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Echoes of the Impact of Webb v. McGowin on the Doctrine of Consideration under Contract Law: Some Reflections on the Decision on the Approach of Its 75th Anniversary

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ECHOES OF THE IMPACT OF *WEBB v. McGOWIN* ON THE DOCTRINE OF CONSIDERATION UNDER CONTRACT LAW: SOME REFLECTIONS ON THE DECISION ON THE APPROACH OF ITS 75TH ANNIVERSARY

*Stephen J. Leacock**

I. INTRODUCTION

"Consideration stands, doctrinally speaking, at the very center of the common law's approach to contract law."[1]

Of course, as William Butler Yeats wrote, if things should fall apart, then, the center cannot hold.[2] Undoubtedly, the center of the common law's approach to contract law has held.[3] Consideration has not fallen apart at all. Indeed, it still "rules the roost." It provides the "good reason" that assists the courts in performing

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[1] Arthur T. von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1009 (1959) [hereinafter von Mehren]. *See also* Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 387 (1996) [hereinafter Teeven, *Preexisting Duty Rule*] ("[T]he impregnability of the common law of contract's core doctrinal fortress of consideration.").

[2] WILLIAM BUTLER YEATS, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS 184 (Macmillan Publishing Co., Inc. 1956). ("Turning and turning in the widening gyre The falcon cannot hear the falconer; Things fall apart; the centre cannot hold....").

[3] *See* Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 929 (1958) [hereinafter Patterson, *Consideration*] ("The doctrine of consideration still rules us, and not from its grave.").

their principle function in contracts disputes.[4] Moreover, as the seventy-fifth anniversary of the Alabama Supreme Court's decision in *Webb v. McGowin*[5] approaches, the decision merits reflection in light of Professor von Mehren's above assertion some fifty years ago. Certainly, Professor von Mehren's proposition remains intact today.[6] However, Judge Bricken's[7] astute invocation of certain ameliorative principles of equity,[8] in the Alabama Court of

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[4] Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 453 (1937) ("[T]he principal function of the courts is ... the determination of whether or not there is good reason for enforcing the promise sued on. . . .").

[5] Webb v. McGowin, 168 So. 199 (Ala. 1936). Edward C. Combs, Jr., one of my research assistants, conducted an exhaustive search of the records (*e.g.*, newspaper articles from the dates around the time of the incident), but failed to unearth any reports of the event. It seems that the heroics of Mr. Webb apparently went unnoticed and thus unreported by the popular press. The case serves as a teaching tool in a number of the major Contracts case law books in the U.S. *See, e.g.*, E. ALLAN FARNSWORTH, ET AL., CONTRACTS, CASES AND MATERIALS 52 (7th ed. 2008); JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS, CASES AND PROBLEMS 293 (5th ed. 2007); IAN AYERS & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 120 (7th ed. 2008); JOHN P. DAWSON, ET AL., CONTRACTS CASES AND COMMENT 216 (9th ed. 2008); RANDY E. BARNETT, CONTRACTS CASES AND DOCTRINE 649 (4th ed. 2008); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES PROBLEMS AND MATERIALS ON CONTRACTS 172 (5th ed. 2008); BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 53 (2d ed. 2008); GEORGE W. KUNEY & ROBERT M. LLOYD, CONTRACTS: TRANSACTIONS AND LITIGATION 220 (2d ed. 2008); JAMES F. HOGG, ET AL., CONTRACTS CASES AND THEORY OF CONTRACTUAL OBLIGATION 132 (2008); CHARLES L. KNAPP, ET AL., PROBLEMS IN CONTRACT LAW CASES AND MATERIALS 291 (6th ed. 2007); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 191 (4th ed. 2007); GERALD E. BERENDT, ET AL., CONTRACT LAW AND PRACTICE 187 (2d ed. 2007); LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 90 (8th ed., Concise 2006); DAVID G. EPSTEIN, ET AL., MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 284 (2d ed. 2006); JOHN EDWARD MURRAY, JR., CONTRACTS: CASES AND MATERIALS 292 (6th ed. 2006); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 193 (3d ed. 2006).

[6] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

[7] Judge Bricken was admitted to the practice of law at Greenville in 1889, *see link to the Alabama Judicial website discussing Judge Charles Bricken*: http://www.judicial.state.al.us/supreme.cfm?Member=101. There are no facts, in print, that Chief Judge Bricken (or any of the other judges in the case) indicated or expressed any regrets over the decision that they reached in the case. Edward C. Combs, Jr., one of my research assistants for this article, spoke with the Bricken family in Alabama. Mr. and Mrs. Charles Bricken, III still reside there, and they said that Judge Bricken never mentioned anything that was "passed down" to them. In fact, the family did tell my research assistant that Judge Bricken's son, Charles Bricken, Jr., was the Clerk of the Court for the Alabama Court of Appeals at the time Judge Bricken was chief judge. Judge Bricken's obituary appears in Appendix A.

[8] These ameliorating principles of equity now form the basis for section 86 of the Restatement of Contracts. "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." RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981). *See also* C.C. Langdell, *A*

Appeals decision in *Webb v. McGowin*,[9] merits admiration. Almost seventy-five years later the opinion retains its merit.

Under the orthodox enunciation of the contract law requirements of consideration, the "receipt of unrequested benefits creates no legal obligation."[10] Forty-nine American common law jurisdictions hold this as the majority position.[11] Therefore, *Webb v. McGowin* is a minority decision[12] in the pantheon of consideration principles under contract law. Professor Perillo referred to the minority doctrine that accepts the moral obligation principle - based upon the *Webb v. McGowin* decision[13] - as "promissory restitution."[14]

Brief Survey of Equity Jurisdiction, 1 HARV. L. REV. 59 (1887-88) ("A true equitable right is ... *derivative* and *dependent* ... upon a *legal* right.") (emphasis added); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 114 (Butterworths 2002) [hereinafter BAKER, ENGLISH LEGAL HISTORY] ("Law and equity were never in 'conflict or variance', because equity was not a self-sufficient system; at every point equity presupposed the existence of common law." (citing F.W. MAITLAND, EQUITY 16-17 (1909))).

[9] Webb v. McGowin, 168 So. 196, 198 (Ala. 1935). Research conducted by Edward C. Combs, Jr., one of my research assistants, indicated that race did *not* play a part in the decision. The parties were both Caucasian. Most, if not all, employees at the lumberyard were white. In fact, my research assistant found out that one employee who was a co-worker of Webb's was the father of Hank Williams, one of the most famous country-western singers in American history. It appears that Hank Williams even wrote a song about the particular lumber yard. *See* Posting of Frank Snyder to ContractsProf Blog, http://lawprofessors.typepad.com/contractsprof_blog/2006/10/six_degrees_of_.html (last visited October 27, 2009).

[10] *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 200 (6th ed. 2009) [hereinafter CALAMARI AND PERILLO ON CONTRACTS] (citing John P. Dawson, *The Self-Serving Intermeddler,* 87 HARV. L. REV. 1409 (1974)).

[11] *Id.* at 150 ("[T]he common law usually requires that promises be made for a consideration if they are to be binding."). Louisiana is the non-common law jurisdiction among the fifty American states.

[12] *See* CALAMARI AND PERILLO ON CONTRACTS, *supra* note 10, at 200 ("A minority of cases [accept] the moral obligation concept. . . .).

[13] *Id.* at 200 n.18.

[14] *Id.* Stanley Henderson is credited as the source of the "promissory restitution" term. Stanley Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts,* 57 VA. L. REV 1115, 1118 n.4 (1971). *See also* Geoffrey R. Watson, *In the Tribunal of Conscience:* Mills v. Wyman *Reconsidered*, 71 TUL. L. REV. 1749, 1793 (1997) ("Another explanation for these cases is a theory of promissory restitution. According to this theory, courts are actually granting the plaintiff restitution for provision of services or goods in the past. Courts emphasize the defendant's later promise, not because it 'waives' a technical defense or because it is binding in and of itself, but because it negates the traditional presumption that the services rendered were gratuitous.") (footnote omitted).

However, the equitable foundation for the moral obligation doctrine is historic and impeccable.[15] It reaches back into earlier centuries of equitable development in support of justice and fairness, when the common law was in danger of becoming rigid and calcified. In that earlier era, equity sometimes initiated "new procedures devised by judicial discretion, without precedent, to make the regular law function more effectively."[16] In fact, the principles that serve as the foundation for the *Webb v. McGowin* decision have weathered centuries,[17] and the American Law Institute has embraced the conceptual basis for the decision in the Restatement (Second) of Contracts.[18] The decision has therefore served as a beacon in this regard.[19]

The reasons for this iconic status are intriguing. As one commentator observed, "[t]he question of enforcement of a promise grounded on a past moral obligation has confounded common law courts for centuries."[20] Common law courts are profoundly reluctant to enforce such promises because of the fundamental re-

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[15] *See* Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 59-60 (2004) ("The genesis in Western legal thought of the idea of a moral obligation principle ... resides in the Roman law. . . . In contrast to civil law countries, Roman Law was ignored as a source of growth in the common law until [Lord] Mansfield . . . sat on the King's Bench. Mansfield's decisions based upon moral obligation, sometimes called moral consideration, covered a wide variety of contexts. . . . Mansfield also drew upon prior common law decisions that enforced promises on moral obligations. . . . [E]arlier moral obligation notions were scattered through sixteenth and seventeenth century case reports. . . .") (footnotes omitted).

[16] BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 204.

[17] *See* Kevin M. Teeven, *Moral Obligation Promise for Harm Caused*, 39 GONZ. L. REV. 349, 349 (2003-2004). (In the course of examining the development of the moral obligation principle, Professor Teeven observed that "[a]lthough the conventional view of the American moral obligation principle recognizes as binding only promises to pay for past benefits, the principle has been applied more broadly. . . . [I] unearthed moral obligation decisions rendered *over the past two centuries* which were not grounded upon receipt of benefits. . . .") (footnotes omitted) (emphasis added).

[18] *See* CALAMARI AND PERILLO ON CONTRACTS, *supra* note 10, at 201 ("The Restatement (Second) has accepted the minority view that a receipt of a material benefit with or without a prior request, followed by the receiver's promise to pay for the benefit, is enforceable without consideration 'to the extent necessary to prevent injustice.'") (footnote omitted).

[19] *Id.* ("Despite the absence of a bargained-for exchange, the Restatement *rightly* takes the position that an expressed intention to be bound founded upon receipt of a material benefit *ought to be enforced*.") (emphasis added).

[20] Kevin M. Teeven, *Origins and Scope of the American Moral Obligation Principle*, 46 CLEV. ST. L. REV. 585, 586 (1998) [hereinafter Teeven, *Moral Obligation Principle*].

quirement of consideration identified by Professor von Mehren.[21] Over time, "[t]he criterion of consideration has been partially supplanted . . . by other criteria of enforceability, such as reliance."[22] Nevertheless, the fundamental requirement of consideration remains intact.[23]

In analyzing and evaluating the role played by *Webb v. McGowin* in the doctrine of consideration, two questions deserve particular attention. First, how does one reconcile the decision in *Mills v. Wyman*[24] with the *Webb v. McGowin*[25] decision? Second, how does one reconcile the decisions in *Webb v. McGowin*[26] and *Harrington v. Taylor*?[27] Reconciliation will emerge in the course of the article and the conclusion will propose probable answers to these two questions.

Part I introduces the theme of the article, that while *Webb v. McGowin* was correctly decided on its facts and its decision merits continuing support, it should nevertheless continue to be interpreted as an exception to the orthodox requirements of consideration. Part II develops this thesis under the rubric of the majority stream of precedent. On principle, the fundamental requirements of consideration in contract law should not be supplanted or drastically modified. Part III has selected a subset of cases espousing the moral obligation principle for separate discussion. The rationale for this separate discussion is articulated in the section itself. Part IV addresses the minority stream of precedent. Arguments based upon the invocation of the ameliorative principles of equity are presented in this section in support of the overall theme of the article. They are drawn from a perception that the doctrine of reliance[28] reinforces the *Webb v. McGowin* decision. Part V of the article explores arguments presenting the case on a basis of the doctrine of reliance as it exists today. Incidentally, such arguments would probably have succeeded at the actual trial. Part VI ana-

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[21] *See* von Mehren, *supra* note 1.

[22] FARNSWORTH, CONTRACTS, CASES AND MATERIALS 30 (7th ed. 2008). In this paper, the author presents a further discussion of the reliance doctrine as it pertains to *Webb v. McGowin*. *See infra* Part V.

[23] *See* Patterson, *Consideration*, *supra* note 3.

[24] Mills v. Wyman, 20 Mass. 207 (1825).

[25] Webb v. McGowin, 168 So. 199 (Ala. 1936).

[26] *Id.*

[27] Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945).

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

lyzes and synthesizes my overall assertion that the doctrine of consideration is particularly well adapted to contract law problem-solving under the common law. Part VII concludes with the observation that the courts would do well to leave the doctrine undisturbed.

II. MAJORITY STREAM OF PRECEDENT

Professor von Mehren's proposition[29] remains accurate today.[30] The doctrine of consideration[31] *does* lie at the heart of the common law of contracts.[32] Moreover, under the provisions of modern contract law, the doctrine of consideration mandates a *present*[33] exchange of value.[34] Therefore, the term "past consideration"[35] is arguably self-contradictory.[36] Consideration, by definition, must be transferred in exchange for a promise or, at a minimum, in reliance upon a promise.[37] It consists of something of value[38] that has been bargained for and received by a promisor from a promisee, which motivated a person to take some action, such as engaging in a legal act.[39]

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[29] *See* von Mehren, *supra* note 1, at 1009.

[30] *See* Patterson, *Consideration*, *supra* note 3, at 929.

[31] RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

[32] *See* Patterson, *Consideration*, *supra* note 3, at 929.

[33] Irrefutably, valid consideration is a function of a *present* exchange of value via a bargain and ordinarily cannot consist of a past conferment of value. *See* Intercon Mfg, Inc. v. Centrifugal Casting Mach. Co., 875 P.2d. 1149, 1153 (Okla. Civ. App. 1993) ("A past consideration, if it imposed no legal obligation at the time it was furnished, will not support a promise. . . . [A] promise made on no other than past consideration is unenforceable.") (citations omitted).

[34] *See* First Nat'l Bank of Butler v. Sturdivant, 288 Ala. 133, 136 (Ala. 1972) ("Generally there is sufficient consideration if there is a benefit or advantage to the promisor or a loss, detriment or inconvenience to the promisee. Benefit to the promisor or injury to the promise is the criterion.") (citations omitted). *See also* Skipper v. Wright & Colquett, 30 Ala. App. 409, 411 (Ala. Ct. App. 1942).

[35] *See* In re Manchester Gas Storage, Inc., 309 B.R. 354, 371 (Bankr. N.D. Okla., 2004) ("[T]he principle that 'past consideration' - value given to the promisor by promisee prior to (and therefore not in exchange for) the promise - is not valid consideration") (emphasis added) (footnote omitted). "Executed consideration" is sometimes used as a synonym for "past consideration."

[36] Harrington v. Taylor, 36 S.E.2d 227, 227 (N.C. 1945).

[37] RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); RESTATEMENT OF CONTRACTS § 75 (1932).

[38] "Something of Value" may be defined as an act, a forbearance, or a return promise.

[39] BLACK'S LAW DICTIONARY 175 (3d pocket ed. 2006).

"Past consideration" may be defined as an act done or a promise made by a promisee – for which enforcement is sought – when the promisee's conduct occurred *prior* to the making of the promise by the promisor. Under the majority stream of precedent, past consideration is not valid consideration for the new promise and cannot suffice for such a purpose. Irrefutably, this is so because it has not been made *in exchange for* the promisor's promise.[40] Past consideration implicates something of value that has been provided *prior* to the time when the promise was made. Therefore, because the provision or conferment of this value in the past was neither induced by the present promise nor paid in exchange for it, it cannot legally qualify as valid consideration under the majority stream of precedent.[41]

Mills v. Wyman[42] epitomizes the majority proposition that a moral obligation does not make an unbargained-for promise enforceable. In *Mills v. Wyman*, for about two weeks, Mills provided shelter and care for Levi Wyman, a twenty-five year old individual who fell ill on his return from a sea voyage. After Mills had *already* incurred the expenditures in providing the shelter and care for Levi Wyman, Levi's father, Seth Wyman, wrote to Mills. The Court interpreted the letter as a promise by Seth to pay Mills for the expenses that he had incurred with regard to Levi's shelter and care.[43] When Seth failed to honor his written promise, Mills sued him.

Judge Cardozo has proposed that "[l]aw accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate."[44] In this regard, the Supreme Judicial Court

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[40] As discussed in Part III of this paper, exceptions exist for *new* promises to pay debts discharged in bankruptcy, debts barred by statutes of limitations or contractual obligations incurred during infancy.

[41] RICHARD A. LORD, WILLISTON ON CONTRACTS § 8:11 (4th ed. 2008).

[42] Mills v. Wyman, 20 Mass. 207 (Mass. 1825). In *Mills*, the Massachusetts Supreme Judicial Court overruled a decision it reached twelve years earlier. Bowers v. Hurd, 10 Mass. 427 (Mass. 1813). In doing so, the court substituted the majority stream of precedent conclusions with respect to the doctrine of consideration in place of the earlier *Bowers* reasoning. *See also* Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749 (1997) (providing a detailed discussion of the *Mills* case).

[43] *Mills*, 20 Mass. at 209.

[44] *See* MARGARET E. HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 274 (Fallon Publ'ns 1947) [hereinafter SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO].

of Massachusetts ultimately ruled in favor of Seth Wyman.[45] The court reasoned that his promise was in no way supported by valid consideration.[46] The court did, however, acknowledge that the promise may very well have been *morally* binding.[47] Its breach may also be perceived as morally disgraceful.[48] Nevertheless, the court declined to enforce Seth Wyman's promise. In the Court's view, societal interests supported the withholding of legal sanction for *some* breaches of *some* promises.[49] Society has assigned to the courts a very difficult task. The courts are required to make the often subtle distinctions between legally binding promises and morally binding promises. Not all morally binding promises will survive the judicial social-policy evaluation that determines whether legal enforcement is justified. The courts are not permitted to shirk this delicate task.

In refusing to enforce Seth Wyman's promise, the court distinguished it from a specific category of enforceable promises based upon antecedent obligations. This category consists of promises to pay debts barred by bankruptcy,[50] the statute of limitations,[51] or the debtor's infancy.[52] The Court reasoned that authori-

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[45] *Mills*, 20 Mass. at 209 ("The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application.").

[46] *Id.* at 211 ("A deliberate promise . . . cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity.").

[47] *Id.* (emphasis added).

[48] *Id.* at 209.

[49] *See id.* at 210-11 (emphasis added) ("Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them."). *See also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1932-33) ("It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.") [hereinafter Cohen].

[50] *See infra* Part III.

[51] *Id.*

[52] *See Mills*, 20 Mass. at 209-10.

ties that stated the *general*[53] proposition that "a moral obligation is sufficient consideration to support an express promise"[54] had quite simply inaccurately articulated the valid principles.[55]

Rather, the court concluded that for the subsequent promise to be enforceable, an additional requirement had to be proven.[56] The Court identified the specifics of the additional requirement that had to be met.[57] It explained that "upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise."[58] More particularly, the facts of successful cases in this regard were readily identifiable.[59]

However, Professor Teeven has suggested that "[t]he *Mills v. Wyman* court ignored earlier English precedents allowing recovery on promises similar to its facts."[60] The Massachusetts court certainly did not seem to find these decisions persuasive. Professor Teeven has also referred to some suggestion "that the rejection of Mansfieldian flexibility in some American jurisdictions like Massachusetts ... may have been due to the split among American judges between Federalists and Jeffersonians, the latter although supportive of natural law solutions were opposed to what was perceived as uncontrollable judicial prerogative."[61]

It may be conceded that, in deciding *Webb v. McGowin*,[62] the Alabama courts may very well have implemented some judicial prerogatives.[63] These prerogatives may actually have been rela-

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[53] Rather than a general proposition, it is instead an exception and a minority position. *See infra* Part IV.

[54] *Mills*, 20 Mass. at 209.

[55] *Id.* at 209-10.

[56] *Id.* at 209.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 209-10. ("The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preexisting equitable obligations may be enforced; there is good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo* . . . .").

[60] *See* Teeven, *Moral Obligation Principle*, *supra* note 20, at 613.

[61] *Id.* at 614.

[62] 168 So. 196, 198 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

[63] *Id.*

tively restrained. Professor Teeven's observations may very well be quite astute. However, let us focus our attention on the facts of the two cases of *Mills v. Wyman* and *Webb v. McGowin.* When we do so, and we compare the facts of the two cases side by side, a particular story emerges. In actuality, *Mills v. Wyman*[64] presented a set of facts that made the decision easier - for the Massachusetts courts to resolve - than the facts of *Webb v. McGowin*[65] did for the Alabama courts to decide. A more valid and accurate explanation for the *Mills v. Wyman* decision may not be inflammatory at all. It may be more practical, more mundane actually. We should not lose sight of the differences in the facts of the two cases. Critical facts of the two cases do indeed differ.[66] First, and perhaps most importantly, McGowin made the promise that the Alabama courts enforced in *Webb v. McGowin.* He was the actual recipient of the benefit conferred by Webb.[67]

In contrast, the promise sought to be enforced by Mills in *Mills v. Wyman,* was a promise made by Seth Wyman, a *non-recipient* of the benefit conferred by Mills.[68] It is unknown, and therefore remains in the realm of speculation, whether the Massachusetts courts would have reached a decision that mirrors *Webb v. McGowin* in other circumstances. At least two sets of hypothetical circumstances merit discussion. First, if Seth Wyman[69] had been the actual recipient of the benefits conferred by Mills, one may wonder whether the decisions in both *Mills v. Wyman* and *Webb v. McGowin* would have been the same as the decision which the Alabama courts reached in *Webb v. McGowin.*

In the second hypothetical, what if Levi Wyman - instead of his father Seth Wyman - had made the promise of payment to Mills. After all, at the time when Seth Wyman made his promise to pay Mills for Levi's maintenance and care, Levi was no longer an infant. Levi was already an adult. No legal or moral obliga-

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[64] 20 Mass. 207 (Mass. 1825).

[65] 168 So. at 198.

[66] MARVIN MINSKY, THE SOCIETY OF MIND 238 (1985) ("The ability to consider differences between differences is important because it lies at the heart of our abilities to solve new problems.").

[67] *See Webb,* 168 So. at 198.

[68] *Mills,* 20 Mass. at 209.

[69] Seth Wyman's son, Levi Wyman, was already a twenty-five year old adult and no longer a legal minor (infant) dependent upon his father. Therefore, Seth Wyman acted for the care and maintenance of his son.

tions of support for Levi were owed to him by his father Seth. As an adult of full contractual capacity, a promise by Levi would also have entailed facts similar to those of *Webb v. McGowin*. Levi, as an adult, would have been promising to pay for expenses incurred for his *own maintenance and care*. One may also speculate about the decision that the Massachusetts courts may have reached on such facts. On the hypothetically factual record, conceivably, the decisions in both *Mills v. Wyman* and *Webb v. McGowin* may have been congruent. The *Mills v. Wyman* decision may have been the same as the decision that the Alabama courts reached in *Webb v. McGowin*.

In *Mills v. Wyman*, the benefits - conferred by Mills - were conferred on a third party and not on the promisor. Section 86 of the Restatement (Second) of Contracts does not treat promises to pay for benefits conferred on third parties,[70] on the same footing as promises made by the promisor to pay for benefits conferred on the promisor himself. As a result, this difference in treatment has subjected the section to a measure of criticism,[71] joined by a number of commentators.[72]

In any event, the Massachusetts Court concluded that a promise based on a moral obligation is enforceable only when the moral obligation was itself previously enforceable.[73] The Massachusetts Court adopted the majority stream[74] of American precedent with respect to the doctrine of consideration rather than the minority stream. The court would undoubtedly have gleaned support from much earlier authorities, such as *Wennall v. Adney*.[75] *Wennall* is authority for the proposition that promises based on moral obligation are binding only to the extent that they *revive*[76]

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[70] This situation is present in *Mills v. Wyman*.

[71] *See* Kevin M. Teeven, *Conventional Moral Obligation Principle Unduly Limits Qualified Beneficiary Contrary to Case Law*, 86 MARQ. L. REV. 701, 727 (2002) ("Section 86 may seem a big step past the archaic position of the first *Restatement*, but a closer look shows that ... section 86 does not cast its net very wide, in that it does not stray from the ambit of the *Wennall* note's demand that a benefit must flow directly to the promisor.") (citations omitted).

[72] *Id.* at 727-50.

[73] *Mills*, 20 Mass. at 212.

[74] *Id.* at 211.

[75] Wennall v. Adney, (1802) 127 Eng. Rep. 137 (K.B.).

[76] *See infra* Part III.

antecedent, legally enforceable promises, for which the enforcement was barred by operation of law.[77]

The New York case of *Pershall v. Elliott*[78] is also significant in this context. In *Pershall*, the court held that "[t]he doctrine that past consideration is no consideration is well recognized and universally enforced."[79] The court indicated that a previous moral obligation was insufficient as valid consideration to support an action to enforce an executory contract. It drew an irrefutable distinction between moral obligations and equitable obligations. The court explained that an equitable obligation rests on an actual duty, which may be legally unenforceable. Valid examples of such equitable obligations would be an infant's executory contractual obligations, or debts barred by the statute of limitations or debts barred by bankruptcy statutes. It explained that a mere moral or conscientious obligation, detached from a prior legal or equitable claim, did not rise to the level of a legal duty. Mere moral or conscientious obligations were therefore disqualified from sufficing as valid consideration to support a promise.[80]

The majority stream of authority is unambiguous in this regard. A promise made in recognition of a moral obligation fails to satisfy the orthodox doctrine of consideration. This doctrine mandates that the law will enforce a promisor's promise if the promisor sought and received something in exchange for his own promise.[81] Comment b. of section 71 of the Restatement (Second) states "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing

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[77] *See Wennall*, 127 Eng. Rep. at 140 n.2 ("An express promise...as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."). Not all commentators agree on the efficacy of the Reporter's Note to *Wennall v. Adney*. *See e.g.* Teeven, *Moral Obligation Principle*, *supra* note 20, at 598 ("In the Note to *Wennall v. Adney*, the Reporters denied that the above cited precedents enforced promises on past moral obligation; they justified the rulings for the plaintiffs by *disingenuously arguing that, despite the absence of evidence in the reports*, the defendants must have made requests prior to the plaintiff's actions.") (emphasis added).

[78] 249 N.Y. 183 (1928).

[79] *Id.* at 188.

[80] *Id.*

[81] RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71 (1981).

of the consideration."[82] The requirement of bargain and exchange therefore inevitably excludes promises based on moral obligations.[83] This inevitable conclusion does not seem to be perceived as morally degenerate or morally fatal.[84]

Let us focus more specifically on the enforcement of promises based upon conceptions of moral obligation. Certainly, it is conceded that such moral obligation - on the part of the promisor - may need to be the product of some earlier action of the promisee. Additionally, that earlier action may also need to have induced the promisor's promise. Nevertheless, that earlier action is legally incapable of meeting the requirement of valid consideration - based upon the criteria of orthodox consideration - for the promisor's promise. The promisee's earlier action did not *induce* the promisor's promise.[85] "The doctrine that past consideration is no consideration is well recognized and universally enforced."[86]

The well-known North Carolina case of *Harrington v. Taylor*[87] is also pertinent in this regard. In *Harrington*, Taylor assaulted his wife who fled to Harrington's house for refuge.[88] The next day, Taylor gained access to the house and launched a further attack on his wife.[89] Taylor's wife knocked him to the floor of the house with an axe. She could probably have succeeded in injuring him very seriously or decapitating him with the axe, as he lay defenseless on the floor.[90] However, the Good Samaritan intervention of Harrington saved Taylor from serious injury or possibly

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[82] *Id.* at § 71 cmt. b.

[83] Steven Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1056 (1992). *But see* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 719 (2007) [hereinafter Shiffrin, *Divergence*] ("[T]he culture and practices facilitated by law should be compatible with a culture that supports morally virtuous character. Even supposing that law is not responsible for and should not aim to enforce virtuous character and interpersonal moral norms, the legal system should not be incompatible with or present serious obstacles to leading a decent moral life.").

[84] *See* Shiffrin, *Divergence*, *supra* note 83, at 719. ("A principled requirement that the law facilitate a culture that is compatible with moral virtue need not go so far as to *enforce* moral virtue.") (emphasis added).

[85] Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 453-56 (1937).

[86] SAMUEL WILLISTON, THE LAW OF CONTRACTS § 142, at 318 (1920).

[87] 36 S.E.2d 227, 227 (N.C. 1945).

[88] *Id.*

[89] *Id.*

[90] *Id.*

death. As Taylor's wife swung the axe down, Harrington caught the axe in her hand.[91] This swift action by Harrington probably saved Taylor's life. This selfless and heroic act by Harrington may have indeed saved Taylor's life, but, it badly mutilated Harrington's hand.[92] Subsequently, Taylor orally promised Harrington that he would pay her damages, presumably as compensation for saving his life. However, after paying a small sum, he failed to make any further payments.[93] Harrington sued Taylor. The North Carolina Supreme Court affirmed a judgment that sustained Taylor's demurrer that Harrington's complaint had failed to state a valid cause of action.[94] Any "consideration" for Taylor's promise was in the past. It was therefore not valid consideration at all.

The Utah case of *Manwill v. Oyler*, is also helpful.[95] In *Manwill*, the court reaffirmed that a mere moral obligation is legally incapable of meeting the requirements of valid consideration for the formation of a valid and enforceable contract.[96] The Court declined to adopt the minority viewpoint or a substantively similar conception[97] that may be gaining some attention elsewhere.[98]

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[91] *Id.*

[92] *Harrington*, 36 S.E.2d at 227.

[93] *Id.*

[94] *Id.* ("The question presented is whether there was a consideration recognized by our law as sufficient to support the promise. The Court is of the opinion that, however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.").

[95] 361 P.2d 177 (Utah 1961).

[96] *Id.* at 178 ("The difficulty we see with the doctrine is that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration. This is so, first because in nearly all circumstances where a promise is made there is some moral aspect of the situation which provides the motivation for making the promise even if it is to make an outright gift. And second, if we are dealing with moral concepts, the making of a promise itself creates a moral obligation to perform it . . . . The principle that in order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request is firmly implanted in the roots of our law.") (citations omitted).

[97] *Id.* Referred to as the "material benefit rule."

[98] *Id.* at 178-79 ("In urging that the moral consideration here present makes a binding contract, plaintiff places reliance on what is termed the 'material benefit rule' as reflecting the trend of modern authority. The substance of that rule is that where the promisors . . . have received something from the promisee . . . of value in the form of money or other material benefits under such circumstances as to create a moral obligation to pay for what they received, and later promise to do so there is consideration for such promise. But

III. VOLUNTARILY REACTIVATED "SUSPENDED LEGAL ANIMATION"[99] CONTRACTS AND THE MORAL OBLIGATION PRINCIPLE – THE HYBRIDS

Continuing[100] Rational[101] Obligation Instances

The class of cases referred to as "[t]he most common application of moral consideration,"[102] stands apart.[103] This class of cases may be referred to as "continuing rational obligation"[104] instances, rather than being grouped under the moral obligation[105] rubric. The class of cases consists of the following promises. They are promises to pay, for example, a debt discharged in bankruptcy.[106] Other examples consist of promises to honor legal obli-

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even the authorities standing for that rule affirm that there must be something beyond a bare promise, as of an offered gift or gratuity. The circumstances must be such that it is reasonably to be supposed that the promisee . . . expected to be compensated in some way therefor [sic.].") (citations omitted).

[99] "Suspended legal animation" is a term coined by Professor Leacock to reflect the fact that the *active* legal viability and enforceability of these contracts are statutorily disabled (eliminated for the time being) by the pertinent statutes.

[100] Continuing, because their legal efficacy escapes from *permanent* elimination in spite of the legislative relief provided by the (i) bankruptcy, (ii) limitations, and (iii) infancy-protection statutes.

[101] Rational, because their valid survival satisfies a societal sense of fairness, in light of the fact that these obligations were entirely valid when *consensually created* initially.

[102] HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 5:17 (3d ed. rev. 2007), MODCON § 5:17 (Westlaw database updated March 2009).

[103] *See* CALAMARI AND PERILLO ON CONTRACTS, *supra* note 10, at 202 ("For a considerable time it had been held that a promise to pay a debt discharged in bankruptcy, barred by the statute of limitations, or otherwise rendered unenforceable by operation of law is enforceable without [additional] consideration.") (footnote omitted).

[104] A term coined by Professor Leacock.

[105] *See* 11 FLA. JUR. 2D *Contracts* § 91(2009) ("Moral Obligation: The general rule is that a mere moral obligation, without anything more, is not sufficient consideration for an executory promise. However, it is now generally held that where the promisor originally received from the promisee something of value under such circumstances as to create a moral obligation on the part of the promisor to pay for what he or she received, even though there was no antecedent or contemporaneous promise or request, and no legal liability at any time prior to the subsequent express promise, the value already received provides adequate consideration. This is known as the 'material benefit' rule. Thus, a moral obligation to pay a debt discharged in bankruptcy is a sufficient consideration for a new promise to pay it.") (citations omitted).

[106] *See* Trueman v. Fenton, (1777) 98 Eng. Rep. 1232, 1235-36 (K.B.) ("[A]ll the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience . . . . A bankrupt . . . is held to be discharged by his certificate from all debts

gations that have been otherwise rendered unenforceable by operation of law.[107] Such promises also fall within this class of cases. Additional examples are promises to honor a legal obligation that has been barred by the statute of limitations;[108] and promises made by someone who has attained full contractual capacity, to honor a contractual obligation incurred during her or his infancy.[109]

Silva v. Robinson is helpful in this respect.[110] It provides a valid example of the genre of promises embedded within the required circumstances that qualify for the imposition of liability[111] by the courts.[112] In *Silva*, Silva owed a debt to Robinson. Silva later declared bankruptcy and the pertinent debt was discharged.[113] Subsequently, Silva executed a note to Robinson promising to repay the amount of the debt that had been discharged in Silva's bankruptcy proceedings.[114] As the court explained, "[w]hen a debt has been discharged in bankruptcy the moral obligation continues precisely the same as though no discharge has been made. The obligation is a continuing one, and continues as long as the debt remains unpaid or is otherwise released. . . . That moral obligation is a sufficient consideration for a new promise *whenever the promise may be made*. . . . [T]he only question is, [i]s there a legal and enforceable new promise?"[115] Silva's note, which he executed in order to satisfy the discharged debt, is a helpful example of what

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due at the time of the commission; but still he may make himself liable by a new promise.").

[107] *E.g.*, Legal obligations the enforceability of which has been *mandatorily disabled* by statute.

[108] *See, e.g.*, *Trueman*, 98 Eng. Rep. at 1235 ("[A]ll debts barred by the Statute of Limitations . . . are due in conscience: therefore, though barred by law, they shall be held to be revived and charged by . . . [t]he slightest acknowledgement [which] has been held sufficient.").

[109] *See id.* at 1234 ("[L]ike every other debt which a man is bound in conscience to discharge . . . where a man, after he comes of age, promises to pay a debt contracted during his minority [he is liable for it].").

[110] 156 So. 280 (Fla. 1934).

[111] Or rather, the *reimposition* of *active* legal liability for the earlier "suspended legal animation" contracts.

[112] In other words, the reactivation - by the courts - of the *active* legal viability and enforceability of these contracts.

[113] *Silva*, 156 So. at 281.

[114] *Id.*

[115] *Id.* (citing Merchs.' Protective Ass'n v. Popper, 204 P. 107, 110 (Utah 1922)) (emphasis added).

suffices as evidence of a new promise that is legally enforceable based upon the moral obligation principle.[116]

With respect to the *Webb v. McGowin* decision, the promise made by McGowin to Webb is substantively similar to the promise made by Silva to Robinson. Silva's promise was evidenced in the form of the note that he executed to Robinson. The two factual situations are sufficiently analogous to warrant a similar legal outcome. McGowin had a moral obligation to compensate Webb for his heroic acts which saved McGowin from serious injury and possibly saved McGowin's life. This moral obligation continued until McGowin's death. Before making his promise, it is conceded that McGowin would *not* have been *legally* obligated to pay Webb anything at all. This matches Silva's freedom from any legal obligation to repay the debt to Robinson which had been discharged in Silva's bankruptcy. However, once McGowin[117] made his promise, he became liable to compensate Webb based upon the minority jurisdiction moral obligation principle of consideration.

The cases of (i) debts discharged in bankruptcy,[118] (ii) obligations that have become barred by the statute of limitations,[119] and (iii) promises, by someone of full contractual capacity, to honor a contractual obligation incurred during infancy[120] are indeed in a class by themselves. They are enforced by the courts in both majority and minority stream states. They are therefore hybrids. They stand apart because the cases represent instances where an orthodox contract[121] *originally* existed. The cases implicate facts where, originally, all the requirements needed to establish the fundamentals of valid consideration were proven at the initial trials. Their original *enforceability* is statutorily suspended

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[116] *See id.* at 281-82 (Fla. 1934).

[117] *Id.* at 281.

[118] *See* Trueman v. Fenton, (1777) 98 Eng. Rep. 1232, 1235-36 (K.B.); *see also supra* text accompanying note 106.

[119] *See id.* ("[L]ike every other debt which a man is bound in conscience to discharge . . . [t]he slightest acknowledgement is sufficient to revive a debt barred by the Statute of Limitations.").

[120] *See id.* at 1234; *see also supra* note 109 and accompanying text.

[121] See Carroll v. LJC Defense Contracting, Inc., No. 2070993, 2009 WL 1353266, at *5 (Ala. Civ. App. May 15, 2009) ("The elements of a valid contract are 'an offer and an acceptance, consideration, and mutual assent to terms essential to the formation of a contract.'") (internal quotation omitted) (citations omitted).

in a form of "suspended legal animation."[122] However, their original *existence* cannot be eradicated. This formulation has been referred to as "[t]he competing – and less satisfactory – explanation."[123] It is perceived[124] as less satisfactory than the moral obligation explanation.[125]

This class of cases is usually classified under the rubric of moral obligation[126] because of the statutorily imposed barriers to ordinary enforcement. Actually, the *policies* underlying legislative enactments of (i) the bankruptcy statutes, (ii) the statutes of limitation, and (iii) the statutes that protect infants from liability for their contractual obligations incurred during infancy are not morally underpinned at all.[127] These statutory barriers are the legal manifestation of policy value-judgments each of a different kind altogether. These value-judgments represent a public policy of imposing economic finality, in each of these contexts, in order to attain legal closure. In essence, these statutes - enacted to put the pertinent legal barriers in place - consist of an exercise of the constitutional power allocated to the legislative branch of government.

Substantively, the policies underlying these statutory enactments are wholly unrelated to the doctrine of consideration under contract law. These policies are as follows. First, with respect

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[122] Essentially, a form of "suspended legal animation" of the *enforceability* of the originally valid contract to which the pertinent statute applies. *See supra* text accompanying note 99.

[123] *See* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 86 (West Publishing Co. Concise Edition 8th ed., 2006) (1946) [hereinafter FULLER & EISENBERG] ("The competing – and less satisfactory – explanation for these cases ran along the following lines. In all these situations the creditor really has, prior to the new promise by the debtor, not merely a *moral* claim, but a *legal* claim. The legal claim is, for the time being, unenforceable, since the debtor may assert the defense of infancy, the statute of limitations, or the discharge in bankruptcy. When the new promise is made, the effect is not to create a legal right in the creditor where none existed before (for that would require consideration), but rather to remove from the hands of the debtor a defense against the assertion of a legal right that already exists.") (emphasis in the original).

[124] *Id.*

[125] *Id.*

[126] *See id.* ("There were two competing lines of explanation. The first explanation was that in all these cases there exists from the beginning a moral obligation to make compensation for a benefit conferred, which supports and serves as consideration for the later promise.").

[127] For the *actual policy underpinnings of these legislative enactments, see infra, notes* 128 (bankruptcy statutes), 129 (statutes of limitations) and 130 (infants/minors statutes) and the policy underpinnings discussion in the text. In some states, statutes adding additional categories may also have been enacted.

to bankruptcy, "'[o]ne of the primary purposes of [the federal bankruptcy law] is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'"[128] The policy and its motivation are unmistakably economic in nature. They are not doctrinally integral to the contractual doctrine of consideration at all.

Next, the policy value-judgments underpinning statutes of limitations may be usefully analyzed as well. Statutes of limitations rest on a policy-footing that differs from that of bankruptcy. With regard to the applicable policy, "[s]tatutes of limitations help ensure that the search for truth is not impaired by stale evidence or the loss of evidence, and that defendants are guaranteed a point of repose for past deeds after a reasonable period."[129] The doctrine of consideration is not doctrinally implicated in the quest to achieve these goals either. Administrative efficiency in court proceedings may be a more accurate articulation of the objective pursued by these policies.

Thirdly, with respect to contracts entered into by infants,[130] "a minor enjoys an almost absolute right to disaffirm a contract entered into either by the minor or by the minor's parent on behalf of the minor . . . ."[131] The policy that supports this right is confirmed and unequivocal. It protects children from economic abuse by adults.[132] It is not a function of the doctrine of consideration at

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[128] In re Perrotta, 406 B.R. 1, 7 (Bankr. D. N.H 2009) (internal quotation omitted) (citations omitted).

[129] Childs v. Haussecker, 974 S.W.2d 31, 38-9 (Tex. 1998).

[130] Also defined in contract law as minors. *See* Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968) ("The law governing agreements made during *infancy* reaches back over many centuries. The general rule is that 'the contract of a *minor* . . . is either void or voidable at his option.'") (citations omitted) (emphasis added).

[131] Shields v. Gross, 448 N.E.2d 108, 112 (N.Y. 1983) (Jasen, J. dissenting) (citations omitted).

[132] *Id.* at 113 ("[S]uch a broad right has evolved as a result of the State's policy to provide children with as much protection as possible against being taken advantage of or exploited by adults . . . This right is founded in the legal concept that an infant is incapable of contracting because he does not understand the scope of his rights and he cannot appreciate the consequences and ramifications of his decisions. Furthermore, it is feared that as an infant he may well be under the complete influence of an adult or may be unable to act in any manner which would allow him to defend his rights and interests. . . . Allowing a minor the right to disaffirm a contract is merely one way the common law developed to resolve those inequities and afford children the protection they require to compensate for their immaturity.") (citations omitted).

all. It serves what may be perceived as a higher purpose in any rational taxonomy of societal values. It stands above the consideration fray.

The doctrine of consideration is too attenuated in the context of the policies undergirding the statutes that: (i) discharge debts in bankruptcy; (ii) bar the legal enforceability of obligations that have become barred by the statute of limitations; and (iii) protect infants from liability for contractual obligation incurred during infancy. Certainly, the consideration doctrine of moral obligation is used in this context. It is the rubric under which the promises, that reactivate the legal obligations that have been suspended in these classes of cases, are discussed and analyzed. In actuality, however, the requirement of valid consideration was satisfied, when the contracts in issue were *originally created.* Rationally, there is no legal requirement of an *additional*[133] exchange of consideration.[134] A promise[135] of payment[136] made *subsequent* to the statutorily created barriers simply annihilates these statutory barriers. Such a promise, when made, thereupon "reactivates" the legal obligations[137] created by the original contract. This reactivation reinstates the legal enforceability of these contracts. It releases their suspended legal animation.

In this sense, conceptions of moral obligation do not genuinely play a decisive role at all. It is not really a very secure basis on which to advocate for enforcement of this class of promises. In fact, the foundation for such enforcement rests on a different conception. It is the irrefutable reality that in all three of these categories of enforcement of subsequent promises, it is the *release* of the suspended legal animation of these enforcement rights that is decisive. Valid consideration already existed for the initial creation of the contract rights in issue. Reactivation of the legal power to enforce such rights is the genuine focal point of legal contention in such cases.

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[133] *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

[134] *Id.*

[135] This is the promise by the *original* obligor on the initial contract.

[136] Or also, a promise to otherwise honor the original contract.

[137] These obligations eliminate the *enforcement-disability* mandated by: (i) the bankruptcy statutes, (ii) the statutes of limitations and (iii) the statutes that protect infants from liability for their contractual obligations incurred during infancy.

Moreover, the conception of waiver[138] as an explanation for the restoration of legal enforcement is not entirely satisfactory. This restoration of legal enforcement is based upon the making of the subsequent promises. In this respect, fundamental substantive differences exist between the doctrine of waiver, on the one hand, and on the other, promises which reactivate and therefore restore legal liability in the three categories of cases under discussion. These differences are as follows.

Of course, it is certainly conceded that waivers do not necessarily require consideration in order to be legally valid.[139] However, provided that notice of retraction is given, subject to some exceptions, waivers can generally be retracted.[140] In contrast, new promises[141] to honor statute-barred obligations - that are made by persons protected from these statute-barred debts - bestow upon the promisees a potent new legal right. Furthermore, this legal right[142]- to enforce these reactivated obligations - cannot be retracted by the promisors. Once the promise to honor the statute-barred obligation is made, the reactivation of the barred obligation becomes valid and *remains* valid.

Two consequences follow. First, the promise to honor the statute-barred debt cannot be retracted. Secondly, the reactivation of the pertinent statute-barred obligation cannot be retracted. Rather, new barriers to enforcement would need to emerge, or be created. The creation of a new barrier to enforcement would re-

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[138] *See* FULLER & EISENBERG, *supra* note 123, at 86 ("[I]n the case of the debt barred by the statute of limitations and the discharged bankrupt, it was said that the new promise of the debtor "waives" the defense of the statute or the discharge . . . .").

[139] *See* Cole Taylor Bank v. Truck Ins. Exch., 51 F.3d 736, 739 (7th Cir. 1995) ("[T]he efficacy of a waiver of a contractual right is generally *not* thought to require . . . consideration . . . .") (emphasis added).

[140] *See* 67 Am. Jur. 2D SALES § 324 (2009) ("A party who has made a waiver affecting a portion of the contract not yet performed may retract the waiver by reasonable notification to the other party, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.") (citation omitted).

[141] This is a contract made subsequent to the statutory imposition of the enforcement-barriers.

[142] This legal right is bestowed when a promisor makes a subsequent promise to the promisee to honor a statute-barred obligation.

quire, for example, a new discharge in bankruptcy[143] or a new running of the statutory period of the statute of limitations.[144]

With respect to waivers, in order to eliminate a waiving party's power of retraction, valid consideration needs to be provided by the recipient of the "waiver." In contrast, additional valid consideration - furnished by the unpaid creditor - is *not* required in order to validate the subsequent promises[145] of the discharged debtors in bankruptcy, or barred obligees.[146] Such subsequent promises, once made, are enforceable entirely without additional new consideration.

Conceptions of moral obligation may therefore be reserved for the discussion of factual instances where valid consideration never existed initially. In those instances, the enforcement-power of moral obligation could be fully assessed. Such enforcement-power could then be activated and applied in factually appropriate circumstances. These circumstances might include situations where plaintiffs pursue quests to attain enforcement of promises that were *never* supported by orthodox consideration in the first place.

IV. MINORITY STREAM OF PRECEDENT

The principle that in order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request is firmly implanted in the roots of our law.[147]

This statement of legal principle quite accurately articulates the majority position in the contract law principles of the forty-nine[148] American common law jurisdictions.[149]

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[143] This is referring to the obligation initially discharged in bankruptcy.

[144] This new period would run from the date when the promise to honor the statute-barred obligation was made.

[145] This form of consideration would be used to pay the debt discharged in bankruptcy or barred by the statute of limitations.

[146] *E.g.*, Barred by the statute of limitations.

[147] Manwill v. Oyler, 361 P.2d 177, 178 (Utah 1961).

[148] *E.g.*, All American states other than Louisiana.

[149] *See supra* Part II.

A. Statutory Modification of the Common Law

However, the legislature may modify or abrogate the common law.[150] Historically, the role of the legislature in reforming the common law of contract is actually quite extensive.[151] However, the legislature and the judiciary respect each other as coequal branches of government.[152] Therefore, when and where the legislature has constitutionally been allocated the legal power to statutorily modify, or abrogate the common law, it exercises this power with restraint.[153] In appropriate circumstances, a statute may therefore lawfully enact that "past consideration" or moral obligation is a valid basis for the enforcement of a promise.[154] Indeed, in the

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[150] Under the separation of powers doctrine, the courts (both federal and state) are not constitutionally empowered to nullify the effect of a valid statute by judicial interpretation: *See* (in the federal context, which is equally applicable in the state context) *e.g.*, Lichter v. U.S., 334 U.S. 742, 779 (1948) ("[T]he respective branches of the government [must] keep within the powers assigned . . . by the Constitution."). *See also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 14 (Yale Univ. Press 1921) [hereinafter CARDOZO, JUDICIAL PROCESS] ("The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges.").

[151] *See* Kevin M. Teeven, *A History of Legislative Reform of the Common Law of Contract,* 26 U. TOL. L. REV. 35, 35 (1994) ("[L]egislation played [a role] in shaping the common law of contract over the past eight centuries. Studies of the evolution of the common law have tended to overlook the impact of legislation on the field. The notion that common law contract is almost solely judicially inspired needs to be revised in light of the extensive contributions that statutory law has made to the field.").

[152] *See* Vigil v. Franklin, 103 P.3d 322, 327 (Colo. 2004) ("Our primary duty in construing statutes is to give effect to the intent of the General Assembly . . . . If a statute is clear and unambiguous on its face, then we need not look beyond its plain language . . . and 'we must apply the statute as written . . . .'") (citations omitted). See also Prego v. City of New York, 147 A.D.2d 165, 170 (N.Y. App. Div.) ("'A statute must be construed according to the ordinary meaning of its words and resort to extrinsic matter . . . is inappropriate when the statutory language is unambiguous and the meaning unequivocal. Where . . . a statute is clear, a court should not attempt to cure an omission in the statute by supplying what it believes should have been put there by the [l]egislature for the judiciary should not substitute its wisdom for that of the [l]egislature.'") (citations omitted).

[153] *See* Vigil, 103 P.3d at 327 ("[W]here the interaction of common law and statutory law is at issue, we acknowledge and respect the General Assembly's authority to modify or abrogate common law, but can only recognize such changes when they are clearly expressed. '[A] statute, general in its terms, is always to be taken as subject to ... the common law. [S]tatutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication. [W]hen the legislature speaks with exactitude, we must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others.'") (citations omitted) (emphasis added).

[154] *See, e.g.*, Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 605 n.51 (1968).

statutorily specified circumstances, where the promisor has made such a promise in a signed writing, the New York legislature has made such promises enforceable:

A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.[155]

Not all legislatures in the United States have statutorily enacted the equitable ameliorating doctrine of moral obligation. However, in the commercial law arena, all forty-nine common law jurisdictions[156] have enacted provisions with respect to contracts for the sale of goods governed by Article two of the Uniform Commercial Code. Under this Article, the statutory provisions applicable to "firm offers" have amended the doctrine of consideration in the specific instances enumerated. In those circumstances where the statutory requirements are satisfied, an offeror is statutorily empowered to make a firm offer, which binds such an offeror. Such offerors are legally bound, without any mandatory requirement of valid consideration.[157] No further value needs to be conferred upon the offerors in order to make such firm offers binding on such offerors.[158]

B. Judicial Embrace of the Moral Obligation Principle

In the states that have *not* enacted the equitable ameliorating doctrine of moral obligation that the New York legislature has statutorily mandated,[159] only a minority of states[160] - through the

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[155] N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 2001). *See also* Robert Braucher, *The Commission and the Law of Contracts,* 40 CORNELL L.Q. 696, 700-01 (1955).

[156] Louisiana is the only non-common law jurisdiction.

[157] This vindicates Lord Mansfield's commercial law decision based upon the Law Merchant centuries earlier in Pillans v. Van Mierop, (1765) 3 Burr. 1663. *See infra* note 329 and accompanying discussion.

[158] *See* WILLIAM D. WARREN & STEVEN D. WALT, COMMERCIAL LAW: SELECTED STATUTES 46 (Foundation Press 2009); UCC § 2-205 ("An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.").

[159] *See supra* note 155.

judicial branch – have embraced it.[161] In the minority of states that have done so, *Webb v. McGowin*[162] is a flagship case.[163] The *Webb* decision reflects the societal value-judgments made by the Alabama judiciary. For a state, like a man,[164] may step to the beat of a different drummer. Indeed, the decision represents the commanding heights of the State's social policy[165] with respect to the doctrine of consideration. "Among common law countries, American jurisdictions are unique in recognizing this ameliorating doctrine . . . . [T]he development and scope of this doctrine [are] buried in the centuries of case law surrounding the tension between the past consideration rule and the moral obligation principle."[166]

Of course, it would be inaccurate and legally erroneous to propose that all conferment of value will create a moral obligation under contract law.[167] *Webb* clarifies the legal contours of the eq-

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[160] *See* CALAMARI AND PERILLO ON CONTRACTS, *supra* note 12.

[161] *See, e.g.*, Homefinders v. Lawrence, 335 P.2d 893, 897 (1959). ("[A] consideration, which will support a subsequent executory promise, may arise from an agreement which, prior to the promise, was unenforceable because of the Statute of Frauds, *or may arise from the moral obligation of that agreement*, or from the antecedent receipt thereunder of material benefit by the promisor. Such rule has received recognition by the appellate courts of California, Indiana, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Pennsylvania and South Dakota.") (citation omitted) (emphasis added).

[162] Webb v. McGowin, 168 So. 199 (Ala. 1936). The case continues to serve as a teaching-tool in the major Contracts case-law books in the U.S.; *see supra* note 5 and accompanying text.

[163] *See In re* Rice, 18 B.R. 562, 565 (Bankr. N.D. Ala. 1982) ("Sometimes Courts . . . refrain from a strict construction to prevent grave injustice and technical miscarriage. See the Alabama case of *Webb v. McGowin* . . . .").

[164] *See* HENRY DAVID THOREAU, WALDEN 502 (The Riverside Press Cambridge 1854). ("If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away.")

[165] *See* SELECTED WRITINGS OF BENJAMIN NATHAN CORDOZO, *supra* note 44, at 274.

[166] Teeven, *Moral Obligation Principle*, *supra* note 20, at 586.

[167] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 136 (6th ed. 2003) [hereinafter Posner, *Economic Analysis*] ("[S]uppose that a man stands under my window, playing the violin beautifully, and when he has finished knocks on my door and demands a fee for his efforts. Though I enjoyed his playing I nonetheless refuse to pay anything for it. The court would deny the violinist's claim for a fee – however reasonable the fee might appear to be – on the ground that, although the violinist conferred a benefit on me (and not with the intent that it be gratuitous), he did so officiously. Translated from legal into economic terminology, this means he conferred an unbargained-for benefit in circumstances where the costs of a voluntary bargain would have been low. In such cases the law insists that the voluntary route be followed – and is on firm economic grounds in doing so.") (citations omitted). Arguably, if the recipient of the benefit had made a promise to pay the violinist, and had afterwards reneged on this promise, it would also *not* be

uitable moral obligation principle. In *Webb*,[168] the Alabama Court of Appeals embraced the ameliorating doctrine.[169] The Supreme Court of Alabama did so as well.[170] The facts of *Webb* are unique. Webb, an employee of a lumber company, was engaged in his ordinary duties on his employer's behalf. As part of the duties assigned to him by his employer, he was in the course of dropping a pine block - weighing approximately seventy-five pounds – from the upper floor of his employer's mill No. 2 where he worked, to the ground below. McGowin happened to be on the ground below, directly under the pine block. He was therefore in danger of death or serious injury from the block, if it had struck him as it fell.

Based upon the Court of Appeals' adoption of the questions for decision as set out in the appellant's brief,[171] Webb took the only safe and reasonable course of action possible in the circumstances.[172] His swift action was courageous and unselfish. Acting spontaneously and without hesitation, Webb held on to the block and fell with it. This enabled him to divert the block from striking McGowin. Webb's diversion of the block prevented any injury to McGowin, and indeed, probably saved his life.[173] Unfortunately,

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enforced by the courts. The moral obligation principle would probably *not* be extended by the courts to such a promise, because no moral or equitable principles would convincingly justify enforcement of such a promise.

[168] Webb v. McGowin, 168 So. 196, 198 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

[169] *Id.* at 198. ("It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.") (citations omitted); *see also* Slayton v. Slayton, 315 So. 2d 588, 590 (Ala. Civ. App. 1975) ("[A] moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.").

[170] Webb v. McGowin, 168 So. 199, 199-200 (Ala. 1936) ("We agree with that court that if the benefit be material and substantial, and was to the person of the promisor rather than to his estate, it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay.").

[171] *See* Webb v. McGowin, 168 So. 196, 196 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

[172] *See id.* at 196-97 ("The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such a way that McGowin was not injured.").

[173] *Id.* at 197.

Webb's action in preventing injury to McGowin caused permanently disabling injuries to Webb. He was badly crippled and unable to do any further mental or physical work for the rest of his life.[174]

McGowin therefore promised Webb payments to provide care and maintenance for him. McGowin promised Webb that the payments would begin from the date of Webb's injuries. McGowin also promised Webb that the payments would be made every two weeks for the rest of Webb's life. McGowin made these payments as agreed until McGowin died several years later. The payments were then discontinued within a few weeks of McGowin's death. Webb therefore filed suit against the executors[175] of McGowin's estate[176] to recover the unpaid installments that had accrued up to the date of bringing the suit. The Circuit Court, Butler County, ruled against Webb.

Of course, it is acknowledged that when physicians provide medical services in an emergency situation, the law mandates that they be compensated.[177] The legal principle on which this mandate rests is the equitable doctrine of restitution.[178] This doctrine is one

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[174] *Id.*

[175] *Id.*

[176] *Id.* Undoubtedly, the promisor McGowin, if he were still alive, would probably have continued the payments as he had promised. He was therefore not personally adversarial to the action. The estate was adversarial by operation of law, in seeking to marshal and preserve the assets of the estate for the appropriate legatees and devisees as required by law.

[177] *See, e.g.*, Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907). *See also* Posner, *Economic Analysis*, *supra* note 167, at 135 ("A doctor chances on a stranger lying unconscious on the street, treats him, and later demands a fee. Has he a legal claim? The law's answer is yes. The older legal terminology spoke of an implied contract between the physician and the stranger for medical assistance. This idea has been attacked as a fiction, and modern writers prefer to base the physician's legal right on the principle of unjust enrichment. This term smacks of morality, but the cases are better explained in economic terms. The concept of an implied contract is a useful shorthand for an economic approach; it underscores the continuity between issues in express contracts and the issues nowadays treated under the rubric of unjust enrichment.") (citation omitted).

[178] *Cotnam*, 104 S.W. at 165 ("[T]he recovery [is] sustained by a contract by implication of law, but [one] is not right in saying that it is a new rule of law, for such contracts are almost as old as the English system of jurisprudence. They are usually called 'implied contracts.' More properly they should be called 'quasi contracts' or 'constructive contracts.'") (citations omitted).

created by the common law in order to achieve justice[179] and attain societal harmony based upon fairness and economic efficiency.[180] Moreover, the pertinent legal mandate applies even in the absence of any promise - on the part of the patient who is treated, or anyone else - to compensate the physician for providing the pertinent emergency medical services.[181]

Reasoning from these principles generally applicable to physicians[182] and – in appropriate circumstances – also applicable to some other professionals,[183] the Alabama Court of Appeals reversed[184] and remanded the decision.[185] The Supreme Court of Alabama denied certiorari.[186] The tension, between the past consideration rule and the moral obligation principle articulated by Professor Teeven,[187] is therefore manifested in these two decisions of the Alabama Courts. The ameliorating doctrine invoked by the Courts in this case is the power[188] of moral obligation[189] to suffice

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[179] Physicians should be encouraged to take action in emergency settings, without hesitation, in order to provide emergency medical services to members of the public for which such physicians should be compensated.

[180] *See* Posner, *Economic Analysis*, *supra* note 177.

[181] *Cotnam*, 104 S.W. at 165-66 ("A contract implied by law . . . rests upon no evidence. It has no actual existence. It is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right.").

[182] Webb v. McGowin, 168 So. 196, 197 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936) ("Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his life, a subsequent promise by McGowin to pay the physician would have been valid.").

[183] *E.g.*, Nurses. *See Cotnam*, 104 S.W. at 166.

[184] *Webb*, 168 So. at 196-97 ("Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents.")

[185] *Id.*

[186] Webb v. McGowin, 168 So. 199 (Ala. 1936).

[187] *See supra* note 166.

[188] *See* THE BLACKWELL COMPANION TO LAW AND SOCIETY 186 (Austin Sarat, ed., 2004) ("To the extent that judges are concerned with establishing rules that will engender the compliance of the community, they will take account of the fact that they must establish *rules that are legitimate* in the eyes of that community.") (emphasis added).

[189] *See supra* note 161.

as consideration[190] in contract law. This is the moral obligation principle. Court decisions in favor of this principle disagree[191] with a fundamental norm[192] of the doctrine of consideration in contract law. This fundamental norm is that in order to be valid, consideration must be bargained for. Its corollary is the past consideration rule.[193]

Therefore, judicial opinions and statutes that have relied on past consideration or moral obligation as a ground for enforcing a promise,[194] essentially represent a minority view of contract law. This view rejects the orthodox view that such grounds are insufficient to justify enforcement of promises made under such circumstances.[195] The orthodox view enunciates the doctrine that past consideration is no consideration. It continues to represent the overwhelming weight of authority in all forty-nine American common law jurisdictions and has done so since the early common law.[196]

Of course, conceptions of moral obligation can be seen at work in the earlier South Carolina case of *Ferguson v. Harris*.[197]

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[190] With regard to orthodox requirement of consideration. *See* E. ALLEN FARNSWORTH, CONTRACTS 47 (2004) ("Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration."). *See* Teigen v. State, 749 N.W.2d 505 (N.D. 2008) ("In the context of a contract, consideration means any benefit conferred or detriment suffered.") (citations omitted). *See also* Snell v. Salem Ave. Assocs., 675 N.E.2d 555, 561 (Ohio App. 1996) ("Consideration may consist of either a detriment to the promisee or a benefit to the promisor.") (citations omitted).

[191] *See* RONALD DWORKIN, LAW'S EMPIRE 87 (1986) ("Judges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice. When they *disagree* in what I called the theoretical way, *their disagreements are interpretive*. They disagree. In large measure or in fine detail, about the soundest interpretation of some pertinent aspect of judicial practice.") (emphasis added).

[192] *See* Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982) ("Valid consideration . . . must be bargained for. It must induce the return act or promise. To be valid, therefore, the purported consideration must not have been delivered before a promise is executed, that is, given without reference to the promise.") (citations omitted). *See also* Greater Boston Cable Corp. v. White Mountain Cable Const. Corp., 604 N.E.2d 1315, 1317 (Mass. 1992) ("Past consideration does not support a contract.") (citations omitted).

[193] *Greater Boston Cable Corp.*, 604 N.E.2d at 1317.

[194] *See* Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 604-05 (1968-1969).

[195] *Id.*

[196] Randy Sutton, Annotation, *Moral or Natural Obligation as Consideration for Contract*, 98 A.L.R. 5th 353 § 4 (2002) [hereinafter Sutton].

[197] 17 S.E. 782 (S.C. 1893).

In *Ferguson*, a married woman desired to build a home on her own separate estate.[198] She entered into an arrangement with her husband's firm, which was in the business of furnishing building materials.[199] Although she did not at any time authorize her husband to order lumber from plaintiff, nevertheless, when plaintiff delivered some lumber, she accepted it.[200] That lumber was subsequently used in the construction of her separate home.[201] After some time later, plaintiff demanded payment and threatened to file a mechanic's lien. She therefore signed a note promising to satisfy the debt.[202] When she failed to honor the note, plaintiff sued her. She claimed as a defense, lack of valid consideration sufficient to support an enforceable contract.[203]

The Supreme Court of South Carolina disagreed and ruled against her.[204] The Court reasoned that at the time she made the promise to pay - evidenced in the note - she was under a moral obligation to do that which she promised.[205] This moral obligation was sufficient consideration for the promise of payment that she made by virtue of the later note. The court emphasized the importance of determining whether or not an obligation - legal or moral - existed *at the time* when the promise of payment was made.[206] The Court acknowledged that some authorities were of the view that a moral obligation could only suffice as consideration in certain specified instances.[207] One instance was a moral obligation that "rests upon a previous legal obligation, the power to enforce which has been lost by reason of some positive rule of law."[208] The court concluded that such was the present case.

The court reasoned that the moral obligation existed *before* any promise was made. For example, if an individual owed a debt which could no longer be enforced because of a statute of limitations, the debtor would nevertheless still have a moral obligation to

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[198] *Id.* at 785.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Ferguson*, 17 S.E. at 785.
[204] *Id.* at 786.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.* at 785-86.

satisfy the debt by paying it. Any promise to repay the debt, which was made subsequent to the statutory bar to enforcement would be valid. This was the case, even though the debtor was under no legal obligation to pay, as a result of the protection which the debtor enjoyed, on the strength of the statutory bar. The obligation to pay - which was created by the subsequent promise made by the debtor - would be based upon the debtor's moral obligation to pay the debt, *despite* the statutory bar.

In *Ferguson*, the Court therefore held that when the wife accepted the lumber and used it in her construction, she had - at a legal minimum - a moral obligation to pay for it. This moral obligation sufficed as consideration for the subsequent promise which she made to pay for the lumber.[209] The Court declared that "a moral obligation is a sufficient consideration to support an express assumpsit, made after the obligation incurred. It is equivalent to a previous request."[210]

Webb is consistent with *Ferguson v. Harris*. McGowin's moral obligation arose at the moment when his injuries were prevented and when his life may have been saved. Subsequently, McGowin acknowledged that obligation and made his promise to compensate Webb. Recognizing the services provided by Webb, although he was not obligated to make any promises to Webb, McGowin promised to pay Webb for the past services. This was the equivalent of a request by McGowin that such services be provided. It was the legal equivalent of a *prior* request of Webb by McGowin that the pertinent performance be rendered.

C. Webb v. McGowin in Context

Webb v. McGowin[211] brings coherence to and provides intentional direction with regard to the moral obligation principle in the State of Alabama. The court in *Webb v. McGowin* did not apply the doctrine of consideration in an orthodox way. The doctrine that past consideration is no consideration represents the overwhelming weight of authority in the majority of the forty-nine American common law jurisdictions.[212] It has represented the

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[209] *Ferguson*, 17 S.E. at 786.

[210] *Id.* at 786 (quoting McMorris v. Herndon, 18 S.C.L 56, 56 (S.C.App.1831)).

[211] 168 So. 196 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

[212] *See, e.g.*, Sutton *supra* note 196.

weight of authority since the early common law.[213] Under general contract law principles, the agreement between Webb and McGowin would be unenforceable. McGowin did not receive any orthodox consideration for his promise at the time when he made it.[214] Without bargained-for consideration, the promise in *Webb v. McGowin* therefore needs to be distinguished from an unenforceable donative promise.[215]

Some judicial opinions[216] and statutes[217] have articulated past consideration or moral obligation as a ground for enforcing a promise.[218] However, judicial decisions in this regard represent a minority view. This minority view rejects the orthodox majority view of insufficiency.[219] The minority view remains the law of the land in Alabama as exemplified in *Slayton v. Slayton*.[220]

In *Slayton*, an uncle directed funds be removed from his nephew's trust account while his nephew was still a minor.[221] The nephew was unaware of his uncle's withdrawal of the funds until several years later.[222] When the nephew learned of his uncle's secret withdrawals, he requested repayment from his uncle.[223] In response to his nephew's request, the uncle repaid sums equal to

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[213] *Id.*

[214] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) ("To constitute consideration, a performance or a return promise must be bargained for."). *See id.* at § 17(1) (". . . the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). The dominant doctrine in modern contract theory is the bargain principle. *See generally* Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982). Under this principle, the unsolicited acts of a rescuer could not be consideration for a rescuee's subsequent promise because these acts were not given in exchange for rescuee's promise. The general rule is that past performance is not consideration sufficient to create a binding contract.

[215] *See generally* Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1158 (1971). Professor Henderson argues that a gift and promise based on past consideration can and should be distinguished. A promise based on a past benefit is motivated by reciprocity and traditional notions of exchange, while a donative promise or gift is motivated by benevolence.

[216] *See*, CALAMARI AND PERILLO ON CONTRACTS, *supra* note 12.

[217] *See, e.g.*, *supra* note 155.

[218] Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 604-05 (1968-1969).

[219] *Id.*

[220] 315 So. 2d 588 (Ala. Civ. App. 1975).

[221] *Id.* at 589.

[222] *Id.*

[223] *Id.*

the principal that he had withdrawn earlier.[224] However, the nephew was not entirely satisfied with this resolution of the problem and requested that the interest which the money would have earned - had the funds not been withdrawn – should also be repaid.[225] The uncle promised to pay the pertinent sums due as interest, but subsequently failed to keep his promise to pay the requested interest.[226] Instead of making the promised payments of interest, the uncle insisted that he did not owe the nephew any payments beyond the principal that he had withdrawn and had already repaid, so the nephew sued his uncle.[227]

Citing *Webb v. McGowin*, the court ruled that it was clear that the uncle had received a material benefit from the use of the funds which he had withdrawn from his nephew's trust account.[228] The uncle's liability for repayment clearly rested on a moral obligation to repay the funds as well as the interest that would have been earned had the withdrawal not been made.[229] The uncle's moral obligation to repay both the principal and the interest existed *prior* to his promise to repay the interest. The moral obligation therefore, served as sufficient consideration for his later promise to pay the interest.[230]

The Restatement (Second) of Contracts has adopted this moral obligation principle in Section 86.[231] This adoption of the *Webb v. McGowin* moral obligation principle typifies the "charismatic legislation"[232] of the Restatement Second in action. This

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[224] *Id.*

[225] *Id.* at 589-90.

[226] *Slayton*, 315 So. 2d at 589.

[227] *Id.*

[228] *Id.* at 590.

[229] *Id.* at 590-91.

[230] *Id.*

[231] *See* RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981) ("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."); *see also* Charles M. Thatcher, *Complementary Promises for Benefits Received: An Illustrated Supplement to Restatement (Second) of Contracts Section 86*, 45 S.D. L. REV. 241 (1999-2000) (discussing section 86 of the Restatement Second of Contracts).

[232] Although the Restatement Second of Contracts is the work of the American Law Institute and is not the enactment of an orthodox legislature, its legal effect has motivated Professor Leacock to coin the term "charismatic legislation" in order to acknowledge the authority's power to evoke the courts' respect, acceptance, and voluntary obedience. In this respect, it is interpreted and applied by the courts in a manner essentially similar to a validly enacted statute.

section permits enforcement of promises such as the one made by McGowin in *Webb v. McGowin*. A promise that is binding under Section 86 is enunciated therein as a "contract"[233] without consideration.[234]

A "contract" is thereby created when the recipient promisor subsequently makes a promise in recognition of that previously-conferred benefit.[235] A "promise for benefit received" is not bargained for because it did not induce the promisee to furnish the benefit that the promisee previously conferred upon the promisor.[236] Instead, the promise commits[237] the promisor to compensate the promisee for conferring upon the promisor a previously uncompensated benefit,[238] which was conferred without donative intent.[239]

Analogies drawn from other aspects of human life may be mentioned. For example, one could perceive the orthodox doctrine of consideration as the main component of a meal.[240] However, complementary components of a meal are routinely present.[241] Other analogies come to mind as well.[242] The moral obligation principle of consideration may be perceived in a somewhat similar context. It arguably helps to add completeness to conceptions of consideration. One commentator has proposed that Section 86 of the Restatement (Second) of Contracts does not go far enough.[243]

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[233] RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

[234] *Id.* at § 82-94.

[235] *See* Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1158 (1971).

[236] *See* Jack W. Grosse, *Moral Obligation as Consideration in Contracts*, 17 VILL. L. REV. 1, 25 (1971).

[237] *See* RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

[238] *Id.* at § 86 cmt. f (1981).

[239] *Id.* at § 86(2)(a) (1981).

[240] The entrée.

[241] *E.g.*, soup, salad, and dessert.

[242] In war, a bomber on a bombing mission is routinely accompanied by fighter-jet escorts. In the naval context, an aircraft carrier might be accompanied by a convoy of support vessels.

[243] *See* Kevin M. Teeven, *Conventional Moral Obligation Principle Unduly Limits Qualified Beneficiary Contrary to Case Law,* 86 MARQ. L. REV. 701, 701 (2003) ("In fact, this exception to the past consideration rule adopted by *Restatement Second of Contracts* section 86 falls short of the broader moral obligation principle expressed in decisions that have enforced promises for benefits received by *persons other than the promi-*

Citing other commentators, he proposed that: "[t]he *Restatement Second's* position is under-inclusive, in that other judicially recognized strands are imbedded in the moral obligation principle. Modern commentators have encouraged the recognition of a broader principle."[244] He however seems to acknowledge that a more expansive application of the moral obligation principles may be perceived as going too far.[245] He may therefore have become reconciled to the incremental and relatively cautious approach that the American Law Institute has ultimately taken.[246]

Of course, confusion needs to be avoided. A compensatory promise, such as McGowin's promise to Webb, does not *induce* the promisee to confer the prior benefit. Such inducement would be retroactive. Of necessity, inducement is rationally incapable of being retroactive.[247] The Section 86 "contract" is therefore *not* supported by "consideration" within the Restatement (Second)'s own orthodox definition of that concept.[248] Within the conception of Section 86, the making of such a promise completes a theoretical "exchange." It is not an exchange within the usual and normal understanding of exchanges. In this context, it is an exchange of the previously–conferred benefit[249] for a binding compensatory present-commitment as enunciated in Section 86.[250] Since the Restatement (Second) of Contracts has been promulgated, a number

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sor. A number of legal commentators have suggested that a more expansive principle seems to exist in the case law . . . ") (footnotes omitted) (emphasis added).

[244] *Id.* at 727.

[245] *Id.* at 701-02 ("The resistance in some jurisdictions to acceptance of a broader principle resides in unease over its *potentially sprawling reach*.") (emphasis added).

[246] *See* RESTATEMENT (SECOND) OF CONTRACTS §86 (1981).

[247] It is also *scientifically* incapable of being retroactive as well. *See* BRIAN GREENE, THE ELEGANT UNIVERSE 205 (1999) ("Time, as we know it, is a dimension we can traverse in only one direction with absolute inevitability . . . ."). *See also* STEPHEN HAWKING, A BRIEF HISTORY OF TIME 145 (1988) ("This is the direction in which we feel time passes, the direction in which we remember the past but not the future.").

[248] RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) ("(1) To constitute consideration, a performance . . . must be bargained for. (2) A performance . . . 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.").

[249] Clearly a *fait accompli*.

[250] *See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1311-12 (1980); *see also* James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 598 (1995); *see also* Jack W. Grosse, *Moral Obligation as Consideration in Contracts*, 17 VILL. L. REV. 1, 32 (1971); *see also* Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1158 (1971).

of cases have cited to Section 86 and treated the "charismatic legislative" rule favorably.[251]

Support for the moral obligation principle demonstrably exists in the past. One commentator has proposed that "[t]he genesis of the moral obligation principle ... in Western legal thought resides in the Roman law doctrine of *negotiorum gestio*, a notion that recompense ought to be given for unsolicited good neighborly acts."[252] The notion that a promise based on a moral obligation[253] could be legally binding was certainly articulated centuries earlier by Lord Mansfield[254] in the early English case of *Atkins v. Hill*.[255] Some years later, Lord Mansfield reaffirmed the proposition in *Hawkes v. Saunders*.[256] Additionally, the case of *Osborne v.*

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[251] *See* Realty Assocs. v. Valley Nat'l Bank of Arizona, 738 P.2d 1121, 1124 (Ariz. Ct. App. 1986); *see also* First Nat'l Bankshares, Inc. v. Geisel, 853 F. Supp. 1344, 1357 (D. Kan. 1994); Knight v. Bd. of Admin. of Pub. Employees' Ret. Sys., 273 Cal. Rptr. 120, 145 n.10 (Cal. Ct. App. 1990); McMurry v. Magnusson, 849 S.W.2d 619, 623 n.1 (Mo. Ct. App. 1993).

[252] Kevin M. Teeven, *Conventional Moral Obligation Principle Unduly Limits Qualified Beneficiary Contrary to Case Law,* 86 MARQ. L. REV. 701, 703 (2003).

[253] *See* John W. Salmond, *The History of Contract,* 3 L.Q.R. 166, 174 (1887) ("In treating . . . the history of this subject it is essential to bear in mind that consideration was not what is now known as valuable consideration. It was a much wider idea, and may be defined as any motive or inducement which could be regarded as rational and sufficient. It included four principle species: first, valuable consideration; second, natural affection; third, legal obligation; *and fourth, moral obligation.*") (emphasis added).

[254] Chief Justice of King's Bench from 1756-88. *See* Julian S. Waterman, *Mansfield and Blackstone's Commentaries,* 1 U. CHI. L. REV. 548, 558 (1933-34). *See also* Kevin M. Teeven, *Mansfield's Reform of Consideration in Light of the Origins of the Doctrine,* 21 MEM. ST. U.L. REV. 669, 669 (1991).

[255] (1775) 98 Eng. Rep. 1088, 1092 (K.B.) ("[I]t is the case of a promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations, which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay."). *See also* Kevin M. Teeven, *Conventional Moral Obligation Principle Unduly Limits Qualified Beneficiary Contrary to Case Law,* 86 MARQ. L. REV. 701, 704 (2003) ("Mansfield's moral obligation decisions also drew on prior common law decisions that enforced promises on moral obligations.") (citations omitted). Lord Mansfield's reasoning in *Atkins v. Hill* was later rejected by the House of Lords in *Rann v. Hughes,* (1778) 2 Eng. Rep. 18 (K.B.). *See infra* note 326 and accompanying discussion.

[256] (1782) 98 Eng. Rep. 1091, 1091 (K.B.) ("Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."). In *Hawkes v. Saunders*, Lord Mansfield proceeded more conservatively and less aggressively with regard to his efforts to entrench the moral obligation principle as a replacement for consideration. Lord Mansfield proceeded more cautiously as he sought to distinguish the

Rogers[257] declared that the plaintiff's conferment of a benefit on the promisor could imply a previous request.[258] These earlier decisions supporting the efficacy of the moral obligation principle as an equivalent of, or a substitute for consideration, did not become the majority stream of precedent.

Prior to the *Webb v. McGowin*[259] decision, a number of cases in the United States also embraced these principles.[260] *Glenn v. Savage*,[261] however, demonstrates a valuable distinction. For example, Glenn rescued Savage's lumber as it was floating away in a river.[262] The facts indicated that Savage was actually unaware of the incident until a later time.[263] When Glenn demanded that Savage pay a reasonable fee for Glenn's services, Savage refused.[264] The circuit court issued a jury instruction that if "Glenn saved the lumber . . . from floating away, then he was entitled to recover from Savage the reasonable value of his services, and for the services of his workmen employed in saving the lumber."[265] Thus, an objectively inflexible basis for recovery seemed to be asserted.

The Oregon Supreme Court, however, reversed the circuit court and remanded the case for a new trial. The Supreme Court explained that

> "[t]he facts enumerated in this instruction could not create a legal liability on the part of Savage. They may have been meritorious, and probably benefi-

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House of Lords decision in *Rann v. Hughes*, (1778) 2 Eng. Rep. 18 (K.B.), while avoiding references to the usages of merchants in commercial law and references to written contracts generally. *See* Teeven, *Moral Obligation Principle*, *supra* note 20, at 593.

[257] (1669) 85 Eng. Rep. 318 (K.B.).

[258] *Id.* at 319 n.1. *See* Comstock v. Smith, 7 Johns. 87, 88 (N.Y. Supp. Ct. 1810); *and* Hicks v. Burhans, 10 Johns. 243, 244 (N.Y. Supp. Ct. 1813) (holding that the subsequent promise was the equivalent of a previous request) for a discussion in the American context.

[259] Webb v. McGowin, 168 So. 199 (Ala. 1936) (the case serves as a teaching-tool in the major Contracts case-law books in the U.S). *See Osborne*, 85 Eng. Rep. at 319 n.5.

[260] *See, e.g.*, Robinson v. Hurst, 26 A. 956 (Md. 1893); Drury v. Briscoe, 42 Md. 154 (1875); Ellicott v. Turner, 4 Md. 476 (1853); Shenk v. Mingle, 13 Serg. & Rawle 29 (Pa. 1825).

[261] Glenn v. Savage, 13 P. 442 (Ore. 1887).

[262] *Id.* at 443.

[263] *Id.*

[264] *Id.*

[265] *Id.* at 448.

> cial, to Savage, but this was not enough. To make him liable, he must either have requested the performance of the service, or, *after he knew of the service, he must have promised to pay for it.*"[266]

The consensual fundamentals of contract law[267] were preserved.[268] As such, Savage's freedom to make a promise to pay or to decline to do so was determinative. If no promise by Savage was proven then no contractual obligation was created.[269] The Alabama Court of Appeals' ruling in *Webb* implemented similar reasoning[270] and the Alabama Supreme Court agreed with this reasoning.[271] After McGowin knew of the services provided by Webb, he promised to pay for those services and, at that point, made himself legally liable.[272]

In Pennsylvania, in the much earlier case of *Clark v. Herring*[273] the court concluded that "a moral obligation alone is sufficient consideration to support an express promise."[274] Moral obligation has been accepted as sufficient consideration in a number of cases involving the conferral of a material benefit upon the promisor. Some courts required that the circumstances must be such that the promisee expected compensation for the benefits conferred at the time he conferred them.[275] Proof of this expectation obviated

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[266] *Id.* (emphasis added).

[267] RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.")

[268] *See, e.g.*, Smith v. Locklear, 906 So. 2d 1273 (Fla. Dist. Ct. App. 5th Dist. 2005) (The provision of services in the past will not satisfy the requirements of valid consideration, where, at the time when the services were furnished, they were provided without any expectation of compensation for them. An alleged subsequent promise to pay for such services does not meet the requirements of a valid contract and will not be enforced by the courts.).

[269] *Id.*

[270] Webb v. McGowin, 168 So. 196, 198 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

[271] Webb v. McGowin, 168 So. 199, 199-200 (Ala. 1936).

[272] *Id.*

[273] 5 Binn. 33 (Pa. 1812).

[274] *Id.* at 36.

[275] Old Am. Life Ins. Co. v. Biggers, 172 F.2d 495, 500 (10th Cir. 1949); Marnon v. Vaughn Motor Co., 194 P.2d 992 (Or. 1948); Manwill v. Oyler, 361 P.2d 177, 179, (Utah 1961).

any assertion that the benefit was conferred as a gift to the recipient.

Additionally, in Massachusetts, in *Bowers v. Hurd*,[276] plaintiff brought an action against the administrator of a promisor's estate. The promisor executed a promissory note to plaintiff promising to pay plaintiff a certain sum upon promisor's death. The promisor intended to compensate plaintiff for "a series of kindness and attention."[277] Actually, the plaintiff was unaware of the promise until the note was delivered to her after the promisor's death.[278] The Supreme Judicial Court of Massachusetts held that the acts of the plaintiff "formed a good moral consideration for such compensation."[279] The Court acknowledged that the promissory note may not have created a *legal* duty upon the part of the promisor.[280] Nevertheless, the promisor created such a duty when she acknowledged the plaintiff's services as beneficial and promised to compensate plaintiff.[281] The Court reasoned that the promisor had "precluded [herself] and [her] representatives from denying a consideration, when [she] has under [her] hand acknowledged one."[282]

Webb v. McGowin is consistent with *Bowers*. *Webb* supports the premise that in spite of the fact that the acts or services rendered were not done at the request of the promisor, the promisor's subsequent promise is equivalent to a previous request.[283] Additionally, although there is no reference to "material benefit" in *Bowers*, the following inference is a viable legal presumption. It can be inferred that when a promisor (i) acknowledges services as beneficial and (ii) makes a subsequent promise based explicitly on such services, it can be presumed that the "promisor received a

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[276] 10 Mass. 427 (1813).

[277] *Id.* at 428.

[278] *Id.* at 429.

[279] *Id.*

[280] *Id.* at 430.

[281] *Id.* at 428.

[282] *Bowers*, 10 Mass. at 428. In *Mills v. Wyman*, 20 Mass. 207, 209 (1825), this reasoning was discarded by the Massachusetts Supreme Court in favor of substituting the majority stream of precedent with respect to the doctrine of consideration. "The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application." *Id.*

[283] *See* Webb v. McGowin, 168 So. 199 (Ala. 1936).

material benefit constituting a valid consideration for his promise."[284]

Of course, if the proof presented established that the promisee intended a gratuity at the time he rendered his service, then the subsequent promise was unenforceable because there was no consideration.[285] In addition, the courts that enforce such promises require that not only must the promisee have suffered a detriment in conferring a material benefit upon the subsequent promisor, but also that a benefit did in fact accrue to the promisor himself.[286]

Saving McGowin's life, as a benefit conferred on McGowin himself, was central to the result in *Webb.* Although McGowin had not made a prior request, the material benefit that he received constituted sufficient consideration to support the subsequent promise.[287] In so holding, the court in *Webb v. McGowin* applied the doctrine of consideration in a manner consistent with a minority of American courts, supported by past precedent. Those cases have generally held that it must be proven that the promisor received from the promisee something of value. Moreover, the value must be received under such circumstances as to have created a moral obligation on the part of the promisor to pay for what he received.[288] This moral obligation arises in spite of the fact that there was no antecedent or contemporaneous promise or request and no existing liability at any time prior to the subsequent express promise. The value conferred upon the promisor by the promisee

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[284] Webb v. McGowin, 168 So. 196, 198 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (1936).

[285] Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945); Irons Inv. Co. v. Richardson, 50 P.2d 42 (Wash. 1935).

[286] *See* Old Am. Life Ins. Co., v. Biggers, 172 F.2d 495, 499 (10th Cir. 1949) ("[W]here services or other consideration moving from the promisee conferred an actual, material, or pecuniary benefit on the promisor, and not merely a detriment to the promisee, and the promisee expected to be compensated therefor and did not intend it as mere gift or gratuity, and the benefit received had not constituted the consideration for another promise already performed or still legally enforceable, a moral obligation arises which will support a subsequent executor promise where there was originally no contract, perfect or imperfect, obligating the promisor."). *See also* Slayton v. Slayton, 315 So. 2d 588 (Ala. Civ. App. 1975); Kaiser v. Fadem, 280 P.2d 728 (Okla. 1955); Snow v. Nellist, 486 P.2d 117 (Wash. Ct. App. 1971), *review denied*, 79 Wash. 2d 1009 (Wash. 1971); Park Falls State Bank v. Fordyce, 238 N.W. 516 (Wis. 1931); Peters v. Poro's Estate, 117 A. 244 (Vt. 1922).

[287] *Webb*, 168 So. at 198.

[288] *Id.*

provided sufficient consideration to make the promisor's subsequent promise binding.[289]

In summary, *Webb v. McGowin*[290] and other judicial opinions that have relied on past consideration or moral obligation as a ground for enforcing a promise represent a minority of cases that reject the orthodox view that this ground is insufficient.[291] The majority stream of precedent doctrine that past consideration is not valid consideration remains undisturbed and continues to represent the overwhelming weight of authority, having done so since the early common law.[292]

V. THE DOCTRINE OF RELIANCE AS SUPPORT FOR THE *WEBB V. MCGOWIN* DECISION

The *Webb v. McGowin* decision closely followed the publication of the Restatement of Contracts.[293] The Restatement (Second) of Contracts, of course, is much more recent.[294] There is no indication that an argument based upon Section 90 of the Restatement of Contracts was made at the *Webb* trial. Perhaps this provision was too new and unfamiliar to Webb's attorneys. Nevertheless, the decision may be examined in light of these publications adopted and promulgated by the American Law Institute. Arguments in this regard could probably have been articulated based upon Section 90 of the Restatement of Contracts.[295] The more modern counterpart would be Section 90 of the Restatement (Second) of Contracts.[296] Such arguments could probably have succeeded at the trial.

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[289] *See generally Biggers*, 172 F.2d 495; *Slayton*, 315 So. 2d 588; Holland v. Martinson, 237 P. 902 (Kan. 1925); *Kaiser*, 280 P.2d 728; *Marnon*, 194 P.2d 992.

[290] Webb v. McGowin, 168 So. 196, 198 (Ala. Ct. App. 1935), *cert .denied*, 168 So. 199 (Ala. 1936).

[291] *See* CALMARI AND PERILLO ON CONTRACTS, *supra* note 10, at 200 n. 18.

[292] *See* Sutton, *supra* note 196.

[293] RESTATEMENT OF CONTRACTS (1932).

[294] RESTATEMENT (SECOND) OF CONTRACTS (1981).

[295] RESTATEMENT OF CONTRACTS § 90 (1932) ("A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

[296] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee

The facts of the case could be argued to meet all the required criteria for success in the context of Section 90 of *both* Restatements of Contracts. The pertinent criteria for success in both Restatements of Contracts may be differentiated as follows. In order to satisfy the requirements for success under the doctrine of reliance, it must be proven that: (i) a promise was made; (ii) the promise - when made - met the qualifications set out in the Section; (iii) the promise induced specified action by the promisee; and (iv) injustice can be avoided only by enforcement of the promise.

First, McGowin made a promise to Webb. McGowin promised to pay Webb - during *Webb's* lifetime and because of his injuries - $ 15.00 every two weeks for his maintenance. A reasonable person would certainly conclude that McGowin's promise was made with every intention on his part that the promise would be kept. More importantly, a reasonable person would certainly conclude that McGowin made the promise with every intention that it would be kept.

Secondly, the requirements of the Restatement of Contracts[297] are more onerous for a plaintiff such as Webb to satisfy than those of the Restatement (Second) of Contracts.[298] Under the Restatement of Contracts, the action or forbearance of the promisee that the promisor should reasonably expect to be induced by his promise must be proven to have been of "a *definite and substantial* character."[299] In contrast, the Restatement (Second) of Contracts imposes lower requirements with respect to the action or forbearance than those that must be proven under the Restatement of Contracts.[300] In light of the facts of *Webb v. McGowin*, the heavier burden of the Restatement of Contracts is met.[301] Arguably, McGowin's promise clearly meets the more onerous standard

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or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

[297] RESTATEMENT OF CONTRACTS § 90 (1932).

[298] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

[299] RESTATEMENT OF CONTRACTS § 90 (1932).

[300] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). The Restatement (Second) of Contracts has eliminated the "definite and substantial character" requirement of the Restatement of Contracts.

[301] *A fortiori*, the lesser burden of the Restatement (Second) of Contracts is *also* met. For, the greater includes the lesser.

of the Restatement of Contracts. Therefore, it also meets the requirements of the Restatement (Second) of Contracts as well. Based upon such arguments, McGowin should have reasonably expected his promise to induce "forbearance of a definite and substantial character"[302] on the part of Webb.

Proof of a definite and substantial character would be successfully presented because McGowin, as promisor, should have reasonably expected that his promise would induce Webb to forbear from seeking other sources of funding for his maintenance *for the rest of his life.* Such forbearance would be life-long. A reasonable person in McGowin's position should irrefutably expect such definite and substantial forbearance on Webb's part. For purposes of completeness, one additional point may be acknowledged. On the facts of *Webb v. McGowin*, the Restatement (Second) of Contracts' *alternative* requirement of proof of the reasonable expectation of inducement of action or forbearance on the part of *a third person* is not implicated on the facts of the case.[303]

Thirdly, Webb would need to persuade the court that he *did* refrain from seeking such alternative sources of funding to finance his maintenance during the remainder of his life. This would satisfy the proof required that forbearance of a definite and substantial character was in fact induced. It would also meet the less stringent requirements of the Restatement (Second) of Contracts. Affidavits to this effect would probably have sufficed. Such affidavits would require refutation by McGowin's estate in order to nullify proof of this third requirement.

Finally, Webb would have been required to prove that injustice could be avoided only by enforcement of McGowin's promise. Elimination of a person's only source of maintenance for the rest of that person's life is indeed an injustice. Webb's required proof that avoidance of injustice could only be attained by enforcement of McGowin's promise would therefore be assured. Thus, the proposed evident success of arguments predicated on Section 90 of both the Restatement of Contracts and of the Restatement (Second) of Contracts reinforces the validity of the *Webb v. McGowin* decision.

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[302] RESTATEMENT OF CONTRACTS § 90 (1932).

[303] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

VI. AN EVALUATION AND SYNTHESIS OF THE DOCTRINE OF CONSIDERATION AS AN ADAPTATION FOR CONTRACT LAW PROBLEM-SOLVING UNDER THE COMMON LAW

The doctrine of consideration is neither an indispensable nor a fundamental requirement of legal systems around the globe. On the contrary, only the common law recognizes and mandates it as a requirement for contract enforcement. For example, French and German contract laws are not based on a doctrine of consideration at all.[304] In fact, Professor von Mehren, an eminent civil law commentator, has significantly criticized the common law doctrine of consideration.[305] However, in the context of the doctrine of consideration and its civil law analogues, fundamental differences between common law and civil law approaches need to be acknowledged. An analytical examination of the significance that common law and civil law assign to the individual facts of each case reveals fundamental differences.[306] A comparative evaluation of these fundamental differences in the role that the individual facts play in contract law disputes in common law and civil law is

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[304] *See* von Mehren, *supra* note 1, at 1057 ("The French and German approaches . . . differ in important respects from . . . the common law. Perhaps because the law . . . is, for the most part, based on rather detailed and comprehensive legislative provisions, it is relatively clear and straightforward. The extrinsic elements recognized are, with few exceptions, *set out in code provisions*. One of the formalities encountered, the simple writing, is well known to the common law. On the other hand, the notarial contract, which requires the participation of a lawyer who holds a special appointment from the state and is charged with handling and recording various types of transactions, the judicial contract of German law, concluded before a judge and recorded in court files, and the so-called beginning of written proof and express acceptance of French law have no counterparts in the common law.") (citations omitted) (emphasis added).

[305] *Id.* at 1076 ("A doctrine based upon a notion of a bargained-for exchange is, in its very nature, too all-inclusive, too expansive. Almost inevitably, it will be called on, as consideration has been, to handle too many different, and separate problems. Moreover, the notion of a bargained-for exchange does not furnish an appropriate approach to all phases of the problems with which the doctrine of consideration is involved. Exchange is too restrictive a standard to handle some aspects of the problem of unenforceability. . . .").

[306] *See* George M. Cohen, *The Fault That Lies Within Our Contract* Law, 107 MICH. L. REV. 1445, 1456 (2009) [hereinafter George M. Cohen] ("[T]he consideration doctrine . . . aim[s], at least to some extent, to deter assertions of false promises.") (citations omitted). With respect to Civil Law, proof of the appropriate writing mandated by the pertinent provision(s) of the applicable Civil Code controls. *See, e.g.*, von Mehren, *supra* note 1, at 1013 ("Article 1341 of the [French] Civil Code provides that '[N]o proof by witnesses against or beyond the contents of an instrument, nor as to what is alleged to have been said previously, at the time of or since it was made shall be allowed. . . .'").

instructive. This evaluation helps to explain why the doctrine of consideration is so critical to the resolution of contract disputes at common law.

At common law, the individual facts of each case matter.[307] The doctrine of consideration therefore plays a profound role in distinguishing between enforceable and unenforceable promises under the common law. The comparative evaluation of the fundamental differences in the role that the individual facts play in contract law disputes in common law and civil law also serves to elucidate civil law resolution of contract law disputes. Professor von Mehren readily acknowledges these fundamental differences between the ways in which the common law and the civil law resolve the factual elements of contracts cases.[308]

In fact, the doctrine of consideration was invented and implemented by common law judges over centuries of diligence. An awareness of the framework and context within which it developed is critical to understanding the doctrine itself. Deciphering the objective of the common law courts in creating the doctrine of consideration is transcendent in contributing to this understanding. Additionally, focusing attention on the methods utilized by the common law judges in their incremental creation of the doctrine is an integral part of this exercise in substantive understanding.

There is no unanimity among commentators as to the origin of the doctrine of consideration.[309] Actually, the growth and development of the doctrine was neither orderly nor elegant. They were not part of a predictable step by step process. On the con-

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[307] *See* George M. Cohen, *supra* note 306.

[308] *See* von Mehren, *supra* note 1, at 1010 ("The central concern is not to examine critically the handling of particular fact situations, drawing out all possible implications. . . . [C]ontinental courts of last resort . . . do not state the facts of cases in their full complexity and ambiguity. Dissenting opinions are not permitted. The court's opinion usually presents only a highly summarized version of the facts, designed to set out the essence of the situation and to provide, much as a hypothetical stated case would, the basis for legal analysis and conclusions of law.") (citations omitted).

[309] *See* Kevin M. Teeven, *Mansfield's Reform of Consideration in Light of the Origins of the Doctrine,"* 21 MEM. ST. U.L. REV. 671 (1991) ("The origin of consideration is one of the great controversies in the history of contract law, inspiring as many views as there are writers on the subject. One would mistakenly assume that there was a single source for a contract doctrine setting the parameters of what was originally a hardship remedy.") (citations omitted). *See also* Kevin M. Teeven, *The Emergence of Modern Contract Law in the Tudor Period*, 10 OHIO N.U.L. REV. 441, 448 (1983) ("[T]he origins of consideration are obscure.").

trary, "[t]he notion of consideration had grown into a legal doctrine in a *haphazard* way in the Tudor period. . . ."[310] In spite of its somewhat turbulent history, the consideration doctrine has served the common law well.[311]

First, it is certainly conceded that the common law does not enforce every promise made.[312] A legal system that sought to implement such a philosophy would probably find the effort untenable and unworkable. Its legal enforcement machinery would be in perpetual motion: a proverbial "treadmill to oblivion."[313] Such a dreadful eventuality was avoided by the common law's invention of the doctrine of consideration. This invention by the judiciary has been practical and incremental.[314] Unlike Athena[315] in mythology,[316] it did not spring fully-formed from any specific source. It evolved.[317]

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[310] *See, e.g.*, BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 351 (emphasis added) ("Little effort was made to identify or express the underlying principle until the eighteenth century, and lawyers managed with the lists of cases gathered on one side or the other in the abridgments.").

[311] *See* von Mehren, *supra* note 1, at 1009 ("It represents an ambitious and sustained effort to construct a general doctrine. The doctrine is complex and subtle. It performs a variety of functions. . . .").

[312] *See* Cohen, *supra* note 49. *See also* von Mehren, *supra* note 1, at 1015 ("No legal system attempts to enforce all types of promises or agreements. Some are not enforced because they are inherently too dangerous for one party or for the society; others are too unimportant or marginal to justify the effort; still others are denied enforcement because they do not make sense in terms of the level of social and economic development achieved in the particular society.") (citations omitted). *See also* BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 351 ("[Consideration] could be seen as performing *a single function*: it was the vital element which caused parol promises to be legally binding.") (emphasis added).

[313] Drawn from the title of the book FRED ALLEN, TREADMILL TO OBLIVION (Int'l Polygonics 1995).

[314] *See* Kevin M. Teeven, *The Emergence of Modern Contract Law in the Tudor Period*, 10 OHIO N.U. L. REV. 441, 448 (1983).

[315] Also referred to as Minerva.

[316] *See* EDITH HAMILTON, MYTHOLOGY 29 (NEW AMERICAN LIBRARY 1969) ("She was the daughter of Zeus alone. No mother bore her. *Full-grown and in full armor, she sprang from his head.*") (emphasis added).

[317] *See* IAN R. MACNEIL AND PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS, 569-70 (Foundation Press 3d ed. 2001) [hereinafter MACNEIL AND GUDEL, CONTRACTS] ("[A] form of action requiring a contract to be in writing sealed with sealing wax could hardly be a basis for general legal enforcement of agreements, especially in a largely illiterate society. It is not surprising therefore that techniques for enforcement of contracts generally did not evolve from covenant; instead they evolved from the two common law writs of debt and trespass on the case.") (citations omitted). *See also* Kevin M. Teeven, *The Emergence of Modern Contract Law in the Tudor Period*, 10 OHIO N.U.

Consideration is therefore not the progeny of a sole ancestor.[318] In developing the doctrine of consideration, the common law's goal was a workable system.[319] Consideration is therefore "a doctrine developed to determine whether a contract was formed . . . ."[320] Use of the term "contract" in this context, means an *enforceable* contract.[321] This requires an awareness of the legal implications of the use of the sealed document at common law. The common law had long recognized the legal enforceability of

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L. REV. 441, 448 (1983) ("[T]here is the distinct possibility that consideration developed due to the convergence of a variety of influences, *causa* or *quid pro quo* quite possibly being among them.") (footnote omitted).

[318] *See id.* MACNEIL AND GUDEL, CONTRACTS ("The Exchequer Chamber definition of consideration quoted in Hamer v. Sidway reflects centuries of development of common law writs. The roots of its two alternatives – a benefit to the promisor or a detriment to the promisee – are found in two forms of action: debt and trespass on the case."). *See also* Kevin M. Teeven, *The Emergence of Modern Contract Law in the Tudor Period*, 10 OHIO N.U. L. REV. 441, 459 (1983) ("*Slade's Case* marks the birth of a modern law of contract because it allowed the enforcement of a truly executory agreement, executory both as to performance and as to consideration.").

[319] *See* Arthur L. Corbin, *Recent Developments in the Law of Contracts,* 50 HARV. L. REV. 449, 453 (1937) ("In the courts, the doctrine of consideration has gone its accustomed course. This course has involved an assumption that the term consideration has a simple and uniformly applied definition, that such a consideration is indispensable to the enforcement of any informal promise, and that the court's only function is one of deductive reasoning. The assumption has always been false; the existence of consideration as defined by anybody has never been totally indispensable; and the principle function of the courts is not deductive, but is, instead, the determination of whether or not there is good reason for enforcing the promise sued on – a question of social policy."). *See also* Amy H. Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 NW. U. L. REV. 132, 147 (1995) ("Regardless of its origins, contract ideology persists in the law in large part because it has a pervasive and persistent hold on the imaginations of many, particularly those professional who most strongly influence public and legal discourse. It involves . . . a cluster of widely and strongly held political and ethical values. And it includes . . . an epistemological aspect: contract ideology supplies the terms in and through which many perceive social reality.") (citations omitted). *See also* Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 140 (2000) ("In the sixteenth century, courts flexibly answered the question: "what promises should be actionable?").

[320] *See* Teeven, *Preexisting Duty Rule*, *supra* note 1, at 476.

[321] *See* Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 46 (1993) ("The classical contract theorists . . . included a . . . proposition within the "doctrine of consideration." They asserted that consideration was a necessary condition for the enforcement of a promise; they thus assigned to the doctrine of consideration a gatekeeping function. The doctrine of consideration sorted promises into two classes, bargain promises and gratuitous promises. The former were admitted to the realm of contract , and the latter were consigned to outer darkness.") (citations omitted).

agreements made under seal.[322] In contrast, parol agreements stood on a different footing. Oral agreements that had not been reduced to writing were problematical. The fact that parties had not been patient enough to take the time and trouble to formalize their oral agreements by reducing them to writing under seal was treated as legally relevant. Such oral agreements were treated differently under contract law.[323] Such agreements were required to conform to the doctrine of consideration.[324] If they did not, then enforcement of them was precluded.[325]

At an earlier stage of the common law, in England, Lord Mansfield sought to step to the beat of a different drummer.[326] Lord Mansfield generally sought to entrench moral obligation principles[327] as a routine basis for enforcement of unwritten agreements generally.[328] In the context of commercial law, he was

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[322] *See* BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 351-52 ("If a party used the formality of a writing under seal, then his contract was taken to be binding without more ado, for it would be 'downright madness to trifle with the solemnity of law and pretend after the sealing that there was nothing seriously designed.'").

[323] *See* MACNEIL AND GUDEL, CONTRACTS, *supra* note 317, at 569-571.

[324] *See* BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 352 ("Where ... the contract was merely by parol it needed consideration to clothe it with binding force: 'otherwise a man might be drawn into an obligation without any real intention by random words and ludicrous expressions, and from thence there would be a manifest inlet to perjury, because nothing were more easy than to turn the kindness of expressions into the obligation of a real promise.'") (footnote omitted).

[325] *Id.*

[326] *See* Teeven, *supra* note 71, at 704-729. *See also* Teeven, *Moral Obligation Principle*, *supra* note 20, at 590 ("King's Bench Chief Justice Mansfield . . . attempted a dramatic civilian-style reform of common law contract based on the principles of logic and equity. Since he perceived consideration as an irrational impediment to the enforcement of serious consensual promises, which in justice should be binding, he made a frontal assault on the doctrine. Mansfield conducted a three-pronged attack, arguing, first, that commercial promises did not need consideration; second, that written contracts generally did not need consideration; and third, that a moral obligation alone could fulfill, if not supplant, the traditional requirement of consideration.") (citations omitted).

[327] *See* von Mehren, *supra* note 1, at 1035 ("Lord Mansfield attempted, in a series of decisions between 1774 and 1782, to introduce a more flexible approach. He sought to consider each case individually, finding consideration, and hence classifying the transaction as enforceable, when a 'moral obligation' could be said to exist."). *See also* Patterson, *Consideration*, *supra* note 3, at 929.

[328] *See* Teeven, *supra* note 71, at 704. ("The . . . reporters' note to *Wennall v. Adney* correctly criticized some of Mansfield's [viewpoints] which had suggested [that] there might be an enforceable moral obligation applicable to *nearly all promises*.") (footnotes omitted) (emphasis added).

particularly forceful. For example, in *Pillans v. Van Mierop*,[329] he declined to be persuaded that a written agreement without consideration was to be treated by the courts as unenforceable in a *commercial* case.[330] However, the House of Lords ruled to the contrary in *Rann v. Hughes*.[331] This probably marked one of the most crucial turning points in the doctrine's history.

After this decision, ultimately, Lord Mansfield's heroic efforts on behalf of the moral obligation principle were overcome.[332] The currently applied doctrine of consideration has triumphed as the workable system that the common law successfully pursued and attained.[333] The consideration doctrine remains the majority doctrine in the forty-nine American common law jurisdictions.

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[329] Pillans v. VanMierop, (1765) 3 Burr. 1663 (K.B.). Teeven, supra note 71, at 704 n.10; *see also* BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 352. *See also* Teeven, *Moral Obligation Principle*, *supra* note 20, at 590 ("*Pillans v. Van Mierop*, [is Lord Mansfield's] best known and most aggressive foray against the doctrine of consideration. In *Pillans*, a past consideration objection was raised in an action brought on a commercial undertaking to honor a bill of exchange. Instead of trying to rationalize a narrow extension of Holt's precedents, Mansfield boldly declared that past consideration or not, the usage of merchants did not require consideration for a binding contract and further that consideration was not required in an unsealed written contract since the passage of the Statute of Frauds 1677.") (citations omitted).

[330] BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 352.

[331] Rann v. Hughes, (1778) 4 Bro. P.C.27 (H.L.); 7 Term Rep. 350 *cited* in BAKER, ENGLISH LEGAL HISTORY, *supra* note 8, at 352 ("[This] decision practically ensured the survival into modern times of the Tudor doctrine of consideration."). *See also* Teeven, *Moral Obligation Principle*, *supra* note 20, at 590-91 ("Mansfield's decision in *Pillans* was followed in his court for the ensuing thirteen years until his reform ideas were flatly rejected by the House of Lords in *Rann v. Hughes*. . . .") (citations omitted). Lord Mansfield's ideas were nevertheless vindicated in modern commercial law. *See* U.C.C. § 2-205 (1977); *see supra* note 158 and *infra* note 333.

[332] *See* Teeven, *supra* note 71, at 713. ("[A]fter three centuries of recognition of a moral obligation alternative to bargain, mid-nineteenth-century English judges returned to the common law of contract position held in the third quarter of the Sixteenth Century.") (footnote omitted).

[333] Subject to the statutory modifications enacted in U.C.C. § 2-205. *See supra* note 158 and accompanying discussion. The enactment of these provisions has ensured the ultimate success of Lord Mansfield's ingenious and prescient ideas in this area of contract and commercial law. *See supra* notes 327-331 and accompanying discussion.

VII. CONCLUSION

In the modern era, the ascendancy of the orthodox doctrine of consideration remains intact.[334] It reflects the individual supremacy of each of the forty-nine American common law jurisdictions in articulating its own contract law principles. The emergence of a norm[335] from the individual states' collective and cumulative articulation is therefore predictable. The development of accompanying individual deviations[336] from such a norm is probably inescapable and therefore inevitable.

The ascendancy of the orthodox doctrine of consideration also reflects the unimpaired right of each individual state to determine its own social policy of promise-enforcement under contract law.[337] These are the fundamental principles that reconcile the decisions in *Mills v. Wyman*[338] and *Webb v. McGowin*.[339] These principles also reconcile the decisions in *Webb v. McGowin*[340] and *Harrington v. Taylor*.[341] Moreover, these principles provide an answer for both the first and second questions posed earlier on in this article.[342]

However, the viability of the *Webb v. McGowin* decision has neither waned nor faded away.[343] No good reasons for criticizing or overturning the decision have emerged or have been detected.[344] The principles that it espouses are alive and well.[345] The decision still retains its vigor and its intellectual vitality endures.[346] Moreover, its future as a teaching tool seems assured.[347] As the

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[334] *See* WILLISTON ON CONTRACTS, *supra* note 41.
[335] *See supra* Part II.
[336] See supra Part IV.
[337] *See* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 44, at 274.
[338] Mills v. Wyman, 20 Mass. 207 (1825).
[339] Webb v. McGowin, 168 So. 199 (Ala. 1936).
[340] *Id.*
[341] Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945).
[342] *See supra* notes 24-27.
[343] *See* Boykin v. Boykin, 1993 U.S. Dist. LEXIS 11194, at *24-26 (S.D. Ala. Aug. 4, 1993).
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] *See supra* note 5.

seventy-fifth anniversary of the decision approaches, its place in the legal firmament of significant contract law cases is secure.[348]

APPENDIX A

"*THE ANNISTON STAR*, ANN1STON, ALABAMA, THURSDAY, JANUARY 11, 1951, P. 1 COL. 2.

Charles R. Bricken, Member Of Appeals Court Since 1917, Dies

MONTGOMERY.—Presiding Judge Charles R. Bricken, of the Alabama Court of Appeals, died early today at a Montgomery hospital.

He had been a member of the Appeals Court since 1917.

Born March 6, 1867, in Richmond, Va.. Judge Bricken was educated in the public schools of Richmond and Alabama.

He started practicing law at Greenville, Ala., in 1889, moved to Luvcrnc in 1890, and practiced there until his election to the Alabama Court of Appeals in November of 1916.

Judge Bricken served as city attorney of Luverne from 1890 to 1893, mayor of that city from 1893 to 1896 and as circuit solicitor from 1899 until 1916.

Commanded Alabama Troops

In 19I9 he became presiding judge of Ihe Appeals Court and was re-elected in 1922, 1928, 1934, 1940, and 1946.

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[348] There is no recent contracts law student alive who has not been required to study the *Webb v. McGowin* decision.

Judge Bricken was in command
of the Alabama troops sent to
the Mcxican border by President
Woodrow Wilson.
He was a major and lieutenant
colonel in the Alabama National,
Guard, and was elected brigadier
general of the First Alabama Brigade in 1915.
He served as a member of the
State Democratic Executive Committee
for seven years.
Was Shrine Potentate
Judge Bricken was a past potentate
of Alcazar Temple, a past
president of the Southeastern
Shrine Association, a member of
the Knights of Pythias, Woodmen
of the World, Redmcn, and Royal
Order of Moose.
Judge Bricken is survived by
two daughters, Mrs. James Dunklin,
Jr., of Greenville, Ala., and
Mrs. Pete Jarman, of Canberra,
Australia, wife of the American
Ambassador to Australia; four
sons, Charles R. Bricken, Jr., John
B. Bricken, Allen Bricken, of Tuscaloosa,
and Reese H.,Bricken, of
Roswcll, N. Mcx."