

No doctrine of the common law of contract has been longer settled or more carefully developed than consideration. Yet none has proved more intractable to theoretical justification. This article suggests that the problem is not with consideration but rather with the theories that defend or challenge it, theories not equipped to explain the doctrine because they invoke functions and purposes that do not belong to the specific kind of relation that consideration necessarily establishes. In contrast with current approaches, the article argues that consideration is not a control device that, for various policy reasons, negatively excludes certain prima facie enforceable promises. Rather, it is constitutive of a kind of interaction that is the only basis on which parties may reasonably be held to have undertaken fully contractual obligations enforceable by expectation remedies. The article sets out the main features of the promise for consideration relation; then seeks to explain the juridical meaning and role of this relation; and finally brings out the contrast with reliance.

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I

Among the most important and, in my view, enduring contributions of *The Idea of Private Law* is its argument that, to understand private law, it is essential to recognize and to elucidate a certain normative conception of relationship that animates its many doctrines, principles, and standards. Not since Hohfeld,¹ has the analysis of basic private law relations been so carefully, deeply, and systematically pursued by legal theory. But Professor Weinrib's contribution in this respect goes still further than Hohfeld's in at least two ways: first, he has moved theory to a higher level of abstraction by elucidating a conception of private-law relation that unifies not only the different private-law doctrines but also the different categories of jural relations that Hohfeld so acutely distinguished and elaborated; second, he has pushed analysis to a deeper level by developing a systematic account of the normative character and framework of this conception of relation in terms that are consonant with a liberal conception of rights and justice. In keeping with his book's theme of the centrality of the private-law relationship, my contribution to this collection of tributes to Professor Weinrib will explore a

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1 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed by Walter Wheeler Cook, with a foreword by Arthur L Corbin (New Haven: Yale University Press, 1964).

part of the common law of contract that is arguably its most characteristic but also its theoretically most controverted doctrine precisely because, in my view, we have not been sufficiently attentive to the kind of relationship it embodies. I am referring, of course, to the doctrine of consideration.

II *Consideration and contract theory*

No doctrine of the common law of contract has been longer settled or more carefully developed than consideration.² The historical product of intense and richly concrete legal argument built from the ground up, consideration's main features were already evident by the end of the sixteenth century when it was fixed as an essential requirement for an action in *assumpsit*. From that time on, if not earlier, consideration embodied an idea of reciprocity that had continuously animated the long history of contract law stretching back to fourteenth- and fifteenth-century English medieval law. At the level of practice, and for the first time in this history, consideration stated a *general* requirement governing all non-formal agreements: without consideration, no promise (not under seal) was actionable in *assumpsit*. Moreover, from the start, this actionability consisted in the possible enforcement of the plaintiff's expectation interest. Thus, from the late sixteenth and early seventeenth centuries, consideration stipulated a general and necessary prerequisite for a kind of liability that is still widely viewed as distinctively 'contractual.' If there has ever been a basic contract doctrine that, as a matter of self-conscious legal practice, has presented itself as reflecting a unified conception of contract, consideration is it.³

2 The historical observations in this paragraph and elsewhere in my article draw on David J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) at chs 2,7,11,12 [Ibbetson, *Historical*]; David J Ibbetson, 'Consideration and the Theory of Contract in the Sixteenth Century Common Law' in John Barton, ed, *Towards a General Law of Contract* (Berlin: Duncker & Humblot, 1990) at 67–124 [Ibbetson, 'Consideration']; John H Baker, 'Origins of the 'Doctrine' of Consideration, 1535–1585' in Morris S Arnold et al, eds, *On the Laws and Customs of England* (Chapel Hill, NC: University of North Carolina Press, 1981) at 336–58; and John H Baker, *The Reports of Sir John Spelman* (London: Selden Society, 1978) (94 SS) at vol 2, ch 9. More recently, there is Warren Swain, *The Changing Nature of the Doctrine of Consideration, 1750–1850* (2005) 26 J Legal Hist 55. For the purposes of developing a theory of consideration, I have found the work of Ibbetson to be particularly helpful.

3 I fully agree with von Mehren's assessment: 'Consideration stands, doctrinally speaking, at the very center of the common law's approach to contract law. It represents an ambitious and sustained effort to construct a general doctrine'; Arthur T von Mehren, 'Civil Law Analogues to Consideration' (1959) 72 Harv L Rev 1009 at 1009. For a similar statement, see AW Brian Simpson, *A History of the Common Law of Contract: The Rise in the Action of Assumpsit* (New York: Oxford University Press, 1987) at 319 [Simpson, *History*].

Why, then, is consideration so difficult for contract theory? For difficult it is. Indeed, no basic contract doctrine has proved more intractable to theoretical justification than consideration. This holds true for all the main theoretical perspectives, however much they may otherwise differ among themselves. Even the most influential defences have been found wanting. When consideration is not simply dismissed as an out-dated and rigid formalism that obscures the real concerns and purposes of contract law, functions are attributed to it that it does not fulfil in central instances of its proper application and that can often be more effectively promoted by other legal devices (such as the seal) or other reasons for liability (such as reliance). It is now commonplace to see consideration, insofar as it is still treated as a prerequisite for enforceability, as a control device that excludes promises for reasons that often promote neither autonomy nor welfare. A leading private-law scholar has concluded that ‘the law would be rendered more intelligible and clear if the need for consideration were abolished.’⁴

I want to suggest that the problem is not with consideration but rather with the current theories that defend or challenge it. The theories are not equipped to explain the doctrine because they invoke functions and purposes that do not belong to the specific kind of relation that consideration necessarily establishes between the parties. Inevitably, they introduce factors and distinctions that are either irrelevant from or inconsistent with the legal point of view. Categorical differences that do matter, such as that between mutual promises and gratuitous promises, turn out to be unjustified on this basis. This is true of both defenders and critics of the doctrine. To illustrate these unavoidably general points about current approaches to consideration, I will very briefly discuss what is widely viewed as the standard and most compelling modern defence of the doctrine; namely, Lon Fuller’s.

In ‘Consideration and Form,’⁵ Fuller seeks to explain the traditional view that consideration stipulates a necessary condition for the full contractual enforceability of promises. He accepts that the non-enforceability of gratuitous promises is an essential part of the doctrine. Fuller begins with the more general idea that underlying ordinary contractual liability is the principle of private autonomy.⁶ By this ‘most pervasive and

4 Andrew Burrows, *Understanding the Law of Obligations* (Oxford: Hart Publishing, 1998) at 197, cited in Mindy Chen-Wishart, ‘Consideration and Serious Intention’ [2009] Sing JLS 434 at 434 [Chen-Wishart, ‘Consideration’]. For a similar conclusion, see Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981) at 35–7. John Dawson notes that a ‘remarkable feature of the extensive literature on the requirement of consideration is the intensity and depth of the hostility it has inspired’; John P Dawson, *Gifts and Promises* (New Haven: Yale University Press, 1980) at 197.

5 Lon L Fuller, ‘Consideration and Form’ (1941) 41 Colum L Rev 799 [Fuller, ‘Consideration and Form’].

6 Ibid at 806–10.

indispensable'⁷ basis of contract, the law treats parties as having a legal power to change, within limits, their voluntary legal relations *inter se*. This principle, as Fuller himself acknowledges, can cover a range of transactions: it is illustrated by a completed gift, a sale, or a promise under seal. Indeed, were the law to enforce non-formal gratuitous promises, this too would involve a right-altering and law-making function. In other words, the principle of private autonomy describes, without justifying, the conclusion that the law chooses to attribute legal effects to parties' acts.

To exclude gratuitous promises, then, Fuller must take the further step of invoking additional factors that are regularly satisfied by promises for consideration but not by gratuitous promises. These factors are both formal and substantive. In terms of formal factors, Fuller argues that a promise for consideration naturally satisfies, whereas a gratuitous promise does not, the desiderata of legal formalities, such as the seal, and in particular, their evidentiary, cautionary, and channelling functions. As for substantive factors, he underlines the economic importance of exchange relations and views promises for consideration, but not gratuitous promises, as forwarding this objective. In other words, Fuller justifies the application of the principle of private autonomy to promises for consideration but not to gratuitous promises on the twofold basis of, first, the kind of functions associated with a seal and, second, the economic significance of exchanges and of transactions ancillary to exchanges.

This overview of Fuller's argument will be familiar to many. Equally familiar is the point that this approach is subject to important qualifications and exceptions.⁸ As a number of writers have argued, consideration does not consistently or effectively satisfy these formal and substantive factors. For example, as Fuller himself acknowledges,⁹ purely executory oral mutual promises – perhaps the central and practically the most important case – do not go very far in fulfilling the functions of a legal formality. As a result, Fuller rejects as unjustified the legally settled proposition that 'where the doing of a thing will be a good consideration, a promise to do that thing will be so too.'¹⁰ At the same time, Fuller's assertion that gratuitous promises cannot satisfy the desiderata of form at all

7 Ibid at 806.

8 A particularly instructive discussion is Andrew Kull, 'Reconsidering Gratuitous Promises' (1992) 21 J Legal Stud 39 at 46ff. Despite these criticisms, most scholars continue to assume that the rationale for consideration must be its role as a natural formality and/or its singling out economic exchanges as enforceable. Only they now view consideration as merely a sufficient rather than a necessary condition of enforceability. This is, for example, Kull's view, and in this respect, he is wholly representative; *ibid* at 47, 56ff.

9 Fuller, 'Consideration and Form,' *supra* note 5 at 816–7.

10 *Thorp v Thorp* (1702) 88 ER 1448 at 1450 (KB); cited in Fuller, 'Consideration and Form,' *ibid*.

seems unfounded. If the concern is to distinguish tentative statements of intention from seriously intended unqualified promises, the law can do this with respect to non-bargain promises.¹¹ As for the substantive economic significance of exchange, well-established instances of promises for consideration, such as unilateral contracts or nominal consideration, can certainly fall outside of exchange relations. Moreover, the fact that executed gifts are fully enforceable shows that, at common law, there is no policy, as such, against gifts, challenging the primacy of exchanges argued for. Not only can gratuitous promises be welfare enhancing; even more, in contrast to enforceable executed gifts, *promises* to give entail the distinct and additional welfare advantage that parties can project their transaction into the future, thereby accommodating their needs and purposes even more effectively.¹²

While these criticisms are important and cogent, they do not seek to displace Fuller's basic premise that the rationale for consideration must be sought in the sort of formal and substantive policies suggested by him. To the contrary, they assume that its justification, if there is to be one, must be sought in these policies but hold that, on this basis, consideration should figure as only a sufficient and not a necessary condition of enforceability.¹³ I would like to suggest that the reason these criticisms apply in the first place is that Fuller's approach does not reflect the basic relation that consideration establishes between the parties.

Take, first, the role of form. Fuller's ideal benchmark for understanding and evaluating the doctrine of consideration is a set of factors that pertain to the functioning of what he calls an 'abstract' formal transaction; that is, a legal formality the legal significance and effects of which are constant and unaffected by the context in which it is used.¹⁴ As already noted, a seal approximates this ideal type of formality. In the case of a seal, we may reasonably say that the seal itself is the source of the promisor's obligation to perform. Moreover, the legally operative facts giving rise to the obligation need not consist in any bilateral interaction between the parties: it is the promisor *alone* who must do certain things – historically, to sign, seal, and deliver the document containing the promisor's sole undertaking – and that undertaking is legally valid and effective without any act or counter-promise by the promisee. In a more detailed discussion of the seal in his casebook,¹⁵ Fuller

11 Kull, *supra* note 8.

12 Kull emphasizes this point; *ibid* at 49–51, 59 ff. The point has also been made by, among others, Fried, *supra* note 4 at 37, and Robert Cooter & Thomas Ulen, *Law and Economics*, 5th ed (Boston: Pearson Education, 2008) at 201ff.

13 This conclusion is widely shared; see Kull, *ibid* at 47, 56ff. A more recent discussion is Randy E Barnett, *Contracts* (Oxford: Oxford University Press, 2010) at 147–87.

14 Fuller, 'Consideration and Form,' *supra* note 5 at 802.

15 Lon L Fuller, *Basic Contract Law* (St Paul, MN: West, 1947) at 313 ff.

himself emphasizes this unilateral feature of the seal. He brings it out by noting that delivery of the document is ordinarily taken by the courts to involve 'the promisor's act in handing the deed over rather than the promisee's act in receiving it.'¹⁶ Strictly speaking, there is no distinct requirement of acceptance by the promisee. Delivery does not require that the document be brought under the promisee's present control or even that the promisee be aware of the instrument or its delivery. The legal effect of the seal depends simply on the terms of the document and the things that the promisor does with it. The three functions of the legal formalities reflect this unilateral character of the abstract formal transaction. The focus of each function is on the promisor alone: channelling his objectives, discouraging his impulsive behaviour, and providing evidence of his acts.

As we will see more fully in the next section, the difficulty with this analysis is that it is fundamentally foreign to the kind of relation between the parties that is required by consideration. Whereas the acts giving rise to an obligation via a sealed document are unilateral, the acts that are prerequisite to an obligation via the requirement of consideration are bilateral. As Fuller himself again notes,¹⁷ a promise for consideration involves a nexus between promisor and promisee in which the promisee's promise or act is no less required than the promisor's. Here, the source of the obligation is not an instrument or merely a unilateral act by the promisor. Rather, the obligation arises through a specific kind of non-formal interaction between the parties. This interaction is not reducible to, but is genuinely distinct from, the idea of delivery (or other acts) in the case of a sealed document.¹⁸ There is no reason to assume that the functions of one can be properly understood and explained through those of the other. To the contrary.

There is a similar difficulty with Fuller's reliance on the policy of promoting exchange. He assumes, without discussion, that consideration's requirement of *quid pro quo* is just the idea of economic exchange.¹⁹ But the relation of economic exchange does not seem to be the same as that constituted by the legal requirement of *quid pro quo*. Unilateral contracts and, more generally, considerations that consist in only a detriment to the promisee are often non-exchanges in the economic sense.²⁰

16 Ibid at 316.

17 Ibid.

18 Ibid at 317. One of the few contemporary theorists to recognize this point is Alan Brudner, 'Reconstructing Contracts' (1993) 43 UTLJ 1 at 34-5.

19 This is widely supposed by contract theorists, including those hostile to the doctrine; see e.g. Fried, *supra* note 4 at 28 ff.

20 Thus Hobbes characterized a typical unilateral contract as a gift or 'free-gift,' which he took to be distinct from both an unenforceable, gratuitous promise and an economic

Yet these instances of consideration fully embody the *quid pro quo* that consideration requires. Fuller's equation of *quid pro quo* with economic exchange makes it difficult, if not impossible, for him to account for the basic contrast between enforceable mutual promises and gratuitous promises. Since they cannot be distinguished from the standpoint of form – they are both equally deficient in meeting its desiderata – their different treatment must be explained solely on the basis of the element of exchange contemplated by one but not the other. But, if so, how is this consistent with the fact, already noted, that completed gifts – which are *not* exchanges – are fully enforceable? Since, in light of this fact, there cannot be a policy against gifts per se, the singling out of mutual promises, but not gift promises, for enforcement is, to this extent, problematic. The analysis of *quid pro quo* and the categorical distinction between mutual promises and gratuitous promises must be consistent with the enforceability of gifts. But Fuller's substantive premise precludes this.

The fundamental question remains: how to explain the basic legal difference between mutual promises and gratuitous promises in a way that is consistent with the equally settled enforceability of completed gifts? In sharp contrast with current approaches, I shall argue that consideration is not a control device that, for various policy reasons, negatively excludes certain *prima facie* enforceable promises, however seriously and freely made or welfare enhancing they may be. Rather, it specifies in positive terms and, indeed, is constitutive of a kind of interaction on the basis of which parties may reasonably be held to have undertaken fully contractual obligations enforceable by expectation remedies. Indeed, my claim is that this interaction is the *only* such reasonable basis. This is how I understand the traditional view that takes consideration to be a necessary condition of full contractual liability. In this connection, it is important to compare consideration and reliance as two bases of obligation. Do they specify two really distinct kinds of interaction; and if so, how does this difference bear on the appropriateness of expectation remedies?

My first task, then, will be to set out clearly the main features of the promise for consideration relation as these are reflected in the historically settled and most fully articulated conception of consideration (Part III). Having done this, I will then try to explain the juridical meaning and role of this relation (Part IV). This addresses the question as to why promises for consideration, but not gratuitous promises, with or without reliance, are enforceable according to the expectation measure of recovery. I shall do this in three steps.

As already noted, a plausible account of consideration must try to be consistent with the fact that gifts, as opposed to donative promises, are enforceable at common law.²¹ In the first step (Part IVA), I therefore begin with a direct comparison between gifts and mutual promises, arguing that they both necessarily establish a relation between the parties through which neither donor nor promisor retains any power of unilateral decision or control *vis-à-vis* the other party to the transaction. In both transactions, the first party gives up unilateral control: through delivery in the case of gifts and by mutual promises independent of delivery in contracts. By contrast, a donative promise simply does not do this at all. Moreover, by engaging the participation of each other through mutual promises, contracting parties may reasonably be held to have intended the juridical meaning of the relation they jointly establish. The next step (Part IVB) is to specify the meaning of this relation. Briefly stated, I argue that contract formation involves a kind of relation that is enforceable in accordance with expectation remedies. To show this, I shall introduce and explain the need for the idea that contract formation involves what I shall call a 'transfer of ownership between the parties,' where the transfer is constituted by the form and content of the promise-for-consideration relation itself. Contract formation must be understood in this way, I argue, if expectation remedies are to qualify as compensatory in character; and consideration fits with and instantiates this conception. Finally (in Part IVc), I confirm the intrinsic connection between consideration and expectation remedies by comparing consideration and reliance as sources of liability and by suggesting that, in contrast to consideration, reliance does not involve a kind of interaction which makes the expectancy the direct and intrinsically required remedial standard. This is consistent with the traditional view that consideration is a necessary prerequisite for the full contractual enforceability of any non-formal promise. In denying contractual enforceability to non-formal promises unsupported by consideration, the common law is not under-inclusive as many, if not most, scholars so readily assume.²²

21 This point is emphasized and discussed in some detail in E Allan Farnsworth, *Contracts*, 4th ed (New York City: Aspen Publishers, 2004) at 53–4. Both Kull and Fried see this as an insuperable obstacle to any plausible account of the traditional view of consideration; see Kull, *supra* note 8 at 49–50; Fried, *supra* note 4 at 37.

22 While proposing a rationale for the basic doctrine of consideration, I do not try, in this article, to provide a complete theory of consideration or, even less, of contract formation. I do not discuss, for example, such topics as past consideration or pre-existing duty. Nor do I explore the relations (or possibly the tensions) between consideration and other contract doctrines, such as offer and acceptance or unconscionability. This is simply the first, though perhaps the most important, step toward a more complete account.

III *The requirements of consideration*

In this section, I present the main features and requirements of the historically dominant and most completely articulated doctrine of consideration. These features provide provisionally fixed points for further reflection; they specify the data, as it were, which are to be accounted for by the proposed theory that I sketch in the fourth section. The formulation of the doctrine supposed here was largely crystallized in English law by the end of the sixteenth century and was further elaborated, explored, and explained not only in judicial decisions but also by the leading contract-law writers, beginning in the late eighteenth century and culminating in the work of, among others, Leake,²³ Pollock,²⁴ Salmond,²⁵ Holmes,²⁶ and Williston²⁷ in the later nineteenth and early twentieth centuries.²⁸ In drawing on all these sources, my aim throughout is to make explicit the form and content of the relation constituted by consideration.

The doctrine of consideration holds that, standing alone, a promise is categorically insufficient to generate an expectation-based enforceable contractual obligation, no matter how seriously and unconditionally it is intended or how carefully and deliberately it is made, and despite the fact that it may be recorded in writing or memorialized in some other way. To be enforceable according to its terms, a promise must be made in return for a legally valid consideration that can be either a reciprocal promise or act that is requested by the promisor and provided by the promisee in return as part of a single transaction. Where the consideration is a counter-promise, there is a bilateral contract formed at the moment the mutual promises are made. If the consideration is a reciprocal act, a unilateral contract is formed when the act is executed. Consideration is not the same as just any motive or reason for the promise; it must move from the promisee; and it must be of some value in the eye of the law.²⁹ Understood in this way, consideration is

23 Martin Leake, *Elements of the Law of Contracts* (London, 1867).

24 Frederick Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*, 9th ed (London: Stevens and Sons, 1921).

25 John W Salmond, *Essays in Jurisprudence and Legal History* (London: Steven & Haynes, 1891).

26 Oliver Wendell Holmes, *The Common Law*, ed by Mark de Wolfe Howe (Boston: Little, Brown & Co, 1963).

27 Samuel Williston, *Law of Contracts*, single-vol ed (New York: Baker, Voorhis & Co, 1938).

28 In addition, any of a number of standard contract law textbooks may be consulted for summaries of the doctrine. I have found Mindy Chen-Wishart, *Contract Law*, 3rd ed (Oxford: Oxford University Press, 2010) at ch 4 [Chen-Wishart, *Contract Law*] to be particularly instructive and thorough.

29 As stated by Patteson J in *Thomas v Thomas* (1842) 2 QB 851 at 859.

unequivocally a necessary condition of contract formation and enforceability. This was the historically settled position of both the common law and equity. Let me now unpack and explore these various aspects of the doctrine in a little more depth in an effort to make explicit the conception of relation that they reflect.

To start, the consideration must be either a promise or an act that moves from the promisee. Any statement of apparent intention that falls short of a crystallized promise cannot function as consideration. Otherwise, there must be an actual act that is executed and irreducible to a statement of intention. Consideration must consist, therefore, in a finalized and complete exercise of choice in the form of a promise or act. Beyond this, what does it mean to say that the consideration – that is, the counter-promise or act – must *move from* the promisee?

It entails, first, that the counter-promise must be directly made by, or be legally imputable to, the promisee, and similarly, the return act must be directly done by, or be legally imputable to, the promisee. If the return promise or act is the work of a third party that in no way can be legally imputed to the promisee (via agency for example), it does not count as consideration as between promisor and promisee; at most, the first promise is, as between these parties, a gratuitous promise that, while it may be morally binding upon the happening of an event (viz. the third party's promise or act), is unenforceable in law and equity. It is at most a conditional gratuitous promise.

To move from the promisee, not only must the consideration not move from a legally independent third party; it must also not move from the promisor. This further point entails that consideration must be *independent* of the first promise in the following way: it must be possible to construe the content of the consideration as something that genuinely originates with the promisee, not the promisor, and that is not simply reducible to an aspect, condition, or effect of the first promise. It must be something that is, as it were, initially on the promisee's side and that is, therefore, not produced by the promisor. Even if the consideration is, in fact, given after the promise, there must be no reason in principle why it could not possibly have initiated the interaction and so have come first.

By way of examples of things that do not satisfy this requirement, suppose the alleged consideration is the promisor's natural love and affection for the promisee or the latter's feelings of satisfaction with and gratitude for the former's promise.³⁰ These can certainly motivate or be reasons for the promise. But, in either case, the law will view the alleged consideration as moving from the promisor, not the promisee,

30 For an historical discussion of these cases, see Ibbetson, 'Consideration,' *supra* note 2 at 79–81.

and so as no consideration at all. With respect to natural love and affection, it clearly does not originate with the promisee. In the example of gratitude or satisfaction on the promisee's part, although it is felt by the promisee and so, in a sense, is on his side, it consists merely in the promisee's reaction to the promise: it represents just the effect that the promise, with its anticipated benefit, has on the promisee; and so it can only be viewed as coming after and as resulting from the promise. It could not possibly originate with the promisee. The same analysis applies where the alleged consideration consists in promising to open or in actually opening a promised gift, where opening the package is the way the promisee can enjoy the gift. Opening the gift is not an act that moves from the promisee but is merely an aspect of the execution of what is, in essence, a gratuitous promise.³¹

The requirement that the consideration must move from the promisee – and, in particular, the idea that it must be independent of the promisor – ensures that there are *two* sides that together constitute the contractual relation. Consideration establishes a bilateral nexus between the parties. This two-sidedness is developed by the next feature of the doctrine. Not only must the promisor request the consideration in return for her promise but, in addition, the promisee must give the consideration in return for the promise. In other words, the consideration must be the reason for the promise and, vice versa, the promise must be the reason for the consideration. Thus, promise and consideration must be *mutually* inducing: 'it is not enough that the promise induces the detriment [i.e., the consideration] or that the detriment induces the promise if the other half is wanting.'³² The requirement of mutual inducement confirms and builds upon the previously discussed requirement of independence. Unless the consideration moves from the promisee and is not reducible to being the mere effect or aspect of the first promise, the consideration cannot be reasonably construed as the cause of or reason for the promise. Promise and consideration could not be viewed as mutually inducing. It is not sufficient that the promisor wants, or even formally requests, something in return for her promise if this something does not originate with and move from the promisee.

This further requirement of mutual inducement is applied objectively. The consideration need not be the promisor's actual sufficient reason for making the promise nor even just one of her actual reasons for doing so. In accordance with the objective test for formation, 'no matter what the

31 As in Williston's famous example of a benevolent person who tells a tramp, 'if you go around the corner to the clothing shop there, you may purchase an overcoat on my credit'; see Samuel Williston, *A Treatise on the Law of Contracts*, 3rd ed (Mont Kisco: Baker, Voorhis, 1957) vol 1 at s 112.

32 *Wisconsin & Mich Ry Co v Powers*, (1903) 191 US 379 at 386.

actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part.³³ Whether there are mutually inducing promise and consideration is decided on the basis of the parties' particular interaction, reasonably construed in the particular setting of their transaction.³⁴ So long as it reasonably appears from the parties' words and deeds *inter se*, interpreted in the circumstances of their interaction, that the promise has been given in return for the consideration and vice versa, this is sufficient. In this sense, there is no consideration that is not reasonably regarded as such by both parties.³⁵

Note that this feature of the consideration doctrine sets up a definite and limited conception of cause of, or reason for, the promise: whatever a promisor's purposes or motives may be, the only thing that counts as the cause of her promise is the receipt of the other party's consideration (promise or act) in return. This sets the framework for contractual analysis. Consideration is emphatically not the same thing as motive in any larger sense. At the same time, the way in which consideration functions as the reason for the promise is as part of a bilateral interaction between the parties. The reason is intrinsically relational. No other conception of reason is relevant. Consideration cannot, therefore, be reduced to just a (any) reason that a court finds sufficient for enforcing the promise.³⁶

Precisely because each side serves as the cause or reason for the other, each side is simultaneously cause and effect of the other. If we may suppose, in general, that a cause necessarily precedes its effect in time, then each side of the mutually inducing relation is, therefore, both before and after the other side. Temporal sequence, which necessarily entails a unidirectional movement, does not apply. In other words, even though the promise may be initiated before the consideration, the doctrine requires that there be a relation between them which is conceptually atemporal and in which both sides are fully and identically co-present.³⁷ In this way, the doctrine of consideration abstracts from

33 Ibid.

34 For a thoughtful discussion and illustration of this approach, see Curtis Bridgeman, 'Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context' (2005) 39 UC Davis L Rev 149 at 167–81.

35 As stated in *Philpot v Gruniger* (1872) 81 US 570 at 577.

36 Atiyah took this view; see Patrick S Atiyah, 'Consideration: A Restatement' in Patrick S Atiyah, *Essays in Contract* (Oxford: Clarendon Press, 1986) 179 at 181ff.

37 An early judicial statement of this point is *Nichols v Raynbred* (1615) Hob 88: 'The promises must be at one instant, for else they will be both *nuda pacta*.' Any interaction that cannot be reasonably construed in these terms of simultaneity or co-presence does not meet the requirement of consideration. Hence, so-called 'past consideration' scenarios – where the thing done by way of consideration has not

the temporal sequence of the interaction that establishes the bilateral relation.

A third feature of the doctrine of consideration is that, to qualify as consideration, what is promised or done by the promisee must have value in the eye of the law. In the traditional formulation, it must be either a legal benefit to the promisor or a legal detriment to the promisee. What qualifies as benefit or detriment in this context?

From the start, it must be emphasized that the conception of benefit and detriment is legal and not merely factual, psychological, or even economic. At the least, this means that the definitions of benefit and detriment must be worked out as part of a framework that reflects the prior requirements of independence and mutual inducement. For instance, benefit and detriment must be the content of a return promise or act. Being the content of an expression of intention that falls short of either of these does not count as a legal benefit or detriment. So, for example, a promisee's stated intention to confer a benefit, where this does not involve a promise without reservation or residual discretion, is not consideration. Benefit and detriment must also be something that can move from the promisee and that can, at the same time, induce the first promise and be induced by that promise. For example, forbearance by the promisee in reliance upon the promise, which might otherwise qualify as a detriment, will not count as consideration if it was not requested by the promisor and done by the promisor in return for the promise, even though the reliance was foreseeable.

In addition to being specified consistently with these prior requirements, the conceptions of benefit and detriment contribute a further dimension. The definitions of 'benefit' and 'detriment' apply to the content of the promise or act that constitutes consideration. I should emphasize that it is not the promise or act formally but its content that must satisfy this aspect of the doctrine. To ensure that the definitions of benefit and detriment suitably refer to the content, it is helpful to specify that a return promise will count as a benefit or detriment if, but only if, when executed, it would confer a benefit or impose a detriment in the senses discussed above.³⁸

been requested by the promisor who promises only after the act has been completed – cannot satisfy the requirement. The common law drew this conclusion on this very basis early on in the development of the doctrine. See the discussion in Ibbetson, 'Consideration,' *supra* note 2 at 88–96.

38 The requirement that the consideration be of value is presented in the alternative form of a benefit or detriment. Why it took this form and what significance should attach to it are interesting questions. In my view, the answer is probably historical and practical. Relatively early in the development of *assumpsit*, the definition of a valuable consideration went further than the already familiar definition of *quid pro quo* for debt which was limited to an executed benefit actually conferred on the debtor-defendant.

More particularly, benefit and detriment refer to the fact that the substance of the consideration – *what* is promised or done by the promisee – must be something that can be used or wanted for use. As a detriment to the promisee, the consideration must involve the giving up of something which is either an object of the promisee's possible purposes and interests or a condition of his pursuit of possible purposes and interests. It is the giving up of something possibly advantageous to the promisee and thus something that the promisee could want to have and enjoy. Benefit to the promisor is essentially the same thing as detriment; only this time, it refers to something that can relate to the promisor's uses rather than to the promisee's; it involves an addition to, rather than a subtraction from, whatever the promisor might have used or enjoyed independently of the promisee. As long as a purported benefit or detriment meets this test, it does not matter whether it has a determinate exchange value. To qualify as a legal benefit or detriment, the substance of the promise or act must simply be something which, in a concrete and specific sense, can be the object of the appropriate party's uses and enjoyment. This may include things, services, and freedom of action.

The fact that consideration must be a detriment to the promisee or a benefit to the promisor ensures that the content or substance of the promisee's return promise or act is, as such, irreducible to being merely an aspect or consequence of the first party's promise. For presumably the latter's promise, including its consequences, represents a benefit to the promisee. Thus, the requirement of benefit or detriment fits with, and indeed, fills out, the structural requirements that the consideration be

Assumpsit widened the content of the idea of *quid pro quo* by including a 'charge,' 'burden' or 'detriment' to or upon the promisee even though it did not actually transfer any value or object to the promisor or, for that matter, to anyone else. This historically significant development was affirmed and enshrined in the formulation of benefit or burden. If benefit is construed in a limited way as involving an actual or promised conferral of a value or object from the promisee on the promisor, the formulation was and remains practically important by ensuring this more inclusive definition of valuable consideration. At the same time, it should be recalled here that because any consideration must be requested by the promisor in return for her promise, it is, by definition, something that the promisor must treat as wanted by her in light of her purposes, even if it imposes a burden or charge upon the promisee. It is also worth noting that the widening of the definition of benefit to include a not yet executed but a merely promised advantage did not give rise to substantial judicial discussion when it was settled in the late sixteenth century. In fact, this extension was viewed as unproblematic and was effected almost as a matter of course. This is striking and stands in sharp contrast with the historically substantial judicial discussions and serious disagreements over whether assumpsit could lie for mere non-performance ('non-feasance') prior to being accepted at the beginning of the sixteenth century. For historical discussion of these points see the works cited in note 2 *supra*.

independent of the promise and move from the promisee to the promisor, as explained above.

Several clarifications and qualifications are in order here. First, whether something is a legal detriment or benefit is assessed and determined on the basis of what reasonably appears from the parties' actual interaction. It is not decided in the abstract or imposed on the parties. Strictly speaking, there cannot be an 'invented'³⁹ consideration, if by this is meant a consideration that does *not* reasonably appear through an analysis of the parties' interaction, where interaction includes both express and implied aspects as well as underlying assumptions that reasonably may be imputed to the parties in the circumstances surrounding their particular interaction.

Second, the detriment or benefit must refer to something that it is physically and legally *possible* for the relevant party to do or have, as the case may be. For example, if the promisee purports to give up something that he could not possibly have done or used or that he is under a legal duty not to do or use, it is not a legal detriment and no consideration. But as long as the promisee might have done or used it, physically and legally, promising to refrain or actually refraining from doing so is sufficient. It follows from this that, even if it can be shown that the promisee could and would have, in fact, refrained in the same way and time, even apart from the contract, this should not disqualify the consideration. The course of action was still possible, and so there was something to give up and to limit.

Third, the interests and purposes that are supposed in specifying benefit and detriment need not be self-regarding in contrast to altruistic. So long as the interests can reasonably appear to be interests *of* a party, that is sufficient. Similarly, the benefit or detriment must refer to something that, as a matter of law and fact, can be or could have been used or enjoyed by a party in his or her own right and for his or her own purposes.⁴⁰ But benefiting another is perfectly intelligible as something that I might want and so can count as an interest of my own.

There is a final feature of the doctrine of consideration that I wish to note. While the consideration must be a legal benefit or detriment in the sense just discussed, its comparative value in relation to the promise for which it is undertaken or done is irrelevant in determining whether it is a sufficient consideration. This is reflected in the fact that, early in the history of the doctrine, courts readily held that there could be

39 The term is from Guenter H Treitel, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 Austl L J 439 at 440 ff.

40 Early cases that illustrate this limit are noted in Ibbetson, 'Consideration,' *supra* note 2 at 74.

so-called 'nominal' considerations.⁴¹ Logically, a nominal consideration is simply the smallest conceivable 'something' that can be a benefit to the promisor or a detriment to the promisee. As already mentioned, there is no need that it have a determinate market value. But, to be a genuine and not a sham consideration, it must meet the general definition of benefit or detriment and, in particular, the requirement that it be something that could be wanted by the parties for their use and enjoyment. It is not enough for the parties to stipulate a purported consideration where, on an objective interpretation, it could not be wanted in this way but is used solely to produce an enforceable agreement. The law does not present a nominal consideration as a legal formality. To the extent that it becomes difficult to make this distinction between nominal and sham consideration in actual circumstances, courts are rightly less ready to accept the proposition that a sufficient consideration can be nominal.

In this connection, it is important to underline that the very idea of comparing promise and consideration in terms of value is foreign to the requirement of sufficient consideration. The legal conception of value is *not* the same as exchange value. To view promise and consideration as either actually or presumptively equal in value, they must be treated as being identically reducible to some single qualitative dimension so that they can be compared in purely quantitative terms. Only on this basis, can they be construed in terms of equivalence. But the doctrine of consideration does not do this. To the contrary, it requires that each side state a content which, when taken by itself, involves benefit or detriment and which, when compared to the other, is qualitatively *different*. What the doctrine of consideration emphasizes is just this need for qualitative difference. Thus a promise of \$100 for \$1, where the contents are just an identical currency, is not a promise for consideration but an unenforceable gratuitous promise for \$99. In this way, the requirement that the consideration be given in return for the promise can be further specified as involving a relation, quite literally, of *quid pro quo* – something for something else – with no reference whatsoever to their comparative values, let alone to their being equivalent in value.

To avoid misunderstanding, I should emphasize that I am only suggesting that equivalence is irrelevant from the standpoint of the doctrine of consideration. Equivalence is the character of a relation that goes beyond what consideration requires. But this by no means entails that equivalence is not, or should not be, a concern of contract law. Nor that such a concern would necessarily be incompatible or even in tension with the doctrine of consideration itself. It points only to the limited function and standpoint of this doctrine. Whether equivalence

41 See e.g. Simpson, *History*, supra note 3 at 446; Ibbetson, 'Consideration,' supra note 2 at 72–4.

is required by some other doctrine of contract law and how consideration and this other doctrine might fit together are questions of the first importance. However, they go beyond the scope of this article.⁴²

We see, then, that, given these features of consideration – and, in particular, the irrelevance of exchange value – the doctrine allows for transactions that range from full-blown exchanges involving equivalence to what may be called ‘mixed’ transactions in which the parties reasonably intend a gift element.⁴³ All of these can fully embody the two-sidedness required by the doctrine. The analysis of an exchange transaction is exactly the same as one that does not seem to involve equivalence in any market or economic sense. Given the wide definition of legal detriment, which includes the promisee’s giving up something that need not be of any use to the promisor or, indeed, to anyone else, non-exchange transactions are on an equal parity with exchanges. Whether contracts involving such legal detriments should be classified as fully enforceable ‘gift’ contracts – as Hobbes characterized them⁴⁴ – they fully satisfy all the aspects of consideration and are not, in any straightforward sense, exchanges. Thus, consideration appears to single out a certain kind of bilateral relation rather than economic exchanges as such. If, as many writers do, one wishes to designate the doctrine of consideration as a ‘bargain theory’ of enforceability, ‘bargain’ should, therefore, be taken only in the limited sense of referring to the doctrine’s requirement of mutual inducement. Anything more would mischaracterize the doctrine at a basic level.

IV *A juridical conception of consideration*

In light of our discussion thus far and for the purpose of seeing whether we can make sense of the law within its own framework, a theory of consideration should take seriously the following desiderata. To begin with the central requirement, a theory of consideration should take as its basic unit of analysis the two-sided or bilateral relation that characterizes any agreement that satisfies consideration. It does not begin with a pre-conceived, extrinsic notion of relation – such as the seriously intended promise which, at the time of making, the promisor has reason to perform and the promisee wants to be performed⁴⁵ – and then judge

42 I have discussed these further issues in ‘The Unity of Contract Law’ in Peter Benson, ed., *The Theory of Contract Law* (Cambridge: Cambridge University Press, 2001) at 184–95.

43 This feature of the common-law doctrine of consideration is noted by von Mehren, *supra* note 3 at 1031, 1033.

44 Hobbes, *supra* note 20.

45 Despite their great differences in approach, this is the benchmark shared by Fried, *supra* note 4, and Cooter & Ulen, *supra* note 12.

consideration against this standard and in light of principles and values that underlie it. Rather, it starts with the specific kind of relation set up by the requirement of consideration and seeks the principles and values that inform it. Accordingly, it is *in and through this relation* that we should discern a division between expressions of intent that do not bind and manifestations of assent that do. Moreover, a conception of private autonomy or will theory that is the basis of contractual liability must also be determined in this way and not construed independently of this relation. Second, a theory of consideration should be consistent with the long and well-settled point that all the basic categories of consideration are on a level of parity. In particular, mutual promises, no less than unilateral contracts (including the half-completed exchange), fully satisfy the requirement of sufficient consideration. The same is true of nominal consideration. Third, it must try to make sense of the classification of all promises without consideration as gratuitous and explain their non-enforceability consistently with the enforceability of gift transactions. Fourth, in keeping with consideration's historically dominant – and still largely prevailing – role, the theory should take it to set a necessary, and not merely a sufficient, condition of contractual liability, where such liability is understood as aiming to vindicate the expectation interest via expectation damages or specific performance. Through an analysis of the relation constituted by consideration, we should try to explain the basis of this connection between consideration and the expectation standard of liability.

A CONSIDERATION AND CONTROL

In the classical view, the doctrine of consideration states a necessary condition of full contractual liability (according to the expectation standard) and categorically denies this status to non-formal promises without consideration. Mutual promises meet this requirement, but donative (gratuitous) promises do not. At the same time, executed gifts are fully enforceable as transfers of property. This evidences the absence of a common-law stance against gifts as such. It also immediately raises the basic question of how, given the enforceability of gifts, the common law can reasonably and consistently deny the enforceability of promises to give. Since this question is fundamental to a justification of consideration, I want to explain consideration in a way that directly answers it. I will, therefore, first try to clarify the juridical relation that constitutes a completed gift.⁴⁶

46 For my analysis of gifts, I have drawn principally on Ray A Brown, *The Law of Personal Property*, 2nd ed (Chicago: Callaghan, 1955) at ch 7; Michael Bridge, *Personal Property Law*, 3rd ed (Oxford: Oxford University Press, 2002) at 93ff; and Michael Pickard, 'The Goodness of Giving, The Justice of Gifts and Trusts' (1983) 33 UTJ 381.

It is trite law that, for there to be a transfer of ownership via gift, the donor must deliver the object of the gift with the requisite unconditional intention to give and the donee must accept the object as so given. I wish to analyse these constituent elements of a gift in a little more depth.

Delivery consists in the donor's completely surrendering physical possession and actual control of the thing in such a way that it passes into the exclusive power or control of the donee or his agent. Delivery places the object under the donee's control and so establishes a certain nexus with the donee. If the donor does this with the evident and unreserved intent to give over complete, exclusive control to the donee, there is donative intent. Thus, donative intent is, and can only be, the reasonably apparent purposive meaning of an external act that constitutes delivery. A key feature of this relation is that delivery with donative intent is completed by the donor alone and the donee's acceptance must be with respect to the object as *already* delivered. While delivery may elicit the donee's response via acceptance, the former represents the donor's unilateral decision and act alone and is not itself specified as just one side of a bilateral relation that refers to what the other party must do in return. Indeed, while it is true that, on the donee's side, there must be acceptance, this does not necessarily require express or positive conduct by him. For example, the requirement of acceptance can be fully satisfied even if the donee is unaware of the gift. In keeping with the idea of implied acceptance, it was expressly held in one influential English case that a gift takes effect and ownership vests immediately upon execution by the donor, subject to later repudiation by the donee.⁴⁷ So we may say that, although a gift entails a relation between donor and donee, the essential positive operative acts that establish this relation are done by the donor alone and these acts are *not* themselves specified or defined as being one side of a bilateral relation that requires the participation of both parties.

Why isn't a donor's *communicated intention* to transfer ownership susceptible, by itself, of expressing donative intent and, where serious and credible, effective in conferring a gift? Why, in other words, is delivery essential? This question is clearly crucial to understanding gift transactions and, we will see, it also sheds light on our main topic, the rationale for consideration. The key to an answer lies in the fact that, in order to effect a gift, a donor's acts must accomplish a *present and exhaustive* transfer of control from donor to donee, leaving no residue of control to be transferred in the future.⁴⁸ Whereas delivery with donative purpose meets this criterion, mere words of intention, however framed and formulated, are taken as at most expressing a commitment to transfer

47 *Standing v Bowring* (1883) LR 31 ChD 282, discussed in Brown, *ibid* at 128.

48 My analysis follows and tries to build on Brown, *ibid* at 78ff.

ownership *in the future* and so as effecting no present transfer at all. Mere words without delivery are treated as a promise to give and as unenforceable for want of consideration. Let me explain.

A gift transaction starts with the external fact that, as against the donee, the donor alone has present exclusive control over and possession of the object at issue. So long as this state of affairs continues, the donor can always exclude the donee. Now, although it is necessary that, in any transfer of ownership, a transferor's decision to give up ownership in favour of another party must be her own independent decision and choice – otherwise her rights as owner are denied – a gift transaction has this further distinguishing feature that this decision is not itself specified in terms of anything that the donee must do. It is a wholly unilateral, separate act done by the donor alone. Through this act, the donor puts the thing in a condition such that the donee can independently assert control over it as he wills. Unless and until the donee can rightfully do this as a result of the donor's decision, the donee cannot reasonably claim against the donor that she has given up control.

Supposing the foregoing to be so, if all the donor has done is to say 'I give you this' without delivery, the problem is as follows. Her words express her intent alone, without any participation whatsoever by the donee. She has done nothing that takes the decision out of her hands and places it in those of the donee. At the same time, in the absence of delivery, the donor continues to exercise present exclusive control over the object no differently than before. Objectively – that is, in relation to the donee – she has, therefore, done nothing that unequivocally has, then and there, put the object outside her present exclusive authority and under that of the donee. Whether or not the transfer takes place is *still* up to her; her words, however expressed, can, therefore, reasonably mean only a present intention or undertaking to transfer *in the future*. These words may create moral expectations in the donee and justified disappointment if there is no follow-through. But there has not been a present transfer, and so no gift at all. To avoid this conclusion, what is needed is some external act that can cancel *now* the donor's present exclusive control over her object. Where, as we have supposed, this act is wholly the transferor's, without being linked with a complementary act by the transferee, it can only be by delivery: that is, by the transferor yielding the object into the transferee's exclusive physical control. Note that, on the view that I am suggesting, delivery is not explained primarily as a 'needed natural legal formality' in Fuller's terms. Rather, it is taken as a constitutive act the reasonable meaning of which is that it transfers control from one party to the other.⁴⁹

49 This is in keeping with Lord Esher's view stated in the leading case of *Cochrane v Moore* (1890) LR 25 QBD 57: '[A]ctual delivery in the case of a 'gift' is more than evidence of the proposition of law which constitutes a gift . . . it is a part of the proposition itself. It

Now, in striking contrast with the operative acts that give rise to a gift, contract formation can be wholly prior to and independent of delivery. Indeed, this is what is distinctive about the contractual relation. Thus, by words of promising alone – by mutual promises – parties are able to establish a fully enforceable contractual relation between themselves. In contract, physical delivery becomes performance; but whereas, in gift, delivery establishes the nexus between the parties that gives the donee a protected interest *vis-à-vis* the donor, in contract, it is the agreement itself, and not performance, that vests an entitlement in the promisee. Our question is: consistently with the requirement of delivery in gift and the non-enforceability of mere donative promises, how can mutual promises by themselves establish this nexus between the parties?

In light of the above discussion of delivery in gifts, it would seem essential that, in the case of mutual promises, even though the parties promise each other and thus undertake to do something in the future, the reasonable meaning of these mutual expressions must, in normative legal terms, *not* be future-oriented or leave anything to the future choice or doing of the promisors.⁵⁰ Taken by themselves, their mutual expressions must count as present and exhaustive acts that *already* accomplish in legal contemplation the whole content that is physically to be carried out by performance. The act or content that is promised must be done in and through making the promise. What must be expunged, therefore, is any normative division of labour between the promise and performance so far as rights are involved.

To clarify what this entails, consider its contrary: in everyday life, there is a familiar, perfectly intelligible case of promising where I can bind myself now to do something later and where I, the promisor, am and remain in control of my decision and its content up to and including the moment when I perform; it is only if and when I perform that anything comes under the promisee's own control. Until then, and in the face of my continuing control, the promisee may place trust in me and may nurture the hope or expectation that I will, in fact, follow through, but there is nothing more: the promise by itself establishes just such a relation of trust between us. To affect control, the promisor must *still* choose to act in the future, and unless he or she does, control does not transfer to the promisee.

is one of the facts which constitute the proposition that a gift has been made.' Similarly, Brown, *ibid* at 80, n 7.

50 This premise is emphasized by Hobbes, *supra* note 20 at 192–4 [66–8], in his analysis of contracts (enforceable in principle) as distinguished from unenforceable promises. I have found Hobbes's entire discussion of contract as a mutual transfer of rights particularly illuminating in developing this account of consideration.

Now, the crucial normative condition of this sort of division between promise and performance is that, although the promise may be to or for the promisee, making the promise is and remains entirely the self-imposed decision *of the promisor alone*. Call this condition 'unilaterality.' As long as this condition holds, the promisee cannot reasonably conclude that the promisor has, merely by promising, placed the promised performance outside her own initial exclusive control and under that of the promisee. In the case of gifts, we have seen that delivery cancels unilaterality. This is the significance of delivery. In the absence of delivery, the law treats a party's words of giving as a mere promise to give, which, if unsupported by consideration, produces no legal effects. This suggests that, like delivery, the requirement of consideration also cancels unilaterality. And, indeed, it does. In fact, this is what it always and necessarily accomplishes.

In our earlier discussion of the main features of consideration, we saw that the doctrine requires that there be two sides, each of which counts as a side that is separate from – yet, at the same time, intrinsically related to – the other. No side is more basic or more significant than the other. Whatever can be said of the one, can and must be said of the other. Even in terms of substance, we may say of both promises that each represents just *something* that is either a benefit to the promisor or a detriment to the promisee. Now, because my promise is stipulated as made in return for your promise, and vice versa, neither counts as a promise outside of this relation of promise for promise. I have placed my promise, as a promise, beyond my control because it is specified in terms of something that you must do to make it a promise. And the same holds for you. Each side has engaged the participation of the other in the most complete way that is available to her independently of and prior to delivery.

By framing my promise in terms of what you must do in return, I necessarily intend a bilateral relation which is not produced by me alone but which, to the contrary, is our joint and inseparable work. Because the promises are entirely and exclusively constituents of this relation between them, there cannot be any residual power in either party to exercise control over, or to make any further decision with respect to, her promise or what she has promised the other. For, as already noted, such further decision or control would have to be unilaterally exercised by a party and this is precisely what is incompatible with the fact of the relation. Thus, mutual promises that satisfy consideration do not involve anything that remains to be done by one or other party in the future. So understood, mutual promises are irreducible to mere donative words that can reasonably be taken as unilateral and future-oriented. Thus, the initial power to decide, which originally resides with each party, is superseded by a relation in which, *pro tanto*,

neither can decide anything on her own. What governs now is only and wholly the reasonable meaning of that bilateral relation and whatever it entails.

In the case of gifts, delivery by which the donor yields physical control of her thing to the donee is necessary because the donor's act of giving is solely with respect to something that is under her control and is itself strictly unilateral. In the case of mutual promises, however, the agreement, which is the whole contractual transaction, is not constituted, even for an instant or in part, by the unilateral act of either of the parties. Each party's act is always an inherently inseparable aspect of their mutual acts that link whatever comes under that party's control to something else that is not under her control but rather under the control of another, and vice versa. There is never a decision to give which does not involve, at the same time, a decision to receive. Mutual promises can establish the requisite bilateral nexus between the parties without delivery. And same is even more obviously the case where the consideration consists in a return act.

Why can't a simple 'I accept' from the promisee without consideration suffice to complete the first party's gratuitous promise? It appears two-sided, and it apparently transposes in the medium of words the very interaction that constitutes a completed gift. But we can see that this is not so. To count as two-sided, the acceptance *must* reasonably and unequivocally appear as an independent act in return for the promise and not merely a reaction to or an aspect of it. However, apart from a prior and binding legal formality or agreement that would attribute contractual effects to this interaction or stamp a given meaning on the words 'I accept,' the latter can reasonably be viewed just as a reaction to the promise, thereby entailing a relation characterized by a unilateral decision still residing with the promisor and corresponding anticipation and trust on the side of the promisee. An 'acceptance' without consideration does not establish the requisite bilateral relation.

What, then, are the legal significance and role of the promissory dimension in the promise-for-consideration relation? On the surface, a promise bespeaks an undertaking and commitment to do something in the future: a unilateral, self-imposed duty to give or do something in the future. But on the view I am suggesting, this is not, in fact, its legal or juridical significance in the promise-for-consideration relation. The promise is embedded in a relationship that is thoroughly and irreducibly bilateral. While it is true that each party must decide to engage the other – for otherwise, their relation cannot be voluntary – the basis of their obligations toward each other is this voluntary *relation*, not their individual promises. The future-orientation of their promises has a different function. First, it is only by making a 'promise,' that is, a representation that something *will* be given or done, that a party can engage the other to

respond and to give or do something in return, whether a return promise or act, as part of one transaction. Otherwise, the second party's response will be to an already executed act and so cannot function as the second side of a bilateral relation. Second, even in its ordinary, non-judicial sense, a promise expresses a firm, unequivocal, and crystallized decision now in the present, albeit to do something in the future. It is this aspect of being a clear and present decision that is pertinent in the contractual relation. It allows the law to construe each side as contributing an act, in the sense of a crystallized, external manifestation of choice, and it provides the parties with a mutually apparent marker that divides exploratory expressions of intention and negotiations from binding decisions. Third, because promise is the kind of act that posits a difference between two distinct moments – present and future – it enables the law to draw the fundamental distinction (discussed below) between the acquisition of ownership, which occurs at contract formation, and the gaining of actual possession and enjoyment through performance. As I will explain, this is the logical basis of the law's being able to treat mutual promises as fully enforceable according to the expectation measure. The key point is that the promissory dimension of the bilateral relation of promise for consideration should not be equated with that of a gratuitous promise: the normative significance and role of each are qualitatively different.

By making mutual promises that satisfy consideration, the parties may reasonably be supposed to have an intention to bring about this relation.⁵¹ Moreover, their intention is filled out by construing the reasonable meaning of this relation and is respected by giving effect to this meaning. What, then, is a reasonable juridical meaning of their relation? In thinking about this, I want to come back to the case of gifts. For here, the transfer of control from donor to donee via delivery involves and effects a transfer of ownership between them. This is the juridical meaning of the transfer of control. For present purposes, I shall provisionally take 'ownership' in the wide sense to mean any sort of rightful exclusive control as against others with respect to some object or service. On this view of ownership, proprietary rights are but one specific kind of ownership and do not necessarily exhaust its possibilities. The entitlements or protected interests acquired at and through contract formation involve, I want to suggest, another distinctive sort of ownership. Thus, contract formation also constitutes and effects a transfer of ownership understood in this widest sense. Indeed, as I explain in the next section, this must be, in general terms, the reasonable juridical meaning of contract

51 This agrees with and extends an idea that Michael Pickard makes with respect to trusts and gifts; see, in particular, his discussion in Pickard, *supra* note 46 at 399–406.

formation. The role and rationale of consideration is that it specifies a kind of bilateral interaction that reflects this meaning and makes it concrete.

B CONSIDERATION AS A TRANSFER OF OWNERSHIP BETWEEN THE PARTIES

If we take 'ownership'⁵² in the wide sense to mean any sort of rightful exclusive control as against others with respect to some object or service, contract formation must be conceived as a transfer of ownership between the parties which, in contrast to gifts, can be effective prior to and independent of delivery. This is the reasonable juridical meaning of the relation constituted by consideration. Why is this? Rather than try to show that it is justified by or derived from some set of theoretical first principles, it is sufficient for our purposes to argue that contract formation must be so viewed if it is to be consistent with the compensatory character of expectation remedies. Only if formation is understood in this way can there be a fit between it and this fundamental feature of contract law. Let me elaborate briefly.

It is a basic and long-settled principle of contract law⁵³ that, in giving a remedy for breach of contract, the law aims to put the plaintiff in the position he would be in if he had received full performance by the defendant. This is a ruling principle. It is also a principle of compensation. As a principle of compensation, it must suppose that the remedy, whether damages or specific performance, restores to the plaintiff what he was deprived of by the breach. What it cannot do, as compensatory, is give the plaintiff something more than he already had prior to and but for the wrong. This is in keeping with the general idea that compensation place the plaintiff 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'⁵⁴ Breach must therefore figure as an interference with something that *already* belongs rightfully to the plaintiff and the source of this entitlement must be contract formation itself. To be consistent with the compensatory character of expectation remedies, contract formation must, therefore, be conceived as a moment of rightful acquisition by one party from another: a transfer of ownership between the parties of a kind that is directly reflected in the expectation remedies.

52 Keep in mind, here, that on the view that I am elaborating, ownership and proprietary rights (*in rem*) are not the same; rather property is but one species of ownership, with contractual entitlements being another, qualitatively different sort of ownership.

53 According to Ibbetson, it dates from the sixteenth century, if not before; see Ibbetson, *Historical*, supra note 2 at 87ff, 131ff. See also the discussion in AW Brian Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 U Chicago L Rev 533 at 556–8.

54 *Livingstone v Rawyards Coal Co* (1880) 5 AC 25 at 39.

There is, however, an immediate and serious difficulty that seems to stand in the way of this view. Contract formation consists of promises but, as noted earlier, there is a very familiar and certainly intelligible⁵⁵ practice of promising in which the promisee does not reasonably view herself as acquiring anything to the exclusion of the promisor by the latter's promise alone. She simply trusts (and perhaps expects) the promisor, who may be morally bound, to carry through as promised. Breach of promise thus counts as a failure to confer this promised benefit on the promisee. It does not deprive the promisee of anything that was already rightfully hers as against the promisor. This is, in fact, the fundamental challenge famously raised by Fuller against the expectation principle of compensation.⁵⁶ Fuller treats *all* promises, including mutual promises that satisfy consideration, as giving rise to this difficulty. At the same time, we have seen that Fuller views *completed* gifts and exchanges as rights-altering. As long as a transaction involves some kind of voluntary physical transfer of a specific thing by one party to another, the latter does obtain the required protected interest. But this interest is proprietary, not contractual. A problem seems, therefore, to arise wherever the plaintiff's claim is founded upon the other's mere commitment to future performance rather than on completed acts that presently transfer specific property.

I would like to suggest that, in treating all promises alike, Fuller overlooks the basic qualitative differences between promissory relations that embody consideration and those that do not. We have already seen that, in the promise-for-consideration relation, the promisor does not retain any unilateral control but, instead, has already vested mutually related control in the promisee. Moreover, the promise counts as a fully present act that is complete and productive when made. I now want to take this analysis one step further and show that the content of this relation, constituted by promise for consideration, may reasonably

55 Grotius, and following him Pufendorf, call it an 'imperfect promise' and analyse it as morally binding but as transferring no rights. See Hugo Grotius, *The Rights of War and Peace*, ed by Richard Tuck. (Indianapolis: Liberty Fund, 2005) at 2.9.3; Samuel von Pufendorf, *On the Law of Nature and Nations* (Oxford: Clarendon Press, 1934) at 3.5.6.

56 In Lon L Fuller & William R Perdue, 'The Reliance Interest in Contract Damages' (1936) 52 Yale LJ at 52-7, esp at 56, n 7. I have discussed Fuller's challenge as well as the answer that I propose here in previous work, beginning with Peter Benson, 'Toward a Pure Theory of Contract' (LLM thesis, Harvard Law School 1983); later in Peter Benson, 'Contract' in Dennis Patterson, ed., *A Companion to Philosophy and Legal Theory* (Oxford: Blackwell, 1996) 24 at 25-9 and Peter Benson, 'The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue' Issues in Legal Scholarship, online: (2001) 1:5 <<http://www.bepress.com/ils/iss1/art5>>; and most recently, in Peter Benson, 'Contract as a Transfer of Ownership' (2007) 48 Wm & Mary L Rev 1673 at 1674-80 [Benson, 'Contract as a Transfer'].

be construed in terms of the elements of ownership in a wide sense, allowing us to characterize contract formation as a transfer of ownership between the parties that is valid and effectual independently of delivery.⁵⁷

To begin, the fact that consideration must have value in the eye of the law and, more specifically, must be a benefit to the promisor or a detriment to the promisee means that the substance of the consideration may be construed in terms of ownership in the wide sense: it refers to an object or service that is ascertainable, useful, separable from the person, and subject to an individual's rightful exclusive control. Any benefit or detriment consideration must have these features. Moreover, to function as consideration, the benefit or detriment must be referred by the promisee to the promisor's power to control, use, and enjoy it. This is the simple meaning of the fact that the consideration must be promised or done by the promisee for the promisor and at his request. Insofar as the benefit or detriment must move from the promisee to the promisor, the consideration can be construed as something usable to the promisor that the promisee has placed under the promisor's control. This rightful control must be exclusive as against the promisee: what was on the promisee's side has now moved to the side of the promisor. As already noted in the discussion of the main features of the doctrine, the promisor's having such exclusive control is fully consistent with the fact that the consideration may directly confer material benefit upon a third party. Consideration *is*, thus, a moving of something useable from the exclusive control of one party to that of the other, where this movement is effected by, and indeed constitutes, their interaction.

If we suppose the consideration is physically executed in fulfilment of the promisee's evident intent to give or do it in return for the other's promise, the transaction is valid as a complete transfer of ownership between the parties. This is particularly clear where the consideration is an object, but it also applies where it consists in an act or service.⁵⁸ The promisee's manifest intent is such that it can produce this legal effect. If it could not, the mere fact of physical transfer would not be sufficient. Now if this is so, it must also be the case that this same intent can be equally effective without delivery so long as it animates a relation that

57 The general form of this response is explicitly set out by, among others, Grotius, *supra* note 55; Pufendorf, *supra* note 55; Hobbes, *supra* note 20; and Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, translated by TM Knox (Oxford: Oxford University Press, 1952) at paras 72–9. Working strictly within the parameters of a legal point of view, I argue that consideration may be understood in these terms.

58 In doing the service, the promisee's act, though not an object, belongs to the promisor in the sense that it is under the promisor's, not the promisee's, rightful control and its value and use belong to the former, not the latter. For further discussion, see Benson, 'Contract as a Transfer,' *supra* note 56 at 1728–9.

can perform the same function as delivery. But, as I tried to show in the preceding section, the bilateral relation established by promise for consideration meets this criterion.

My argument, therefore, is simply that the promise-for-consideration relation, which actually constitutes contract formation, *can* be reasonably construed in terms of ownership and a transfer of ownership, and that it *must* be possible to so view formation if the law's characterization of expectation damages as compensatory is to be vindicated. Now, this way of understanding consideration and contract formation immediately raises certain questions. For example, if indeed there is a transfer of ownership at contract formation, how is this consistent with the fact that it is not until performance that the parties are entitled to take physical possession of what already, *ex hypothesi*, belongs to them? Further, how does this characterization of contract formation fit with the standard view that the parties' contractual entitlements are *in personam*, holding only as between them? To clarify the proposed view of contract formation and to try to prevent misunderstanding, I should address these concerns.

To start, it is worth noting that the law of gifts carefully but definitely distinguishes between the vesting of an ownership interest and the exercise or enjoyment of that interest.⁵⁹ On the one hand, ownership must presently vest with the donee or there has been no gift. This is accomplished by delivery animated by an intent to confer unreserved present ownership on the donee. On the other hand, for ownership to vest presently, it is *not* necessary that the donee have actual physical possession, or even be entitled to immediate physical possession, of the object gifted. The object may be in the possession of a third party, and the time when the donor intends the donee to use and enjoy it may be in the future, with someone else – possibly the donor herself – being entitled to use and enjoy the thing until the designated future time. It is only necessary that the timing of future enjoyment and use be definite, certain, and no longer subject to the donor's unilateral decision. Ownership can thus be acquired or transferred – and the object rightfully and exclusively belong to the donee – even if actual use and enjoyment are only to be later. While the transfer of ownership via gift must include a determination of *some* time when the donee can henceforth physically possess and use the object, the timing is up to the donor to decide and may be after delivery.

In the case of mutual promises, this distinction between the vesting (or acquisition) and enjoyment of ownership appears even more explicitly and is taken one step further via the differentiation between contract formation and performance. As between the parties, ownership is

59 This paragraph draws on Brown, *supra* note 46 at 114–9.

transferred at formation, with performance representing the modality and timing of the promisee's authorized exercise of physical control over and enjoyment of the transferred interest. The crucial point is that, when a party performs, he or she does not do so as present owner of the object or service that is the subject matter of the performance.⁶⁰ As between the parties, it already belongs to the one to whom performance is contractually owed.⁶¹ From the moment of contract formation and as between the parties, neither party can act in a way that is inconsistent with the other's exercising rightful control over and enjoying her interest as decided by the express and implied terms of their agreement.⁶² The difference between gift and contract in this respect is that, in the former, these modalities of possessing and enjoying the object are determined by the donor's unilateral intention embodied via delivery, whereas, in contract, they are decided in and through the parties' mutual promises alone.

Is there a difficulty in conceiving this contractual transfer of ownership as involving *in personam* entitlements in keeping with the standard distinction between contract and property rights? To see why not, it is important to keep in mind, here, that the contractual *transfer* of ownership – the relation which this transfer involves – is what constitutes contract formation. Contract formation *is* the transfer as such, not the results of that transfer or any other factor viewed apart from the transaction. And this transfer is itself constituted by the form and content of the promise-for-consideration nexus between the parties. It follows that just as the latter has a character that is strictly mutual and bilateral as between the parties, so the ownership that must be possible at formation is, and can only be, as between the parties. The entire analysis holds just as between them. The conception of entitlement is transactional, not proprietary.⁶³

60 Pufendorf, *supra* note 55 at 610, makes this point explicitly: 'Indeed, delivery of possession itself is not, properly speaking, the final act of dominion, but an abdication of physical retention. For that is held an act of dominion which is exercised freely from the power of dominion, while delivery of possession does not take place freely but of necessity, or because of an obligation.'

61 What is the legal character of the promisor's possession and possible use of the object (consistent with the contractual terms) prior to performance if ownership has been transferred? It constitutes rightful possession but is less than ownership, as with the protected interest that a bailee can have as against the bailor.

62 In the leading case of *Hochster v De La Tour* (1853), 2 El & Bl 678 (QB), the court explicitly makes this relation the basis of its conclusion that there can be an anticipatory repudiation amounting to breach despite its being prior to the stipulated time for performance.

63 This distinction – and the fact that the contractual interest acquired in and through formation is itself thoroughly transactional – is consistent with the common-law distinction between chose in possession and chose in action. Blackstone writes,

Thus, I can reasonably claim *vis-à-vis* you that, in light of our making with each other mutual promises that satisfy consideration, you have vested in me rightful control over the promised content from the moment of contract formation, and vice versa. The reason you cannot resile and assert control over this content is that it belongs to me not as against the world but rather because of the contract – in other words, because of, and as an incident of, our transfer involving our mutually related acts. Because the entitlement is framed as an aspect of the transfer, it can only be between the parties and not as against third parties. Contract *is* contract formation, and the latter is just this transfer as a transaction. In the words of the seventeenth-century English writer, Jeffrey Gilbert, '[C]ontract is the act of two or more persons concurring, the one in parting with, and the other in receiving some property right or benefit.'⁶⁴

Viewing contract in this way can resolve an apparent dilemma that led Fredrick Pollock, among others, famously to conclude that there is no logical justification for holding mutual promises to be sufficient consideration for each other, despite the fact that this rule is 'the most characteristic in our law of consideration and the most important for the business of life.'⁶⁵ The difficulty may be stated as follows.⁶⁶ Mutual promises can be valid consideration, each for the other, only if each, taken by itself, is a benefit or detriment in the required way. However, unless the promise is legally binding, it can be neither a benefit nor a detriment. But we cannot suppose this. For the promise is not enforceable unless it itself is supported by valid consideration, and in this case of mutual promises, the consideration must be the other promise, which itself must be a detriment or benefit and so already binding, and so forth. On this analysis, there is clearly a vicious circle. The difficulty arises because the promise is treated as a separate act that needs a second, separate factor – here, another promise – to make it enforceable; but since this also is

'A contract may also be either executed ... in which case the possession and the right are transferred together; or it may be executory ... here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed conveys a chose in possession; a contract executory conveys ... a chose in action ...' JW Ehrlich, ed, *Ehrlich's Blackstone* (San Carlos, CA: Nourse, 1959) at 391 [Title by Gift, Grant, and Contract: Consideration]. Blackstone notes that being given a valuable consideration for what she has promised, the promisor is 'as much an owner ... as any other person'; *ibid*.

64 Jeffrey Gilbert, *Of Contracts* (about 1710), London, British Library (Hargrave ms 265, folio 39), cited in Stephen M Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* Cambridge, UK: Cambridge University Press [forthcoming] at ch 3.

65 Frederick Pollock, *Principles of Contract* (London: Stevens and Sons, 1921) at 193 [Pollock, *Principles*].

66 Frederick Pollock, 'Note' 28 Law Q Rev 101.

true for the second promise with respect to the first, a vicious circle results. But once we understand, as I have argued we can, mutual promises as two sides of a single bilateral relation and therefore as absolutely inseparable and co-present, the logical basis for this problem disappears.

Moreover, specified as a transfer of ownership between the parties, this relation suggests a quite different way of understanding the benefit or detriment imported by a promise. In the discussion of the main features of consideration, I pointed out that, by having a content that is a detriment or benefit in the required way, a promise-consideration may reasonably be construed as independent, rather than as an aspect, of the promise for which it is given. This ensures a two-sided relation. Specifying this relation as a transfer of ownership entails that, in the case of mutual promises, each side give and receive something that counts as his or her 'own' prior to performance. Understood as aspects of this relation, benefit and detriment are not factors that *make* the other side's promise binding. Benefit and detriment do not *produce* an obligation. Rather, construed as aspects of the bilateral relation involving a transfer of ownership, a promise-consideration necessarily confers a benefit on the promisor or imposes a detriment on the promisee because benefit and detriment characterize, or pertain to, the ownership that has been transferred. At contract formation, benefit or detriment are respectively 'added' or 'subtracted' through being vested with the promisor as a matter of rightful ownership, even though, in physical terms, they are enjoyed or suffered only through performance.

This, we have seen, is how we view completed gifts where ownership vests though the enjoyment of it is postponed. It is also how the common law viewed contracts for sale as early as the fourteenth century.⁶⁷ In the eye of the law, the buyer received the benefit of the bargain, in the shape of having the 'property' in the goods sold, at the time of and through their agreement and independently of delivery or payment of the price. It is not surprising that when courts justified the enforcement of mutual promises from the late sixteenth century onward, they assumed, without discussion, that, at formation, the defendant had received the 'benefit of the bargain' in the shape of the plaintiff's promise, so long as the promise involved benefit or detriment in the required way; and that having received it, the defendant could not reasonably complain if he was held to his side of the bargain. The courts applied

67 I draw here on the historical discussions of sale in Pollock; *ibid* at 179ff; David J Ibbetson, 'Sale of Goods in the Fourteenth Century' (1991) 107 *Law Q Rev* 480; David J Ibbetson, 'From Property to Contract: The Transformation of Sale in the Middle Ages' (1992) 13 *J Legal Hist* 1; and Ibbetson, *Historical*, *supra* note 2 at 35–6, 75.

this analysis to any agreement involving mutual promises (and not merely to sales) whose content met the requirement of benefit or detriment. In so viewing the consideration, they did not, however, have to conceptualize the benefit as a 'property' in the strong sense taken by the medieval law of sale. The signal accomplishment of the law of consideration was to articulate a transactional, in contrast to a proprietary, conception of entitlement. As dimensions of this conception of entitlement, the promised contents count as legal benefit or detriment.

Instead of this conception of contract formation, it might be suggested that the parties' promises should be viewed, not as transferring ownership with respect to the substance of the consideration, but rather as the means whereby they bind themselves to transfer such ownership in the future when performance is due.⁶⁸ It is only this future act that changes the parties' entitlements as between themselves with respect to this content. Even on this alternative view, however, contract formation must include consideration and be construable as a transfer of ownership of a kind that can be represented at the remedial stage by the value of the promised consideration. This is essential to establish an appropriately bilateral relation and to preserve the compensatory character of expectation damages. If, according to this alternative view, the content of that transfer must not be with respect to the substance (that is, the object or service) of the consideration, in what might it consist? It seems that the consideration can *only* be the act of promising as such, in abstraction from the substance of the object or service. But this cannot reasonably be viewed as a legal benefit and detriment.⁶⁹ And because acceptance of another's gratuitous promise would be no less an act by this analysis, the giving and acceptance of any serious promise would be enough to create a perfectly good bilateral or unilateral contract. This collapses the distinction between gratuitous promises and promises for consideration.⁷⁰

The teaching of the doctrine of consideration is that a party can acquire something from the other at contract formation only if this

68 This seems to have been Kant's view. See the discussions in B Sharon Byrd & Joachim Hruschka, 'Kant on "Why Must I Keep My Promise?"' (2006) 81 *Chicago-Kent L Rev* 47 at 57 ff and Ernest J Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 *Chicago-Kent L Rev* 55 at 65ff. I discuss this view in more detail in Benson, 'Contract as a Transfer,' *supra* note 56 at 719ff. A further difficulty, which I don't discuss in this present article, is that this view cannot explain expectation remedies as directly reflecting the interest acquired at formation; see Weinrib, *ibid* at 68.

69 This is emphasized by such writers as Pollock and Williston, among others; see Pollock, *Principles*, *supra* note 65 at 195 and Samuel Williston, 'Consideration in Bilateral Contracts' (1914) 27 *Harv L Rev* 503.

70 This consequence was pointed out by Pollock in response to the Ames's theory of consideration; *ibid* at xi.

acquisition is expressed as a giving of something else in return for it; and similarly, a party can only give something to the other party if this giving is expressed as an accepting of something else in return. In this way, each party can make his or her act part of a relation that is constituted by the co-equal acts of both, with neither side being reducible, in form or content, to being merely an effect or aspect of the other side: *actus contra actum*.⁷¹ The significance of this reciprocity is *not* that a party has thereby purchased the other's object with his or her promise but rather that, *vis-à-vis* the other, neither party *retains any unilateral authority with respect to the form and content of his or her own promise or act*. The conception of reciprocity is, thus, purely juridical; not economic. The parties' promises are intelligible solely in and through this relation which they voluntarily bring about, and the parties are governed by the reasonable meaning of that relation, as specified by the various features of consideration. I have tried to show that the reasonable meaning of this relation is that it involves a transfer of ownership between the parties, with the consideration and promise providing the form and content of the transfer. This bilateral relation is the very relation that the doctrine of consideration always and necessarily establishes. Indeed, given the way the features and requirements of consideration are formulated, it seems clear that the doctrine states the essential conditions of this kind of bilateral relation in the most elementary and abstract terms applicable to any voluntary interaction. In sum, consideration singles out as enforceable, not economic exchanges, but rather bilateral relations that can be reasonably construed as transfers of ownership between the parties; and the latter include transactions on a continuum ranging from promises for nominal consideration (i.e., in material terms, those involving a gift element) to promises for equal value (i.e., full exchanges).

Clearly, this account of consideration does not see it primarily as a surrogate for legal formalities or as a means of singling out economic exchanges in the way Fuller suggests. Consideration is not a proxy for, or evidence of, anything else, including an intention to be contractually bound. To the contrary, the doctrine's first and most indispensable purpose is simply to establish the mutually related acts that constitute a kind of bilateral relation that, qualifying as a transfer of ownership, is enforceable in accordance with the expectation standard. At the same time, this conception of consideration's rationale shows how consideration furnishes an external test of enforceability. The fact that a promisor can reasonably recognize that she has enlisted the promisee's own participation as a co-requisite of her own provides a test for enforceability that is external – because determined in accordance with a reasonable

71 *Wiseman v Cole* (1585), 2 Co Rep 15a at 15b, Co Litt 47, cited in Ibbetson, *Historical*, supra note 2 at 141.

interpretation of the parties' interaction and not their private, inward intentions or judgements – and that is also obviously of the right sort – because contractual obligation is owed to another who has independent standing to assert a corresponding right. This analysis is reinforced by the fact that the requested consideration must be either a crystallized promise or a completed act. Where the requested response from the promisee falls short of these, no contractual obligation arises. In this way, the participation requested by the promisor must be definite, discrete, and finalized – exactly the same sort of decision taken by the promisor herself.

Moreover, this test of enforceability is fully compatible with respect for the parties' voluntariness and their character as conscientious moral agents. For an action to be voluntary, it must, I shall suppose, aim at some good which the agent seeks to obtain. Consideration imports a particular kind of good; namely, one that is aimed at as part of a bilateral relation between the parties. In this way, it functions as a sort of good that allows the law to impute the voluntary undertaking of a legal obligation. For liability in private law respects the basic premise that, in the absence of a clear and unambiguous expression of intent to the contrary, no one is presumed to intend to give away his or her own for nothing or to assume an onerous obligation without compensation. But where there is consideration, the promisor requests something else that comes in the place of her own.⁷² Her externally manifested reason for promising is to obtain for herself an object or service that counts just as something else for the something (*quid pro quo*) she promises away. Moreover, attributing contractual consequences to these voluntary assumptions of commitment respects the parties as conscientious moral agents by taking seriously their shared moral understanding of their interaction. Each has, through his or her expression of commitment, engaged the return commitment of the other. That each party should recognize how his or her conduct reasonably and unambiguously appears to the other is also part of that party's *moral, and not merely legal*, responsibility, given that he or she has chosen to interact with the other in circumstances where both present themselves as having independent and separate interests. While the doctrine of consideration is not rooted in or reflective of the morality of promising, it does not conflict with or undermine this morality. Divergence does not entail, here, tension or incompatibility.⁷³

I conclude that the requirements of consideration ensure that neither party can reasonably complain if her words or conduct are taken to

72 This formulation is from Jeffrey Gilbert's unpublished 1702 work, *Of Contracts*, supra note 64.

73 For a different view, see Seana Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harv L Rev 708.

represent the undertaking of a legal contractual obligation toward the other. While these requirements may, in fact, conduce to deliberation and purposefulness on the part of a promisor deciding whether and how to contract, the reasonableness of consideration as a marker of enforceability does not depend on this. These further aspects may, as a matter of fact, be encouraged by the requirements of consideration, but they are not intrinsic to the doctrine's role in furnishing a simple and external test of contractual enforceability. I should add that the proposed account of consideration certainly does not preclude the law, for the very purposes stated by Fuller, from imposing additional requirements of form that limit or specify what will be recognized as an enforceable agreement. But that is a further and distinct step that goes beyond, and so does not explain, consideration.

C THE CONTRAST WITH RELIANCE

There can be liability for breach of a promise that induces actual reliance on the part of the promisee, even though the reliance is not requested by the promisor or done by the promisee as *quid pro quo* for the promise. What constitutes reliance and which remedies are available by way of enforcement are matters over which there is currently some disagreement among scholars and even courts.⁷⁴ My aim here is limited to identifying a conception of reliance-based liability that is compatible with the doctrine of consideration and then to compare their respective characteristics.

The first and the most important question is the meaning of 'reliance.' All agree that reliance must involve something more than the promisee's merely trusting in the promisor's word and expecting or hoping for performance. If reliance were only this, it would suppose the existence of a gratuitous promise and nothing more. This is also the case even if the promisee's trust consists in (unrequested, though induced) imagining or planning some advantageous or valuable opportunity that depends on the promisor's following through. As long as the failure to perform does not make the promisee worse off in comparison to his position before relying, reliance would suppose a scenario that is indistinguishable from breach of a gratuitous promise. If reliance-based liability and consideration are to stand together, reliance must involve something more.

There is, in fact, wide agreement that reliance must consist in the promisee's doing or omitting to do something that changes his pre-reliance

⁷⁴ An instructive overview of this issue and of the different approaches is Chen-Wishart, *Contract Law*, supra note 28 at 162–79. I have examined this basis of liability in Peter Benson, 'The Basis for Excluding Liability for Pure Economic Loss in Tort Law' in David G. Owen, ed., *The Philosophical Foundations of Tort Law* (New York: Oxford University Press, 1995) at 450–4.

position to his detriment.⁷⁵ More specifically, in reliance upon the promise, the promisee must either decide not to pursue an advantageous opportunity or not to incur an expense which, independently of the promise, he, respectively, could have obtained or would not have spent. Reliance-based liability arises from the fact that the breach of promise leaves the promisee worse off as compared with the pre-reliance position in which he would have pursued the opportunity or not made the expenditure.

I have suggested that unless reliance involves this form of change of position, a doctrine of reliance or promissory estoppel must directly collide with the requirement of consideration. This is true as long as we suppose that reliance is not requested as *quid pro quo* but is merely, though foreseeably, induced. To explain, if the promisee's reliance is requested as *quid pro quo* for the promise and it involves a detriment to the promisee or a benefit to the promisor within the meaning of consideration, the reliance can be viewed as one side of a bilateral relation that transfers ownership. However, where the reliance is not so requested, it represents, at most, an *effect* of the promise upon the promisee's thoughts and conduct. In light of the analysis of the previous sections, the reliance cannot, therefore, reasonably be construed as an act through which the promisee *acquires* anything from the promisor. If reliance is to bring into play something that rightfully belongs to the promisee to the exclusion of the promisor, it must refer to an interest *that already exists independently of and prior to his reliance*. This is the only way reliance-based liability can qualify as a form of compensatory justice that does not directly contradict the requirement of consideration. In contrast with consideration-based contractual liability, promissory estoppel does not, therefore, protect an interest that is acquired through reliance but rather one that pre-exists reliance and is endangered by the breach of promise.

Viewing the promisee's pre-reliance position as involving a protected interest might be challenged on the ground that, as a matter of fact, the promisee gave it up (for example, by foregoing the alternative opportunity) and so did not have anything to be injured at the time the promisor failed to perform. Consequently, the objection goes, damages for such breach cannot qualify as compensation. But this is not so because it cannot be a reasonable interpretation of the parties' interaction. Precisely because of her inducement to rely, the promisor cannot treat the promisee's reliance as his own independent decision that has nothing to do with her. To the contrary, she must take responsibility for the fact that he gave up his initial position and for resulting foreseeable

75 The classic scholarly statement of this view is Warren A Seavey, 'Reliance upon Gratuitous Promises or Other Conduct' (1951) 64 Harv L Rev 913.

loss. It does not lie in her mouth to claim that he gave up, and so did not have, a valuable interest that she could detrimentally affect by her breach, when the reason he gave it up and did not physically have it was her promise and his reasonable reliance on it.⁷⁶ But note that what the estoppel establishes is only that this pre-reliance position must be taken by the promisor as a protected base-line in light of her interaction with the promisee and for the purpose of specifying her liability *vis-à-vis* him.

This conception of reliance can stand consistently with consideration. It is characterized by the following features and legal effects. In the absence of change of position that worsens the promisee's position as measured against his pre-reliance base-line, there is no liability.⁷⁷ This means that breach of a promise (without consideration) is not a legal wrong unless and to the extent that it causes such loss. Where, for example, the promisor alerts the promisee of a change of mind in time for the latter to resume his pre-reliance position without loss, the failure to perform is not at all a legal wrong or injury. For the same reason, where the promisee relies, but in so doing ends up in a better position than his pre-reliance situation even if the promisor reneges, the failure to perform is not actionable. In these circumstances, the promisor may renege from her promise without injustice to the promisee. In sharp contrast with a promise supported by consideration, here, the failure to keep one's promise is not wrongful in itself but rather wrongful, if at all, as breaching a duty of care not to make the promisee worse off in comparison to his pre-reliance position. This pre-reliance position sets the upper limit of liability and damage. It follows that the quantum of damages awarded will be determined by what is necessary to ensure that he is not made worse off relative to this pre-reliance base-line. Depending upon the particular facts, such damages may of course be set by the value of the promise. But this need not be the case. Thus, in contrast with promises for consideration, there is here no intrinsic connection between reliance-based liability and expectation remedies.

This analysis of reliance brings out an important point that also applies to our understanding of consideration itself. I have suggested that liability in promissory estoppel presupposes a different protected interest embedded in a different relation than the protected interest that vests solely through the promise-for-consideration relation. Now, it is frequently suggested that reliance and consideration are but different ways in which promisors can manifest an intention to be contractually

76 For a judicial statement, see *Imperator Realty Co, Inc v Tull* (1920) 127 NE 263, Cardozo, CJ.

77 For further discussion of these points with helpful examples, see Andrew Burrows, 'Contract, Tort, and Restitution: A Satisfactory Division or Not?' (1983) 99 Law Q Rev 217 at 239–44.

bound.⁷⁸ And the use of a legal formality is understood as still another mode of doing so. This view supposes that behind or underlying the different prerequisites of liability is a single idea of contractual intention and that these are but different ways in which the law can discern evidence of its existence. The whole thrust of my argument is that this view is seriously mistaken. Each of these bases of liability entails a definite and distinct kind of legal relation and these relations are constituted by different sorts of acts of the parties reasonably interpreted. There is no intention apart from that which is already embodied in these acts which alone are the juridically relevant and real operative facts. This is no less true of intention in voluntary transactions such as gift and contract than it is of the intention – *animus possidendi* – operative in first acquisition. Intention – like duty or liability – is not anything in the abstract but only what is specified through the qualitatively distinct categories of juridical relations between the parties. Thus, it is not only unnecessary but also misleading to take these relations as evidence of a unitary underlying intention to contract or, even more broadly, to form legal relations. This is particularly so when dealing with the doctrine of consideration, which establishes a form and content of relation that is irreducibly different from those entailed by either estoppel or a seal.

78 This seems to be, for example, Barnett's view; see Barnett, *supra* note 13 at 186–7. For a recent detailed critical discussion of this approach, see Chen-Wishart, 'Consideration,' *supra* note 4.