees' reliance claims were rife with bewildering nomenclature.[120] Fuzzy judicial thinking included added analysis and misuse of equitable estoppel,[121] mutuality, unilateral contracts, and the statute of frauds part performance exception. The troublesome requirement of mutuality in unilateral contracts was canvassed earlier, and it will be seen again in the coverage of at-will contracts. The application of the misguided mutuality requirement added on top of the doctrine of consideration in unilateral contracts led to unnecessary disorder and unfairness.[122]

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118. Zwolanek, 137 N.W. at 771-72, 773 (Employer defended on ground that written contracts reserved benefit "for members of the corporation."); *contra* Note, *Offer and Acceptance*, 26 HARV. L. REV. 274, 274 (1912) (submitting that *Zwolnek v. Baker* was wrong to bind offeror when acceptance not pursuant to all terms of offer). *See* Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892) (remarking that "it would be a fraud" to induce offeree's substantial performance and then revoke); *cf.* Erskine, 117 S.E. at 712) (asserting manufacturing would be guilty of fraud if it induced performance without intending to perform).

119. *See, e.g.,* The Vigo Agricultural Society v. Brumfiel, 1 N.E. 382, 385-86 (Ind. 1885) (involving theft of plaintiff's property placed with defendant-bailee for an exhibition where defendant negligently failed to station police after assurance of safekeeping); Sunflower Bank v. Pitts, 66 So. 810, 812 (Miss. 1914) (stating that bank was a "wrongdoer" to sell land, while plaintiff was agent to sell it, at price below the minimum price at which the bank said that neither it nor the agent could sell it).

120. *See, e.g.,* Watkins v. Davison, 112 P. 743, 744 (Wash. 1911) (Attorney claimed seller gave "unilateral acceptance," but court called it a unilateral offer); Axe v. Tolbert, 146 N.W. 418, 420 (Mich. 1914) (Attorney claimed real estate firm obtained "options" to sell farms, but court said intent was to grant the firm agency authority.); *cf.* G. Ober & Sons Co. v. Katzenstein, 76 S.E. 476, 477-78 (N.C. 1912) (calling at-will contract an option to cancel).

121. *See* Curry, 78 S.W. at 436. Equitable estoppel bars a person from claiming that the true facts are different from what he misrepresented them to be, but promissory estoppel supports enforcement of a promise for future performance.

122. *See* Arthur L. Corbin, *The Effect of Options on Consideration*, 34 YALE L. J. 571, 573, 586-87 (1925) (asserting that the idea that both parties must be bound or neither is bound was never true of unilateral contract). Williston would not insist on the inclusion of mutuality in the *Restatement*. *See* 1 WILLISTON, 1921 TREATISE, *supra* note 22, § 140 (acknowledging that mutuality is unnecessary way of saying there must be consideration).

Further confused thinking emanated from attempts to remove a contract from the perceived pitfall of the unilateral box by judicial declarations that an offeree's part performance converted a unilateral contract into a bilateral contract.[123] As an Illinois court put it in *Plumb v. Campbell*, part performance transmuted the unilateral contract into Parsons' paradigm for all binding contracts of "a promise for a promise, with entire mutuality of obligation."[124] This was an inaccurate transfer of a classification since, unlike bilateral contract, a unilateral offeree was not bound to complete the partial performance commenced.[125] Erroneous thinking was present as well in unilateral contracts involving the part performance exception to the statute of frauds, since overcoming the statute facilitated an unspoken, backdoor method to assume, without analysis, the existence of both consideration and mutuality.[126]

Then, during the second decade of the twentieth century, several academics began to write in support of the increasing instances of judicial relief given unilateral offerees on account of reliance hardship. Academic writers, and eventually drafters of the *Restatements* of the law, set about suggesting cures to the defective doctrine enunciated in the case law as a means to order the law and thereby encourage the fairness obtained in these decisions. Judicial opinions prior to the 1920s rationalized relief as an equitable exception to the mutuality requirement or under the rationale that offeree's part performance answered the demand for mutuality either because it supplied the mutuality or there was now a promise for a promise. By around 1910, academics began to exhibit an interest in active support for the equitable results

123. *See, e.g.*, Los Angeles Traction Co., 67 P. at 1088 (stating that part performance barred revocation and also converted unilateral into bilateral contract); (Buick Motor Co. v. Thompson, 75 S.E. 354, 356 (Ga. 1912); Plumb, 18 N.E. at 792; Edwards v. Roberts, 209 S.W. 247, 251 (Tex. 1918) (saying it ceased to be unilateral contract and became bilateral).

124. *Plumb*, 18 N.E. at 792 (citing Parsons' mutuality ideas).

125. *Cf.* WILLISTON, 1921 TREATISE, *supra* note 22, § 60 (arguing that if part performance is enough to convert a unilateral into a bilateral contract, then the offeror is being denied the right to dictate the terms of his offer). The classifications unilateral and bilateral were dropped from the *Restatement Second* because of the confusion they caused.

126. *See*, e.g., The American Publishing and Engraving Co. v. Walker, 87 Mo. App. 503, 509 (1901) (saying part performance cured statute of frauds and unilateral objections); *cf.* Wynn v. Garland, 19 Ark. 23, 35-36 (1857) (commenting that part performance cured statute of frauds and mutuality concerns); Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892). The inclination to equate the statute of frauds part performance exception with the reliance needed to bar revocation of a unilateral contract is perhaps not surprising in a license case like *Wynn*, in that the statute of frauds part performance exception, created to avert a fraudulent invocation of the statute, influenced early cases that provided justifiable reliance relief in land license and easement cases.

achieved in the courts, but the trick was how to convert that equitable impulse into unassailable contract doctrine in order to encourage its healthy growth.[127]

In 1910 Professor Ashley observed in the cases that granted offerees reliance relief the suggestion of "estoppel" at work,[128] and he encouraged the open application of a device like estoppel to bar revocation after an offeree's reliance.[129] Ashley admitted that the facts of the cases did not strictly fall under equitable estoppel, but he said that "[a] doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature."[130] Four years later, Professor McGovney weighed in to advance what would prove to be the most influential suggestion of a sound theoretical approach to avert reliance hardship caused by an offeror's revocation.[131] McGovney was uneasy about Ashley's estoppel proposal because it involved "stretching the doctrine of estoppel beyond the vaguest meaning in which it is now applied," and he thought the proposal would "scarcely meet with approval."[132] In order to defeat the barriers presented by the dogma of mutuality and bargain, McGovney reached for inspiration beyond the common law system by ferreting out a mid-nineteenth century civilian dissent, and in part, by following the ruminations of English treatise writer Pollock. McGovney highlighted an 1852 dissent to a Louisiana case of an offer for a reward, wherein Judge Preston argued that after part performance, the plaintiffs "acquired an inchoate right" that barred the offeror's revocation.[133]

Pollock agreed with the equitable outcome Ashley's proposal would effectuate, as did McGovney, but Pollock characterized the estoppel notion as "legal sophistry."[134] Pollock borrowed from

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127. *See* Clarence D. Ashley, *Offers Calling for Consideration Other than a Counter Promise*, 23 HARV. L. REV. 159, 161, 165-66 (1910) (noting constant effort to devise way out of the difficulty that consideration is not given until offeree's act completed). Ashley thought perhaps legislation would be necessary. *Id.* at 159.

128. *Id.* at 163 (citing as example *Los Angeles Traction Co. v. Wilshire*).

129. *Id.* at 166.

130. *Id.* at 168.

131. McGovney, *supra* note 59, at 659.

132. *Id.* at 657.

133. Cornelson v. Sun Mutual Ins. Co., 7 La. Ann. 345, 347 (1852). McGovney also mentioned dicta in well known English and American decisions, though both decisions offered the solution he opposed of the offeree being bound as well at part performance. McGovney, *supra* note 59, at 656; *see* Offord v. Davies, 142 Eng. Rep. 1336, 1338 (1862) (commenting that offeror of guaranty contract bound upon creditor's part performance); Plumb, 18 N.E. at 792 (saying part performance binds offeror and provides mutuality).

134. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 26 (8th ed. 1911).

French law the idea that an "acceptance is complete" as soon as an offeree makes an "unequivocal beginning of the performance requested."[135] McGovney perceived two offers being made in a unilateral contract offer: first, the principal offer to sell or buy, and, second, a "collateral offer to keep the principal offer open for a reasonable time if the offeree begins performance."[136] McGovney's implied collateral offer was inspired by the nineteenth century consensual theory contribution permitting courts to imply terms in order to inject fairness into common law contract. Common law courts had been utilizing the fiction of implied consent as a matter of law in order to incorporate uniform equity into contract doctrine for a century prior to McGovney's article.[137]

Williston rejected McGovney's proposal in 1921 because of the lack of precedent to support his idea. He admitted the probable advantage to business interests of irrevocability but thought "recognized principles of contract" could only be overcome by "invention of new ones," which he was unwilling to propose.[138] Between the publication of Williston's treatise in 1921 and the first *Restatement* draft in 1925, Williston's mind was changed about irrevocable unilateral offers after he joined forces on the *Restatement* drafting committee with Yale law professors Corbin and McGovney,[139] two of the four drafters active on the project. The result of their collective efforts was a solution that was obviously influenced by McGovney's suggestions in 1914. The solution enunciated in Section 45 stated that an offeree's part performance held an offeror to a binding implied "subsidiary promise" to not revoke for a reasonable time.[140] The lamented requirement of mutuality was now proclaimed to be wrong.[141]

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135. *Id.*

136. *Id.* at 659.

137. The civilian implication of terms to contracts generally are found in the law regarding merchantability, impossibility and good faith. *See* TEEVEN, HISTORY OF CONTRACT, *supra* note 3, at 139, 232-35, 309.

138. 1 WILLISTON, 1921 TREATISE, *supra* note 22, at § 60. Corbin supported irrevocability of offer on the grounds of policy, convenience and general advantage. Arthur L. Corbin, *Offer and Acceptance and Some of the Resulting Relations,* 26 YALE L.J. 169, 186, 195 (1917) [hereinafter Corbin, *Offer and Acceptance*].

139. Williston and Corbin were obvious choices, but McGovney's selection surely reflected the importance of the doctrinal concerns of the time regarding the status of unilateral contracts and the deleterious impact of the mutuality requirement.

140. RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. b (1932). The modern English common law position is that a unilateral offer is irrevocable after performance begins if a court's reading of the contract itself indicates that was the offeror's intent, leaving open the possibility that an offeror could revoke after performance began if that was found to be

(a) Options and Firm Offers

The specific unilateral contract categories of offers for option contracts and offers for guaranty contracts present their own particular problems; a byproduct of the development of solutions contributed to the growth of justifiable reliance. This sub-section will cover options and the one following will address guaranty contracts.[142] Options intended to be irrevocable for a brief period are often labeled "firm" offers.[143] When a merchant stated an offer was "firm," the commercial understanding might have been that it was irrevocable, but the offer was revocable as a matter of contract law in the absence of consideration.[144] By the latter part of the nineteenth century, this began to change in cases of reliance on the firm offer.[145] In contrast to unilateral offers generally, the reliance on a promise of irrevocability frequently involved a form of substantial reliance that did not necessarily include part performance of contract terms.[146] For instance, in *Wilson v. Spry*, the offeree's reliance came in the form of extensive examinations of timber

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offeror's intent. *See* MICHAEL P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 64-66 (2001).

141. *See* RESTATEMENT OF THE LAW OF CONTRACTS § 12 cmt. b (1932); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. f (1981) (elaborating that the requirement that both parties be bound was inapplicable to unilateral contracts, reliance-based obligations, moral obligation and negotiable instruments).

142. Offers for both options and guaranties share the requirement that reliance be substantial. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 87, 88(c) (1981). As to a written guaranty, reliance is extremely probable in a "commercial context." *Id.* at § 88 cmt. d. The provisions in Sections 87 and 88 were not in the first *Restatement*.

143. *See* Fuller and Perdue (pt. 2), *supra* note 82, at 416 (explaining that when an offer is "firm," there is a stated period of irrevocability to distinguish it from other types of options); U.C.C. § 2-205 cmt. 4 (1952) (clarifying that a "firm" offer is not a long-term option in modern usage). Not all option offers make assurances of irrevocability of the offer like a firm offer does, but if there is reliance on an option or a firm offer, the result is the same.

144. *See* A.L.I. UNIFORM REVISED SALES ACT (Sales Chapter of Proposed Commercial Code), Proposed Final Draft No. 1, § 18 cmt. (Karl Llewellyn reptr. 1944) (commenting that firm offers were so relied upon by merchants that they rarely came into case law, and when they did, it was because of "revocation in bad faith"); Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practices in the Construction Industry*, 19 U. CHI. L. REV. 237, 260(1952), *supra* note 144, at 245-46 (discussing Louisiana case that remanded for proof on whether trade custom was that firm offer irrevocable); *cf.* U.C.C. § 1-205 cmt. 4 (1952) (stating custom may not replace established legal rules); 1 CORBIN, *supra* note 107 § 43; *cf.* JOHN DAWSON, GIFTS AND PROMISES 207 (1980) [hereinafter DAWSON, GIFTS] (explaining that consideration concerns contract formation but has been confused with irrevocable offers and contract discharge).

145. *See, e.g.*, Work, 43 N.E. at 721; Fontaine, 17 S.E. at 1018.

146. This potential difference is reflected in the *Restatement Second* stance that substantial reliance is sufficient for an option but part performance is required for other types of unilateral contracts. RESTATEMENT (SECOND) OF CONTRACT §§ 87(2), 45 (1981).

property in order to determine the value of the property offered,[147] and in *Spitzli v. Guth*, a lessee made substantial improvements to leased property in reliance on a promise to extend a lease.[148] Each of these decisions, rendered in the year 1920, treated the subsequent substantial reliance as the nineteenth century species of consideration reviled by Langdell and Holmes and noted by Corbin as the "so-called estoppel theory of consideration."[149] That is, justifiable reliance was treated in some jurisdictions as a ground, independent of bargain, for finding sufficient consideration.

Cases of reliance on commercial options of particular importance involved contractors bidding on contracts.[150] Notwithstanding opposition to binding reliance during the second quarter of the twentieth century,[151] legal history shows that options in the form of bids were actionable, if relied upon, by the late nineteenth century. A good example of this protection of the reliance interest was the 1892 Georgia decision *Fontaine v. Baxley*.[152] A railroad tie manufacturer in Georgia offered to supply ties at a set price for one year if the buyer's bids to sell ties were accepted by New York railway companies.[153] Georgia's Chief Justice Bleckley said that the tie manufacturer could have repudiated for lack of mutuality "before [buyer] had incurred trouble and expense in complying with it on his part."[154] The buyer had relied on the manufacturer's

147. 223 S.W. 564, 568-69 (Ark. 1920) (noting examination costs of $25 per day on property offered at $250,000).

148. Spitzli v. Guth, 183 N.Y.S. 743, 745 (1920); *see Work*, 43 N.E. at 721 (land improved substantially in reliance on offer to convey).

149. *Wilson*, 223 S.W. at 568-69 (ruling examination of land subsequent to 45 day option was consideration); *Spitzli*, 183 N.Y.S. at 747 (ruling that improvements, which lessor aware of, provided "consideration which related back to the original agreement"); LANGDELL, SUMMARY, *supra* note 8 § 79; HOLMES, *supra* note 12, at 292-94; Corbin, *Offer and Acceptance, supra* note 138, at 189; *see Work*, 43 N.E. at 721.

150. *See, e.g.*, James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933); Northwestern Engineering Co., 10 N.W.2d 879 (S.D. 1943); Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958).

151. *See James Baird Co*, 64 F.2d at 346 (Hand, J.).

152. 17 S.E. 1015 (Ga. 1892). A bid at an auction is a revocable offer revocable until accepted. *See* Payne v. Cave, 100 Eng. Rep. 502 (1789).

153. The court inartfully said that the parties had an "agreement" but that the manufacturer's promise to meet the buyer's requirements was a unilateral promise, since the offeror could withdraw before the offer was acted upon. Subsequent to reliance, however, the manufacturer was obliged to supply as many ties as the buyer-counterclaimant "might need." *Fontaine*, 117 S.E. at 1018. A counterclaim was involved in *Fontaine v. Baxley* because the manufacturer had sued for a modest amount due on an earlier delivery, but the issue on appeal concerned the defendant's counterclaim in recoupment for reliance harm suffered in connection with bids submitted to railway companies.

154. *Fontaine*, 17 S.E. at 1018. As with the subcontractor in *Drennan v. Star Paving Co.*, the manufacturer here did not bargain for the reliance of submitting a bid to railways;

offer to sell railway ties by traveling from Georgia to New York, setting up office in New York, submitting bids to New York railway companies based on the manufacturer's price set, landing contracts with two railways and securing assurances he had submitted low bids on three upcoming contracts.[155] The court concluded that it would be a "fraud" to permit revocation after substantial reliance.[156] The manufacturer's promise to supply the ties needed to fulfill contracts at a stated price was held irrevocable once the buyer reasonably relied on the supplier's promises of quantity and price in making his bids to railway companies,[157] at least as to the two contracts actually formed with railways.[158]

The outcome in *Fontaine v. Baxley* was the same as that reached by Justice Traynor on parallel facts in *Drennan v. Star Paving Co.* sixty-six years later, but the judicial opinions in each case approached the problem from different perspectives. The rationale in *Fontaine v. Baxley* reflected the nineteenth century natural law sensibilities of a jurisdiction comfortable with employing an approach from equity to produce a common law solution. The Georgia court averted a fraud, in equity, by barring revocation of a unilateral offer that had induced the reliance of partial acceptance. This answer was borrowed from a practice in equity that barred the potential fraud of raising the statute of frauds to defend against an oral promise after it had induced part performance.[159] On the other hand, Traynor combined common law bargain with consensual notions by analogizing the subcontractor's bid to a unilateral offer falling under *Restatement* Section 45. Although the subcontractor did not bargain for plaintiff's justifiable reliance on the subcontractor's bid, Traynor said a fictional implied "subsidi-

nevertheless, the manufacturer had reason to expect his bid to be incorporated in bids to railways. *Id.*; *Drennan*, 333 P.2d at 759-60.

155. *Fontaine*, 17 S.E. at 1018. The damages measure was the quantity Fontaine could succeed in pre-engaging within one year. *Id.*

156. *Id.*

157. The court emphasized that counterclaimant had no alternative supply readily available in the market. *Id.*

158. As to the three bids, he had assurances that he had submitted the lowest bid; a determination would have to be made about whether reliance was sufficient for them. *Id.* If offer is for a potential series of unilateral contracts, reliance on one does not bind offeror to remaining transactions in series. *See* Hopkins v. Racine Malleable & Wrought Iron Co., 119 N.W. 301, 303 (Wis. 1909).

159. *See* Butcher v. Stapley, 1 Vern. 363 (1686); Thynne v. Thynne, 23 Eng. Rep. 459 (1684); Halfpenny v. Ballet, 2 Vern. 373 (1699); LeFevre v. LeFevre, 4 S.&R. 241, 244 (Pa. 1818). *See also* SIMPSON, *supra* note 2, at 616. The court in *Fontaine,* said it would be a fraud to repudiate after reliance and that this part performance satisfied both mutuality and statute of frauds. *Fontaine*, 17 S.E. at 1018.

ary promise" arose to not revoke after reliance.[160] As in unilateral contract offers generally, this left open the question of whether the protected offeree who relied was obliged in the end to accept the subcontractor's bid.[161]

In order to obtain just results, Traynor reintroduced a reliance theory to bind suppliers to their commercial bids relied upon when general contractors calculated their own bids.[162] Judge Hand had demanded a bargained-for, or at the least consensual, ground to bar revocation, and he decried the loss of the consensual solution the seal provided.[163] A decade later, U.C.C. Reporter Llewellyn crafted a consensual substitute for the sealed bid in the form of a proposed statutory firm offer rule,[164] but then this was not the first civilian experimentation to replace the loss of the seal with the signed writing formality of the commercial age.[165] Still, the statutory solution would not protect the reliance interest if a bidder refused to extend a firm offer in compliance with statutory formality.

(b) Guaranty Contracts

The issue of lack of mutuality in this unilateral contract category had been rejected by the English judge Parke early in the development of the obstructive notion of mutuality in the nineteenth century. In 1839, Parke observed, "But a great number of cases are of contracts not binding on both sides at time when

160. *Drennan*, 333 P.2d at 760 (saying contractor had reason to expect his bid to be incorporated in general contractor's bid).

161. *Id.* The court in *Fontaine v. Baxley* suggested that the victimized offeree was bound to order all the railway ties needed from the offeror-manufacturer. *Fontaine*, 17 S.E. at 1018. Although this solution was flawed in theory since the unilateral offeree was not bound to complete the deal with the offeror, it did provide a lead for legislatures to consider. *See* 1 CORBIN, *supra* note 144 § 46 (discussing statutory and civilian treatment of some bids as irrevocable). A mid-twentieth century survey of Indiana contractors' sense of fair play indicated that 65 of 90 contractors surveyed felt obliged to contract with a subcontractor if the contractor awarded contract. *See* Franklin M. Schultz, 19 U. CHI. L. REV. 237, 260 (1952).

162. *Drennan*, 333 P.2d at 760.

163. *James Baird Co.*, 64 F.2d at 346.

164. In a 1944 preliminary draft leading to of U.C.C. § 2-205, Llewellyn proposed a statutory firm offer rule. A.L.I. UNIFORM SALES ACT (Sales Chapter of Proposed Commercial Code), Proposed Final Draft No. 1 (Karl L. Llewellyn, reptr. 1944).

165. *See* 1 CORBIN, *supra* note 144, at § 46 (mentioning statutes as early as 1914 in Maryland and 1941 in NewYork and civilian rule of irrevocability for deliberate promises). *See also* Armed Services Procurement Regulation § 2-203, 32 Code Fed. Regs. § 401.303 (1951) (barring revocation of bid to U.S. Government).

made."[166] Baron Parke continued that in the case of a guaranty contract, the party indemnified is not bound to extend credit, but if he does so, then the guaranty becomes binding.[167] Parke's comment that an extension of credit in reliance on the guaranty promise was necessary to bind the guarantor was corroborated in the well known 1862 English guaranty decision *Offord v. Davies*.[168] That court said a guaranty promise was "conditioned" and only became "binding if [the creditor] acts upon it," and until it was "at least in part fulfilled the [guarantors] have the power of revoking it."[169] Guaranty contracts had been binding at common law for centuries prior to the nineteenth century; due to their unique nature, they were one of the few instances, prior to the industrial age, in which there was a need for transactions to be designed with a suspension of time between the offer and the acceptance. In the United States, Professor Parsons, and later his disciple Langdell, wrestled with how to find guaranty contracts in conformity with the invented doctrine of mutuality. Parsons declared that once the creditor relied by extending credit, mutuality's magical moment had arrived in the form of a promise for a promise.[170] Langdell, on the other hand, did not deny the binding nature of a guaranty contract at common law, but he nevertheless huffed that *Offord v. Davies* was one of the "ingenious attempts" to avoid a hardship by declaring an offer irrevocable once performance had begun. Langdell said, "Such a view seems to have no principle to rest upon."[171]

Those nineteenth century American judicial opinions that held guaranty promises binding on account of reliance tended to invoke equitable estoppel more than other unilateral contract categories like options and firm offers. Estoppel was perhaps perceived to be a useful device due to the peculiarity of the reliance redounding to the benefit of a third party rather than the promisor. The claimed applicability of equitable estoppel to a guaranty was often erroneous, however, since there was, in essence, injurious reliance on a promise for future action as opposed to equitable estoppel's bar

166. Kennaway v. Treleavan, 151 Eng. Rep. 211, 212 (1839).
167. *Id. accord* Whittle v. Frankland, 121 Eng. Rep. 992, 994-95 (1862) (Crompton, J. stated in dictum in a criminal case that, "I never could understand that mutuality doctrine," as in case of guaranty where the only question is about consideration).
168. 142 Eng. Rep. 1336, 1340 (1862).
169. *Offord*, 142 Eng. Rep. at 1340.
170. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 451 (1853).
171. LANGDELL, SUMMARY, *supra* note 8 § 4.

from claiming facts different from those misrepresented.[172] Thus, in the 1864 Connecticut decision *Rice v. Almy*,[173] the guarantor induced a creditor to relinquish his lien on his debtor's machinery, so that the guarantor could buy the machinery, in exchange for the defendant's guaranty of a new note signed by the debtor. The court claimed that equitable estoppel applied,[174] but where was the misrepresentation of fact? The creditor had relied on the guarantor's promise to answer for any default by the debtor on the note in the future, and a reporter's note to the opinion inferred as much.[175] *Rice v. Almy* provided early support for the innovation by American courts of law and equity that injurious reliance qualified as consideration.[176] The case reporter saw the shift and questioned whether it was necessary to invent some new definition of consideration.[177] Doctrinal concerns notwithstanding, the injection of the reliance impulse in equitable estoppel into the doctrine of consideration was in full swing.

One other important question concerned reliance on the common commercial practice of giving a guaranty promise to cover a series of future credit extensions, as in a letter of credit or an open line of credit. Did the reliance of the first credit extension in the series bind the guarantor to the whole series? In *Offord v. Davies*,[178] the defendant guaranteed that a draper would honor bills of exchange issued by the plaintiff for the next twelve months. One credit extension had been honored by the draper before the guarantor revoked midway in the year. The guarantor defended on the ground that he had revoked before any further reliance on his guaranty promise.[179] The court adopted the measured resolu-

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172. *See, e.g.*, Rice v. Almy, 32 Conn. 297, 304 (1864); Winham v. Crutcher, 78 Tenn. 610, 615, 623-25 (1882); Litzelman v. Howell, 20 Ill. App. 588, 589-90 (1886).

173. 32 Conn. 297 (1864).

174. *Rice*, 32 Conn. at 304 (estoppel *in pais*).

175. *Id.* at 307-08 (disagreeing that equitable estoppel could enforce an *agreement* if consideration was not also present).

176. *Id.* at 304 (asserting that if "promise induces promisee" to act, there is sufficient consideration). *See* BIGELOW, *supra* note 58, at 441; WILLISTON'S WALD'S POLLOCK, *supra* note 22, at 186-87 n.(d); WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 129 n.2 (Arthur L. Corbin ed., 4th American ed. 1924).

177. *Rice*, 32 Conn. at 306. The reporter admitted, however, that this form of consideration was sometimes found. *Id.* at 307-08 (saying consideration and estoppel "perfectly coincide here").

178. *Offord*, 142 Eng. Rep. at 1337.

179. *Id.* at 1336. The opinion contained the oft-quoted hypothetical discussed by Justices Williams and Erle about the guaranty to a manufacturer of the buyer's payment for a carriage. *Id.* at 1338. The conclusion was reached that the guarantor could revoke up to

tion that if a part of an extension was made before revocation, then the defendant would be bound for the whole of that extension in the series, but a revocation would be ineffective as to all remaining potential extensions in the series for which no reliance had yet occurred.[180]

3. *Revocability of At-Will Contracts Subsequent to Reliance*

The right to revoke at-will contracts runs parallel to the right to revoke unilateral offers in that an at-will agreement does not commence if performance does not actually begin, and at-will relations are structured to permit contractors to terminate their relationship at any time. The types of relationships involved, often resembling traditional employment relations or extensions thereof, include agency, distributorship, exclusive sales arrangements, franchises, licenses and other related revocable contractual relations.[181] The traditional common law presumption that an employment relationship ran year-to-year[182] was called into question as relationships in the distributive chain became more complex in an industrial market.[183] Treatise writer Wood declared that unless an employee could prove to the contrary, the new employment contract paradigm was "at will."[184] Modern studies have established that Wood disingenuously cited authority that did not support his audacious claim.[185] However, the proposition proved attractive to an instrumental age keen to facilitate corporate maneuverability to react rapidly to turbulent markets; by the late

the point when manufacturer had prepared materials for manufacture of carriage. *Id.* (citing Parsons' treatise, characterized as an American work of considerable authority).

180. *Id.* at 1340. *See* Fuller & Perdue (pt. 2), *supra* note 81, at 414 (pointing out that *Offord* court took "middle ground" by allowing revocation of extensions not made); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 88 cmt. d (1981) (commenting that the typical remedy is performance of guaranty, thus avoiding measurement difficulties).

181. *See, e.g.,* G. Ober & Sons v. Katzenstein, 76 S.E. 476 (N.C. 1912) (revocable purchase order); Caddo Oil v. Producers Oil, 64 So. 684 (La. 1913) (oil drilling lease).

182. Kent followed Blackstone's description of employment contracts running year-to-year. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (1765); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258-59 (2d ed. 1832).

183. Wood's ruminations have been pointed to as a harbinger of the shift to at-will treatment. HORACE G. WOOD, MASTER AND SERVANT 134 (1877). *See* Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEG. HIST. 118, 126-30 (1976). Twentieth century commentators have established that Wood disingenuously cited authority that did not support his claim. *See id.* at 126; *see also* 1 WILLISTON, 1921 TREATISE, supra note 22, § 39 (regretting failure of courts to follow the true contract principles).

184. WOOD, *supra* note 183 § 134.

185. *See* Feinman, *supra* note 183, at 126. *See also* 1 WILLISTON, 1921 TREATISE, *supra* note 22 § 39 (regretting failure of courts to follow true contract principles).

nineteenth century, this introduced at-will theory had begun to overtake the field.[186] As traditional employment relations were supplanted by more complex alternative arrangements for the distribution of goods and services, the emerging notion of at-will relations migrated into these modern contractual devices.[187] There was a natural doctrinal tendency for courts to expand at-will treatment to modern methods of distribution since agency had always been considered at-will.[188] Courts began to say that, for the purpose of determining revocability, it was immaterial whether agency or distributorship was involved because case law on termination could be applied interchangeably.[189]

As reliance hardship resulted from at-will treatment of these new methods of marketing, courts softened the impact of the new rule by granting relief for the loss of substantial initial investments necessary to conduct exclusive distribution and franchise agreements. The evolution of this reliance relief began with exclusive sales agreements and licenses, and then during the first quarter of the twentieth century, theories of recovery evolved to cover more intricate agency and distributorship agreements. The equitable solutions granted in exclusive sales transactions near the turn of the century were prompted when producers canceled agreements after having induced buyers to accumulate large inventories through promises of exclusive territories. In *Saddlery Hardware Co. v. Hillsboro Mills*,[190] the plaintiff bought plaid blan-

186. *See* Raymond v. White, 78 N.W. 469, 471 (Mich. 1899) (accepting that employee could be terminated at any time); Feinman, *supra* note 183, at 126-34; 1 WILLISTON, 1921 TREATISE, *supra* note 22 § 139 (admitting universality of at-will rule). "Permanent" or "for life" employment interpreted as at-will unilateral undertaking. *See* 9 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1017 (Samuel Williston & George T. Thompson eds., rev. ed. 1936).

187. *See* Bassick Mfg. Co. v. Riley, 9 F.2d 138, 138-39 (E.D.Pa. 1925); 4 WILLISTON, 1936 TREATISE, *supra* note 48 § 1027A (stating that under influence of simpler master and servant relations, where it is less easy to raise mutual obligations and detrimental reliance, sales agencies and distributorships have been found to be at-will).

188. *See, e.g.*, Courier-Journal Co. v. Miller, 50 S.W. 46, 47 (Ky. 1899) (interpreting agency to sell newspapers to allow discharge "at any time without cause"); Alexander v. Capitol Paint Co., 111 A. 140, 141-42 (Md. 1920) (saying ordinary brokerage with no time strictures may be terminated at-will); Buick Motor Co. v. Thompson, 75 S.E. 354, 354-55 (Ga. 1912) (ten day notice for termination).

189. *See* Kelly-Springfield Tire Co. v. Bobo, 4 F.2d 71, 72 (9th Cir. 1925); Carlson v. Stone-Ordean-Wells Co., 107 P. 419, 422 (Mont. 1910); 9 WILLISTON, 1936 TREATISE, *supra* note 48 § 1017A (stating that for the purpose of determining termination of relations, they "are essentially the same, and cases of either type are authoritative on this point for the other"). The notion of revocable agency relations, when ownership of goods did not pass, had been extended to distributorships and franchises where ownership of producer's goods did pass.

190. 44 A. 300 (N.H. 1895).

kets made by the defendant on the understanding that the plaintiff had the exclusive right to sell them in New York City, but the defendant later revoked before the plaintiff could sell the inventory acquired. The 1895 New Hampshire decision barred the defendant from selling blankets to anyone else in the City until the plaintiff could sell the blankets purchased in reliance on the promise of an exclusive territory.[191] Fifteen years later, a Montana court applied the "rule announced by the New Hampshire court" in *Saddlery Hardware Co. v. Hillsboro Mills* to a buildup of inventory under similar circumstances.[192] This implied consent to a good faith duty to not revoke until a plaintiff's induced investment had been recouped would soon be applied by courts and legislatures to distributorship and franchise arrangements, such as those used in contracts between automobile manufacturers and dealers.[193]

The relief given to buyers in exclusive sales agreements was extended to cover substantial reliance harm suffered by at-will distributors. In a 1912 action brought against Buick Motor Co., an automobile dealer, operating under a ten day cancellation clause, was terminated and refused delivery of automobiles to fill the three purchase orders the plaintiff had made the effort to obtain. The Georgia court ruled that revocation was barred because of the plaintiff's part performance of a unilateral contract,[194] but the relationship could also have been characterized as an at-will relationship that could not be terminated once the plaintiff had incurred reliance cost and labor. Automobile manufacturers' abuse of their market power became so egregious that in *Erskine v. Chevrolet*

191. *Saddlery Hardware Co.*, 44 A. at 301 (allowing concern for reliance harm to outweigh concern over restraint of trade).

192. Carlson v. Stone-Ordean-Wells Co., 107 P. 419, 422 (Mont. 1910); *Saddlery Hardware Co.*, 44 A. at 301. The Montana court said, "Parties must have contemplated that the defendant company would give to the plaintiff a reasonable opportunity to dispose of the goods which he had on hand" before defendant revoked. *Carlson*, 107 P. at 422; *cf.* 1 ROBERT J. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS 4 (1761) (William Evan tr. & ed. 1806) (requiring "concurrence of intention in two parties").

193. *See* J.R. Watkins v. Rich, 235 N.W. 845, 846 (1931) (When termination of an at-will "relationship is commercial . . . the option must be exercised in good faith"); Automobile Dealers Day in Court, 15 U.S.C.A. § 1222 (1956); Petroleum Marketing Practices Act of 1978, 15 U.S.C.A. § 2802 (gasoline distributors); New Jersey Franchise Practices Act, N.J. Stat. Ann. 56:10-5, 56:10-7 (West. Supp. 1983); Massachusetts Fair Dealing Act, M.G.L.A. ch. 93A, 93B (1971).

194. Buick Motor Co. v. Thompson, 75 S.E. 354, 356 (Ga. 1912). The transaction can be characterized as an at-will contract or, in the alternative, a series of possible unilateral contracts because the defendant offered to pay the plaintiffthe difference between list and retail price for orders he obtained. *Id.*

Motors Co. a North Carolina court launched into a diatribe against automobile manufacturers for their unsavory tactics in luring "victimized" dealers into "relying" on the seeming security of "written contracts," when in fact no protection was afforded by their at-will contracts.[195] Since either party could cancel the written contract on five days notice, the plaintiff informed Chevrolet's regional general manager that he would cancel if Chevrolet did not give assurances that the same would not happen to him. After the general manager gave oral assurances that the plaintiff would not be canceled like that, the plaintiff incurred large necessary start-up expenses; however, the defendant subsequently canceled anyway.[196] The North Carolina court reasoned that it "was solely on the faith" of the oral assurances that "plaintiff expended large sums of money" and that consideration was present.[197] This finding of reliance on the manufacturer's promise in the form of distributor's expenditure of necessary start-up costs, over and above what was need in a revocable agency, became a key factor in binding principals in future decisions.[198]

Pennsylvania followed a unique alternative route to reach the same conclusion that the above line of cases arrived at to provide relief from the justifiable reliance of at-will sales distributors. The genesis of Pennsylvania's solution was in an 1826 decision on a specific performance action brought on account of reliance on a land license.[199] The court in *Rerick v. Kern* noted that a license is normally revocable by a landowner, but when the plaintiff was induced to build a commercial mill on the defendant's land, it had

195. Erskine v. Chevrolet Motors Co., 117 S.E. 706, 711 (N.C. 1923).

196. *Erskine*, 117 S.E. at 710. In a parallel 1954 California decision, a court held a producer bound to a one year relationship with the plaintiff on an oral contract of indefinite duration because the plaintiff relied on assurances of the producer's representative that the producer was a well meaning company that did not arbitrarily terminate distributors. J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F.Supp. 484, 488-493 (N.D. Cal. 1954).

197. *Erskine*, 117 S.E. at 710. "Stronger or more effective inducement could not have been held out." *Id.* at 712. The primary emphasis in rationale was on reliance on oral modification which assured no arbitrary cancellation, but the court did not preclude the interpretation that reliance on at-will written contract would have been sufficient. *See id.* at 714 (stating that reliance was incurred upon oral assurances and "not necessarily upon the written contracts").

198. *See, e.g.*, Bassick Mfg. Co. v. Riley, 9 F.2d 138, 139 (E.D. Pa. 1925); J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F.Supp. 484, 493 (N.D. Cal. 1954) (California law); Jack's Cookie Co. v. Brooks, 227 F.2d 935, 938-39 (4th Cir. 1955).

199. Rerick v. Kern, 14 S.&R. 267 (Pa. 1826).

"the effect of turning such a license into an agreement that will be executed in equity."[200]

The reliance protection on a revocable land license in *Rerick v. Kern* laid the groundwork in Pennsylvania at the turn of the twentieth century for the unusual step taken in *Harris v. Brown*[201] of extending the real property license precedent to a license to use intangible personal property. The defendant had purchased the assets of an insolvent firm, and she acquired a license to use the former firm's name from her son, a shareholder of the defunct firm. After the defendant had applied her business acumen and efforts for four years to make a success of her new business, her son brought an action to bar her use of the trade name. The trial court in *Harris v. Brown* applied the general rule that a license to use a plaintiff's intangible personal property was revocable, but on appeal the Pennsylvania Supreme Court ruled that it "would be inequitable and unjust" to allow revocation of the license after a licensee acted upon a licensor's consent and generated commercial value in the trade name.[202]

The protection of the licensee's reliance interest in *Rerick v. Kern* was advanced by *Harris v. Brown*, and that protection was further extended in Pennsylvania to exclusive distributorship relationships in 1925 in *Bassick Mfg. Co. v. Riley*.[203] In *Bassick*, the plaintiff argued that the general rule provided for the revocability of both the agency relationship and the attendant license of the plaintiff's trade name,[204] but the court retorted that more was involved in the distributorship relationship than a revocable agency and license because the defendant was obliged to incur substantial

200. *Rerick*, 14 S.&R. at 272. *Accord* LeFevre v. LeFevre, 4 S.&R. 241, 244-45 (Pa. 1818). *Wynn v. Garland* cited *Rerick v. Kern* as authority in a similar case of reliance on a license which, if revoked, would have caused irreparable damage. Wynn v. Garland, 19 Ark. 23, 33-34, 38 (1857) (stating licensor cannot revoke after licensee "reposed . . .confidence" in the "good faith" of licensor). *See* Roscoe Pound, *Consideration in Equity in* WIGMORE CELEBRATION LEGAL ESSAYS 435, 443 (Albert Kocourek ed. 1919) [hereinafter Pound, *Consideration in Equity*] (observing that courts will prevent an "unconscionable revocation" in the case of reliance by treating a license as an easement).

201. 51 A. 586 (Pa. 1902).

202. Harris, 51 A. at 587 (*citing Rerick v. Kern* as authority while closely paraphrasing that decision). *See also* Rerick v. Kern, 14 S.&R. 267, 271(Pa. 1826) (opining that it would be "against all conscience to annul" such a grant after the grantee's expenditures were observed by the grantor). *Cf.* Pound, *Consideration in Equity, supra* note 200 at 443 (explaining equity would treat a license as an easement to prevent "unconscionable revocation").

203. 9 F.2d 138 (E.D. Pa. 1925).

204. Bassick Mfg. Co., 9 F.2d at 139. (Plaintiff's cause of action was to restrain defendant from using plaintiff's trade name and trademark.). *Id.*

expenditures to maintain a store, employ agents, and build up his business in order to get the distributorship off the ground.[205] The court said, "The case comes clearly within the rule laid down by the Supreme Court of Pennsylvania in *Harris v. Brown* . . . ."[206] The distributorship relationship of course required more complex initial efforts by the distributor than was the case for the licensee in *Harris v. Brown*. Thus, in three cases decided under Pennsylvania law during the span of a century, Pennsylvania courts extended the reliance relief granted in 1826 to bar revocation of a land license to a license of a trade name in 1902 and then on to a sales distributorship in 1925.

In the following year, Reporter Williston's report to A.L.I. portrayed *Bassick Mfg. Co. v. Riley* as an anomalous expansion of precedents that had earlier granted specific performance on land gifts relied upon by possession and improvements.[207] *Bassick Mfg. Co. v. Riley* has been occasionally cited by other courts,[208] though no jurisdiction has evolved along the same path as Pennsylvania in drawing inspiration for equitable treatment of at-will agreements from land licenses. The route to rationalizing reliance recovery for distributors in other jurisdictions like North Carolina has been more main stream in remaining within the confines of contract theory at law and in equity. Still, the crux of the reasoning employed to reach the conclusion in the North Carolina decision, *Erskine v. Chevrolet Motor Co.*, was parallel to that reached under Pennsylvania law in *Bassick Mfg. Co. v. Riley* and *Harris v. Brown*. These three courts saw more involved in the relationships than merely an agency or a license, and so each court refused to permit the manufacturer to revoke the distributorship with impunity because each party anticipated that the distributor's enjoyment of profits would necessarily be preceded by substantial start-up costs and labor.[209]

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205. *Id.*

206. *Id.*

207. A.L.I. COMMENTARIES 1926, *supra* note 22, at 15.

208. *See, e.g.*, Jack's Cookie Co. v. Brooks, 227 F.2d 935, 938-39 (4th Cir. 1955) (saying that under South Carolina law, relationship not revocable since reliance entailed more than simply selling principal's goods); Boulevard Airport, Inc. v. Consolidated Vultee Aircraft Corp., 85 F. Supp. 876, 879 (Dist. Ct. Pa. 1949); Meadow v. Radio Industries, Inc., 222 F.2d 347, 349 (7th Cir. 1955).

209. Harris v. Brown, 51 A. at 587; Erskine v. Chevrolet Motors Co., 117 S.E. 706, 710-11 (N.C. 1923); Bassick Mfg. Co. v. Riley, 9 F.2d at 138; *accord* J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 493 (N.D.Cal. 1954); Jack's Cookie Co. v. Brooks, 227 F.2d 935, 937-39 (4th Cir.1955).

4. *Reliance on Contract Modifications*

For centuries, courts have refused to enforce contract modifications to reduce or increase a contract obligation because of the fear of coercion and the absence of fresh consideration to support a modification promise.[210] This bargain corollary to the doctrine of consideration, known today as the preexisting duty rule, appeared in the sixteenth century in the wake of the emergence of the consideration test for enforcement of contractors' promises that looked to future performance. Erosion of this broad prohibition on contract modifications occurred during the nineteenth century as American courts began to provide relief from hardship caused by promisees' reliance on modification promises. This hardship relief would prove to be a harbinger of modern reforms of the preexisting duty rule grounded upon consent alone.[211]

(a) *Reduction in Contract Obligation*

The Rule in *Pinnel's Case*, enunciated in 1602, is the precedent traditionally invoked to deny a contract modification to reduce an amount owed.[212] The rule took on renewed vitality when in 1884 when the House of Lords repulsed a serious challenge to the rule in the influential decision of *Foakes v. Beer*, though Lord Blackburn came close to dissenting since a creditor might find benefit in the bird-in-the-hand of part payment.[213] This decision lent more importance to the rule by consolidating both decreases and in-

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210. *See* Pinnel's Case, 77 Eng. Rep. 237 (1602) (refusing attempted reduction of payment due because modification to pay 10 pounds was no "satisfaction for the 20 pounds"); Stilk v. Myrick, 170 Eng. Rep. 1168 (1809) (refusing attempted increase in compensation because employees had not taken on any new duties).

211. *See, e.g.,* Clayton v. Clark, 21 So. 565, 567-68 (Miss. 1896); Frye v. Hubbell, 68 A. 325, 334 (N.H. 1907); Moore v. Williamson, 104 So. 645, 646-47 (Ala. 1925); Rye v. Phillips, 282 N.W. 459, 460 (Minn. 1938); U.C.C. § 2-209(1) (1952).

212. Pinnel's Case, 77 Eng. Rep. 237 (1602) (refusing debt action since part payment did not discharge obligation); *cf.* Richards v. Bartlet, 74 Eng. Rep. 17 (1584) (ruling in assumpsit action that no new profit to plaintiff nor charge to defendant by modification). *Foakes v. Beer* later presumed that *Pinnell's Case* also barred attempted increases in contract obligations and thereby pointed to *Pinnell's Case* as the source of the preexisting duty rule for both decreases and increases in contract obligations. Foakes v. Beer, 9 App. Cas. 605, 609, 615 (H.L. 1884); *see* DAWSON, GIFTS, *supra* note 144, at 210(stating that *Pinnel's* accord rule spread to increases in obligations as well).

213. Foakes v. Beer, 9 App. Cas. 605, 622 (H.L. 1884). *Cf.* Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 487-88 (1950) (arguing it would not be unjust to demand the original rental price from a tenant who is allowed to pay less than original agreement); *but cf.* Jaffray v. Greenbaum, 20 N.W. 775, 778-79 (Ia. 1884) (finding consideration in benefit to landlord in keeping tenant afloat to make the reduced rental payments).

creases in contract obligations under what became known as the "preexisting duty rule."[214] While the English court in *Pinnel's Case* did not find it relevant that the debtor had relied on the modification agreement and paid the reduced amount, an Illinois court held in 1846 that a debtor's reliance on a time extension, by not rushing to make the original deadline, was consideration for the extension.[215] Some late nineteenth century American decisions held that once a debtor relied on the modification promise by full payment of the reduced amount, the creditor was barred from recovery of the remainder of the original obligation.[216] In enforcing a reduction of rent owed, a New York court said, "Both parties acted under this arrangement, and it was executed and carried into effect."[217] Another New York court concluded that *Pinnel's Case* did not apply to a modification agreement "fully executed,"[218] despite the fact the agreed part payment had also been made in *Pinnel's Case*. Some nineteenth century courts of law and equity rejected *Pinnel's* preservation of the bargain when reliance facts indicated that near tortious harm had been induced.

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214. The law lords indiscriminately lumped together precedents involving increases in contract obligations under the *Stilk v. Myrick* strand and decreases in contract obligations under *Pinnel's Case*.

215. Wadsworth v. Thompson, 8 Ill. 423, 431 (1846). Modern formalist English common law contract permits promissory estoppel to apply as a defensive tool to enforce reduction of a contractual obligation under the *High Trees* decision. Justiable reliance has not been permitted, however, to create a new cause of action, with the exception in property law of the limited reach of proprietary estoppel. *See* Central London Property Trust Ltd. v. High Trees House Ltd., 1 K.B. 130 (1947); Crabb v. Arun District Council, Ch. 179, 187-88, 195 (1976) (proprietary estoppel to avert a fraud in equity).

216. *See, e.g.*, Nicoll v. Burke, 78 N.Y. 580, 585 (1879); McKenzie v. Harrison, 24 N.E. 458, 459-60 (N.Y. 1890). The reliance of creditors was a basis for enforcing assignments for the benefit of creditors and of creditors' compositions. *See also* Taylor v. Ewing, 132 P. 1009 (Wash. 1913) (binding debtor to agreement to assign on account of reliance of 38 of 40 creditors); Butler v. Rhodes, 170 Eng. Rep. 341 (1794) (barring one creditor from withdrawing from composition after other creditors committed); Bartlett v. Woodsworth Co., 41 A. 264 (N.H. 1898) (creditors' composition).

217. *Nicoll*, 78 N.Y. at 585. Since the parties fully performed the modified agreement as well, it would have been useful to point out that the proprietary logic in the debt action *Pinnel's Case* was inappropriate to the promise-based action of assumpsit. *See* AMES, *supra* note 17, at 329; *see also* STOLJAR, *supra* note 2, at 120-21.

218. *McKenzie*, 24 N.E. at 460 (making remarkable claim that executed gift had been made, thereby taking it out of contract rule stated by Coke in *Pinnel's Case* and the law lords in *Foakes v. Beer*). This executed gift logic exhibited a reticence to make a frontal reliance-based assault against the recently-announced decision in *Foakes v. Beer*; nonetheless, it entailed disguised reliance hardship relief in the absence of clear donative intent. By contrast, the explanation of the court in *Nicoll v. Burke* was doctrinally closer to the mark in reasoning that the rent reduction agreement was binding because "defendant occupied the premises and the plaintiffs received the rent, according to the altered terms of the contract." Nicoll v. Burke, 78 N.Y. at 585.

The need for a reduction in the amount due under the contract was occasionally triggered by losses generated by an unanticipated change in circumstances in the new industrial economy. While unanticipated circumstances alone were insufficient to justify enforcement of a modification during the last quarter of the nineteenth century,[219] a debtor's reliance on the modification by continuation of what was otherwise a financially untenable project sometimes made the difference. In *Ten Eyck v. Sleeper*,[220] a lessee under a long-term lease of a hotel building became unable to pay the rent due to a general depression in the economy in 1893, and so the lessee informed the lessor that he would have to vacate. In order to induce the lessee to continue occupancy, the lessor offered him a rent reduction, which the lessee accepted and paid for the next sixteen months. The Minnesota court noted that mere inability to pay rent would not be a reason to find consideration, but that it was a different matter when an unforeseen depression precipitated a reduction agreement that was subsequently performed.[221] The unforeseen circumstances and the subsequent reliance assuaged any concern over coerced modifications, and they also established consideration.[222] Other jurisdictions sometimes simply would find consideration for a reduction agreement on facts of changed circumstances and a subsequent reliance without development of how this combination of facts supplied a good reason for enforcement.[223]

(b) Increase in Contract Obligation

A modification to increase the contract compensation owed fell under the *Stilk v. Myrick*[224] strain of the preexisting duty rule.

219. Today, a modification may be binding, in the absence of reliance, if made "in view of circumstances not anticipated by the parties when the contract was made." *See* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981).

220. 67 N.W. 1026 (Minn. 1896) (involving dispute between landlord and other creditors of insolvent lessee).

221. *Ten Eyck*, 67 N.W. at 1027-028 (stating that modification was binding "especially as it has been executed"). This case is similar to modern English decision *High Trees*. *See* Central London Property Trust Ltd. v. High Trees House Ltd, 1 K.B. 130 (1947).

222. *Ten Eyck*, 67 N.W. at 1027-028. An added prong of the rationale was grounded upon the benefit that the lessee's reliance provided to the lessor in form of continuing occupancy and some flow of rental income. *Id.* (citing *Jaffray*, 20 N.W. at 775, and *Raymond v. Krauskopf*, 54 N.W. 432, 433 (Ia. 1893)).

223. *See, e.g.*, *Raymond*, 54 N.W. at 433 (noting that severe storm's damage to crops prompted agreement to halve the crops that a farmer was required to deliver to his landlord).

224. 170 Eng. Rep. 1168 (1809).

This 1809 English decision ruled unenforceable a sea captain's promise to increase the wages of seamen who agreed to work short-handed after other seamen deserted in a foreign port. The English court concluded that consideration was lacking, but concern about coercion seemed to be a subtext.[225] The leading nineteenth century American precedent to depart from *Stilk v. Myrick* was the 1830 decision *Munroe v. Perkins*.[226] The plaintiff in *Munroe v. Perkins* expressed concern to the defendant about the plaintiff's ability to continue with construction of a hotel for the defendant because of losses, and the defendant assured him that he would not lose on the deal if he completed the project. In the end, the Massachusetts court employed logic from New York and Pennsylvania decisions, rendered in 1817 and 1818 respectively, to support recovery for completion of the hotel at a higher modified price. In the 1817 New York decision, *Lattimore v. Harsen*,[227] a contractor indicated that he would have to abandon his contract to open a cart way for the City of New York; subsequently, the contractor completed the work after the defendant agreed to pay more if he would complete construction. The New York court declared that the plaintiff had the right to elect to breach the contract and incur damages, but the modification became binding when the defendant released the plaintiff from the first contract on the condition that the modified arrangement was performed.[228] In the 1818 Pennsylvania decision, *Le Fevre v. Le Fevre*,[229] the location of an

225. *Stilk*, 170 Eng. Rep. at 1169 (saying seamen's original duty was to work short-handed if there were desertions); *cf.* Harris v. Watson, 170 Eng. Rep. 94, (1791) (refusing seaman extra wages promised under coercion while their ship was in danger on policy grounds).

226. 26 Mass. 298 (1830).

227. 14 Johns. 330 (N.Y. 1817).

228. *Lattimore*, 14 Johns. at 331 (ruling consideration supported second contract); Munroe v. Perkins, 26 Mass. 303, 303-04 (1830) (finding a waiver of original contract); *cf.* Harris v. Carter, 118 Eng. Rep. 1251, 1252 (1854) (stating dictum that if a first contract had been discharged and a new contract had been made to pay higher wages to seamen because of desertions, then consideration would have been present). The Holmesian paradox of a right to breach a contract and pay damages, derived from *Lattimore v. Harsen*, was roundly criticized by other commentators who saw an obligation in law to perform a contract and only secondarily to pay damages upon breach. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, -- and nothing else."); *but cf.* Willard Barbour, *The "Right" to Break a Contract*, 16 MICH. L. REV. 106, 107-09 (1917) (stressing that duty to perform since time of Bracton); 1 HOLMES-POLLOCK LETTERS, *supra* note 15, at 80 (Pollock chided Holmes for his right-to-breach view on grounds of morality and a promisee's reasonable expectations.); 1A CORBIN, *supra* note 144, § 182 (depicting primary duty to perform contract).

229. 4 S.&R. 241 (Pa. 1818) (action was trespass *vi et armis* for defendant cutting the water pipe).

easement, granted by deed, to run a water pipe across the defendant's land was altered at the defendant's oral request. However, the defendant later cut the pipe and raised a statute of frauds defense against enforcement of the modified oral license. The court held the modified agreement binding because it would be a "fraud" for the defendant to revoke the license after the defendant induced the plaintiff to rely by expenditures and effort to move the water line.[230] The court drew on a strain of land cases in which equity barred a statute of frauds defense and granted specific performance on account of justifiable reliance without any reference to the doctrine of consideration.[231] If the reliance element was emphasized solely to prevent the fraud of raising a statute of frauds defense, equitable estoppel would have been at play, but since the reliance also effectively supplanted the need to show consideration to support the modification promise, promissory estoppel was present as well.[232]

The formula *Munroe v. Perkins* derived from these two precedents was that a contract modification became binding if a party elected to breach a losing contract and thereafter the victim agreed to waive the breach and pay more compensation in order to induce completion of performance.[233] From *Lattimore v. Harsen* came the notions of right-to-breach and waiver, without emphasis on the subsequent reliance present in its facts,[234] and from *Le Fevre v. Le Fevre* came the emphasis on induced justifiable reliance.[235] Thereafter, American courts cited *Munroe v. Perkins* and occasionally *Lattimore v. Harsen*, both contracts cases, but courts rarely cited the reliance-based statute of frauds license decision *Le*

230. *Le Fevre*, 4 S.&R. at 244 (concluding that the plaintiff had partly performed "by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution").

231. *See, e.g.*, Rerick v. Kern, 14 S.&R. 267, 271-72 (Pa. 1826) (land license); Wynn v. Garland, 19 Ark. 23, 34-36 (1857) (land license); Butcher v. Staplely, 23 Eng. Rep. 524, 525 (1685) (land sale); *see also* Bright v. Bright, 41 Ill. 97 (1866) (stating that taking possession of land was not enough to take it outside statute of frauds but improvements made it a "promise resting upon a valuable consideration"). In *Le Fevre v. Le Fevre*, plaintiff's lawyer and the court paraphrased Phillipps' comment that evidence of oral modification may be admitted to vary a written agreement "provided those variations have been acted upon." SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 450 (2d ed. 1815); *Le Fevrev*, 4 S.&R. at 242, 245.

232. Giving reliance relief to avert fraud was consistent with sixteenth century actions permitted at common law in assumpsit for deceit and in church courts under *fidei laesio*.

233. 26 Mass. 298, 305 (1830). The court emphasized that the promisee was induced to return to work and in fact completed performance. *Id.* at 303, 305.

234. 14 Johns. 330, 331(N.Y. 1817).

235. 4 S.&R. 241, 244-45 (Pa. 1818).

Fevre v. Le Fevre, with the unfortunate increased risk of coercion when the reliance factor was not required in some later cases.[236] Through the middle of the nineteenth century, citations to *Munroe v. Perkins* and *Lattimore v. Harsen* emphasized reliance on the substituted modification agreement.[237] Some jurisdictions emphasized the reliance element when they cited *Munroe* and *Lattimore* through the rest of the century.[238] However, other decisions emphasized the *Lattimore* prong of the *Munroe* rationale as a means to assert that a modification could be supported by consideration, in the absence of reliance, if there was a rescission of the original contract and a substitution of a new contract. And when such cases happened to include reliance facts, they were treated as superfluous.[239]

The influential 1895 Minnesota decision *King v. Duluth M. & N. Ry. Co.*[240] raised concerns about the potential for coercion in case law applications of *Munroe v. Perkins* that enforced modifications solely because of rescission and substitution, irrespective of reli-

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236. The concern about coercion embedded in the preexisting duty rule was assuaged in *Munroe v. Perkins* by a contractor's election to breach without any demand for higher compensation, followed by the owner's voluntary offer to pay more and the contractor's subsequent reliance upon the promise to pay more.

237. In *Coyner v. Lynde*, a railway agreed to pay more to induce contractor to return to a losing contract. The court cited *Munroe* and *Lattimore* and emphasized that defendant "relying on this promise . . . they completed said work." Coyner v. Lynde, 10 Ind. 282, 285 (1858). *Coyner* was widely cited during the remainder of the century. In *Meech v. City of Buffalo*, defendant's counsel cited *Lattimore* and *Munroe*, and the court paraphrased the latter, without citation, in emphasizing the relevance of the reliance. Meech v. City of Buffalo, 29 N.Y. 198, 211, 213-14. By the *Meech* court's reading of *Munroe v. Perkins* in conflating the reliance element in *Le Fevre* together with the elective right-to-breach in *Lattimore*, the New York court effectively compromised *Lattimore's* controversial theory. Cf. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 202 n. (3d ed. 1887) (observing that *Munroe* also rejected that elective right-to-breach in *Lattimore* could stand alone).

238. *See, e.g.*, Sargeant v. Robertson, 46 N.E. 925, 926-28 (Ind. 1897) (saying "much stress is properly laid upon . . . subsequent conduct of the parties. It would seem that it would be a reproach to the law if any of its rules were so inflexible" as to strictly apply preexisting duty rule here); Evans v. Oregon & W.R. Co., 108 P. 1095, 1096 (Wash. 1910) (stating that enforcement supported freedom of contractors to modify their relationship). *Restatment* drafters would recognize this reliance basis for a binding contract modification. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89(c) (1981).

239. *See, e.g.*, Bryant v. Lord, 19 Minn. 396, 404 (1872) (stating that if the defendant refused to proceed unless a modification granted, then the substituted agreement would be on valid consideration); Rogers v. Rogers, 1 N.E. 122, 122 (Mass. 1885) ("The parties could clearly substitute for it a new contract, which would determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract."); Schwartzreich v. Bauman-Basch, 131 N.E. 887, 888-90 (N.Y. 1921) (citing *Lattimore v. Harsen* that rescission and substitution is good, and mutual promises are consideration).

240. 63 N.W. 1105 (Minn. 1895).

ance.[241] The cases criticized were decisions that, like *Lattimore v. Harsen* earlier, did not articulate the need for reliance in their rationales even when reliance was present in the facts.[242] These criticisms were reinforced by doctrinal objections leveled against the right-to-breach theory enunciated in *Lattimore* and *Munroe* and supported by Holmes.[243] The court in *King v. Duluth Ry.* concluded that an unanticipated change in circumstances assuaged concern over coercion and permitted enforcement of a modification under that exception to the preexisting duty rule.[244]

Early cases of contract modifications made because of unanticipated changes in circumstances cited the landmark modification precedent *Munroe v. Perkins* as well, though no changed circumstances were present in *Munroe v. Perkins*.[245] One of the earliest changed circumstances cases appeared in the 1864 New York decision *Meech v. City of Buffalo*, where a contractor unexpectedly hit quicksand while constructing a sewer for the city, and the city agreed to pay more for completion of the work.[246] Counsel for the contractor, citing both *Munroe* and *Lattimore*, argued that when a contract became a losing proposition due to an unforeseen obstacle, the defendant could waive the breach action and agree to a fair adjustment.[247] The New York court cited no precedent but obviously drew from *Munroe* and *Lattimore* in referring to the contractor's election to breach and the city's subsequent promise of increased compensation, which thereby induced completion of the

241. *King*, 63 N.W. at 1106 (seeing coercion in taking "unjustifiable advantage of the necessities of the other party"). The court said the breachor of the first contract "cannot lay the foundation of an estoppel by his own wrong." *Id.* at 1107. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. (b) (1981) (rejecting fiction of rescission and substitution because modified contract might be "unfair and inequitable").

242. *See, e.g.*, Bryant, 19 Minn. at 346; Rogers v. Rogers, 1 N.E. 122, 122 (Mass. 1885).

243. Pollock opposed Holmes' callous views that justifiable reliance could not be a ground for consideration and that a contractor had an elective right to breach and pay contract damages. *See* HOLMES, *supra* note 12, at 294-96; Holmes, *supra* note 228, at 462; *cf.* HOLMES-POLLOCK LETTERS, *supra* note 14, at 80; FREDERICK POLLOCK PRINCIPLES OF CONTRACT 1 (8th ed. 1911); *see also* Willard Barbour, *The "Right" to Break a Contract*, 16 MICH L. REV. 106, 107-09 (1917); 1A CORBIN, *supra* note 144, § 182.

244. *King*, 63 N.W. at 1106-07; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 89a (1981).

245. The fact that a contract turned out to be a losing deal for one of the parties did not of itself mean there were unanticipated circumstances to justify a modification. *See King*, 63 N.W. at 1107.

246. Meech v. City of Buffalo, 29 N.Y. 198 (1864); *cf.* Osborne v. Reilly, 9 A. 209, 216 (N.J. 1887) (holding modification binding on account of reliance and changed circumstances).

247. *Meech*, 29 N.Y. at 218.

sewer.[248] The court concluded that coercion was unlikely since the contractor was performing in "good faith" when he unexpectedly encountered quicksand.[249] A Minnesota court made a similar point in *Michaud v. MacGregor,*[250] when it noted the criticism of the risk of coercion in the use of the rescission and substitution aspect of *Munroe v. Perkins,* but said a case was different when higher costs were caused by the unexpected circumstances of rock obstructions in the ground.[251]

While *Meech v. City of Buffalo* and *Michaud v. MacGregor* included the dual grounds of reliance and unanticipated circumstances,[252] the *King v. Duluth Ry.* decision justified enforcement of the modification to increase compensation solely upon unanticipated circumstances.[253] The opinion in *King v. Duluth Ry.* cited both *Meech* and *Michaud* with approval, since these cases included in their facts the types of unforeseen difficulties that qualified for an exception to the general rule.[254] But the *King v. Duluth Ry.* court swam against main stream legal development by opposing enforcement of a contract modification relied upon when no new burden was thrust upon the relying party.[255] Under this approach, a prospective loss on a contract was a risk to be borne unless a substantial change in circumstances placed an additional burden on the party not contemplated by the parties when the contract was made. The consensual theory supplied the basis for enforcement of a modification made due to a change not contem-

248. *Id.* at 213-14 (telling assessed property owners who brought action that it was "eminently just" for city to promise to pay more).

249. *Id.* at 213.

250. 63 N.W. 479 (Minn. 1895).

251. *Michaud*, 63 N.W. at 480-81 (commenting that added costs to remove rocks in reliance on modification "equitably estops him from insisting on" the original terms).

252. *Accord* Osborne v. O'Reilly, 9 A. 209, 216 (N.J. 1887) (enforcing modification because of changed circumstances and reliance).

253. King v. Duluth M.&R. Ry. Co., 63 N.W. 1105, 1107 (Minn. 1895). A generation earlier *Bishop v. Busse* enforced a modification because of unexpected increases in materials in rebuilding a house damaged by the Great Chicago Fire of 1871. Bishop v. Busse, 69 Ill. 403, 407 (1873). *See also* Linz v. Schuck, 67 A. 286, 288 (Md. 1907) (holding modification binding because "the difficulties were substantial, unforeseen and not in the contemplation of the parties when the original contract was made").

254. *King,* 63 N.W. at 1107. Qualifying changed circumstances are not uncommonly brought on to a degree by the fault of the defendant. *See id.* at 1108 (railway changing location of railway line and railway's defaults); *Osborne*, 9 A. at 215 (excavator "misled" by owner's representations regarding nature of stone); United Steel Co. v. Casey, 262 F. 889, 893 (6th Cir. 1920) (delays and hindrances of steel company).

255. Of course when there were changed circumstances, an additional performance burden would be present. The exchange of extra work done in reliance on the promise of additional payment was supported by consideration. *See King*, 63 N.W. at 1107.

plated, and the unforeseen circumstances rebutted any inference of coercion.[256] Perhaps the *King v. Duluth Ry.* court's resistance to reliance relief, in the absence of changed circumstances, can be attributed to the fact that the reliance element was not always clearly separated from the faulty rescission and substitution theory in cases that focused on the *Lattimore v. Harsen* aspect of the rationale in *Munroe v. Perkins.*[257] The viewpoint expressed in *King v. Duluth Ry.* did not end the availability of the pure reliance exception, but it did contribute to the decline in the fictional rescission and substitution exception to the preexisting duty rule.[258] The reliance prong of the opinion in *Munroe v. Perkins* and the unanticipated circumstances ground in *King v. Duluth Ry.* comprise the primary justifications at common law for enforcement of modifications which increase contractual obligations for subject matter other than goods to this day.[259]

III. DEVELOPMENT OF MORAL OBLIGATION PRINCIPLE

The genesis in Western legal thought of the idea of a moral obligation principle, and of restitution as well, resides in the Roman law doctrine of *negotiorum gestio*, the notion that recompense ought to be given for unsolicited good neighborly acts.[260] In contrast to civil law countries, Roman law was ignored as a source for growth in the common law until Mansfield and his disciples sat on the King's Bench.[261] Mansfield's decisions based upon moral obligation, sometimes called moral consideration, covered a wide variety of contexts including waiver of bankruptcy, a widow's ratification after coverture, and a father's promise to pay for his illegiti-

256. *Id.* (tolerating waiver and substitution explanation when changed circumstances).

257. *E.g., Bryant*, 19 Minn. at 404; Rogers, 1 N.E. at 122. *See* RESTATEMENT (SECOND) OF CONTRACTS § 279 cmt. c (1981) (substituted contract binding if supported by consideration).

258. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981) (rejecting fiction of rescission and substitution).

259. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89(a), (b) (1981).

260. *Cf.* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 227-29 (1962); JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 55-60 (1951) [hereinafter DAWSON, UNJUST ENRICHMENT]. Roman *negotiorum gestio* was an obligation implied in-law in the absence of a subsequent promise.

261. *See id.* at 55-64, 129, 139-40. Mansfield. C.J.'s broad support for moral obligation would have accommodated negotiorum gestio under his decisions in the allied fields of quasi contract and moral obligation, e.g., Moses v. Macferlan, 97 Eng. Rep. 676 (1760); Atkins v. Hill, 98 Eng. Rep. 1088, 1090 (1775); Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1038 (per Wimot, J.).

mate child's maintenance.[262] Mansfield also drew upon prior common law decisions that enforced promises on moral obligations, including the redoubtable Chief Justice Holt's waiver and ratification precedents.[263] Beyond the strand of moral obligation introduced by Holt, earlier moral obligation notions were scattered through sixteenth and seventeenth century case reports, primarily for cases of necessaries provided to dependents.[264] Nevertheless, a conservative common law judicial reaction set in during the second quarter of the nineteenth century to Mansfield's absorption of civilian and equitable ideas into the common law. This atavism was justified under the logic of a doctrinaire 1802 reporters' note to *Wennall v. Adney*,[265] which had been ignored by judges but not commentators; the note criticized perceived doctrinal inconsistencies and paid little heed to the justice being dispensed. The goal of traditional judicial thinkers in both countries was to turn the clock back on the common law, along the lines suggested in Bosanquet and Puller's 1802 reporters' note, by demolishing most of what had been accomplished to further the just results made possible by the moral obligation principle over the preceding three hundred years, aside from Holt's waiver and ratification precedents.[266]

262. *See* Trueman v. Fenton, 98 Eng. Rep. 1232 (1777); Goodright ex dim. Elizabeth Carter v. Straphan, 98 Eng. Rep. 1043 (1774); Scott v. Nelson (1763) *reported in* Wennall v. Adney, 127 Eng. Rep. 137, 138n. (1802); *see also* Atkins v. Hill, 98 Eng. Rep. 1088 (1775); Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782); Atkins v. Banwell, 102 Eng. Rep. 463 (1767).

263. *See* Ball v. Hesketh, 90 Eng. Rep. 541 (K.B. 1697) (adult ratification); Heylings v. Hastings, 91 Eng. Rep. 1157 (1699) (waiver of statute of limitations).

264. *See, e.g.*, Style v. Smith, 74 Eng. Rep. 401 (1588) (promise to pay for medical care given son); Befich v. Coggill, 81 Eng. Rep. 1219 (1628) (promise to pay for burial of son overseas); Church v. Church, 73 Eng. Rep. 608 n.b (1656) (burial of child); *Anonymous.*, 89 Eng. Rep. 879 (1682) (promise to pay for maintenance of promisor's illegitimate child).

265. Wennall v. Adney, 127 Eng. Rep. 137, 138 n.a (1802) (note of case reporters Bosanquet and Puller).

266. *Id.* at 140 n.a; Ball v. Hesketh, 90 Eng. Rep. 541 (1697) (adult ratification); Heylings v. Hastings, 91 Eng. Rep. 1157 (1699) (statute of limitations waiver). Holt cited no precedent in his terse opinion in *Ball v. Hesketh*, but there were precursors. Two such cases were added as notes to *Hunt v. Bate*. The first, Burton's Case, Mich. 28 Eliz. (1586), ruled that adult defendant's promise to a joint obligor on a debt incurred during defendant's minority was binding: "[A]ssumpsit ... lies, because it was a good consideration," and, Whitepool's Case, 1 Leon. 113 (1589), enforced an adult's promise on a debt incurred in infancy. Hunt v. Bate, 73 Eng. Rep. 605, 607-08 n. (1568); *see also* JOHN H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH HISTORY 499-500 (1986). *Heylings v. Hastings*, on the other hand, presented an issue of first impression, and so Holt, C.J. "[p]ut this case to all the Judges of England ... assembled at Serjeant's Inn; and that this conditional promise had brought the case out of the Statute of Limitations, and that a general indebitatus assumpsit might be well maintained, because the defendant has waved (sic) the benefit of the statute." *Heylings*, 91 Eng. Rep. at 1179.

A. *Courts Unmoved by Early Opposition to Moral Obligation*

The *Wennall v. Adney* reporters' note was an attempt to rationalize away the scant, but long-running, moral obligation precedents with the argument that the promises in those cases somehow must have been grounded upon prior legal obligations, just as was supposedly the case with Holt's waiver and ratification cases.[267] The reporters employed 1731 dictum in *Hayes v. Warren* to indicate that a promise could not be binding in the absence of bargain evidenced by an expressed or an implied previous request for the plaintiff's action.[268] The court in *Hayes v. Warren* had speculated that if the default judgment under review had instead gone to jury verdict, then perhaps a previous request could have been implied from the facts.[269] This dictum gave the *Wennall* reporters a means to effectively claim that all contracts must meet the sixteenth century previous request bargain model announced in the past consideration precedent *Hunt v. Bate*.[270] For some commentators and judges, the *Hayes v. Warren* dictum laid out a doctrinal means to prevail on moral obligation promises by pleading how, with more information, a requisite previous request might be implied to overcome the objection of lack of a bargain.[271] Still, it constituted a caving in to the claim that only bargain promises were binding.[272] The King's Bench under Mansfield would roundly criticize the suggestion that the *Hayes* dictum could be said to establish that bargain was the exclusive test for promissory relief,[273] and no court employed the idea in *Hayes* through the remainder of the eighteenth century.

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267. Wennall v. Adney, 127 Eng. Rep. 137, 140 n.a (1802); Trueman, 98 Eng. Rep. 1232 (1777) (bankruptcy waiver); Ball v. Hesketh, 90 Eng. Rep. 541 (adult ratification); Heylings v. Hastings, 91 Eng. Rep. 1157 (1699) (statute of limitations waiver). The Wennall reporters were disingenuous in claiming that a prior legal obligation was created when the minor had originally entered into the agreement.

268. Hayes v. Warren, 93 Eng. Rep. 950 (1731).

269. *Id.*

270. 73 Eng. Rep. 605 (1568) (ruling plaintiff could not recover for benefit provided to defendant since defendant did not request plaintiff to act).

271. *See* Livingston v. Rogers, 1 Cai. (N.Y.) 583, 585 (N.Y. 1804) (dictum); Hicks v. Burhans, 10 Johns. (N.Y.) 243, 244 (1813). Metcalf would later encourage pleaders to follow Sjt. Williams' idea of using the implied previous request fiction as a means of avoiding the lack of bargain defense. METCALF, supra note 47, at 200; Osborne v. Rogers, 1 Wms. Saund. 264 n.1, 85 Eng. Rep. 318, 319 n.1 (1680) (1798).

272. *Cf.* TEEVEN, PRIOR OBLIGATIONS, supra note 40, at 3, 106-07 (stating that the focused academic debate over prior obligations in the nineteenth century contributed to emergence of exclusive bargain consideration test).

273. In the controversial decision *Pillans v. Van Mierop*, Wimot, J. derided *Hayes v. Warren* as "strange and absurd" because the previous request's "[s]trictness has been re-

The *Wennall* note was ignored by English and American judges during the subsequent generation, and commentators on the law became fixated upon it. In the first edition of Selwyn's treatise, published six years after the note, Selwyn wrote that the "learned reporters"of the *Wennall* note had explained "[w]hat must be understood by that term" moral obligation.[274] In reaction to a 1767 moral obligation decision of Mansfield,[275] Selwyn marginalized the decision by saying: "I cannot forbear transcribing a part of the ingenious remarks" on that case of the *Wennall* reporters in observing that there appeared to be a prior legal obligation in support of the subsequent promise.[276] In Selwyn's sixth edition in 1824, he admitted that the moral obligation principle had been applied subsequent to his first edition in the well known *Lee v. Muggeridge*,[277] a decision which enforced a widow's ratification of her contract made earlier under coverture; he then neutralized that decision by placing his comment immediately below it, which was supportive of the bargain-based dictum in *Hayes v. Warren*.[278] Selwyn did not acknowledge that English courts had ignored the *Wennall* note and had instead liberally applied the moral obligation principle in a string of cases during the first quarter of the nineteenth century.[279] In the United States, New York case reporters Caine and Johnson quickly fell in line with English commentators, despite the leanings of New York judges. Two years after the *Wennall* note, Caine's doctrinaire note to *Livingston v. Rogers* cited the "very able note" in *Wennall v. Adney* and declared that it was "very much in doubt" and "very questionable whether, on a moral obligation, a request or consideration can be implied."[280] Johnson wrote in an 1819 note to *Edwards v. Davis* that the *Wen-*

laxed; as, for instance, burying a son, or curing a son, the considerations were both past, and yet holden good." He added: "It has been melting down into common sense, of late times." Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039 (1765). *Pillans* was discredited in England thirteen years later. Rann v. Hughes, 101 Eng. Rep. 1014 n. (H.L. 1778). Nevertheless, *Pillans* was cited occasionally in nineteenth century American cases.

274. 1 WILLIAM SELWYN, AN ABRIDGMENT OF THE LAW OF NISI PRIUS 41 (1808) [hereinafter SELWYN, 1808 ABRIDGMENT].

275. *Atkins*, 102 Eng. Rep. at 463.

276. 1 SELWYN, 1808 ABRIDGMENT, *supra* note 274, at 50 n.11; REPORTERS' NOTE to Wennall, 127 Eng. Rep. 137, 139 n.a.

277. 128 Eng. Rep. 599 (1813).

278. 1 WILLIAM SELWYN, AN ABRIDGMENT OF THE LAW OF NISI PRIUS 55-56 (6th ed. 1824).

279. *E.g.*, Cooper v. Martin, 102 Eng. Rep. 759 (1803); Barnes v. Hedley, 127 Eng. Rep. 1047 (1809); Lee v. Muggeridge, 128 Eng. Rep. 599 (1813); Wing v. Mill, 106 Eng. Rep. 39 (1817).

280. Livingston v. Rogers, 1 Cai. (N.Y.) 583, 586 n (1804).

nall note was absolutely correct that a subsequent promise could not be binding unless a prior legal obligation had existed.[281] Johnson added that a benefit had to flow to the promisor.[282] This last idea would be adopted by the *Restatement* drafters in 1981.[283] Case report annotators performed a role analogous to later treatise writers and *Restatement* drafters in their encouragement of consistent doctrinal purity.

Notwithstanding the enthusiasm of annotators and treatise writers for the bargain logic of the *Wennall* note, English courts extended the moral obligation principle during the half century following Mansfield's retirement in 1788. English common law judges extended the line of moral obligation precedents in a string of decisions. In the 1803 case of *Cooper v. Martin*,[284] an adult stepchild's promise to pay his stepfather for maintenance provided during his infancy was found binding; Chief Justice Ellenborough employed the implied request fiction raised in *Hayes v. Warren* and perfected as a pleading technique in Serjeant Williams' 1798 case note.[285] Then in 1809 and 1813, the court enforced subsequent promises on void contracts. In *Barnes v. Hedley*,[286] a formerly usurious contract was corrected by a second agreement. The subsequent promise was enforced because a court of chancery would enforce it.[287] In the 1813 case of *Lee v. Muggeridge*,[288] the court applied a precedent on point in which Mansfield had enforced a widow's subsequent promise to perform a contract made earlier under the disability of coverture.[289] These decisions on void promises were of the genre of Holt's adult ratification precedent,[290] also a case of a formerly unenforceable obligation. Sweeping dictum in an 1826 English opinion exhibited the strong judicial support for moral obligation then in the air. Chief Justice Best wrote that the promise to apply a legacy to pay a former debt was binding because he said, in a Mansfieldian flourish, "There was a

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281. Edwards v. Davis, 16 Johns. (N.Y.) 281, 283 n.1 (1819).

282. *Edwards*, 16 Johns. (N.Y.) at 283 n.1 (1819).

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

284. 102 Eng. Rep. 759 (1803).

285. *Cooper*, 102 Eng. Rep. at 761; *Hayes*, 93 Eng. Rep. at 950; Osborne v. Rogers, 85 Eng. Rep. 318 n.1 (1798).

286. 127 Eng. Rep. 1047 (1809).

287. The court seemed to adopt the plaintiff's argument that the debt would be enforced in equity. Barnes, 127 Eng. Rep. at 1049.

288. 128 Eng. Rep. 599 (1813).

289. *Lee*, 128 Eng. Rep. at 603; Goodright ex. dim. Elizabeth Carter v. Straphan, 98 Eng. Rep. 1043 (1774).

290. Ball v. Hesketh, 90 Eng. Rep. 541 (1697).

moral obligation to pay; and I hope that the judges of Westminster Hall will always hold, that a moral obligation to pay is sufficient consideration for a promise to pay."[291]

B. *Judicial Reaction Against Growth in Moral Obligation*

Judicial interest in the *Wennall* note appeared initially in some jurisdictions in the United States during the third quarter of the nineteenth century.[292] The first judicial breach noticed in the long line of moral obligation cases came in 1825 in the oft-cited Massachusetts decision *Mills v. Wyman*.[293] Relief was denied on a father's promise to reimburse for care provided to his ill adult son while he was on a journey. The facts justified the outcome, for such a promise would not be enforceable even today in most jurisdictions since no benefit flowed directly to the promisor. Chief Justice Parker had liberally applied moral obligation ideas in an earlier decision,[294] but the language in his rationale in *Mills v. Wyman* was overly broad in denying the application of moral obligation principle to any facts beyond the scope of the English waiver and ratification precedents.[295] Parker referred to no common law decision for the proposition that only promises on prior legal obligations now barred were binding; rather, he cited "the very able review of all the cases in the note in . . ." *Wennall v. Adney*.[296]

An English court arrived at the same conclusion as *Mills v. Wyman* fifteen years later. In *Eastwood v. Kenyon*,[297] English Chief Justice Denman disingenuously claimed that "[h]owever general the expressions used by Lord Mansfield may at first sight appear," a careful reading of his decisions showed that he did not

291. Wells v. Horton, Executor of Blisset, 172 Eng. Rep. 173, 175 (1826).

292. It has been suggested that the rejection of Mansfieldian flexibility in the U.S. in doctrinaire jurisdictions like Massacusetts earlier than in England may have been due to a split among American judges between Federalists and Jeffersonians; the latter, while supportive of natural law, were opposed to unbridled prerogative. *See* Robert Stevens, *Basic Concepts and Current Differences in English and American Law*, 6 J. LEG. HIST. 336, 338-39 (1985); Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 642-46 (1933).

293. 20 Mass. (3 Pick.) 207 (1825).

294. Bowers v. Hurd, 10 Mass. 427 (1813) (ruling binding a note given to the plaintiff, a friend who had "regularly attended" the now deceased promisor).

295. *Mills*, 20 Mass. at 209-10 (Parker asserted that society has left a promise like the father's to the "tribunal of one's conscience.").

296. *Id.* at 212.

297. 113 Eng. Rep. 482 (1840).

go beyond Holt's waiver and ratification exceptions.[298] Denman rightly stated that Mansfield's loose dictum about moral obligation had gone too far; but rather than stopping there, he employed the *Wennall* note to deny the validity of any moral obligation decision over the prior four centuries if it strayed beyond Holt's precedents.[299] Denman and his conservative common law brethren extinguished the moral obligation principle from English law to such an extent that a modern English contract treatise writer recently has written that the moral obligation theory "[l]abel has become unfashionable" since it no longer exists in English law, other than waiver and ratification.[300] So after three centuries of recognition of a moral obligation alternative to bargain, English judges of the mid-nineteenth century returned common law contract to the position it held in the third quarter of the sixteenth century,[301] Holt's precedents excepted. After flirting with liberalizing continental ideas in the half century after Mansfield introduced policy into the common law contract,[302] pedantic common law judges, educated at the inns of court, returned to their self-contained legal system, a system Dawson referred to as "the application of methods of legal positivism to a system of case law."[303] The American practice of borrowing fertilizing ideas from sister states fell into disuse in the increasingly hidebound single case law system of England and Wales.[304] What perhaps should have perplexed even the dogmatic English theoretician was that, in the process of Denman purging the law of the Enlightenment ideas of the previous eighty years, Denman jettisoned indigenous common law moral obligation precedent that preceded Mansfield. English law might have bounced back from this reaction, as American jurisdictions would do, if English common law judges had shared the later American view that fusion of law and equity allowed courts to follow equity's flexible practices in equity of adjusting precedent to obtain a fair

298. *Eastwood*, 113 Eng. Rep. at 486.

299. *Id.* at 485.

300. GUENTHER H. TREITEL, THE LAW OF CONTRACT 76 (10th ed. 1999).

301. Hunt v. Bate, 73 Eng. Rep. 605 (1568).

302. *See* PATRICK S. ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW, 116, 128-32, 240-44 (1987) (suggesting that English jurists fell under sway of Bentham and Austin's legal positivism wherein policy was to emanate from legislature and not courts).

303. DAWSON, UNJUST ENRICHMENT, *supra* note 260, at 20.

304. *See* Karl N. Llewelyn, *Book Review*, 40 Colum. L. Rev. 944, 948-49 (1940) (portraying an English method of tight "articulate casuistry" with little concern for case results); *cf.* S.F.C. Milsom, *A Pageant in Modern Dress*, 84 YALE L. J. 1585, 1587-88 (1975) (yearning for the reforming effect that a restatement could have on England's single jurisdiction).

result.[305] So the development of a modern moral obligation principle became exclusively a story of American adaptations and extensions of earlier English moral obligation ideas to fit their new environment.[306]

Mills v. Wyman was not cited that often in the case law;[307] nevertheless, it became a leading American case because of the emphasis given it by treatise writers.[308] In Kent's second edition of his *Commentaries* in 1830, he declared that a moral obligation constitutes consideration only when a prior legal obligation had existed.[309] Parsons cited *Mills v. Wyman* in 1855 and provided an abstract of *Eastwood v. Kenyon*.[310] Langdell emphasized *Mills v. Wyman* in his books published in 1871 and 1880 and stated that waivers and ratification were the extent of moral obligation's applicability.[311] In 1889, the English contract writer Pollock admitted that, "For a long time it was thought that the existence of a previous moral obligation . . . would support an express prom-

305. The 1873 English Judicature Act had seemed to say that thereafter when there was a conflict between rules at law and in equity, equity prevailed, but common law judges quickly denied that equity superseded rules at-law. Judicature Act, 36 & 37 Vic., c. 66, § 25 (1873); *cf.* Brian v. Rossiter, 11 Q.B.D. 123 (1879) (saying equity could not supersede law). That conservative view held sway until near the end of the twentieth century when restitution was finally recognized as an independent branch of private law. *See also* Raymond Evershed, *Reflections on the Fusion of Law and Equity After 75 Years*, 70 L. Q. REV. 326, 327-28 (1954) (arguing that equity's rule was only to complement and fulfill the common law but not to supersede it); *but cf.* Lipkin Gorman v. Karpnale Ltd, 2 App. Cas. 548, 558-59, 579 (recognizing field of unjust enrichment and ruling that rule of equity would prevail over conflicting rule at-law).

306. American and English lawyers and judges share the mode of legal analysis spawned during the year books era, but on the view of malleability of precedent, they parted ways in the nineteenth century with many states republican experimentation with natural law ideas, excepting the American formalism hiccup during the latter part of the nineteenth century.

307. *See* Geoffrey R. Watson, *In the Tribunals of Conscience*: Mills v. Wyman *Reconsidered*, 71 TUL. L. REV. 1749, 1787-788 (1997) (indicating that a Lexis search of hundreds of moral obligation cases unearthed only 27 citations of *Mills*, 11 in Massachusetts, where it hasn't been cited since 1906).

308. Well into the twentieth century, the Williston treatise continued to defend the certainty provided by a strict application of past consideration rule. *See* 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 148 (1957 3d ed. Jaeger). Since the publication of *Restatement Second* § 86, a 1992 edition stated the reform "sacrifices some certainty" and yet, despite all of that treatise's earlier qualifications, this edition somehow managed to say that § 86 was largely consistent with prior case law. 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 8:12 (1992 4th ed. Lord). When reading this late twentieth century edition of the conservative treatise, one can still hear the mid-nineteenth century voice of Theophilus Parsons, whose treatise Williston edited in 1893.

309. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 465 (2d ed. 1830).

310. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 358-61 (2d ed. 1855).

311. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS 367 (1871) [hereinafter LANGDELL, CASES] (republishing *Mills* in its entirety); LANGDELL, SUMMARY, *supra* note 8, at 89-100.

ise,"[312] but that view had become "exploded ground."[313] And Williston's 1893 edition of Parsons' treatise claimed that the cases had settled the question "definitively" that, retaining Parson's quote of the conservative English judge Baron Parke, "a mere moral consideration is nothing," outside waivers and adult ratification.[314] These contract law commentators promoted predictable first principles to provide uniformity for business planning in a federal system, and with that aim in mind, they chose as leading decisions those that ignored the scattered moral obligation precedents that caused occasional exceptional outcomes under the moral obligation principle.[315]

C. *Some Nineteenth Century Jurisdictions Did Not Retreat*

During the first quarter of the nineteenth century in the United States, American courts employed natural law solutions similar to what English courts were doing contemporaneously. Lawyers and judges of the young republic gained creative energy from the natural law view that morals were relevant to the new body of American law being formed.[316] The case reports are replete with moral obligation decisions, and Mansfield's moral obligation cases were regularly cited throughout the century.[317] The influential state of New York, led by its Chief Justice Kent, was a big supporter. In an 1804 case, Justice Kent's indicated in dictum that the circumstances of a benefit passing to the promisor obviated the officiousness concern of the past consideration rule.[318] Kent cited Wilmot, J.'s famous dictum in *Pillans v. Van Mierop* that past considera-

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312. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 168 (5th ed. 1889).

313. *Id.* at 170.

314. 1 THEOHPILUS PARSONS, THE LAW OF CONTRACTS 445 (8th ed. Williston 1893); Jennings v. Brown, 152 Eng. Rep. 210, 212 (1842) (Parke). In the end, Parke actually found a bargain to support the moral obligation promise. *Id.*

315. Holmes' support for the objective standard added an element to Kent's definition of consideration and contributed to excluding natural law and morality from contract law. *See* HOLMES, supra note 12, at 293, 301. *See also* 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 6 (2d ed. 1855); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 148 (stating that strict application of past consideration rule promotes certainty).

316. *See* GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS 187, 189, 193, 206, 217 (1826) (urging that law of morals ought to apply throughout contract law).

317. *See, e.g.*, Clark v. Herring, 5 Binn. (Pa.) 33, 38 (1812); State, Use of Stevenson, v. Reigart, 1 Gill (Md.) 1, 6 (1843); McMorris v. Herndon, 18 S.C.L. (2 Bail.) 56 (1830); Ellicott v. Turner, 4 Md. 476 (1853); Early v. Mahon, 19 Johns. (N.Y.) 147 (1821); Ferguson v. Harris, 17 S.E. 782, 786 (S.C. 1893); Hurst v. Mutual Reserve Life Ins. Ass'n, 26 A. 956, 958 (Md. 1893); Drake v. Bell, 55 N.Y.S. 945, 946 (1899).

318. Livingston v. Rogers, 1 Cai. R. 583, 585 (N.Y. 1804).

tion cases were "melting down into common sense, of late times."[319] After Kent became Chief Justice of New York's top common law court, a per curiam opinion in *Comstock* v. *Smith* cited Mansfield for the more conservative proposition that: "a beneficial consideration and a request are necessarily implied from the moral obligation."[320] After Kent moved over to Chancery,[321] in *Early v. Mahon*, Spencer, C. J. enforced a subsequent promise made to cure a usurious contract because "the promise subsequently to repay this money, was founded on a moral and equitable duty."[322]

Doctrinal obstructions raised by the *Wennall* note were overcome or ignored in the United States until decisions like *Mills v. Wyman* insisted upon the *Wennall* note's exclusive bargain model.[323] Whether or not the *Mills* approach represented the majority position in the country by mid-century, treatise writers probably succeeded in effectuating that result during the second half of the nineteenth century.[324] The formalist shift of those courts which followed the dogma of legal commentators constituted a reaction against the earlier instances of common law decisions identifying law with morals. Now that the creative work of fashioning a legal system and a body of precedent had been finished, support for natural law notions of moral ideals was being transformed into an urge to stabilize the system through clear precedent.[325] Kent's shift in view reflected that transition; in the early decades of the century, he wrote judicial opinions in support of growth in the use of moral obligation,[326] but by 1830 treatise writer Kent supported the principle set forth in *Mills v. Wyman* in

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319. *Id.*; Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039 (1765). *Pillans* had been repulsed by English House of Lords. *See* Rann v. Hughes, 101 Eng. Rep. 1014 n. (H.L. 1778).

320. Comstock v. Smith, 7 Johns. 87, 88 (N.Y. 1810).

321. James Kent would sit as Chancellor of New York's Court of Chancery from 1814 to 1823.

322. *Early*, 19 Johns. at 150 (N.Y. 1821). Mansfield's controversial decision in *Hawkes* v. Saunders was cited for the proposition. Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782).

323. Mills v. Wyman, 20 Mass. 207, 212 (1825).

324. Langdell would republish *Mills v. Wyman* in its entirety. LANGDELL, CASES, *supra* note 311, at 367.

325. *See* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 100-05 (1938) [hereinafter POUND, FORMATIVE ERA]. The certainty goal required curtailment of jury discretion. Before the end of the first quarter of the century, detailed jury instructions were introduced and became routine and new trials granted when rules of evidence not followed. *See* WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW 3-4, 7, 8, 167-68; *see also* A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 600 (1979) (stating that dethronement of jury came with reception of civil law notions).

326. *E.g.*, Livingston v. Rogers, 1 Cai. R. 583, 585 (N.Y. 1804); Comstock v. Smith, 7 Johns. 87, 88 (N.Y. 1810).

his *Commentaries*.[327] Kent, Parsons, Langdell, Holmes and Williston[328] would be at the vanguard throughout the remainder of the nineteenth century in assuring reception of English common law to the exclusion of French civil law ideas urged by American natural law adherents such as Laussat and Verplanck.[329] However, treatise writers' declarations of the prevailing rule in no way meant that anything near overwhelming support existed for a strict application of the past consideration rule.

A significant grouping of state courts did not, however, abandon their moral obligation ideas during the remainder of the nineteenth century. The continuing adherents during the first half of the century were Pennsylvania, New York, Connecticut, New Hampshire, Vermont, North Carolina, South Carolina and Alabama,[330] and, during the second half of the century, they were joined by Illinois, Michigan, Wisconsin, Indiana, Missouri, Maryland, Georgia and Washington.[331] These states had not forgotten their egalitarian republican roots in the moral ideals of natural law. Furthermore, notions of morals and ethics imbedded in equity would have contributed since many American jurisdictions had operated under fused or partially-fused courts of law and equity from statehood. A survey of American courts provided in an appendix to Laussat's 1826 work on equity in Pennsylvania indicated that four states had no exercise of equitable powers and four had fully separate courts of law and equity; however, ten states had fully fused courts of law and equity and four others had a part

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327. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 465 (2d ed. 1830).

328. *Id.* 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 360 (2d ed. 1855); LANGDELL, CASES, *supra* note 311, at 370; Holmes, *supra* note 228, at 458-64; 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 445 (Williston ed. 8th ed. 1893); *cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1870 - 1960) 136, 140 (1992) (arguing that Holmes' separation of law and morals and his emphasis on external standards was attack upon natural rights theory); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 154 (1993) (commenting Holmes wanted to purge common law of moral content by emphasizing objective and external).

329. LAUSSAT, *supra* note 28, at 90; VERPLANCK, *supra* note 316, at 187-93; *see* POUND, FORMATIVE ERA, *supra* note 325, at 144 (seeing shift from republican creation of ideas to faith in historical doctrine by late 1830s).

330. *E.g.*, Greeves v. McAllister, 2 Binn. 591 (Pa. 1809); Nixon v. Jenkins, 1 Hill. 318 (N.Y. 1857); Cook v. Bradley, 7 Conn. 57 (1828); Hatchell v. Odom, 19 N.C. (2 Dev. & Bat.) 302 (1836); McMorris v. Herndon, 18 S.C.L. (2 Bail.) 56 (1830); Hatch v. Purcell, 21 N.H. 544 (1850); Glass v. Beach, 5 Vt. 172 (1833); Vance v. Wells, 8 Ala. 399 (1845).

331. *See, e.g.*, Spear v. Griffith, 86 Ill. 552 (1877); Hurst v. Mutual Reserve Life Ass'n, 26 A. 956 (Md. 1893); Edwards v. Braasted, 16 N.W. 261 (Mich. 1883); Gwinn v. Simes, 16 Mo. 335 (1875); McElven v. Sloan, 56 Ga. 208 (1876); Muir v. Kane, 104 P. 153 (Wash. 1909); Bevan v. Tomlinson, 25 Ind. 25 (1865); Jilson v. Gilbert, 26 Wis. 637 (1870).

of equity jurisdiction with their courts of law.[332] Perhaps not surprisingly, Massachusetts, whose court authored *Mills v. Wyman*, was one of the four which had no court exercising equity powers. Having said this about the liberalizing effects of fusion in the young republic, it would be inaccurate to say that the same degree of adherence to natural law ideas of morality existed by the end of the nineteenth century as many courts reverted to a formalist preference for the predictability of traditional contract doctrine.[333] Nevertheless, support for moral obligation continued in some states throughout the nineteenth century, including the influential states of Pennsylvania and New York.[334] One only has to read case law reports in these states during the latter part of the century to see continuing citations to Mansfield and references to equitable and moral obligations constituting legal obligations in order to see that American law had not forgotten its natural law roots.

But how did states supportive of moral obligation rationalize the presence of consideration? Two approaches predominated. The most common solution involved the manipulation of contract doctrine as a means to feign the presence of a bargain, but a few jurisdictions came to the straightforward conclusion that the moral obligation standing alone constituted consideration. First, as to the more common nineteenth century method of doctrinal manipulation,[335] New York courts followed Serjeant Williams' suggestion[336] that the plaintiff's conferment of a benefit on the promisor could imply a previous request[337] or, a bit later, that the subsequent promise was the equivalent of a previous request.[338] Williams per-

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332. LAUSSAT, *supra* note 28 at 153-57.

333. Illinois is an example. During the second half of the nineteenth century, Illinois applied a liberal view of the moral obligation principle. *See* Spear, 86 Ill. at 552; Lawrence v. Oglesby, 52 N.E. 945 (Ill. 1899). However, Illinois courts employed a formalist application of the past consideration rule during the first half of the twentieth century. See Hart v. Strong, 55 N.E. 629 (Ill. 1899); Strayer v. Dickerson, 68 N.E. 767 (Ill. 1903); Finch v. Green, 80 N.E. 318 (Ill. 1907); Plowman v. Indian Refining Co., 20 F. Supp. 1 (E. D. Ill. 1937) ("Early Illinois cases ...recognize (moral obligation's) validity. But their doctrine has been modified and no longer prevails in Illinois.").

334. *E.g.*, Stebbins v. County of Crawford, 92 Pa. 289 (1879); Anderson v. Best, 35 A. 194 (Pa. 1896); Drake v. Bell, 55 N.Y. S. 945 (1899).

335. For a more detailed study of the techniques employed by 19th century courts to find moral obligations binding, *see* TEEVEN, *supra* note 41, at 105-114 (1998).

336. Osborne v. Rogers, 85 Eng. Rep. 318, 319 n.1 (1798).

337. *E.g.*, Comstock, 7 Johns. At 88 (N.Y. 1810); Hicks v. Burhans, 10 Johns. 243, 244 (N.Y. 1813).

338. *E.g.*, Doty v. Wilson, 14 Johns. 378, 382 (N.Y. 1817); Nixon v. Jenkins, 1 Hill. 318 (N.Y. 1857).

verted the dictum in *Hayes v. Warren* to encourage the view that a bargain could be grounded upon the plaintiff's act in response to the defendant's implied previous request.[339] The fiction of the implied previous request appealed to the conservative common lawyer's demand for adherence to supposed doctrine; and, in this respect, it paid obeisance to the inaccurate but influential denials, in both *Hayes v. Warren* and the *Wennall* note, of the existence of a long standing separate strain of promissory liability grounded upon moral obligation.[340]

The less common, and more radical, approach was the straightforward declaration, without alleging a feigned bargain, that moral obligation constituted sufficient consideration, also referred to as moral consideration. A Pennsylvania judge suggested this in 1809,[341] and three years later Tilghman, C.J. announced in *Clark v. Herring*: "a moral obligation alone is sufficient consideration for an assumption."[342] Tilghman added that other worthy moral obligation promises existed besides a statute of limitations waiver.[343] His sources were Mansfield's criticized decision in *Atkins v. Hill* and a 1748 ruling of Chancellor Hardwick.[344] Pennsylvania's fused courts followed this modern approach from that decision onward.[345] Thereafter, Pennsylvania courts cited *Clark v. Herring* without

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339. *Id.*; Hayes v. Warren, 93 Eng. Rep. 950 (1731).

340. *See* Samuel Stoljar, *No Obituary for Wennall v. Adney*, 11 J. LEG. HIST. 250, 260 (1990).

341. *See* Greeves v. M'Allister, 2 Binn. 591, 592 (Pa. 1809). Rush, J. spoke of the implied request fiction but also that the plaintiff's conferral of a benefit went "to the morality and honesty of the promise on the part of the defendant." *Id.* at 593.

342. Clark v. Herring, 5 Binn. 33, 36 (Pa. 1812). The doctrinal common lawyer's lawyer, Holt, C.J., found consideration in his inviolate waiver and ratification precedents without manipulating consideration doctrine in order to fabricate a bargain. In *Ball*, 90 Eng. Rep. at 541, Holt said there was "good consideration" for adult's ratification , and in *Heyling*,, 91 Eng. Rep. at 1158, he said waiver of statute of limitations was "in consideration that" the sale had occurred.

343. *Clark*, 5 Binn. at 37.

344. *Id.* at 37-38; Atkins v. Hill, 98 Eng. Rep. 1088 (1775); Reech v. Kennegal, 27 Eng. Rep. 932, 933 (Ch. 1748). In a curious republican twist, Tilghman said that a Pennsylvania statute permitted him to cite early Mansfield moral obligation cases, including Mansfield's 1774 trial decision in *Rann v. Hughes*, but that the statute precluded him from citing English precedents subsequent to July 4, 1776, which included the House of Lords stern language in *Rann v. Hughes* in upending Mansfield's moral obligation ideas in *Pillans v. Van Mierop*. *Id.* at 37; *Rann*, 101 Eng. Rep. at 1014 n.a. Oddly, the case that best symbolized the House of Lords' disapproval of Mansfield's continental ideas in the King's Bench was not published until it was tacked onto a 1797 case report as a note.

345. *E.g.*, Nesmith v. Drum, 8 Watts. & Serg. 9, 10 (Pa. 1844) ("a moral obligation ... is a consideration for an express contract."); Hemphill v. McClimans, 24 Pa. 367, 372 (1855) ("a moral obligation is a sufficient consideration for a direct promise."); Landis v. Royer, 59 Pa. 95, 98 (1868) ("benefit derived from the unsolicited services of another creates a moral obligation ...sufficient to sustain an express assumption.").

any reference to English decisions. Such was the pattern for the creation of a body of precedent in the young republic.

New York also experimented with this more radical equitable approach of moral consideration in *Bentley v. Morse*,[346] an 1817 case of a creditor promising to return one payment to a debtor who had paid a debt twice. The court stated: "there was such a moral obligation on the part of the [creditor] to refund the money, as would be a good consideration to support an assumpsit."[347] In reporter Johnson's note to the *Bentley* case, he carped on the doctrinal point, also found in the *Wennall* note, that no prior legal obligation had existed in these facts.[348] New York then appeared to hesitate, perhaps in reaction to Johnson's note and *Mills v. Wyman*[349] eight years later, and retreated in its rationalizations of moral obligation decisions to the artifices of either a fictional implied previous request or that the promise was the equivalent of a previous request.[350] For the next eighty years, *Bentley v. Morse* was restricted to a narrow Holt-like exception[351] for cases of a debtor paying twice.[352] Thus New York courts continued to grant moral obligation relief but under the formalist guise of contrived compliance with bargain doctrine. New York employed the fiction techniques until the end of the century when the decision in *Drake v. Bell*[353] returned New York law to the civilian solution in *Bentley*

346. 14 Johns. 468 (N.Y. 1817).

347. *Bentley*, 14 Johns. at 468. Vermont also experimented with finding of consideration without concern for the use of fictions. *See* Seymour v. Town of Marlboro, 40 Vt. 171, 179 (1868) ("The consideration upon which it was made, moved from the plaintiff, was meritorious and beneficial.").

348. *Id.* at 468 n. ("This doctrine is not fully sustained by the authorities. The better doctrine seems to be that the moral obligation must have a prior legal or equitable claim connected with it."). Johnson's inclusion of prior "equitable claim" was, however, more liberal than the *Wennall* reporters.

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

350. *E.g.*, Ehle v. Judson, 24 Wend. 97, 99 (N.Y. 1840) (citing *Hunt v. Bate* that consideration not present without a previous request, except for waivers and ratifications, but then acknowledging implied request fiction could be used); Nixon v. Jenkins, 1 Hill. (N.Y.) 318 (1857) (saying promise equivalent of previous request).

351. Doctrinalists had tried to restrict Holt's moral obligation decisions to the specific facts of those cases. Ball v. Hesketh, 90 Eng. Rep. 541 (1697) (adult ratification); Heylings v. Hastings, 91 Eng. Rep. 1157, 1179 (1699) (statute of limitations waiver).

352. *See, e.g.*, Cameron v. Fowler, 5 Hill (N.Y.) 306, 308-09 (1843) (stating that "the principle of *Bentley v. Morse*" applied when debtor had paid a debt that creditor nevertheless obtained judgment on). From at least the fifteenth century, chancery provided relief based on "reason and conscience" when a debtor on a sealed instrument was required to pay twice because of his inability to produce proof of acquittance. *See* Barbour, *Contract in Equity*, *supra* note 1, at 85-89.

353. 55 N.Y.S. 945 (1899). Gaynor, J. stated: "If the rule so plainly stated by Lord Mansfield, that a moral obligation was of itself sufficient consideration for a subsequent promise,

v. Morse. The contractor in *Drake v. Bell* had repaired the wrong vacant house, and subsequently the defendant promised to pay for the unsolicited repairs to his house. Gaynor, J. made a point-by-point frontal attack against the English doctrinal positions in the *Wennall* note and in *Eastwood v. Kenyon*.[354] He distinguished *Mills v. Wyman* because the defendant in *Drake* received a benefit to his property unlike the father in *Mills* who promised to pay for the care given to his adult son.[355] Gaynor found consideration for the promise in the promisor's prior receipt of a material benefit.[356] This was the moral obligation alternative to bargain as consideration. Gaynor's leading decision had openly slain the doctrinal warhorses of the nineteenth century in the most important jurisdiction in the country. *Drake v. Bell* and *Bentley v. Morse* would be acknowledged as models for the moral obligation principle stated in *Restatement Second of Contracts* section 86.[357] Yet, Williston steadfastly clung to the doctrinaire position in the *Wennall* note in his final draft of the first *Restatement* in 1928,[358] despite the reality that New York and Pennsylvania, the two most popu-

had been followed, the sole question in each case would be whether there was a moral obligation to support." *Id.* at 946.

354. *Drake*, 55 N.Y.S. at 946-47. Gaynor said Denman in *Eastwood v. Kenyon* used overly broad exclusionary language in objecting to Mansfield's overly inclusionary language. *Id.*; *accord* Ferguson v. Harris, 17 S.E. 782, 786 (S.C. 1893) (clarifying that Denman ignored the distinction between a promise made under no obligation, legal or moral, and a promise made on account of moral obligation of receiving benefit); Muir v. Kane, 104 P. 153, 156 (Wash. 1909). As to the *Wennall* note, Gaynor said *Wennall* reporters were incorrect that ratification of a minor was a formerly enforceable legal obligation. *Id.* at 246-47; *accord* Goulding v. Davidson, 26 N.Y. 604, 608-9 (1863) (pointing out that adult ratification was not of a legal obligation originally enforceable at law, and likewise case of a promise under coverture); Boothe v. Fitzpatrick, 36 Vt. 681, 683 (1864); Farnham v. O'Brien, 22 Me. 475, 481 (1843).

355. *Drake*, 55 N.Y.S. at 946; *accord Boothe*, 36 Vt. at 684.

356. *Drake*, 55 N.Y.S. at 945, 947 (1899).

357. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. c (1981) (explaining that illustrations 4 and 5 were based on *Drake v. Bell* and *Bentley v. Morse*, respectively).

358. Williston would continue to repeat the logic of the *Wennall* note in his drafts of *Restatement of Contracts* in the 1920s, as he had a generation earlier in his 1893 edition of Parsons' treatise. Indeed, even Lord's 1992 edition of Williston's treatise still seemed reluctant to encourage the *Restatement (Second)* § 86 position, saying that the "vast majority of jurisdictions in the United States have rejected the principle that a moral obligation might support a subsequent promise," this despite the fact that his footnotes are replete with case citations in numerous jurisdictions which have gone at least as far as *Restatement (Second)*. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 445 n., 446 n. (Williston 8th ed. 1893); 4 SAMUEL WILLISTON, WILLISTON OF CONTRACTS § 8:12 (Lord 4th ed. 1992) (claiming that Restatement Second "moves cautiously in this area" and that the drafters "eschew the term 'moral obligation.' ") This writer agrees with the Lord edition that the *Restatement (Second)* has moved cautiously but, contrary to Lord's view, too cautiously. This of course is the point of the present study.

lous states, had, along with other states, reformed the law a century earlier.

D. Treatment of Moral Obligation in Restatements

Reporter Williston's final draft of the *Restatement* (1928) subscribed to the position taken in the *Wennall* note and so treated the past consideration rule as having remained static since the sixteenth century, except for Holt's waiver and ratification precedents set at the end of the seventeenth century.[359] Williston accorded no recognition whatsoever the broader moral obligation principle in the hundreds of decisions to be found in American case reports over the previous 125 years. In support of Williston's goal of encouraging predictability in commerce,[360] he portrayed American contract law as having remained as impervious to natural law ideas as England had permanently become by the middle of the nineteenth century. Williston's conservatism notwithstanding, the pull of moral obligation ideas proved too strong, and the flow of decisions grounded on a wider moral obligation principle continued to flow unabated in a substantial minority of jurisdictions.

When the drafters of a second restatement began their review of the past consideration rule in the early 1960s, Williston's treatise continued to support the rule's strict application.[361] The drafters concluded, however, that they could not ignore the undeniable presence in the case law of the variety of moral obligation decisions falling outside the boundaries of Holt's exceptions. From the "wide variety of miscellany" in the case law, the drafters of the second restatement captured the "principle"[362] that: "A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice."[363] In the American Law Institute Proceedings in 1965, Reporter Braucher explained that the drafters were focusing on cases of subsequent promises that removed doctrinal difficulties on facts which were neither gratuitous nor quite qualified for

359. *See* RESTATEMENT OF CONTRACTS §§ 86-89 (1932).
360. *See* SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 148 (W. Jaeger 3d ed. 1957) (lauding the certainty afforded by strict application of past consideration rule).
361. *Id.* at § 142.
362. 42 AMERICAN LAW INSTITUTE PROCEEDINGS 273-74 (1965).
363. RESTATEMENT (SECOND) OF CONTRACTS § 89A(1) was proposed in Tentative Draft No. 2 in 1965 and was approved in the same form in 1979 and published two years later as RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

quasi contract relief.[364] In so doing, the drafters of the second restatement rejected the wrongheaded denial of the *Wennall* reporters that precedents did not exist for promissory liability in the absence of a bargain. In adopting section 86 in 1979, the drafters isolated one of the sub-principles of the moral obligation principle found in the case law. Section 86 of the Second Restatement enunciates the conventional moral obligation recognized in English and American jurisdictions by the early nineteenth century.[365]

The restaters were certainly correct that moral obligation promises on account of the receipt of a material benefit have been enforced in cases since the late seventeenth century. The promisor's receipt of a benefit had been acknowledged as a worthy moral obligation from at least Holt's waiver and ratification precedents. In his 1699 statute of limitations waiver decision, Holt said "in consideration that" the sale had occurred, the defendant waived the statute.[366] And in his 1697 adult ratification precedent, he stated: "Ruled, that where the defendant under age borrowed money of the plaintiff, and afterwards at full age promised to pay it him, this is a good consideration for the promise."[367] In both cases, the promisors' felt moral obligations to pay for the benefits received prompted the subsequent waiver and ratification. Following this strand through the case law after Holt, most of Mansfield's moral obligation decisions fit the receipt of material benefit model. A decade after Mansfield's retirement in 1788, Serjeant Williams tried to adapt moral obligation precedents to the dictum in *Hayes v. Warren*, by his suggestion to pleaders: "But where a party derives a benefit from the consideration it is sufficient because equivalent of a previous request."[368] Then four years later, even the redoubtable *Wennall* note underlined the importance of the material benefit strand by marginalizing any prior precedent that did not conform to the requirement that "in each instance the party bound by the promise had received a benefit previous to the

364. 42 AMERICAN LAW INSTITUTE PROCEEDINGS 273-74 (1965); *see* RESTATEMENT (SECOND) OF CONTRACTS § 86 cmts. b, e (1981).

365. Modern commentators' encouragement of restitutionary relief is a particular example of abandonment of generality in favor of fact-specific equitable relief. Ames, Keener and Corbin were progenitors of this approach in the *Restatement of Restitution* and indirectly of recognition of the modern moral obligation principle.

366. Heyling v. Hastings, 91 Eng. Rep. 1157, 1158 (1699).

367. Ball v. Hesketh, 90 Eng. Rep. 541 (1697).

368. Osborne v. Rogers, 85 Eng. Rep. 318, 319 n.1 (1798); Hayes v. Warren, 93 Eng. Rep. 950 (1731). As recently as 1965, a Maryland court cited Sjt. Williams' note regarding implied request. Reece v. Reece, 212 A. 2d 468 (Md. 1965).

promise."[369] In beating back Mansfield's sometimes overly broad civilian dictum[370] in a few of his decisions,[371] the *Wennall* reporters went too far and denied valid moral obligation precedents decided before Mansfield which did not involve either a prior legal obligation or the promisor's previous receipt of a benefit.

In the early republican period, American courts treated a promisor's receipt of a material benefit as a basis for an exception to the past consideration rule. In the 1809 Pennsylvania decision *Greeves v. M'Allister*,[372] the court said consideration was present for the defendant's promise, made on account of the plaintiff's aid to the defendant in collecting a debt owed to the defendant, "[b]ecause the defendant, had in fact, derived a very important benefit and advantage at the expense and labor of the plaintiff."[373] In the New York *per curiam* decision *Hicks v. Burhans*,[374] rendered a year before Kent, C.J. left the common law court to become Chancellor, the promisor's receipt of benefit strand of moral obligation was adopted for the first time in New York by acceptance of Kent's 1804 dictum[375] that: "In many cases a request may be inferred from the beneficial nature of the consideration, and the circumstances of the transaction."[376]

Six years subsequent to *Hicks v. Burhans*, the New York court in *Edwards v. Davis*[377] was presented with the question of whether a benefit could be received by someone other than the promisor. The defendant, a widow, had promised to pay for maintenance that the plaintiff had provided her indigent parents. The court responded that the lack of benefit to the defendant "[n]egate[s] the

369. Wennall v. Adney, 127 Eng. Rep. 137, 138 n.a. (1802).

370. Reporter Johnson said in 1819: "[o]ur law does not go the length of the civil law in enforcing a naked promise, or mere moral obligation." Edwards v. Davis, 16 Johns. 281, 283 n.9 (N.Y. 1819).

371. *E.g.*, Atkins v. Hill, 98 Eng. Rep. 1088, 1090 (1775); Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782).

372. 2 Bin. 591 (Pa. 1809).

373. *Id.* at 591. The court continued and said this was "[a] rational explanation from the liberal ideas that actuate modern courts of justice" when "a party be under either a legal or moral obligation to pay" and cited as authority a bastard maintenance case, whose facts did not involve receipt of benefits by promisor. *Id.* at 592. The bastard maintenance case the court would have probably been referring to would have been either *Anonymous.*, 89 Eng. Rep 879 (1682) or Scott v. Nelson (1763) *reported in* 127 Eng. Rep. 138 n.a. (1802).

374. 10 Johns. 243 (N.Y. 1813).

375. Livingston v. Rogers, 1 Cai. R. 583, 585 (N.Y. 1804).

376. Hicks v. Burhans, 10 Johns. 243, 244 (N.Y. 1813); *Livingston*, 1 Cai. R. at 585; *see* Comstock v. Smith, 7 Johns. 87, 88 (N.Y. 1810) (dictum).

377. 16 Johns. 281 (N.Y. 1819) (widow "undertook" to pay sister for necessaries provided parents). Two possibly gratuitous elements appear in case since promisee was her sister and beneficiaries were parents.

idea that any request was made by her."[378] Reporter Johnson supplied a note to *Edwards v. Davis* wherein he said this decision was consistent with the *Wennall* note's requirements that a benefit had to flow to the promisor.[379] Although the *Edwards v. Davis* court seemed more liberal than the *Wennall* note, since it seemed willing to enforce promises beyond Holt's precedents, the court remained in line with the spirit of the *Wennall* note in the refusal of moral obligations that did not include a benefit flowing directly to the promisor.[380] Like the *Wennall* note, the *Edwards v. Davis* court denied a line of moral obligation precedents that would have provided relief. Section 86 of the *Second Restatement* has basically not gone beyond the scope of the 1819 ruling in *Edwards v. Davis* in the use of the consensual theory to bind this category of moral obligation promise, in the absence of a bargain, for benefits received by the promisor.

Section 86 may seem a big step past the archaic position of the first *Restatement,*[381] but a closer look shows that, in drawing from the miscellany in the case law,[382] Section 86 did not throw its net very wide since it did not stray from the ambit of the *Wennall* note's demand that a benefit had to flow directly to the promisor.[383] The drafters of the second restatement were under-inclusive because other judicially recognized strands are imbedded in the moral obligation principle.[384] As Corbin observed, the *Wennall* note did not halt growth in the field of moral obligation, nor did Section 86 constitute a complete, immutable principle because, as he said, "Sometimes, and perhaps here, the best we can do is review the collected experience, without attempting any general and all-inclusive statement."[385] The structure of the American moral obligation principle resides in the operative groups of facts, based on prior decisions, which provide predictions for future decisions of

378. *Edwards,* 16 Johns. at 286 (disagreeing with Comstock v. Smith dictum that benefit might be implied from moral obligation alone. *See* Ehle v. Judson, 24 Wend. 97, 99 (1899) (saying not binding since no benefit to promisor).

379. *Edwards,* 16 Johns. at 283 n.1.

380. Wennall v. Adney, 127 Eng. Rep. 137, at 138 n.a. (1802).

381. RESTATEMENT OF CONTRACTS §§ 86-89 (1932). Perhaps the appearance of the first contracts restatement prior to the Restatement of Restitution in 1937 caused the Restatement Second of Contracts to overly focus on restitutionary promises.

382. 42 AMERICAN LAW INSTITUTE PROCEEDINGS 273-74 (1965).

383. *Wennall,* 127 Eng. Rep. at 138 n.a.

384. *See* DAWSON, GIFTS, *supra* note 144, at 226-27; E. Allan Farnsworth, *Promises and Paternalism,* 41 WM. MARY L. REV. 385, 395 (2000) (seeing decline in belief that individuals know best, as reflected in judicial refusal to enforce gift promises).

385. 1A CORBIN, *supra* note 144, at §§ 230, 231.

judges.[386] Prior decisional law has accommodated a broader range of promises than that covered by moral obligation sub-principle isolated by those who drafted the second restatement for the promisor's prior receipt of a benefit.

E. Toward A Broader Moral Obligation Principle

In the remainder of this study of the moral obligation principle at common law, consideration will be given to two fields of moral obligation decisions in which relief has been granted on factual parameters not encompassed by Section 86, namely, restitutionary promises for benefits received by someone other than the promisor himself and promises to atone for harm caused. The intent here is not to state these two additional sub-principles of moral obligation in terms of majority and minority positions but rather to set out these instances of a broader principle that courts of law and equity have drawn upon to realize just results consistent with community expectations.[387] Starting with the sub-principle of promises on benefits not received directly by the promisor, some courts have enforced moral obligation promises when the benefit of necessaries flowed to promisor's dependents and not to the promisor. Enforcement of promises to pay for necessaries provided to dependents, in the caregiver's absence, fulfills community expectations that these voluntary beneficial acts will be recompensed, when restitution is unavailable, if a moral obligation promise is extended in return.

As to promises for emergency necessaries provided to a loved one, it can be said that the genesis of all moral obligation recovery at common law stems from the sixteenth century decision of *Style v. Smith*,[388] wherein a father promised a physician to pay him for the cure of his son administered while the father was away. *Style v. Smith* was the originating moral obligation precedent that successfully deviated from the past consideration rule bar enunciated in *Hunt v. Bate; Hunt v. Bate* had also stated what was necessary to establish a bargain.[389] In contrast to the market bargain, emer-

386. *See* 3A *id.* at § 624.

387. *Cf.* 42 AMERICAN LAW INSTITUTE PROCEEDINGS 273-74 (1965) (commenting on a tentative draft of what became Section 86 on the same point regarding majority and minority positions).

388. *reported in* 74 Eng. Rep. 400, 401 (1588).

389. Hunt v. Bate, 73 Eng. Rep. 605 (1568) (requiring defendant's request previous to the plaintiff acting in order for a bargain to be formed). The facts in *Style v. Smith* are distinguishable from *Hunt v. Bate* in that the previous benefit in *Hunt* was the bailing out

gency services are not past consideration in a meaningful sense because they are provided in such circumstances that the possibilities of negotiation and a previous request are unrealistic. The principle applicable to emergency necessaries is not an implied-in-law category akin to *negotiorum gestio* for actions of officious do-gooders;[390] rather it concerns the narrow circumstance of a plaintiff who acted as a surrogate for the defendant in performance of what the defendant would have done had he been present and which the defendant confirms by his subsequent promise.[391] The fact-specific moral obligation case of funeral expenses paid by a third person provided a vehicle for an extension of *Style v. Smith*[392] to other emergency circumstances that qualified for moral obligation relief. Both of the instigating seventeenth century funeral cases involved burial of a child by a non-relative in the father's absence, and in each instance, the father subsequently promised to repay expenses borne by the plaintiff.[393] Some emergency necessaries factual categories, including payment of a dependent's funeral expenses, have evolved into restitution grounds, where a subsequent promise is rendered superfluous.[394]

Beyond emergency necessaries, a strain of moral obligation decisions enforced promises for non-emergency necessaries provided by the plaintiff to the promisor's loved ones; the earliest English cases involved promises to pay for maintenance of the promisors' bastard children.[395] Most of the American cases involved promises for necessaries provided to children[396] and for benefits provided to aged parents.[397] At the outer edge of moral obligation theory in a

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of defendant's servant, while the benefit in *Style* was an emergency necessary administered to defendant's son.

390. *See* NICHOLAS, *supra* note 260, at 227-29.

391. *Cf.* RESTATEMENT OF THE LAW OF RESTITUTION § 112 cmt. b (1937) (stating that sometimes "it is desirable to encourage persons to interfere with the affairs of others" as where it imperative to protect a person).

392. 74 Eng. Rep. 401 (1587).

393. Besfich v. Coggill, 81 Eng. Rep. 1219, 1220 (1628); Church v. Church, 73 Eng. Rep. 608 n.b. (1656).

394. *See* Jenkins v. Tucker, 126 Eng. Rep. 55, 57 (1788) (funeral of wife); France's Estate, 75 Pa. 220, 225 (1874) (funeral expenses); *cf.* Nicholson v. Chapman, 126 Eng. Rep. 536, 539 (1793) (dictum for case of emergency preservation of defendant's property); *but cf.* Glenn v. Savage, 13 P. 442, 448 (Ore. 1887) (ruling restitution denied for property preservation in owner's absence).

395. *See Anonymous.*, 89 Eng. Rep. 879 (1682); Scott v. Nelson (1763) *reported in* 127 Eng. Rep. 137, 138 n.a (1802).

396. *See, e.g.,* Coleman v. Frum, 4 Ill. 378, 380 (1842); Hargroves v. Freeman, 12 Ga. 342, 350 (1852); Todd v. Weber, 95 N.Y. 181, 191 (1884).

397. *See, e.g.,* Kennedy v. Badgett, 19 S.C. 591, 595 (1883); In re Estate of Flagg, 59 N.Y.S. 167, 169 (1899); Worth v. Daniel, 57 S.E. 898, 900 (Ga. App. 1907).

realm admittedly more civilian,[398] some jurisdictions have held promises binding for non-necessaries provided to the promisor's children[399] and even to charities. The extraordinary moral obligation relief granted in a few of these non-necessaries cases may be explainable on account of an admixture of moral obligation and reliance elements present in the facts.[400] Charitable subscriptions were binding in morals and conscience in the sixteenth century in the absence of reliance, though no direct benefit flowed to the promisor other than a spiritual one.[401] As late as the nineteenth century, a few courts enforced a charitable subscription because of a moral obligation alone,[402] and those twentieth century decisions that enforced charitable subscriptions for policy reasons[403] were effectively based on moral obligation as well. Before the mid-nineteenth century, charitable subscriptions were increasingly found binding when reliance was present.[404]

Finally, the other moral obligation sub-principle that falls beyond Section 86 pertains to promises made to atone for harm caused by a promisor. Although the conventional view is that the moral obligation principle covers promises to pay for past benefits received, courts have ruled binding moral obligation promises made to atone for past harms caused in relationships where cooperation and good faith were reasonably expected.[405] Recovery on

398. *See* DAWSON, GIFTS, *supra* note 2, at 96-100 (commenting that civilian jurisdictions enforce consensual, gratuitous promises on moral obligations not binding at common law).

399. *See, e.g.*, Marsh v. Rainsford, 74 Eng. Rep. 400, 401 (1588) (enforcing father's promise to give marriage gift of 100 pounds to daughter and son-in-law subsequent to discovery of their elopement); Lee v. Muggeridge, 128 Eng. Rep. 599, 603 (1813) (widow's ratification of promise for benefit of son-in-law after coverture lifted); Hemphill v. McClimans, 24 Pa. 367, 371 (1855) (divorcee's ratification of promise for benefit of son after coverture lifted).

400. *See, e.g.*, Best & Jolly, 82 Eng. Rep. 955, 956 (1660) (Father's promise to pay son's debt binding since father induced creditor's forbearance from proceeding against son.).

401. *See* DOCTOR AND STUDENT, *supra* note 3, at 229-30; SIMPSON, *supra* note 2, at 431.

402. *See, e.g.*, Caul v. Gibson, 3 Pa. 416 (1846) (opining that "[t]here is a moral obligation for all the subscribers to fulfill their engagements").

403. *See, e.g.*, Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609 (Iowa 1974). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 90 (2) (1981) (proclaiming charitable subscriptions binding "without proof that the promise induced action"); *Id.* at cmt. f (indicating "a probability of reliance is enough").

404. *See, e.g.*, Trustees of Farmington Academy v. Allen, 14 Mass. 172 (1817); Robertson v. March, 4 Ill. 198, 199 (1841); Pryor v. Cain, 25 Ill. 292 (1861).

405. A felt moral obligation to atone for harm caused has occasionally been masked by a court stretching to emphasize some form of benefit in the facts in order to comply with the conventional moral obligation benefit principle. *See* Webb v. McGowin, 168 So. 196, 197 (Ala. App. 1935) (emphasizing that McGowin benefitted from rescue); *cert denied* Webb v. McGowin, 168 So. 199 (Ala. Sup. Ct. 1936) (emphasizing injury to rescuer as well as benefit to rescued promisor). The harm has also been sometimes masked by in cases of promises to alleviate harm done by the parties' past cohabitation by reaching for a bargain in the fa-

promises to indemnify or atone for wrongs or harm caused by promisors have been rendered in contractual and reliance-based contexts. A moral obligation promise to compensate for a non-tortious wrong falls short of what is necessary to bring an action in either restitution or tort; thus a binding subsequent promise effectuates a just outcome in the same way that a promise falling under Section 86 ameliorates inequity in facts short of the requirements of restitution.

Moral obligation promises in contractual contexts have been held binding for harm caused during the phases of the life of a contract; contract formation, performance and enforcement. Promises have been held binding to atone for harm caused by contracts formed on account of egregious inducements, including promisors' dishonesty, bad faith and fraud.[406] Harm caused during the performance phase of contracts could not include mere unequal contract exchange values alone, but subsequent modification promises have been ruled binding when unequal exchange values were caused by significant and unanticipated changes in circumstances.[407] Modifications of contract relations have also been enforced when the reason for the subsequent promise was atonement for fiduciary breaches of duties committed during contract performance.[408] A frequently litigated area in this regard has been

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ther's annuity promise in exchange for the mother caring for her child. *See* Jennings v. Brown, 152 Eng. Rep. 210, 212 (1842); Hicks v. Gregory, 137 Eng. Rep. 556, 557 (1849).

406. *See, e.g.*, Trueman v. Fenton, 98 Eng. Rep. 1232, 1234 (1777) (Mansfield, C.J. chagrined at dishonesty of inducing credit on eve of bankruptcy); Hurst v. Mutual Reserve Fund Life Ass'n. 26 Al 956, 959 (Md. 1893) (discussing misrepresentations of financial condition to induce loan); Haynes Chemical Corp. v. Staples & Staples, Inc., 112 S.E. 802, 804 (Va. 1922) (emphasizing lack of good faith when considering contract formation). Promises to atone for harm caused to a woman by inducements to sexual relations and past cohabitation have been found to be binding moral obligations in some nineteenth century jurisdictions. *See* Wyant v. Lesher, 23 Pa. 338, 341 (1854) (declaring "it would be a disgrace to our age and generation if the law" did not enforce promises on past and future cohabitation); Karoley v. Reid, 269 S.W.2d 322, 326 (Ark. 1954) (finding consideration in agreement to permanently sever illicit relations).

407. *See, e.g.*, United States v. Cook, 257 U.S. 523, 526 (1922) (ruling government promise to pay more to contractor supported by binding "moral consideration" due to changes caused by San Francisco earthquake); Meech v. City of Buffalo, 29 N.Y. 198, 210 (1864) (concluding unforeseen circumstances justified adjustment); King v. Duluth Ry. Co., 63 N.W. 1105, 1107 (1895) (saying unanticipated circumstances justified enforcement of modification); *cf.* Pittsburg Vitrified Paving and Bldg. Brick Co. v. Cerebus Oil Co., 100 P. 631, 633 (Kans. 1909) (enforcing subsequent promise because of unjust enrichment realized by promisor during performance).

408. *See, e.g.*, Gray v. Hamil, 10 S.E. 205 (Ga. 1889) (holding promisor bound because of failure to perform partnership duties on account of excessive use of stimulants); Cardwell's Administrators v. Strother, 16 Ky. 429, 432 (1821) (ruling moral obligation supported promise to cure deficiency in deed of conveyance); Spear v. Griffith, 86 Ill. 552 (1877) (finding

adjustments to employment benefits because of insufficient remuneration after long and faithful service. Civilian jurisdictions have been more inclined to enforce such wage adjustments,[409] but common law courts have given relief in cases of extreme underpayment[410] and when harm was caused by reliance on employers' misrepresentations or past practices.[411]

Harm caused during the contract enforcement phase concerns promises to modify the impact of unfair court judgments. When an offending judgment is out-of-line or simply wrong, the felt pang of moral obligation may generate a promise to modify or waive the impact of the judgment upon the wronged party. Court decisions have justified enforcement of these promises for the reason that the promisor was bound once he did what he ought to do by recognizing his or her moral duty to abate any harm caused by the judgment.[412] In the case of a plaintiff who received too little under a judgment, the promise to increase what was owed has been justified because, though the judgment extinguished plaintiff's claim, "[t]he moral obligation to pay these items was not extinguished."[413] Some decisions justified enforcement by analogies to traditional precedents for waivers of a statute of limitations or of bankruptcy.[414] However, unlike the facts in the waiver precedents,[415] the judgment itself caused the harm, and the moral obligation raised by that harm is the moral consideration that supports enforcement of the subsequent promise. Unwritten promises to

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moral obligation to promise compensation for mistake in conveyance). Promises to make amends for poor performance of fiduciary duties has proved a fertile area for recovery. *See* Scott v. Carruth, 17 Tenn. 418, 420 (1836); Hyman v. Succession of Parkerson, 72 So. 953, 955 (La. 1916); Slayton v. Slayton, 315 So. 588, 590 (Ala. 1975).

409. *See, e.g.,* Barthe v. Succession of J. LaCroix, 29 La. Ann. 326, 327 (1877) (stating that adjustment of wages for past services was a "natural obligation" and not a mere gratuity).

410. *See, e.g.,* In re Schoenkerman's Estate, 294 N.W. 810, 811-12 (1940) (enforcing bonus promise to in-laws who cared for promisor's young children for ten years for room and board alone); Earl v. Peck, 64 N.Y. 596, 599 (1876); Worth v. Case, 42 N.Y. 362 (1870); *contra* Loan Assoc. v. Stonemetz, 29 Pa. 534 (1858); Plowman v. Indian Refinery Co., 20 F. Supp. 1 (E.D. Ill. 1937).

411. *See, e.g.,* Grady v. Appalacian Electric Power Co., 29 S.E.2d 878, 883 (W. Va. 1944) (enforcing promise of disability benefit because of both misrepresentation by company representative and employee's reliance on company's custom of paying disability benefits); Bailey v. Philadelphia, 31 A. 925, 926 (Pa. 1895) (concluding that moral obligation raised in light of plaintiff-school principal's reliance on school board election).

412. *See* Turlington v. Slaughter, 54 Ala. 195, 197 (1875).

413. Brunhoeber v. Brunhoeber, 304 P.2d 521, 523 (Kans. 1956).

414. *See* Stebbins v. The County of Crawford, 92 Pa. 289, 295 (1879); *Brunhoeber,* 303 P.2d at 523.

415. English courts have refused to extend traditional waiver precedents. *See* TRIETEL, *supra* note 260, at 76.

waive the impact of judgments have been less successful than formal waivers due to the higher footing a judgment enjoys over a contract debt.[416]

The remaining category of promises to compensate for harm caused relates to promises made to compensate for previous reliance hardship induced. These tend to entail fact situations in which, though defendant induced some form of reliance, the elements of promissory estoppel have not been fulfilled. Still, the promisor felt moved to promise recompense because of a sense of moral obligation caused by the reliance hardship suffered. The subsequent promise cures the inability to use promissory estoppel in much the same way that a restitutionary promise covered by Section 86 overcomes the unavailability of the doctrine of restitution. Courts have used two approaches in finding these promises binding. The straightforward judicial explanation has been to state that the moral obligation raised by the induced reliance loss binds the subsequent promise; the alternative approach has been for courts to find a binding contract through manipulation of the doctrine of consideration.

The straightforward use of the moral obligation principle to atone for induced reliance can be seen in the 1922 Virginia decision *Haynes Chemical Corporation v. Staples & Staples, Inc.*[417] This decision is the basis for illustration number eight to *Restatement Second* Section 86,[418] notwithstanding the point that the case facts are devoid of any benefit flowing to the promisor. The plaintiff was induced to spend a large amount of time and effort to prepare a business proposal, which the defendant promised would be given its "heartiest consideration," but in the end the plaintiff's plan was given no attention whatsoever. The company's general manager acknowledged how shabbily the plaintiff had been treated and promised to pay his expenses.[419] The defendant company objected to the use of the moral obligation principle to bind the defendant to that promise, but the court concluded that the moral obligation principle made the promise binding once reliance was induced.[420] Other decisions have come to the forthright conclusion that a promise to pay for induced reliance loss is binding

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416. *See* Anspach v. Brown, 7 Watts. 139, 140 (Pa. 1838); *Stebbins,* 92 Pa. at 295.
417. 112 S.E. 802 (Va. 1922).
418. RESTATEMENT (SECOND) OF CONTRACTS § 86 illus. 8 (1981).
419. *Haynes,* 112 S.E. at 804.
420. *Id.*

under the moral obligation principle,[421] but the more common solution has been for courts to rationalize recovery through manipulation of the doctrine of consideration, thereby avoiding flying in the face of the conventional moral obligation principle stated in Section 86. By manipulation of consideration, courts have concluded that the induced reliance constituted consideration for the subsequent promise or that the moral obligation generated by inducing reliance was sufficient consideration.[422] For example, an employee relied upon his employer's custom of providing disability benefits by remaining in the defendant's employ.[423] The court said no legal obligation was created by the custom because of its indefiniteness, but that the reliance on the custom supported the company's moral obligation promise of a disability benefit.[424] The court arrived at this conclusion despite the fact that the reliance of staying on the job had not been bargained-for since the custom was not shown to have been an inducement at hiring nor was there any indication that a bargain had been struck for disability protection in exchange for continued employment.

IV. CONCLUSION

The scattered reliance and moral obligation precedents rendered prior to the eighteenth century were discussed and advanced in a more orderly fashion under the influence of Enlightenment ideas during the last quarter of the eighteenth and the first quarter of the nineteenth centuries in both the United States and England. Inspiration at common law was found in English Chief Justice Holt's narrowly crafted reliance and moral obligation relief, and Chief Justice Mansfield's equitable and natural law ideas proved particularly attractive to American jurisdictions during those heady early republican days. Both justifiable reliance and moral obligation reflected judicial unease over a monist bargain test which could cause injustices if these gratuitous promises were not

421. *See, e.g.*, Hurst v. Mutual Reserve Fund Life Assn., 26 A. 956, 957-58 (Md. 1893) (stating that promisor had placed himself under a moral obligation since his representations had induced plaintiff to rely).

422. Alternatively some decisions have found a bargained exchange elsewhere in the facts. *See e.g.*, Jennings v. Brown, 152 Eng. Rep. 210, 212 (1842) (concluding that bargain made for mother to care for child of parties' former cohabitation in exchange for annuity).

423. *See* Grady v. Appalachian Electric Power Co., 29 S.E.2d 878 (W.Va. 1944).

424. *Id.* at 881-82 (indicating agent said company would pay employee $70 per month for life); *cf.* Hemphill v. McClimans, 24 Pa. 367, 371 (1855) (stating that a "moral duty" generated by induced reliance was not enforceable by law but was "a sufficient consideration for an express promise to perform that duty").

enforced. However, a backlash against imported continental ideas arose among conservative common law thinkers during the second quarter of the nineteenth century as formalist support for the market bargain marginalized ameliorating exceptions. The dampening effect on moral obligation relief may have been greater than that on reliance actions in that the latter was under the radar of jurists of the time, with the exception of a few vocal judicial opponents like Kent. The principal goal of the conservative judges was the annihilation of Mansfield's broad moral obligation pronouncements which threatened the centrality of the doctrine of consideration. The long term success of this reactionary campaign was much greater in the unitary legal system of England and Wales than it was in the multiplicity of American jurisdictions, where regional experimentation with natural law ideas was possible in parts of the country.

Growth in justifiable reliance and moral obligation began anew during the second half of the nineteenth century as rapid changes in the American economy and in industrial society necessitated contractors' capacity to react and adjust to unanticipated change. In commercial contexts, that flux stimulated the need to devise transactions in more open-ended forms, and in the case of felt moral obligations, restitutionary promises were extended upon the discovery of a promisor's receipt of unexpected enrichment. These hardship solutions were rationalized on equitable and legal grounds by newly fused courts. Justifications for relief were sometimes drawn from natural law and from the equitable devices *causa,* moral consideration and equitable estoppel; more often, however, common law courts operated within the confines of the bargain construct by either disingenuous manipulation of facts and doctrine to declare a bargain present or more often by the finding of sufficient consideration to bind a voluntary promise in the alternatives to bargain of justifiable reliance and moral obligation. Indeed, voluntary consent is a fundamental underpinning of both justifiable reliance and moral obligation; a voluntary promise raises reasonable expectations in the case of reliance, and a moral obligation promise negates the fear of officiousness and defines the scope of liability.

During the generation subsequent to the publication of the first *Restatement*, opposition returned, but by the 1960s the pendulum swung back again the other way. Williston's commentary to the first *Restatement* marginalized promissory estoppel to a scope not much beyond charitable subscriptions, and he urged bargain as

the sole test of a binding commercial promise. Furthermore, the *Restatement* denied the validity of moral obligation relief beyond the old waiver and ratification precedents of the early eighteenth century. The Restatement's drafters sought predictable rules for market operators and so denied the equitable tendencies of the previous decades; the reaction that followed in the case law during the subsequent generation constituted yet another formalist reaction against equitable and natural law ideas supportive of justifiable reliance and the moral obligation principle. The drafters of the restatement rejected what they perceived to be excessive injection of equity and natural law into common law contract during the previous century, but in introducing their monist bargain consideration test, they had to ignore four centuries of legal history regarding development of these alternative reasons sufficient to satisfy the doctrine of consideration. The legislative mind of a drafter is naturally desirous of distilling various reasons found in case law into a predictable first principle for modern planners, but legislative enactments like restatements fail in their structural incapacity to take into account the variety of good reasons common courts have found in human behavior for the enforcement of promises.

In summarizing the development of the justifiable reliance alternative to bargain consideration, the ground appeared in common law contract in the early sixteenth century as an aspect of what became the consideration test for the emerging action of assumpsit at a time when assumpsit was still perceived as a reliance remedy. But by the middle of the sixteenth century this nascent notion of consideration was converted into a test that required reciprocity. Over a century later, Holt, C.J. exhumed the early use of reliance as consideration to bind a gratuitous bailee who negligently carried out his promise to safely convey goods, and later in the eighteenth century, Mansfield's court justified reliance relief on the basis of natural law. In early nineteenth century America, Kent attempted to narrow Holt's decision to cases of tortious misfeasance, but not long after the middle of the nineteenth century, support grew for the equitable notion that a reliance hardship ground ought to be considered an alternative basis, to bargain, for promissory enforcement. Then during the second half of the nineteenth century, the doctrine of justifiable reliance grew into a relatively common equitable exception for two categories of promises: charitable subscriptions and commercial promises.

Charitable subscription decisions operated within a *sui generis*, policy-charged field. Charitable and business precedents became interchangeable, and charitable subscription decisions acted as precedents for family gift promises, but subscription decisions did not act as precedent for reliance on promises in a commercial context. In rationalizing enforcement of subscription promises in the absence of bargains, common law courts borrowed the equitable techniques of equitable estoppel and *causa* for consideration. Powerful instrumental policy reasons underlined the enforcement of business and community subscriptions, made for subscribers' mutual benefit, to build the infrastructure of communities emerging in the westward expansion of the nation in the absence of government assistance.

A contextual reason for the upsurge in commercial justifiable reliance decisions in the nineteenth century flowed from contractors' experimentation with flexibly designed commercial promises to contend with the unpredictability of industrial age market swings. Contractors' use of promissory innovations to adapt their now longer term relations to uncertainties in the form of open-ended contract language, unilateral offers, at-will relations and the greater likelihood of the need to modify contract relations. In cases of contractors' reliance on these consensual attempts to contend with uncertainty, attempts to enforce these innovative contractual practices butted up against traditional contract requirements of definiteness, mutuality, reciprocity of bargain and its attendant preexisting duty rule. In spite of these doctrinal barriers to enforcement of new forms of agreements, courts did begin to grant equitable relief when reliance upon these novel arrangements caused hardship. By at least the 1860s, such reliance hardship prompted courts to provide relief through extensions of theories at law and equity.

Reliance recovery was justified under a variety of judicial rationales until the first *Restatement* unified certain of the grounds into the so-called doctrine of promissory estoppel. Prior to the *Restatement*, some jurisdictions justified relief under extensions of Holt's use of assumpsit's reliance origins in tort. Justifications were also drawn from the equitable part performance exception to the statute of frauds and from the notion that induced reliance hardship constituted *causa* for enforcement. Elsewhere support for reliance was found in a coalescence of good faith reliance in equity and consensual theory support for parties' freely designed method of dealing with the unforeseen future. There were also doctrinally

flawed rationales based on the inappropriate use of equitable estoppel and disingenuous manipulation of bargain consideration. The equitable solutions crafted by judges of law and equity required the balancing of doctrinal demands for certain contract provisions with consensual theory support for adaptations of relations to contend with the unfolding of promissory transactions. This perplexing variety of justifications notwithstanding, reliance on contracts designed to adjust to industrial age change contributed significantly to the growth in the doctrine of justifiable reliance. It would only be with *Restatement* Section 90 that an organizing principle would be provided for the doctrine now called promissory estoppel.

In summarizing the development of the moral obligation principle exception to bargain consideration, moral obligation decisions likewise first appeared in sixteenth century English common law decisions. The early decisions of the sixteenth and seventeenth centuries involved promises to pay for necessaries supplied to dependents of the promisor. At the turn of the eighteenth century, Holt, C.J. rendered his widely adopted exceptions to the bargain principle for statute of limitations waivers and adult ratifications. Later in that century, Mansfield employed a civilian approach to generalize a broader principle as a means of accommodating a wider range of moral obligations. Mansfield's enlightened ideas were pursued during next half century in England and republican America. Mansfield's language may have been overly broad, but the actual facts of the cases he decided did not go beyond the case law in many American jurisdictions today. Nevertheless, during the second quarter of the nineteenth century in the United States and England, a conservative common law reaction set in against those of Mansfield's enlightened natural law ideas that roamed beyond Holt's exceptions to the bargain standard. This opposition permanently arrested development in England, but it had only a temporary effect in some American jurisdictions and little or no effect in jurisdictions more committed to republican natural law ideals.

In those states which continued to recognize a broader moral obligation throughout the nineteenth century, a variety of justifications were given for enforcement of moral obligation promises. Close extensions of Holt's waiver and ratification exceptions were widely accepted as binding and supported by consideration. In the wake of conservative opposition to the moral obligation principle, some state courts disingenuously manipulated consideration doc-

trine by implication of fictional previous request in order to bring the case under the bargain principle. A natural law justification was given by Kent in judicial dictum in support of a promise to provide restitution since the promise obviated concern over officiousness. A few fused courts of law and equity declared that the promise of restitution was supported by equitable moral consideration. And in a few jurisdictions, a moral obligation was said to provide consideration to support a promise to pay for a benefit previously received by the promisor. This last rationale that moral obligation could act as an alternative basis for consideration was the widely recognized reasoning used for the American moral obligation principle by at least the last quarter of the nineteenth century. Nevertheless, Williston did not recognize a moral obligation principle in the first *Restatement* except for Holt's precedents. It would only be with the *Second Restatement* that an organizing principle would be articulated for some of the moral obligation developments beyond the waiver and ratification precedents. The conventional American moral obligation principle recognized today was finally enunciated in the *Restatement Second of Contracts* Section 86, which stated the version of the promisor's moral obligation liability that had been accepted by courts in New York and some other states for over a century.

In closing, throughout the nearly five hundred year history of the common law of contract, there have been three reasons courts have recognized for enforcement of promises voluntarily made. Bargain has been the predominant reason, but it has never been the exclusive reason for binding promisors because of the occasional hardship caused by a strict demand for reciprocity. Naturally not all promises uttered are binding in law, but in the course of promissory transactions on the periphery of the market bargain, two categories of gratuitous promises have been found worthy of enforcement by the community as a means of averting injustice. A legal system of promissory liability would be a harsh and unjust system if it were to only enforce market bargains to the exclusion of occasional hardships suffered when a promise induces reasonable reliance or when a felt moral obligation engenders a promise to make restitution. These two types of gratuitous promises are consensual, they are made in a context that indicates a good reason for the promise, and they raise reasonable expectations that, in fairness, the promisors would not later deny liability because of lack of bargain.

Since the advent of treatise writers in the early nineteenth century, there have been ebbs and flows in the availability of relief for reliance and moral obligation because of the influence enjoyed by these overseers of doctrinal purity and consistency. The formalist instinct of commentators, conservative judges and, eventually, restatement drafters, has been to corral predictable first principles, like bargain, from the morass of case law and to marginalize or reject the messiness of equitable exceptions. Resultant judicial reactions against the liberalizing impact of these equitable exceptions have meant temporary setbacks for enforcement of gratuitous promises, and it has been suggested that we may be in such a conservative reactionary period again today. The periodic formalist-inspired suggestions that upsurges in promissory estoppel and moral obligation relief are aberrant deviants from the monist bargain norm are inaccurate claims in law and are founded upon bad legal history. Reliance, moral obligation and bargain have coexisted within a tripartite system of promissory liability since the sixteenth century origins of the action of assumpsit and its attendant test the doctrine of consideration. Unavoidably, this coexistence has been uneasy due to the dissonance caused by these equitable alternatives to the predictability of the predominant bargain standard, but dogmatic consistency, irrespective of hardship facts, does not a fair system of justice make. So while there might be today a temporary ebbing away from the liberal justice granted a generation ago under promissory estoppel and the moral obligation principle, inevitably the two equitable alternatives to bargain will flourish again. In the end, the fair administration of contract law must include hardship relief for injustices that can sometimes be caused by the absolutism of the bargain principle.