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ARTICLE

IN CONSIDERATION OF CONSIDERATION: PROBING THE PURPOSE AND FUNCTION OF BARGAINED-FOR EXCHANGES

Paul M. Spinden[†]

My contracts students seem to be in good company in their struggle to understand the purpose and function of the doctrine of consideration.¹ Their textbook acknowledges that this doctrine is “often confusing [to] legal neophytes,”² and another describes consideration as “one of the biggest mysteries of the first year [of law school].”³ Still another seemingly invites dismissal of consideration altogether as all but irrelevant:

While courts consistently use the term “consideration,” the term is . . . not a real issue in many real world problems or cases. In other words, . . . courts, lawyers, and law professors (especially law professors) regularly mention “consideration”; BUT . . . there is not a single, universally accepted definition of consideration;

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1. Consistent with the views of RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981), “consideration” as used in this paper refers to a bargained-for exchange in which a promisor is induced by receiving the promisee’s return promise or giving of something—an act, a forbearance, or some significant change in a legal relation. This view is, according to some commentators, “narrow.” 2 JOSEPH M. PERILLO & HELEN H. BENDER, CORBIN ON CONTRACTS § 5.1 at 7 (1995). “When the term ‘consideration’ is limited to bargained-for exchange,” Perillo and Bender assert, “the other bases for enforcement of promises are not eliminated but are simply discussed under other labels, for example, ‘promissory estoppel’ and ‘past consideration.’” *Id.* Perillo and Bender recognize that “[c]urrent usage . . . has restricted the term to its narrow meaning . . .” *Id.* at 6. Richard Lord describes bargained-for exchange as “the fundamental and generally accepted idea of consideration.” 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7.2 at 19-21 (4th ed. 2008).

2. CHRISTINA L. KUNZ & CAROL L. CHOMSKY, CONTRACTS: A CONTEMPORARY APPROACH 15 (2d ed. 2013).

3. GEORGE KUNY & ROBERT LLOYD, CONTRACTS: TRANSACTIONS AND LITIGATION 163 (4th ed. 2017).

AND . . . it is unusual for an agreement to be unenforceable because of a lack of consideration.⁴

Consideration's mysteries, however, apparently confound more than my students and other legal neophytes. Allan Farnsworth concedes, "It would be foolhardy to attempt to defend [consideration] by an exercise in logic . . ."⁵ Charles Fried has concluded that consideration is void of "any consistent set of principles . . .,"⁶ and he calls for its abandonment in favor of enforcing promises on the basis of moral duty alone.⁷

Consideration seems to be one of those concepts that is easier to explain than to understand. Unable to provide a defense of consideration grounded in logic, Farnsworth simply celebrates the common law's being able to develop some kind of basis for enforcing promises. Alas, he says, "[I]t is perhaps less remarkable that the basis developed by the common law [for enforcing promises] is logically flawed than that the common law succeeded in developing any basis at all."⁸

BRIEF HISTORY OF BARGAIN EXCHANGES

Rivalry among early English tribunals over jurisdiction—not doctrine or principle—seems to have been the primary reason consideration became the cornerstone doctrine it is. According to Farnsworth,⁹ English common law courts discerned no reason in law to enforce breached executory promises. Rival tribunals—merchant courts, ecclesiastical courts, and courts of equity—had been providing remedies for breach of executory promises for many years without impeding on the efforts of the common law courts. Because barter—not promises—dominated the status-oriented agrarian society of fifteenth-century England and because enforcement of promises did not fit with the courts' particularized forms of action, the common-law courts deemed executory promises to be purely private matters and, thus, had

4. DAVID G. EPSTEIN ET AL., BRUCE A. MARKELL, & LAWRENCE PONOROFF, *CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS* 273 (5th ed. 2018) (emphasis in original).

5. E. ALLAN FARNSWORTH, *CONTRACTS* 18 (4th ed. 2004).

6. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 33 (2015) (emphasis in original).

7. Others calling for abandonment of consideration are listed by PERILLO and BENDER, *supra* note 1, at 12 n.8.

8. FARNSWORTH, *supra* note 5, at 18-19.

9. Farnsworth sets out an excellent synopsis of the history of the development of consideration as a basis for enforcing promises. FARNSWORTH, *supra* note 5, at 9-26.

not recognized any basis for their enforcement.¹⁰ Even the moralists and theologians of the time perceived no need for enforcing all promises, and they accepted the notion that promises motivated by generosity or friendship should be distinguished from those intended to impose legal obligation.¹¹ As the number of such actions increased, the common-law courts felt much pressure to expand their jurisdiction to provide similar enforcement.¹²

By the end of the sixteenth century, the common-law courts recognized a general basis for enforcing an exchange of executory promises. The courts accomplished this momentous change by crafting exceptions to actions for *assumpsit*. This early tort action had originated to provide a remedy for a defendant's misfeasance in various undertakings, such as negligent construction of a structure. The courts used these exceptions to expand *assumpsit* to allow for recovery of damages for nonfeasance, or failure to perform.¹³ Attaching *assumpsit* to an action for nonfeasance resulted in the courts' developing recovery based on a promisor's utter failure to act on his promise. This opened the courts' doors to the previously inconceivable notion of enforcing an executory promise merely on grounds that the promisor had given his promise in exchange for a return promise. In addition to showing the promisor's failure to perform as promised, the only detriment the plaintiff had to show was that he had given a return promise to the promisor.¹⁴ Provided the promise was made as part of an exchange of promises, the promisor assumed legal obligation merely by making a promise, even if the promisee did not alter his position at all in reliance on the promise.¹⁵

With these stunning developments, the bargain approach to consideration, originally conceived as a means for the common-law courts to remain relevant, became a fundamental part of contract law. The courts came to rely on this approach as the key for determining whether a plaintiff's case satisfied *assumpsit*'s complicated conditions.¹⁶ The most important of these conditions was a concept borrowed from an action in debt, which *assumpsit* had supplanted. This concept took the form of *quid pro quo* by requiring a

10. *Id.* at 11-12.

11. WIM DEACOCK, *THEOLOGAINS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE JUS COMMUNE (CA. 1500-1650)* 178 (2013).

12. FARNSWORTH, *supra* note 5, at 12.

13. *Id.* at 14-16.

14. *Id.* at 16.

15. *Id.* at 15.

16. *Id.* at 18.

showing that the promisee had conferred a benefit on the promisor in exchange for receiving the promisor's promise.¹⁷

These stages of the bargain exchange's development are much easier to trace than is understanding why such exchanges seemed right to fifteenth- and sixteenth-century courts. "English judges did not ask 'why' when, beginning in the sixteenth century, they implemented the doctrine of consideration," observes Farnsworth.¹⁸ Other than settling on an approach that fit with their elaborate and complicated system of writs, these courts left few discernible clues as to why bargain exchanges seemed "right." As will be discussed later,¹⁹ however, the courts' mere lack of debate concerning the "rightness" of bargain exchanges seems to provide a significant clue as to why, in the face of strong criticism, the bargained-for exchange approach to consideration has lingered as a foundational principle of contract law.

As the courts conceived consideration in the nineteenth century, a promisee had to establish that he had conferred a benefit on the promisor. Although this requirement persisted into the twentieth century, the concept of what constituted a benefit had broadened significantly by the end of the nineteenth century. For example, in the venerable case of *Hamer v. Sidway*,²⁰ the Court of Appeals of New York rejected a lower court's notion that the benefit had to be "something of value . . . in a pecuniary sense."²¹ At issue in that case was whether an uncle's promise to pay his nephew \$5000 was enforceable. In making his promise, the uncle was induced by his nephew's return promise to refrain from drinking liquor, using tobacco, swearing, or gambling on cards or billiards.²² In considering whether the uncle had received a benefit from his nephew's promised forbearances, the court said, "[I]t is no moment whether such performance [by the nephew] actually proved a benefit to the promisor, . . . but were it a proper subject of inquiry, we see nothing . . . that would permit a determination that the uncle was not benefited in a legal sense."²³ This was a clear indication that the previous requirement that the understanding of benefit as a pecuniary or strong business interest was waning.

17. *Id.* at 11.

18. FARNSWORTH, *supra* note 5, at 50.

19. *Infra* note 31 and accompanying text.

20. 124 N.Y. 538, 27 N.E. 256 (1891).

21. 11 N.Y.S. 182 (Sup. Ct. 1890), set out in KUNZ, *supra* note 2, at 19.

22. *Hamer v. Sidway*, 27 N.E. 256, 257 (1891).

23. *Id.* at 546.

Indeed, when, in 1932, the American Law Institute (“ALI”) published its distillation of contract law as the *Restatement of Contracts*,²⁴ its definition of consideration did not mention either benefit or detriment. The ALI defined “consideration” as “an act other than a promise, or . . . a forbearance, or . . . the creation, modification or destruction of a legal relation, or . . . a return promise, bargained for and given in exchange for the promise.”²⁵ Hence, by the early twentieth century, whether the promises exchanged in a bargain constituted consideration did not depend at all on the conferring of benefits on the promisors.

Consideration continued to evolve. Nearly fifty years later, when the ALI published its second Restatement, the central focus of consideration was inducement. The Restatement’s new definition of consideration, and the one persisting today, declared, “To constitute consideration a promise or return performance must be bargained for. A performance or return promise is bargained for if it is *sought* by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”²⁶ Furthermore, according to Restatement § 81,²⁷ the promisee’s performance or return promise has to be only *one* of the motivators for the promisor’s making his promise. For a promisor’s promise to be deemed to be supported by consideration, getting the promisee’s performance or return promise does not have to be the promisor’s main or even primary objective. So long as the evidence, viewed objectively rather than subjectively,²⁸ establishes that the

24. The first RESTATEMENT largely resulted from the effort of Samuel Williston, and its purpose was to reflect the generally-held view of contract law at the time. Arthur L. Corbin, *Samuel Williston*, 76 HARV. L. REV. 1327, 1327-28 (1963).

25. RESTATEMENT OF CONTRACTS § 75(1) (AM. L. INST. 1932).

26. RESTATEMENT (SECOND) OF CONTRACTS §§ 71(1) and (2) (AM. LAW INST., 1981) (emphasis added).

27. This restatement says:

The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise. . . . The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.

RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (AM. LAW INST., 1981) (emphasis added).

28. Originating primarily as a judicial rule, Judge Learned Hand summarized the objective theory of contracts in an oft-repeated segment of *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911):

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law

promisor was motivated even partially by a desire to obtain what the promisee was giving, the court will deem the promisee's performance or return promise to constitute consideration.

HISTORY'S LESSONS

Having originated as a way for the common-law courts to avoid losing out in a jurisdictional tussle to rival courts, consideration continues to linger five centuries later as "a cornerstone for the law of contracts."²⁹ It lingers long past the demise of the competing tribunals and, some would say, long past even a need for such a doctrine.³⁰ Does its "hanging around" suggest that there is something significant about bargained-for exchanges, or is it merely an accident of history—that is, a variation of the old saw that old habits die hard? That it lingers, despite its flaws, despite the strong critics, and in spite of the markedly different cultures and societies that have embraced it, suggests that the answer is that there is something special about bargained-for exchanges. Surely, its tenacious "staying power" in contract law cannot be explained as a merely accident of history.

Indeed, Joseph Perillo and Helen Bender confirm this conclusion. They admonish that it would be wrong to expect that tracing consideration back to its origins would result in "the discovery of a doctrine that existed from time immemorial, that determined the decisions of courts, and that is still to be stated as the existing law."³¹ They note that during each stage of consideration's development, the reasons for the courts' acceptance of the doctrine varied according to the needs of societies' demands.³² Those demands have varied starkly, from the barter-based society of fifteenth- and sixteenth-century England to the industrialized, market-based society of the modern era. Still, in the twenty-first century, the doctrine continues to "feel right" to a society searching for an anchor for grounding legal duties.³³

to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were mutual mistake, or something else of the sort.

29. FARNSWORTH, *supra* note 5, at 18.

30. See FRIED, *supra* note 6, chs. 2 and 3 (advocating for grounding enforcement of promise in morality and contending that bargained-for exchange and freedom of contract are "contradictory" concepts).

31. PERILLO & BENDER, *supra* note 1, at 5.

32. *Id.*

33. Roberto Unger observes that "the parcel of truth contained in the liberal and the conservative conception of the problem of order in modern life is the nonexistence of an order

Nonetheless, despite these stark changes through the centuries, a common challenge has faced the courts at each stage of consideration's development. This challenge has to find an effective means for separating promises worthy of the courts' enforcement from those that were not. Societies through the ages have universally agreed that not all promises are worthy of being enforced. "No legal system has ever been reckless enough to make all promises enforceable," Farnsworth observes.³⁴ Moralists through the centuries have accepted the need to make exceptions for promises motivated by, as Roger Bern puts it, "matters of the heart."³⁵ For Bern, such matters are reserved for the exclusive jurisdiction of God who "searches all hearts and understands every intent of the thoughts."³⁶ Morris Cohen opines, "Many of us . . . 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."³⁷ The premise underlying this notion is that the law must allow for changed minds because not all promises are worthy of the courts' time and attention, particularly those promises motivated by such nonbusiness purposes as love, friendship, and gratuity. "Fundamentally," Perillo says, "the idea is that the coercive power of the State will not be employed to impose sanctions on the defaulting promisor unless the law deems the enforcement of the promise socially useful."³⁸

Fried suggests that bargained-for exchanges have served this function and others through the centuries because of its flexibility. Bargain exchanges, he says, have "the virtue of being able to pound nails, drive screws, pry open

men can accept. . . . Thus, we can account for a basic, common experience in modern society. . . the sense of being surrounded by injustice without knowing where justice lies." ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 175 (1976). See also Phillip Kline, *Imprisoning the Innocent: The "Knowledge of Law" Fiction*, 12 *LIBERTY L. REV.* 394, 447 (2019) (modern law emphasizes a sourced-based, positivist approach to law, which "offers nothing regarding the purposes or merits of law").

34. *Id.* at 11.

35. Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Applications to Contracts, Antitrust, Remedies and Public Policy Issues*, 6 *REGENT U. L. REV.* 103, 136 (1995) (referring to promises of a gift). See also *supra* note 11 and accompanying text.

36. *Id.* at 123, quoting 1 *Chronicles* 28:9 (New American Standard Bible).

37. Morris R. Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553, 573 (1933).

38. JOSEPH M. PERILLO, *CONTRACTS* 156 (7th ed. 2014).

cans.”³⁹ Nonetheless, Fried dismisses bargain exchanges as “an awkward tool” that does no task well, certainly not as well as a specialized tool.⁴⁰

Fried takes his criticism of bargain exchanges even further. He charges that they have not lived up to their billing being able to simplify the process and enhancing the freedom of contract.⁴¹ If bargained-for exchanges did what they are touted as being able to do, he contends, they would allow the courts simply to determine whether a transaction had been forged by means of a true bargain. If it had, the courts could then go about their business of enforcing agreements without concern for whether the exchanges had substance. By the same token, he adds, it would grant people the freedom to make whatever bargains seemed best to them without outside interference. Fried concludes that, if consideration did at least that much, “the only question left to answer would be what there is about bargains that makes them among promises the privileged objects of legal recognition.”⁴² In his estimation, however, consideration does not achieve either of these potential objectives. Instead, he decries, the courts have applied the doctrine in what he deems confusing and contradictory epicycles.⁴³

Yet, Fried does not offer an explanation for why, in the face of such failings, the courts would persist in basing consideration on bargain exchanges. If Fried is correct, we can only surmise that the courts must be so blinded by tradition and precedent that they cannot perceive their need to abandon the bargain approach to consideration. As will be explored later,⁴⁴ Fried may be overstating his case. But before we scrutinize his criticism, we should consider the possibility of another, more compelling explanation for the “staying power” of bargained-for exchange. Indeed, it may well be the case that, even if Fried’s criticism is not overstated, there is something special

39. FRIED, *supra* note 6, at 39.

40. *Id.*

41. FRIED, *supra* note 6, at 31. Farnsworth notes that, in applying the modern permutation of consideration, the courts’ concern has shifted from the substance of the promises of the exchange. “Their sole inquiry now [is] into the process by which the parties . . . arrived at that exchange—was it the product of ‘bargain?’” FARNSWORTH, *supra* note 5, at 48.

42. FRIED, *supra* note 6, at 31.

43. Among the contradictions and epicycles to which Fried points are the requirement of mutuality of obligation even when the parties are accepting of something less; the seeming contradiction of declaring that motive is irrelevant but demanding that the exchange not be a pretense or charade; enforcement of promises to pay uncollectable debts; enforcement of promises to pay for benefit already received; modification of executory contracts because of unanticipated circumstances. *Id.* at 29-33.

44. See *infra* note 141 and accompanying text.

about bargained-for exchanges that explains why the courts have not abandoned this approach to consideration.

RECIPROCITY: BARGAINED-FOR EXCHANGES' SPECIAL COMPONENT

Fried has identified the key issue—the one he dodges by leveling his strong criticism against the bargain approach to consideration. This issue is what is so special about a bargained-for exchange that it should be accorded privileged legal recognition? Farnsworth poses the issue this way: “Why should a promisee’s mere return performance without more suffice to bind a promisor? Put differently, why should . . . the promisor [not] be free to renege on the promise as long as the promisee has done nothing in reliance on it?”⁴⁵ Why, in light of the confusion and seeming contradiction surrounding consideration, have the courts tenaciously persisted in applying it, especially when, as Fried points out, alternative doctrines would seem better suited to one or more of consideration’s possible functions?⁴⁶

Lon Fuller would surely answer Fried by noting what he identifies as the central component of bargained-for exchanges—that is the component of reciprocity. Fuller believes that reciprocity is quite significant—not only to contract law but to all of society’s human interactions.⁴⁷ He notes that “[w]henever an appeal to duty seeks to justify itself, it does so always in terms of something like the principle of reciprocity.”⁴⁸ The universality of reciprocity is apparent in its being “found in every morality of duty, from those heavily tintured by an appeal to self-interest to those that rest on the lofty demands of [Immanuel Kant’s] Categorical Imperative.”⁴⁹ Relationships grounded in reciprocity are, for Fuller, what establishes the affinity between the morality of

45. FARNSWORTH, *supra* note 5, at 50.

46. Fried tersely suggests that “movement in the law . . . suggests that we may have in the not too distant future a more candid set of principles to determine which promises should be enforceable in terms of the fairness of each type.” FRIED, *supra* note 6, at 39. He takes his cue from developments in contract law concerning option contracts, firm offers, compromises of debts, modification of contracts, and promissory estoppel. *Id.* at 39. Promissory estoppel in particular is frequently treated as an exception to, or substitute for, bargained-for exchanges, but Perillo and Bender assert that it and other doctrines like it should be treated as a different form of consideration rather than an exception. They contend that these “alternatives” are as much an inherent part of contract law as cases involving bargained-for exchanges, having “fully come into their own as separate reasons for enforcement of promises . . .” PERILLO & BENDER, *supra* note 1, at 6.

47. LON FULLER, *THE MORALITY OF LAW* 19 (rev. ed. 1969).

48. *Id.* at 20.

49. *Id.*

duty and the economics of exchange.⁵⁰ That reciprocity functions as a contractual agreement's link to moral duty is made clear, he asserts, in the "sober reciprocity"⁵¹ of Jesus' declaration in the Sermon on the Mount:

Do not judge, or you too will be judged. For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you.

. . . .

. . . So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.⁵²

Commonly referred to as the Golden Rule,⁵³ Jesus is describing, in this passage, reciprocal relationships in which individuals look out for each other and cooperate to achieve the mutual interests of each other. "What the Golden Rule seeks to convey," Fuller concludes, "is not that society is composed of a network of explicit bargains, but that it is held together by a pervasive bond of reciprocity."⁵⁴ By building such relationships, Fuller adds, reciprocity becomes a "pervasive bond" holding all of society together.⁵⁵

Such insights are illuminating in probing the mystery of what makes bargained-for exchanges special in contractual relations. If reciprocity operates in society in general as a means for giving rise to moral and legal duty and as the "glue" that holds society together, it seems safe to assume that the reciprocity of bargained-for exchanges operates in the same manner to give rise to duty and to provide the "glue" to keep contracting parties tied to the transaction. Like virtually all reciprocal exchanges, bargained-for exchanges cultivate relationship, and relationship is essential to contractual transactions. These deals are commonly fraught with risk that, but for the rewards, would be a high barrier to the parties' entry into a transaction. Where risk abounds, reciprocity is most needed because it promotes risk sharing by virtue of giving the parties opportunity and incentive to share the risk in ways acceptable to each of them.

The ordinary health insurance contract illustrates the point. Why does an insurance company, in promising to pay an insured's medical expenses, typically seek a return promise that the insured will pay, not only a premium

50. *Id.*

51. *Id.*

52. *Matthew* 7:1-2, 12 (New International Version).

53. The Golden Rule, THE INTERNET ENCYCLOPEDIA OF PHIL., <https://www.iep.utm.edu/goldrule/> (last visited on Oct. 23, 2018).

54. FULLER, *supra* note 47, at 20.

55. *Id.*

for the insurance, but also a “deductible,” or portion of the cost? The idea is to put more responsibility for paying for health costs on insureds as a form of sharing some of the risk. The deductible becomes the insured’s “skin,” in terms of giving him “skin in the game,”⁵⁶ and gives the insurer a basis for hope that the insured’s having some of his own wealth at stake will cause him to act more prudently in deciding to seek medical assistance. This arrangement fosters and facilitates trust between insurer and insured.

Moreover, bargained-for exchanges create an incentive of cooperative effort. The parties are tethered to each other such that the success for one of them typically occurs only if the other succeeds, too. Furthermore, Fuller observes, the reciprocity manifested in the Golden Rule is the key to this tethering: “Just as you should treat others in the way you’d like to be treated, you would like to share the responsibility for events without unfairness and inequity.”⁵⁷

To push the point even further, Fuller notes the widespread adoption of the antithesis of the Golden Rule—which he words: “So soon as I have received from you your assurance that you will treat me as you yourself would wish to be treated, then I shall be ready in turn to accord a like treatment to you”⁵⁸—destroys reciprocity’s capacity to function as a pervasive bond.⁵⁹ “This is not the language of morality,” Fuller says, “nor even of friendly commerce, but of cautious and even hostile trade. To adopt its thought as a general principle would be to dissolve the social bond altogether.”⁶⁰ This truth confirms, he concludes, “the extent to which the principle of reciprocity has roots not only in our professions but in our practices as well.”⁶¹

56. William Safire explains the metaphor: “The *skin* in this case is a synecdoche for the self, much as ‘head’ stands for cattle and ‘sail’ for ships. The *game* is the investment, commitment or gamble being undertaken. Thus, investors in a company will be more comfortable in their own skins if they know that the managers are personally invested as well—that they share the risk and have an incentive to share the gains.” William Safire, *Skin in the Game*, N.Y. TIMES MAG. (Sept. 17, 2006), https://www.nytimes.com/2006/09/17/magazine/17wwln_safire.html. (last visited on Sept. 15, 2018). Safire debunks the widely held notion that Warren Buffet coined the metaphor and suggests that it originated much earlier, even in the nineteenth century.

57. FULLER, *supra* note 47, at 22.

58. *Id.* at 20.

59. *Id.*

60. *Id.* He asserts that it would not pervert the intent of the Golden Rule to say: “So soon as it becomes perfectly clear that you have no intention whatever of treating me as your yourself would wish to be treated, then I shall consider myself as relieved from the obligation to treat you as I would wish to be treated.” He asserts that reciprocity still operates in this understanding of the rule, although by “several removes from the duty itself.” *Id.* at 21.

61. *Id.* at 21.

Reciprocity fosters the parties' commitment to cooperating with each other to strive to make a contractual transaction succeed, and, because two heads are typically better than one, as the old proverb goes,⁶² it promotes rationality and increased understanding in often complex situations.

Nassim Taleb concurs that reciprocity functions as society's pervasive bond. For Taleb, one cannot understand the world without taking account of reciprocity.⁶³ Referring to reciprocity as "skin in the game," Taleb's perspective is that reciprocity operates universally as an effective, unifying application of justice and fairness.⁶⁴ In other words, reciprocity operates as a bond at all levels of human interactions—from individual-to-individual dealings all the way to international affairs. Reciprocity is "fractal," he contends, "in the sense that it works at all scales: humans, tribes, societies, groups of societies, countries, etc., assuming each one is a separate standalone unit and can deal with other counterparts as such."⁶⁵ For example, reciprocity is the standard by which society generally measures whether or not its members have fulfilled their civic obligations.⁶⁶ Moreover, as James Wilson observes, "The norm of reciprocity is universal. Virtually everyone who has looked has found it in every culture for which we have the necessary information."⁶⁷

The examples are myriad. Capturing the notion in a folksy way, baseball legend Yogi Berra is credited with saying, "Always go to other people's funerals—otherwise, they won't come to yours."⁶⁸ Numerous large social organizations, such as Kiwanis and Rotary clubs, urge their members to

62. The Scriptures confirm this notion: "Two are better than one, because they have a good return for their labor: If either of them falls down, one can help the other up. But pity anyone who falls and has no one to help them up." *Ecclesiastes* 4:9-10 (New International Version).

63. NASSIM TALEB, *SKIN IN THE GAME: HIDDEN ASYMMETRIES' IN DAILY LIFE* 3 (2018).

64. *Id.* at 4.

65. *Id.* at 19-20.

66. FULLER, *supra* note 47, at 20-21. Fuller illustrates his point by noting that nonvoters are often asked how they would feel if everyone acted as lethargic about voting as they. *Id.* at 21.

67. JAMES Q. WILSON, *THE MORAL SENSE* 65 (1993).

68. In an interview with William Safire, Berra denied making the remark. William Safire, *On Language*, N. Y. TIMES MAG. (Feb. 15, 1987), <https://www.nytimes.com/1987/02/15/magazine/on-language.html> (last visited Sept. 24, 2018). One of the earliest occurrences of the remark is in a novel, "The Youth of the Period," by J. F. Shaw Kennedy, and published in 1876 in which a character remarked, "[I]f I don't attend other people's funerals they won't come to mine." Garson O'Toole, *Always Go to Other People's Funerals—Otherwise They Won't Come to Yours*, QUOTE INVESTIGATOR (updated Sept. 28, 2015), <https://quoteinvestigator.com/2015/09/27/funeral/> (last visited Sept. 24, 2018).

practice the Golden Rule.⁶⁹ In international law, where no codified authority of enforcement of agreement exists, reciprocity assumes enormous importance as the primary means for obtaining cooperation among the nations.⁷⁰ Indeed, the strong reliance on reciprocity by the indigenous Quechua peoples of Peru is notable in this regard. A sacred reciprocity, known as *ayni*, provides the bases for regulating all exchanges in Quechua communities, according to Alejandro Argumedo and Michel Pimbert.⁷¹ “[W]hen Quechua communities [could not] find goods, services and [labor] from within the household,” Argumedo and Pimbert observe, “they [resorted] to a variety of reciprocal arrangements with [neighbors] and kin based on obligation, loyalty, social and ritual debts.”⁷²

The primary reason for reciprocity’s universality, according to Wilson, is the “advantages of cooperation” it reinforces.⁷³ Wilson illustrates the point with a hypothetical of two primitive men under attack by a tiger:

If both run, the slower of the two will be killed. If one fights and the other runs, the fighter will be killed. But if both stand and fight, the tiger will be killed. If the two men are entirely self-interested, both will run. They each will think as follows: If my buddy fights, I will live if I run. If my buddy runs, I will be killed if I fight. No matter what my buddy does, I am better off running. So I will run. Both think the same way, and so both wind up doing something that gives to each a 50-50 chance of being killed by the tiger. They would be better off if they both fought, but for that to happen, one or the other of two conditions must exist. Either they must be so committed to one another that each feels he has a duty to help the other, or they must be able to agree after a brief discussion that fighting makes them better off. For the second consideration to

69. Kiwanis declares that one of its primary objectives is “[t]o encourage the daily living of the Golden Rule in all human relationships.” *Our Values*, KIWANIS, <https://www.kiwanis.org/about/values> (last visited Sept. 24, 2018). Rotary urges its members to adopt a “Four-Way Test . . . to use for their personal and professional relationships.” The test is: “1. Is it the TRUTH? 2. Is it FAIR to all concerned? 3. Will it build GOODWILL and BETTER FRIENDSHIPS? 4. Will it be BENEFICIAL to all concerned?” *Guiding Principles*, ROTARY, <https://my.rotary.org/en/guiding-principles> (last visited Sept. 24, 2018) (last visited Sept. 24, 2018).

70. Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INTER’L L. J. 94, 94-95 (2003).

71. Alejandro Argumedo & Michel Pimbert, *Bypassing Globalization: Barter Markets as a New Indigenous Economy in Peru*, 53 DEVELOPMENT 343, 344 (2010).

72. *Id.*

73. WILSON, *supra* note 67, at 69.

have any effect, they must be willing to trust the promise of the other to fight. In the first case, they do the right thing because they are altruistic, in the second because they are fair. After a few thousand encounters with sabretooth tigers, this primitive culture will probably come to consist disproportionately of people who are altruistic or fair or both. The others will have been eaten.⁷⁴

Taleb concludes that reciprocity is not only essential for contract theory, but it is the mediating principle in virtually every human interaction, including used car buying, ethics, learning, governmental power, risk science, bureaucratic accountability, social justice, option theory, and theology.⁷⁵ It accomplishes this function, he concludes, by requiring that, should something go awry, harms and penalties are shared and by instilling a sense of justice.⁷⁶ Joining in Fuller's emphasis of the Golden Rule, Taleb explains, "If you have the rewards, you must also get some of the risks, not let others pay the price of your mistakes. If you inflict risk on others, and they are harmed, you need to pay some price for it."⁷⁷

Not only does reciprocity foster cooperative relationships, but it also instills a sense of justice and fairness, Taleb concludes, by reducing the effects of the divergences that frequently occur in human interactions. He names a few: "those between action and cheap talk . . . , consequence and intention, practice and theory, honor and reputation, expertise and charlatanism, concrete and abstract, ethical and legal, genuine and cosmetic, merchant and bureaucrat . . . , [and] commitment and signaling"⁷⁸ Farnsworth has also perceived that, innately, reciprocity resonates with the "average person's sense of justice."⁷⁹ Indeed, Wilson reports a "vast body of research" that confirms reciprocity's universal acceptance as exuding justice and fairness.⁸⁰

Fuller warns, however, that reciprocity is only a "rough and approximate" measure of justice and fairness.⁸¹ Even so, humans instinctively equate it to justice. Moreover, as Fuller notes, it serves society well because it is a part of the social fabric that unites individual actions and functions as "a sort of

74. *Id.* at 66-67. The Scriptures confirm the lesson of this hypothetical. "Though one may be overpowered, two can defend themselves. A cord of three strands is not quickly broken." *Ecclesiastes* 4:12 (New International Version).

75. TALEB, *supra* note 63, at 3-4, 6.

76. *Id.* at 4.

77. *Id.*

78. *Id.* at 6.

79. FARNSWORTH, *supra* note 5, at 50.

80. WILSON, *supra* note 67, at 60.

81. FULLER, *supra* note 47, at 22.

anonymous collaboration among men by which their activities are channeled through the institutions and procedures of an organized society.”⁸²

GOD’S USE OF RECIPROCITY TO INTERACT WITH HUMANS

Jesus declared that the Golden Rule “sum[med] up the Law and the Prophets,”⁸³ confirming reciprocity’s universality and function a pervasive bond of society. Indeed, the Holy Bible is full of accounts of reciprocity. These accounts are extraordinary—“complicated and, at times, quite strange.”⁸⁴ The most noteworthy for our purposes are the ones that occur in the Bible’s accounts of God’s interaction with humans. In what is surely confirmation of reciprocity’s exceptional nature, God chooses covenants as his preferred form for these interactions. The first of a series of formal covenants between God and man is God’s covenant with His entire creation communicated to Noah.⁸⁵ In this covenant, God vows to sustain his creation by never allowing chaos like the universal flood to destroy it again, and he seals the vow with a rainbow. These formal covenants number as many as ten, depending on interpretation.⁸⁶ Among the most notable ones are God’s covenants with Noah,⁸⁷ Abraham,⁸⁸ Moses and the nation of Israel,⁸⁹ and David.⁹⁰ That they take on the form of bargain exchanges seems quite noteworthy for our purposes. That God would use a form that contract law adopts and roughly

82. *Id.*

83. *Matthew* 7:12 (New International Version).

84. Rev. Dr. Martha Kearse, *The Economy of God*, PEAKLAND BAPTIST CHURCH (Oct. 14, 2018), <http://www.peaklandbaptistchurch.org/media/sermon-archives/> (transcript of sermon notes on file with author).

85. *Genesis* 9:8-17 (New International Version).

86. PAUL R. WILLIAMSON, *SEALED WITH AN OATH: COVENANT IN GOD’S UNFOLDING PURPOSE* 31 (2007).

87. *Genesis* 6:18.

88. *Genesis* 15, 17.

89. *Exodus* 19:5-6 (New International Version): “[The LORD told Moses to tell Israel,] ‘[I]f you obey me fully and keep my covenant, then out of all nations you will be my treasured possession. Although the whole earth is mine, you will be for me a kingdom of priests and a holy nation.’” This bilateral covenant seemingly was prompted by God’s covenant promises made to Abraham, Isaac, and Jacob. *Exodus* 2:23-24 (New International Version). Its formal ratification occurs in *Exodus* 24.

90. *2 Samuel* 7; *1 Chronicles* 17. “While objections have been raised over the application of covenantal language to Yahweh’s dynastic promise to David . . . , it is generally agreed that . . . these passages recount a covenant-making occasion.” WILLIAMSON, *supra* note 86, at 120.

replicates in everyday contractual transactions is surely quite significant to understanding consideration's function and purpose.

From the earliest days of human existence, God's interactions with humankind occur, according to the Scriptures, in the form of bargain exchanges. "It's a funny thing to think about, for me—God making deals," says Martha Kearsse:

But, in fact, it is the core of the Old Testament and the foundation of the New—we have a deal with God. God's piece of the deal is this: God agrees to be our God, present with us, guiding and protecting us, giving us the land for our use and all other good things. Giving us the ability to be co-creators, participating in in creation as farmers, as artists, as artisans, as parents, as business people, as care-givers, as teachers, as ministers. That is God's part of the deal—not insubstantial. Our part of the deal is very simple: we recognize God as God, and enact our lives according to God's wishes. This is the economy of God—the recognition that all we have is God's, that God has given it all to us, and our only part of the deal is to remember that this is so—that what we have has been given to us and that the best of all possible worlds includes our making sure that what has been given is shared with mercy and justice.⁹¹

In the opening chapters of Genesis, God promises Adam and Eve sanctuary—that is, he allows them to partake of the Garden of Eden's bounty and blessing—in exchange for their reciprocal performance of not partaking of the forbidden fruit.⁹² The arrangement clearly had the appearance of one type of bargained-for exchange—a promise offered in exchange for performance.⁹³ In fact, the prophet Hosea strongly suggests that the promise and performance were part of a covenant.⁹⁴

As the Sovereign of the universe, God surely could have used simple commandment to forbid the first couple's eating the forbidden fruit. Instead, he chose to bargain for their performance—their obedience. It seems safe to surmise that God sought Adam's and Eve's "buy in." By virtue of this

91. Kearsse, *supra* note 84.

92. "And the LORD God commanded the man, 'You are free to eat from any tree in the garden [promise]; but you must not eat from the tree of the knowledge of good and evil [return performance], for when you eat from it you will certainly die.'" *Genesis* 2:16-17 (New International Version).

93. RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (AM. LAW INST. 1981).

94. "[Like] Adam, [Israel has] broken the covenant . . .". *Hosea* 6:7 (New International Version).

arrangement, when God banished the couple from the garden in recompense for their breach of his condition, they had no valid basis for claiming injustice because, unquestionably, he had dealt with them justly.

The Bible is replete with similar accounts of God's bargaining for what he sought,⁹⁵ typically obedience and compliance. For example, when God calls Abraham, long before entering into formal covenant with him, God deals with the patriarch in the form of a reciprocal exchange—a promise intended to induce Abraham's action:

Go from your country, your people and your father's household to the land I will show you. I will make you into a great nation, and I will bless you; I will make your name great, and you will be a blessing. I will bless those who bless you, and whoever curses you I will curse; and all peoples on earth will be blessed through you.⁹⁶

Abraham acted on the promise,⁹⁷ and it was credited to him as righteousness.⁹⁸

Later, in a quite extraordinary exchange, God bargains with Abraham concerning destruction of the wicked cities of Sodom and Gomorrah.⁹⁹ God agrees to Abraham's entreaty to spare the cities if fifty righteous people could be found there, but Abraham continues bargaining. God accedes at each point as Abraham asks to lower the number of righteous people to forty-five righteous persons, then forty, then thirty, then twenty, and finally ten.¹⁰⁰ How could Abraham doubt God's justness after that encounter?

95. This is the key word of Restatement § 71(2) in which the restatement establishes reciprocal inducement as the central component of bargained-for exchanges. *See supra* note 1. *See infra* note 104 and accompanying text.

96. *Genesis* 12:1-3 (New International Version).

97. "By faith Abraham, when called to go to a place he would later receive as his inheritance, obeyed and went, even though he did not know where he was going. By faith he made his home in the promised land like a stranger in a foreign country; he lived in tents, as did Isaac and Jacob, who were heirs with him of the same promise." *Hebrews* 11:8-9 (New International Version). The writer of *Hebrews* further notes that Abraham "embraced the promises." *Hebrews* 11:17 (New International Version).

98. "Abram believed the LORD, and he credited it to him as righteousness." *Genesis* 15:6 (New International Version).

99. God told Abraham, "The outcry against Sodom and Gomorrah is so great and their sin so grievous that I will go down and see if what they have done is as bad as the outcry that has reached me. If not, I will know." *Genesis* 18:20-32 (New International Version).

100. *Genesis* 18:27-32 (New International Version). It is not the purpose of this paper to assert that such entreaties by humans toward God should be understood as normative. Without considering the theological ramifications of such exchanges, it seems highly

In another remarkable exchange, God bargains with Moses concerning God's decision to cease sojourning with Israel to the promised land—a decision induced by the Israelites' becoming “a stiff-necked people.”¹⁰¹ God relents when Moses pleads for God to continue traveling with him and the Israelites. God says to Moses, “I will do the very thing you have asked, because I am pleased with you and I know you by name.”¹⁰² When Moses pushes for more—for God to show his glory—God again responds favorably by granting as much of Moses' request as he can without harming Moses. He shows Moses his backside but not his face.¹⁰³

Like bargain exchanges in the mold of Restatement § 71, these biblical bargains feature a notable and effective bonding agent—that is, inducement. In bargained-for exchanges compliant with Restatement § 71, the promisor makes his promise in order to obtain the promisee's promise or action in return. Restatement § 71(2) states, “A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”¹⁰⁴ A comment to the Restatement § 71 explains:

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 of the consideration. . . . [I]t is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. . . . But it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain. Moreover, a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no consideration¹⁰⁵

noteworthy concerning the significance of bargain exchanges that God would engage in such incidents of bargaining.

101. *Exodus* 33 (New International Version).

102. *Exodus* 33:17 (New International Version).

103. God explained to Moses, “[Y]ou cannot see my face, for no one may see me and live.” *Exodus* 33:18-23 (New International Version).

104. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

105. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

Exchanges satisfying Restatement § 71 allow the courts to enforce a promise with assurance that, viewed objectively,¹⁰⁶ the promisor was motivated¹⁰⁷ or induced by the promisee's return promise or performance and voluntarily entered into the transaction knowing that he would be accountable to the same degree as he expected the promisee to be held accountable. The promisor also enters the transaction with assurance that, while he may be the obligor in this deal, he can just as readily be the obligee in the next one.

Fuller identifies these aspects of a reciprocal exchange as distinctive marks of a just and fair transaction. To operate effectively, even as a rough and approximate measurement of fairness and to impart the strongest sense of duty, he asserts that reciprocal exchanges must be voluntary, equal in the level of performance demanded of each party, and provide for fluidity of roles—that is, today's obligor can just as easily become tomorrow's obligee and vice versa.¹⁰⁸ He explains that, without fluidity of roles, “we are likely to be stumped by Rousseau's question, What is the reason that I, being myself, should act as if I were the other person when I am virtually certain that I shall never be found in his situation.”¹⁰⁹

God's covenants exude Fuller's indicia of justice and fairness.¹¹⁰ The parties to each of God's covenants agreed to them voluntarily, as free agents. Noah, Abraham, Israel and the others were free to demur to, and even to reject, God's entreaties. God did not require any more performance from his

106. See *supra* note 28 and accompanying text.

107. The courts do not demand that obtaining the other party's performance and return promise be the promisor's actual subjective motive, but only that, in applying an objective standard, there is evidence from which a fact-finder could reasonably conclude that this was his motive at least in part. Restatement § 81 states:

“(1) The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise. (2) The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.”

RESTATEMENT (SECOND) OF CONTRACTS § 81 (AM. LAW INST. 1981).

108. FULLER, *supra* note 47, at 23.

109. *Id.*

110. This observation is not made to suggest in any way that God's dealings are subordinate to Fuller's notions. The obverse is emphatically the case. Instead, it is made to suggest that Fuller did not originate the factors. They were established by God at creation. See *infra* note 118 and accompanying text. Nonetheless, the comparison does seem to confirm, even if perversely, the reliability of the biblical model.

promisees than he required of himself.¹¹¹ God does not treat humans as objects of his sovereignty. Instead, by bargaining, he accords them dignity—as true bearers of his image.¹¹² Moreover, God’s pronouncements of judgment for lack performance by the promisees, most notably the nation of Israel, were unquestionably just. God had performed, or stood ready, willing, and able to perform, his side of the bargain.

Moreover, in each of these covenants, God was both obligor and obligee. For example, the objective of his covenant with the new nation of Israel was to induce its full obedience.¹¹³ Thus, he made himself both obligor, ready to carry out his promises to be the nation’s sustainer and protector, and obligee, desiring the benefit of Israel’s obedience.¹¹⁴ He thereby established a standard for measuring his faithfulness and fairness.¹¹⁵ As a matter of presupposition, just as God’s promisees have a general obligation to keep their promises to God,¹¹⁶ God has a general obligation to keep the promises and covenants that he makes. Though it might seem to be a bit audacious to say so, it is as much a matter of moral obligation for God to perform his promises as it is for his promisees to keep their promises to him. In light of the biblical depiction of God as making promises, God generates in himself a moral obligation to keep his promises. If it were not so, the biblical accounts of God’s making promises would surely be false. In the same way, we generate in ourselves moral duties when we make promises.¹¹⁷ Depicting as they do reciprocal “skin in the game”

111. This observation is, of course, an understatement. “Know therefore that the LORD your God; he is the faithful God, keeping his covenant of love to a thousand generations of those who love him and keep his commandments.” *Deuteronomy* 7:9 (New International Version).

112. “Then God said, ‘Let us make mankind in our image, in our likeness, so that they may rule over the fish in the sea and the birds in the sky, over the livestock and all the wild animals, and over all the creatures that move along the ground.’ So God created mankind in his own image, in the image of God he created them; male and female he created them.” *Genesis* 1:26-27 (New International Version).

113. God instructed Moses to tell the Israelites, “Now if you obey me fully and keep my covenant, then out of all nations you will be my treasured possession.” *Exodus* 19:5 (New International Version).

114. See *supra* note 91 and accompanying text.

115. The Psalmist wrote, “I will listen to what God the LORD says; he promises peace to his people, his faithful servants—but let them not turn to folly. . . . Love and faithfulness meet together; righteousness [justice] and peace kiss each other.” *Psalms* 85:8-10 (New International Version).

116. One of the laws of God’s covenant with Israel was: “If you make a vow to the LORD your God, do not be slow to pay it, for the LORD your God will certainly demand it of you and you will be guilty of sin.” *Deuteronomy* 23:21 (New International Version).

117. See *infra* note 187 and accompanying text.

by both parties, there was no basis for denying that God's dealings with humans were just and fair.

Nonetheless, the justice and fairness of God's bargain exchanges is verifiable independently of Fuller's indicia. Indeed, God's actions are a precise measurement of justice and fairness. God makes clear that his cause is justice. He declared to Israel, "Listen to me, my people; hear me, my nation: Instruction will go out from me; my justice will become a light to the nations."¹¹⁸ He proclaimed, "...I, the LORD, love justice...."¹¹⁹ Isaiah described justice as one of God's attributes.¹²⁰ The Psalmist identified him as a lover of justice.¹²¹ He desires that his people follow his example by being a just people. "For the LORD loves the just...."¹²²

An obvious conclusion is that, by virtue of his attribute of justice, God not only chooses justice over injustice, but all that he does is necessarily just. When his interactions with humans take the form of reciprocal exchanges, the exchange is justice in action. Because justice is one of his attributes, not only do his acts radiate justice, but they *are*, by definition, justice. That is to say, God does not merely reflect justice in degrees. All that he does is pure justice because he cannot act inconsistently with justice—that is, contrary to one of his attributes.¹²³

The centrality of reciprocity in God's justice is manifest in more than God's covenants and interactions with the likes of Abraham and Moses. The *lex talionis* is a part of the laws mandated by God through Moses for Israel and is notable for its reciprocal approach to retribution. "Show no pity," these laws declared, "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."¹²⁴ These laws are often dismissed as primitive and uncivilized,¹²⁵ but such dismissal is facile and unperceptive. Many scholars have concluded that these laws were progressive for their time. They provided an effective means

118. *Isaiah* 51:4 (New International Version).

119. *Isaiah* 61:8 (New International Version).

120. "For the LORD is a God of justice. Blessed are all who wait for him!". *Isaiah* 30:18 (New International Version).

121. *Psalms* 99:4 ("The King is mighty, he loves justice—you have established equity; in Jacob you have done what is just and right.")

122. *Psalms* 37:28 (New International Version).

123. *Psalms* 111:6-8 (New International Version) ("The works of his hands are faithful and just; all his precepts are trustworthy. They are established for ever and ever, enacted in faithfulness and uprightness.")

124. *Deuteronomy* 19:21 (New International Version). See also *Exodus* 21:23-25 (New International Version) and *Leviticus* 24:18-20 (New International Version).

125. David VanDrunen, *Natural Law, the Lex Talionis, and the Power of the Sword*, 2 LIBERTY U. L. REV. 945, 945 (2008).

for quelling violence by mandating restraint in response to wrongdoing.¹²⁶ Moreover, it was reciprocity that moderated these laws., God commanded Israel “not [to] seek revenge or bear a grudge against anyone among your people, but love your neighbor as yourself. I am the LORD.”¹²⁷ The term “love” was tied to Israel’s covenantal understanding of its relationship with God,¹²⁸ but the Israelites viewed “neighbor” as referring to Israelites alone.¹²⁹ Centuries later, Jesus made clear that the mandate had an immensely wider scope: “You have heard that it was said, ‘Love your neighbor and hate your enemy.’ But I tell you, love your enemies and pray for those who persecute you”¹³⁰

Jesus, declaring his intent to be the fulfillment of the law, not destruction of it,¹³¹ had provocative takes on all the *lex talionis*:

You have heard that it was said, “Eye for eye, and tooth for tooth.”
But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also. And if anyone wants to sue you and take your shirt, hand over your coat as well. If anyone forces you to go one mile, go with them two miles. Give to the one who asks you, and do not turn away from the one who wants to borrow from you.¹³²

Jesus’ view is both ameliorating and troubling. It is troubling in its seeming mandate for a pacifist response to aggression (an issue not within this paper’s scope).¹³³ It is ameliorating in its tempering the harshness of retaliation by calling for responses of mercy and forgiveness instead of revenge. Such responses calm the emotions, especially anger, that spur revenge, often to levels greater than the wrong inflicted so the wrongdoer gets taught a lesson. Jesus’ call for forgiveness should not be understood as seeking to obstruct justice, but to make room for true justice—God’s justice.¹³⁴ This teaching laid

126. *Id.* at 950.

127. *Leviticus* 19:18 (New International Version).

128. Joel S. Kaminsky, *Loving One’s (Israelite) Neighbor: Election and Commandment in Leviticus 19*, 62 INTERPRETATION 123, 125 (2008).

129. *Id.* at 123.

130. *Matthew* 5:43-44 (New International Version).

131. *Matthew* 5:17.

132. *Matthew* 5:38-42 (New International Version).

133. VanDrunen notes the passage’s “innumerable” difficulties and seeks to reconcile them with Reformed theology. *Supra* note 125, at 959-64.

134. *Romans* 12:19 (New International Version) (“Do not take revenge, my dear friends, but leave room for God’s wrath, for it is written: ‘It is mine to avenge; I will repay,’ says the Lord.”) (New International Version) (quoting Deuteronomy 32:35).

the foundation for the Golden Rule, which culminated the Sermon on the Mount. Intertwined in the Golden Rule's plea to treat others as we want to be treated are justice, fairness, reciprocity, responsibility, and rationality.

WHAT MAKES BARGAINED-FOR EXCHANGES SO SPECIAL?

Indeed, in the Golden Rule, Taleb perceives the inherent fairness of reciprocal exchanges—that is, the vehicle for risk sharing. “Just as you should treat others in the way you’d like to be treated,” he opines, “you would like to share the responsibility for events without unfairness and inequity.”¹³⁵ A bargained-for exchange assures the courts that a party has negotiated for the level of risk sharing he undertakes in the transaction. Absence of that assurance often has been one of the causes for the courts’ declaring consideration to be “inadequate.”¹³⁶ Moreover, a bargained-for exchange provides succor to the promisee by relieving him of the burden of showing that the promisor intended to be bound by the promise or that he actually relied on the promise to his detriment. Instead, his burden will be only to establish that the promise was sufficient to induce his own performance or return promise.¹³⁷

What is so special about bargained-for exchanges that they merit privileged status in contract law? The answer seems rather clear. They give operation to reciprocity, which since creation's genesis has universally operated at every strata of human relations to effectuate at least three significant purposes. First, it accords the parties dignity by placing them on equal footing. Each has assurance that his performance will not be enforced to a greater degree than his counterpart's. Second, reciprocity provides a simple, straightforward measure of justice and fairness. This measure can be imprecise at times, but instinctively humans have always believed that risk sharing is more fair than bearing risk alone. The symmetry of both parties' having skin in the game—sharing the rewards and the risks—is more fair than the asymmetry of reaping rewards without risk or inflicting risk and not paying for the harm caused.¹³⁸ Third, reciprocity fosters and builds relationships of committed cooperation. Bargained-for exchanges, with their emphasis on inducement, help assure that contracting parties are “all in”—that is, they understand that they have a responsibility to work cooperatively

135. TALEB, *supra* note 63, at 4.

136. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

137. FARNSWORTH, *supra* note 5, at 50; E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 59 (1998).

138. TALEB, *supra* note 63, at 4.

with their contracting counterparts to avoid, at a minimum, sharp dealing and “ambushing” the other party.¹³⁹

There may be other reasons why bargained-for exchanges have lingered in contract law in the face of its seeming logical flaws and the uncertainty of its purpose and function. But even if it is only these three reasons, surely it is enough. These three alone bring rationality to the abstract complexity of contract law.¹⁴⁰

FRIED’S CRITICISM THAT BARGAINED-FOR EXCHANGES ARE INEFFECTIVE

Fried, however, asserts that, even with these potential qualities, bargained-for exchanges are not an effective tool for deciding which promises should be enforced because of the inconsistent and contradictory manner in which the courts apply this tool. He notes that proponents typically claim that bargained-for exchanges permit the parties to judge for themselves the prudence of making the exchange without interference from the courts on matters of the exchanges’ value or the parties’ motives in making their promises. Instead, Fried charges, the courts reveal a willingness to judge both value and motive by refusing to enforce promises made as part of a mere pretense of a bargained-for exchange on grounds that it is disguising a gift.¹⁴¹ “[H]ow can we decide that the exchange . . . is a charade without looking either at motive—which [the doctrine] forbids us to do—or at the substance of the exchange, which [the doctrine also] forbids,” he asks.¹⁴² The answer to Fried’s criticism is that it is not the mere occurrence of some kind of an

139. In *Market St. Assoc. Ltd. P’ship v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991) (emphasis added), Judge Richard Posner opined,

[I]t is one thing to say that you can exploit your superior knowledge of the market—for if you cannot, you will not be able to recoup the investment you made in obtaining that knowledge—or that you are not required to spend money bailing out a contract partner who has gotten into trouble. It is another thing to say that you can take deliberate advantage of an oversight by your contract partner concerning his rights under the contract. Such taking advantage is not the exploitation of superior knowledge of the avoidance of unbargained-for expense; it is *sharp dealing*.

140. LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* 20 (1965) (contract law is abstraction).

141. Fried offers this illustration of such a case, which he bases on RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981), ill. 5: “A father, wanting to assure his son of a gift but not having the funds in hand, promises to pay \$5000 in return for a peppercorn or some other worthless object.” FRIED, *supra* note 6, at 30,

142. *Id.*

exchange that causes proponents to tout the advantages offered by bargained-for exchanges. Instead, the key is the reciprocal inducement of each party's promises. Oliver Wendell Holmes identified inducement as the "essence of a consideration."¹⁴³ Only in bargained-for exchanges is such inducement manifest. Indeed, as Holmes said, "The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise."¹⁴⁴

Fried also criticizes the courts for inconsistently enforcing promises motivated by a sense of moral obligation. He points to cases in which the promisor, convicted by moral obligation, promises to pay for a benefit he has already received from the promisee. The courts will enforce the promises if doing so seems just, even though the promisor has no legal obligation to do so.¹⁴⁵ Fried concludes, "The bargain theory of consideration not only fails to explain why this pattern of decisions is just; it does not offer *any* consistent set of principles from which all of these decisions would flow."¹⁴⁶

But, again, Fried does not perceive the significance of reciprocity as the distinguishing element. For example, when Fried decries the court's refusal to enforce a father's promise to recompense a family for the care of his adult son¹⁴⁷ because the benefit is conferred before the promise is made, he acknowledges the missing element of inducement. Yet, he fails to perceive the significance of its absence. The difference seems obvious. Clearly, there was no kind of an exchange between the father and the family, much less a bargained-for exchange, and the father did not make his promise for the purpose of seeking the family's care of his son. They had already provided the care. The father was not seeking to induce the family to do anything. Unless the promisor's purpose is to induce the promisee's return promise or performance, the promisor is not bargaining, and reciprocity and its special qualities do not operate.

Moreover, the courts are not acting as duplicitously as Fried charges when they enforce a promise not supported by consideration on the basis of moral obligation.¹⁴⁸ Generally, the courts in these cases hold that a moral obligation

143. OLIVER WENDELL HOLMES, *THE COMMON LAW* 293 (1881).

144. *Id.* at 294.

145. FRIED, *supra* note 6, at 33. These cases, known by several labels, including material benefit rule, promissory restitution, and promise for benefit already received, are the subject of Restatement § 86(a), which provides, "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(a) (AM. LAW INST. 1981).

146. FRIED, *supra* note 6, at 30.

147. Fried bases his example on *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

148. *See supra* note 146.

plus a material benefit previously *bargained for* and received constitutes consideration for the promisor's subsequent gratuitous promise.¹⁴⁹ The more notable of these cases involve gratuitous promises to pay debts that are barred from collection by the statute of limitations; to pay debts discharged in bankruptcy; and to pay the debts of infants that the infants have disaffirmed.¹⁵⁰ Fried correctly suggests that the subsequent gratuitous promise fails the bargained-for exchange test and, thus, should not be enforced. Indeed, a majority of jurisdictions do not enforce these promises for that reason.¹⁵¹ What Fried does not mention, however, is that in each of these cases, there was originally, before the gratuitous promise was made, a bargained-for exchange and benefit conferred.

Indeed, that was the primary basis for the sixteenth-century courts to begin enforcing these promises. Deeming it unjust enrichment for the promisor to have the benefit of the uncollected debt, the credit extended to him before bankruptcy, and the benefit enjoyed by an infant, the courts succumbed to intense pressure to enforce these promises.¹⁵² In the venerable case of *Mills v. Wyman*,¹⁵³ on which Fried bases one of his examples,¹⁵⁴ a Massachusetts court distinguished the promise made in that case from the promissory restitution cases that Fried criticizes and refused to enforce it. A father promised to reimburse a family for providing care for his 25-year-old son for several weeks. Recognizing the promissory restitution cases, the *Mills* court distinguished them from the father's promise:

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, 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. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is

149. *E.g.*, *Drake v. Bell*, 55 N.Y.S. 945 (N.Y. Supp. 1889).

150. FARNSWORTH, *supra* note 5, at 58-61.

151. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 200 (6th ed. 2009).

152. *Id.* at 57.

153. 20 Mass. (3 Pick.) 207 (1825).

154. *Supra* note 146.

preserved by looking back to the origin of the transaction, where an equivalent is to be found.¹⁵⁵

Nonetheless, the obvious objective of the courts that do enforce these promises under the promissory restitution doctrine is justice. Their clear motive is to avoid even the appearance of unjust enrichment of not enforcing a renewed promise to repay an uncollectable debt, bargained for and benefit received, merely because no new consideration has been given for the renewed promise. If one of the reasons for the courts' continuing to apply bargained-for exchanges is because of the sense of justice that such exchanges exude, it should be expected that, when in the courts' view applying the doctrine would work an injustice, they would turn to an alternative, such as promissory restitution, for the purpose of effectuating justice.

Showing the importance of inducement to the courts' analysis, courts refuse to enforce promises, even ones made for the purpose of inducing the promisee's performance, if the promisee was not aware of the promise. The promisee may perform as the promisor desires, but the promisee's act clearly is not induced by the promise. The action did not induce the promise—that is, the action was not bargained for. The promisee has acted, not because he was induced to do so, but because the act apparently was something he would have done without regard for whether or not the promise was made. Again, because of the lack of a bargained-for exchange, there is no reciprocity, and the courts rightly refuse to enforce the promise.

Fried is correct that courts' declarations that they will not question the adequacy of consideration is slightly disingenuous, but only slight.¹⁵⁶ When the courts make such statements, as they frequently do, they certainly are heeding the mandates—or lack thereof—of Restatement § 71, which says nothing about the substance of the exchange. Neither did the first edition of Restatement § 71. These definitions speak only of the process of the exchange itself. As long as the exchange involves reciprocal inducement, it satisfies the requirements of Restatement § 71. Nonetheless, courts still speak of “adequate consideration,”¹⁵⁷ a term ensconced in the literature and case law.

155. *Id.*, reprinted in GEORGE PURCELL COSTIGAN, CASES ON THE LAW OF CONTRACTS, PART 1 298-99 (1921).

156. *See, e.g.,* *Bailey v. Vaughn*, 2017 WL 4176996 (Ohio App. 2017), at 2 n.1 (“Courts do not question the adequacy of consideration because “it is still believed to be good policy to let people make their own bargains and their own valuations.”) (*quoting* *Lake Land Emp. Group of Akron, L.L.C. v. Columer*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶21; 15 *Corbin on Contracts* (Interim Ed.2002) 96-97, Section 1395.”).

157. A search on WestLaw for the term “adequate consideration” returned more than 10,000 cases. For example, in *Socko v. Mid-Atlantic Systems of CPA, Inc.*, 126 A.3d 1266, 1274 (2015), the Supreme Court of Pennsylvania said that covenants not to compete are enforceable

As Farnsworth suggests, this probably results from old habits dying hard,¹⁵⁸ just as reference to the old nineteenth century benefit-detriment test lingers in the case law.¹⁵⁹

Fried's criticism of the courts' refusal to enforce peppercorns, or matters of nominal value, is the most puzzling. Courts do enforce peppercorns. The classic case of *Embola v. Tuppela*¹⁶⁰ is a prime example. Taking into consideration the risk involved in the transaction, the *Embola* court enforced the promisor's promise to pay \$10,000 if he was successful in reclaiming his mine in return for the promisee's paying \$50 to finance the promisor's trip to Alaska for the purpose of reclaiming the mine. The court said, "The risk of losing the money advanced was as great in this case as if the same had been advanced under a grubstake contract."¹⁶¹ Nonetheless, such lop-sided exchanges raise "red flags" that the arrangement is a sham—that no true bargaining or reciprocal inducement occurred. As Fried acknowledges, people rarely trade large sums of money for peppercorns.¹⁶² This fact alone makes the courts wary that the transaction is a sham or ruse and choose not to be a party to effectuating a pretense. Of more importance, a sham exchange does not indicate inducement—the key component of bargained-for exchanges. The mere occurrence of an exchange of promises is not enough. Restatement § 71(2) makes clear that what gives the exchange its special qualities is that the exchange of promises has been induced by the prospect of getting the return promise. Of equal concern to the courts is the strong possibility that bargained-for exchanges of a promise for a peppercorn can be the "smoke" that evidences the "fire" of misrepresentation, mistake, duress, or lack of seriousness—all defenses to enforcement of a contract.

Fried seems particularly troubled by the courts' refusal to enforce promises to make gifts. The general reason given for the courts' refusing to enforce gratuitous promises is that, unlike those bargained for, they tend not to enhance society's total wealth—that is, they usually are not productive.¹⁶³

"only if they are . . . supported by adequate consideration . . ." The court added, "When a non-competition clause is required after an employee has commenced his or her employment, it is enforceable only if the employee receives 'new' and 'valuable consideration'—that is, some corresponding benefit or a favorable change in employment status." *Id.* at 1275.

158. See FARNSWORTH, *supra* note 5, at 70.

159. See, e.g., *Lake Land Emp. Group of Akron, LLC v. Columber*, *supra* note 156, 101 Ohio St. 3d at 32, 804 N.E.2d at 247 ("Consideration may consist of either a detriment to the promisee or a benefit to the promisor.").

160. 220 P. 789 (Wash. 1923).

161. *Id.* at 790.

162. FRIED, *supra* note 6, at 30.

163. FARNSWORTH, *supra* note 5, at 54.

Because, by definition, the recipient gives nothing of significance to the promisor, these promises are not enforceable because of a lack of a bargained-for exchange.

This befuddles Fried. He asks why his promise to sell his car to his brother-in-law should be deemed more productive than his promise to give it as a gift to his nephew. Both promises, he argues, express his will, and both increase his own satisfaction. Thus, he asserts, both are productive “just in the sense that any freely chosen, significant act of mine is useful to me, and therefore is of net utility to society unless it harms someone else. Allowing people to *make gifts* . . . serves social utility by serving individual liberty.”¹⁶⁴

Nothing in contract law stops Fried from “*making gifts*.” Nothing in a bargained-for exchange in particular, or in consideration in general, impedes Fried from giving his car to his nephew and thereby garnering the satisfaction he seeks. He need only sign over the car’s title to his nephew and deliver the car to him.¹⁶⁵ Contract law does not even prohibit the making of promises to make gifts; it simply declines enforcement of them. Obviously, Fried’s actual complaint is not that he is deprived of the liberty to do what he chooses with his property but that his nephew is accorded no legal right to enforce Fried’s gift promise.¹⁶⁶

164. FRIED, *supra* note 6, at 37 (emphasis in original).

165. It is property law, not contract law, that necessitates his having to make the effort of signing over the title and delivering the car. Contract law is indifferent to the whole proposition.

166. Melvin Eisenberg poses an insightful response to Fried’s argument that his gratuitous promise should be enforced because he derives satisfaction from giving the car to his nephew:

This argument . . . assumes its own conclusion: Why should the promisor’s pleasure, without more, put him under a legal obligation? That aside, the satisfaction a promisor derives from his promise may be considerably less than the economic value of the promised performance. A distinction must be drawn between a present transfer and a promise to give. If *A* makes a present transfer to *B* of \$1000, it can normally be assumed that the satisfaction *A* derives from the transfer equals or exceeds the value to him of \$1000. If, however, *A* merely promises to give *B* \$1000 in one year, it can normally be assumed only that *A* believes the value he presently expects \$1000 will have for him in one year will not exceed the sum of (1) the satisfaction he derives at present from making the promise, (2) the satisfaction he expects at present to derive over the year from having made the promise, and (3) the satisfaction he expects at present to derive in one year from making the transfer. Therefore, there is no assurance that the satisfaction derived merely from making a donative promise will equal the value of the promised performance. Moreover, because an informal donative promise is likely to be uncalculated, the promisor’s solution of the satisfaction equation may be seriously askew even when the promise is made; and because the

As for the nephew's seeking enforcement of his uncle's promise to give him the car, the nephew, unlike the one in *Hamer*,¹⁶⁷ cannot show the courts anything he has done or promised to do that induces his uncle's promise. Moreover, because the nephew's demanding enforcement would be necessary only if the uncle changes his mind, enforcement fails to take into consideration circumstances that most would deem to be excusing of the uncle's performance, such as the nephew's apparent ingratitude, or changed circumstances that make the uncle's keeping the promise imprudent.¹⁶⁸ Melvin Eisenberg concludes, "[W]hat constitutes ingratitude and improvidence is very difficult to determine, particularly in the context of the intimate relationships that often give rise to donative promises, and this difficulty would add substantially to the problem of administration."¹⁶⁹ Thus, as Eisenberg notes, these difficulties have led to rejection of Fried's view and widespread acceptance that only gratuitous promises that are relied upon should be enforced.¹⁷⁰

promisor's satisfaction during the time following the promise is peculiarly susceptible to changed circumstances, the equation will often turn out wrong even if it originally seems to be in balance.

Melvin Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 7 n.17 (1979).

167. *Supra* note 20. The uncle promised his nephew \$5000 if he would refrain from partaking in certain vices until the nephew was 21 years of age. Although the court had difficulty perceiving the true benefit to the uncle, the court did exactly what Fried asserts should happen if bargained-for exchanges operated as they should: it refused to concern itself with either the value of the uncle's benefit or the uncle's motive for making the promise. *Supra* note 23.

168. Melvin Eisenberg offers these examples:

If Uncle promises to give Nephew \$20,000 in two years, and Nephew later wrecks uncle's living room in an angry rage, no one, not even Nephew, is likely to expect Uncle to remain obliged. The same result may follow if Uncle suffers a serious financial setback, and is barely able to take care of the needs of his immediate family; or if Uncle's wealth remains constant, but his personal obligations significantly increase in an unexpected manner, as through marriage, the birth of children, or illness; or perhaps even if Uncle's wealth and personal obligations both remain constant, but, due to miscalculation, execution of the gift would jeopardize his ability to maintain his immediate family in a proper manner.

Eisenberg, *supra* note 166, at 5-6 (citing *Davis & Co. v. Morgan*, 117 Ga. 504, 508, 43 S.E. 732, 733 (1903) (enforcing donative promises might bring such obligations "into competition with the absolute duties to wife and children . . . and make the law an instrument by which a man could be forced to be generous before he was just").

169. *Id.* at 6.

170. *Id.* Enforcement of gratuitous promises that reasonably induce the promisee's reliance to his detriment are generally enforced to the extent of affording the promisee his reliance

Fried acknowledges the possibility of a promisor's justified change of mind, but he seeks to avoid the problem by asserting that respect for the promisor's freedom requires that the courts should treat his original promise as determinative as his first choice.¹⁷¹ This seems to be baseless, especially when one considers that such a notion would never be accepted as a sound basis for the courts' refusing to grant divorce.¹⁷²

But the greater difficulty for Fried is to articulate a sound basis for the courts' enforcement of promises in the absence of a bargained-for exchange. As Fried recognizes, elimination of the bargain approach to consideration means that a promisor must have a moral duty to perform his promise even though what is promised carries no moral duty other than the making of the promise.¹⁷³ Fried's proposal is what he calls "contract as promise," an apparent resurrection of the nineteenth-century "will theory."¹⁷⁴ Consistent with the notion of self-imposed obligation prevalent in the will theory, Fried would restrict enforcement to a promise in which the promisor intends to be bound by his promise. "In order that [the promisor] be as free as possible," Fried explains, "it is necessary that there be a way in which [the promisor] may . . . make nonoptional a course of conduct that would otherwise be optional"¹⁷⁵ Under Fried's approach, a promisor would create this obligation by intentionally invoking a social convention¹⁷⁶ to "give grounds—

interest under the doctrine of promissory estoppel. RESTATEMENT (SECOND) OF CONTRACTS § 71, 90 (AM. LAW INST. 1981).

171. FRIED, *supra* note 6, at 20-21.

172. P. S. Atiyah, Review, *Contract as Promise: A Theory of Contractual Obligation* by Charles Fried, 95 HARV. L. REV. 509, 526 (1981).

173. FRIED, *supra* note 6, at 13.

174. In his review of Fried's work, Anthony Kronman observes that Fried "revives an older and now largely disfavored theory of contractual obligation, the so-called 'will theory' of contract. However, unlike his nineteenth-century predecessors, Fried acknowledges that other, non-promissory principles—those centered around the notions of reliance, benefit and sharing—also play an important and legitimate role in the contractual domain." Anthony T. Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404, 405 (1981). Farnsworth describes the "will theory" as enforcing a promise on the basis that the promisor "willed" to be bound by his promise. FARNSWORTH, *supra* note 5, at 47.

175. FRIED, *supra* note 6, at 13. Restatement § 71(2) accomplishes this by restricting enforcement to promises made by a promisor seeking a return promise or performance from the promisee. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

176. A social convention is a set of arbitrary rules and norms that govern everyday behavior, such as greeting people with a handshake or saying hello when answering the telephone. Generally, a rule is conventional

[I]f and only if all the following conditions obtain: 1. There is a group of people . . . that normally follow [the rule] in [certain] circumstances 2.

moral grounds—for another to expect the promised performance.”¹⁷⁷ It would have to be a convention that defines “the practice of promising and its entailments.”¹⁷⁸ But grounding enforcement in convention necessitates that, in the absence of law, enforcement of a promise depends on what society universally accepts as moral. Apparently recognizing this, Fried grounds enforcement of promises in “Kantian principles,”¹⁷⁹ such as Immanuel Kant’s Categorical Imperative.¹⁸⁰ This notion would presumably work something like this: A promisor, who decides to not do something he has promised to do, must ask himself if he is willing to accept that everyone who wants to not keep a promise acting under the same circumstances could do so. If the promisor cannot accept this universal license, he cannot morally give himself license to break the promise.

It seems rather obvious that the courts would have much difficulty applying such notions consistently. Taleb dismisses the notion of basing a doctrine of law on Kantian principles: “Universal behavior is great on paper, disastrous in practice. Why? . . . [W]e need simple practical rules.”¹⁸¹ He charges that such notions fail because they attempt to conflate the tangible and the abstract and the emotional and the logical.¹⁸² Lawrence Kohlberg dismisses the notion as “moral musical chairs.”¹⁸³ As noted *supra*,¹⁸⁴

There is a reason, or a combination of reasons . . . for members of [a group] to follow [a rule] in [the] circumstances . . . 3. There is at least one other potential rule . . . that if members of [a group] had actually followed in [the] circumstances . . . , then [the reason] would have been a sufficient reason for members of [a group] to follow [the alternative rule] instead of [the rule in question] in [the] circumstances . . . , and at least partly because [the alternative rule] is the rule generally followed instead of [the rule in question]. The rules, [the one in question and the alternative rule] are such that it is impossible (or pointless) to comply with both of them concomitantly in [the] circumstances . . .

ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW 2* (2009).

177. FRIED, *supra* note 6, at 16.

178. *Id.* at 17.

179. *Id.*

180. Kant asserted that all individuals should be treated as ends: “[A]ct according to that maxim which you can at the same time will to be a universal law. . . . Treat humanity, in your own person, and in the person of everyone else, always as an end as well as a means, never merely as a means.” *THE GREAT POLITICAL THEORIES* 16 (Michael Curtis ed., 1962) (quoting Kant).

181. TALEB, *supra* note 63, at 21.

182. *Id.*

183. LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT, VOL. I: THE PHILOSOPHY OF MORAL DEVELOPMENT* xxxiii (1981).

184. MARMOR, *supra* note 177, at 2.

conventions typically involve arbitrary rules, and moral norms do not fit that mold because, generally, they are not arbitrary.¹⁸⁵ Samuel Williston cautions that grounding enforcement of promises in morality will always result in unpredictability and inconsistencies because moral standards “vary with the opinion of every individual.”¹⁸⁶

CLASSICAL CONTRACT LAW’S APPROACH TO GROUNDING
PROMISES IN DUTY

Wesley Hohfeld laid out the classical approach to grounding promises in duty, which seems to offer the advantage of the simple, straightforward rules called for by Taleb. The classical approach, according to Hohfeld, seeks to tether a promisee’s right to enforcement of a promise in an articulable and clear duty by the promisor to fulfill his promise. Hohfeld noted that the law rests enforcement on the legal correlatives of rights and duties.¹⁸⁷ He illustrates his point with a hypothetical situation in which Y agrees with X to stay off X’s land. “[I]f X has a right against Y that he shall stay off the former’s land,” he noted, “the correlative . . . is that Y is under a duty toward X to stay off the place.”¹⁸⁸ “A duty,” he declared, “is the invariable correlative of that legal relation which is most properly called a right or claim.”¹⁸⁹ Assuming that Hohfeld intended that every right has a correlative duty and that every duty has a correlative right,¹⁹⁰ then it is clear that X, having a right that Y not come on his land, does not have the same duty, but a privilege of going on his own land. Indeed, in Hohfeld’s “opposites”¹⁹¹ in which the opposite of a privilege

185. *Id.* at 131.

186. FARNSWORTH, *supra* note 5, at 60 (quoting Samuel Williston).

187. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 33 (Walter Wheeler Cook, ed., 1923). The analysis of Hohfeld’s work draws strongly from the work of NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 249-54 (2008).

188. HOHFELD, *supra* note 188, at 38. Hohfeld identified the “correlatives” in law as right-duty, privilege-no right, power-liability, and immunity-disability and the “opposites” in law as right-no-right, privilege-duty, power-disability, and immunity-liability. *Id.* at 36.

189. *Id.* at 39.

190. Hohfeld does not make clear whether he meant that every right has a correlative duty and every duty has a correlative right or that every right has only a correlative duty but a duty does not have a correlative right. He restricts his discussion to whether or not every right has a correlative duty, suggesting that he intended only that every right has a correlative duty but a duty may not have a correlative right; however, he also said that X’s right that Y stay off his land has a correlative duty. “[T]he correlative (and *equivalent*) is that Y is under a duty toward X to stay off the place.” The latter suggests that he intended that every right has a correlative duty and that every duty has a correlative right.

191. See HOHFELD, *supra* note 188, at 36 (listing Hohfeld’s “opposites”).

is no right, X has no duty to stay off the land—that is, because X has a privilege to go on his own land, Y has no right to keep him from going on his own land.¹⁹² Hence, in this paradigm, rights and claims are distinct from privileges, which Hohfeld identifies as the opposite of duty. In other words, X does not have a duty to stay off the land, making the privilege of entering the land “the negation of a duty to stay off.”¹⁹³ This makes clear, Hohfeld notes, “the importance of keeping the conception of a right (or a claim) and the conception of a privilege quite distinct from each other”¹⁹⁴

This distinction between rights and privileges is important because X’s privilege to go on his own land does not give him a right against Y or anyone else who might try to prevent him from exercising his privilege. X may exercise his privilege to go on his own land if he does not wrong anyone, but X is not wronged should Z try to prevent him going on the land.

Hohfeld makes the last point extremely well in a hypothetical situation¹⁹⁵ in which X wants to eat shrimp salad that is on a table where X sits along with A, B, C, and D. By virtue of being an invitee to the table, X has a privilege of eating the salad, but, because the correlative of a privilege is no right, X has no right to demand that A, B, C, and D not also try to eat the salad. Had X gained a right, instead of only a privilege, to eat the salad, A, B, C, and D would have a correlative duty to not interfere with his eating the salad. Hohfeld explains:

These two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not. A, B, C and D, being the owners of the salad, might say to X: “Eat the salad, if you can; you have our license to do so, but we don’t agree not to interfere with you.” In such a case the privileges exists, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn’t eat the contents, no right of X would have been violated.¹⁹⁶

Hence, classical contract law grounds enforcement in a simple, straightforward paradigm of correlatives and opposites. In promising to do something, a promisor creates a duty in himself to do it, and he creates a right in the promisee to enforce the promisor’s duty to fulfill his promise. These

192. *Id.* at 39.

193. *Id.*

194. *Id.*

195. *Id.* at 41.

196. *Id.*

standards are far less complex than Fried's paradigm for the courts to apply. Without consideration, a promisee would have a right to enforce every promise made to him; however, by adding the element of consideration's "policing" function, a just, rational approach emerges that facilitates an emphasis of freedom of contract with limited interference by the courts.

Fried blames the utilitarians' emphasis of the need for social utility for the demise of grounding enforcement of promises in morality in the nineteenth century.¹⁹⁷ The more tenable notion is that it was the complexity attending to that approach, especially in light of a much simpler bargained-for exchange approach—bargained-for exchanges—that may be an awkward tool but is certainly a much simpler one than Fried's "contract as promise," and, as Fried acknowledges, it works well enough.¹⁹⁸

CONCLUSION

Fifteenth-century Englishmen are not too much different than twenty-first-century Americans in their preference for simple theories rather than complex ones. Jurists of the fifteenth century offered no explanation for why bargain exchanges seemed right, but clearly they accepted them as an effective tool for their needs. When both the legal and geographical landscape began to change markedly in nineteenth-century America, the actions of *assumpsit* and debt had begun disappearing quickly, but bargain exchanges were still around—even reaching their apogee.¹⁹⁹ Not quite sure why they worked, but knowing that they generally did, the courts reshaped the doctrine a bit and hung onto it. In the face of predictions that doctrines such as promissory estoppel will soon eclipse the foundational role of bargained-for exchanges, chances seem to be strongly in favor of bargained-for exchanges.²⁰⁰ Understanding why bargained-for exchanges work is often a struggle for my contracts students to master, until it is equated to a principle they comprehend and embrace intuitively as a matter of common sense—that bargained-for exchanges are a form of assuring that the contracting parties have skin in the game.

197. *Id.*

198. See FULLER, *supra* note 47.

199. See FARNSWORTH, *supra* note 5, at 19.

200. See *id.* at 22-23.