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Consider Consideration

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TEACHING IMPORTANT CONTRACTS CONCEPTS

CONSIDER CONSIDERATION

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Yes, consider consideration. Should we weave webs with it to sharpen our students' legal analyses or demystify it by letting them know up front that it's really very easy and rarely matters in practice? There are dangers with each approach: generations of law students have been made to feel stupid in contracts class only to ask later, like Peggy Lee, "Is that all there is?" Yet "demystification," a word popularized by the late Critical Legal Studies Movement,[1] often makes the students think a topic is unimportant. Now consideration *is* unimportant in many respects, but at the same time, it is *very* important—it makes us ask why we enforce promises. This paradox is part of what we have to teach, yet again, it runs the danger of making the topic too mystical, a secret of the Holy Order of Contracts Teachers.

I'd like to define consideration as the quality that makes the legal system decide to enforce a promise. But that definition won't do, at least not as the term is currently used in American courts. It is a pretty good definition of the civil law's *causa* or *cause*,[2] but consideration as we use it does not include

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1. The Crits were famous for their jargon, which ranged from slang like "trashing" to trendy literary terms like "deconstruction." (In fact, these last two are synonymous. *See* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).) My all-time favorite CLS term is "counterhegemonic dereification." On this, see Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373, 1388 (1984).

2. *See* FRENCH C. CIV. arts. 1131-33. The Cour de cassation, the highest court in France, said nearly 140 years ago that "a natural obligation, even of conscience, can become the *cause* of

concepts like reliance and benefits previously conferred, which are said to create "contracts without consideration."[3] Consideration, at least the classical consideration that most of us start with, is a narrower and rather formalized concept that seems to exist mostly to be set up and knocked down again.[4] What we are talking about when we speak of "consideration" is the familiar Restatement version, something that is "bargained for" and "given in exchange" for a counter-act or promise,[5] a simple enough concept that seems to give everyone a lot of trouble.

One of the problems in teaching the bargain theory of consideration is the case often used as the jumping-off point, *Hamer v. Sidway*.[6] *Hamer* is a wonderful case, with delectable flavor of 130 years ago: in 1869 William E. Story gets up at his parents' golden anniversary party and tells his fifteen-year-old nephew that if "Willie" will "refrain from drinking, using tobacco, swearing or playing cards or billiards for money"[7] until his twenty-first birthday, Uncle will give him $5000 (a huge amount, of course, in those days). Willie "assent[s] thereto, and fully perform[s]."[8] In 1875 he informs Uncle Story, who tells him, in an engaging letter, that he will hold the money for him. Uncle tells how "[t]he first five thousand dollars that I got together cost me a heap of hard work . . . . I shoved a jackplane many a day, butchered three or four years . . . . I was here in the cholera season '49 and '52 and the deaths averaged 80 to 125 daily . . . . [I wanted] to go home, but Mr. Fisk, the gentleman I was working for, told me if I left them, after it got healthy he probably would not want me. I stayed . . . ."[9] Uncle Story continues by telling Willie that at Willie's birth twenty-one years earlier, he bought him twenty sheep, which Willie's father and grandfather were supposed to look after until Willie was of age. Uncle Story estimates that there should be 500 to 600 by

a civil obligation." ("Une obligation naturelle, même de conscience, peut devenir la cause d'une obligation civile.") DALLOZ, RECUEIL PÉRIODIQUE ET CRITIQUE MENSUEL, Pt 1, 208 (1862). The clearest explanation of *cause* that I have found is in ARTHUR T. VON MEHREN AND JAMES R. GORDLEY, THE CIVIL LAW SYSTEM 913-14 (2d ed. 1977).

3. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 82-90 (1981).

4. Given the ideological swing to the right, even in private law matters in state courts, there is a good case to be made that like a Joe Palooka doll, classical consideration has bounced up again and is daring us to keep it down for good.

5. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981):

> (1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise . . . .

6. 27 N. E. 256 (1891).

7. *Id.* at 256.

8. *Id.*

9. *Id.*

now,[10] but we never learn what happened to them—they are the contracts equivalent of the giant rat of Sumatra.[11] In the end, he warns Willie not to squander the money. Uncle Story eventually dies, and his estate is sued, not by Willie, but by someone who has taken by "mesne assignments." (Some, but not all casebooks tell us that just as Uncle Story feared, Willie had become bankrupt; he and his father had failed in business. Whether profligacy also played a role is not clear, but either Willie's wife or his creditors were the ones trying to enforce the promise. There is also more than a suggestion in the lower court opinion that Willie committed bankruptcy fraud or other questionable conduct.[12])

Up to this point, the students have an entertaining fact situation, but no law. Now they get two points of law, one useful, the other very misleading. The useful point is that a legal detriment need not be a harm. The estate tries to argue that Willie benefited from his path of virtue and thus gave no consideration for Uncle's promise, but the court explains that not doing something that you have the legal right (or privilege) to do is a legal detriment, even if it is good for your health or soul. That is of some value, and actually operates as a good illustration of Hohfeldian Analysis, to which I introduce the class when I teach offer and acceptance.[13] In Hohfeldian terms, since Willie had no legal duty to refrain from drinking, smoking, swearing, playing cards and shooting pool (the juvenile laws apparently being pretty loose in those

10. *Id.*

11. "'Matilda Briggs was not the name of a young woman, Watson,' said Holmes in a reminiscent voice. 'It was a ship which is associated with the giant rat of Sumatra, a story for which the world is not yet prepared.'" *The Adventure of the Sussex Vampire*, 2 SIR ARTHUR CONAN DOYLE, THE COMPLETE SHERLOCK HOLMES 1033-34 (Doubleday & Co. ed., 1930) (1927). Finding this citation lured me into rereading Holmes, which itself made writing this article profitable.

12. The General Term's opinion, 11 N.Y.S. 182 (1890), which was reversed by the Court of Appeals, is set out and discussed in an engaging note, *Relational Background: Other Dealings Between Willie and His Uncle*, in Professor Randy Barnett's casebook, RANDY BARNETT, CONTRACTS 663 (2d ed. 1999).

13. Wesley Hohfeld, a brilliant but impenetrable legal philosopher who died young in 1918, put together a system of two groups of four terms (right-duty, privilege-no right; and power-liability, disability-immunity) that I find valuable in teaching basic contract law. Hohfeld's actual writings are difficult, but Arthur Corbin, an early backer, wrote a lucid explanation that I give out to students. *See* Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919). Corbin had relied heavily on Hohfeld in his equally classic article, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917), *reprinted in* PETER LINZER, A CONTRACTS ANTHOLOGY 273 (2d ed. 1995) (hereinafter "LINZER, CONTRACTS ANTHOLOGY"). (Since I use my book when I teach the course, I have an excuse to plug it here.) I have a short note on Hohfeldian terminology immediately preceding the Corbin reprint, see Wesley Hohfeld, *Arthur Corbin and Precise Legal Terminology*, *id.* at 271. (hereinafter "Linzer Note").

days), his giving up of his "privilege" or imposing a duty upon himself was enough to bind the contract.[14]

So far, so good. But here comes the kicker. *Hamer* isn't a classic consideration case at all. It doesn't use the bargain theory, but an older theory called benefit-detriment. While that system is apparently still the law in New York State,[15] it was going out of style generally even in the 1890s when *Hamer* was written. It confuses some students, at least those who, in Jane Austen's words, are no conjurers;[16] they figure (with some justice) that the lead case on consideration ought to tell them what consideration is. Instead, they learn what it was, and was about 150 years ago, at that.[17] I love *Hamer*, but I can't tell you how demoralizing it is to read an exam discussing a twenty-first century contracts problem in terms of benefit and detriment.

I wouldn't for a minute get rid of *Hamer*, but I think we've got to be a lot more precise than most of us are in teaching it. The real problem is that most of us don't have the faintest idea how benefit-detriment differs from the bargain theory, and the reason for this is that *Hamer* is, in fact, *a perfect bargain case*! It's exactly like the Brooklyn Bridge hypothetical[18] that we all use to explain unilateral contracts: Uncle says, "If you won't smoke 'til you're twenty-one I'll give you $5000," and Willie accepts through full performance, which was bargained for by the Uncle and given by Willie in exchange for Uncle's promise.[19] Thus, *Hamer* would be a fine illustration of bargain theory, *but it doesn't mention bargain*. Even bright students probably need this to be pointed out, and the non-bright can hardly be faulted for not getting the difference. Talk about mystification.

14. In a nutshell, according to Hohfeld, a duty is something that the legal system will enforce through force if necessary, while a privilege is the absence of duty. *See* Corbin, *Legal Analysis and Terminology*, *supra* note 13, at 167-68; Linzer Note, *supra* note 13, *passim*.

15. *See* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 444-45 (N.Y. 1982) (applying the benefit-detriment rule to an employment dispute involving a personnel manual, and citing *Hamer*). While *Weiner*'s impact as an employment law case has been limited by later cases, *see, e.g.*, Sabetay v. Sterling Drugs, Inc., 506 N.E.2d 919 (N.Y. 1987); Skelly v. Visiting Nurse Ass'n, 619 N.Y.S.2d 879 (N.Y. App. Div. 1994), there is no indication that the benefit-detriment rule has been abandoned in New York State.

16. "Well, and so this was kept a great secret, for fear of Mrs. Ferrars . . . –til this very morning, poor Nancy, who, you know, is a well-meaning creature, but no conjurer, popt it all out." SENSE AND SENSIBILITY 258 (Oxford Univ. Press 1933) (1806).

17. Holmes was attacking the benefit-detriment approach when he put forth his version of bargain theory ("reciprocal conventional inducement") in 1881, fully ten years before *Hamer*. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 230 (Mark DeWolfe Howe ed., Bellknap Press of Harvard Univ. Press 1963) (1881).

18. *See* I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136 (1916) ("I will give you $100 if you walk across the Brooklyn Bridge.").

19. Actually, since the opinion says that Willie "*assented* and fully performed," *see supra* note 8 and accompanying text, maybe it's a bilateral contract, though I don't see how. Could Uncle have collected damages if Willie had breached?

Actually, *Hamer* can work very well with the bargain theory if it is immediately followed by a case like *Baehr v. Penn-O-Tex Oil Co.*[20] *Baehr* is not in every casebook, though it is in some, most notably *Knapp, Crystal and Prince*,[21] and similar cases abound. In *Baehr* the plaintiff owned several gas stations that he had leased to a man named Kemp who got behind on his accounts with his supplier. The supplier, Penn-O-Tex, took an assignment of Kemp's receivables and put an agent in to oversee his business. Nobody made any rental payments to Mr. Baehr, though the supplier was receiving rent from Kemp's sub-tenants. According to Mr. Baehr, when he called up for his money, Penn-O-Tex's agent told him that Kemp's affairs "were in a very mixed up form but that he would get them straightened out and mail me [the plaintiff] my checks for the rent."[22] Baehr then wrote to Penn-O-Tex asking what he had to do to get his rent checks, and added "[o]r will I have to give it to an attorney to sue."[23] Penn-O-Tex wrote back that it was attempting to assist the tenant in keeping the business going but was in no way operating the station or taking possession of it, and denied knowledge of or responsibility for the rent. A week or ten days after receiving the letter, Mr. Baehr called the agent and asked for the rent. According to the court, "Defendant's agent then said to plaintiff, 'they (the company) were interested and that they would see that I (the plaintiff) got my rent, and would take care of it, and they would work it out with the head office . . . He said he would take it up with them and they would assure me my rent.'"[24] Penn-O-Tex never paid, and after waiting several months, Mr. Baehr evicted the tenant and sued Penn-O-Tex for the back rent. Penn-O-Tex denied ever making the assurance, but since a jury had found for Mr. Baehr the court accepted his version. According to the court, Penn-O-Tex never asked Baehr to forebear collection in exchange for its promise to see that the back rent got paid. On Baehr's own version of the facts all Penn-O-Tex had said was "that they would see that I . . . got my rent, and would take care of it," and that was not a proposed exchange.[25] Although Baehr argued that his forebearance was evidence of an agreement that he would forebear in exchange for the promise, the court found that his reason for waiting about four months was to avoid interrupting his winter vacation and thus for his own convenience rather than as consideration for Penn-O-Tex's promise.

20. Baehr v. Penn-O-Tex Oil Co., 104 N.W.2d 661 (Minn. 1960).

21. *See* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 103 (4th ed. 1999).

22. *Baehr*, 104 N.W.2d at 663.

23. *Id.*

24. *Id.*

25. *Id.* at 665-66. The court also rejected other theories of recovery not based on contract, but did not explicitly deal with reliance.

Baehr reflects a rigid, and rather old-fashioned, view of bargain and exchange. Surely many courts would find a bargain implicit in the words attributed to Penn-O-Tex, and that is a point worth making. But to me, *Baehr* is most interesting as an illustration of a case *that would be good under the benefit-detriment theory*. Thus, we can use *Baehr*, the bargain case, to illustrate benefit-detriment, and *Hamer*, the benefit-detriment case, to illustrate bargain. Penn-O-Tex made a promise to Baehr: "We'll see you get your rent." It received a benefit in connection with this promise, even if not exactly in exchange for it: Baehr held off evicting the tenant. On top of this, Baehr, the promisee, suffered an actual detriment in connection with the promise: he didn't get his rent, as well as a legal detriment: he didn't exercise his privilege to evict the tenant.

All this works if I am correct in my assessment of the benefit-detriment theory, but I admit that based on *Hamer*, I cannot be sure what it really was—or is, if New York really still follows it.[26] Grant Gilmore described it in *The Death of Contract* ("*The Death*") as a looser version of consideration than bargain, closer to the civil law's *causa*,[27] but Gilmore is notoriously casual about his history in *The Death*, and even though he seems right here, the book has to be used cautiously.[28] Although *Hamer* is not a good example of benefit-detriment, some of the cases and writers cited with approval by the New York Court of Appeals are, and they intrigue me because they would not work under the bargain theory. In an English case cited, *Shadwell v. Shadwell*, the promisor wrote that he was so pleased at the promisee's getting engaged that he would pay him £150 per year until his annual income as a chancery barrister reached six hundred guineas (£630).[29] This promise was held enforceable, the "benefit" being the uncle's happy feeling. The Court of Appeals also cited the twelfth edition of Kent's Commentaries to the effect that "[a]ny damage, or

26. *See supra* note 15 and accompanying text.

27. GRANT GILMORE, THE DEATH OF CONTRACT 20-22 (Ronald K. L. Collins ed., rev. ed. 1995). On *causa*, *see supra* note 2 and accompanying text.

28. THE DEATH OF CONTRACT is a book that is underestimated by the sophisticated and overestimated by the unwashed. For assessments of it, *see* Ronald K. L. Collins, *Forward to the Rev. Ed.*, of GILMORE, THE DEATH OF CONTRACT, *supra* note 27, at vii-xxix; Symposium: RECONSIDERING GRANT GILMORE'S THE DEATH OF CONTRACT, 90 NW. U. L. REV. 1-266 (1995); and authorities cited in Collins's most interesting contribution to the Northwestern Symposium, Ronald K. L. Collins, *Gilmore's Grant (or The Life & Afterlife of Grant Gilmore & His Death)*, 90 NW. U. L. REV. 7 (1995), *reprinted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 262. In my view, THE DEATH OF CONTRACT is a great book, but a loaded (and quirky) pistol that can blow up in your face if you're not careful.

29. *Hamer*, 27 N.E. at 257 (citing Shadwell v. Shadwell, 9 C.B.(N.S). 159 (1891)). The General Term, in the decision below, 11 N.Y.S. 182 (1890), had distinguished *Shadwell* as possibly involving reliance, based on the nephew marrying and incurring expenses because of the uncle's promise.

suspension, or forbearance of a right will be sufficient to sustain a promise."[30] Since the promisee in *Shadwell* was not asked to do anything and Chancellor Kent makes no reference to the connection between the promise and the detriment, it is clear that neither of these authorities required explicit exchange, just a promise and a benefit or detriment related to it in some way. There is no reason to get bogged down in the details of this largely superannuated theory, but if it is explained at least to this extent it can do two things: illustrate by contrast what the bargain theory *is* about (in Holmes's words, reciprocal conventional inducement[31]), and raise the question whether bargain ought to be an essential element of consideration.[32]

That question can be answered in a number of ways, but one of the best ways is to jump to a case usually found a little later in the book, at the start of promisory estoppel, *The Allegheny College Case*.[33] That famous Cardozo opinion needs no detailed analysis by me; it has been discussed innumerable times, notably by Grant Gilmore in *The Death*,[34] by Leon Lipson in an uproarious and widely reprinted essay that he wrote in the *Yale Law Report*,[35] and by Fred Konefsky in a line by line exegesis that is essentially a transcript of a legendary annual lecture in his contracts class at the State University of

30. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 465 (12th ed. 1873), cited in *Hamer*, 27 N.E. at 257.

31. *See supra* note 17 and accompanying text.

32. It appears unclear just how closely related the detriment or benefit and the promise had to be; the cases and writers don't seem to focus on the issue. M. P. Furmston, author of the leading current English contracts text, writes that in the nineteenth century a plaintiff might establish consideration in either of two ways: "He might prove either that he had conferred a benefit upon the defendant *in return for which* defendant's promise was given or that he himself had incurred a detriment *for which* the promise was to compensate." M. P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S THE LAW OF CONTRACT 69 (9th ed. 1985) (emphasis added). In contrast to the authorities I discussed in the text, the *Hamer* court quoted others that seem to require reciprocity, though nothing is made of the difference in language. The opinion quotes *Anson on Contracts* as saying, "It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made *as consideration for the promise made to him*," and *Parsons on Contracts* as "[i]n general a waiver of any legal right *at the request of another party* is a sufficient consideration for a promise." 27 N.E. at 257 (emphasis added). The words that I have italicized seem to show that a reciprocity requirement may in fact have been present in most versions of the benefit-detriment version of consideration, but if so, the reciprocity requirement seems to have been casually assumed rather than subjected to the nice distinctions of *Baehr*.

33. Allegheny College v. National Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927).

34. GILMORE, *supra* note 27, at 68-70, 144-46, 165-66.

35. Leon Lipson, *The Allegheny College Case*, 23 YALE L. REP. 8 (1977). Lipson's piece is quoted or summarized in many casebooks. Its most notable passage is reprinted in LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 222-23, as part of the Fred Konefsky article cited in the next note.

New York at Buffalo.[36] I am fond of all three discussions, but with the greatest respect for Gilmore and Lipson, Fred Konefsky's piece steals the show. I regularly assign it to be read by the students along with the case, like a score to a symphony.

In brief, Mary Yates Johnston signed a pledge card in which she promised to pay $5000 to Allegheny College ("the College") thirty days after her death "[i]n consideration of my interest in Christian Education, and in consideration of others subscribing . . . ."[37] On the back of the card she wrote "[i]n loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund," the proceeds of which were to be used for the education of ministry students. She put a $5000 bequest to the College in her will, but before her death she removed it and paid the College $1000, which it may have placed in a special account, but did not use to name a fund after her.[38] When the balance was not paid at the appropriate time after her death the College sued her executor. On its face the transaction looks like a promise of a gift, a conditional one at that. Cardozo, however, found that it was an implied offer of a bilateral contract requiring the College to promise to establish the named fund, and that by accepting the $1000 the College impliedly bound itself to establish the fund when it received the balance, thereby accepting the offer—impliedly.

Going through Cardozo's factual convolutions is a valuable lesson for students—in Grant Gilmore's words, "[s]ince Cardozo was one of the best case lawyers who ever lived, the proof was invariably marshaled with a masterly elegance,"[39] some would say with the misdirection of a three-card monte pitchman on the New York City subway.[40] In any event, with Fred Konefsky and an attentive classroom teacher, the students can learn a lot about fact management from *The Allegheny College Case*, especially if they are also exposed to Cardozo's *trompe l'oeil* of ten years earlier, *DeCicco v. Schweitzer*.[41]

36. Alfred S. Konefsky, *How To Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645 (1987), *reprinted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 219.

37. *Allegheny College*, 159 N.E. at 174.

38. On this factual point there is some dispute. Cardozo says that "[t]he college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry," *id.*, but Fred Konefsky quotes the brief for the executor (written by future Supreme Court Justice Robert H. Jackson), which states "that the fund has never been established for—'We could not establish the fund and have students coming expecting to receive from it until we had it.'" Konefsky, *supra* note 36, at 697 (quoting the testimony of the college's treasurer); LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 235.

39. GRANT GILMORE, THE AGES OF AMERICAN LAW 75 (1977).

40. *Compare* Lipson, *supra* note 35 (using the metaphor of a Thaumatrope, an eighteenth century precursor of the motion picture, which relied on optical illusion).

41. DeCicco v. Schweitzer, 117 N.E. 807 (N.Y. 1917). In *DeCicco* a father promised an annuity after marriage to his daughter and her fiancé, an Italian count. After some years the

But it trivializes *Allegheny* to turn it into a parlor trick. In all likelihood the students will agree with the dissenting Judge Kellogg that not only is it nonsense to try to turn this promise of a gift with a condition attached into an offer of a contract, but that even if this characterization of the pledge could be supported, it would be nothing more than the offer of a unilateral contract that could not be accepted during Mrs. Johnston's lifetime and thus had to lapse at her death.[42] And they're probably right. But that's not the reason to read *Allegheny*. The reason to read it is Cardozo's description, manipulation and ultimate modification of consideration doctrine itself.

That is why I assign Fred Konefsky's article. He discusses Cardozo's factual *legerdemain* extremely well, but his real contribution is to show in detail what Cardozo was doing to the doctrine of consideration. The dicta in Cardozo's opinion may have helped legitimize promisory estoppel, but Konefsky quite correctly makes clear that the College's success in *Allegheny* is not based on estoppel. Cardozo found consideration, but in a way that arguably changed its essence.

Cardozo began his discussion with *Hamer* and the concept of detriment to the promisee being enough, but suggested that "[s]o compendious a formula is little more than a half truth,"[43] the other half of the truth apparently being Holmes's requirement of reciprocity between the promisee's detriment and the promisor's motive for the promise. But, says Cardozo, the motive requirement has been progressively weakened, and in addition, "there has grown up of recent days a doctrine that a substitute for consideration *or an exception to its ordinary requirements* can be found in what is styled 'a promisory estoppel.'"[44] As Konefsky correctly and perceptively teaches us, the italicized words show that Cardozo uses promisory estoppel primarily as evidence that the gap between the loose New York benefit-detriment rule and classical bargain theory was closing, especially when charitable subscriptions were involved.[45]

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father reneged and the couple sued through an assignee. Cardozo found consideration in their not breaking off the engagement, saying with a straight face that this could be viewed as what the father wanted for his promise. He stated:

> The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forebore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it.

Id. Note Cardozo's intertwining of bargain and reliance in the last sentence.

42. *See Allegheny*, 159 N.E. at 177 (Kellogg, J., dissenting).

43. *Id.* at 174.

44. *Id.* at 175 (emphasis added).

45. Konefsky, *supra* note 36, at 66, *reprinted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 226-27.

This, to my mind, is why it is important to spend the time and effort teaching *Allegheny*. Konefsky shows us that it is a critical opinion, not just a clever one. Yes, it is written in that wonderfully stylized language that would be intolerable in anyone else. Yes, Cardozo affects that pose of *naïf* who is making no changes in the law. Yes, we can wonder what went on in that strange man's mind, that monk of the law whose father had to resign from the bench in a judicial scandal, who never married, who lived with his sister all his life, who fascinates us sixty years after his death. But the reason to teach *The Allegheny College Case* is that by reading it closely, with help from the instructor (and Fred Konefsky), students can learn how and why the concept of consideration changed in this century, can ask whether we should go back to a stricter view of bargain, and most of all, can be introduced to the real question: do we need consideration at all?

Before turning to that bedrock question, though, it is useful to disabuse the students of the notion that Cardozo was some subversive who just didn't care about rules of consideration. We can start by asking those who think that of him why he didn't just rely on *Hamer* to decide *Allegheny*. Why did he say that the benefit-detriment rule was only a half-truth in terms of Holmes's approach to bargain? Why did he go to such lengths to find an implied reciprocal bargain over the naming of the fund? And most of all, why did he write *Dougherty v. Salt*?[46]

Dougherty is another case that I like because of its flavor. Cardozo quotes the infant plaintiff's guardian, who tells how the eight-year old Charles Napoleon Dougherty's Aunt Tillie came to visit:

> When she saw Charley coming in, she said, "Isn't he a nice boy?" I answered her, Yes; that he is getting along very nice, and getting along nice in school; and I showed where he had progressed in school, having good reports, and so forth, and she told me that she was going to take care of that child; that she loved him very much. I said, "I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk." She said, "I don't intend to take it out in talk; I would like to take care of him now." I said, "Well, that is up to you." She said, "Why can't I make out a note to him?" I said, "You can, if you wish to." She said, "Would that be right?" And I said, "I do not know, but I guess it would; I do not know why it would not." And she said, "Well, will you make out a note for me?" I said, Yes, if you wish me to," and she said, "Well, I wish you would."
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> A blank was then produced, filled out, and signed. The aunt handed the note to her nephew, with these words: "You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable."[47]

46. 125 N.E. 94 (N.Y. 1919).

47. *Id.* at 94-95.

Though the note read "For value received," the New York Court of Appeals unanimously ruled against Little Charley, in an opinion by Cardozo. "The plaintiff through his own witness, has explained the genesis of the promise, and consideration has been disproved." The guardian gave Aunt Tillie very bad legal advice; any lawyer could have come up with half a dozen ways to make the gift enforceable. And there is no indication that Aunt Tillie ever changed her mind. And it appears that Little Charley needed the money. Why did Cardozo, who worked so hard to find a bargain in *Allegheny*, almost disdainfully dismiss Aunt Tillie's inept but sincere promise, especially since the Appellate Division had held for Charley? Was it because this was a family gift rather than an institutional one? But he went to great lengths to find a bargain in *DeCicco*,[48] involving a count, an heiress and her father's promise of an annuity upon their marriage. Why not here? After all, Charley needed the promised money so much more and there was no indication that Aunt Tillie had ever changed her mind, as the promisors had in *Allegheny* and *DeCicco*.

There are two answers that I can come up with. First of all, there just weren't the facts to work with. Charley was a little boy who probably didn't even understand Aunt Tillie's promise, so it would have been very hard to find reliance sufficient to impose promisory estoppel. And Aunt Tillie hadn't put any conditions on the gift, not even Charley doing well in school or not dropping out, so Cardozo would have been hard pressed to weave his webs here. But Aunt Tillie's note said "for value received."[49] Couldn't Cardozo have relied on the boilerplate language and held Tillie's estate bound by it? That leads to my second answer. Cardozo cared about consideration. Cardozo was and is notorious for his indirection. Consider in Torts how he expanded the notion of responsibility in *Wagner v. International Railway*'s "danger invites rescue"[50] only to contract it with *Palsgraf*'s "the risk reasonably to be perceived defines the duty to be obeyed",[51] and how he eliminated the privity of contract requirement for products liability[52] only to keep it for accountants.[53] In Corbin's famous words, after Cardozo has been to work, "the law is not exactly as it was before; but there has been no sudden shift or revolutionary change."[54] Clearly the same process is involved in the consideration cases. Cardozo is quite willing to stretch the concept and

48. *See supra* note 41 and accompanying text.

49. *Dougherty*, 125 N.E. at 94.

50. Wagner v. International Ry. Co., 133 N.E. 437, 437 (N.Y. 1921)

51. Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928). Some might find this not inconsistent with *Wagner*, but I think the point of view is less generous.

52. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

53. Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931).

54. Arthur L. Corbin, *Mr. Justice Cardozo and The Law of Contracts*, 39 COLUM. L. REV. 56, 57 (1939).

enforce many promises not clearly involving bargain, but he has his limits, and unfortunately for Little Charley, Aunt Tillie went beyond them.

As a judge, Cardozo was not obliged to explain his limits or to put forth a coherent and comprehensive theory. But many law professors have done so, and by this point the students have enough familiarity with the issue to benefit from some heavyweight thinking. Law students aren't used to reading a group of articles without any cases, but they can learn a lot from a one day debate among say, Lon Fuller, Farber and Matheson, Yorio and Thel, Chuck Knapp and Mel Eisenberg. Lon Fuller's 1941 Columbia Law Review article, *Consideration and Form*,[55] is excerpted in most casebooks, especially with respect to his explanation of the "evidentiary," "cautionary" and "channeling" effects of consideration, but in a more complete transcription it functions as a good apology for a fairly traditional approach to consideration: necessary to protect private autonomy in those situations where we can be confident that private actors should be held to have bound themselves. I assign it fairly early in the consideration portion of the course, but it can be recalled and interpolated among writers who virtually dismiss consideration, or at least think that it plays—and should play—much less of a role than Fuller assigned it.

These writers, with varying political outlooks, have argued that because of the widespread use of reliance, moral obligation and other "substitutes," consideration has become superfluous for all promises except perhaps gifts within the family.[56] I like to juxtapose these writers, some (Farber and Matheson) relational, some (Yorio and Thel) autonomy based, one (Knapp) perhaps best described just as pragmatic. If there were time, I would contrast Judge Richard Posner's economic analysis of why we don't enforce promises of gifts within the family[57] with Mel Eisenberg's very thoughtful and to me, rather convincing analysis of the same question.[58] In an ideal world, I'd probably have the class read Allan Farnsworth's new book on regret.[59]

55. 41 COLUM. L. REV. 799 (1941), *excerpted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 285.

56. *See, e.g.*, Daniel A. Farber & John H. Matheson, *Beyond Promisory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903 (1985) *excerpted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 361; Edward Yorio & Steve Thel, *The Promisory Basis of Section 90*, 101 YALE L.J. 111 (1991), *excerpted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 377; Charles L. Knapp, *The Promise of the Future—and Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. (1984). For some short comments on the rationales put forth, see my notes in LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 360-61 and 377.

57. Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEG. STUD. 411 (1977), *reprinted in* LINZER, CONTRACTS ANTHOLOGY, *supra* note 13, at 296.

58. Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1970).

59. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS (1998). Of course, we don't live in an ideal world, especially as Contracts is increasingly reduced

Students hate theorizing, but we aren't in this business just to teach mechanics. Prosser is supposed to have said that the trouble with law students is that they only want one thing—to become lawyers. That depresses those of us who have gone into teaching because we are concerned with the questions of why the law is what it is and whether what it *is* is what it ought to be.[60] I think that this is more than intellectual self-entertainment; it is our obligation to raise these questions with the students. We have a duty to do all we can to induce them to think about questions beyond the mechanical, both to help them understand mechanical things more fully, and to prepare them to carry out their obligations as leaders of the society they serve.

There has always been debate whether instructors should disclose their own position. The professor as pitchman can be intimidating (and irritating) to students and close off their independent reasoning, but Olympian detachment by the teacher is frustrating (and equally irritating) and can leave students with a sense of cognitive dissonance—a million ideas floating about and nothing mooring them. If teachers make clear that their opinions are available for potshots, that mindless parroting back is much less welcome than reasoned criticism, students sometimes will rise above the Gilberts and Nutshells and actually think.[61] For these reasons, I think it makes sense to show my hand, and let the class know what I think.

What I think is that consideration has a great deal to do with regret. That is, the real question is when are we going to allow a promisor[62] to renege, not for any functional reason like mistake or impossibility or the promisee's breach, but just because the promisor has changed his mind. The traditional analyses of consideration focused on mechanics: was there a detriment, was there a bargain? This was consistent both with a medieval system heavy with form, and with the classical (that is, mid- to late-Victorian) pretense that the system was neutral and value-free. But with all the substitutes that are allowed

to four or five credits. The instructor must figure how to expend the scarce resource of time. I would argue that what they will learn justifies spending a day on theory and policy.

60. The less sympathetic would just say that we flunked out of practice and had to find work.

61. In Houston, Texas, where I teach, most of the grappling with bigger issues has come from the right: Federalist Societies, economic libertarians and Christian Legal Societies show that students will sometimes think beyond the bar exam. I try to move the big picture back into the classroom with somewhat less of a partisan slant.

62. A related question, not exactly part of the consideration topic but really intertwined with it, is whether a promise is always needed. The "contractual" obligation may arise from a relationship itself. The writings of Ian Macneil are the major source here, though Macneil does not always approve of where his disciples (I am one) take his theories. I explored this question in the context of employment at will in Peter Linzer, *The Decline of Assent: At-Will Employment As a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986). A recent and excellent discussion in a quite different context can be found in John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93 (2000).

today we should move away from form and ask instead whether this is the kind of promise where we want to allow regret alone to justify non-performance. Eisenberg makes a good case for regret in the family context generally, and as a privilege of consumers, particularly when the seller (who has promised to provide goods or services in exchange) has not really suffered any reliance damage from the consumer's promise.[63] Most of us feel the same way about a promise to meet a friend for dinner, even if he promised to do something in exchange. The consumer's right to renege was protected statutorily some forty years ago in the context of door-to-door sales.[64] There is certainly consideration present in a door-to-door contract, but it is an area that has a great potential for hard-to-prove overreaching, and it is heavily dependent on pushing the householder into impulse buying without taking time for reflection.

Harold Havighurst told us many years ago that most promises were performed, that most breach of contract litigations involved some extraneous factor like the promisor's death or a change in management of a company.[65] Some but not all of the cases I have discussed in this paper fit that description: in *Hamer* and *Dougherty* there was nothing to indicate that the testator wanted to renege, but an executor had to try to frustrate the testator's intent. On the other hand, in *The Allegheny College Case*, *Baehr* and *DeCicco* the promisors did regret their promises[66] and sought to renege. Only one was successful, and that was the one with the least justifiable regret, the oil company in *Baehr*, which was in a business transaction and had made money on the arrangement. Yet it got out of its promise precisely because of the consideration doctrine. The most justifiable regret is said to be of promises within the family, yet the consideration doctrine led to enforcement in *DeCicco* when the father had changed his mind, and to invalidity in *Dougherty* where Aunt Tillie had not and apparently went to her grave wanting Little Charlie to get her $3000.

All this suggests that the consideration doctrine doesn't work very well. Both the Restatement (Second) of Contracts and Article 2 of the Uniform Commercial Code have decreed that some substantive types of promises will be enforced without consideration: charitable subscriptions for the Restatement[67] and contract modifications for Article 2.[68] I would expand the concept to a general one: a promise should be enforced if the promisor

63. Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 794-98 (1982).

64. 16 C.F.R. §§ 429.0-.2 (2000).

65. Harold C. Havighurst, *The Nature of Private Contracts*, *in* 1961 Rosenthal Lectures, Northwestern Univ. School of Law (Northwestern Univ. Press 1961).

66. I assume, arguendo, that Mr. Baehr's story was true. *See supra* notes 21-23 and accompanying text.

67. *See* RESTATEMENT (SECOND) OF CONTRACTS §90 (2) (1981).

68. *See* U.C.C. § 2- 209 (1).

expressed no regret during his lifetime, or if it is made in a non-family, non-consumer context. There undoubtedly need to be some refinements made, but that's a beginning. I would toss this out and invite student potshots. As long as they realize that most if not all courts don't buy what I say, and as long as they know what most courts do require in order to find a promise enforceable, they will understand consideration in terms both of what is involved today, and of what may be the issues tomorrow. If I can get that much across, I'll consider my time well spent.